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JEAN PICTET	THE XXTH INTERNATIONAL CONFERENCE OF THE RED CROSS: RESULTS IN THE LEGAL FIELD	3
PAULINE B. TAYLOR and MICHAEL CSIZMAS	TWO ASPECTS OF PRE-TRIAL PROCEDURE IN EASTERN EUROPE	20
THOMAS BUERGENTHAL	THE DOMESTIC STATUS OF THE EURO- PEAN CONVENTION ON HUMAN RIGHTS: A SECOND LOOK	55
EDOUARD ZELLWEGER	THE SWISS FEDERAL COURT AS A CON- STITUTIONAL COURT OF JUSTICE	97
LUCIAN G. WEERAMANTRY	DIGEST OF JUDICIAL DECISIONS ON AS- PECTS OF THE RULE OF LAW	125

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THE XXth INTERNATIONAL CONFERENCE OF THE RED CROSS: RESULTS IN THE LEGAL FIELD

by

JEAN PICTET *

Editor's Note.

The basic principles underlying the protection of human rights are by now incorporated in a series of international conventions and declarations: the Charter of the United Nations, the Universal Declaration of Human Rights, the Draft Covenants of the United Nations on Human Rights, the Genocide Convention, I.L.O. Conventions, the European Convention on Human Rights, and other international conventions. Among these conventions there are some which, though universally accepted, are often not associated in the public mind with the emerging international law concerning human rights: among these are the Red Cross Conventions of Geneva.

The antecedents of the Hague Convention of 1907 and of the Geneva Conventions of 1949 go back to 1864 when, in Geneva, on the initiative of the newly created International Committee of the Red Cross the original "Geneva Convention" was adopted. This first international treaty in this field established the broad fundamental principles for the protection of wounded and sick combatants, which remained unshaken and are now universally accepted. It gave impetus to the Red Cross movement throughout the world. The Conference of 1868 made an attempt to extend these rules to maritime warfare; however this extension was not accomplished. A recommendation by the First Hague Peace Conference in 1899 raised the question of further revisions. The 1906 Diplomatic Conference of the Red Cross established a revised text which recast and considerably developed the 1864 Convention. In 1907, the Hague Convention adapted the principles of the Geneva Convention to maritime warfare. After World War I, the Diplomatic Conference of 1929 recast the provisions of the Geneva Convention in the light of the war experiences, and adopted a Convention on the

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Treatment of Prisoners of War. The experience of World War II necessitated a new revision which was accomplished in 1949, and resulted in the present Geneva Conventions of 1949.

The Hague Convention of 1907 contained provisions calling for respect for individual life and precluding punishment for the acts of others. The Geneva Conventions of 1949 contain detailed provisions requiring that persons in captivity shall be treated humanely and not be subjected to treatment likely to cause injury or death. The taking of hostages or reprisals is prohibited.

The First Convention concerns the care of the wounded and the sick, the defenceless combatants; the Second Convention extends the provisions of the First Convention to Maritime Warfare; the Third Convention concerns Prisoners of War and submits all aspects of captivity to humanitarian regulation under international law. The Fourth Convention supplements Sections II and III of the Fourth Hague Convention of 1907 concerning the Laws and Customs of War on Land in respect to the civilian population. These conventions have been ratified (as of June, 1966) by 109 countries.

Since 1949 the Red Cross has devoted growing attention to the protection of the civilian population in war as well as in civil war and internal strife, as provided for by article 3 of each of the 1949 Conventions. This is reflected in the activities of the XXth International Conference of the Red Cross, held in October 1965, which are analyzed below by an eminent specialist, the Director of the International Committee of the Red Cross. By publishing this important article, the International Commission of Jurists wishes to contribute to a better understanding of the problems involved – problems which are of immediate concern not only to every jurist but to the whole of mankind.

In its Bulletin no. 21 (December 1964), the International Commission of Jurists drew attention to the alarming fact that in many armed conflicts which have been taking place recently in different parts of the world, fundamental rights of persons detained or captured by opposing forces are not being recognized. Instances of killing and other inhuman treatment of prisoners or civilians – including the taking and killing of hostages – are only too frequent. The Commission believes that the principle of humanitarianism enunciated by the Red Cross should bind all nations and groups of belligerents and should apply to all persons coming under their control. With this end in view, it was suggested that, whenever an internal conflict or disturbance arises in any part of the world, the Secretary General of the United Nations or some other United Nations authority should specifically and unequivocally bring to the notice of the belligerents the provisions of the “law of nations” as elaborated by the Geneva Conventions as well as the provisions of the Universal Declaration of Human Rights. In cases where the

belligerents are receiving active support from outside states, these states should also be requested to use their best endeavours to ensure the proper application of these minimal humanitarian rules. They should be reminded that by Article 1 of the Geneva Conventions they are bound not only to respect the Conventions themselves, but to ensure their respect in all circumstances. It would be essential that this machinery should operate automatically wherever an internal conflict is anticipated.

M. Jean Pictet, the Director of the International Committee of the Red Cross, in the following article raises issues of vital importance to humanity. It is hoped that governments and jurists throughout the world will unequivocally respond to the authoritative and reasoned pleas contained in his article.

1. What is the International Conference of the Red Cross?

The Conference, according to the Statutes, is the "highest deliberative authority" of that vast world-wide association known as the International Red Cross. It is composed of delegates from all the recognised National Societies and from the two international bodies: the International Committee of the Red Cross (ICRC) – the founding body and intermediary in time of war – and the League of Red Cross Societies – the federation of the National Societies. In addition – and this is an important point to note – participation in the discussions is open to representatives of States which are parties to the Geneva Conventions (i.e. practically all States). The Conference meets every four years, circumstances permitting – thus, it did not meet between 1938 and 1948. Each delegation has one vote.

What are the powers of the Conference? Its decisions are binding on the organs of the Red Cross only in respect of matters coming within its exclusive competence, that is: the interpretation and revision of the Statutes of the International Red Cross; disputes between members; and proposals relating to the Geneva Conventions. The Conference also ensures "unity of effort" by the Red Cross. It can give mandates to the ICRC and the League but it cannot amend their statutes. In all other matters its authority is purely moral – it can only voice its wishes. This is fully consonant with the spirit of the International Red Cross, the principal characteristic of which is the independence of its constituent elements.

Are the governments which participate in the Conference legally bound by its decisions? No – for such to be the case the Conference would need to be diplomatic in character or to be an official intergovernmental organisation. Conference resolutions, however, retain their full moral force.

In truth too much importance should not be attached to the presence of governments at the International Conference, where they sometimes adopt, by right or in fact, the attitude of observers – but they abandon this reserve when a matter having politically important implications comes before the Conference, such as was the case in 1957 when the ICRC submitted its draft rules for the protection of civilian populations against the dangers of indiscriminate warfare. The Government delegates bring all their weight to bear in such cases in an endeavour to secure acceptance of their own views on the question.

Does this mean that the Red Cross should dispense with the participation of governments in its Conferences? Certainly not; the benefits of having them present do, in the end, outweigh the disadvantages, since Red Cross action is so closely linked with the public authorities.

2. The Vienna Conference

The XXth International Conference of the Red Cross met from October 2 to 9, 1965 in the admirable accommodation offered by the Hofburg in Vienna. Organised by the Austrian Red Cross, with the assistance of personnel from the international bodies of the Red Cross, the Conference was presided over by Mr. Hans von Lauda, Chairman of the National Society. It was attended by 580 delegates representing 92 National Societies and 84 governments. The ICRC, for its part, had prepared the basic working documents, including no less than 24 bound reports, some of them quite voluminous.

Since the Conference had not met for eight years, this session was of particular importance; the results attained fully justified the hopes placed in it. The session provided a demonstration of the unity and universality of the Red Cross; agreement was quickly forthcoming on the many items on the agenda, and the spirit of harmony which prevailed during the debates enabled the resolutions to be adopted in near unanimity.

It had been feared that there might be a repetition of the incidents concerning the representation of certain countries, such as occurred at the 1952 and 1957 sessions; however, difficulties of this kind were, very fortunately, kept to a minimum. The Red Cross, a philanthropic institution, has no right to waste its time, and consequently its money, in debating political or diplomatic questions which are outside its competence. If it were to do so, what would the distressed peoples awaiting succour from it think? The Red Cross does not pronounce on the legitimacy of States or governments. In virtue of its principles of neutrality and universality, and in the over-riding interests of those needing help, any government

exercising *de facto* authority over a territory is, *de jure*, a member of the Conference.

3. The Principles of the Red Cross

The XXth Conference adopted the final version of the basic charter incorporating the principles which govern the movement. The text of this charter is as follows:

Humanity: The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples.

Impartiality: It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress.

Neutrality: In order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature.

Independence: The Red Cross is independent. The National Societies, while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with Red Cross principles.

Voluntary service: The Red Cross is a voluntary relief organisation not prompted in any manner by desire for gain.

Unity: There can be only one Red Cross Society in any one country. It must be open to all. It must carry on its humanitarian work throughout its territory.

Universality: The Red Cross is a world-wide institution in which all Societies have equal status and share equal responsibilities and duties in helping each other.

Why, it may well be asked, did the Red Cross wait for a hundred years before stating the moral basis on which the movement is founded, and how, again, did it succeed in doing so at a time

when conflicting ideologies are noisily striving for universal acceptance?

The reason is that in former times men, while they were doubtless no better than those of today, had a reasonably well defined sense of good and evil, or at least of what they regarded as such. Thus certain standards were automatically observed, as a matter of conscience, without any admission that they were open to discussion and without any feeling that they needed to be defined. Moreover, the influence of tradition was on occasion stronger than that of written law.

Out of the convulsions of the First World War there came about a new era in the history of human relations; from the very beginning, this era, in which we are still living, was marked by a complete reversal of values and by a profound confusion of ideas. It was at this period that peoples started to talk different languages and to attribute different meanings to the same words. This made it all the more vital for the Red Cross to have a sound and clearly defined doctrinal basis; henceforth the Red Cross needed a clear awareness of what it was, where it was going and what it believed in.

A doctrine had to be established, to which men cast in all moulds – idealists or realists, believers or non-believers – could subscribe. To this end it was necessary to speak a universal language, to break with conformist thinking, with preconceived ideas, with misplaced sentiment and with all the outworn jargon which lives on only because man is a prisoner of the petty world of his own immediate environment, in which he seeks to encompass the whole vast universe.

The declaration of Vienna is the fruit of modern thinking, which urges the seeker to be wary of himself and of the civilisation to which he belongs, to strike out beyond such limitations and propose solutions which serve the greatest number because they reflect human nature and are not merely dissimilar remedies of purely local application.

4. The Geneva Conventions

This is a traditional item on the agenda of sessions of the International Red Cross Conferences.

From the very outset the ICRC has promoted these Conventions and has worked unceasingly to develop and propagate them. Thus, it was mainly at the instigation of the ICRC that the Conventions were revised in 1949. This monumental legal work, containing over 400 articles, constitutes the most up-to-date and most thorough codification of the rules for the protection of the human person in case of armed conflict. The Geneva Conventions give concrete expression to the very ideals of the Red Cross and provide

it with an instrument admirably adapted to the fulfilment of its task; the Conventions also help to spread the spirit of mutual assistance and peace among peoples.

Almost all the States in the world – 109 to be precise, a degree of universality rarely achieved in the field of international law – have by now ratified these fundamental charters of humanity. The ICRC has also prepared a detailed commentary on these instruments; at present the main effort is directed towards disseminating knowledge of them, because these Conventions can save thousands upon thousands of lives – but only if they are widely known. This suffices to illustrate the primordial importance of the issues involved.

In signing these treaties, the States have undertaken to publicise their provisions; but it must be added that little has been done in this regard. The ICRC is therefore encouraging States to greater efforts, by providing assistance and, particularly, by issuing appropriate publications. The XXth Conference called upon States to intensify their efforts to implement the Conventions and to make them widely known.

There is one particular point I would like to emphasize in this connection: the need to ensure that military forces placed at the disposal of the United Nations apply the provisions of the Geneva Conventions. It appears quite likely that in the future the United Nations will be called upon to an increasing extent to maintain or restore peace and UN troops will consequently be engaged more frequently. But the United Nations Organisation, as such, is not a party to the Conventions.

As early as 1956, at the time of the Suez conflict, the ICRC had intimated its misgivings in this connection to Mr. Hammarskjöld and received satisfactory assurances. But in 1960, when the United Nations intervened in the Congo, it became clear that their forces had not been sufficiently briefed in this respect. The ICRC therefore took up the question once again and was informed that the UN aimed at respecting the “principles” of the Geneva Conventions, that mention to this effect had been introduced into the service regulations and that the troops would henceforth receive adequate instruction on the point.

When the Congo dispute ended, the ICRC took up the whole question with Mr. Thant, Secretary-General of the United Nations. The intention in so doing was to ascertain what measures should be taken to ensure that the Conventions would be observed in full (thus going beyond mere observance of the principles alone) and also what measures were to be taken against breaches of their provisions. Could not the United Nations Organisation, as such, adhere to the Conventions, or could not its General Assembly at least make a solemn declaration to that effect? To do so would not appear to give rise to any theoretical difficulty – it is acknowledged

nowadays that the UN can become a party to any treaty whatsoever. United Nations jurists, however, raise difficulties of a procedural nature: the UN is not a state and has no army of its own; moreover, it cannot substitute its own jurisdiction for that of the countries which have furnished contingents of troops.

For the moment, we have received an assurance that the Secretariat-General of the UN will include in all agreements made with countries placing troops at the disposal of the UN a provision to the effect that such troops shall respect the Geneva Conventions. This system has worked satisfactorily in the case of the UN contingents sent to Cyprus. The question has, therefore, been partly solved, at least on the practical level. At the same time the ICRC sent a memorandum directly to all the member States of the United Nations, drawing their attention to the fact that the States themselves continued to remain responsible for the application of the Conventions by the troops they furnish to the UN. Each one of them was, consequently, requested to take whatever measures it deemed appropriate to this end.

The whole question was submitted to the XXth International Conference of the Red Cross, which adopted the following resolution on the subject:

The XXth International Conference of the Red Cross,

considering that the States parties to the Geneva Conventions have undertaken to respect them and make them respected in all circumstances,

considering further that it is necessary for the "United Nations Emergency Forces" to respect these Conventions and be protected by them,

expresses its satisfaction at the practical measures already taken by the United Nations,

recommends

1. that appropriate arrangements be made to ensure that armed forces placed at the disposal of the United Nations observe the provisions of the Geneva Conventions and be protected by them;
2. that the Governments of countries making contingents available to the United Nations give their troops – in view of the paramount importance of the question – adequate instruction in the Geneva Conventions before they leave their country of origin as well as orders to comply with these Conventions;
3. that the authorities responsible for the contingents agree to take all the necessary measures to prevent and suppress any breaches of the said Conventions.

5. The Protection of Civilian Populations against the Dangers of Indiscriminate Warfare

This was undoubtedly the most important item before the Vienna Conference.

The 1949 Geneva Convention No. IV protects civilians only against abuses of power by the enemy authorities. It does not touch upon such matters as the rules of warfare or the use of certain weapons. The accumulated ravages of the Second World War were, however, such as to leave the world horror-stricken. Whereas the First World War totalled 10 million killed, including 500,000 civilians, the 1939-45 war killed 50 million people - 26 million military personnel, and 24 million civilians. Of the civilian casualties, 1,500,000 deaths resulted from air attack.

A helpless world witnessed a prodigious acceleration in destruction, an irreversible evolution of the instruments of war towards an ever more "total" form, progressing from classic bombardment to the atomic bomb, by way of "carpet-bombing", V2s and napalm. And, when the fires of war were quenched, nuclear physics continued to yield frightening discoveries. Today, a single thermo-nuclear missile suffices to annihilate a large capital city - and the great powers possess enough missiles to end all life on the surface of the globe.

Even more disquieting is the fact that, whereas the ruined cities have been rebuilt, the States have done nothing to restore the Hague Rules, which vanished under the same ruins. Neither the Government of the Netherlands nor the United Nations have been willing to take up the torch - the horizon remains dark in so far as undertaking a revision of the rules of warfare is concerned. While the techniques of offensive action have taken giant strides forward, the only rules which can be invoked date from 1907. Such a situation is flagrant in its absurdity.

And what is more, the very repetition of destructive attacks, and the progress made in the technical field, have bred a terrible familiarity - the feeling of horror becomes numbed and indignation yields to resignation to what is regarded as the work of fate. New methods of warfare thus finally come to appear lawful. We must protest with all the force at our command against this attitude, against this abdication of conscience in the face of the rampant neo-barbarism which dishonours the century we live in, and which is tantamount to claiming that man should allow himself to be dominated by his own creations instead of remaining master of them. While it is true that the rules of warfare, drawn up before bomber aircraft were known, are outmoded because they have not been brought up to date, the principles underlying these rules remain valid because they are the expression of an eternal truth. It can be

affirmed that the mass bombing raids of the last war were unjustifiable from either the moral or the legal standpoint, and indeed even from the practical aspect.

In view of the paramount importance of the question, and since no other body was willing to tackle it, the ICRC stepped outside the framework of the Geneva Conventions, but in so doing it believes that it is being faithful to its duty. And, further, it limited itself to the question of air bombardment. In undertaking such a venture the ICRC based itself on the finding that the mass bombing of cities during the Second World War did not "pay" from the military viewpoint, this being the rather tragic admission the experts had to make after the event. And when the military planners wished, for tactical or political reasons, to spare particular buildings they were remarkably successful in doing so.

We had also present in our minds an idea which could, perhaps, provide the key to the problem. What is required is to attack, not any specific weapon, such as the atomic bomb, but rather certain methods of waging war. It may be taken for granted that States which possess nuclear armaments will not agree to deprive themselves of such weapons. Indeed, to do so would serve no purpose, for as soon as one weapon is banned an even more terrible one will be invented. The Hamburg and Dresden raids caused as many, if not more, deaths as did the A-bomb attacks on Hiroshima and Nagasaki – and at Oradour the weapon employed was simply an ordinary box of matches. The principle to be established is, therefore, as follows: irrespective of the weapons employed in the course of a conflict, the civilian population must be respected, or at least not exposed to risks out of proportion to the military value of the objective aimed at.

The ICRC has drawn up, with the assistance of experts, "Draft Rules" designed to limit the risks incurred by the civilian population in time of war; these Rules were the object of a rather hesitant approval in principle at the XIXth International Red Cross Conference (New Delhi, 1957). In accordance with the decision of that session of the Conference, the ICRC transmitted the draft text to governments; their replies took the form of a crushing silence, with the exception of a few well-disposed countries. The great powers, in particular, remained silent, being apparently of the opinion that the draft text was incompatible with their present defence systems which they think offer them security, illusory though it may be.

What was to be done? The Red Cross could not abandon the civilian populations to their sad fate. Consequently, having again consulted experts, the ICRC conceived the idea of persuading States to acknowledge some elementary humanitarian principles to be applied in all cases to the treatment of the civilian population in

the conduct of military operations. The XXth Conference also adopted this course when it approved the following resolution:

The XXth International Conference of the Red Cross,

in its endeavours for the protection of the civilian population, reaffirms Resolution No. XVIII of the XVIIIth International Conference of the Red Cross (Toronto, 1952), which, in consideration of Resolution No. XXIV of the XVIIth International Conference of the Red Cross (Stockholm, 1948) requested Governments to agree, within the framework of general disarmament, to a plan for the international control of atomic energy which would ensure the prohibition of atomic weapons and the use of atomic energy solely for peaceful purposes,

thanks the International Committee of the Red Cross for the initiative taken and the comprehensive work done by it in defining and further developing international humanitarian law in this sphere,

states that indiscriminate warfare constitutes a danger to the civilian population and the future of civilisation,

solemnly declares that all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:

- that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- that it is prohibited to launch attacks against the civilian populations as such;
- that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible;
- that the general principles of the Law of War apply to nuclear and similar weapons;

expressly invites all Governments who have not yet done so to accede to the Geneva Protocol of 1925 which prohibits the use of asphyxiating, poisonous, or other gases, all analogous liquids, materials or devices, and bacteriological methods of warfare,

urges the ICRC to pursue the development of International Humanitarian Law in accordance with Resolution No. XIII of the XIXth International Conference of the Red Cross, with particular reference to the need for protecting the civilian population against the sufferings caused by indiscriminate warfare,

requests the ICRC to take into consideration all possible means and to take all appropriate steps, including the creation of a committee of experts, with a view to obtaining a rapid and practical solution of this problem,

requests National Societies to intervene with their Governments in order to obtain their collaboration for an early solution of

this question and urges all Governments to support the efforts of the International Red Cross in this respect,

requests all National Societies to do all in their power to persuade their Governments to reach fruitful agreements in the field of general disarmament.

In the present disjointed state of the rules of warfare, most of which are more than 50 years old, it is no exaggeration to consider the four rules in the central part of the resolution as being the general principles of customary law which now regulate the question. It is the only pronouncement of the kind made by an assembly in which governments are represented since the Second World War.

The first of these principles is taken from the 1907 Hague Rules; the second, and part of the third, come from the declaration made by the League of Nations in 1938. Other elements could doubtless be added, such as a statement that bombardments should be limited to military targets and should not inflict on the enemy suffering out of proportion to the military importance of the objective aimed at, and that during attacks on military targets every precaution should be taken to avoid injury to populations.

The fourth principle, which is to be found in the British Manual of Military Law, appears for the first time in an international instrument. The implications of this principle are far-reaching because, if words are to have any meaning, it indicates that the indiscriminate use of nuclear energy is not lawful. The new weapons may be employed only under the conditions established by the general principles of law. The principles in question are precisely those which we have just mentioned – no attacks on civilian populations as such; a distinction to be made between combatants and non-combatants; and avoidance of disproportionate suffering.

On this basis, already well established, the ICRC will pursue its efforts and we can be sure that the results already achieved will be put to the best effect. Its hope is that the powers will formally confirm their undertakings on the basis of the principles formulated at Vienna.

One particular, immediate and practical aspect of the protection of civilian populations is the question of the status to be accorded to persons engaged in practical work in an endeavour to ensure the survival of inhabitants. Such persons, active in what is known as Civil Defence, deal with alerts, black-outs, shelters, fire-fighting, searching for casualties under ruins and caring for them, evacuation, etc. In short, what is required is the formulation of international rules securing immunity to members of Civil Defence services, similar to that provided for military medical personnel under the Geneva Conventions. When, one hundred years ago, in-

ternational protection was granted to military medical corps, these bodies developed and saved thousands of lives. Civil Defence services, granted immunity in their turn, could perhaps also develop and save equal numbers of lives. The problem is admittedly complex, since such services make a contribution to national defence, but it is not beyond solution.

In order to be protected, these services should remain non-combatant in character, even if they engage in rescue work in establishments regarded as military targets. They would be allowed to protect only such property as is not used mainly for military ends. In performing their duties the personnel of Civil Defence services would wear a distinctive uniform insignia (which would not be a red cross, except perhaps in the case of purely medical services). A resolution adopted at Vienna recognised the need to strengthen protection for Civil Defence personnel and requested the ICRC to continue its work, drawing upon the assistance of specialists. The ICRC proposes, therefore, to draft appropriate regulations.

6. Assistance to Victims of Internal Disturbances

The Geneva Conventions, despite the broadening of their scope in 1949, do not cover the whole range of human suffering. The ICRC will therefore continue to work, as it has done unceasingly for the past century, towards extending the ground won by humanitarian law. One of the main tasks in this field is to secure a minimum of protection for victims of internal disturbances.

Until quite recently, international law applied only to international wars. Insurrectionary movements were, with rare exceptions, bloodily repressed. This amounted to a gaping lacuna in humanitarian law and gave rise to an urgent need to secure in such cases the application of at least the basic principles of the Geneva Conventions, since civil wars cause proportionately greater suffering, by reason of the hatred and mercilessness they conjure forth, than do international wars. Why is this so? It is because the adversary is known to the combatant and personal considerations envenom the conflict.

For this reason the ICRC evolved the idea of introducing into the Geneva Conventions an audacious and paradoxal provision which would aim at applying international law to a national phenomenon. After months of discussion the 1949 Diplomatic Conference adopted Article 3, common to all four Conventions, already widely known at that stage, and which in itself constitutes what one might term a "mini-Convention". This Article provides that in non-international conflicts all the parties involved should observe at least certain basic humanitarian principles: respect for persons not participating in the conflict; prohibition of torture, of

the taking of hostages and of irregular convictions and executions. This Article has already enabled the ICRC to intervene in several armed conflicts. Nevertheless, despite its value and the precedent it represents, Article 3 is still of limited scope and presupposes the existence of a state of armed conflict.

A characteristic of our times is, however, the thriving growth of political ideologies which aim at subordinating everything to their own ends; a consequence of such a situation is the proliferation of subversive movements seeking to overthrow the established régime by the use of force. Against this background there have developed, between States, those extreme tensions sometimes referred to as the cold war and, within States, destructive opposition between competing factions. And it frequently comes to pass that, in their own countries, citizens are the object of exceptional legislation, are deprived of their liberty merely because they voice certain opinions, are subject to arbitrary procedures and, in the final analysis, are less well treated than enemy soldiers captured bearing arms. During the course of history, law first developed within human communities; efforts were then made to extend some elements of the law to international wars, and subsequently to civil wars. By a strange and surprising reversal of the situation, what is now required is that the Law of War should apply in time of peace and also be applicable to the internal affairs of countries.

In this way it is coming to be more and more widely held that the mission of international law is to secure a minimum of guarantees and humanitarian treatment to all mankind, be it in time of peace or in time of war, and irrespective of whether the conflict in which the individual may be engaged is with either a foreign nation or the society to which he belongs. Opinion will certainly continue to evolve along these lines but will probably not attain its full development until the law is sanctioned by judicial instances and supervisory machinery, backed by an international force capable of securing compliance with the decisions pronounced. Such a system would probably imply a new world organisation. For the moment, there is scope here for exploring the possibilities for humanitarian action, since a "no Man's land" should not be tolerated in the field of human suffering. The approach to the problem is particularly delicate; national sovereignty and State security are formidable obstacles to progress in this direction.

How has the ICRC tackled the question up to now? It has convened meetings of experts of world-wide reputation. These experts proclaimed the principles which should govern the treatment of victims and on which rescue action should be based. These declarations have already helped the ICRC to open certain doors. Bodies such as the International League for the Rights of Man or the International Commission of Jurists could doubtless complement

Red Cross action by undertaking measures in areas outside Red Cross competence. For practical reasons, and in order to avoid compromising its very existence, the ICRC has limited itself to matters relating to war or to situations resembling a state of war. For the moment its efforts are restricted to persons detained as a result of violence, disturbances or extreme tensions. A resolution adopted by the XXth Conference urges the ICRC to pursue its activities in this field.

7. The Red Cross and Peace

Can the Red Cross contribute to the maintenance of peace and the peaceful solution of international conflicts? This is a question which has now been under discussion for a long time. While it was immediately granted that the Red Cross can help to spread the spirit of peace among peoples and that its whole approach, and its day-to-day work, are a condemnation of violence, it was also recognised that the non-political character of the Red Cross imposes limits on the action it can take to prevent war.

If it be true that peace is cherished by all peoples, it is also true that they often seem to be unable to agree on how peace is to be established or maintained or on the nature it should take. Now to pronounce on the questions raised by a reorganisation of the world is to move, willingly or not, into the political sphere. The desire to achieve something in this sphere implies descending into the arena with the nations and parties. It is quite certain that if the Red Cross were to engage thus in a struggle for which it is not intended, one of the first results would be its own destruction.

Nevertheless, a few years ago the ICRC was called upon to go beyond the traditional scope of its mission and undertake responsibilities in a completely new field. This happened in autumn 1962 during the Cuba incident. For a few days the political situation was so serious that it seemed as if thermo-nuclear war were imminent. The Secretary-General of the United Nations then turned to the ICRC as being the only body capable of still saving the peace: what was required was to verify that ships bound for Cuba were not carrying long-range atomic weapons for that country. The ICRC considered that it could not shirk such a task, but it made its acceptance subject to all the conditions imposed by prudence and the desire to maintain its neutrality. In particular, and with a view to getting the question out of the political sphere, it insisted on securing the express agreement of the countries concerned. Such agreement was forthcoming, but, finally, the situation eased before the Red Cross had actually to undertake inspections. An interesting precedent had, however, been established.

At Vienna more discussion than ever was devoted to peace. Ten different draft texts were submitted; these were finally consolidated in one text, as follows:

The XXth International Conference of the Red Cross,

noting with satisfaction the Resolution entitled "Red Cross as a factor in world peace" adopted by the Council of Delegates (Geneva, 1963),

recalling Resolutions previously adopted in this field particularly by the XIXth International Conference of the Red Cross (New Delhi, 1957),

welcomes the efforts made by various Governments to eliminate the danger of armed conflicts through disarmament and, in particular, through the conclusion of the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space, and under water and also the 1963 Resolution of the United Nations General Assembly banning the stationing of weapons of mass destruction in outer space,

expresses its profound anxiety with regard to the suffering endured by the populations of a number of countries where armed conflicts are being waged,

further expresses its deep concern at and deplores the repeated use of force directed against the independence or the right to self-determination of all peoples,

urges all Governments to settle their international disputes by peaceful means in the spirit of international law,

appeals to all Governments to pursue their efforts to reach agreement on the ban of all nuclear weapon tests and on general and complete disarmament under effective international control as well as to consider taking such partial measures as the establishment of nuclear free zones and agreements for the non-proliferation of nuclear weapons,

encourages the International Committee of the Red Cross to undertake, in constant liaison with the United Nations and within the framework of its humanitarian mission, every effort likely to contribute to the prevention or settlement of possible armed conflicts and to be associated, in agreement with the States concerned, with any appropriate measures to this end,

urges the ICRC and the League of Red Cross Societies, the National Societies and Governments to redouble their efforts with a view to the universal and scrupulous application, in a spirit of humanity, of the Geneva Conventions, in all armed conflicts,

expresses its appreciation for the efforts of the ICRC, the League, the National Societies and Governments for the alleviation of suffering, and encourages them to continue such efforts in the future.

As can be seen, the 1965 Conference remained worthy of its predecessors. It showed that the International Red Cross is indeed a living institution, active everywhere and always faithful to its ideals. It has blazed the trail in many fields of international law, and we may hope that the final result of its efforts will benefit all mankind.

TWO ASPECTS OF PRE-TRIAL PROCEDURE IN EASTERN EUROPE

I. THE ROLE OF THE INVESTIGATOR IN SOVIET CRIMINAL PROCEDURE

by

PAULINE B. TAYLOR *

Soviet law has insulated the preliminary criminal investigation from judicial control or supervision. No investigative action may now be appealed to a court or judge. The investigator himself is not a judicial officer, but a member of the staff of the Procuracy, Police Ministry or Committee for State Security (KGB). Divorce from the judiciary radically distinguishes the Soviet investigator from the French examining magistrate, to whom he has been loosely equated.¹

This departure of Soviet law from normal continental practice was effected by degrees. Until 1928, investigators remained administratively subordinate to the judiciary, and though subject to Procuracy direction, they retained a right to appeal to the courts from certain of the Procuracy directives. However, in 1928, investigators were detached from the judiciary and incorporated in the Procuracy. Professor Strogovich, the Soviet authority on criminal procedure, has characterized this transfer as a "reform dictated by . . . the necessity for maximum consolidation of the investigative forces in the struggle against criminality".² Nevertheless, the investigative organs of the political police remained free from outside control of any kind.³

One vestigial remnant of judicial authority survived, on paper at least, until the enactment of the 1960 Code of Criminal Procedure. The latest edition (1957) of the prior code provided for judicial review of Procuracy decisions on complaints by aggrieved parties against actions of investigators.⁴ This last obsolete link between the courts and the investigators was severed by the 1960 Code. On the other hand, recent legislation is interpreted as subjecting State Security investigators to general supervision by the Procuracy.⁵ The actual extent to which this supervision is exercised

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¹ Berman, H. J., *Justice in the U.S.S.R.*, N.Y. 1963, Vintage Ed., p. 302.

² Strogovich, M. S., *Course in Soviet Criminal Process*, Moscow, 1958, p. 127.

³ Gsovski and Grzybowski, *Government, Law and Courts in the Soviet Union and Eastern Europe*, N.Y., 1959, pp. 552-53; R.S.F.S.R. Code of Criminal Procedure (1957), Moscow, arts. 107, 108.

⁴ *Ibid.*, art. 220.

⁵ Zhogin and Fatkullin, *Preliminary Investigation*, Moscow, 1965, p. 351.

remains uncertain. Although past excesses of State Security forces are now frequently criticized,⁶ their activities are rarely mentioned in the present tense.

State Security investigators may exercise jurisdiction over political crimes, including treason, espionage, anti-Soviet propaganda, massive disorders and even currency speculation. For a brief period from 1960 to 1963 the Procuracy investigators were expected to cope with all other crime excepting a scattering of minor offences which remained subject to summary police inquiry. This arrangement put an impossible burden on the Procuracy, because it suddenly reversed the preexisting situation, when the Procuracy investigated selected major crimes and the police inquiry summarily disposed of the rest. The result of this 1960 change was that the police, in effect, processed the bulk of the cases, while the harassed Procuracy staff merely reduced the police work to official form.⁷ To correct this extra-legal solution, a new corps of investigators was created in the Ministries of Police (Ministries for Protection of Public Order) in 1963 to investigate the simpler crimes uncovered by routine police procedure.⁸ This new corps was largely staffed by the promotion of officers experienced in the conduct of police inquiries.⁹ Contemporaneously, the list of petty offences subject to summary police inquiry was further reduced. These now include insult, slander, minor hooliganism, minor bodily injury and poaching, and it has been authoritatively proposed that even such minor infractions should be made the responsibility of the new police investigators.¹⁰ In effect, the 1963 changes have roughly restored the previous division of labour between police and Procuracy, but under greater uniformity of procedure.

The procedure of the new corps of police investigators has not yet crystallized and, as previously mentioned, available data on State Security investigations is scanty. Consequently, the description, which follows, of Soviet preliminary investigation is based largely on the operations of Procuracy investigators.

Although criminal proceedings may occasionally be initiated by an investigator, most pass through a preparatory stage of police

⁶ See, Zhogin, N. V., "On Vyshinsky's distortions of the theory and practice of Soviet law." *Sovetskoe Gosudarstvo i Pravo* (hereinafter cited as S. G. P.) No. 3, 1965, p. 22.

⁷ Chistyakova, V., "Organs of preliminary investigation in the Soviet criminal process," *Vestnik Moskovskogo Universiteta, Seriya X, Pravo*, No. 4, 1964, p. 35, at 37.

⁸ Chistyakova, V., "On the delimitation of competence among the organs of preliminary inquiry," *Sotsialisticheskaya Zakonnost* (hereinafter cited as S. Z.) No. 7, 1964, p. 11.

⁹ Zhogin and Fatkullin, *op. cit.*, p. 51.

¹⁰ Tikunov, V. "On further improvement of preliminary investigation," *S. G. P.* No. 6, 1965, p. 3 at 10.

inquiry. The Soviet police stage is lengthier and more extensive than the police stage in Western Europe. By the French Code of Criminal Procedure of 1958, police detention is limited to twenty-four hours, which may be extended for an additional twenty-four hours by the prosecuting attorney, after seeing and hearing the suspect. (FCCP, 77).¹¹ Although the Soviet Procurator also should receive a report within twenty-four hours of an arrest, he has an additional forty-eight hours in which to decide whether to order release or to sanction preliminary detention. (CCP, 122).¹² He need not question the suspect personally, except in "necessary cases".¹³ After ten days of preliminary detention, a suspect should be charged or released. (CCP, 90). Ten days also is the length of time prescribed for completion of the preparatory police inquiry and transfer of the case to the investigator. Within this time limit, the police inquiry is expected to cover the most urgent investigative acts. In addition to arrest, these may include inspection, search, seizure, examination, and interrogation of suspects, victims and witnesses. (CCP, 119). However, the police are directed to transfer the case to the investigator as soon as the most urgent acts have been performed, and the investigator may take charge earlier on his own initiative. (CCP, 119, 127). After the investigator has assumed jurisdiction, the police are restricted to performance of tasks which he may delegate, except for the continuance of operational detective measures in any case in which it has not been possible "to find the person who committed the crime". (CCP, 119).

It is the investigator's duty to prepare the charge when there is "sufficient evidence to provide a basis for a charge". (CCP, 143). The charge must be stated in a "motivated" ruling, which names the accused, the crime charged, the statute relied on, and the time, place and other circumstances of the commission of the crime, "in so far as established by the materials of the case". (CCP, 143, 144). (The prevailing standard of proof for the charge will be discussed later in connection with a survey of the role of the investigator.)

The investigator must present the charge to the accused within two days of its issuance. At this time, the investigator should explain the substance of the charge and inform the accused of his rights during the investigation: to give explanations, proffer evidence, present petitions, challenge the investigator for interest, and lodge complaints against acts or decisions of the investigator or procurator. At the close of the investigation, the accused may also examine the materials of the investigation and has at this stage the right to assistance of counsel. However, if the accused is a minor or is in-

¹¹ FCCP denotes The French Code of Criminal Procedure of 1958, New York University, N.Y., 1964, translated by Gerald L. Kock.

¹² CCP denotes R.S.F.S.R. 1960 Code of Criminal Procedure (1964), Moscow.

¹³ Regulations on Procuracy Supervision in the U.S.S.R., art. 18.

capable of self-defence by reason of mental or physical defects, he has the right to assistance of counsel from the time of presentation of the charge. (CCP, 149). The investigator should interrogate the accused immediately after presenting the charge. (CCP, 150).

The Soviet charge procedure differs essentially from west European procedure, here for convenience exemplified by the French Code of 1958. As previously indicated, the French examining magistrate is a member of the judiciary. He is assigned to investigative work for a period of three years and investigates only by virtue of a petition by the prosecuting attorney. (FCCP, 80). At the first appearance, the magistrate acquaints the accused with the acts imputed to him and further advises him that he is free to make no statement, and has the immediate right to choose counsel or have counsel assigned to him. (FCCP, 114). The accused is not interrogated at his first appearance unless there are urgent reasons for an immediate interrogation or confrontation. (FCCP, 115).

The French accused may communicate freely with counsel "promptly after the first appearance". (FCCP, 116). Thereafter, he may be heard or confronted only in the presence of counsel, who must have been called in advance. In addition, the procedural file must be placed at the disposal of counsel for the accused before each interrogation. (FCCP, 118).

As previously noted, a competent adult has no right to counsel before the close of the Soviet investigation, and the materials of the case are not available to the accused or his counsel during the course of the investigation. The accused is interrogated immediately by the Soviet investigator in order to forestall fabrication of his story,¹⁴ and is not warned that he cannot be forced to testify. However, if the accused refuses to testify about the substance of the charge, the investigator "should explain to him that refusal to testify impedes the collection of exculpatory or extenuating evidence, and cannot operate to prevent the further conduct of the investigation". If the accused persists in his refusal, the investigator should reflect that fact in the protocol of the investigation.¹⁵

A witness in a Soviet investigation is cautioned that he will be criminally responsible for failure to testify or for giving false testimony. (CCP, 158). A suspect is not considered a witness for this purpose, but the Soviet definition of a suspect is very narrow. Under Soviet law, a suspect is either (1) a person arrested on suspicion of the commission of a crime, or (2) a person under detention or other preventive restraint in advance of the issuance of a charge. (CCP, 52). There are no expectations to this formalistic

¹⁴ Zhogin and Fatkullin, *op. cit.*, pp. 227-28.

¹⁵ Commentary to the R.S.F.S.R. 1960 Code of Criminal Procedure, Leningrad University, 1962 (hereinafter cited as Leningrad Commentary), p. 152.

rule;¹⁶ so that actual suspicion does not of itself minimize the obligation to testify. This contrasts sharply with the prohibition of the French Code that "The examining magistrate . . . may not with intention to cut off the rights of the defence, hear as witnesses persons against whom there exist grave and concordant indications of guilt". (FCCP, 105). Also, the examining magistrate must give warning that: "Any person included by name in a complaint accompanied by a civil claim may refuse to be heard as a witness." In case of refusal of the person named to testify, he may be heard only as an accused. (FCCP, 104).

The French provisions for pretrial detention also are comparatively mild. The French Code declares that: "Detention pending trial is an exceptional measure." (FCCP, 137). Detention may not exceed five days for persons domiciled in France, when the maximum penalty is less than two years, and the accused has not previously been convicted of a felony or sentenced to more than three months in jail. (FCCP, 138). In all other cases, detention is limited to four months, which may be prolonged by order of the examining magistrate for not more than four months. The magistrate's order prolonging detention may be appealed to the indicting chamber of the court of appeal. An application for release on bail may be made at any time, and denial of bail also is appealable. (FCCP, 186). The magistrate may apply to a detained person a ten-day period (once renewable) of prohibition of communication. However, this prohibition may not interfere with the right to communicate freely with counsel. (FCCP, 116).

In Soviet practice, preliminary detention is restricted only to accusations which could result in deprivation of liberty — however short. (CCP, 96). Bail, in the sense of financial security, although authorized by the Code, has fallen into disuse.¹⁷

One article of the R.S.F.S.R. Code specifies the conventional indications of danger of flight, or tampering with evidence, or of repeated crime (CCP, 89), to be considered in the light of the accused's age, health and other personal circumstances, in order to determine the need for preliminary detention or other preventive measures. (CCP, 91). However, another article of the Code supersedes these conventional indications with respect to most major crime: Article 96 classifies approximately sixty crimes as so inherently dangerous that detention may be applied to a person accused of any crime on the list solely on the basis of the dangerousness of the crime.

The investigator needs the assent of the procurator to pretrial detention. Nevertheless, detention appears to be too commonly applied. A district procurator of the Kursk region was singled out

¹⁶ Zhogin and Fatkullin, *op. cit.*, p. 118.

¹⁷ *Ibid.*, pp. 260, 263.

for criticism because he had sanctioned preliminary detention of a collective farmer suspected of stealing five eggs.¹⁸

The prevalence of preliminary detention may be inferred from a flood of letters to *Soviet Justice* on the vexing problem of engaging counsel to represent a detained accused. The accused himself may not engage his own counsel, because he is held incommunicado until the close of the investigation. Frequently relatives of the accused try to arrange for his defence, but they also are hampered by their inability to communicate with the accused, who remains in ignorance of their efforts. Thus it often happens in such cases that "an accused will distrust such defenders, suspecting them of some 'deal' with the investigator, who could act behind the back of the accused and against his wishes in selecting a 'profitable' defender and then palming this man off on the relatives".¹⁹

Another problem of representation of a detained accused is the time element. There is a strict statutory requirement that counsel appear within five days of the time when the investigator announces the close of the investigation. (CCP, 201). Unless the investigator informs the engaged counsel of the progress and probable termination date of the investigation, counsel may be unable to arrange his time so that he will be free to appear when needed.

A correspondent who was president of the Orlov college of advocates proposed that an investigator who knows of advance engagement of counsel for a detained accused should summon the chosen counsel to be present when the accused decides for or against legal assistance. Presence of counsel at this moment of choice would deter investigators from such improprieties as asking the accused to explain why it is that he wants counsel.²⁰

An editorial review of this correspondence proposed the adoption of rules permitting controlled communication between a detained accused and his relations for the purpose of considering employment of defence counsel. The editors of *Soviet Justice* agreed further that pre-engaged counsel should be present when the accused is faced with the decision to accept or reject his assistance, in order to prevent "individual investigators" from pressuring the accused to reject such assistance.²¹

These thorny problems of representation of the accused are

¹⁸ Shubin, Yu, "For high culture in the work of the procural-investigative organs," *S. Z.* No. 4, 1965, p. 19 at 21.

¹⁹ Dubovik, A., "Concerning the practice of acquainting accused and defence counsel with the materials of a criminal case, pursuant to art. 201, CCP, RSFSR", *Sovetskaya Yustitsiya* (hereinafter cited as *S. Yu.*), No. 23, p. 8.

²⁰ Aleshin, N., "To prevent the infringement of legal rights of accused and defence counsel in preliminary investigation," *S. Yu.*, No. 6, 1965, p. 24 at 25.

²¹ "From the practice of acquainting accused and defence counsel with the materials of a criminal case, pursuant to art. 201, CCP RSFSR" *S. Yu.*, No. 8, 1965, p. 22.

still unsettled because admission of defence counsel to any stage of the preliminary investigation dates only from 1958. Effective participation of counsel at the close of the investigation is crucial, because of the unique opportunity then offered to review the record and request supplementary investigation to fill out or augment the case for the defence.

The seclusion of the accused under detention and the absence of counsel during the course of the investigation combine to make lengthy detention particularly onerous. The R.S.F.S.R. Code sets a basic period of two months for preliminary detention and provides for successive prolongations up to a maximum total of nine months. (CCP, 97). Successive prolongations require approval at progressively higher levels of the Procuracy; so that detention beyond six months requires the assent of the Procurator General of the U.S.S.R. However, illegal prolongation of detention is reported to be common,²² and the Presidium of the Supreme Soviet sometimes intervenes to extend detention beyond the nine-month limit set by the Code.²³

Whereas the accused in France may appeal to the court from an order prolonging detention, the Soviet accused has no appeal to the courts during the preliminary investigation. He may lodge complaints with the procurator supervising the case, and the decision of the procurator may be appealed to his immediate superior. (CCP, 220). This system of review seems to have little or no relevance to extensions of detention by the Procurator General or even the Procurator of a republic. Of course, if the detention is illegally prolonged by the investigator, without the requisite high level assent, the accused may complain to the supervising procurator, provided he is aware of the time limits and alert to his rights in the absence of counsel.

The investigator has the responsibility for the general conduct of the investigation. (CCP, 127). However, the accused or any other party may petition for additional acts of investigation, as, for example, expert opinion on technical questions or the taking of additional testimony. The investigator should grant such requests, if they might have significance for the case. (CCP, 131). In the course of the investigation, such petitions are likely to be shots in the dark, but as previously mentioned, they may become important at the close of the investigation, when the records of the case first become available for inspection by the parties. At this time, the accused may also complain of any action by the investigator which has prejudiced his defence (CCP, 202). These eleventh hour re-

²² Zhogin, N., "For decisive improvement of the work of the investigative apparatus," *S. Z.*, No. 7, 1965, p. 2 at 3.

²³ Zhogin and Fatkullin, *op. cit.*, p. 265.

medies are particularly important because they immediately precede the drawing up of the indictment.

It is the investigator who prepares the indictment, and although it is subject to review by the procurator and by a preliminary session of the trial court, it is likely to be the final document on which the accused stands trial. The Procuracy staffs assigned to supervision of preliminary investigation are known to be undermanned and supervision of investigation is criticized as weak.²⁴ The excessive reliance of the trial courts on the work of the investigation will be discussed in relation to judicial evaluation of the investigation as a whole.

The responsibility of the investigator for preparing both the charge and the indictment gives him a unique power to shape the entire case. Under the French Code of Criminal Procedure of 1958 the examining magistrate investigates on petition of the prosecuting attorney, and the French indictment is prepared by the examining magistrate, with a right of appeal to the indicting chamber of the court of appeal, which is known as the second degree investigating jurisdiction. Even among the countries of Eastern Europe only Poland and Rumania require the investigator to draw up the indictment.²⁵

There are contradictions inherent in the dual role of the Soviet investigator who first prepares the charge and subsequently draws up the indictment. These contradictions are focused by the controversy about the standard of proof required to support a charge. The imprecise requirement of the Code for "evidence sufficient to provide a basis for a charge" has given rise to wide fluctuations of interpretation. Present legal theory insists on a very high standard, not unlike proof beyond a reasonable doubt at common law. There is no agreed wording of the current charge standard. One version calls for "reliable and incontrovertible evidence not evoking doubt",²⁶ while the combined consideration of a Lvov procurator and a professor of criminal law and procedure at Lvov University arrived at the formula of a "firm conviction of guilt, based on objective and full consideration of all the circumstances".²⁷ A Leningrad University Commentary to the Code also calls for evidence which evokes no doubt, and for such certainty that only the guilty shall be charged.²⁸

²⁴ Zhogin, N., *op. cit.*, n. 22; Ivanov, L., "For better regulation of the work of the investigative sections," *S. Z.*, No. 10, 1964, p. 41.

²⁵ Grobovenko, Ya. V., *Basic Features of the Criminal Process of the European Countries of the People's Democracy*, Moscow, 1964, p. 69.

²⁶ Paraskevich, V., "On the disputable and indisputable in the theory of legal evidence," *S. Z.*, No. 12, 1964, p. 41.

²⁷ Sadovsky and Tyrichev, "Questions of theory and practice in legal evidence," *S. Z.*, No. 11, 1963, p. 39.

²⁸ Leningrad Commentary, p. 145.

Attempts to require a high degree of certainty at such an early stage of the case may harm rather than help the accused. Professor Strogovich has proposed a less rigorous standard of "weighty and verified incriminating evidence" as more conducive to an impartial investigation. In this connection, Strogovich asks: "How can the investigator bring out the circumstances vindicating the accused, and how can the accused vindicate himself in the preliminary investigation, if the investigator by the very act of issuing the charge has reached his own final conclusion of the guilt of the accused?"²⁹

This requirement of certainty at such an early stage has, in practice, been evaded by the expedient of deferring the charge. Authorities on preliminary investigation state that "the reprehensible device of fixing the moment of formulating and presenting the charge at the very end of the investigation is not infrequently encountered in investigative practice".³⁰ Postponement of the charge also occurs in those east European countries which require the investigator to issue the charge.³¹

Soviet theorists who insist on standards of perfection for the charge refuse to recognize any connection between high charge standards and evils of delayed charges and biased investigations. They persist in rejecting such alternatives as "well-founded supposition", which they rigidly equate to the discredited theories of Vyshinsky.

However, Soviet insistence on early ascertainment of guilt may be a necessary concomitant of the practice of terminating a "significant portion of criminal cases" by non-judicial means, such as transfer to Comrades' Courts and Commissions for Juveniles.³² Another such device, collective probation, consists in releasing the accused for re-education under the tutelage of a workers collective. Collective probation assumes guilt and requires a confession by the accused in addition to the sanction of the procurator. The inducement of release on probation has been used by investigators to obtain a false confession and even false implication of pretended accomplices.³³ Transfer to a Commission for Juveniles may be made without obtaining a confession, although this procedure also assumes

²⁹ Strogovich, *op. cit.*, p. 300.

³⁰ Zhogin and Fatkullin, *op. cit.*, p. 192.

³¹ Grobovenko, *op. cit.*, p. 66.

³² "Discussion of controversial theories of evidence in the criminal process," *S. Z.*, No. 5, 1965, p. 85 at 86.

³³ Koblikov, A. S., *The Right of Defence in Preliminary Investigation*, Moscow, 1961, p. 64.

guilt, and the Commission proceeds to prescribe corrective measures without re-examining the evidence.³⁴

The theoretical implication of such non-judicial termination of criminal cases has been considered by the All-Union Institute for Study of Causes and for Development of Measures for Prevention of Crime. The Commission concluded that: "It is impossible to assert that only a court finally determines the question of guilt. However, it is only a court which finally determines guilt and simultaneously fixes punishment."³⁵

If the investigation proceeds without interruption to the final stage, the investigator must decide between indictment and an order of discontinuance. If he determines that "the evidence collected is sufficient for drawing up an indictment" (CCP, 200), he so notifies the parties. This is the time for examination of the record of the investigation by the accused, with counsel, if he so desires, and for presentation of petitions for supplementary investigation. If the defence does not change the investigator's conclusions, he proceeds to draw the indictment. According to Professor Strogovich, the indictment expresses the investigator's conviction of the guilt of the accused, derived from the entire conduct of the investigation. Conviction of guilt, reasonably founded, is the standard, and "so long as the investigator is not convinced of the guilt of the accused, he may not draw up the indictment".³⁶

There is no controversy about the requirements for indictment. The argument connected with this stage of the investigation revolves around discontinuance "for failure to prove the participation of the accused in the commission of the crime". (CCP, 208(2)). Various practices have been developed in a vain effort to distinguish between those whose innocence has been affirmatively proved and those not proven guilty, but in some procedural way which will avoid damaging the reputation of the latter.³⁷ The situation is in hopeless confusion, which could be dissipated by adopting a suggestion to abolish the distinction entirely. A writer who put forward this idea perceived that those not proven guilty must be considered innocent in order to give effect to the provisions of the Code which place the burden of proof on the investigative organs.³⁸

³⁴ Davidov and Mirsky, *Discontinuance of Criminal Cases*, Moscow, 1963, p. 46; Savitsky, V. M., "Concerning criminal-procedural guarantees of the innocent," *S. G. P.* No. 9, 1965, p. 48 at 54.

³⁵ "Discussion of controversial theories of evidence in the criminal process," *op. cit.*, n. 32.

³⁶ Strogovich, *op. cit.*, p. 349.

³⁷ Leningrad Commentary, p. 206; Davidov and Mirsky, *op. cit.*, pp. 63-64; Zhogin and Fatkullin, *op. cit.*, pp. 332-39.

³⁸ Changuli, G., "Failure to prove the participation of the accused in the commission of a crime as a procedural ground for discontinuance of a criminal case in the stage of preliminary investigation," *S. Z.* No. 3, 1965, p. 58 at 59.

The investigator must submit both the indictment and the order of discontinuance to the procurator. However, the procurator does not act to confirm the order of discontinuance, although he may overrule it at any time before the expiration of the statute of limitations. (CCP, 210). The procurator must act on the indictment within five days and may confirm, remand for re-investigation, order discontinuance of the case, send back the indictment for correction, or revise it himself. (CCP, 214).

Procurators, unlike judges, may not be disqualified by reason of prior participation in a case. (CCP, 63). So it seems probable that a supervising procurator will frequently carry a case into the trial stage and draw upon the grasp of the facts acquired during the investigation.

Judicial respect for investigative work is probably enhanced by the high level of education among procurators and their investigative staff. Most are graduates in law, and by 1965 it had become difficult to find a procuracy investigator without an advanced diploma.³⁹ In addition, their special knowledge is refreshed by post-graduate courses and technical seminars.⁴⁰

The tendency of the trial courts to indulge in inert reliance on the preliminary investigation is reflected by complaints of unnecessary remand of cases to the procurator for supplementary investigation. The Code authorizes such remand for insufficiency of the investigation which cannot be remedied at the trial. (CCP, 232(1)). For example, the need for lengthy expert examination of some technical question would justify reopening the investigation. But if the court can complete the case by calling an additional witness or promptly obtaining expert opinion, the trial should proceed. However, courts do frequently remand cases for further investigation merely to avoid calling additional witnesses or the necessity of reconciling discrepancies, when a witness in the court room changes the story told earlier to the investigator.⁴¹ *Soviet Justice* has commented editorially that such remands are explicable "not by the fact that the courts really expect to obtain new data, but by a desire to avoid decision of the difficult case, to relieve themselves of the responsibility for it".⁴²

The reluctance of trial courts to grapple with facts appears also from instances of stubborn perpetuation of investigative error, of

³⁹ Larin, A., "For radical change in the preparation of investigators," *S. Z.* No. 2, 1965, p. 41.

⁴⁰ Baranov, L., "Raising qualifications, the basis for improvement of investigative work," *S. Z.* No. 7, 1964, p. 22.

⁴¹ Vorobev and Goldberg, "Against baseless remand of cases for supplementary investigation," *S. Z.* No. 10, 1964, p. 39.

⁴² "For raising the standards of excellence of preliminary investigation," *S. Yu.* No. 19, 1964, p. 1 at 3.

correction of flagrant injustice only at the Supreme Court level:

- (1) Peter Kizilov, arbitrarily arrested in 1958, was twice convicted of a savage murder and twice sentenced to death by a regional court. Twice his conviction was set aside by the R.S.F.S.R. Supreme Court, and only at the third investigation was Kizilov's forced confession discredited, his innocence established and the true culprits exposed.⁴³
- (2) K., a member of a road survey group, tossed away a match. The match exploded a barrel that had once held gasoline, and another man was killed. Although K. did not know and could not have known of the danger, and was himself the nearest to the explosion, he was convicted of negligent homicide. The R.S.F.S.R. Supreme Court found accidental death clear and terminated the prosecution.⁴⁴
- (3) Shirikov, charged with bribe-taking, punishable by eight to fifteen years, was denied the defense counsel of his choice, and had an unwanted defender forced on him by the investigator. The Moscow City Court disregarded Shirikov's complaint of this violation of his rights and convicted but the Supreme Court (over the objection of the procurator) remanded the case for reinvestigation and correction of the error.⁴⁵

It is, naturally enough, the Supreme Court judges who are particularly conscious of weak performances below. Judge Gorkin, President of the U.S.S.R. Supreme Court, attempted to correct the lower courts by an article published in *Izvestia*. The judge re-affirmed the significance of the criminal trial, vigorously supporting the position taken by Professor Strogovich that, regardless of the weight and cogency of incriminating evidence, no accused should be considered guilty before a court has had its say. Strogovich had been challenged by a regional procurator, who contended that the court room trial merely serves to verify the degree of culpability and the deserts of punishment.

Judge Gorkin castigated trial courts which shirk their duty to scrutinize the investigative data and "blindly, uncritically follow, and in effect rubberstamp the indictment".⁴⁶ He tried to stimulate judicial criticism by observing that not every acquittal or remand for supplementary investigation should be regarded as a reflection on the quality of the preliminary investigation. The judge also asserted that there could be no return to the ways of the "cult of personality" when the investigative organs effectively determined the guilt of persons accused of crimes against the state.

However, it is doubtful that hortatory pronouncements can

⁴³ Koblikov, *op. cit.*, p. 12.

⁴⁴ *Ibid.*, p. 33.

⁴⁵ Bulletin of the RSFSR Supreme Court, No. 3, 1965, p. 12.

⁴⁶ Gorkin, A., "Socialist administration of justice," *Izvestia*, December 2, 1964, p. 3.

overcome the imbalance of Soviet criminal procedure, and the Gorkin article has been followed by tentative proposals for procedural change to strengthen the trial courts.⁴⁷

The concentration of powers and functions in the hands of Soviet investigators, to issue and present charges, initiate detention and transfer to non-judicial channels, draw up indictments and issue orders of discontinuance, are formidable, apart from the additional handicap of judicial powerlessness throughout the investigative stage. The long process of sapping the courts and fortifying the investigative organs at judicial expense can hardly be reversed without some significant restoration of judicial authority.

II. REMAND IN CUSTODY IN HUNGARY

by

DR. MICHAEL CSIZMÁS *

A tenacious struggle can undoubtedly be said to be the keynote of current developments in the law in Hungary; there are two aspects to this struggle – the elimination of the calamitous inheritance of the very recent past, and efforts to extend the legal guarantees which could prevent the repetition of illegalities.

In this process, which is directly bound up with the political, economic and social development of the country, the system of criminal justice occupies the forefront of public interest – and this interest is not merely the result of chance. In the last 20 years, politics twice – during the period of the “cult of personality” and after the repression of the national uprising in 1956 – completely dominated justice and the judiciary. Even the preliminary stages of criminal proceedings involved the most serious dangers for accused since the procedures involved oppression, compulsion, force and even more repressive measures of all kinds. The most glaring abuses during these periods occurred precisely in the course of investigations and during remands in custody.

1. Violations of the Law during the Periods 1949–1953 and 1956–1962

The first period in which violations of the law occurred under the system of justice obtaining in the Hungarian People's Democracy

⁴⁷ Rakhunov, R., “Legality and administration of justice,” *Pravda*, September 22, 1965.

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(1949–1953) was brought to an end on August 16, 1962 by a resolution by the Central Committee of the Hungarian Socialist Workers' Party (HSWP) concerning "the liquidation of illegal proceedings against members of the workers' movement during the years of the "cult of personality".¹ This resolution stated that during the period in question criminal trials took place which "were in violation of socialist legality". Those responsible for these proceedings, and their assistants, were in some cases expelled from the party by the Central Committee, or at least removed from positions of power in the administrative machinery of the party, in the Ministry of the Interior, in the Office of the Public Prosecutor and in the administration of justice, if they could not prove that an excusable error had occurred.

In giving judgment on a point of principle the Supreme Court stated: "Formerly (before 1953) the basis of many criminal cases brought before the courts on grounds of violation of legality rested on the fact that in the initial stages of the investigation the procedure had been conducted in a one-sided fashion and matters which the accused person had advanced in his defence were either not investigated at all or were not adequately investigated".²

A well-known Hungarian legal authority, Professor Tibor Király, takes the view that before 1956 the procedures employed by the investigating authorities obviously reflected an endeavour to keep defence counsel away from the remanded person. In his view, this attitude finally resulted in limiting the rights of the defence or even in frightening counsel away from undertaking the defence. This naturally weakened the position not only of defence counsel but also of the accused and, in the final analysis, did serious harm to justice and society.³

No harsher judgment on this period of the "cult of personality"

¹ *Népszabadság* (Budapest), 17 August 1962: "Resolution concerning the liquidation of illegal proceedings against members of the workers' movement during the years of the cult of personality." See also: *Pártélet* (Budapest), No. 9/1962: The Central Committee ordered the expulsion from the Party of 17 persons who had been responsible for the bringing of illegal proceedings, either in a political capacity or as prosecutors, judges or officials of the State Security Service: Gyula Alapi (former Procurator); Vilmos Olthy (former President of the Court of Budapest; presided in the cases against Cardinal Mindszenty and Archbishop Grösz); István Timár (Deputy President of the Supreme Court); Ferenc Ledényi and 6 judges of the Supreme Court, Ferenc Ando (Deputy Minister of Justice) and others. See further: *Bulletin of the International Commission of Jurists*, No. 15, April 1963.

² See *A büntető perrendtartás* (Code of Penal Procedure), Budapest, 1957, p. 27.

³ Király, Tibor: *A védelem és a védő a büntető ügyekben* (The Defence and Defence Counsel in Penal Proceedings), Budapest, 1962, p. 6.

in the administration of justice in Hungary can be made than that given by the then Minister of Justice, Erik Molnár: "In the past we had legal provisions governing procedural matters, the full observance of which would have prevented illegality. Some of these provisions were, however – often as a result of confidential directives – not observed in practice. Thus, for example, the provision in the Code of Criminal Procedure protecting personal liberty was not fully applied and throughout the administration of justice the right to be defended was often mere formality."⁴

During its short life the government of Imre Nagy tried to restore respect for the law and the observance of legality. His programme published on July 4, 1953 included the following: "Law and order in a peoples' democracy is incompatible with police justice, which in essence combines investigator and judge in one person. The large number of court proceedings, and the administrative methods widely used, have, together with other injustices, offended the sense of justice of the people and shaken their faith in the law. A contributory factor in all this is undoubtedly to be found in our failure to observe all the provisions of the Constitution. We are also aware that there were persons who were led astray, who came into conflict with the law because of major or minor transgressions and who were subjected to injustice or were unjustly treated because our authorities did not always bear in mind those principles of the Constitution which guarantee the rights, the personal liberty and the security of the citizen".⁵ Among other measures, Prime Minister Nagy closed the internment camps and also proposed the establishment of a Procurator-General which would be the supreme guardian of law and order and of constitutional rights.^{5a}

The next period of illegality in the administration of penal law in Hungary came about during the rigorous proceedings taken against participants in the national uprising of 1956. Even at this stage the full extent of the arbitrary manner in which penal proceedings were conducted can only be appreciated in rough outline. It is, however, apparent from official reports that the vast majority of illegal actions during this time also occurred during investigation and remand – as was the case during the period of the "cult of personality". Many articles in the internal bulletin of the Ministry of the Interior, *Magyar Rendőr*, (The Hungarian Policeman) refer to violations of the Code of Criminal Procedure by the investigating

⁴ *Szabad Nép* (Budapest), 26 June 1956.

⁵ *Ibid.*, 5 July 1953.

^{5a} Editor's Note: In Socialist states the conduct of prosecutions and general control of legality are entrusted to the Procurator-General of the Republic and his Office. The term *Procurator* is retained in the English language literature on law in Eastern Europe.

authorities as regards the rights of the remanded person.⁶ According to these reports, the public prosecutors at the time lost control over penal proceedings and were unable to ensure that legality was observed. The executive branch of the State Security Service and the special Officer Commandos in the army are alleged to have refused to observe the most elementary provisions of the Code of Criminal Procedure. This period may be characterized by a statement made by the director of the police headquarters in the Veszprém district; when the office of the Public Prosecutor ascertained that he had not observed the provisions of the Code of Criminal Procedure he replied shortly: "At the moment it is revolutionary legality and necessity which rule the day".⁷

The Procurator-General Géza Szénási, himself admitted in an interview on March 30, 1957 that illegalities had occurred during investigations: "Many examples in recent months show that during investigations insufficient attention has been paid to the requirement of formal and substantive defence."^{7a} The view that only a confession by the accused person is decisive proof cannot be tolerated, because it follows that, in the interests of obtaining a confession, the investigator will not shrink from using methods which are not permitted. Good relations with the public are also adversely affected by the fact that during investigations there were many cases in which the legal guarantees which must be strictly observed in accordance with the Code of Penal Procedure were violated. It is a striking

⁶ *Magyar Rendőr* (Budapest), 6 July 1957: "On the principle that the end justifies the means, the requirement to observe legality is considered as irrelevant and, indeed, even a hindrance. Zoltán Tamás, Senior Lieutenant of Police, more than once said, for instance, that observance of the provisions of the Code of Penal Procedure should be regarded merely as a bureaucratic formality and that the demand by public prosecutors that legality be respected was nothing but a legal nicety." See *Magyar Rendőr* (Budapest), 16 March 1957: "Lieutenant Földes, head of the C.I.D. subsection in Dorog, complained that 8-10 files at a time often reached his desk. Evidence proving guilt is either lacking or insufficient, but the persons concerned have already been detained. Excesses occur on the pretext of revolutionary legality. People who should be allowed to go free are arrested, and officials do not shrink from employing brutal methods... My own experience confirms that interrogation methods are nothing but a prolonged insult." See also *Magyar Rendőr* (Budapest), 30 March 1957: "In many places the police authorities have denied access to their detention block to procurators acting in performance of their duty. In the detention block of the district police station in the Borsod District officials from the procurator's office found on 24.1.1957 32 persons who had been illegally detained. A similar situation was found at the district police station in the Veszprém district." See *ibid.*, 16 February 1957: 91 arrests in the town of Szentes.

⁷ *Magyar Rendőr* (Budapest), 30 March 1957.

^{7a} For a definition of these terms see the section "Substantive and Formal Defence during Remand in Custody", p. 7.

manifestation of our times that most penal proceedings commence with an arrest".⁸

This era may be regarded as having been terminated by certain Decrees of the Hungarian Government aimed at strengthening the guarantees of the administration of justice by a reform of criminal law, of criminal procedures and of the office of the public prosecutor.⁹ Finally, on March 21, 1963 Prime Minister János Kádár announced the promulgation of an amnesty. This amnesty applied both to those who had participated in the 1956 uprising and to those who during the Stalinist period had misused their power and violated "socialist legality".¹⁰

2. Remand in Custody Under Current Law

The Hungarian Code of Penal Procedure – Legislative Decree No. 8/1962¹¹ – provides in Section 3(2) that "no one shall be deprived of his personal liberty except in the cases provided for by law and only in the manner prescribed by law". Citizens may be deprived of their personal liberty only by a judgment valid in law. As an exceptional measure the Code allows restrictions to be placed on personal liberty before pronouncement of sentence. For such cases the law prescribes the conditions under which the accused may be deprived of his liberty, and the approval of the Public Prosecutor is necessary before making a provisional arrest in the course of investigations. Provisional arrest can only be ordered if the person involved is suspected of a criminal act for which the penalty is imprisonment. Under the law arrest is justified on the basis either of already established facts or of well-founded suspicion.

Provisional arrest can be ordered in the following cases:

- a) if the identity of an accused person caught in the act cannot be ascertained;
- b) if there is danger of escape or if the accused has escaped;
- c) if there is danger of interference with the evidence;
- d) if the accused commits a further offence during the investigations, or if it may be feared that if he is released he will commit the offence he has planned or attempted to commit, or will commit a further offence;
- e) if the release of the accused would disturb the public peace by reason of the nature of the offence committed by him.

⁸ See note 7.

⁹ See Act No. V/1961 respecting the Penal Code of the Hungarian People's Republic: *Penal Code of the Hungarian People's Republic*, Budapest, 1963; Order of the Presidium of the People's Republic, No. 8/1962, respecting the Code of Penal Procedure; *Magyar Közlöny* (Budapest), No. 33/1962; Order of the Presidium, No. 9/1959 respecting the Office of Procurator in the Hungarian People's Republic, *Magyar Közlöny* (Budapest) 28 March 1959.

¹⁰ *Népszabadság* (Budapest), 22 March 1963.

¹¹ See note 9.

Until a charge is formally brought, remand in, or release from, custody may be ordered either by the public prosecutor or, with his consent, by the investigating branch under him; once the charge has been brought only the court is competent to make such an order (Section 121, paras. 1-3). Such an order must be in writing and must state the reasons. If the accused is employed by a state authority the latter must be officially informed of the beginning of the investigation (Section 115(5)). The members of the detained person's family must also be informed without delay (Section 121(4)). As a rule, remand in custody is for a period of one month and can be extended by a further two months by the competent Senior Procurator (Section 123(1)). Any further extension can only be ordered by the Procurator-General (Section 123(2)). If the accused is already in custody when the charge is brought, the court must rule within 15 days, during its preliminary sitting, on whether the remand in custody is to be continued (Section 124(1)).

Senior Public Prosecutor István Kovács remarked at a conference of the Hungarian Association of Jurists¹² that the present legal rules regarding the duration of remand in custody lead to considerable difficulties in practice. Thus, for example, in cases in which an arrest is made immediately, the investigating authorities have practically no time to perform their duties. In accordance with Section 123(1) the accused may be remanded in custody until the preliminary sitting of the court, subject to a maximum period of one month. Of this period 15 days are taken up by the Procurator in accordance with Section 165(2) and 15 days by the court in accordance with Section 124(1). Therefore it is not only in particularly complicated cases but in practically all cases that application must be made for a further remand. The possibility of remand in custody which had been provided for as an exceptional measure restricting the citizen's rights has in reality become general practice.

Legal protection against any possible ill treatment, third degree questioning or illegal detention is provided under Sections 145 - 147 of the Penal Code¹³. Compensation for the remand in custody of an innocent person is provided for in Sections 293 - 295 of the Code of Criminal Procedure; in accordance with these provisions the person concerned may apply for appropriate compensation subject to certain conditions. Full compensation can only be claimed if the detention was illegal and also amounts to the tort of breach of official duty. In this case there is a right of action under Section 349 of the Civil Code¹⁴. Compensation for the remand in custody of an innocent

¹² Magyar Jog (Budapest), 1964, No. 5, p. 233.

¹³ See note 9.

¹⁴ Act No. IV/1959 respecting the Civil Code of the Hungarian People's Republic, *Magyar Közlöny* (Budapest), No. 82/1959.

person is conditional upon the arrest having been ordered by an investigating authority, by the procurator or by the court. There is no compensation if the detained person takes refuge in flight, otherwise frustrates the proceedings or has incurred suspicion through his own fault. Application for compensation in respect of detention must be made to the district court for the area where the investigating authority or the procurator who started the criminal proceedings is located. The final decision as to the compensation is taken by the Minister of Justice ¹⁵.

Each year between 40,000 and 70,000 persons are arrested in Hungary in connection with public prosecutions, but in only from 30,000 to 60,000 cases does the arrest subsequently prove justified. Approximately 5,000 to 13,000 persons are deprived of their liberty without such deprivation of liberty being subsequently upheld by the judgment of a court. The number of acquittals as compared with convictions in all criminal cases is even more striking. Of one hundred accused persons only 40-60 are found guilty and sentenced. The following statistics show that baseless charges and malicious prosecutions occur fairly often ¹⁶.

Number of Persons Prosecuted with Due Process of Law

	1958	1959	1960	1961	1962	1963
Prosecutions	73,144	72,953	55,700	56,652	59,787	37,915
Cases dropped, acquittals	13,319	13,988	9,097	8,501	9,232	4,294
Convictions	59,825	58,965	46,603	48,151	50,555	33,621
Number of Convictions as percentage of Persons Accused	80.2%	80.1%	82.4%	85.0%	84.6%	88.7%

Number of Convictions as Percentage of all Persons Accused

1953	1954	1955	1956	1957	1958	1959	1960	1961	1962	1963
60.3	56.1	56.5	53.9	43.2	51.0	51.0	48.5	46.9	48.7	41.9

Substantive and Formal Defence During Remand in Custody

In accordance with the provisions of Section 40(2) of the Constitution ¹⁷ and of Section 7(2) of Act. No. II/1954 relating to the judicial system ¹⁸ the accused is entitled to be defended in the course of the judicial proceedings. On the one hand the accused may at any stage defend himself in the manner prescribed by law or claim the assistance of defence counsel (formal defence), while on the

¹⁵ Brunner, Georg: *State Liability in Hungary*, Cologne, 1965, p. 22.

¹⁶ *Statisztikai Evkönyvek* (Statistical Yearbooks), Budapest, 1960, p. 357; 1962, p. 247; 1963, p. 379.

¹⁷ *The Constitution of the Hungarian People's Republic*, Budapest, 1949, p. 15.

¹⁸ Act No. II/1954 respecting the Judicial System of the Hungarian People's Republic; *Hatályos jogszabályok gyűjteménye* (Collection of Valid Laws), Vol. I, 1945-1958; Budapest, 1960, p. 25.

other hand throughout the whole case the court authorities are obliged to ascertain and evaluate not only the aggravating but also the mitigating circumstances (substantive defence). Section 57 of the Code of Penal Procedure expressly provides that the authorities acting in penal cases shall at all stages of the proceedings ascertain and take account of not only the incriminating and exculpatory but also the aggravating and mitigating circumstances. During the investigation the investigating authorities must act in accordance with these rules. Section 117(2) of the Code of Penal Procedure also provides: "The accused shall be heard in detail and must be given an opportunity of presenting his statements relating to his defence in a coherent fashion".

An investigation recently undertaken by the National Institute for Criminology revealed the following position as regards the attitude of the investigating authorities towards fulfilment of their legal duty respecting "substantive defence"¹⁹: it was found, for example, that in proceedings on charges of malicious prosecution, in 20 % of the cases statements made in his defence by the accused were not checked. Furthermore, discrepancies between the information supplied by the accused and other information were not cleared up.

The investigation revealed that the situation was the same as regards charges concerning perjury. In this type of offence, the accused's defence was neither checked nor verified in a third of all the cases. "The reason for this state of affairs" – states the report by the Institute – "is to be found in the fact that either no importance is attached to the defence of the accused or that this defence is simply accepted and not verified".

These errors are all the more serious in that the investigations in this type of offence are undertaken by public prosecutors who have received a university education, and thus are capable of placing a more exact interpretation on the legal standards than are the investigating officers of the police, whose education has been of a lower standard. According to the findings of the Institute for Criminal Law a higher rate of error may be expected in the cases undertaken by the police. In practice this means that there are more cases in which "substantive defence" is neglected. As the report mentions, such practices on the part of the investigating authorities mean not only that the objectivity of the investigation is brought into question, since only the evidence tending to establish guilt is recorded, but that the proceedings are considerably prolonged.

The fact that investigating authorities violate the provisions of the law often entails the need for supplementary investigations. According to the findings of the Institute, in 75 % of the cases in which

¹⁹ See Balog, János: *Az igazság a büntető eljárásban* (The Truth in Penal Proceedings), *Jogtudományi Közlöny* (Budapest), 1965, No. 6, p. 265.

supplementary investigations are made one of the deciding factors is that no account was taken of ascertained facts which were relevant to the accused's defence. The undertaking of supplementary investigations also accounts to a large extent for adjournments of trials. In the second half of 1962 and the first half of 1963, 13.8 % of trials had to be adjourned while supplementary investigations were undertaken.

In the view of Professor Tibor Király this concept of so-called "substantive defence" should be abandoned²⁰: "It dates from the time when the limits of the functions of procedure had not yet been determined. Nowadays this concept serves only one function – it recalls the duty of impartiality, truth, and legality which is incumbent on the authorities. It is essentially a didactic and pedagogic function. If the authorities cannot be reminded of their duty without this concept, and if it educates them in the performance of their duty, the concept of substantive defence may be retained".

The "formal" defence of the accused person is, in accordance with the provisions of the Code of Penal Procedure, undertaken either by the accused himself or with the assistance of defence counsel. The following may serve as defence counsel: advocates' collectives, lawyers, the persons specified in Section 114 of the Penal Code provided they have attained their majority and in so far as the accused will be tried before the district court and a term of imprisonment exceeding five years is not anticipated. Finally, persons who may be called upon in virtue of special legal authorization may also serve as defence counsel.

The defence counsel must advise the accused on the legal remedies available to the defence and on his legal rights. He must also bring to the attention of investigating authorities, and of the courts, any circumstances which exculpate the accused and are such as to mitigate his responsibility. He must further employ without delay all legal means and methods of defence in the interest of the accused.

In criminal proceedings before civil and military courts, if the interests of the State so dictate, an accused may, in accordance with Legislative Decree No. 34/1957²¹, be defended only by a lawyer who is included on a list established by the Minister of Justice for this purpose. A separate list exists for defence counsel appearing before military courts.

Defence counsel is entitled to intervene orally or in writing on behalf of the accused at any stage of the proceedings. He is permitted access to the file in the case only when the investigation has been terminated; before that stage he is granted such access only if to do

²⁰ See note 3, p. 138.

²¹ *A büntető eljárás* (Penal Proceedings), Budapest, 1962, p. 210.

so does not imperil the success of the investigations (Section 41(1), Code of Penal Procedure). Detailed regulations concerning the application of these legal measures were contained in directive No. 7/1963 issued by the Procurator-General and dealing with the rights of defence counsel during the investigation and during remand in custody²². In accordance with this directive application for the appointment of defence counsel must be made in the course of investigations if the participation of defence counsel is obligatory in the main proceedings in accordance with Section 38(1), clauses (a) – (e) of the Code of Penal Procedure. The participation of defence counsel in the main proceedings is obligatory if:

- (a) the law provides for a penalty exceeding five years' imprisonment or if the accused is remanded in custody;
- (b) the accused is not familiar with the Hungarian language;
- (c) it is anticipated that the accused will be compulsorily commuted to a medical institution;
- (d) the proceedings before the court are held in the absence of the accused, in accordance with Section 198(4) of the Code of Penal Procedure;
- (e) the procurator himself conducts the case for the prosecution.

Point 69(4) of the directive of the Procurator-General²³ does not categorically provide that in all cases application must be made for the appointment of defence counsel during the preliminary proceedings, but merely provides that in such cases application should in general be made for the appointment of such counsel. The appointment of defence counsel is therefore left to the discretion of the investigating authorities. In such cases the investigating authorities must examine whether the grounds which require the participation of defence counsel in the proceedings within the meaning of Section 38(1) are of such weight as to necessitate the appointment of counsel in the course of the investigation.

The appointment of defence counsel is obligatory only when the conditions mentioned in Section 38(3) of the Code of Penal Procedure (mental illness, etc.), are fulfilled. If, the accused, after examination as a suspect after admitting guilt, intimates, following appropriate advice by the investigating authorities, that he wishes to instruct defence counsel, or applies for the appointment of defence counsel, the investigating authorities must, upon request by an accused in custody, immediately inform the defence counsel or the advocates' collective named by him. In such cases the accused must be given an opportunity to instruct his counsel and to draw up the necessary formal authority to act in his behalf. If the accused requests the appointment of defence counsel, the police must forward a copy

²² *Ügyvédi Közlöny* (Budapest), 1964, No. 1, p. 5.

²³ *Ibid.*

of the investigation file to the competent procurator within 24 hours.

The procurator must apply to the president of the district court having jurisdiction within three days for the appointment of defence counsel, submitting at the same time the investigation file. Ferenc Kratochwill is of the view that there is a loophole in the provisions concerning the possibility of appointing defence counsel during the investigatory stage²⁴: "From a comparison of the two texts – the Code of Penal Procedure and the directive of the Procurator-General – it can be deduced that application need not be made for the appointment of defence counsel in all cases when the accused so requests, even including a case in which the participation of defence counsel in the proceedings is obligatory". In his view, legality requires that the application of the guarantees should be subject to a discretionary decision as rarely as possible: "The more appropriate solution would be that by which, if the conditions mentioned in Section 38(1), clauses (a) – (e), are present, the appointment of defence counsel, on a request of the accused or of his family, would be obligatory in the course of the investigations, and the decision to do so would be discretionary only when the accused does not request defence counsel".

In this connection the following declaration by the Deputy Procurator-General Károly Csendes, is worthy of attention²⁵. "We cannot assert that the view according to which the defence counsel is a necessary evil which one is obliged to tolerate in penal proceedings is something which nowadays belongs wholly to the past. This detrimental attitude proves that those who adopt it have doubts concerning the helpfulness of defence counsel and concerning the success of his work during the proceedings".

Personal Communication with the Accused in Custody

Under the present law a person remanded in custody is entitled to unrestricted communication with his defence counsel, both during the period of remand in custody and during the court proceedings. This presents no problem if the accused is left at liberty during the investigations; if, however, he is remanded in custody access to his defence counsel, while being permitted in principle, may be restricted.

The relations of a detained person with the outside world are governed by the provisions of Section 125(3) of the Code of Criminal Procedure, in accordance with which the correspondence of prisoners on remand and their dealings with other persons must be supervised. Access to other persons is authorised by the competent

²⁴ *Magyar Jog* (Budapest), 1964, No. 1, p. 9.

²⁵ See Csendes, Károly: A büntető jogalkalmazás jogpolitikai elvei (The Legal Principles of the Application of Penal Law), *Magyar Jog*, Budapest, No. 10, p. 433.

procurator, or by the head of the police authority if the accused person is detained by the police.

In accordance with instructions from the Procurator-General²⁶ the head of the police authority or the appropriate procurator must, when considering such applications, decide whether dealings with the outside world will imperil the success of the proceedings or not. The question of imperilling the success of the proceedings can, according to the instructions from the Procurator-General, arise in cases where all the facts have not yet been ascertained and further evidence against the accused still remains to be obtained. In this case communication by the detained person with his defence counsel may be allowed only under supervision, in the presence of an official who is familiar with the details of the investigation.

Only when the investigations have been officially terminated may the detained person freely communicate with his defence counsel without supervision.

The real position regarding communication between a defence counsel and his client may be appreciated from a report by the General Secretary of the Budapest Bar Association, László Kárpáti²⁷: "It must be stated openly that we often come up against what in our view is exaggerated reticence. The practice by which all information is refused and communication with the detained accused is generally excluded on the grounds that the interests of the investigation so require must be revised. It must also be mentioned that even after the termination of the investigation and after the formulation of the charge against the accused, communication with him is still subjected to severe restrictions which hinder the defence. Persons accused of a serious offence are remanded in custody – but it is precisely in connection with such cases, which call for greater efforts on the part of the defence, that the preparatory work in connection with the defence is more or less theoretical, by reason of the illusory nature of the communications with the accused. The present regulations under which the defence counsel can spend 10 to 15 minutes a week with his client do not permit defence counsel to acquaint himself in sufficient detail, before the trial, with the accused's version of the facts (essential though this may be), with the personal circumstances of the accused or with the reasons which led him into wrongdoing; without such preparation defence counsel cannot function properly at the trial and cannot fully meet the obligations placed on him. The interpretation of the law, by which unsupervised communication with the detained person should be the rule and supervised communication the exception, should not be allowed to be reversed in practice, supervised communication becoming the rule

²⁶ See note 22.

²⁷ I. Országos Ügyvédkongresszus (First National Congress of Lawyers),

and unsupervised communication not being allowed at all. The law should also be observed by the authorities – to do so is also an aspect of socialist legality.”

In the view of a senior Procurator, András Seres²⁸, the machinery for prosecuting crime is so well organized and so experienced that, in the case of a genuinely guilty person who is detained, a visit from his defence counsel offers no opportunity for sharp practice and such a visit cannot help the accused to escape conviction. Therefore, communication between a defence counsel and his client should rarely be regarded as imperilling the success of the proceedings. In Mr. Seres' view the possibility of participation by defence counsel even in this early stage of the proceedings would considerably improve the effectiveness of the defence. On this point he also states: “By so doing it would at least be possible to avoid the situation in which the defence counsel appointed does not meet his client until the day of the trial.”

The Presence of Defence Counsel at the Preliminary Proceedings

The presence of defence counsel at the preliminary proceedings gives him a direct knowledge of the facts of the case. Consequently, the possibility of being present at these proceedings is as important as the possibility of putting forward a defence. The investigations are secret and, in general, defence counsel is not allowed to participate in them. The exceptions to this rule are specified in Section 158 of the Code of Penal Procedure: defence counsel may be present at the examination of expert witnesses, at inspections, at the seizure of property and at the search of premises.

Section 158(1) of the Code of Penal Procedure makes the presence of the parties subject to two conditions: they may be present only if their presence does not imperil the success of the proceedings and if the undertaking of the action in question is not so urgent as to admit of no delay. In accordance with the current rules, imperilling the success of the proceedings is in general no longer to be feared once the investigations have been officially terminated. Directive No. 7/1963 of the Procurator-General prescribes in Art. 72(1) that the investigating authorities must ex officio ensure the participation of defence counsel in investigations. Defence counsel must be acquainted with the results of investigations in writing and in good time, accompanied by a warning that his absence does not constitute grounds for adjournment of the proceedings.

In the view of the National Bar Council²⁹ defence counsel has

Budapest, 1963, p. 68.

²⁸ Seres, András: Az előzetes letartóztatások foganatosításának törvényessége (The Legality of Provisional Arrest), *Jogtudományi Közlöny* (Budapest), 1964, No. 3, p. 159.

²⁹ *Ügyvédi Közlöny* (Budapest), 1964, No. 7, p. 59.

the obligation to participate not only in the investigation proceedings listed in Section 158 of the Code of Penal Procedure but also in all proceedings of which he is advised by the investigating authorities. In these cases however the presence of defence counsel is permitted only if it does not prejudice the success of the proceedings.

The presence of defence counsel is not necessary for the validity of measures taken in the investigations. In accordance with Section 38(5) of the Code of Penal Procedure, in certain cases (mental illness etc.) the presence of defence counsel is obligatory in the preliminary proceedings but the law does not provide that his absence has any effect on measures taken during the investigation proceedings.

The Hungarian Code of Penal Procedure does not permit the presence of defence counsel during the questioning of the accused and of the witnesses (Sections 116(2) and 133(1)). Two considerations are said to influence the decision to exclude defence counsel: that his presence would prejudice secrecy and prevent rapid termination of the proceedings. The presence of defence counsel when the results of the investigation are notified to the accused is permissible; defence counsel then has an opportunity to express an opinion on the results and in particular to apply for investigation of additional matters (Section 163(2), Code of Penal Procedure).

Márton Pöstyéni, President of the Budapest Bar Association, read a paper on the practises of investigating authorities at the first National Congress of Lawyers³⁰: "There exists a tendency to limit the rights of defence counsel, as guaranteed in Section 41(1) of the Code of Criminal Procedure^{30a}, to the final sentence of the section. Such a practice, which gives defence counsel the opportunity to make applications and objections during the investigation stage only when the results of the investigation are communicated to the accused is, in our view, not in accordance with the provisions of Section 41 of the Code of Penal Procedure and does not serve to uphold socialist legality . . . a quick glance through a possibly lengthy file on the investigation scarcely gives defence counsel an opportunity to make relevant comments on the spot."

The plenary sitting of the National Bar Council took up the question of the role of defence counsel in July 1964³¹. On this

³⁰ See note 27.

^{30a} "Defence counsel may make, on behalf of the accused, oral or written applications or submissions at all stages of the proceedings and may have access to the files in the case when the investigations are completed and even during the investigations if this does not imperil the success of the proceedings; defence counsel may also be present when the results of the investigation are communicated to the accused and may comment thereon or apply for investigation of additional matters."

³¹ See note 29.

occasion Mihály Sebestyén, President of the Szolnok District Bar Association expressed regret that it was not possible to get a copy of the papers during the investigation and that the taking of notes was also not allowed: "Defence Counsel, who can be present during these proceedings, should be enabled either to obtain a copy or to take notes."

Jenő László published in May 1964 in *Ügyvédi Közlöny*³² – the official organ of the Hungarian Law Association – a study on the procedural deficiencies in connection with the communication of the results of the investigation to the accused person: "If we examine the role of defence counsel during the investigation stages of penal proceedings we constantly hear that defence counsel is subject to restrictions in his appearance at the communication of the results of the investigation to the accused, in his inspection of the investigation file and thus in the making of applications and submissions. Many defence counsel refer to the fact that when the results of the investigation are communicated they have no opportunity for a detailed study of the case."

In accordance with the directive of the Procurator-General the investigating authorities must immediately examine applications and comments made by defence counsel when the results of the investigation are communicated and must decide on the action to be taken on them. The directive states that the need for an immediate decision arises in the interests of a rapid completion of the proceedings and also for various practical reasons.

András Egressy, a procurator, criticised the system under which the results of the investigation are communicated to the accused person by the police authorities³³. He expressed the opinion that experience showed that in many places no importance was attached to this very important final act of the investigation and that it is carried out as a mere formality. In consequence the provisions of the Code of Penal Procedure are violated and much harm is done. Egressy also cited examples of this: "At the Procurator's Office in Balassagyarmat, for instance, several accused declared when being questioned by the procurator that at the local and district police stations they had not been given time to read the statements of witnesses. In one case in which the results of an investigation were being communicated to an accused, Police Sergeant I.J. allowed a quick reading of the witnesses' statements but declared that he was not interested in studying them and that in any event they were of no concern to the accused. The formal notification of the results of the investigation can often reveal surprising discrepancies. It often

³² *Ügyvédi Közlöny* (Budapest), No. 5, 1964.

³³ *Magyar Rendőr* (Budapest), 20 September 1958.

happens that an accused, who has denied everything throughout the proceedings, finally makes a formal statement that he is in agreement with the matters set forth in the investigation and has no comments to make thereon. It may appear amusing, but is in fact rather frightening, when one finds that an accused who is illiterate makes a formal statement to the effect that he has read the documents in the investigation and has no comments to make on them."

Notification to Defence Counsel of Decisions during the Proceedings

Defence counsel can acquaint himself with the facts of the case through the accused, through personal contacts, through participation in the proceedings and through access to the files. He can also base his defence on decisions notified to him during the course of the proceedings.

In accordance with Section 41(2) there is an obligation on the authorities to notify defence counsel of decisions in respect of which legal remedies may be available. In any case in which the investigating authorities, without good reason, restrict defence counsel in the fulfilment of his duties or, despite the specific provisions of Section 41(2), fail to notify defence counsel of decisions against which an appeal is possible the latter can lodge a complaint.

In accordance with the applicable legal provisions (Section 168(5), Code of Penal Procedure) a copy of the charge must be delivered to the court and to each accused. Defence counsel however does not receive a copy of the charge and must acquaint himself with it either through the accused or by studying it at the court.

The law is generally considered to be deficient in this respect, since it does not provide that decisions taken during the course of the investigation should also be communicated to defence counsel. Under Section 7(2) defence counsel is entitled to intervene on behalf of his client at any stage of the proceedings. In Professor Király's view³⁴ this provision offers a solution which would indicate those decisions which should be communicated to defence counsel in the course of the investigation. When the accused is remanded in custody any decisions which directly affect his position are of particular importance.

Access to the Files

During the investigatory stage, the possibility of securing access to the files is, because of the requirement of secrecy of the proceedings, possible in practice only after the decision concerning the conclusion of the investigation has been taken, when the results thereof are communicated to the accused (Section 165(2)). Under the law – Section 41(1) of the Code of Penal Procedure – defence

³⁴ Király, *loc. cit.*, note 3, p. 193.

gations "if this does not imperil the success of the proceedings". According to Professor Király, however, this possibility is in practice usually denied until the investigations have been concluded.³⁵

When the decision to close the investigation has been taken, the investigating authority acquaints the accused with the results thereof. In accordance with the specific provisions of the law – Section 163(2) of the Code of Penal Procedure – defence counsel must on this occasion be granted access to the files in the case.

Directive No. 7/1963 of the Procurator-General provides in Art. 71 that defence counsel shall be entitled to have access to the files after examination of the accused and any possible accomplices, and after their confrontation with each other and with any witnesses has taken place. Permission to study the files is given by the director of the investigating organ – the competent procurator or head of the police authority. The director of the investigating organ must, in accordance with the directive of the Procurator-General, observe the provisions of Section 125(3) of the Code of Penal Procedure when authorising access to the files in the case; this section provides that access is only permitted if the success of the investigation is not thereby imperilled.

Mihály Móra, Professor of the Law of Criminal Procedure at Budapest University takes the view, in a book he has published³⁶, that, according to the law, access to the files during the investigation should be regarded as the rule and refusal of such access as the exception. He goes on to state, however: "whether or not the exception becomes the rule often depends on the attitude of the investigating officials, on their observance of the law and practical experience and on the knowledge available to them in their conduct of the investigation".

The National Bar Council set forth in its instructions of July 1964³⁷ the duties of defence counsel as regards access to the files in criminal cases. In accordance with these instructions defence counsel should, in the interests of making a complete defence as provided for by Section 41(1) of the Code of Penal Procedure, study the files in the case with a view to ascertaining all the facts, if possible before the communication of the result of the investigation to the accused. If no other opportunity is provided, defence counsel should make an appearance when the result is notified and should avail himself of his right to express an opinion and make applications if grounds for so doing exist.

counsel should indeed have access to the files during the investi-

³⁵ Király, *loc. cit.*, note 3, p. 202.

³⁶ Móra, Mihály: *A magyar büntetőeljárásjog* (The Hungarian Law of Criminal Procedure), Budapest, 1961, p. 182.

³⁷ See note 29.

Notification of Appeal

Section 41(1) of the Code of Penal Procedure reads as follows: "Defence counsel is entitled to make written or oral submissions or applications on behalf of his client at any stage of the proceedings". In the course of investigation proceedings, applications are mainly in writing since defence counsel is excluded from most of the proceedings.

In accordance with Section 158(2) defence counsel is entitled to be present when an expert witness is being examined, when an inspection is being made, when a seizure is effected and during a search of premises, provided that his presence does not imperil the success of the proceedings. In such cases he is also entitled to make submissions and applications. A similar opportunity is available to him when the results of the investigation are being communicated to the accused (Section 163(2)).

In line with the instructions of the National Bar Council³⁸, defence counsel should lodge a complaint in all cases in which he is unjustifiably impeded in the performance of his legal duties by the investigating authorities or in which, in defiance of the provisions of Section 41(2) of the Code of Penal Procedure, decisions against which an appeal is possible are not communicated to him. Appeals against decisions and other relevant actions are to be made by defence counsel on the basis of Articles 10-12 of the directive of the Procurator-General.

Complaints in respect of measures taken, or neglected, by the investigating authorities should be made to the competent procurator, or to the senior procurator if the measures in question were taken by a procurator. The complaint can be made to the deciding authority which will forward it within 24 hours to the competent higher authority if no action is taken. The higher authority must make a decision within three days of receipt of the complaint, having ensured that the eight-day period allowed for complaints has been observed (Section 166, Code of Penal Procedure).

According to an instruction from the Procurator-General³⁹ concerning the correct manner of applying individual provisions of Directive No. 7/1963, investigating authorities whose measures or actions have been the subject of complaint must in all cases examine whether such complaints are well founded. If the complaint is well-founded the unjustified measure or action must be annulled and an appropriate new decision taken.

The following has been stated in connection with the practice of the investigating authorities in this respect⁴⁰: "defence counsel who

³⁸ *Ibid.*

³⁹ See note 22.

⁴⁰ See note 27, p. 39.

is allowed access to the files only when the results of the investigation are communicated cannot make any submissions or applications at the various stages of the proceedings. If he is given access to the files only at this late stage he cannot always fulfil his duty, since it happens that the accused may express the wish to have defence counsel only after the results of the investigation have been communicated to him or indeed only when the investigating authorities have already forwarded the papers to the appropriate procurator".

Methods of Remand in Custody

A person remanded in custody is detained either in the cells of a police station or in a prison; both come under the supervision of the Ministry of Interior.

The rules governing detention were issued on 1 October 1959 in the form of an order by the Deputy Minister of the Interior. This order contains, *inter alia*, provisions respecting detention on remand in police custody. The order covers all detained persons, including those remanded in custody who are held in various police stations or by other criminal authorities. The offices of the State Police are located in the main police stations in towns and also in the main district police stations and the municipal and district police stations⁴¹. The rules governing imprisonment lay down guidelines for the manner in which remand prisoners shall be detained in prisons.

Because of differences between the two sets of regulations the method and conditions of remand in custody will differ according to whether the prisoner is held in a prison or in a police station. In general the prisoner is in a more favourable position if he is lodged in a prison.

In police custody there are usually to be found persons remanded in custody pending trial by a court of first instance. The rules governing imprisonment, in contrast, differentiate between two groups of remand prisoners: prisoners who have been remanded in custody pending trial and prisoners whose sentence is subject to a possible appeal. The latter prisoners are in practice treated in the same way as prisoners serving their sentence.

Remand prisoners should in principle be lodged separately from recidivists. According to Hungarian reports, this is not always the case. At the later stage when a prison sentence is being served more attention is paid to this principle. An accused remanded in custody should, as far as possible, be kept separate from his fellow detainees (Section 125(2)). According to the commentary on the Code of Penal Procedure the reason for this rule is that the type of accommodation and supervision are conditioned exclusively by the need to

⁴¹ See note 28.

ensure that the provisions of the penal law are fully carried out⁴².

Officially it is not permitted to exploit remand in custody with a view to the "success" of the investigation. But even Senior Procurator Andreás Seres does not exclude the possibility⁴³ that there are "investigators who, in cases which are not clear, endeavour to proceed by the old-fashioned and cunning method of tricking the accused into a confession in order to secure proof which the investigator would otherwise be unable to obtain. The fact that he is remanded in custody may influence an accused to make a confession as indicated by the investigator. The prisoner may get into such a state of nerves that he prefers to make the confession expected of him with the sole purpose of bringing about a change in his position".

Senior Procurator Seres calls for a change in the legal regulations and practice currently governing remand in custody. In his view strict isolation of a remand prisoner may possibly be regarded as mild treatment during the first two or three days, but after that it may be quite the opposite. Loneliness can become increasingly harder to endure and a point can be reached at which remand in custody becomes more trying than ordinary imprisonment. In the case of a convicted prisoner solitary confinement is permissible only as a disciplinary measure and as a rule lasts for only a short time, considerably shorter than the normal period of remand in custody, and it cannot be extended. Seres proposes that, in the case of prisoners remanded in custody, solitary confinement should be employed only as an exceptional measure.

Since remand prisoners are subjected to longer periods of solitary confinement, their isolation can, in Seres' view, take on the nature of a punishment, either because the investigating officer hopes by placing the accused in this unfavourable position to persuade him of the error of his ways and thus secure a confession or because the prisoner himself regards his detention in solitary confinement as a "punishment". Seres even alludes to the possibility of undesirable psychic effects and nervous troubles among remand prisoners who have to spend a fairly long time in solitary confinement.

According to information from Hungary the feeding of prisoners, hygiene, medical care, heating of prisons and periodical access to the open air are in general assured. The so-called privileges allowed to remand prisoners are, however, more problematical. Privileges can be granted but this is a question decided by the investigating authorities. Such privileges determine what the remand prisoner is allowed to do and to have in his cell.

Between the rules governing police detention and those governing imprisonment in prison establishments there are also various

⁴² See note 21, p. 12.

⁴³ See note 28.

differences in this respect. In this case also the rules governing police detention are more severe.

Privileges Allowed in Police Detention

1. Reading books and newspapers, use of library;
2. smoking;
3. receipt of toilet articles;
4. receipt of food parcels (granted only in exceptional cases);
5. correspondence;
6. communication with the outer world - visit from legal adviser etc.

Privileges under Prison Rules

1. Receipt of toilet articles;
2. receipt of food parcels (withdrawn only as a disciplinary penalty);
3. correspondence;
4. communication with the outer world, etc.
5. In institutions where sentences are served (i.e. in prisons) the reading of books and smoking are rights of which a detained person cannot be deprived.

According to Professor Tibor Király⁴⁴ and Senior Procurator András Seres, this position is anomalous. Under the Code of Penal Procedure and in the view of various authors remand in custody should not be regarded as an "advance sentence" and applied in the same way as for a sentenced prisoner. A presumption of innocence remains until the accused has been validly convicted and sentenced by a court. In their view the accused should be regarded as an innocent person. Under remand in custody we find: (a) persons who have committed a crime and whose detention is therefore justified; and (b) persons who are innocent, or who should be regarded as innocent by reason of the presumption of innocence, and whose detention is not justified.

In current Hungarian practice, however, the position of a remand prisoner - in contrast to the basic principles of Hungarian penal procedure - is worse than that of convicted prisoners.

The current practice is, for example, to withhold from a person remanded in custody under police detention permission to read books and newspapers. In contrast, under prison rules a remand prisoner detained in a prison is entitled, even in cases of solitary confinement, to borrow books from the library. Restrictions are however also possible in the case of such a prisoner: "The procurator is entitled to forbid a remand prisoner to read". Again, the remand prisoner is not allowed to read newspapers but a convicted prisoner serving a sentence is entitled to do so.

⁴⁴ See note 3.

The receipt of food parcels is regarded as a further privilege. In general, the prisoner can avail himself of this right except when he has incurred punishment in respect of some disciplinary offence, which may entail withdrawal of food parcels for a specific period. On the other hand a remand prisoner may only receive a food parcel if the police doctor considers it necessary. Since this privilege is allowed only once a month, it is only in the case of relatively lengthy duration of remand in custody that it has any meaning. However, the longer the remand in custody lasts – even when the detained prisoner is not at fault – the more does the absence of food parcels come to be felt as a lack – or even as a punishment. Whereas a convicted prisoner is, in general, entitled to receive food parcels the remand prisoner can receive them only subject to special permission. Obviously, the remand prisoner is consequently discriminated against.

The fact that the receipt of toilet articles is considered to be a privilege is regarded by Hungarian jurists as a curiosity. A packet which contains nothing but articles of personal care, e.g. toothpaste, is, according to prison rules, regarded as a privilege. Senior Procurator Seres regards the receipt of such parcels as the inalienable right of any convicted or detained person, in the interests of hygiene, and recommends that the rules should be amended accordingly.

Communication by the remand prisoner with the outside world is included among the privileges. Even though under the Code of Penal Procedure the detained person has an irrevocable right to communicate with his defence counsel the law leaves the practical measures to be taken in this vitally important matter to the complete discretion of the investigating authorities. It is these authorities who decide whether the detained person may in fact communicate at all with his defence counsel. This whole matter depends on the existence or nonexistence of “peril to the success of the investigation”, a factor which is very difficult to define.

The current Hungarian practice is that the procurator⁴⁵ gives, when the charge has been brought, permission to the detaining authority to allow the remand prisoner the usual privileges from that time onwards. It is only at this stage that the remand prisoner is put on an equal footing with convicted prisoners as regards privileges. During the investigations, as commented by Seres, it happens only rarely that the remand prisoner can claim such privileges.

In this connection Hungarian jurists propose that persons remanded in police custody and in prisons should benefit at least from the same rules as govern the detention of convicted prisoners or that they should be allowed more favourable rules⁴⁶.

⁴⁵ Beér, János; Kovács, István; Szamel, Lajos: *Magyar államjog* (Hungarian Public Law), Budapest, 1960, p. 430.

⁴⁶ See note 28.

The position of remand prisoners is moreover adversely affected by various undesirable habits of the investigating authorities. According to one report, one finds court officials who are amazingly casual in their attitude towards cases involving detention if the accused has been remanded in custody. Others are of the opinion that it is no violation of the law if, in criminal cases where there is danger of flight because of the length of sentence which might normally be expected, a short sentence of deprivation of liberty, identical to the expected duration of the remand in custody, is first imposed.

In contrast to previous regulations, the current Code of Penal Procedure does not allow release on bail. At the present time Hungarian jurists are appealing for the re-introduction of this institution. In so doing they base their case, *inter alia*, on the new Code of Penal Procedure in the Soviet Union⁴⁷ under which release from custody with sureties is possible. The proposals put forward in Hungary state that the socialist work brigades and social organisations should act as sureties.

Closing Remarks

The legal position of accused persons during the investigation and during remand in custody has in fact improved following the promulgation of the 1962 Code of Penal Procedure but the preliminary proceedings continue to be marked by their inquisitorial character.

The Constitution and all penal laws without exception contain provisions respecting the right to defence but the Code of Penal Procedure and the internal directives of the Procurator-General leave to the judgment of the investigating authorities the question of whether defence counsel should be admitted in the preliminary stages of the proceedings.

The defence can as a rule only fulfil its important function after termination of the investigations, so that at this stage of the proceedings a remand prisoner is practically without defence. Even when the charge has been brought, any consultation between defence counsel and his client requires the approval of the procurator.

The remand prisoner is in general kept isolated from the outer world. Frequently he is held in solitary confinement, without any personal contact, he receives no legal assistance before termination of the investigation and he is rarely or never given reading material, in particular newspapers. His position is regarded as intolerable even by Hungarian authors.

⁴⁷ *Az OSZSZSZK büntető törvénykönyve, büntető eljárási törvénykönyve és bírósági szervezeti törvénye* (The Penal Code, Code of Penal Procedure and Judicial System in the R.S.F.S.R.), Budapest, 1961; section 202 of the Code of Penal Procedure.

THE DOMESTIC STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS:

A SECOND LOOK

by

THOMAS BUERGENTHAL *

I. INTRODUCTION

One cannot, of course, be unaware of the snail-like progress international law has been able to make in the sphere of human rights. Nevertheless, the goal of an effective international system for the protection of human rights is not advanced, if the slightest achievement in this area, regardless how small when compared to the tasks still undone, is hailed as a revolutionary step forward and if measures which would otherwise be dismissed as mere lip-service, are uncritically accepted as progress. It is accordingly not very encouraging to see that the voluminous literature dealing with the European Convention on Human Rights and Fundamental Freedoms¹ does little to point out the practical weakness of the system established by it. That considerable success has been achieved in its administration, that its very existence is a great accomplishment,

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Born in Germany in 1934, Professor Buergenthal spent the war years in various Nazi Concentration Camps, amongst them Auschwitz, Sachsenhausen, and was probably one of the youngest survivors of these camps. He emigrated to the United States in 1951 and is now an American citizen.

¹ The European Convention on Human Rights [hereinafter cited as Convention] was signed in Rome on November 4, 1950, and entered into force on September 3, 1953, in accordance with the provisions of Article 66 (2), after ten instruments of ratification had been deposited with the Secretary-General of the Council of Europe. The first Protocol to the Convention on Human Rights, which guarantees three additional rights (peaceful enjoyment of property, right to education, free elections), was signed in Paris on March 20, 1952. It became effective on May 18, 1954. The equally authentic English and French texts of the Convention and the Protocol may be found in European Commission of Human Rights, Documents and Decisions [hereinafter cited as 1 Yearbook] 4 (1955-57). See generally Stein & Hay, Cases and Materials on the Law and Institutions of the Atlantic Area 367-94 (1963).

is undisputed. But apart from the fact that even the most complete implementation of its provisions would still only guarantee a bare minimum of human rights and fundamental freedoms, very few searching questions have been asked about the manner in which states adhering to the Convention are discharging the obligations incumbent upon them. Such questions have to be asked, not to disparage past achievements, but to prevent the lethargic acceptance of token implementation. And in dealing specifically with the European Convention, it must be remembered that, since it is not global in application, it should in all fairness be judged in the light of what might today – almost a generation after the Second World War – be expected of Western European states.

One aspect of the European Convention on Human Rights that has received very little systematic attention concerns the extent to which the Convention has been implemented within the states adhering to it. Ideally, a paper dealing with the domestic implementation of the Convention should examine all areas of national substantive and procedural law to determine whether and how they are affected by the Convention. This task, because of its scope, calls for a joint multi-national scholarly project that has not yet been undertaken. That it should be undertaken is clear. Without it the real impact of the Convention cannot be properly evaluated. A more modest study, and the one here attempted, seeks to ascertain, on a country by country basis, whether the Convention has gained the status of domestic law. Such an analysis should at least reveal the extent to which the High Contracting Parties honour one of the obligations they assumed by ratifying the Convention.²

II

The European Convention on Human Rights and Fundamental Freedoms was designed, as its preamble indicates, to bring about the collective enforcement by European states of certain of the human rights proclaimed by the General Assembly of the United Nations in the Universal Declaration of Human Rights. Section I of the Convention, consisting of 17 Articles, enumerates and delimits the rights and fundamental freedoms guaranteed in the Convention.³ To ensure that the High Contracting Parties honour these obligations, the Convention provides for the establishment of a European Com-

² The following states have ratified the Convention: Austria, Belgium, Cyprus, Denmark, Greece, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey, United Kingdom.

³ For an analysis of these provisions, see Weil, *The European Convention on Human Rights* 43-80 (1963).

mission of Human Rights and a European Court of Human Rights.⁴

The Commission was created to review state and, in some circumstances, private petitions charging a violation of the Convention. That is, a state adhering to the Convention may refer to the Commission an alleged breach thereof by another High Contracting Party.⁵ Aggrieved individuals have that right, however, only if the allegedly delinquent state has also, in addition to ratifying the Convention, expressly recognized the competence of the Commission to pass on private petitions.⁶ The Commission's function consists of investigating the charges and, if possible, securing friendly settlement "on the basis of respect for Human Rights as defined in this Convention."⁷ If it fails to bring about such a settlement, it must submit a report to the Committee of Ministers of the Council of Europe,⁸ containing the facts of the case, the Commission's opinion concerning the merits of the allegations together with any recommendations it desires to make.⁹ Whenever such a case is not referred to the Human Rights Court, in the manner indicated below, within three months from the date of the Commission's transmission of its report to the Council of Ministers, it is the latter that must decide whether there has been a violation of the Convention and what action should be taken.¹⁰

The European Court of Human Rights, whose jurisdiction extends to all cases concerning the interpretation and application of the Convention,¹¹ may only hear a case, if it has been submitted to it within the three-month period referred to above, if the Commission has failed to bring about a friendly settlement, and if the allegedly delinquent state has recognized the compulsory jurisdiction of the Court.¹² A state's ratification of the Convention does not constitute *ipso facto* a recognition of the compulsory jurisdiction of the Court;

⁴ Convention, Art. 19. For a discussion dealing with these two institutions and their respective functions, see Vasak, *La Convention Européenne des Droits de L'Homme* (1964); Robertson, *Human Rights in Europe* (1963); Golsong, *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention* (1958).

⁵ Convention, Art. 24.

⁶ Convention, Art. 25 (1).

⁷ Convention, Art. 28.

⁸ The Committee of Ministers consists of one government representative of each Member State of the Council of Europe. See generally, Robertson, *The Council of Europe* 24-40 (2d ed. 1961).

⁹ Convention, Art. 31.

¹⁰ For the powers and function of the Committee of Ministers, see Convention, Art. 32; Robertson, *Human Rights in Europe* 75-84 (1963); Cassese, *L'esercizio di funzioni giurisdizionali da parte del Comitato dei ministri del Consiglio d'Europa*, 45 *Rivista di Diritto Internazionale* 398 (1962).

¹¹ Convention, Art. 45.

¹² Convention, Arts. 45, 46, 47.

a separate declaration must be made to that effect.¹³ A private party, however, has no standing to appeal to the Court. Only the Commission and the High Contracting Parties may do so.¹⁴ The Court's judgment is final¹⁵ and its decisions are binding upon the parties to the case.¹⁶ While the Court lacks the power to reverse or set aside domestic judgments or to annul national legislation in conflict with the Convention, it may "afford just satisfaction to the injured party."¹⁷

III

Needless to say, the international machinery established by the Convention to ensure the enforcement of the rights proclaimed therein is far from perfect. To demonstrate its defects, one need only note that the victim of an illegal state action has no standing to initiate a suit in the Court. He cannot, furthermore, control the proceedings before the Commission, even if the delinquent state has recognized the Commission's competence to accept private appeals. Besides, a number of states which have ratified the Convention have as yet recognized neither the compulsory jurisdiction of the Court nor the right of private petition.¹⁸ But even if all of them did so today, the expense, effort and delay involved in vindicating one's rights by submitting a complaint to an international institution like the Commission would be substantial, if only because all domestic remedies must first be exhausted.¹⁹ Accordingly, if the High Contracting Parties had agreed only to be internationally accountable

¹³ Convention, Art. 46.

¹⁴ Convention, Art. 48 provides that in addition to the Commission a case may be submitted to the Court by a High Contracting Party whose national is alleged to be a victim; a High Contracting Party which referred the case to the Commission; or a High Contracting Party against which the complaint has been lodged.

¹⁵ Convention, Art. 52.

¹⁶ Convention, Art. 53.

¹⁷ Convention, Art. 50. For an analysis of this provision, see Vis, *La réparation des violations de la Convention Européenne des Droits de l'Homme*, 10 *Annales de la Faculté de Droit et des Sciences Politiques et Economiques de Strasbourg* [hereinafter cited as *Annales*] 279 (1961); Buergenthal, *The Effect of the European Convention on Human Rights on the Internal Law of Member States*, *Int'l & Comp. L. Q.* (Supp. Publ. No. 11) 79 (1965).

¹⁸ Of the 15 states that have ratified the Convention, only the following ten have recognized the right of private petition: Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway and Sweden. Nine of these have also recognized the compulsory jurisdiction of the Human Rights Court; only Sweden has as yet not done so. Cyprus, Greece, Italy, Turkey and the United Kingdom have recognized neither the competence of the Commission to receive private appeals nor the compulsory jurisdiction of the Court.

¹⁹ See Convention, Art. 26.

for a breach of the Convention, it might have been expected that its impact on the day-to-day administration of justice would be minimal. Needless to say, if relief cannot be had where and when it is needed, it loses much of its prophylactic value. Therefore, the real significance of the Convention derives from the fact that by adhering to it the High Contracting Parties assumed two interrelated obligations. They undertook to implement the Convention within their respective jurisdictions by making it a part of their domestic law,²⁰ and they pledged that an aggrieved individual "shall have an effective remedy before a national authority" to enforce the rights guaranteed in the Convention.²¹

Since it is the purpose of this study to determine whether the High Contracting Parties have in fact discharged these obligations, it should be noted that the domestic implementation of the Convention is facilitated by the fact that most of its Section I provisions were designed to be self-executing in nature. That is to say, they were formulated so as to be capable of creating rights and duties directly enforceable in national courts without necessitating special implementing legislation.²² Theoretically therefore, in those countries whose constitutional law provides that the ratification of a self-executing treaty effects its automatic transformation into the internal legal order, the Section I provisions of the Convention should *ipso*

²⁰ Compare Convention, Art. 64, with Arts. 1, 13. See also European Commission of Human Rights, Application No. 214/56, Decision of June 9, 1958, 2 Yearbook 214, 234 (1958-59); Golsong, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, 10 Jahrbuch des öffentlichen Rechts der Gegenwart 123, 128-29 (1961).

²¹ Convention, Art. 13.

²² That the Convention was drafted to achieve this result is apparent from the legislative history, or *travaux préparatoires*, of the Convention, see Golsong, *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention* 9 (1958), the precise and mandatory formulation of most of its Section I provisions, and from the fact that they demonstrate a clear intent to grant directly enforceable rights to individuals. For an extensive analysis of this question, see Süsterhenn, *L'application de la Convention sur le plan du Droit Interne*, 10 Annales 303, 304-307 (1961).

But see Comte, *The Application of the European Convention on Human Rights in Municipal Law*, 4 J. Int'l Comm'n Jurists 94 (1962), who argues that, while such provisions as Articles 3, 7, 11, 12 and 14 are capable of immediate application in any of the states adhering to the Convention, this is not necessarily true with regard to certain of the other provisions, because they may in some countries require far-reaching institutional changes beyond the province of the courts. *Id.* at 118. Although this may well be true, it cannot affect the contention that the Convention was intended to create rights enforceable in the domestic courts. Instead, it may well bolster the position advanced in this paper that adherence to the Convention constitutes an undertaking that no such obstacles to the complete enforcement of the Convention exist within the jurisdiction of the High Contracting Parties.

facto gain the status of directly enforceable domestic law.²³ And in those states where a self-executing treaty, even if ratified, cannot be invoked in the courts until the requisite legislation has been enacted, no special legislation beyond such enactment should be necessary to achieve the full implementation of the Convention.²⁴ But since it is for the appropriate national authorities to decide whether and to what extent the provisions of a treaty create legal rights enforceable in their own courts, we must look to the law of the fifteen states adhering to the Convention to ascertain its domestic status.²⁵

AUSTRIA

Although Austria ratified the Convention in 1958, its domestic status in that country was a hotly disputed issue until 1964.²⁶ This situation was due to a number of factors worth recounting. When the Austrian legislature ratified the Convention, it did so with the intention of giving it the status of a constitutional law (*Verfassungsgesetz*),²⁷ which takes precedence over both prior and later ordinary legislation.²⁸ To achieve this result, the legislature complied with the applicable provisions of the Austrian Constitution, omitting how-

²³ See Weil, *op. cit. supra* note 3, at 44.

²⁴ See Süsterhenn, *supra* note 22, at 307.

²⁵ Despite basic similarities in the constitutional law of some of these states, great differences exist in the manner in which their courts have approached the Convention. Only the four Scandinavian countries can readily be treated as a group. Accordingly, except for these states, the domestic status of the Convention will here be examined on a country-by-country basis.

²⁶ See generally, Liebscher, *Austria and the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 J. Int'l Comm'n Jurists 282 (1963). See also, Ermacora, *Die Menschenrechtskonvention als Bestandteil der österreichischen Rechtsordnung*, 81 Juristische Blätter [hereinafter cited as J.B.] 396 (1959); Winkler, *Der Verfassungsrang von Staatsverträgen. Eine Untersuchung des geltenden österreichischen Verfassungsrechtes*, 10 Österreichische Zeitschrift für öffentliches Recht [hereinafter cited as Ö.Z.ö.R.] 514 (1959/60).

²⁷ Thus, in submitting the Convention for ratification to the National Council, the president of that body stated in taking the vote:

Since the requested ratification of the Convention and the Protocol thereto constitutes a binding obligation by the federal constitutional lawgiver [Bundes-Verfassungsgesetzgeber] and accordingly they must be regarded as state treaties modifying the Constitution [verfassungsändernde Staatsverträge] within the meaning of Article 50 of the Federal Constitution, I herewith note, in accordance with Article 55(c) of the rules of procedure, the presence of one half of the members.

Stenographische Protokolle über die Sitzung des Nationalrates, VII. GP., 1958, p. 2951, quoted in Winkler, *supra* note 26, at 522. (Author's translation from Winkler's text).

²⁸ See Federal Constitution of Austria, Arts. 89 (2), 140; Adamovich & Spanner, *Handbuch des Österreichischen Verfassungsrechts* 398 (5th ed. 1957); Seidl-Hohenveldern, *Transformation or Adoption of International Law Into Municipal Law*, 12 Int'l & Comp. L. Q. 88, 111-12 (1963).

ever to specifically designate the Convention as a constitutional law.²⁹ While most Austrian constitutional lawyers assumed and argued that this formal omission did not deprive the Convention of the normative rank that parliament intended to bestow upon it,³⁰ the Austrian Constitutional Court in 1961 ruled that the Convention lacked constitutional status because of the legislature's failure to so designate it.³¹

To complicate matters further, the Constitutional Court, which had in a prior decision already concluded that Article 6 of the Convention was non-self-executing,³² now reached the same conclusion with regard to Article 5.³³ It reasoned that these provisions were too vague to create directly applicable law and thus required implementing legislation. Applying this highly questionable reasoning to the remaining sections of the Convention, a number of legal scholars concluded that Austrian courts would hold that most of these provisions were non-self-executing and thus in need of further legislation.³⁴

The Austrian parliament took a first step in that direction in 1962 and 1963. This action, in the form of two amendments to the

²⁹ See Arts. 50 and 44 (1) of the Austrian Constitution. Article 44 (1), as translated in 1 Peaslee, *Constitutions of Nations* 107 (2nd ed., 1956), provides:

Constitutional laws or constitutional provisions contained in ordinary laws may be enacted by the Nationalrat only in the presence of at least one half of its members and by a majority of two thirds of the votes cast. They shall be specifically designed as such ("constitutional law", "constitutional provision").

³⁰ See e.g., Ermacora, *Die Menschenrechte und der Formalismus*, 84 J.B. 118 (1962) Pfeifer, *Die parlamentarische Genehmigung von Staatsverträgen in Österreich. Ihre innerstaatliche Wirksamkeit*, 12 Ö.Z.ö.R. 1 (1962); Pfeifer, *Der Verfassungsrang von Staatsverträgen*, 17 Österreichische Juristen-Zeitung 29 (1962). *But see*, Winkler, *supra* note 26, whose arguments the Constitutional Court adopted.

³¹ Constitutional Court, Judgment of October 14, 1961, 84 J.B. 145 (1962), 4 Yearbook 604 (1961).

³² Constitutional Court, Judgment of June 27, 1960, [1960] Slg. VerfG. 330, 3 Yearbook 616 (1960). This judgment has been criticised by Vasak, *Was bedeutet die Aussage, ein Staatsvertrag sei "self-executing"?*, 83 J.B. 621 (1961).

³³ Constitutional Court, Judgment of October 14, 1961, 84 J.B. 145 (1962), 4 Yearbook 604, 610-12 (1961). The validity of this conclusion has been persuasively challenged. See Ermacora, *supra* note 30; Pfeifer, *Die parlamentarische Genehmigung von Staatsverträgen in Österreich. Ihre innerstaatliche Wirksamkeit*, 12 Ö.Z.ö.R. 1, 51 n. 176a (1962).

³⁴ See Ermacora, *supra* note 30; Vasak, *supra* note 32. See also, Appeals Court (Oberlandesgericht/Linz), Judgment of January 22, 1960, 2 Zeitschrift für Rechtsvergleichung 170 (1961), where a Belgian defendant's contention that under the Convention he was entitled to a French translation of the Austrian indictment was rejected. *But see*, Ger. Fed. Rep., District Court (Amtsgericht/Bremerhaven), Judgment of October 18, 1962, 16 Neue Juristische Wochenschrift 827 (1963), ruling that American defendant was entitled under Article 6 of the Convention to the free services of an interpreter.

Austrian Code of Criminal Procedure, was prompted by a series of private petitions filed against Austria with the European Commission of Human Rights.³⁵ In the cases submitted to the Commission, the appellants challenged, as contrary to Article 6 of the Convention, the provisions of the Austrian Code of Criminal Procedure pursuant to which the Public Prosecutor participated in the deliberations of the Court of Appeals and the Supreme Court reviewing a so-called plea of nullity (*Nichtigkeitsbeschwerde*) while counsel for the accused was only permitted to submit written observations. To forestall the possibility of a ruling unfavourable to Austria, the government rushed two bills through the legislature. The first amendment to the Code of Criminal Procedure enacted in 1962, places the accused on a more equal footing with the Public Prosecutor as far as the plea of nullity is concerned, besides authorising the assignment of free counsel in certain appellate proceedings.³⁶ The second amendment provides, interestingly enough, that persons convicted before the passage of the 1962 act may apply for a re-hearing of their appeal within six months thereof, provided that their case has been ruled admissible by the European Commission of Human Rights.³⁷

Finally, in March 1964 the Austrian parliament effectively settled the question relating to the legal status of the Convention in that country. In enacting a very far-reaching amendment of the treaty clause of the Austrian Constitution,³⁸ the legislature took the occasion to expressly designate the European Convention on Human Rights and the First Protocol thereto as constitutional laws.³⁹ In

³⁵ For a discussion of these cases, see Schwelb, *On the Operation of the European Convention on Human Rights*, 18 *International Organization* 558, 578-580 (1964).

³⁶ Federal Law of July 18, 1962, [1962] *Bundesgesetzblatt für die Republik Österreich*, No. 229, p. 1129, 5 *Yearbook* 340 (1962).

³⁷ Federal Law of March 27, 1963, [1963] *Bundesgesetzblatt für die Republik Österreich*, No. 66, p. 167.

³⁸ Constitutional Law of March 4, 1964, promulgated on April 6, 1964, [1964] *Bundesgesetzblatt für die Republik Österreich*, No. 59, p. 623. This amendment permits the Austrian legislature in approving the ratification of a treaty to stipulate that its domestic implementation requires the promulgation of enabling legislation. *Id.* Article 1, para. 2, amending Article 50 of the Austrian Constitution. In the absence of such a stipulation, the ratification of a treaty would presumably *ipso facto* effect its transformation into domestic law. As a result of this amendment, the Austrian legislature may now choose between general or special transformation of international agreements. See Klecatsky, *Die Bundesverfassungsnovelle vom 4. März 1964 über die Staatsverträge*, 86 *J.B.* 349 (1964).

³⁹ *Id.* Article II, para. 7. See Kunst, *Die Menschenrechtskonvention als Bestandteil der Bundesverfassung*, 19 *Österreichische Juristen-Zeitung* 197 (1964). For the very revealing parliamentary debates preceding the adoption of this constitutional law, see *Stenographische Protokolle über die Sitzung des Nationalrates*, X.GP., 1964, p. 2425.

Austria, as a result of this action, the Convention today enjoys a normative rank equivalent to the Constitution itself.

BELGIUM

Under Belgian law a self-executing treaty approved by the legislature in conformity with Article 68 of the Constitution⁴⁰ has force of law. That is to say, it has the same effect as any other legislative enactment.⁴¹ And like domestic legislation, its contents are not subject to judicial review.⁴² Self-executing international agreements, which have become domestic law by virtue of parliamentary approval and publication in the official journal, supersede prior legislative enactments.⁴³ By the same token, later laws bar the application of prior inconsistent treaty provisions.⁴⁴ Belgian courts reach this conclusion by postulating that it is for the legislature to determine whether a law violates international obligations assumed by Belgium, and that the courts have no power to refuse the application of a later law, even though it may conflict with a treaty.⁴⁵

⁴⁰ Article 68 (2) of the Belgium Constitution provides: "Treaties of commerce, and treaties which may burden the state, or bind Belgians individually, shall take effect only after having received the approval of the two houses." 1 Peaslee, *Constitutions of Nations* 153 (2nd ed. 1956).

⁴¹ Janssen-Pevtschin, Velu & Vanwelkenhuyzen, *La convention de sauvegarde des Droits de l'homme et des libertés fondamentales et le fonctionnement des juridictions belges*, 15 *Chronique de Politique Etrangère* 199, 217 (1962); Masquelin, *Le contrôle et l'application des traités par les organes juridictionnels internes*, 15 *Annales de Droit et de Sciences Politiques* 3, 4 (1955).

⁴² De Visscher, *La Communauté Européenne du Charbon et de l'Acier et les Etats membres*, in 2 *Actes Officiels du Congrès International d'Etudes sur la C.E.C.A.* 7, 50 (1957); Verbaet, *Du conflit entre le traité et la loi*, 9 *Journal des Tribunaux d'Outre-Mer* 113 (1958). The courts do have the power, however, to determine whether the treaty was approved and published in the manner stipulated by the constitution. Masquelin, *supra* note 41, at 10-11.

⁴³ Masters, *International Law in National Courts: A Study of the Enforcement of International Law in German, Swiss, French and Belgian Courts* 208-09 (1932) and cases cited there.

⁴⁴ Masquelin, *supra* note 41, at 16; Rolin, *La force obligatoire des traités dans la jurisprudence belge*, 68 *Journal des Tribunaux* 561 (1953); Slusny & Waelbroeck, Note, 75 *Journal des Tribunaux* 724, 725-26 (1960).

⁴⁵ *Schieble v. Procureur général*, Court of Cassation, Judgment of November 26, 1925, [1926] *Pasicrisie Belge* I, 76, reprinted in [1925-26] *Ann. Dig.* 8; *Min. Publ. Bara et cons v. Debeur*, Cour d'Appel de Bruxelles, Judgment of July 3, 1953, 68 *Journal des Tribunaux* 518 (1953). *But see*, Tribunal de Commerce (Brussels), Judgment of June 16, 1960, 75 *Journal des Tribunaux* 724 (1960) with highly critical note by Slusny & Waelbroeck. See also the very interesting article by De Termicourt, *Le conflit «Traité - Loi interne»*, 78 *Journal des Tribunaux* 481 (1963), who argues that Belgian courts never had to face this problem squarely in the case of self-executing treaties and thus could give priority even to a prior treaty in conflict with a later statute.

While Belgian courts have not expressly passed upon the hierarchic status of the Convention, it is safe to assume that the Section I provisions of the Convention have become directly applicable Belgian law.⁴⁶ As such, they would prevail over conflicting prior domestic legislation. This conclusion finds support in the manner in which Belgian tribunals have ruled upon pleas invoking the Convention.⁴⁷ That is to say, these courts have in the past assumed that the provisions contained in Section I of the Convention created directly enforceable rights under Belgian law.⁴⁸ Thus, a Belgian administrative tribunal, relying on Article 9 of the Convention, ruled that, for the purpose of determining eligibility for unemployment compensation, a practicing orthodox Jew had the right to have Saturdays considered a day of rest, even though the applicable statute made no such provision.⁴⁹ And in 1963 the Belgian Supreme Court held that Article 6(3)(b) of the Convention had not been violated by a refusal to furnish a person held in custody pending trial with the dossier of the investigating magistrate. In the court's view, this provision of the Convention referred to the rights of an accused at the trial and not during the investigatory stage.⁵⁰ That same court, in another case, rejected an appeal based on Article 6(3)(d), wherein petitioner charged that the lower court violated the Convention by refusing to permit him to call a certain witness in his defence. It ruled that Article 6(3)(d) did not deprive a judge of his largely discretionary power to determine whether the testimony of a witness has probative value.⁵¹ Significantly, a com-

⁴⁶ See Rolin, *Un texte de droit positif ignoré des juristes belges: La convention européenne des Droits de l'Homme*, 73 *Journal des Tribunaux* 515 (1958).

⁴⁷ See generally Janssen-Pevtschin, Velu & Valwelkenhuyzen, *supra* note 41, at 217-19 and cases discussed therein.

⁴⁸ See, e.g., *Min. Publ. v. Knapen*, Court of Cassation, Judgment of March 25, 1963, 78 *Journal des Tribunaux* 333 (1963); *Min. Publ. v. Belaid*, Court of Cassation, Judgment of July 20, 1962, [1962] *Pasicrisie Belge* 1238; *Min. Publ. v. Ratzloff*, Court of Cassation, Judgment of September 21, 1959, 75 *Journal des Tribunaux* 573 (1960).

⁴⁹ *Cymerman v. Office national de l'emploi, Commission de réclamation O.N.E. (Brussels)*, Judgment of March 13, 1962, 77 *Journal des Tribunaux* 267, 268 (1962).

Article 9 of the Convention provides:

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

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

⁵⁰ *Min. Publ. v. Knapen*, *supra* note 48, at 334.

⁵¹ *Min. Publ. v. Belaid*, *supra* note 48, at 1239.

parison of this holding with the case law of the European Commission reveals substantial agreement. Thus, the Commission held not long ago that Article 6(3)(d), in stipulating that everyone charged with a criminal offence is entitled "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," cannot be construed so as to permit "an accused person to obtain the attendance of any and every person and in particular of one who is not in a position by his evidence to assist in establishing the truth."⁵² But even if these Belgian decisions were erroneous in their interpretation of Article 6, they nevertheless demonstrate that the Belgian Supreme Court acknowledged that this provision of the Convention is capable of invalidating the enforcement of a prior Belgian law in conflict with it. Accordingly, it is not unreasonable to assume that Belgian courts would reach that same conclusion in passing upon most of the Section I provisions of the Convention, because they are, on the whole, framed with a precision similar to that of Article 6.

A study of the domestic implementation of the Convention in Belgium would be incomplete without a discussion of the consequences resulting from the submission of the *De Becker* case to the Human Rights Court.⁵³ Raymond De Becker, a Belgian journalist and writer, was condemned to death for collaborating with the Germans during the Second World War. While the death penalty was subsequently commuted, his sentence carried with it the forfeiture of various civil rights enumerated in Article 123(6) of the Belgian Penal Code. Subsection (e) of this law provided for the forfeiture of "the right to have a proprietary interest in or to take part in any capacity whatsoever in the administration, editing, printing or distribution of a newspaper or any other publication." In 1956, after his release from prison on condition that he leave the country, De Becker appealed to the Commission charging that the continued deprivation of the rights described in Article 123(6) and especially subsection (e) violated Article 10 of the Convention,⁵⁴ since the effect of this Belgian law was to prevent him for

⁵² Application No. 753/60, Decision of August 5, 1960, 3 Yearbook 310, 320 (1960). To the same effect, see Application No. 1134/61, Decision of December 19, 1961, 4 Yearbook 378 (1961).

⁵³ "De Becker" Case, Judgment of March 27, 1962. This case was published by the Registry of the Court as a separate pamphlet entitled "Publications of the European Court of Human Rights, Series A: Judgments and Decisions 1962".

⁵⁴ Article 10 provides:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

all practical purposes from exercising his profession and expressing his opinions. The Commission accepted the appeal⁵⁵ and referred it to the Human Rights Court on April 29, 1960.

For more than a decade attempts had been made in Belgium to modify this post-war legislation and to normalize the status of persons affected by it. For obvious political reasons, however, only minor revisions could be enacted. But, while the *De Becker* case was pending before the Human Rights Court, the Belgian parliament hurriedly passed a far-reaching amendment providing for the mitigation of punishments meted out to Belgian collaborators. This law prompted De Becker to withdraw the complaint he had addressed to the Commission. Since the Commission agreed with the Belgian government that under these circumstances it would serve no useful purpose to pursue the matter any further, the Human Rights Court consented to the discontinuance of the proceedings.⁵⁶

CYPRUS

The Republic of Cyprus ratified the Convention and the First Protocol thereto in 1962. Under Article 169(3) of its Constitution⁵⁷ duly enacted treaties and conventions enjoy "superior force to any municipal law." Most of the rights guaranteed in Section I of the Convention were, furthermore, written into the Cypriot Constitution.⁵⁸ In view of the existing civil war in Cyprus and the *de facto* suspension of its Constitution,⁵⁹ it is unfortunately abundantly clear that in that country the Convention has so far remained a document devoid of any legal significance.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁵⁵ Application No. 214/56, Decision of June 9, 1958, 2 Yearbook 214 (1958-59).

⁵⁶ "De Becker" Case, *supra* note 53. The applicable Belgian laws referred to in the text are set out in the Court's judgment.

⁵⁷ Constitution of the Republic of Cyprus of August 16, 1960, Inter-Parliamentary Union, Constitutional and Parliamentary Information, No. 45, p. 1 (3rd Ser. 1961).

⁵⁸ See Vasak, *op. cit. supra* note 4, at 244.

⁵⁹ In a news dispatch from Cyprus, W. Granger Blair reported that on July 9, 1964, the Cypriot legislature enacted a law merging "the former Supreme Constitutional Court and the High Court, abolished the post of chief neutral judge in both courts and ended communal requirements in lower courts. *It was adopted by the Greek Cypriot legislature; the Turkish Cypriot members were all absent* [Emphasis added.] *New York Times*, July 10, 1964, p. 3, col. 6.

GERMANY (FEDERAL REPUBLIC)

In Germany the Convention has been invoked before domestic tribunals to a much greater extent than in any other signatory state.⁶⁰ And its effect on German law in general⁶¹ and on specific legal provisions,⁶² has been extensively debated.⁶³ But the status of the Convention as directly applicable federal law was never seriously disputed.⁶⁴ Most of the discussions revolved around the more difficult problem of ascertaining its normative rank within the German legal order.⁶⁵ That is to say, its transformation into federal law⁶⁶ did not resolve the question whether it could be equated to a constitutional law and, if not, whether it might nevertheless prevail over later ordinary federal laws incompatible with its provisions.

That the Convention acquired constitutional status was suggested by one eminent German jurist who maintained that the Convention defines and amplifies the concept of human rights arti-

⁶⁰ For a discussion of these cases see Morvay, *Rechtsprechung nationaler Gerichte zur Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950 nebst Zusatzprotokoll vom 20. März 1952*, 21 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 89 and 316 (1961). A comprehensive list of these cases may be found in Golsong, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, 10 *Jahrbuch des öffentlichen Rechts der Gegenwart* 123, 131 n. 41 (1961).

⁶¹ See, e.g., Echterhölter, *Die Europäische Menschenrechtskonvention im Rahmen der verfassungsmässigen Ordnung*, 10 *Juristenzeitung* 689 (1955); Herzog, *Das Verhältnis der Europäischen Menschenrechtskonvention zu späteren deutschen Gesetzen*, 12 *Die öffentliche Verwaltung* 44 (1959).

⁶² See, e.g., Henrichs, *Änderung der ZPO durch die Konvention von Rom?*, 9 *Monatsschrift für deutsches Recht* 140 (1955); von Weber, *Die Durchsetzung der Grundrechte der europäischen Menschenrechtskonvention in der innerdeutschen Strafrechtspflege*, 9 *Monatsschrift für deutsches Recht* 386 (1955).

⁶³ For an interesting debate concerning the admissibility of a so-called constitutional appeal (*Verfassungsbeschwerde*) pursuant to Article 90 of the Law on the Federal Constitutional Court of March 12, 1951, see Guradze, *Kann die Verfassungsbeschwerde auf eine Verletzung der Konvention zum Schutze der Menschenrechte gestützt werden?*, 13 *Die öffentliche Verwaltung* 286 (1960) (arguing in the affirmative); Herzog, *Nochmals: Verfassungsbeschwerde gegen Verletzung der Menschenrechtskonvention?*, 13 *Die öffentliche Verwaltung* 775 (1960) (arguing in the negative). The Federal Constitutional Court in its decision of January 14, 1960, 10 *Entscheidungen des Bundesverfassungsgerichts* 271, 274 (1960), 3 *Yearbook* 628, 632 (1960), held that such an appeal could not be based on the Convention.

⁶⁴ See, e.g., Appeals Court (Oberlandesgericht/Bremen), Judgment of February 17, 1960, 13 *Neue Juristische Wochenschrift* [hereinafter cited as N.J.W.] 1265 (1960), 3 *Yearbook* 634 (1960). *But see*, Henrichs, *supra* note 62.

⁶⁵ See generally Münch, *Zur Anwendung der Menschenrechtskonvention in der Bundesrepublik Deutschland*, 17 *Juristenzeitung* 153 (1961).

⁶⁶ On the domestic implementation of treaties under German law, see Menzel, *Die Geltung internationaler Verträge im innerstaatlichen Recht*, in *Deutsche Landesreferate zum VI. Internationalen Kongress für Rechtsvergleichung* 401 (1962).

culated in the German Constitution in very general terms, and thus became an inherent part of it.⁶⁷ The courts, however, have shown no inclination to accept this argument and have either implicitly or expressly denied the Convention any constitutional status.⁶⁸ Whether the Convention nevertheless outranks at least ordinary laws regardless of the date of their promulgation is a somewhat more difficult question. This is due to the fact that Article 25 of the Basic Law (Constitution) of the Federal Republic provides: "The general rules of international law shall form part of federal law. They shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory."⁶⁹ Thus, if the Convention could be said to merely codify general rules of international law, its provisions would outrank ordinary federal laws and all state legislation with the possible exception of the Federal Constitution itself.⁷⁰ While it might be argued that at least some provisions of the Convention qualify as "general rules of international law,"⁷¹ this proposition has been rejected by most commentators.⁷² Their position is supported by at least one German court,⁷³ which reached the following conclusion:

The general rules of international law [within the meaning of Article 25 of the Basic Law] comprise only those rules which are universally valid for all members of the community of nations and whose reciprocal provisions are binding on them . . . In the first place Switzerland, Austria, Spain, Portugal, Yugoslavia, Finland and countries beyond the "Iron Curtain," not to mention all non-European countries, have not acceded to the Convention. Even though the municipal law of some of these countries is compatible with the provisions of the Convention, as is partly the case in Switzerland, those countries have shown no wish to be

⁶⁷ Echtermöller, *supra* note 61, at 691-92.

⁶⁸ See, e.g., Higher Administrative Court (Münster), Judgment of November 25, 1955, 9 N.J.W. 1374 (1956), 2 Yearbook 572 (1958-59); Bavarian Constitutional Court, Judgment of July 3, 1961, 14 N.J.W. 1619 (1961).

⁶⁹ Basic Law for the Federal Republic of Germany, English translation from 2 Peaslee, *Constitutions of Nations* 30 (2d ed. 1956). The German text reads as follows: "Die allgemeinen Regeln des Völkerrechts sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes".

⁷⁰ See Federal Constitutional Court, Judgment of March 26, 1957, 6 Entscheidungen des Bundesverfassungsgerichts 309, 363 (1956-57). See also Münch, *supra* note 65, at 154, who contends that the hierarchic status of general rules of international law within the meaning of Article 25 of the Basic Law is by no means settled in Germany, since it is not clear in what relation they stand to the Constitution itself.

⁷¹ This argument has been advanced by von Stackelberg in his case note, 13 N.J.W. 1265 (1960), with regard to Article 5 (3) of the Convention and by Münch, *supra* note 65, at 154, with regard to the rights of aliens.

⁷² See Morvay, *supra* note 60, at 98-99, where the literature and jurisprudence are reviewed. See also Echtermöller, *supra* note 61, at 690-91.

⁷³ Higher Administrative Court (Münster), Judgment of November 25, 1955, 9 N.J.W. 1374 (1956), 2 Yearbook 572 (1958-59).

bound in this matter by an international Convention or to submit to a supranational authority. Furthermore, . . . the Convention cannot be regarded as a codification of general rules of international law, since the basic rights set forth therein are not recognised in most parts of the world, as is proved by the failure of the attempts of the United Nations to conclude a similar Convention.⁷⁴

Needless to say, the court's reasoning is not entirely persuasive. Its method of ascertaining the meaning of "general rules of international law" is questionable, since it seems to confuse the general acceptance of certain legal rules with the political decision whether to adhere to international agreements codifying such rules. Furthermore, some provisions of the Convention may well be recognized "in most parts of the world" so as to satisfy the court's own test of a general rule of international law.

Be that as it may, it is important to recall that German courts have uniformly held that the Section I provisions of the Convention are directly applicable federal law.⁷⁵ As such, they supersede conflicting prior federal laws and all state legislation regardless of the date of enactment.⁷⁶ Thus, one German court set aside an otherwise valid detention order on the ground that it violated Article 5(3) of the Convention.⁷⁷ In another very interesting case, a decree expelling a Belgian national from Germany was quashed, because the court concluded that its execution would amount to a serious interference with petitioner's right to a family life as guaranteed in Article 8 of the Convention.⁷⁸ The Belgian had been convicted of a sex offense in 1951, but his residence permit was not withdrawn at that time (as it was in the power of the government to do), due to the fact that, as a farm labourer, his services were found to be indispensable to his German employer. In 1953 petitioner married a German woman with two German-born illegitimate children not fathered by

⁷⁴ *Id.* at 1375, 2 Yearbook at 580.

⁷⁵ See Federal Constitutional Court, Judgment of May 10, 1957, 6 Entscheidungen des Bundesverfassungsgerichts 389 (1956-57), 2 Yearbook 594 (1958-59); Federal Court of Justice, Judgment of June 27, 1957, 25 Entscheidungen des Bundesgerichtshofes (Zivilsachen) 60 (1958), 2 Yearbook 596 (1958-59); Federal Court of Justice, Judgment of April 21, 1959, 13 Entscheidungen des Bundesgerichtshofes (Strafsachen) 102 (1960); Higher Administrative Court (Münster), Judgment of November 25, 1955, 9 N.J.W. 1374 (1956), 2 Yearbook 572 (1958-59); Appeals Court (Oberlandesgericht/Bremen), Judgment of February 17, 1960, 13 N.J.W. 1265 (1960), 3 Yearbook 634 (1960).

⁷⁶ Echterhölter, *supra* note 61; Münch, *supra* note 65, at 154; Wendt, *Zur Frage der innerstaatlichen Geltung und Wirkung der Europäischen Konvention zum Schutze der Menschenrechte*, 9 Monatsschrift für deutsches Recht 658 (1955).

⁷⁷ Appeals Court (Oberlandesgericht/Saarbrücken), Judgment of November 9, 1960, 14 N.J.W. 377 (1961).

⁷⁸ Federal Administrative Court, Judgment of October 25, 1956, 72 Deutsches Verwaltungsblatt 57 (1957), 2 Yearbook 584 (1958-59).

him. Thereafter, in 1953, a child was born to the couple. In 1954, by which time he had obtained other employment, he was served with an expulsion order withdrawing his residence permit. In setting aside this order, the court pointed out that under the Basic Law and Article 8 of the Convention "the family is under the special protection of the State." Accordingly, "if the unity and integrity of the family are threatened, the interests of family protection must be taken into account and set against other public interests."⁷⁹ This, the court concluded, was not done here.

Should the expulsion order be put into effect, the wife will therefore be obliged either to follow her husband and part from the illegitimate children born to her before her marriage, who are still very young, or to part from her husband in order to remain with her children. It is probable, of course, that a way of reuniting the family will eventually be found, but, in view of the circumstances, the separation is likely to continue for some time.

The unity of the family will be compromised by this separation. It is true that he has no parental connection with the children born to his wife before the marriage, but the children must nevertheless be reckoned as belonging to his family, within the meaning of the above-mentioned provisions; they live in his home and, in view of their age, need the care of their mother.

Since, for these reasons, the expulsion order represented a serious threat to the plaintiff's family, it was necessary to consider whether the special conditions laid down in Article 8 (2) of the Convention as a justification for such a threat were fulfilled.⁸⁰

The court then concluded that these conditions had not been fulfilled,⁸¹ so that the expulsion order had to be set aside. This judgment was followed in a more recent German case which reached a similar result.⁸²

Mention might also be made of a 1957 judgment of the Federal Constitutional Court, in which the defendant challenged the constitutionality of German penal provisions punishing homosexual activities. In the course of its decision, that tribunal stated:

⁷⁹ *Id.* at 57, 2 Yearbook at 590.

⁸⁰ *Id.* at 58, 2 Yearbook at 590-92.

⁸¹ *Id.* at 58, 2 Yearbook at 592. Article 8 (2) of the Convention provides:

There shall be no interference by the public authority with the exercise of this right [to private and family life] except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

A valuable discussion of this case may be found in Golsong, *The European Convention for the Protection of Human Rights and Fundamental Freedoms in a German Court*, 33 *Brit. Yb. Int'l L.* 317 (1958).

⁸² Higher Administrative Court (Münster), Judgment of August 2, 1960, 13 *Verwaltungsrechtsprechung in Deutschland* 199 (1961), 4 Yearbook 618 (1961). *But see*, Federal Administrative Court, Judgment of December 15, 1955, 3 *Entscheidungen des Bundesverwaltungsgerichts* 58 (1957).

Irrespective of the Applicant's allegations it is necessary for the Court to examine *ex officio* the question of whether Articles 175 *et seq.* of the Penal Code are or are not consistent with the Convention, in view of the fact that after its ratification ... the said Convention entered into force in the Federal Republic on 3rd September 1953 ... and the Applicant R. was not sentenced until 14th October 1953, after the Convention had entered into force. If Articles 175 *et seq.* of the Penal Code had been abrogated by the provisions of the Human Rights Convention, the Applicant would have been sentenced under a penal law no longer in force and his plea of unconstitutionality would have to be entertained.⁸³

The court found, however, that the challenged provisions of the German Penal Code had not been abrogated by the Convention, since the punishment of homosexual activity was a measure necessary for the protection of health and morals within the meaning of Article 8(2).⁸⁴ It is noteworthy that this conclusion finds support in the jurisprudence of the European Commission of Human Rights. The Commission recently rendered the following judgment:

[T]he Commission has already decided on many occasions that the Convention allows a High Contracting Party to punish homosexuality since the right to respect for private life may, in a democratic society, be subject to interference as provided for by the law of that Party for the protection of health or morals (Article 8 (2) of the Convention); whereas it is clear from the foregoing that Article 175 of the German Criminal Code is in no way in contradiction with the provisions of the Convention; whereas it thus appears that this part of the Application is manifestly ill-founded and must be declared inadmissible under Article 27 (2) of the Convention; ...⁸⁵

It thus appears that, while the Convention is not in Germany a norm in the nature of a constitutional law, it does have the status of an ordinary federal law. As such, it can be effectively invoked in German courts⁸⁶ and guarantees to those subject to the jurisdiction of the Federal Republic additional civil rights. While subsequent federal legislation would supersede any inconsistent provisions of the Convention, it is most unlikely that such action will be taken in the foreseeable future. As a matter of fact, in December 1964 the Federal Government enacted a law amending the Code of Criminal Procedure.⁸⁷ This law, which among other things regu-

⁸³ Federal Constitutional Court, Judgment of May 10, 1957, 6 Entscheidungen des Bundesverfassungsgerichts 389, 440 (1956-57), 2 Yearbook 594 (1958-59) (excerpted report).

⁸⁴ *Id.* at 441, not excerpted in Yearbook.

⁸⁵ Application No. 530/59, Decision of January 4, 1960, 3 Yearbook 184, 194 (1960).

⁸⁶ See Süsterhenn, *L'application de la Convention sur le plan du Droit Interne*, 10 Annales 303, 311-14 (1961).

⁸⁷ Gesetz zur Änderung der Strafprozessordnung und des Gerichtsverfassungsgesetzes (StPAG) of December 19, 1964, [1964] Bundesgesetzblatt, part I, p. 1067, which entered into force on April 1, 1965.

lates the permissible duration of preventive detention, besides putting the accused and his counsel on a more equal footing with the public prosecutor,⁸⁸ was expressly designed to conform German rules of criminal procedure to the provisions of Articles 5 and 6 of the Convention.⁸⁹

GREECE

Under Greek law an international agreement becomes domestic law following the enactment of legislation approving and reproducing the treaty.⁹⁰ Theoretically, it is not the treaty that is internally enforceable, but the law incorporating it into the domestic legal order.⁹¹ Thus transformed, a treaty gains the status of an ordinary law, with the result that it abrogates prior inconsistent legislation and may itself be superseded by a later law in conflict with it.⁹² But even though an international convention has been promulgated in the manner indicated above, the courts might still conclude that all or some of its provisions are non-self-executing. In that case, and until the requisite implementing legislation has been enacted, such a treaty cannot abrogate or modify prior laws.⁹³

In view of the fact that the Convention was approved by the requisite legislation,⁹⁴ it has gained the status of Greek law.⁹⁵ The

⁸⁸ See Dahs, *Die kleine Strafprozessreform*, 18 N.J.W. 81 (1965); Schorn, *Die Rechtsstellung des Beschuldigten und seines Verteidigers nach dem StPAG*, 18 N.J.W. 713 (1965); Kleinknecht, *Gesetz zur Änderung der Strafprozessordnung und des Gerichtsverfassungsgesetzes*, 20 Juristenzeitung 153 (1965).

⁸⁹ See Schorn, *supra* note 88; Note by the Secretariat (D/5/322), *Reform of the German Code of Criminal Procedure* (Application No. 2122/64).

⁹⁰ Kyriacopoulos, *Le Droit International et la Constitution Hellénique de 1952*, in *Gegenwartsprobleme des Internationalen Rechtes und der Rechtsphilosophie* 201, 211 (1953); Papacostas, *L'autorité des Conventions internationales en Grèce*, 15 *Revue Hellénique de Droit International* 361, 363 (1962).

⁹¹ Valticos, *Monisme ou Dualisme? Les rapports des traités et de la loi en Grèce (spécialement à propos des conventions internationales du travail)*, 11 *Revue Hellénique de Droit International* 203, 208 (1958).

⁹² Patras, *L'autorité en Droit interne hellénique des Traités internationaux*, 15 *Revue Hellénique de Droit International* 348, 360 (1962), and cases discussed therein; Papacostas, *supra* note 90, at 362-63.

⁹³ Valticos, *supra* note 91, at 224. The courts have the power, furthermore, to determine whether a treaty or some of its provisions conflict with the Greek constitution and to refuse enforcement if that should be the case. Patras, *supra* note 92 at 360; Valticos, *supra* note 91, at 223.

For a study comparing the Convention with the pertinent provisions of the Greek constitution and the argument that no conflict exists between these two instruments, see Kyriacopoulos, *Zur Einwirkung der Europäischen Menschenrechtskonvention auf die Verfassung Griechenlands*, in *Grundprobleme des Internationalen Rechtes* 285, 304-06 (1957).

⁹⁴ Greece, Law No. 2329, [1953] Official Journal, I, No. 68 (March 3, 1953).

⁹⁵ Kyriacopoulos, *supra* note 93.

available case law indicates, furthermore, that Greek courts have so far not questioned the self-executing nature of its Section I provisions. That is to say, these courts have proceeded on the assumption that these provisions were directly applicable Greek law and did not require any additional implementing legislation. Thus, for example, the Greek Supreme Court, after noting that the Convention had become Greek law, ruled that a law licensing and regulating the construction and maintenance of religious edifices did not infringe upon religious freedom guaranteed in Article 9(1) of the Convention. The court noted that the law in question, besides being non-discriminatory in nature, came within the scope of Article 9(2), which permits states to enact laws restricting the exercise of religious freedom to the extent that such laws are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.⁹⁶

The Council of State, Greece's highest administrative tribunal, has also repeatedly asserted that the Convention has "force of law" in Greece.⁹⁷ It should be noted, however, that this court, which has exclusive jurisdiction over questions involving possible abuse of administrative power and related areas (*e.g.*, arrest and detention for political crimes), has consistently misinterpreted the Convention. The reasoning of this court has been so blatantly erroneous that one may seriously question whether the Convention is being effectively applied in Greece. For instance, in a 1954 judgment the Council of State ruled that a petitioner could not invoke Article 5 of the Convention to challenge his continued detention under a 1948 emergency measure enacted to cope with the Communist insurrection. The court took the position that, since Article 15(1) of the Convention permits states "in time of war or other public emergency threatening the life of the nation" to take measures derogating from the obligations they have assumed under the Convention, petitioner could not complain even if his detention violated Article 5 and that it was accordingly unnecessary to determine this question.⁹⁸ The Council of State adopted this same reasoning in two 1961 decisions,⁹⁹ implying, furthermore, that the determination of whether a

⁹⁶ Supreme Court (Arios Pagos) Case No. 386/1955, 9 *Revue Hellénique de Droit International* 206 (1956), 2 *Yearbook* 606 (1958-59).

⁹⁷ See, *e.g.*, Council of State, Case No. 724/1954, 7 *Revue Hellénique de Droit International* 278 (1954).

⁹⁸ *Ibid.*

⁹⁹ Council of State, Case No. 35/1961; Council of State Case No. 182/1961. For a French translation of these cases and Case No. 1442/1955, *infra* note 105, I am most indebted to the Hellenic Institute of International and Foreign Law and its distinguished director Professor Pan. J. Zepos.

public emergency threatening the life of the nations exists is not subject to judicial review.

These conclusions must, for a number of reasons, be considered erroneous. The laws challenged in the three cases decided by the Council of State were being enforced in Greece at the time that country ratified the Convention. Pursuant to Article 64 of the Convention, Greece could have reserved the right to enforce these laws, since Article 64(1) provides:

Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

Since Greece did not register any reservation with regard to the laws here in question,¹⁰⁰ it would seem to have waived its right to enforce them. But even if one were to assume that the right of derogation is not lost with regard to laws in force at the time the Convention was ratified, because such laws merely provide for the exercise of extraordinary powers in a national emergency sanctioned under Article 15(1), the state exercising such powers would have to comply with the procedure established in Article 15(3). It stipulates that a state invoking the right of derogation "shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor." This Greece failed to do. That a timely notification to the Secretary-General of a state's intention to exercise its right of derogation is a condition which must be complied with would seem to be apparent from the wording of Article 15(3). Whatever doubt there may have existed with regard to this question was resolved by the Human Rights Court in the *Lawless* case.¹⁰¹ The Court there agreed with the Human Rights Commission that a state may only rely on Article 15 if it notified the Secretary-General without delay of the measures of derogation taken by it together with the reasons therefor.¹⁰² Finally, the assertion by the Greek Council of State that a derogation exercised by a state is not subject to judicial review, finds no support whatsoever in the text of the Convention. Needless to say, if such an argument were accepted, it would enable governments to freely nullify the rights guaranteed in the Convention,

¹⁰⁰ The only reservation made by Greece relates to Article 2 of the Protocol, which deals with the right to education and was not involved in the cases here under discussion.

¹⁰¹ "Lawless" Case (Merits), Judgment of July 1, 1961, 4 Yearbook 438 (1961).

¹⁰² *Id.* at 484-86.

reducing it to a lofty, but in practice meaningless, statement of principle. It is, therefore, significant that the Human Rights Court in the *Lawless* case left no doubt about the fact that it considered the exercise of the right of derogation to be subject to judicial review.¹⁰³ As a result, since the Convention has become Greek law, it is difficult to see how a Greek court can, in reliance on the right of derogation, apply a law in conflict with the Convention, if such law was enacted before the effective date of the Convention, without at least determining whether the right of derogation was duly exercised.¹⁰⁴

It is thus apparent that, regardless of the fact that the Convention has become Greek law, it has so far not been effectively enforced in Greece. That the courts are not entirely to blame for this unsatisfactory state of affairs may be illustrated by considering a 1955 case.¹⁰⁵ Petitioner here challenged a 1945 emergency measure by alleging that his continued detention under it violated the Convention. The Council of State found, however, that parliament had extended the effective date of this law by legislation enacted *after* the Convention entered into force in Greece. Since under Greek law, as we have seen, a later law supersedes a prior inconsistent treaty provision, the tribunal had no choice but to give effect to the will of the legislature and to reject the appeal.

Now it might be that none of the challenged laws actually violate the Convention.¹⁰⁶ What is most regrettable, however, is that those subject to Greek jurisdiction are for all practical purposes deprived of the right to have that question effectively determined by Greek courts. This is especially serious, because Greece recognizes neither the compulsory jurisdiction of the Human Rights Court nor the right of private parties to appeal to the European Commission of Human Rights.

IRELAND

The Constitution of Ireland provides that "no international

¹⁰³ *Id.* at 472.

¹⁰⁴ The situation would be different, of course, if the law alleged to be in conflict with the Convention were later in date. In such a case, a Greek court would have no choice, under Greek constitutional law, but to apply the most recent legislation.

¹⁰⁵ Council of State, Case No. 1442/1955. This case is discussed in Papacostas, *supra* note 90, at 365.

¹⁰⁶ In a March 1, 1964 news dispatch from Athens, the *New York Times* reported that the new Greek government under Premier Papandreou plans to seek the enactment of a law, which "would free about two-fifths of Greek Communist prisoners, abolish political deportation and remove regulations under which the police can veto any applicant for work on political grounds". *New York Times*, March 2, 1964, p. 8, col. 4.

agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”¹⁰⁷ And Article 15.2(1) of the Irish Constitution stipulates that “the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.” It thus appears that, unless the Oireachtas (Parliament) has enacted a law implementing a treaty ratified by Ireland, it merely binds that country internationally without, however, creating any rights or duties enforceable in Irish courts.¹⁰⁸

While Ireland deposited its ratification of the Convention on February 25, 1953, and also recognized the right of private petition as well as the compulsory jurisdiction of the Human Rights Court, no implementing legislation has as yet been promulgated by the Oireachtas. The Convention has, nevertheless, been invoked in the Irish courts in a very interesting case arising out of a *habeas corpus* proceeding instituted by one Lawless.¹⁰⁹ Suspected of being a member of the outlawed Irish Republican Army (I.R.A.), he was arrested for allegedly engaging in activities prejudicial to the security of the state and placed under preventive detention, all in accordance with the provisions of the *Offences Against the State (Amendment) Act, 1940*.¹¹⁰ In challenging the legality of his detention, Lawless relied, among other grounds, on Articles 5 and 6 of the Convention. Aware of the fact that Ireland's ratification of the Convention did not effect its transformation into domestic law, counsel for Lawless¹¹¹ made a rather ingenious argument to overcome this legal obstacle. He submitted that the government, having ratified the Convention and having bound itself to perform its obligations

¹⁰⁷ Constitution of Ireland, Art. 29.6. The Oireachtas consists of the President, the House of Representatives (Dáil Eireann) and the Senate (Seanad Eireann). See Constitution of Ireland, Art. 15.1.(2).

¹⁰⁸ See Lang, *A Constitutional Aspect of Economic Integration: Ireland and the European Common Market*, 12 Int'l & Comp. L.Q. 552, 561 (1963).

¹⁰⁹ *In re Ó Laighléis (Lawless)*, [1960] Ir. R. 93 (1957), *aff'd*, [1960] Ir. R. 109 (1957).

¹¹⁰ Ireland, *Offences Against the State (Amendment) Act, 1940* (No. 2 of 1940). This law supplemented the *Offences Against the State Act, 1939* (No. 13 of 1939). Both were designed to check the illegal activities of the I.R.A. See generally Kelly, *Fundamental Rights in the Irish Law and Constitution* 52-59 (1961). Section 4 (1) of the 1940 law empowers a Ministers of State to issue a warrant for the arrest and detention of a person believed by him to be engaged in activities prejudicial “to the preservation of public peace and order or to the security of the State”. Section 3 (2) conditions the exercise of this power upon a governmental proclamation declaring that it is necessary and expedient to invoke the powers conferred in the Act “to secure the preservation of public peace and order”.

¹¹¹ Lawless was represented by Sean MacBride, S.C., former Irish Minister for External Affairs, and present Secretary-General of the International Commission of Jurists.

thereunder, should be estopped from asserting the right to exercise powers in violation of the Convention. But the High Court¹¹² as well as the Supreme Court¹¹³ rejected this proposition. After indicating that the Oireachtas had not determined that the Convention was to be part of the domestic law, the Supreme Court emphasized that, in accordance with the explicit stipulations of the Irish Constitution, "this Court cannot give effect to the Convention if it be contrary to the domestic law or purports to grant rights or impose obligations additional to those of domestic law."¹¹⁴ Then, addressing itself specifically to counsel's argument, the Supreme Court ruled:

The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law. It may be that such estoppel might operate as between the High Contracting Parties to the Convention, . . . but it cannot operate in a domestic Court administering domestic law.¹¹⁵

Counsel's attempt to obtain Lawless' release by urging the Supreme Court to construe the Act of 1940 in such a manner as not to violate general rules of international law – a status which he sought to attribute to Articles 5 and 6 of the Convention – also failed since, in the Supreme Court's view, domestic laws must prevail against inconsistent provisions of international law.¹¹⁶ It is thus apparent that the Convention cannot be successfully invoked in Irish courts against conflicting prior or subsequent domestic legislation.

Parenthetically, it should be noted that Lawless submitted his case to the European Commission of Human Rights. The Commission ruled that his petition was admissible,¹¹⁷ and referred it to the Human Rights Court on April 12, 1960, where it became the first case to be decided by that Court.¹¹⁸ The Court found that Lawless' detention violated Articles 5(1) (c) and 5(3) of the Convention, since it was not imposed for the purpose of bringing him, within a reasonable time, before a competent judicial authority to determine the legality of his detention or to pass upon the merits of

¹¹² In re Ó'Laighléis (Lawless), [1960] Ir. R. 93, 102-04 (1957).

¹¹³ *id.* at 124-26.

¹¹⁴ *Id.* at 125.

¹¹⁵ *Ibid.*

¹¹⁶ In re Ó'Laighléis (Lawless), [1960] Ir. R. 93, 124 (1957).

¹¹⁷ Application No. 332/57, Decision of August 30, 1958, 2 Yearbook 308 (1958-59).

¹¹⁸ See "Lawless" Case (Preliminary Objections and Questions of Procedure), Judgment of November 14, 1960, 3 Yearbook 492 (1960); "Lawless" Case (Merits), Judgment of July 1, 1961, 4 Yearbook 438 (1961).

the charges against him.¹¹⁹ It ruled, however, that the Irish government had nevertheless not acted unlawfully, since Article 15 of the Convention permits a state in time of war or other public emergency threatening the life of the nation to take measures derogating from its obligations under the Convention "to the extent strictly required by the exigencies of the situation, . . ." The Irish government had notified the Secretary-General of the Council of Europe in 1957 that it was compelled to invoke Article 15, in order to cope with the terrorist activities of the I.R.A. In the Court's view, Ireland properly exercised its right of derogation considering the circumstances prevailing within its territory at that time. Accordingly, after finding that the measures taken against Lawless were within the scope of Ireland's derogation, the Court dismissed the appeal.¹²⁰ In conclusion, it should be noted that by a communication dated April 3, 1962, the Irish Department of External Affairs notified the Secretary-General of the Council of Europe that the here relevant provisions of the *Offences Against the State (Amendment) Act of 1940*, "ceased to be in force as from 9th March, 1962, when the Government of Ireland published . . . a Proclamation to that effect."¹²¹

ITALY

In Italy, which ratified the Convention in 1955, a treaty approved by parliament becomes Italian law.¹²² As such it is capable of abrogating prior laws inconsistent with it,¹²³ but "a subsequent legislative act can modify or even invalidate a prior treaty."¹²⁴ Since the constitutionality of statutes is subject to judicial review by the Constitutional Court,¹²⁵ that same tribunal may also review the constitutionality of treaties.¹²⁶

¹¹⁹ "Lawless" Case (Merits), *supra* note 118, at 464-66.

¹²⁰ *Id.* at 486. For a discussion of this case, see O'Higgins, *The Lawless Case*, [1962] Camb. L.J. 234; Robertson, *Lawless v. The Government of Ireland (Second Phase)*, 37 Brit. Yb. Int'l L. 537 (1962).

¹²¹ Letter from the Secretary-General, Department of External Affairs, Republic of Ireland, 5 Yearbook 6 (1962).

¹²² *Combes de Lestrade v. Ministry of Finance*, Court of Cassation, Judgment of October 31, 1955, [1956] *Jurisprudentia Italiana*, I, p. 128, [1955] Int'l L. Rep. 882; Mosler, *L'application du Droit international public par les tribunaux nationaux*, 91 Recueil des Cours 619, 638 (1957).

¹²³ Sereni, *The Italian Conception of International Law* 322-23 (1943).

¹²⁴ Bebr, *Judicial Control of the European Communities* 223 (1962).

¹²⁵ Cassandro, *The Constitutional Court of Italy*, 8 Am. J. Comp. L. 1, 4 (1959); Sanduli, *Die Verfassungsgerichtsbarkeit in Italien*, in Heidelberg Colloquium on Constitutional Jurisdiction 292, 305 (Mosler ed. 1962); Telchini, *La Cour constitutionnelle en Italie*, 15 Revue Internationale de Droit Comparé 33, 38 (1963).

¹²⁶ De Visscher, *La Communauté Européenne du Charbon et de l'Acier et les Etats membres*, in 2 Actes Officiels du Congrès International d'Etudes sur la

While the Convention accordingly became Italian law, due to its promulgation by the Italian parliament,¹²⁷ it should be noted that the legislators apparently could not agree upon the legal effect produced by this transformation.¹²⁸ Thus the standing committee on foreign and colonial affairs of the Chamber of Deputies assumed, as its report indicates, that the Convention did not create rights directly enforceable within the member states, but that it merely formulated general obligations binding the signatories on the international plane. In other words, that the Convention was not self-executing in nature.¹²⁹ The Senate's counterpart of this committee, however, reached the opposite conclusion, when it asserted that Italian courts were bound to apply the Convention and that additional implementing legislation was not necessary to achieve this result.¹³⁰ Because of the paucity of Italian decisions involving the Convention, it is probably too early to state unequivocally what position Italian courts will take. To my knowledge the Convention has been invoked in only two Italian cases. In the first case, involving bi-lingualism in the Alto Adige (South Tyrol) province,¹³¹ the Constitutional Court, without addressing itself to the legal status of the Convention in Italy, merely noted that the Convention could not affect the outcome of the decision, since the challenged law guaranteed German-speaking Italian citizens greater rights than were available to them under the Convention.¹³² In the second and more recent case, the Italian Supreme Court acknowledged that the failure of the trial judge to hear certain pertinent

C.E.C.A. 7, 50 (1957); Bebr, *op. cit. supra* note 124 at 223. While Article 10(1) of the Italian Constitution stipulates that "the Italian juridical system conforms to the generally recognized principles of international law", 2 Peaslee, *Constitutions of Nations* 482 (2d ed. 1956), this provision is understood not to include treaties. Fiore, *The Relation of the International to the Domestic Law and the Italian Constitution*, in 1 *Aktuelle Probleme des Internationalen Rechtes* 165, 171 and 175-76 (Schriftenreihe der Deutschen Gruppe der AAA, 1957).

¹²⁷ Law of August 4, 1955, No. 848, [1955] *Gazzetta Ufficiale*, No. 221, p. 3372.

¹²⁸ For a summary of Italian legislative debates and committee reports dealing with the Convention, see Partsch, *Die europäische Menschenrechtskonvention vor den nationalen Parlamenten*, 17 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 93, 127-31 (1956-57).

¹²⁹ *Id.* at 130.

¹³⁰ *Id.* at 128. One commentator assumes on the basis of the Senate report that the Convention has become directly applicable Italian law. Süsterhenn, *L'application de la Convention sur le plan du Droit Interne*, 10 *Annales* 303, 310 (1961).

¹³¹ Italy, Pres. Regione Trentino-Alto Adige v. Pres. Cons. ministri, Constitutional Court, Judgment of March 11, 1961, 44 *Rivista di Diritto Internazionale* 670 (1961).

¹³² *Id.* at 676.

evidence violated a rule of Italian criminal procedure as well as Article 6 of the Convention. It held, however, that the defendant, by not entering a timely objection, had forfeited his right to challenge his conviction on this ground.¹³³ Because this tribunal made no effort to substantiate its sweeping statement that Italian rules of criminal procedure conformed to the provisions of the Convention,¹³⁴ and because of the above-mentioned inconclusive legislative history relating to the ratification of the Convention, it remains to be seen whether the Convention has in fact become directly applicable Italian law.

While a number of scholars have concluded that the Convention must be regarded as having such a status in Italy,¹³⁵ it may well be significant that, in defending Italy's failure to recognize the right of private petition and the compulsory jurisdiction of the Human Rights Court, its Foreign Minister made the following statement in 1961:

In view of the important repercussions that decisions of the [Human Rights] Court might have on the Italian legal system, our Government ... have thought it best not to adhere to certain more specifically binding clauses of the Convention until these have been accepted by almost all of the member States...

It should be added that for States such as Italy, where there is complete separation of powers, adherence to Article 46 [compulsory jurisdiction clause] might create very serious difficulties...

In order to comply with a decision of the [Human Rights] Court affording just satisfaction [Article 50], the Italian domestic system would have to be adjusted in certain particulars, and this raises the problem of whether and how it could in practice be adapted to a specific obligation of this kind.¹³⁶

Implicit in this assertion may well be the government's belief that the Convention is not directly applicable domestic law. For, if the Convention could be effectively invoked in Italian courts, it might be argued that the problems anticipated by the Foreign Minister would be less likely to arise. But since Italian courts are not bound to adopt the government's characterisation of an international agreement,¹³⁷ it is possible that they will determine that the Section I provisions of the Convention became directly enforceable Italian law.

¹³³ Corte Supreme di Cassazione, Judgment of February 6, 1962, 87 Foro Italiano, II, 315 (1962).

¹³⁴ *Id.*, at 317.

¹³⁵ See Süsterhenn, *supra* note 130, at 310; Sperduti, *La Convenzione europea dei diritti dell'uomo e il suo sistema di garanzie*, 46 Rivista di Diritto Internazionale, 161, 174 (1963); Vasak, *La Convention Européenne des Droits de L'Homme* 241 (1964).

¹³⁶ Italian Senate, February 25, 1961, 4 Yearbook 596-98 (1961).

¹³⁷ Bebr, *op. cit. supra* note 124, at 223; Sereni, *op. cit. supra* note 131, at 324.

LUXEMBOURG

The Luxembourg government and legislature, in considering the ratification and approval of the Convention, apparently proceeded on the assumption that it would take precedence over conflicting prior and subsequent domestic enactments.¹³⁸ The legal basis for this assumption can be traced to relatively recent but entirely unequivocal decisions of the highest Luxembourg courts dealing with the domestic status of treaties.¹³⁹ These cases hold that international agreements duly approved by the legislature and published pursuant to law not only supersede prior inconsistent legislation, but take precedence also over subsequent laws in conflict with them.¹⁴⁰ Thus, the Luxembourg Supreme Court in 1950 set aside a conviction on the theory that the law which the defendant had violated was incompatible with the provision of a treaty and could therefore not be invoked against him, even though it was later in date than the treaty. The Supreme Court emphasized that "in case of a conflict between the provisions of an international treaty and the provisions of a later domestic law, the international law must prevail over the domestic law."¹⁴¹ This doctrine was reiterated by the same tribunal in a later decision, in which it pointed out that as a general rule the effect of conflicting successive laws depends upon the date of their promulgation. This, the Supreme Court explained, was not true, however, if the provisions of a treaty were incompatible with a domestic law, since the former enjoyed a higher normative rank. Accordingly, a prior treaty provision, having received legislative approval, had to prevail even over a later law.¹⁴² It is interesting to note, as one Luxembourg commentator does, that the principle establishing the hierarchic supremacy of treaties is entirely judge-made law.¹⁴³ Pre-1950 jurisprudence, furthermore, tended to equate international agreements to statute

¹³⁸ See Vasak, *op. cit. supra* note 135, at 241-42.

¹³⁹ For a discussion of this case law, see Pescatore, *L'autorité, en droit interne, des traités internationaux selon la jurisprudence luxembourgeoise*, 18 *Pasicrisie Luxembourgeoise* [hereinafter cited as *Pas. Lux.*] 87 (1962).

¹⁴⁰ *Chambre des Métiers v. Pagani*, *Cour Supérieure de Justice* (Cassation criminelle), Judgment of July 14, 1954, 16 *Pas. Lux.* 150 (1954-56); *Dieudonné v. Administration des Contributions, Conseil d'Etat* (Comité du Contentieux), Judgment of July 28, 1951, 15 *Pas. Lux.* 263 (1950-53); *Min. Publ. v. Brasseur*, *Cour Supérieure de Justice* (appel correctionnel), Judgment of July 21, 1951, 15 *Pas. Lux.* 233 (1950-53); *Huberty v. Min. Publ.*, *Cour Supérieure de Justice* (Cassation criminelle), Judgment of June 8, 1950, 15 *Pas. Lux.* 41 (1950-53).

¹⁴¹ *Huberty v. Min. Publ.*, *supra* note 140 at 42 (Author's translation).

¹⁴² *Chambre des Métiers v. Pagani*, *supra* note 140, at 152.

¹⁴³ Pescatore, *La prééminence des traités sur la loi interne selon la jurisprudence luxembourgeoise*, 68 *Journal des Tribunaux* 645 (1953).

law, resolving any conflicts between them by applying the later in time.¹⁴⁴

Since the Convention was duly approved by the Luxembourg legislature and published in the manner stipulated by law,¹⁴⁵ it should theoretically take precedence over all prior and subsequent domestic laws provided, of course, the particular provision is found to be self-executing in nature.¹⁴⁶ A lower Luxembourg tribunal, however, recently concluded that the Convention could not be successfully invoked in the courts.¹⁴⁷ The defendant in this case was found guilty and fined for charging a higher rental price for films than sanctioned by Luxembourg law. He appealed this decision without, however, complying with a statutory provision, which stipulates that "an appeal shall be admissible only if it is accompanied by a receipt for payment in full of the fine imposed." The prosecution accordingly submitted that the appeal was inadmissible, while the defence contended that this law violated the Luxembourg Constitution and Article 6 of the Convention. The court sustained the prosecution's argument and, after examining the Convention as a whole, ruled that "the rights and principles described in the Convention may not, under the terms of the Convention, be appealed against or invoked directly before national courts but may only be the subject of international appeals as laid down and stipulated in the Convention."¹⁴⁸ While it is difficult to see how the challenged law could violate the Convention unless appellant might show that he had no money to pay the fine, the reasons given by the court in rejecting the appeal may seriously be questioned. First, the court did not even refer to a prior case in which the highest tribunal of the country, by implication at least, reached a contrary conclusion.¹⁴⁹ Here a conviction under a ministerial decree temporarily restricting the use of certain propulsion fuels was challenged on the ground, *inter alia*, that it violated Article 5(1) of the Convention. While the

¹⁴⁴ Pescatore, *L'autorité, en droit interne, des traités internationaux selon la jurisprudence luxembourgeoise*, 18 Pas. Lux. 87, 112-13 (1962).

¹⁴⁵ Law of August 29, 1953, [1953] *Mémorial du Grand-Duché de Luxembourg* 1099. Article 1 (2) of this law provides that it be "executed and observed by all those whom it may concern."

¹⁴⁶ See *Brasserie Henri Funck et Cie v. Kieffer*, Tribunal d'arrondissement de Luxembourg (Commerce), Judgment of December 8, 1960, 18 Pas. Lux. 553, 556-57 (1960-62), where Article 86 of the European Economic Community Treaty was ruled to be non-self-executing in nature and thus could not be pleaded to invalidate a contractual arrangement concluded by the parties.

¹⁴⁷ Court of Summary Jurisdiction, Judgment of October 24, 1960, 4 Yearbook 622 (1961).

¹⁴⁸ *Id.* at 630.

¹⁴⁹ *Min. Publ. v. Wehrer*, Cour Supérieure de Justice (Appel correctionnel), Judgment of January 25, 1958, 17 Pas. Lux. 248 (1957-59).

Supreme Court rejected this contention, it did so only after concluding that no rights guaranteed in the Convention had been infringed.¹⁵⁰ While not conclusive, this approach indicates that the Supreme Court apparently assumed that the Convention was Luxembourg law and could be directly invoked in the courts. Secondly, the lower court does not seem to say that Article 6 of the Convention is too vague to be self-executing. Instead, it concludes that the Convention by its terms creates rights enforceable only through an international appeal.

It is one thing to say that the domestic legal order does not afford a person a remedy for a breach of a right guaranteed in the Convention. If true, this is merely an admission that the state in question is not living up to its international obligations. As the European Commission of Human Rights pointed out some time ago,

... in accordance with the general principles of international law, borne out by the spirit of the Convention as well as by the preliminary work, the Contracting Parties have undertaken ... to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end, since the Convention is binding on all authorities of the Contracting Parties, including the legislative authority. ...¹⁵¹

It is quite another thing to assert that the Convention, by its terms, creates rights enforceable only through an international appeal. This is so patently erroneous that it is difficult to believe that the court, despite its express language, did not merely hold that Article 6 was non-self-executing. Otherwise it is difficult to account for the unambiguous text of Article 13 of the Convention which provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.

Accordingly, while higher Luxembourg tribunals might reach the conclusion that some of the provisions of the Convention are not self-executing under Luxembourg law, it is reasonable to assume that they will not agree with the lower court that the rights guaranteed in the Convention were designed to be enforced only by appeals to the European Commission of Human Rights and the Human Rights Court.¹⁵²

¹⁵⁰ *Id.* at 252.

¹⁵¹ Application No. 214/56, Decision of June 9, 1958, 2 Yearbook 214, 234 (1958-59).

¹⁵² For a very valuable recent study on the domestic application of treaties under Luxembourg law, see Pescatore, *Conclusion et Effet des Traités Internationaux* (1964).

THE NETHERLANDS

The Law of May 22, 1953, effected a series of far-reaching changes in the Dutch Constitution.¹⁵³ These were clarified by additional amendments enacted in 1956.¹⁵⁴ Article 66 of the Dutch Constitution, as thus amended, provides:

Legislation in force within the Kingdom shall not apply if its application would be incompatible with provisions of [international] agreements which are binding upon citizens and which have been entered into either before or after the enactment of such legislation.¹⁵⁵

And Article 60 states in part that "the judiciary are not empowered to pronounce upon the constitutionality of [international] Agreements." These provisions, to speak in general terms, assure the supremacy of treaties over all other forms of domestic legislation.¹⁵⁶

An analysis of these provisions indicates that when Article 66 refers to agreements "which are binding upon citizens" the legislature had in mind self-executing treaties.¹⁵⁷ Furthermore, reading Articles 66 and 60 together, it is apparent, first, that, as far as the courts are concerned, such international agreements take pre-

¹⁵³ Law of May 22, 1953, No. 261, [1953] *Staatsblad van het Koninkrijk der Nederlanden* 451. An English translation of these amendments may be found in *Inter-Parliamentary Union, Constitutional and Parliamentary Information*, No. 13, p. 104 (3d ser. 1953).

¹⁵⁴ Law of September 11, 1956, No. 472, [1956] *Staatsblad van het Koninkrijk der Nederlanden* 1211. For English text, see *Inter-Parliamentary Union, Constitutional and Parliamentary Information*, No. 29, p. 26 (3d ser. 1957).

¹⁵⁵ I have preferred the English translation of this provision found in Erades & Gould, *The Relation Between International Law and Municipal Law in the Netherlands and in the United States: A Comparative Study* 201 (1961), to that prepared by the *Inter-Parliamentary Union*, *op. cit. supra* note 154, which reads:

Legislative provisions in force within the Kingdom shall not be applied in cases in which such an application would be incompatible with clauses by which everyone is bound contained in Agreements which have been concluded either before or after the entry into force of such provisions.

¹⁵⁶ See Van Panhuys, *The Netherlands Constitution and International Law*, 47 *Am. J. Int'l L.* 537, 553 (1953); Zimmermann, *Die Neuregelung der auswärtigen Gewalt in der Verfassung der Niederlande*, 15 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 164, 195 (1953/54). While these monographs deal with the 1953 amendments, they apply with equal force to the 1956 amendments, since the latter, to a large extent, merely clarified and rearranged the provisions in question.

¹⁵⁷ Bauer, *Die niederländische Verfassungsänderung von 1956 betreffend die auswärtige Gewalt*, 18 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 137, 152 (1957/58); Erades & Gould, *op. cit. supra* note 155, at 325-26.

cedence over the Dutch Constitution itself¹⁵⁸ and all other forms of domestic legislation either prior or subsequent in time.¹⁵⁹ And second, that it is for the courts to determine whether a conflict exists between a treaty and domestic legislation, be it of a statutory or constitutional nature, and if it is found to exist, to apply the treaty.¹⁶⁰ Parenthetically, it might be noted that the opponents of these constitutional changes acknowledged the necessity and advisability of providing for the hierarchic supremacy of treaties. They thought it unwise, however, to empower the judiciary to decide whether or not an international agreement conflicted with domestic laws preferring, instead, to leave this determination to parliament.¹⁶¹ This attitude may be attributed to the fact that Dutch courts may not review the constitutionality of statutes.¹⁶² Thus, the above constitutional amendments relating to treaties wrought fundamental changes in the previously existing balance of power between the legislature and the judiciary.

The foregoing indicates that the Section I provisions of the Convention should prevail as against conflicting prior and later legislative enactments as well as the Netherlands Constitution itself. Accordingly, a recent case¹⁶³ deserves special attention. The defendant Van Loon, a Roman Catholic priest, had been adjudged guilty of conducting a Catholic service in a public place and taking part in a religious procession on a public thoroughfare in violation of Article 184 of the Dutch Constitution, which permits the celebration of religious services only in buildings and other enclosed places. On appeal, an intermediate appellate court set aside defendant's conviction on the ground that the constitutional provision here in question was incompatible with Article 9 of the Convention. Article 9(1) provides that everybody has the right to freedom of religion and that this right includes the public or private manifesta-

¹⁵⁸ While the courts lack the power to rule that a treaty is unconstitutional, the legislature would seem to be bound not to enact unconstitutional treaties.

¹⁵⁹ This is the accepted view in the Netherlands. Erades & Gould, *op. cit. supra* note 155, at 416; Van Panhuys, *supra* note 156, at 557; Beaufort, *Some Remarks About The European Convention for the Protection of Human Rights and Fundamental Freedoms*, in *Varia Juris Gentium* (Liber Amicorum presented to J. P. A. François) 42, 45 (1959).

¹⁶⁰ See Zimmermann, *supra* note 156, at 201; Van Panhuys, *supra* note 156, at 553.

¹⁶¹ For an extensive analysis of these debates see Zimmermann, *supra* note 156, at 197-201.

¹⁶² See Constitution of the Kingdom of the Netherlands, Art. 131(2) (formerly 124(2)). (An English translation of the Constitution without the 1953 and 1956 amendments may be found in 2 Peaslee, *Constitutions of Nations* 754 (2d ed. 1956); see also Erades & Gould, *op. cit. supra* note 155, at 414.

¹⁶³ Public Prosecutor v. Van Loon, Court of Arnhem, Judgment of March 8, 1961, 4 Yearbook 630 (1961).

tions of one's religion or belief. Under Article 9(2) the freedom to manifest one's religion or beliefs may be limited by laws "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others." The court first found that the acts of which the defendant was charged had to be regarded as a public manifestation of the Catholic religion within the meaning of Article 9(1) of the Convention. Interpreting the phrase "to manifest . . . in public" as referring to religious services outside buildings and public places, the court emphasized that "had there been any intention to limit this freedom to the manifestation of religion in public within buildings and enclosed places, that restriction would undoubtedly have been covered by Article 9."¹⁶⁴ The court then ruled that defendant's conviction could not be sustained as a permissible limitation under Article 9(2) of the Convention. Only the exception for the "protection of public order" could be relevant, but it was not applicable. The court reached this conclusion by pointing out that it had not been proved that the constitutional provision relied upon by the prosecution was necessary for the protection of public order or that it was enacted solely for its maintenance. Besides, since what is necessary for the protection of public order should be decided in the light of present-day conditions, the enactment of Article 184 of the Constitution, even if intended for the protection of public order, "cannot be a valid standard for judging what is necessary for the protection of public order *today* (more than 100 years later) . . ." ¹⁶⁵ The prosecution appealed this decision to the Dutch Supreme Court which reversed.¹⁶⁶ While the Supreme Court rejected the prosecution's argument that the right to manifest one's religious beliefs in public as guaranteed in Article 9(1) of the Convention was designed as a protection only against the need to worship in secret, it based its reversal of the lower court's judgment on the theory that the law against public religious services was a measure for the protection of public order within the meaning of Article 9(2) of the Convention. The challenged law, the Supreme Court reasoned, had been intended and was designed to prevent tension and agitation leading to disorder among Netherland's mixed religious population and must therefore be considered "as a measure necessary for the protection of public order."¹⁶⁷ In its view, furthermore, the lower court had erred, because it had applied an improper standard in deciding that the law under which

¹⁶⁴ *Id.* at. 638.

¹⁶⁵ *Id.* at 640 (Italics in the original).

¹⁶⁶ Public Prosecutor v. Van Loon, Court of Cassation, Judgment of January 19, 1962, 4 Yearbook 640 (1961).

¹⁶⁷ *Id.* at 648.

defendant was sentenced was not necessary for the protection of public order. A judge, the Supreme Court ruled, may reach such a conclusion "only in the event of its being considered quite unthinkable that a legislature faced with the need to adopt a regulation in this matter . . . could adopt or maintain such a regulation in all equity . . ." ¹⁶⁸ By applying this test, the court upheld the validity of the challenged law on the theory that even by present-day standards, it was not unreasonable for a legislature to enact such a measure in order to forestall potential conflict between different religious groups. ¹⁶⁹

Even if one might disagree with the Supreme Court on its interpretation of Article 9(2) of the Convention, it is clear that it and the intermediate appellate tribunal both proceeded on the assumption that Article 9 was self-executing in nature. ¹⁷⁰ That is, had the Convention been found violated, Van Loon's conviction would have been set aside. The Supreme Court reached a similar conclusion in a prior case ¹⁷¹ where, however, it rejected a Protestant clergyman's allegation that an Old People's Act, requiring him to contribute to a pension plan, violated rights guaranteed in Article 9 of the Convention. To sustain its finding, the Supreme Court correctly noted that this provision of the Convention "does not mean that anyone may be free to evade the enforcement of laws even when they have nothing to do with the manifestation of religion or beliefs . . ." ¹⁷²

From the preceding it appears that in the Netherlands the Convention enjoys a constitutionally guaranteed supremacy over prior and subsequent laws as well as the Dutch Constitution itself. It is possible, of course, that Dutch courts might conclude that some provisions of the Convention are by their nature incapable of application by the courts without additional legislation. ¹⁷³ Considering,

¹⁶⁸ *Ibid.*

¹⁶⁹ Netherlands, Public Prosecutor v. Van Loon, Court of Cassation, Judgment of January 19, 1962, 4 Yearbook 640, 650 (1961).

¹⁷⁰ This view was confirmed in A.J.K. v. Public Prosecutor, Court of Cassation, Judgment of May 5, 1959, reported in 8 *Nederlands Tijdschrift voor Internationaal Recht* 73, 74 (1961). See, in this connection, Buergenthal, *The Effect of the European Convention of Human Rights on Internal Law of Member States*, Int'l & Comp. L.Q. (Supp. Publ. No. 11) 79, 91-93 (1965).

¹⁷¹ Case No. 436, Court of Cassation (Third Chamber), Judgment of April 13, 1960, 3 Yearbook 648 (1960).

¹⁷² *Id.* at 670.

¹⁷³ See, in this connection, Netherlands, X v. Inspector of Taxes, Court of Cassation, Judgment of February 24, 1960, reported in 8 *Nederlands Tijdschrift voor Internationaal Recht* 285 (1961), where the court stated:

As the Court of Appeal said, Article 13 merely imposes upon the contracting States the obligation to organise their legislation in such a way that in the cases defined by that Article effective remedies will exist. The Court of Appeal rightly decided that Article 13, according to its

however, that the Netherlands Supreme Court did not place Article 9 of the Convention in that category, and that Article 66 of the Netherlands Constitution defines as self-executing those treaty provisions, which are "binding upon citizens," it is unlikely that more than one or two Section I provisions would not meet this test.

SCANDINAVIAN COUNTRIES

In Norway, Sweden, Denmark and Iceland, where the Convention was ratified at an early date, parliamentary approval or ratification does not effect the transformation of international agreements into domestic law.¹⁷⁴ To achieve such a transformation, separate implementing legislation has to be enacted.¹⁷⁵ This has not been done in any of these countries. But where the respective legislatures considered that the Convention might conflict with certain provisions of their domestic law, appropriate reservations were made.¹⁷⁶ In this connection, it is interesting to note that Norway, which had made a reservation with regard to Article 9 of the Convention, because Article 2 of the Norwegian Constitution provided that "Jesuits shall not be tolerated," subsequently deleted this provision from its Constitution and withdrew the reservation.¹⁷⁷

To my knowledge, only an Icelandic court has expressly considered the domestic status of the Convention. It ruled that, since the Convention "has not been legalized in this country, neither as general nor as constitutional law," plaintiff could not rely upon it

nature, cannot directly be applied by the Courts and therefore, under Article 6 of the Constitution, does not belong to those provisions of international agreements that are binding upon everyone and by which municipal legislation shall be judged. *Id.* at 286.

See also the interesting study by Van Emde Boas, *La Convention Européenne de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales dans la Jurisprudence Néerlandaise*, [1962] *European Yearbook*, Vol. 1, p. 226, who argues that certain provisions of the Convention may well be non-self-executing under Dutch law because, in his view, they require the judiciary to weigh competing legislative policies which presupposes the existence of reviewing powers that Dutch courts lack with regard to domestic legislation. *But see*, Van Panhuys, *The Netherlands Constitution and International Law: A Decade of Experience*, 58 *Am. J. Int'l L.* 88, 103-104 (1964).

¹⁷⁴ See Sørensen, *Principes de Droit international public*, 101 *Recueil des Cours* 1, 118 (1960); Ross, *Lerbuch des Völkerrechts* 69 (1951).

¹⁷⁵ Sørensen, *supra*, at 118; Løchen & Torgersen, *Norway's Views on Sovereignty* 95-96 (1955).

¹⁷⁶ Sweden made a reservation with regard to Article 2 of the Protocol, 1 *Yearbook* 44 (1955-57); Norway with regard to Article 9 of the Convention. *Id.* at 41-42. Denmark and Iceland made no reservations.

¹⁷⁷ Letter of December 4, 1956, by Norwegian Foreign Minister Lange to the Secretary-General of the Council of Europe, 1 *Yearbook* 42 (1955-57).

in challenging the legality of an Icelandic revenue law.¹⁷⁸ While the Convention was recently also invoked in the Norwegian Supreme Court,¹⁷⁹ that tribunal left unresolved the question concerning the domestic status of the Convention. The case arose out of the conviction of a dentist named Iversen for the violation of the *Provisional Act of June 21, 1956, relating to obligatory public service for dentists*. This law subjects dentists completing their professional training after 1955 to compensated governmental service as dentists for a period of one to two years in certain parts of the country designated by the Ministry of Social Affairs. After serving in such an assignment for a few months, Iversen left his post and advised the Ministry that he was unwilling to perform "forced labour". He was tried and sentenced to pay a substantial fine. This judgment was affirmed by the Norwegian Supreme Court, where the defendant argued, *inter alia*, that the Act of 1956 violated Article 4 of the Convention. Article 4(2) provides that "no one shall be required to perform forced or compulsory labour." Article 4(3)(d) qualifies the term "forced or compulsory labour" by stipulating that it shall not include, among others, "any work or service which forms part of normal civic obligations." Addressing himself directly to defendant's contention, Judge Hiorthoy, speaking for the majority of the Court, ruled:

It seems hardly doubtful to me that the prohibition in the Convention against subjecting anyone to perform "forced or compulsory labour" cannot reasonably be given such a wide construction that it includes instructions to perform public service of the kind in question here. The present case concerns brief, well-paid work in one's own profession in immediate connection with completed professional training. Although such injunctions may in many cases be in conflict with the interests of the individual as he sees them in the moment, I find it manifest that they cannot with any justification be characterized as an encroachment on, still less a violation of any human right. Accordingly, as I cannot see that there is any contradiction between the Convention and the Norwegian Act in question, I need not enter into the question as to which of these shall prevail in the event of conflict.¹⁸⁰

¹⁷⁸ Olafsson v. Ministry of Finance, Municipal Court of Reykjavik, Judgment of June 28, 1960, 3 Yearbook 642, 646 (1960). This Icelandic revenue law was the subject of an appeal to the Commission which held that it did not violate Article 1 of the Protocol to the Convention, Application No. 511/59, Decision of December 20, 1960, 3 Yearbook 394 (1960).

¹⁷⁹ Norway, Public Prosecutor v. Stein Andreas Iversen, Supreme Court, Judgment of December 16, 1961, [1961] Norsk Retstidende, II, 1350. (I am most indebted to the Legal Department of the Norwegian Foreign Ministry and its Deputy Director, Mr. Egil Amlie, for providing me with an English translation of this decision, from which all English quotations are taken. A report of this case, prepared by Prof. Hambro, may also be found in 90 Journal du Droit International (Clunet) 788 (1963).)

¹⁸⁰ *Id.* at 1351.

It may be assumed however that, if the Supreme Court had found that the Act of 1956 conflicted with the Convention, it would have had to give effect to the Norwegian law. This result would seem to follow not only because the law was later in date, but also because in Norway, as in Denmark, Sweden and Iceland, an international agreement requires implementing legislation to be capable of creating rights enforceable in the municipal tribunals. Thus, in commenting on this case, Professor Hambro points out:

It is interesting that the Court in this case – as in many cases before – discusses the possibility of a conflict between municipal law and an international obligation in spite of the fact that the well nigh unanimous doctrine in Norway states that Norwegian Courts must apply Norwegian law even when this law is clearly in opposition to international law.¹⁸¹

TURKEY

To ascertain the status of the Convention in Turkey is a most frustrating endeavour. The rather extensive bibliographies dealing with the Convention compiled in the Yearbooks of the European Convention on Human Rights list only one entry pertaining to Turkey.¹⁸² The French-language law journal published by the Law Faculty of the University of Istanbul¹⁸³ contains no case reports or articles dealing with the Convention. And this writer's communications to some Turkish professors have elicited no response whatsoever. As a result, the following report on the domestic implementation of the Convention by Turkey is at best incomplete.

Turkey ratified the Convention in 1954.¹⁸⁴ The Turkish Constitution then in force¹⁸⁵ contained no express reference relating to

¹⁸¹ Hambro, *supra* note 179, at 790. One Norwegian author, however, has recently advanced the theory, to judge from the English summary of his article, that the European Convention on Human Rights cannot be equated, for the purpose of determining its domestic legal status, to an ordinary treaty. Since, in his view, the Convention guarantees human rights to all persons within the jurisdiction of the High Contracting Parties, they have a right to the enforcement of the Convention regardless of the constitutional laws of the individual states. Wold, *Den europæiske menneskerettskonvensjon og Norge*, in *Legal Essays: A Tribute to Frede Castberg* 353, 373 (1963).

¹⁸² The monograph listed is a doctoral dissertation presented to the Faculty of Law of the University of Geneva by Ali Reza Gullu, entitled *Les Droits de l'Homme et la Turquie* (1958). Unfortunately it is of limited usefulness for purposes of our study.

¹⁸³ It is published under the title of "Annales de la Faculté de Droit d'Istanbul."

¹⁸⁴ Turkey, Law No. 6366 of March 10, 1954, reprinted in 1 Yearbook 43 (1955-1957).

¹⁸⁵ See Turkey, Constitution of January 10, 1945, 3 Peaslee, *Constitutions of Nations* 404 (2d ed. 1956).

the domestic status of international agreements. It provided merely that "the Grand National Assembly alone exercises such functions as enacting, modifying, interpreting, and abrogating laws; concluding conventions and treaties and making peace with foreign states; . . ." ¹⁸⁶ This provision was interpreted to mean that a treaty duly approved by the Grand National Assembly became domestic law. ¹⁸⁷ Since, as above noted, the Convention was approved in that manner by the Turkish parliament, it should have gained that status. ¹⁸⁸

Since there are no available judicial decisions dealing with the domestic status of the Convention, ¹⁸⁹ one can only speculate on the extent to which the Convention was implemented in Turkey. It is common knowledge, however, that the Menderes regime blatantly disregarded even the most elementary notions of human rights by imprisoning political opponents, imposing press censorship, etc.

¹⁸⁶ Constitution of January 10, 1945, Art. 26.

¹⁸⁷ Gullu, *Les Droits de l'Homme et la Turquie* 69-71 (1958).

¹⁸⁸ As such, the Convention could prevail over prior laws in conflict with it and could itself probably be superseded by subsequent legislation. Gullu, *op. cit. supra* at 71. Gullu, however, also suggests that a duly promulgated treaty could not be nullified by an ordinary law later in time. *Ibid.* But this proposition may well be questioned, because he bases this conclusion on the assertion that a treaty derives its legal force from international law so that it cannot be abrogated by national legislation. Thus he apparently confuses the continued international validity of a treaty, even after it has been unilaterally abrogated by a later domestic law, with the internal effect of such a law.

¹⁸⁹ The Yearbooks of the European Convention on Human Rights, which note national court decisions involving the Convention, contain no reference to Turkish cases. The only Turkish judicial decision involving the Convention that has come to my attention is a judgment of the Turkish Constitutional Court, wherein the Turkish Labour Party sought a ruling that the death penalty was incompatible with the provisions of the new Turkish Constitution. In rejecting this contention, the Turkish Constitutional Court stated:

The question can be further clarified by referring to the relevant provisions of an international convention which, as is evident from the report of the Constitutional Committee and the proceedings of the Constituent Assembly, was taken into consideration during the drafting of the Constitution. Article 2 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, to which Turkey acceded in 1954, stipulates that "everyone's right to life be protected by law" and that "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." This also shows clearly that the death penalty is not incompatible with fundamental human rights and freedoms. (Turkish Constitutional Court, Judgment of July 1, 1963. English translation, Council of Europe, Doc. H (64) 11, May 21, 1964.)

Obviously, this statement is too vague to justify any conclusion regarding the domestic status of the Convention in Turkey.

Accordingly, it may be safely assumed that during this era in Turkish history the Convention was not an effective guarantee against deprivations of human rights. But since Turkey recognized neither the competence of the Commission to hear private appeals directed against Turkey nor the jurisdiction of the Human Rights Court, it is impossible to assess the extent of such deprivations.

This situation may have been remedied with the overthrow of the Menderes regime and the subsequent adoption of a new Turkish Constitution,¹⁹⁰ which contains significant new guarantees in the sphere of human rights and fundamental freedoms.¹⁹¹ Furthermore, it is noteworthy that Article 65(5) of the 1961 Constitution expressly provides: "International treaties duly put into effect shall carry the force of law. No recourse to the Constitutional Court can be made as provided in articles 149 and 151 with regard to these treaties." By virtue of this provision an international agreement like the Convention, besides having the status of domestic legislation, may very well have gained a preferred position vis-à-vis ordinary laws. This would follow from the fact that, whereas ordinary laws may be challenged and annulled if they violate the Constitution,¹⁹² international treaties like the Convention are not subject to direct constitutional review.¹⁹³

In the light of these developments, it is premature to attempt to say how Turkish courts will apply the Convention. The overthrow of the Menderes regime and the apparent establishment of a constitutional democracy taken together with the fact that the human rights guaranteed in the new Constitution appear to be patterned on the Convention, are extremely significant factors. They may well give added meaning to our rather general conclusion that the Convention has become Turkish law.

¹⁹⁰ Constitution of the Turkish Republic of July 9, 1961, reprinted in Inter-Parliamentary Union, *Constitutional and Parliamentary Information*, No. 49, p. 18 (3d ser. 1962).

¹⁹¹ See generally Giritli, *Some Aspects of the New Turkish Constitution*, 16 *The Middle East Journal* 1 (1962).

¹⁹² Arik, *La Cour constitutionnelle turque*, 14 *Revue Internationale de Droit Comparé* 401, 406 (1962); Balta, *Die Verfassungsgerichtsbarkeit in der Türkei*, in Heidelberg Colloquium on Constitutional Jurisdiction 550, 556-57 (Mosler ed. 1962).

¹⁹³ Arik, *supra* note 192, at 407. Balta, *supra* note 192, at 562, however, points out that the wording of Article 65 (5) of the Constitution does not exclude the possibility of an indirect constitutional review of treaties by lower courts.

For a general discussion of the domestic status of treaties under the new Turkish Constitution, see Eroglu, *La Constitution Turque de 1961 et les Relations Internationales*, [1961] *Turkish Yearbook of Int'l Relations* 62, 79-82 (1963).

UNITED KINGDOM

Under the constitutional law of the United Kingdom, a treaty does not upon its ratification acquire the status of domestic law.¹⁹⁴ As Lord Atkin explained in *Attorney-General for Canada v. Attorney-General for Ontario*:¹⁹⁵

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.¹⁹⁶

In other words, the provisions of a treaty have no force of law in United Kingdom courts in the absence of implementing legislation.¹⁹⁷ This is true even if the particular international agreement is intended to be self-executing in nature and uses language capable of such interpretation.¹⁹⁸ As a matter of fact, with the possible exception of treaties affecting belligerent rights and diplomatic immunities, there is no such thing in British constitutional law as a self-executing treaty.¹⁹⁹

Although the United Kingdom was the first country to ratify the Convention,²⁰⁰ no legislation implementing its provisions has as yet been enacted.²⁰¹ Accordingly, the Convention cannot be successfully invoked in British courts although, as Professor Waldock suggests, it might be utilized by the courts "in dealing with doubtful

¹⁹⁴ McNair, *The Law of Treaties* 81-82 (1961).

¹⁹⁵ [1937] A.C. 326 (P.C.) (Can.).

¹⁹⁶ *Id.* at 347.

¹⁹⁷ See *The Parlement Belge*, 4 P.D. 129, 154-55 (1879), reversed on other grounds, 5 P.D. 197 (1880); Sinclair, *The Principles of Treaty Interpretation and their Application by the English Courts*, 12 Int'l & Comp. L.Q. 508, 525 (1963); Wade & Phillips, *Constitutional Law* 259 (6th ed. 1960).

¹⁹⁸ See Marsh, *Civil Liberties in Europe*, 75 L.Q. Rev. 530, 535 (1959).

¹⁹⁹ McNair, *op. cit. supra* note 194, at 81, 89-93.

²⁰⁰ The United Kingdom ratified the Convention on February 22, 1951, and deposited the instrument of ratification on March 8, 1951.

²⁰¹ Here it might be noted that in ratifying the Protocol to the Convention, the United Kingdom availed itself of the right under Article 64 to stipulate the following reservations:

... in view of certain provisions of the Education Acts in force in the United Kingdom, the principle affirmed in the second sentence of Article 2 (of the Protocol) is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

1 Yearbook 45 (1955-57).

points in the domestic system."²⁰² No such cases have as yet been reported.

It was not until January 14, 1966, that the United Kingdom recognized the competence of the Commission to receive, pursuant to Article 25, private petitions, and accepted the compulsory jurisdiction of the Human Rights Court under Article 46.

While the step, though belated, is to be welcome, the United Kingdom should and must, in addition, if it is to discharge the obligations incumbent upon it under the Convention, allow its own courts to pass upon these questions. And since, in addition to Ireland, the United Kingdom is the only other common-law signatory of the Convention, British courts would have a valuable contribution to make in developing the law of the Convention. Accordingly, one cannot but share the sentiments of one eminent British jurist, Mr. Norman S. Marsh, who states:

In so far as we in this country have a conception of civil liberty which is of value – although some Continental comparisons may show that it is by no means comprehensive – it may be thought regrettable that our courts do not have an opportunity to interpret a Convention to which as a State we have subscribed. It is not easy to convince a foreign lawyer that it would be catastrophic for Parliament to pass a law giving legal effect to a Convention which we have signed and ratified.²⁰³

CONCLUSION

Our study indicates that the Convention lacks the status of domestic law in six states which ratified it, namely in the United Kingdom, Ireland, Norway, Sweden, Denmark and Iceland. It may, of course, be that the rights guaranteed in the Convention are nevertheless adequately safeguarded in these countries. But whether or not this be true, the fact remains that one cannot test this proposition in their courts by attempting to show that a certain law or governmental action violates the Convention. The same may also be the case in Luxembourg, where the Convention has been held not to be self-executing in nature. In all these countries, accordingly, an individual does not enjoy the full benefits of the Convention because, if he should in fact have a valid claim based on the Convention, the appropriate domestic courts are powerless to give him any relief. This result cannot be squared with the provisions of Article 13 of the Convention which stipulates in part that "every-one whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national

²⁰² Waldock, *The European Convention of Human Rights and Fundamental Freedoms*, 34 *Brit. Yb. Int'l L.* 356, 358 (1959).

²⁰³ Marsh, *supra* note 198, at 537.

authority . . ." It is difficult to see how an individual can have "an effective remedy before a national authority," to enforce the rights guaranteed in the Convention, if he cannot invoke a specific provision "set forth" therein.²⁰⁴ Article 13 must, therefore, be interpreted to require each High Contracting Party to give the Convention the status of domestic law.²⁰⁵ States which have as yet not done so have not fully implemented the Convention.

In such countries as Germany, Belgium, the Netherlands and more recently Austria, the Convention does have the status of directly applicable domestic law. Here an individual can effectively invoke a given provision of the Convention in the national courts to enforce the rights guaranteed by it. These states, furthermore, recognize the right of private petition as well as the jurisdiction of the Human Rights Court. These institutions, of course, lack the power to reverse a determination of a domestic tribunal. But it is reasonable to assume that such national courts might in subsequent litigation involving the same legal questions reconsider their own determinations in the light of the opinions expressed by the Commission and especially the Human Rights Court. This type of interaction, be it formal or informal, between the international judiciary and national courts empowered to pass on the Convention, can work both ways in contributing to the growth and effective application of the Convention.²⁰⁶

These considerations point up one especially serious obstacle to the effective enforcement of the Convention. That is, that a state ratifying the Convention does not thereby recognize or even undertake to recognize the right of an individual to appeal to the Commission. Its negative consequences are painfully apparent if we recall that in Greece, for example, the Convention has theoretically gained the status of domestic law without, as a practical matter, offering any real protection because Greek courts have in the past completely misunderstood its legal implications. But since Greece, like the United Kingdom, Italy and Turkey, does not recognize the right of private petitions, little can be done to rectify the situation. It is, of course, true that another High Contracting Party might nevertheless submit the victim's claim to the Commission. Experience shows, however, that states will rarely do this so as not to jeopardize their relations with another friendly nation.²⁰⁷ In all likelihood, one state will charge another with a breach of the Convention only to further

²⁰⁴ See Golsong, *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention* 8 (1958).

²⁰⁵ If it were interpreted not to impose such an obligation, it would be meaningless, because it would add nothing that the Convention does not already provide for.

²⁰⁶ On this question, see Buergethal, *supra* note 170, at 94-105.

²⁰⁷ See Rolin, *Les Conclusions du Colloque*, 10 *Annales* 404, 411-12 (1961).

its own political interests.²⁰⁸ Thus, unless individuals have access to the Commission and through it to the Human Rights Court, a state is under no real compulsion to live up to the obligations it has assumed by ratifying the Convention.

In practice, therefore, one cannot really divorce the domestic implementation of the Convention from the right of individual petition to the Commission. The situation in Turkey under the Menderes regime demonstrates this proposition. A government willing to disregard basic human rights will not be deterred by the fact it is violating its own laws, even if their source be a duly ratified treaty like the Convention. It is more likely to abstain from embarking upon such a course, however, if its actions are subject to review by an international tribunal such as the Commission and the Court. Accordingly, one cannot but conclude that, unless the Convention enjoys the status of the domestic law in each state adhering to it and unless these states also recognise the right of private petition to the Commission and the compulsory jurisdiction of the Human Rights Court, the Convention will in some countries remain a document devoid of any real meaning.

²⁰⁸ Thus, Greece accused the United Kingdom of such a violation in Cyprus before that island became independent. And Austria has taken up various claims of certain South Tyrolian irredentists alleging that their rights were violated by Italy.

THE SWISS FEDERAL COURT AS A CONSTITUTIONAL COURT OF JUSTICE

by

EDOUARD ZELLWEGER *

I. THE ADMINISTRATION OF CONSTITUTIONAL LAW UNDER THE TERMS OF THE FEDERAL CONSTITUTION OF 1848

Switzerland has been a federal State since 1848. By virtue of the Federal Constitution of September 12, 1848, the International League of the 22 sovereign cantons based on the Federal Charter of August 7, 1815 was replaced by a federal state. The federal state was an offspring of the liberal movement which – inspired by the July Revolution in France – spread to most of the cantons from 1830 onwards. The Federal Constitution of 1848 was, therefore, based to a large extent on the principles of liberalism and characterized by the guarantee of basic rights.

The 1848 Constitution provided for a Federal Court, the organization and jurisdiction of which were laid down subsequently in the federal law of June 5, 1849 on the organization and administration of federal justice. An analysis of the relevant provisions shows that the authors of the Constitution, and in particular the drafting commission of the Diet, did not intend to set up a permanent court of law with professional judges. “It was even less a supreme court entrusted with the supervision of the observance of the constitution and to protect citizens against the misuse of the powers entrusted to the administrative authorities . . . The aim of the drafting commission was to arrange for the drawing up of a list of judges so as to provide parties to certain categories of lawsuits with a court to which they could have recourse when needed. This court was clearly intended to be subordinate to the legislative and executive powers of the Confederation.”¹

The jurisdiction of the Federal Court, that had no permanent seat and – as explained above – no permanent judges, was consequently extremely limited. In its capacity of constitutional court it only had jurisdiction in cases of:

* Dr. jur., Councillor of State, Switzerland.

¹ William E. Rappard, *La Constitution fédérale de la Suisse 1848-1948* (Boudry-Neuchâtel: 1948), p. 163.

1. Infringements of the rights guaranteed by the Federal Constitution if complaints relating to such infringements were brought before it by the Federal Assembly (Art. 105 FC);
2. Disputes relating to statelessness.

With regard to complaints relating to the infringements of constitutional rights, the Federal Assembly decided only once during a quarter of a century to refer such a complaint to the Federal Court (1815 Dupré). In all other cases the constitutional jurisdiction was exercised by the Federal Council (Federal Government) and the Federal Assembly (Parliament). Under Art. 90 paras. 2 and 3 of the Federal Constitution of 1848 complaints relating to unconstitutional acts of sovereignty by cantonal authorities fell within the jurisdiction of the Federal Council, while Art. 74 para. 15 of the Federal Constitution gave the Federal Assembly jurisdiction over complaints brought by cantons or private citizens against orders of the Federal Council. These clauses resulted in an extensive administration of constitutional justice by the political authorities, under which system complaints were usually decided in the first instance by the Federal Council. This was true of all cases brought before the Federal Council. If they were brought before the Federal Assembly, the latter took immediate cognizance of the complaints but first referred them to the Federal Council for its recommendations.

The Federal Council pronounced a large number of decisions supported by noteworthy statements of reasons that are still worth consulting today. It not infrequently quashed decisions of cantonal courts on the grounds that they were unconstitutional. However, it soon became apparent that the Federal Council as a body could not continue to administer constitutional law indefinitely, as its members did not have time to deal with all the cases brought before it. This resulted in cases being put into the hands of the Department of Justice and the Federal Council pronouncing judgment based on the recommendation of this Department without giving the matter any further consideration.

The Federal Assembly was even less suited to the administration of constitutional law. "In a two-house system there was always the possibility that an appeal was not decided on its merits, but merely dismissed. The results of this system were particularly prejudicial to the appellants when one Council recommended the partial allowing of an appeal and the other was in favour of allowing it entirely. If the two Councils failed to reach an agreement the appeal could be dismissed. It was also to be expected that a political body had to take certain political considerations into account; furthermore, most of the cases were legal disputes of a non-political

character and in view of the structure of the Councils an informed decision was hardly possible.”²

This system, that appears so strange to us today, can be accounted for in the first place by the predominating opinion of the authors of the 1848 Constitution, i.e. that the legislative assembly, in its capacity of people's representative, had precedence over the other state authorities. There is the further factor that – as Munzinger wrote in 1871 – “the entire new structure of the Confederation appeared so problematic to the statesmen of the day that it was considered expedient to put the realization and development of the new principles into the firm hands of the political authorities”.³

The administration of constitutional law by the political authorities met in the first place with the opposition of jurists who denounced the judicial activity of the Federal Council and Federal Assembly as “cabinet justice”. Minzinger declared, “I would rather entrust the protection of my rights to a single jurist than to a hundred-man assembly”.⁴ One of the most eminent politicians and jurists of the day – the federal councillor and later federal judge, Dubs – spoke of a “situation unsatisfactory in every respect”.⁵ The truth of this criticism could not continue to be ignored by the political authorities. In 1865 a committee of the Council of States proposed that all public law disputes requiring a judicial decision should be transferred to the Federal Court. In its explanatory memorandum of June 17, 1870 on the total revision of the Federal Constitution, the Federal Council accepted this proposal. “For the decision of disputes relating to infringements of the law, the judge, who in the whole world is considered the natural authority, and not the government or legislative authorities, is competent.”⁶

The inevitable reform of the administration of constitutional law was carried out at the time of the total revision of the Federal Constitution in 1874.

II. THE SWISS FEDERAL COURT – ORGANIZATION

The Swiss Federal Court was first accorded the status of permanent supreme court in 1874 at the time of the total revision of the Federal Constitution. The organization and jurisdiction of the Court are laid down in Art. 113 of the Federal Constitution (FC),

² Albert Schellenberg, *Die Verfassungsrechtspflege der politischen Bundesbehörden* (Winterthur: 1957), p. 23.

³ W. Munzinger, *Studie über Bundesrecht und Bundesgerichtsbarkeit* (Berne: 1871), p. 9.

⁴ W. Munzinger, as above, p. 24.

⁵ Jakob Dubs, *Das öffentliche Recht der Schweizerischen Eidgenossenschaft* (Zurich: 1878), p. 82.

⁶ George Solyom, *La jurisdiction constitutionnelle aux Etats-Unis et en Suisse* (Geneva, 1923), p. 92.

in the federal law on the administration of federal law of December 16, 1943 (OL) and in the federal law on the administration of federal criminal law of June 15, 1934. The Federal Court is not only a constitutional court but also the court of last instance in the fields of civil, criminal and administrative law. It is composed of the following divisions: a public law and administrative division, consisting of the public law chamber and administrative law chamber, two civil law divisions, a debt-collecting and bankruptcy division, a criminal appeal division and a federal criminal division (the only instance in certain federal criminal cases). The Federal Court as such is responsible for the administration of federal justice. The judgments are not given by the plenary court but by the individual divisions listed above. Uniformity of decisions among these divisions, i.e. the prevention of decisions based on contradictory conceptions of the law, is provided for in Art. 16 OL which reads as follows:

If a division of the Court wishes to give a decision at variance with a former decision of another division, of several divisions conjoined, or of the whole Court, it may only do so with the consent of the other divisions or if authorized by a decision of the meeting of the divisions concerned, or of the whole Court. This decision is taken without hearing the parties concerned and *in camera*; it binds the division in giving judgment on the case in question.

In accordance with Art. 1 OL, the Federal Court consists of 26–28 members and 11–12 alternates. At the time of writing it has 26 members. The elective body is the Federal Assembly, i.e. for elections of federal judges the two houses of the Federal Parliament – the National Council (representatives of the people) and the Council of States (representatives of the cantons) – meet in joint session under the chairmanship of the President of the National Council, decisions being reached by the absolute majority of all the voting members of the two councils (Art. 92 FC). When electing the federal judges, it is necessary to ensure that all three official languages – German, French, Italian – are represented (Art. 1, para. 2 OL). Of the judges currently in office, 17 are of German Swiss mother tongue, 7 of French mother tongue and 2 of Italian mother tongue. As regards the language in which the judgments of the Federal Court should be delivered, Art. 19 of the Rules of Procedure of the Swiss Federal Court of October 21, 1944 stipulates:

Judgments are delivered in the official language in which the trial was conducted, failing this in that of the decision contested. Exceptions may be made to this rule if the parties concerned are of other mother tongues. In cases falling within the exclusive jurisdiction of the Court, judgment is delivered in the official language of the parties concerned. If the parties are of different languages, it is generally given in the language of the defendant, and if there are several defendants of different languages, in all the languages represented.

Any Swiss citizen eligible for membership of the National Council (Art. 2, para. 1 OL), that is to say any Swiss citizen entitled to vote, i.d. "any Swiss citizen who has reached the age of twenty years and who is not excluded from the rights of active citizenship by the law of the canton in which he is domiciled" (Art. 74 FC) is eligible for election as a federal judge. Neither the constitution nor the law stipulates any legal qualifications as a condition of eligibility. In practice, however, only eminent jurists are appointed to the Federal Court, e.g. professors of law, well-known lawyers (not infrequently those who have been members of the Federal Parliament), federal court registrars or secretaries and, more particularly, members of the superior cantonal courts. (All intermediate and lower courts are cantonal courts. Legislative power in the field of civil and criminal law was transferred to the Confederation by stages from 1874 onwards but "the organization of the courts, judicial procedure and the administration of justice" remained vested in the cantons, according to Art. 64 FC, "as hitherto".)

The term of office of the members and alternates of the Federal Court is six years. Intermediate vacancies are filled at the next session of the Federal Assembly for the rest of the term of office (Art. 5 OL). In accordance with a well established custom that has virtually acquired the status of customary law, federal judges who do not resign are re-elected at the end of their term of office. Recently, it has become the practice for federal judges to retire at not later than the age of 70. The President and Vice-President of the Federal Court are elected from among the members of the Court for a period of 2 years (Art. 6, para. 1 OL).

The Federal Court appoints its own registrar, secretaries and registry staff, the number of registrars and secretaries being decided by the Federal Assembly. The registrars and secretaries are elected at the time of the re-election of the whole Court for 6 years or, if elected during a term of office, until the end of that term (Art. 7 OL). It happens only very rarely that federal judges have personal assistants; if they do, they are responsible for their salaries.

The divisions of the Federal Court consist of 5 judges, unless another number is provided for by law; e.g. it is stipulated in Art. 12, para. 1, subpara. c, OL, that the debt-collecting and bankruptcy division shall be composed of 3 members. For public law cases, 7 judges are required, except in the case of public law disputes relating to cantonal acts that infringe Art. 4 FC (equality before the law). The chamber that deals with these cases has 5 members.

Instruction in cases of public law and, in particular, of constitutional law, is exercised by the public law chamber, to which the 9 members of the public law and administrative division belong. As already explained, 7 judges are required for the decision of all cases

falling within the scope of public law. The very frequent public law complaints alleging the infringement of Art. 4 FC are dealt with by the public law chamber composed of five members. Obviously unfounded complaints may be settled in the so-called "preliminary examination". Under Art. 92 OL a committee of 3 judges may unanimously, without public hearing, direct a non-suit in obviously inadmissible complaints or dismiss complaints which they consider, beyond a shadow of a doubt, to be unfounded. Such decisions must be supported by a summary statement of reasons.

The administrative law chamber deals with administrative law complaints relating to decisions and orders given by federal or cantonal authorities in the application of federal administrative law (a large number of administrative laws of the Confederation are administered by cantonal authorities in accordance with the principle of administrative decentralization which is characteristic of the federal organization of the Swiss Confederation). The scope of administrative law assigned to the administrative law division is comparatively limited. The various administrative acts that may be contested by means of a complaint before the administrative division are enumerated in the text of the law. There is only one general clause and that refers to disputes relating to federal taxes. According to Art. 97 OL, a complaint to the administrative chamber is generally permitted "against decisions on matters connected with federal taxes, whether relating to their payment or restitution, or to liability to or immunity from taxation". The term "federal taxes" includes taxes on income and capital, stamp and excise duties, military taxes, licence fees and postal, telegraph and telephone charges levied in accordance with federal law". A bill proposing a considerable extension of the administrative law jurisdiction exercised by the Federal Court was tabled in Parliament by the federal government in December 1965.

III. PUBLIC LAW PROCEEDINGS (THE JURISDICTION OF THE FEDERAL COURT IN THE FIELD OF PUBLIC LAW)

a) In the field of public law, the public law chamber decides conflicts of jurisdiction between the federal authorities on the one hand and the cantonal authorities on the other (Art. 83, a OL). In this capacity it deals with disputes on the proper separation and delimitation of the powers assigned to the Confederation and the cantons. It also decides public law disputes between cantons (Art. 83, b OL), i.e. disputes relating to the delimitation of cantonal acts of sovereignty such as for example, disputes relating to cantonal territory, cantonal boundaries, cantonal servitudes, intercantonal rivers, etc., disputes between cantons relating to encroachments of jurisdiction in matters of the law, the validity, application and inter-

pretation of concordats ⁷ in so far as the latter do not have a purely civil law content, intercantonal conflicts of jurisdiction, relating to the administration of justice.

b) The principal attribute of the Federal Court in the field of public law is the constitutional jurisdiction defined in Art. 84 OL, i.e. jurisdiction over disputes that are commenced by means of a public law complaint brought before the Federal Court and dealt with by the public law chamber. Under Art. 84 OL, public law complaints against cantonal enactments and orders may be brought before the Federal Court in the following cases:

- a) infringement of the constitutional rights of citizens;
- b) infringement of concordats (treaties between cantons);
- c) infringement of treaties with foreign countries, with the exception of the infringement of civil law or criminal law provisions of treaties by cantonal acts;
- d) infringement of federal law provisions relating to the delimitation of the substantive or geographical jurisdiction of the authorities.

“Disputes relating to the voting rights of the citizen and to cantonal elections and referenda, on the basis of the relevant provisions of cantonal constitutional law and federal law” also fall within the scope of public law disputes (Art. 85, para. a OL).

c) The constitutional rights of the citizen are the principal and most important subject protected by the public law complaint. These constitutional rights include, in the first place, the basic rights guaranteed by the Federal Constitution and the cantonal constitutions, and more particularly the basic freedoms guaranteed to individual citizens (civil rights) and the political rights.

The basic freedoms guaranteed by Swiss law are: freedom of conscience and belief (Art. 49 FC), freedom of worship (Art. 50 FC), freedom of trade and commerce (Art. 31 FC) considerably restricted by the so-called “economic clauses” of 1947, freedom of the person and inviolability of the home, and sometimes the secrecy of mails under cantonal constitutional law, the right of petition (Art. 57 FC), freedom of the press (Art. 55 FC) and freedom of expression under cantonal constitutional laws, freedom of residence (Art. 45 FC), freedom of association (Art. 56 FC), freedom of assembly under cantonal constitutional law, and freedom of education guaranteed by a large number of cantonal constitutions.

The Federal Constitution guarantees the following political rights: the election of the National Council and the federal juries, the compulsory constitutional referendum, the optional referendum

⁷ Concordats are treaties which are made between cantons relating to matters within their competence.

relating to treaties and laws, the right to demand total or partial revision of the Federal Constitution and a popular vote on it (constitutional initiative). The political rights laid down in the Constitution have been adopted from cantonal law which guarantees more numerous and more extensive political rights than federal law. Most of the cantonal constitutions, for example, provide for a compulsory referendum relating to laws and popular initiative (the right to propose the drafting of a law and to demand a popular vote on it).

The principle of legal equality (equality before the law, Art. 4 FC) is one of the fundamental constitutional rights, and is more important in the jurisprudence of the Federal Court than all the other basic rights.

The Federal Court has also derived basic rights from certain principles of the constitutional order, e.g. from the principle of the separation of powers laid down in a large number of cantonal constitutions and from the derogatory power of federal law (federal law renders invalid inconsistent cantonal law). The infringement of these organizational principles to the prejudice of a private citizen or a corporation entitles those concerned to bring a public law complaint. The same applies to the infringement of another organizational principle, namely that of the autonomy of local authorities who, if they consider their autonomy infringed, are authorized to bring a complaint.

With the exception of the canton of the Tessin, all cantonal constitutions guarantee private property. The Federal Constitution itself contains no such guarantee. Irrespective of this fact, by virtue of the jurisprudence of the Federal Court the guarantee of the right of property is binding on the Confederation and all the cantons. A decision of March 11, 1909 (FDC 35 I 571) contained the following statement: "Private property flows naturally from the social order".⁸

d) The public law complaint is of a subsidiary character, i.e. it is only permissible "if the alleged infringement of the law cannot be contested otherwise by an action or appeal to the Federal Court or another federal authority" (Art. 84, para. 2 OL). It is moreover only allowed after exhausting the cantonal remedies. By Art. 86 para. 2 OL exception is made for complaints relating to the infringement

⁸ FCD 35/I/571 : FCD - Official collection of decisions of the Swiss Federal Court. The first number - 35 - indicates the volume; the figure I indicates "Part I - Public and Administrative Law". The last number is the number of the page. Four volumes of the decisions of the Federal Court are published every year: the first volume contains decisions relating to public and administrative law, the second decisions relating to civil law, the third the decisions of the debt collecting and bankruptcy division, and the fourth the decisions of the Criminal Appeal Division.

of freedom of residence (Art. 45 FC), the prohibition of double taxation (Art. 46, para. 2 FC), the right to one's constitutional judge (Art. 58 FC), the right to the judge of the domicile (Art. 59 FC), the right of citizens of other cantons to equality with the citizens of the canton of domicile in legislation and judicial proceedings (Art. 60 FC) and the right to enforcement of judgments in all cantons (Art. 61 FC).

Those entitled to bring a public law complaint are "citizens (private persons) and corporations who have suffered a legal wrong arising from generally binding enactments or from orders affecting them personally" (Art. 88 OL). The law defines corporations as legal persons under private law with independent legal personality, and also members of collective and limited partnerships, professional associations, a trustee in bankruptcy on behalf on the creditors, exception being made in matters relating to rights that, by their nature, cannot be claimed by legal persons, such as freedom of conscience and belief or political rights.

In certain exceptional cases, a public law complaint may also be brought by a public law corporation, namely if the latter wishes to defend itself against the activity of its superior public authority within the sphere of its own autonomy. A local authority may, for example, bring a complaint against an act of sovereignty by the canton to which it is subordinate if it considers that such an act constitutes an infringement of its autonomy.

e) Public law complaints may be brought against "cantonal enactments and orders". These include all cantonal acts of sovereignty – laws, administrative acts, judgments. Such acts must constitute an expression of the will of a cantonal authority acting in its official capacity. These cantonal authorities in question include the voting population of the canton, who may pass a law by referendum, the supreme cantonal collective or individual organs (Great Council⁹, government Council¹⁰, the government departments, the supreme cantonal court), lower collective and individual organs, public law corporations, religious authorities, self-governing bodies, local authorities.

There is no distinction between cantonal acts of sovereignty executed in application of cantonal law and those introduced in application of federal law. If a cantonal act of sovereignty is deemed to be unconstitutional because an unconstitutional provision of federal law has been applied, this can be alleged by means of a public law complaint, to the extent that the provision is not binding

⁹ Great Council or Cantonal Council are designations used for the cantonal parliaments.

¹⁰ Government, Council of State, Lower Council, are designations used for the cantonal governments.

upon the Federal Court. This particularly important limitation of the constitutional jurisdiction of the Federal Court is discussed in Chapter IV.

Another limitation on its jurisdiction, imposed by the Federal Court itself, is that it does not receive public law complaints relating to the provisions of cantonal constitutions; a provision of a cantonal constitution that infringes the rights of citizens or corporations guaranteed by the Federal Constitution cannot be contested by means of a public law complaint. Neither can a public law complaint be brought in respect of an individual act of sovereignty (e.g. an administrative act prejudicial to the individual in a specific case) carried out in application of a provision of a cantonal constitution which is inconsistent with the Federal Constitution. This principle has been consistently opposed in Swiss legal theory. The Federal Court (i.e. its public law chamber) has confirmed this practice in a recent judgment of October 1963 in the *Nelz v. Canton of Zurich* case (FCD 89/I/389). This attitude is based on the fact that the cantonal constitutions and amendments to them must be approved by the Federal Assembly, whose duty it is to ascertain that they are in conformity with the Federal Constitution. The Federal Court considers that the control exercised by the Federal Assembly is not different from that which the Court itself could exercise if it had to go into the question of whether cantonal constitutions are in conformity with federal law, for the question whether a cantonal constitution contains anything contrary to the provisions of the Federal Constitution is entirely a legal and not a political question. The deciding factor is not a question of political expediency, but whether the cantonal constitutional provision is lawful. As the Federal Assembly exercises a purely legal control it would be unusual if the same control were exercised by the Federal Court. It is obvious that the authors of the Constitution would not entrust the same task to two different authorities.

IV. THE SUBJECTION OF THE FEDERAL COURT TO FEDERAL ENACTMENTS OF THE FEDERAL PARLIAMENT

The most important limitation on the constitutional jurisdiction of the Federal Court is that the Court is not competent to examine the constitutionality of legislative acts of the Federal Parliament issued in the form of federal laws or generally binding federal decrees. The aforesaid legislative forms were defined as follows in Art. 5 and 6 of the federal law of March 23, 1962 on the business of the Federal Assembly and on the form, publication and entry into force of its acts: federal laws are acts unlimited in time which contain legislative provisions of a general and abstract character

“which assign duties to natural or legal persons or grant rights or regulate the organization, jurisdiction or the duties of authorities or their procedure”, being deemed constitutive of the law. Generally binding federal decrees are acts containing legislative provisions limited in time. Generally binding federal decrees also include acts against which, by virtue of a constitutional provision, a referendum may be demanded and for which the form of a federal law is not laid down.

Federal laws and generally binding federal decrees are subject to optional referendum, i.e. they “must be submitted to the people for acceptance or rejection, if so demanded by 30,000 enfranchised Swiss citizens or 8 cantons” (Art. 89, para. 2 FC).

By Art. 113, para. 3 FC, “laws and generally binding decrees passed by the Federal Assembly and treaties ratified by the Assembly are binding on the Federal Court”. This provision is by no means uncontested by Swiss jurists. It reveals the present conflict within the constitutional system of Switzerland between the concept of democracy on the one hand, and concept of the rule of law and liberalism, on the other. Professor Hans Nef of the University of Zurich, in his paper presented to the Swiss Jurists’ Congress in 1952 on “The Significance and Protection of Constitutional Legislation and Lawful Administration in the Confederation”¹¹, stated on this subject:

“It is not compatible with a consistent democratic way of thought to invest a small assembly of judges with the power to examine and, if necessary, to pronounce null and void laws that have been passed in accordance with the will of the people’s representatives or of the people themselves. Constitutional control by the courts is according to this school of thought inconsistent with democracy. The concept of democracy demands that the will of the representatives of the people, or of the people themselves, be accepted unconditionally. The concept of constitutional control by the courts implies that even acts passed by the representatives of the people or by the people themselves may be annulled by the judge. That is the paradox that exists between the principles of democracy and the rule of law.”

At the time of the total revision of the Federal Constitution in 1874 the principle of the absolute supremacy of the legislative authority was still firmly established. In one of the first decisions of the newly established permanent Federal Court it was stipulated (FCD 2, p. 105): “It must be considered both a general and a specifically Swiss principle of federal law and cantonal law that the

¹¹ Hans Nef, *Sinn und Schutz verfassungsmässiger Gesetzgebung und rechtmässiger Verwaltung im Bunde*, Zeitschrift für Schweizerisches Recht, vol. 69 (1950), p. 227a.

power of the legislative authority is supreme, and the courts do not have the power to control the validity and applicability of laws or decrees passed by the legislative authority on the ground that they are inconsistent with the Constitution.”

In respect of their exclusion from scrutiny by the Federal Court for their constitutionality, regulations passed by the Federal Council by virtue of emergency powers granted to it by Parliament, for example at the outbreak of the two world wars (e.g. by the federal decree of August 30, 1939 on measures for the protection of the country and the safeguarding of its neutrality) are placed on the same footing as federal laws and generally binding federal decrees. The Federal Court attributes to such emergency regulations the character and binding power of laws, and does so without waiting for the possible subsequent approval of the Federal Assembly (the emergency decrees passed during the Second World War had to be confirmed by the Federal Assembly at regular intervals).

V. JUDICIAL CONTROL OF ORDINARY FEDERAL DECREES AND REGULATIONS OF THE FEDERAL COUNCIL

As Art. 113, para. 3 FC only excludes federal laws and generally binding federal decrees from judicial control, the other legislative acts of the Confederation and treaties of a law-making character ratified by the Federal Assembly may be examined for their conformity with the constitution and laws by all courts of law. However, this judicial control is only of an accessory nature, i.e. it is undertaken as a preliminary issue when provisions of the law are to be applied in specific cases. A provision of the law that is contrary to the constitution or the law is not annulled by the judge, it is merely not applied in the particular case.

Judicial intervention is limited in matters relating to delegated legislation – i.e. regulations based on delegated powers – issued by the executive. To the extent that the Federal Assembly delegates legislative powers to the Federal Council or to other state organs under Art. 113, para. 3 FC, the courts may only check whether the regulations remain within the scope of the powers delegated, i.e. whether the law has granted the organ that passed the regulation contested power to issue that regulation or provision thereof. “Judicial control cannot, on the other hand, be aimed at determining whether a regulation that is in conformity with the law is also constitutional. This would amount to the judge deciding indirectly whether the law granting the delegated power is constitutional, which he is prohibited from doing under Art. 113, para. 3 FC”¹²

¹² Fleiner/Giacometti, Schweizerisches Bundesstaatsrecht (Zurich: 1949), p. 936.

This restriction does not apply to the autonomous regulations of the Federal Council. The judge is free to examine their constitutionality. The Federal Council is empowered by various provisions of the Constitution to make autonomous regulations. Under Art. 41, para. 4 FC, for example, it may issue regulations on the manufacture, acquisition and distribution, and the import and export, of war materials. Mention should also be made of the autonomous power to issue regulations that practice has recognized as accruing to the Federal Council by virtue of Art. 102, paras. 9 and 10. By these provisions of the Constitution, the Federal Council safeguards the external security of Switzerland and the maintenance of its independence and neutrality and ensures the internal security of the Confederation and the maintenance of tranquility and order.

VI. DECISIONS OF THE FEDERAL COURT RELATING TO THE PROTECTION OF BASIC RIGHTS

It is not possible to outline even roughly the exceptionally comprehensive basic rights jurisprudence of the Federal Court. The author has had to limit the following discussion to a few interesting examples that illustrate the principles underlying the decisions taken.

(a) General

In accordance with the predominating theory, the Federal Court holds the basic rights to be absolute and, consequently, directly applicable. As absolute rights, they are not merely guaranteed as laid down by the law, but the legislature must respect them in the exercise of its legislative duties. It is principally the task of the judge to give flesh and blood to the basic rights, and in this respect the Swiss Federal Court has performed a remarkable creative function. More particularly, it has also defined the conditions under which restrictions on basic rights are admissible and tolerable in a democracy under the rule of law.

Basic rights are only guaranteed subject to the need – which is generally unwritten in Switzerland – to preserve public order. Thus Art. 55 of the Federal Constitution states concisely and simply, “The liberty of the press is guaranteed”. Art. 56, which guarantees the freedom of association, prohibits the formation of associations, the objects or methods of which are unlawful or dangerous to the State, and empowers the cantons to make the necessary provisions in their laws for the prevention of abuse of the law relating to associations. Basic rights may be restricted to the extent that the reservation relating to public order permits.

According to the jurisprudence of the Federal Court, the term “public order” has a double meaning in that it covers both the protection of society and the protection of the State. The interests

protected in the social field include public order and peace, safety of movement, public morals, public health, good faith (protection from fraud and exploitation). The reservation relating to public order as a concept protecting the security of the State legitimates measures against any exercise of basic rights that endangers "the existence of the authority of the State", "the basic institutions of the State, and the constitutional order". By "protection of the constitutional order" the Federal Court understands the maintenance of the internal security and external independence of the Confederation (decision of the Court of Cassation of February 5, 1940, *Schaad v. Janser*). "Basic rights should not be misused to undermine the basic institutions of the State, and the constitutional reservation relating to public order amounts to an order to the State organs to protect the basic institutions of the State from the dangerous exercise of basic rights by passing laws or, if necessary, by direct intervention"¹³.

The Swiss executive authorities – the Federal Council and the cantonal governments – have the right to take police measures without legal authority "to prevent an imminent threat of disturbance of or danger to public security, health or morals arising from a specific event, in the face of which the passing of legal regulations would be ineffective due to the slowness of the normal legislative procedures". (FCD 83/I/117). In cantons, the constitutions of which do not provide for emergency laws, the public law jurisprudence of the Federal Court basing itself on the cantonal police powers recognizes the cantonal government's right to issue emergency regulations. Furthermore "provisions restricting the basic rights of the citizen" may "only be passed by the legislator, or the authority with power to issue regulations, if such action is authorized by the law; the administration may not therefore impinge upon basic rights in a specific case... without express legal authority" (FCD 67/I/76, 80/I/153, 81/I/132).

(b) Equality before the Law (Legal Equality)

General definition. Art. 4 of the Federal Constitution has been interpreted in a particularly creative manner by the Federal Court. It reads as follows: "All Swiss are equal before the law. In Switzerland no person is subject to another, and there are no privileges of territory, birth, person or family."

Originally this constitutional guarantee applied to the political rights of citizens only. After the entry into force of the 1848 Constitution, the political authorities at the time entrusted with the ad-

¹³ J. A. Bumbacher, *Die öffentliche Ordnung – eine Schranke der Freiheitsrechte* (Winterthur: 1957), p. 84.

¹⁴ CC = Swiss Civil Code of 10th December 1907; OR = Swiss Code of Obligations (Law of contract and tort) of March 30, 1911/18. December 1936.

ministration of constitutional law – the Federal Assembly and the Federal Council – extended the principle of legal equality to other sectors of the law. It was first extended to tax law and to freedom of trade and commerce. The permanent Federal Court set up under the Constitution of 1874 soon came to consider the principle of equality before the law as a general principle governing the whole of the legal order. This conception was first expressed in the decision of April 2, 1880 in the *Jaeggi v. Canton of Solothorn* case (FCD 6, 171 ff). The following statements from the judgment are worth quoting: “The importance and significance of the principle of equality before the law is determined and restricted by the fact that it is a postulate of justice binding on the state. As such, this principle is in no way restricted to the prohibition of the privileges mentioned in Art. 4, para. 2; on the contrary, it should, as follows from the legislative history of Art. 4 and from the jurisprudence of the Federal Court to date, be considered as a general principle governing the whole of the legal order . . . On the other hand, it is obvious that this does not imply the not only inexpedient but also unjust and completely impracticable requirement that the legislator should apply to all citizens without distinction one and the same legal rule. It is rather evident that, without prejudice to the principle of equality before the law, the natural difference existing between individual citizens with regard to age, race, sex, profession and other conditions, can and must find expression in a large number of legal distinctions. Therefore, not every legal distinction should be considered as an inequality before the law. On the other hand, it cannot be presumed that the principle of equality before the law is only valid when factual conditions are entirely equal. This would mean that all exceptional laws, which apply not to specific individuals but to whole classes of citizens, would render the principle of equality entirely illusory, as there will naturally always be a characteristic feature by which a class affected by a law can be distinguished from other citizens, so that in glaring contradiction to the constitutional principle, the most arbitrary exceptional law, favouring or prejudicing individual classes of people, would have to be admitted. On the contrary, the principle of equality before the law is intended to promote equal treatment of citizens not only in the case of absolutely similar factual conditions, but in the case of equality of all relevant factual conditions. To justify inequality in the legal treatment of citizens, the difference in conditions must not lie in just any conditions but in such conditions as, in accordance with accepted principles of the present legal and political order, would be considered material for the legislation in the field in question.”

The above decision concerned the applicability of the principle of equality before the law in the field of legislation. It annulled

art. 16 of the Penal Code of the Canton of Solothorn, by virtue of which bankrupts and persons declared incapable of managing their own affairs could not be punished by way of a fine. "When sentencing such persons, the judge, where the law provided for a fine or imprisonment, can only impose the latter, and where the law only provided for a fine, must replace it by imprisonment, one day's imprisonment corresponding to the sum of Fr. 2.—" The Federal Court considered this practice an infringement of the principle of legal equality as "the fact that the debtor is bankrupt is entirely unrelated to other offences than that of self-induced insolvency; it has no connection whatsoever with either the objective or the subjective aspects of the offence, in that it has no tangible influence on either the degree of guilt or on the unlawful act committed."

Views as to the nature of the factual matters having sufficient legal significance "to justify inequality in the legal treatment of citizens" have naturally changed with the times. The decisions of the Federal Court have taken into account, for example, the changes that have occurred in the status of women. In a decision of 1887 (FCD 13, 5ff.), the Federal Court declared: "Now it would appear, in accordance with still undoubtedly prevailing legal opinion, that the distinction in the legal treatment of the sexes in the field of public law, and more particularly in the field of their participation in public life, is in no way unfounded. Therefore, a provision of cantonal law that excludes women from representing parties before the courts can in no way be considered contrary to Art. 4 of the Federal Constitution". 35 years later, in a decision of 1922 (FCD 49/I/16 ff.) it declared that the exclusion of women from the legal profession was based on anachronistic prejudices and that such distinction between the sexes was no longer in accordance with Art. 4 FC.

In a large number of decisions the Federal Court has dealt with the implications of the equality clause in the field of tax law. It deemed it inadmissible for a local authority to impose income tax on employed persons and not on self-employed persons (FCD 38/I/34). It considered it inadmissible to deny a mortgagor the right to deduct the amount of his debt from his taxable income if the mortgagee, being a public authority, did not have to pay tax on the interest it received. (FCD 48/I/328, 49/I/4). It also declared it inadmissible to tax collective partners or limited partners residing outside the canton differently from those residing in the canton. (FCD 51/I/76).

In the field of the law of procedure, according to the decisions of the Federal Court, the principle of legal equality requires the cantonal legislatures to pass laws providing for legal aid (legislation on civil and criminal procedure falls, to the extent that it does not relate to proceedings before federal courts, within the jurisdic-

tion of the cantons.) If the law is to be applied equally to all citizens, access to the courts should not be made dependent on the fact that a citizen is able to pay the costs of legal proceedings. Even those without means have right to legal protection. The prohibition of a denial of legal remedy is inherent in the principle of equality before the law and this justifies the claim of citizens without means to the free administration of justice.

In the fields of administration and of the administration of justice, the principle of legal equality is expressed first of all in the above-mentioned prohibition of a denial of legal remedy. Citizens have a constitutional claim to have their cases decided by the courts and to execution of judgments by the organs of the executive. This embraces, in particular, the right to be heard and to legal aid. The right to a legal hearing also gives the parties the right of access to the files and to the publication of the reasons for the decision.

Special mention should be made of the introduction of a right to be heard in administrative proceedings, which was not included in the law of most of the cantons until recently, but was recognized through judicial interpretation of Art. 4 FC. Admittedly the Federal Court had originally "always allowed the constitutional right to be heard only to those who were subjected to civil or criminal proceedings and it did not extend the right to administrative proceedings. This would have been hard to put into practice in view of the principle applicable in the administrative procedures of most of the cantons, that it was the authorities who initiated action, and in their official capacity undertook the necessary investigations in such manner as seemed appropriate to them." This was stated in a decision given in 1902. To begin with very few exceptions were made to the rule expressed in this decision. The activity of the administrative authorities, declared the Federal Court in other decisions, could be paralysed or inadmissibly delayed if the administrative authorities, before ordering a measure, were obliged to hear all those directly or indirectly affected by that measure. This applied to all measures of a general nature as, for example, preventive measures for the protection of public health. The Federal Court also repeatedly declared that the right to be heard "could not be deduced from Art. 4 of the Federal Constitution as a general principle when the relationship under the decree issued by the administrative authorities is one of subordination of the citizen to the State". In a subsequent important decision, the Federal Court raised the following significant objection to the above argument: "It must be allowed that from the standpoint of the citizens, this subordination should in reality constitute a reason to grant him as many guarantees as possible and in particular that of expressing his views on orders which the administrative authorities intend to make

in relation to him." In recent years, the Federal Court has continued to extend the scope of administrative proceedings in respect of which citizens may not be refused a legal hearing. The right to be heard was first admitted in relation to administrative acts that constituted an obvious invasion of the supremely personal sphere of the citizen (administrative detention of those who refuse to work or alcoholics, maintenance of a person declared incapable of managing his affairs although of sound mind in an institution). Then the Federal Court required a preliminary hearing of citizens whom the administrative authorities intended to detain under police arrest or whose naturalisation they proposed to withdraw. The Federal Court has recently abandoned its former reserve. It now demands the guarantees of a legal hearing in all cases where the administrative decree in question cannot be subjected to a renewed examination and affects a case that does not require an immediate decision. (FCD 74/I/249, 75/I/226).

Finally, the Federal Court has deduced from Art. 4 FC a general prohibition of arbitrary action that extends to all legislation and application of the law. Every cantonal act of sovereignty, whether a provision of a law or regulation, a judgment or administrative order, may be successfully contested by means of a public law complaint if it is arbitrary. As explained above, about one third of the public law complaints relate to arbitrary action, i.e. they are complaints demanding the annulment of a cantonal act of sovereignty alleged to be arbitrary. A judgment or administrative decree is arbitrary if it is "obviously wrong" or "glaringly contrary to clear provisions of the law" (FCD 49/I/528). The Federal Court considers a legislative act arbitrary "if it is not based on serious considerations, if it is senseless or if it makes legal distinctions for which there is no reasonable ground in the factual situation involved" (FCD 91/I/84). A provision of a law recently contested on the grounds of arbitrary action was article 3, para 2 of the Holidays Law passed by the Canton of Solothurn on 25.10.1964. This provision stipulated that "public holidays that fall within an annual holiday should not be counted as part of the latter". The complainant claimed that "Annual holidays are intended for rest and public holidays for the protection of religious or patriotic sentiments. There is nothing to prevent one from celebrating a public holiday during one's annual holiday. There are no well-founded practical reasons to justify the decision contested". The Federal Court did not accept this reasoning and dismissed the complaint (FCD 91/I/241).

The decisions of the Federal Court have laid down the following principles relating to the prohibition of arbitrary action in the field of application of the law.

Two cases, presenting similar facts, should not receive different

treatment, for two contradictory decisions cannot both be correct; Art. 4 FC, however, is only infringed if the different decisions are pronounced by the same authority (FCD 91/I/169). A modification of Court practice is not a breach of the prohibition of unequal treatment if it is based on objective reasons, if it results from a new, serious and thorough investigation of the problem (FCD 48/1/261, 51/I/103). A decision is arbitrary if it is obviously based on considerations other than those underlying the provision contested. (FCD 67/I/12). Finally, arbitrary action is constituted by any infringement of the principle "nulla poena sine lege". This principle thus appears to be implied in Art. 4 FC and is, therefore, integrated in the constitution (FCD 45/I/445, 52/I/42, 57/I/273, 58/I/33).

(c) The Freedom of the Press

In a judgment given in 1900 (FCD 26/I/42) the Federal Court declared that the guarantees of the freedom of the press implied not only "a limitation on cantonal legislation in the sense that it prohibits censorship and similar measures against the press, but it also gives individual citizens a concrete individual right of a public law nature: the right of free expression of opinion through the written word and more particularly through the press".

As stipulated by the Federal Court for the first time in a decision given in 1911, the freedom of the press only extends to those publications in the press that are undertaken in fulfilment of the responsibilities incumbent on the press in a free democratic state. (FCD 37/1/368). These particular responsibilities include the discussion of all political problems, criticism of the State and its officers, criticism of the legislature, executive and judiciary, the critical discussion of events in the economic field, criticism of science and the arts, including reviews of plays, concerts and films. If the press directs its efforts to the fulfilment of these responsibilities, it serves, as stated in the decision referred to above, a high, and in a certain sense, idealistic purpose, and is then entitled to the protection implied in the constitutional guarantee of the freedom of the press. Notices serving commercial interests do not fall under the guaranteed freedom of the press.

Police measures taken by the administrative authorities, such as precensorship, the confiscation of publications of the press (to the extent that it is not undertaken under judicial control), the prohibition of newspapers and magazines, as well as the deposit of a sum of money by way of security which is required before authority is given for the publication of a newspaper, are basically inconsistent with the principle of the freedom of the press. Administrative interventions are, as in the case of other basic rights, only admissible to the extent that they are justified by the reservation

relating to public order (to protect society or the State), i.e. if they serve to ward off grave dangers that constitute an immediate and obvious threat to the lawful exercise of the powers of the State or publicly threaten the legally protected rights of individual citizens, such as their life, their health, their possessions or their reputation.

The Federal Court has so far only once had to deal with one case of the prohibition of a newspaper. From the judgment of February 3, 1934 in this case, *Pressunion des Kämpfers v. the Government of the Canton of Zürich*, it follows that such a drastic measure as prohibiting the publication of a newspaper is only justified under the most exceptional circumstances. On August 15, 1933 the Government of the Canton of Zurich prohibited the production, printing and circulation of the Communist "Kämpfer" in the Canton of Zurich for a period of two weeks. On July 1, 1933 the plumbers and electricians went on strike. This strike was conducted in an exceptionally violent manner. Everywhere pickets guarded the building sites and used bodily force to prevent those who wished to work from entering the place of work. The municipal police force intervened 313 times between July 1 and August 12. It drew up 156 reports to the Zurich Office of Public Prosecutions on bodily injuries, housebreaking, physical coercion, malicious damage to property, threats, and disobedience to the public authorities. 52 reports involving 85 alleged offenders were received at the police court of the town of Zurich for minor offences. The Government of the Canton of Zurich, and later the Federal Court, considered that the abovementioned disturbances were due largely to the inordinately inflammatory articles that appeared over a period of six weeks from the beginning of the strike in every number of the "Kämpfer". On August 11, 1933 the Department of Public Prosecutions petitioned the Government to prohibit the publication of the "Kämpfer" as the provisions of the criminal law and the administration of criminal justice could not stop or sufficiently restrain the threat to public order and security. This argument was later put in the forefront by the Federal Court in its justification of the 14-day prohibition of the "Kämpfer". Although public order was obviously seriously disturbed by the press campaign in the "Kämpfer", in its judgment the Federal Court found that instead of 14 days an 8-day prohibition would have sufficed.

Up to January 1, 1942 – the date of the entry into force of the Swiss Penal Code – the cantons had power to make provision for the punishment of the misuse of the freedom of the press, as the ordinary criminal law legislation fell within their jurisdiction. Up to January 1, 1942, every canton had its own penal code permitting it to restrict the freedom of the press to the extent that punishable offences, e.g. defamation, could be committed through

the press. While the cantonal penal codes were in force, the Federal Court posed the question as to how the balance between the freedom of the press on the one hand, and the offences the press was liable to commit under cantonal penal codes on the other, could be kept. In its famous decision in the *Kälin & Jaeggi v. Bourcard and Associates case* (FCD 37/I/368), the Federal Court introduced the principle that when deciding whether a specific statement in the press was protected by the freedom of the press, it was necessary to start from the special responsibilities of the press. Allegations made by the press within the field of these special responsibilities are protected by the freedom of the press, if they can be proved true or if they are at least based on facts that the author, in all good faith, believed on the basis of careful investigations to be true. If these conditions are fulfilled, a newspaper report that was defamatory by cantonal law was not punishable. As stated by the Federal Court itself, to this extent Art. 55 FC grants the press freedom to defame. This decision of the Federal Court, in other words, raises the freedom of the press to the status of a justification that excludes the unlawfulness of the defamatory report.

The introduction of the Swiss Penal Code resulted in a change in the situation. By its decision of March 2, 1944 relating to the *Pfändler* case, the Criminal Appeal Division of the Federal Court introduced a principle that no longer permitted the freedom of the press to be pleaded as a justification in cases of defamation by the press under the new Swiss Penal Code. This new principle, limited to the criminal law and contested by academic lawyers and the press, significantly soon resulted in a revision of the law by which the principle of justification based upon the freedom of the press was incorporated into the revised text of Art. 173 of the Swiss Penal Code. The original second paragraph of Art. 173, under which the unlawfulness of a defamatory report could only be refuted if the report could be proved true, was altered as follows: "If the accused proves that the statement made or propagated by him, corresponds to the truth, *or that he had serious reasons to believe it, in all good faith, to be true*, he has not committed an offence."

In the field of civil law, Arts. 28 CC 14 and 49 OR 14, which protect the personality of the individual, i.e. grant certain rights of action to the person whose personal rights have been infringed, set certain limits to the freedom of the press. The press may not injure the personality of the individual. According to the jurisprudence of the civil law division of the Federal Court, Arts. 28 CC and 49 OR are consistent with the freedom of the press and incorporate the spirit of the principle of the freedom of the press, that is to say, one can and must interpret these provisions in such a way that they do not impinge on the freedom of the press as it

has been formulated in the jurisprudence of the public law chamber. When deciding whether the personal rights of an individual have been seriously infringed, it must be determined whether the accused has acted in fulfilment of the special responsibilities of the press. If this is the case, his action may be justified to the extent that the conditions laid down in the jurisprudence of the public law division have been fulfilled, i.e., to the extent that the defamatory report was based on a careful investigation of the subject and was made in good faith.

(d) Freedom of Expression and Assembly

A theory of Swiss legal thought according to which the freedom of the press can be considered as a guarantee of freedom of expression in a wider sense is not shared by the Federal Court. The latter has, on the contrary, adopted the view that the Federal Constitution contains no guarantee of general freedom of expression (FCD 55/I/226). Neither does the Federal Constitution provide a guarantee of freedom of assembly. The Federal Court has so far left open the question as to whether this is included in freedom of association. However, both freedom of expression and freedom of assembly are guaranteed in a large number of cantonal constitutions.

In the field of freedom of expression, lectures, training courses and so on have been prohibited, namely by cantonal governments. (Such prohibitions can also be characterized as infringements of the freedom of assembly, which in the first place guarantees free expression of opinion in the form of assemblies). The line drawn between constitutional and unconstitutional interventions is clearly illustrated by the comparison between two decisions given by the Federal Court on two public law complaints brought by the former secretary of the Communist party, Jules Humbert-Droz.

By an order of November 13, 1931, the Government of the canton of Neuchâtel prohibited the holding, on its territory, of public meetings called by Humbert-Droz or at which he was to speak, because, in two speeches he had made shortly before, Humbert-Droz had called for revolutionary action and stressed that the methods used in Russia should be taken as an example by the Swiss proletariat. According to the police report, Humbert-Droz declared that the time when factory workers would carry rifles and bayonets was no longer far off. The revolution could not be achieved without blood-shed. The Federal Court accepted the public-law complaint brought by Humbert-Droz against the prohibition of assembly issued by the Neuchâtel authorities, and annulled the prohibition. The following were among the reasons stated (FCD 58/I/43):

It is undoubtedly inconsistent with current principles of law to modify the existing structure of the State by any except constitutional means. It is

equally certain that under the prevailing principles of Swiss public law, propaganda may be made for any doctrine by word of mouth and in writing provided that propaganda does not degenerate into unlawful acts ... One cannot therefore oppose Communist propaganda if it remains within the scope of the exposé of a doctrine and is aimed at the enrolment of new members without directly inciting them to acts of violence. The indignation aroused in the non-communist audience listening to the doctrine and maxims of the complainant are fully understandable, but the principles of freedom that at present prevail in the Swiss democracy, render it the duty of citizens, (subject to Arts. 56 of the Federal Constitution, 78 of the Civil Code and 11 of the Constitution of the Canton of Neuchâtel) to tolerate the expression of theories in opposition to the existing order.

On April 9, 1935 the government of the Canton of Vaud prohibited the holding of "Marxist courses" in its canton. This prohibition was upheld by the Federal Court. The subject of these courses would have been the preparation of the revolution within the army, and more particularly, the tactics to be used for the achievement of this aim (formation of cells, excitement of dissatisfaction and of a state of mind hostile to military discipline on the part of the soldiers, disorganization). In relation to the facts the Federal Court found (FCD 61I267):

One is faced with a movement aimed at undermining and disrupting the army. Discipline, which is the basis of military organization, is to be undermined. When faced with the task of re-establishing order in the country or protecting the country from a foreign invader, the army is to disobey orders at a critical time and thus to become an instrument of the revolution. This is a tactic of concealment and treason. The mask of the disciplined, zealous, trustworthy soldier, conceals an enemy, a saboteur, a traitor.

The legal grounds put forward by the Federal Court included (p. 269 f.):

The military order is an essential part of the national public order. It is obvious that to undermine the discipline of the army constitutes an immediate threat to this important institution of the State and, consequently to the State itself. The fact that Humbert-Droz, in his lectures, advocated the disruption of the army, justifies the intervention of the Council of State under Art. 8 of the Constitution of the canton of Vaud which permits the prohibition of assemblies if their object and method are inconsistent with public order. ... When considering the legality of the prohibition it is important to note that the present case does not relate to a simple exposé of Communist doctrine but to the incitement of the Communist soldiers in the army to immediate forbidden conduct. ...

(e) Freedom of Association

Art. 56 FC guarantees the right of formation of associations, the objects of which, and the methods by which they are carried

out, are not unlawful or dangerous to the State. Associations that are unlawful or dangerous to the State can, therefore, be prohibited without infringing the Federal Constitution. The criterion of unlawfulness contained in the Federal Constitution is a reference to the rest of the law, i.e. all the Federal and cantonal laws applicable at a given time, though these must be checked to ensure that all their provisions are consistent with other constitutional provisions. An association, the articles or activity of which are contrary to an unconstitutional provision of cantonal law, is not considered unlawful under Art. 56 FC. In contradistinction to the other basic rights, it can be said that freedom of association is only guaranteed to the extent that the law provides.

In the 1930's the Federal Court was called upon to consider the admissibility of the prohibition of political parties. During that period the cantons of Geneva, Neuchâtel and Vaud prohibited by means of ordinary legislation, i.e. by laws passed by the people, the Communist and revolutionary organizations existing on their territory. By its decision of December 3, 1937, the Federal Court upheld the constitutional character of the Neuchâtel law of February 23, 1937 "prohibiting communist or subversive organisations" and gave its opinion on the elements constituting the criterion of danger to the state. It found that the Communist Party constituted a danger to the State for two reasons. Firstly, it recalled the already established tactics and techniques of the Communist Party aimed at disrupting the army:

The disruption of the institution intended to guarantee internal security with a view to overthrowing the legal order by revolution is not just a remote and purely ideological aim of the Communist party.

The Court then stressed the complete dependence of the Communist party on the organs of the Communist International, in particular on its executive committee, on which no member of the Swiss Party had sat since 1935:

The almost complete lack of independence renders the Swiss Communist party particularly dangerous to the State. This threat is increased by the close, if not completely elucidated, relationship between the International and a foreign power. Foreign interests threaten to endanger the external security and neutrality of Switzerland. Such a threat exists as soon as a party organised in Switzerland is subjected to a foreign party or State by a binding duty of obedience.

The Federal Court pointed out that the threat to the State constituted by an association must be a genuine one if its prohibition is to be justified; it also added that the effectiveness of a threat could vary according to the place, time and public mood. "In periods and communities of heightened economic crisis, of particularly high

unemployment and when part of the population is suffering under difficult living conditions, it is easier for subversive propaganda to attract supporters ready to consider the violent overthrow of the existing order. Possibilities of this nature require an increased wakefulness on the part of the State. In such cases, it is the cantonal authorities who are judges of the situation. It is not for the Federal Court to voice an opinion."

(f) Political Rights

As explained above (cf, IIIb), the rights protected by the constitutional judge include the exercise of political rights that are so important in a direct democracy (Art. 85 lit. aGG). This is not the place to cite examples of decisions on ordinary complaints relating to elections and referenda. Decisions relating to the nature and working of, for example, the popular initiation of laws, are of greater interest, as the so-called people's right to initiate legislation is a particularly characteristic institution of direct democracy in the Swiss cantons.

In a decision of March 31, 1965 (FCD 91/I/189) the Federal Court had to deal with the question as to whether the Great Council (Parliament) had the right to oppose a counter-draft of its own to a draft law introduced on the initiative of enfranchised citizens, if the cantonal constitution did not expressly accord it such a right.

Under Art. 9 of the Constitution of the Canton of Berne, 12,000 voters may present a request for the passing, repeal or amendment of a law, or the annulment or revision of an implementing decree, of the Great Council. On May 24, 1964 a popular request with 19, 201 signatures was addressed to the chancery of the Canton of Berne requesting that Art. 8 para. 1 on family allowances of March 5, 1961 be amended as follows:

A child's allowance is at least Fr. 30.— per month for every child that has not completed its 16th year. This age limit is increased to 20 years for children who, due to sickness or infirmity, are prevented from earning their living. It is increased to 25 years for children undergoing professional training or higher education. During the period of professional training or higher education the allowance is Fr. 50.— per month.

The Great Council decided to oppose the following draft to the people's draft:

A child's allowance is at least Fr. 25.— per month for every child who has not completed its 16th year. This age limit is increased to 20 years, if, and as long as, the child is still studying or is substantially prevented by sickness or infirmity from earning a living.

Two signatories of the draft law introduced by popular initiative brought a public law complaint requesting that the counter draft of the Great Council should not be put to the vote. Their main arguments in support of their application were as follows: If an alternative draft is put to the vote at the same time as the revision requested by popular initiative, this will result in a splitting of the vote. The prospect of the draft law introduced by popular initiative being accepted in the referendum is reduced and this constitutes an infringement of the people's right to initiate legislation. The Federal Court dismissed this complaint. In its judgment it explained the principle underlying the popular initiation of laws and its position in the system of popular legislation as follows:

According to Art. 2 of the cantonal constitution, the powers of the State are vested in the people as a whole; they are "exercised directly through enfranchised citizens and indirectly through the authorities and officials". Under the second and third parts of the cantonal constitution, enfranchised citizens exercise the legislative power in collaboration with the Great Council; elements of both direct and indirect democracy therefore play a role in legislative proceedings. The introductory stages of legislative proceedings (the proposal to initiate legislative action, the decision to do so and the drawing up of the draft) are generally incumbent on the Great Council, while the subsequent approval of the draft law by compulsory referendum is always incumbent on the voting population. The popular initiative allows enfranchised citizens to take part in the initiation of the legislative process . . . 12,000 enfranchised citizens may avail themselves of the right to introduce a draft law. A draft introduced by popular initiative is not, therefore, necessarily supported by the whole of the voting population, but only by a part of it and sometimes by only a small minority. If the initiation of the process is not to be left in the hands of a part of the voting population only, but, as required in Art. 2 of the cantonal constitution, is to be in the hands of all the voters, the Great Council in its capacity of representative of the whole of the voting population must play its part. The power to draw up its own draft law is incorporated in this principle.

It is true that the drawing up of an alternative draft by the Great Council lessens the chance of a draft introduced by popular initiative being approved by popular vote. However, this is only the result of the greater freedom of decision accorded to the voting population, which permits it to express more varied shades of opinion in the referendum. If a draft introduced by popular initiative is put to the vote alone, the voters have to choose between passing or rejecting it. The counter draft of the Great Council offers voters a third solution. If this third solution were banned in the interests of the possible success of the draft introduced by popular initiative, the result would be a limitation of the referendum, which is inconsistent with the object of the popular initiation of laws. There is also a wider outlook to consider. As experience has shown, the comprehensive investigation and handling of the affair by the executive authorities and the Great Council often result in a parliamentary counter-draft that is more in keeping with the objects of the initiators than the draft proposed by them itself. For this reason the latter is not infrequently set aside in favour of the counter-draft of the Great Council.

Thus the counter-draft contributes to the fulfilment of the fundamental objective of the popular initiation of laws, i.e., a constant evolution of the law.

One of the most interesting decisions of the Federal Court of recent years concerns the exercise of the popular initiation of laws and at the same time the guarantee of the right of property. This decision was given in the *Dafflon v. the Great Council of the Canton of Geneva* case on November 14, 1962 (FCD 88/1/248).

In 1961 the Communist part of the Canton of Geneva launched a popular initiative proposing a law to promote the construction of cheap housing. Under the text proposed by the initiators, the State (Canton) was entitled to acquire land that was to become part of the development area as a result of an alteration in the area plan, by exercising a legal option to purchase or by compulsory purchase. The land thus acquired was to be used by the State or the local authorities for the construction of cheap housing. It could be assigned to building co-operatives or public law foundations for the same purpose. The Great Council of the Canton of Geneva decided not to follow up the initiative, i.e. not to submit it to a referendum, on the grounds that it was unconstitutional. It based this decision on the opinion of several eminent teachers of public law who considered that the proposed text infringed both the guarantee of the right of property and the principle of the prevailing authority of the federal law and was also inconsistent with the autonomy of the local authorities.

The Federal Court upheld the public law complaint brought against the Great Council's decision not to act. It agreed with the decision of the Great Council not to act if a draft law introduced by popular initiative was unconstitutional, but did not agree that the initiative in question was unconstitutional. It considered, more particularly, that the draft law in question did not infringe the guarantee of the right of property, as it was in the public interest to erect cheap housing. In the light of its former jurisprudence, the Federal Court undoubtedly extended the definition of public interest in this judgment. The following reasons are worth noting:

If the Court has continued to extend the definition of public interest in order to adapt it to the new duties of the State it has always – at least implicitly – required that public interest should be directly involved and that it should provide itself sufficient grounds to justify an infringement of the right of property. Accordingly, the Federal Court has satisfied itself in many judgments that the undertaking in respect of which compulsory purchase was applied for was, taken as a whole, in the public interest. It has, however, never required that the undertaking should serve public interest exclusively. On the contrary, it has often found compulsory purchases that also served private interests constitutional, on condition, however, that no obvious incongruity existed between the private interests actually followed and the public interest alleged.

From the standpoint of the public interest, the draft law contested differs from other cases usually brought before the Federal Court in two respects. To the extent that it is aimed at providing people who would otherwise be on the street with a roof over their heads, it can be considered a purely administrative proceeding. It also constitutes, however, a general measure of social and economic policy. For this reason it is of greater significance than other public actions that, according to past decisions, fulfill the requirement of public interest. Of the fact that the present draft affects public interest there is no doubt. In its decision of September 19, 1962, in *Geneva Chamber of Real Property v. the Government of the Canton of Geneva*, the Federal Court found that the housing problem was a problem of public interest. The whole community is interested in the problem particularly when it concerns the construction of cheap housing. Materially speaking, the construction of such housing contributes to social peace and helps to check the rise in the cost of living.

Nonetheless, in the present case the public interest is mainly indirectly affected. The efforts of the Canton in favour of the construction of cheap housing benefit, in the first place, the private interest of those persons who will have the opportunity to live in it. Nevertheless, the public interest involved is important enough – in spite of this situation – to justify compulsory purchase.

As result of the upholding of the complaint the text drafted by the initiators was put to the vote at the same time as a counter-draft of the Great Council of the Canton of Geneva. The voters rejected both the draft introduced by popular initiative and the parliamentary counter-draft.

* * *

Swiss jurists consider the public law complaint the most valuable instrument the Swiss legal order possesses for the protection of the rule of law. Jurists are therefore jealous to ensure that its effectiveness remains unimpaired. This attitude was impressively demonstrated at the Swiss Jurists' Congress in 1962. In 1960 and 1961 about one-third of the complaints brought were dismissed by means of a nonsuit. As this was considered disquieting, the committee of the Swiss Jurists' Association made the public law complaint the main subject of the proceedings of the Swiss Jurists' Congress in 1962. A formalization of procedure through a series of judgments was diagnosed, certain consequences of this formalization were regretted, and the increasing need for legal protection in the field of disputes relating to basic rights was stressed. The criticism of the jurisprudence of the Federal Court did not, however, deny that the public law complaint was still – in the words of the eminent public lawyer Giacometti – a “splendid, original and unique institution of the liberal federal democracy”.

DIGEST OF JUDICIAL DECISIONS

by

SUPERIOR COURTS OF DIFFERENT COUNTRIES

on

ASPECTS OF THE RULE OF LAW

Compiled and Annotated

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INDEX

ADMINISTRATIVE INQUIRIES AND ORDERS

Duty of inquiring officer to comply with rules of natural justice

Mohammad Mohsin Siddiqi v. Government of West Pakistan
(Supreme Court of Pakistan) 129

Vasudevan Pillai and Another v. City Council of Singapore
(Federal Court of Malaysia) 130

Scope of Minister's Power of Review

Paolo Violo v. the Superintendent of Immigration and the Minister of Citizenship and Immigration
(Supreme Court of Canada) 132

Statement of Reasons for Administrative Decision

Case of Saiko Saibansho Minji Hanrei-shu
(Supreme Court of Japan) 133

CITIZENSHIP

Deprivation of Citizenship

Lim Lian Geok v. Minister of the Interior
(The Judicial Committee of the Privy Council)
(On appeal from the Court of Appeal of Malaya) 134

Right to establish Claim to Citizenship

Lim v. de La Rosa
(Supreme Court of the Philippines) 135

FUNDAMENTAL RIGHTS AND FREEDOMS

Equality of Opportunity

Marfaing v. Minister of Finance
(Conseil d'Etat, France) 136

Equality of Sexes

Bombay Labour Union v. Franchises (Private) Ltd.
(Supreme Court of India) 137

Freedom of Association

Abdul A'la Maududi v. Government of West Pakistan
(Supreme Court of Pakistan) 138

Freedom of Expression

The Queen v. the Associated Press of Nigeria Ltd.
(Federal Supreme Court of Nigeria) 139

Dr. Chike Obi v. the Director of Public Prosecutions
(Federal Supreme Court of Nigeria) 140

Freedom of Movement

Minister of the Interior v. Madame Vicini
(Conseil d'Etat, France) 142

Williams v. Majedodunmi
(Federal Supreme Court of Nigeria) 143

Fundamental Rights during Emergency

Beckles v. Dellamore
(Court of Appeal of Trinidad and Tobago) 144

Sadanandan v. The State of Kerala
(Supreme Court of India) 146

State of Bihar v. Rambalak Singh
(Supreme Court of India) 147

State of Maharashtra v. Sangzivi
(Supreme Court of India) 149

Rights of an Employee

Salem Erode Electricity Distribution Co.
v. the Workmen
(Supreme Court of India) 150

Right to Life and Security of Person

Decision of the First Senate, of June 30, 1965
(Constitutional Court of Germany) 151

Right to choose one's Occupation

Case of Kei-Shu
(Supreme Court of Japan) 152

Right to Vote

Harman v. Forssenius
(Supreme Court of the United States) 153

JUDICIARY AND COURTS**Independence of the Judiciary**

- The Attorney-General of Ceylon v. Liyanage and Others*
(The Judicial Committee of the Privy Council)
(On appeal from the Supreme Court of Ceylon) 154

OFFENCES AGAINST THE STATE**Distinction between offending Nation and Regime**

- Attorney-General v. R. M. José*
(Supreme Court of Spain) 157

TRIAL (AND INVESTIGATION)**Right to appear in Person**

- Williams v. Majedodunmi*
(Federal Supreme Court of Nigeria) 158

Right to Counsel – Incriminating Statements made in his Absence

- People v. Friedlander*
(Court of Appeals of New York) 158

Right to Fair Trial

- Estes v. Texas*
(Supreme Court of the United States of America) 159

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Supreme Court of Pakistan**DUTY OF INQUIRING OFFICER TO COMPLY WITH RULES
OF NATURAL JUSTICE****MOHAMMAD MOHSIN SIDDIQUI v. GOVERNMENT
OF WEST PAKISTAN**

(P.L.D. 1964 S.C. 64)

Article 177 of the Constitution of Pakistan (1962) provides that a civil servant shall not be dismissed, removed or reduced in rank without being given a reasonable opportunity of showing cause against the action proposed – departmental enquiries should be conducted in accordance with the principles of natural justice – superior courts will not tolerate conditions in which officials who are the complainants act as prosecutors, judges and punishing authorities as well.

Before Cornelius C. J., Kaikaus and Hamoodur Rehman JJ.

Article 177 (1) (b) of the Constitution of Pakistan (1962) reads as follows: Subject to this Constitution, a person who is a member of an all-Pakistan Service or of a civil service of the Centre or of a Province, or who holds a civil post in connection with the affairs of the Centre or of a Province – subject to clause (2) of this Article, shall not be dismissed or removed from service, or be reduced in rank, unless he has been given a reasonable opportunity of showing cause against the action proposed to be taken with respect to him.

In dealing with the procedure followed at a departmental enquiry purported to have been conducted in terms of the above Article, Cornelius C. J. made the following observation: "The whole proceeding in a departmental enquiry is required by the Rules to be conducted in accordance with the principles of natural justice. The superior courts will not tolerate, and certainly not within the frame-work of the judicial administration itself, conditions in which officials can be made prosecutors, judges and punishing authorities when they themselves are the complainants, merely on the ground that the power of removal is vested in them as appointing authorities under the Rules (pp. 67-68)."

Federal Court of Malaysia

**DUTY OF INQUIRING OFFICER TO COMPLY WITH RULES
OF NATURAL JUSTICE****VASUDEVAN PILLAI AND ANOTHER v. CITY COUNCIL
OF SINGAPORE**

(Federal Court of Civil Appeal, Singapore, No. 90 of 1963
and (1965) 2 Malayan Law Journal, pp. 51-55)

Departmental enquiry - failure of enquiring officer to comply with rules of natural justice - appeal to departmental sub-committee having the right of review - where quasi-judicial tribunal has failed to observe the rules of natural justice, such failure cannot be cured by the fact that the appellate tribunal had observed all such rules in the conduct of its proceedings.

Before Thomson (Lord President), Barakbah C. J. (Malaya) and Wee Chong Jin C. J. (Singapore).

Heard on February 22, 1965.

The appellants were employees of the City Council of Singapore. They were both dismissed from employment on May 27, 1957 following upon an enquiry purported to have been held by the deputy electrical engineer of the Council. This enquiry was required to be held according to certain regulations formulated by the Council. However, the deputy electrical engineer had neither complied with the relevant regulations nor followed the principles of natural justice in conducting his enquiry. The appellants exercised their right of appeal against the order of dismissal to the sub-committee of the establishments committee which duly enquired into their appeals and dismissed them. The appellants thereupon filed an action claiming a declaration that their dismissal from the employment of the City Council of Singapore was wrongful.

The trial judge found on the facts that the City Council was justified in dismissing the appellants as they had refused to obey lawful orders. He also found that the officer who conducted the inquiry relating to the appellants had not complied with the rules of natural justice, but that this failure had been cured by proceedings before the sub-committee of the establishments committee.

The appellants appealed to the Federal Court against the judgment of the trial judge. As the appellants had chosen to bring the action before the courts to contest the issues as to whether they were entitled to refuse to perform certain work which they were instructed to perform and as to whether such refusal entitled the respondents to summarily dismiss them under their terms of employment, and as these issues were answered against the appellants, the appeal was dismissed.

However, Wee Chong Jin, the Chief Justice of Singapore, while examining in the course of his judgment the principles which should govern departmental enquiries and the circumstances, if any, under which errors,

omissions and irregularities in such enquiries can be cured, made the following observations:

It is clear on the evidence that the respondents in dismissing the appellants purported to act under these regulations. It is conceded by counsel for the respondents that the trial judge was correct in his view that in conducting the enquiry the enquiring officer had not acted in accordance with the rules of natural justice. The question remains: was the trial judge right in his view that when the appellants exercised their right of appeal under the regulations the fact that at the appeal they were represented by counsel and allowed to recall and cross-examine all the witnesses who made statements at the enquiry had cured the failure to comply with the rules of natural justice at the enquiry.

It seems to me on principle that where a quasi-judicial tribunal has failed to observe the rules of natural justice, such failure cannot be cured by the fact that on an appeal, the appellate tribunal has so conducted its proceedings as to observe all the rules of natural justice.

If authority is needed, it can be found in the case of *Annamunthodo v. Oilfields Workers' Trade Union*. In that case the appellant was a member of the respondent union and had been notified to appear before the general council of the union to answer four charges of offences against the rules of the union. He attended and denied the charges. The hearing was then adjourned for one week but he failed to appear at the adjourned hearing. The next day he was informed by the general secretary that he had been convicted on all four charges and that the general council had as a result seen fit to expel him. He thereupon appealed to the annual conference of delegates, as provided for under the rules, but they upheld his expulsion. He then sought relief in the courts. None of the four charges against him entitled the general council to expel him and in expelling him the general council invoked a rule, a breach of which he had not been charged with. This rule created a separate and distinct offence but even if it did not it was held that it should not have been invoked without giving him notice of it and a fair opportunity of meeting it. It was also held that he had not lost his right to complain of this failure to observe the rules of natural justice by appeal to the annual conference of delegates. On this point Lord Denning who delivered the judgement said:

It was, therefore, quite proper for him to appeal to the annual conference before coming to the courts, even though he was not bound to do so. But, having appealed and failed, he does not by so doing forfeit his right to redress in the courts. If the original order was invalid, for want of observance of the rules of natural justice, he can still complain of it, notwithstanding his appeal.

Editor's Note:

The case of *Annamunthodo v. Oilfields Workers' Trade Union* is reported in (1961) 3. All England Reports page 621. The observations of Lord Denning, referred to in the judgment of the Chief Justice of Singapore appear at page 625.

Supreme Court of Canada

SCOPE OF MINISTER'S POWER OF REVIEW

PAOLO VIOLÒ v. THE SUPERINTENDENT OF IMMIGRATION AND
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

(1965 Canada Law Reports p. 232)

Minister in exercise of his power of review defers two deportation orders for specified periods, provided no unfavourable reports were received in the meantime against the two persons concerned – at the end of the periods a further study of the cases was to be made – no unfavourable reports received during those periods – long after the periods had elapsed the persons concerned were arrested on warrant – they were informed that the deportation orders would be implemented – Minister could not, after the expiration of the stipulated periods of probation, hold orders in suspense and require enforcement at any time he pleased – decision granting probationary periods final in terms of Section 31 (4) of the Immigration Act – no power to make further review or to extend probationary periods for an additional time.

Before Cartwright, Fauxteux, Martland, Ritchie, Hall and Spence JJ., Taschereau (Chief Justice) Abbott and Hudson, JJ., dissenting.

The appellants, two brothers R and G, were admitted to Canada as

immigrants. After conviction of an offence under the Criminal Code – with the result that under Section 19 (1) (e) (ii) of the Immigration Act, 1952, they were liable for deportation – they were ordered to be deported as provided for by Section 19 (2) of the Act. Their appeal to the Immigration Appeal Board was dismissed, but on the Minister (the second defendant) reviewing the decision of the Board in accordance with Section 31 (4) of the Act, he informed each of the brothers that the deportation order was deferred, in the case of R for 12 months, in the case of G for 6 months, provided that no unfavourable report was received during those periods, at the end which a further study of their cases would be made.

Three years later in the case of R, and 18 months later in the case of G, they were arrested and detained pursuant to a warrant of arrest signed by the Minister of Citizenship and Immigration; and both were informed by letter that their cases had been reviewed and the deportation orders were to be implemented. Neither had any notice of the time or place of the review. They applied for writs of habeas corpus and certiorari. The application was refused by the trial judge and the Court or Appeal.

On Appeal, the Supreme Court held that after expiration of the stipulated periods of probation, the Minister could not hold the detention orders in suspense and require their enforcement at any time he chose at his discretion. Having exercised his power of review and decided to grant a probationary period, that decision was by the terms of Section 31 (4) of the Immigration Act final. He thereafter had no power to make a further review or extend the probationary period for an additional time. In the absence of anything during the probationary period which would have justified it, he did not thereafter have statutory authority to enforce the deportation orders.

Supreme Court of Japan

**STATEMENT OF REASONS FOR ADMINISTRATIVE
DECISION**

CASE OF SAIKO SAIBANSHO MINJI HANREI-SHU

(Supreme Court Reports, Civil, Vol. 17, No. 4, p. 617)

The law often requires that a statement of reasons be attached to an administrative decision – any kind of statement of reasons would not satisfy this requirement – the statement must be sufficient in the eyes of the law – courts can annul administrative decisions on the ground that the statement of reasons was insufficient.

Decided by the Second Minor Bench on May 31, 1963.

It is often a requirement of the law that when an Executive Officer, having the power to do so, makes an administrative decision, he should attach to it a statement of his reasons for arriving at his conclusion. There had been differing views expressed by the lower courts in Japan as to the extent to which such a statement of reasons should be detailed and as to what should be done in the case of decisions which are not supported by an adequate statement of reasons. The decision of the Supreme Court in this case is important, in that it was the first time that the Supreme Court of Japan annulled an administrative decision on the ground that the statement of reasons was insufficient in the eyes of the law.

The Judicial Committee of the Privy Council
(on Appeal from the Court of Appeal of Malaya)

DEPRIVATION OF CITIZENSHIP

LIM LIAN GEOK v. MINISTER OF THE INTERIOR

(1964 – 30 Malayan Law Journal, 158 – Privy Council)

Provision in Constitution that a registered or naturalised citizen could be deprived of his citizenship if Federal Government was satisfied that he was disloyal or disaffected towards the Federation – citizen concerned should have reasonable and proper opportunity to deal with the grounds on which a deprivation order is proposed – he should have such reasonable information as he may seek in regard to the case against him – inquiry not properly held where he is denied such particulars as he might need or might reasonably request to protect his interests.

Before Lords Cohen, Evershed, Hodson, Donovan and Morris of Borth-Y-Gest.

Article 25 (1) (a) of the Constitution of the Federation of Malaya provided that a registered or naturalized citizen could be deprived of his citizenship if the Federal Government was satisfied “that he has shown himself by act or speech to be disloyal or disaffected towards the Federation”.

The appellant was informed by Notice that the Government proposed to deprive him of his citizenship under this Article and informed of his right to have his case heard by a Committee of Inquiry.

The appellant did not refer his case to the Committee of Inquiry but chose instead to challenge the validity of the Notice by way of legal proceedings. The High Court held the Notice to be valid. From this decision he appealed to the Court of Appeal which dismissed the appeal. He then appealed to the Privy Council which also dismissed his appeal.

The arguments raised in the case and the grounds on which the appeal was dismissed are not of importance and are therefore not summarized here, but it is important to note that the Privy Council, while dismissing the appeal, made the following observations which uphold the citizen's right not to be deprived of his citizenship without being given every opportunity to show cause against such deprivation:

“This (i.e. the holding of the Committee of Inquiry) involves that the citizen concerned is to have every reasonable and proper opportunity to deal with the ‘ground’ (or ‘grounds’) on which a deprivation order is proposed. This in turn involves that he must have such reasonable information as he may seek to have in regard to the case against him so as to enable him to deal with it or to answer it or to make such representations in regard to it as he wished. There would not be a proper inquiry if the citizen concerned was denied such particulars as he might need to have or as he might reasonably request in order to be able to protect his own interests.”

Supreme Court of the Philippines

RIGHT TO ESTABLISH CLAIM TO CITIZENSHIP

LIM v. DE LA ROSA

(G.R. No. L-17790)

Person claiming to be a citizen of the country cannot be compelled to register as an alien by administrative officers of the government - he should be given a reasonable opportunity to establish his claim - where such opportunity is not afforded, injunction lies to prevent the officers concerned from compelling such registration.

Decided on March 31, 1964

The petitioners, who are husband and wife, claiming to be citizens of the Philippines, filed a petition in the Court of First Instance to enjoin respondents, Assistant Commissioner of Immigration and Alien Control Officer, from requiring or compelling them to register as aliens. Relying on opinions of the Secretary of Justice, respondents argued that petitioners were not citizens of the Philippines. After hearing, the trial court rendered judgment holding that petitioners "are Filipino citizens either by reason of the husband's illegitimacy, or, granting that his parents were legally married, by his mother's reversion to Philippine citizenship when his father died," and enjoining permanently the respondents from requiring the petitioners to register as aliens. Respondents appealed, and assigned as error among others, the propriety of the lower court's determining petitioners' citizenship in the petition appealed from.

Affirming the judgment of the lower court, the Supreme Court observed:

What would be the remedy of a citizen or an inhabitant of the country claiming to be a citizen thereof, who is being required or compelled to register as an alien by administrative officers of the Government, who, relying upon rulings or opinions of superior administrative officers, are in turn complying with their duty? If the person claiming to be a citizen of the country who is being required or compelled to register as alien, can show, establish, or prove that he is such citizen, the remedy of injunction to prevent the officers from requiring or compelling him to register as alien is certainly the proper and adequate remedy to protect his right.

Conseil d'Etat, France

EQUALITY OF OPPORTUNITY**MARFAING C/ MINISTER OF FINANCE**

(Judgment No. 56.939 of 1965)

Right of every official to the same opportunities – promotion by competitive test – no restriction may be imposed on that right – assessment of the merits of a candidate a matter within the sole competence of the examiners – departmental superiors of the candidate cannot usurp this power – irregular refusal to permit an official to take the test vitiates the results and nullifies the test.

Decided on October 8, 1965.

One Marfaing, a customs inspector, wished to present himself for a test held by his department for selecting inspectors for a higher grade. It happened to be the last of a series of tests for that period specially fixed for the benefit of those candidates who were prevented from presenting themselves at one of the earlier tests for good reason. A ministerial order of January 28, 1950 prescribed the nature of the test, and laid down the conditions for the admission of candidates. Marfaing's department refused to admit him to the test on the ground that he did not satisfy the required conditions. Marfaing, who alleged that the decision to exclude him was arbitrary, petitioned the Administrative Tribunal of Paris for a declaration that he had been wrongly refused entry to the test and asked that the ministerial order announcing the results be nullified. His petition was dismissed but he succeeded on appeal before the Conseil d'Etat.

There were two grounds on which the Administration had refused him entry to the test. The first was that it was a special test meant for officials who had been prevented for good reasons from presenting themselves at one of the earlier tests and that Marfaing had not been able to give any reasonable excuse for not having presented himself at an earlier test as required by the ministerial order of 28 January, 1950 fixing the conditions for admission. Besides, another ministerial order had specified that that test was reserved for officials who worked well. Secondly, the Administration considered that the petitioner was incapable of fulfilling the functions of an inspector of the higher grade, his inaptitude having manifested itself in the discharge of his functions.

On the first point, the Conseil d'Etat held that all officials should have equal access to the examination and promotion should be based strictly on the performance of the official concerned at the test. The Conseil d'Etat also observed that a ministerial order could not impose restrictions on admission to tests, as all statutory regulations applicable to officials could only be made by a decree of the Conseil d'Etat and not by mere ministerial order. On the second point, the Conseil d'Etat took the view that when his superior formed the view that Marfaing did not have the aptitude to exercise the functions of an officer in the grade to which he sought promotion, he was making a decision which the examiners alone were competent to make.

Holding that the grounds given for refusing to admit Marfaing to the test did not legally justify the refusal and holding further that his improper exclusion was a fact which should vitiate the whole test, the Conseil d'Etat set aside the judgment of the Administrative Tribunal of Paris and declared invalid the results of the test which had been announced under the ministerial order.

Supreme Court of India

EQUALITY OF SEXES

BOMBAY LABOUR UNION v. FRANCHISES (PRIVATE) LTD.

Indian Constitution guarantees equality of sexes - service conditions under which unmarried women must resign their jobs on getting married violate this provision of the Constitution - this condition should be abrogated in the interests of social justice - exceptions to the general rule could be permitted only for good and convincing reasons.

Judgment of Mr. Justice Wanchoo.
Delivered on November 3, 1965.

Article 15 (1) of the Indian Constitution states:

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

The appellant, the Bombay Labour Union, representing the women employees of the respondent, Messrs. Franchises (Private) Ltd., raised a demand for the deletion of a service condition of the company which barred married women from continuing in employment.

The rule provided that women working in a particular department of the concern should resign on marriage. This rule was defended by the respondent whose stand was upheld by the Industrial Tribunal, Marashtra.

In the appeal it was urged by the respondent that other pharmaceutical concerns in the region had a similar service condition. The department to which the rule applied required work to be done in a team and there was a considerable degree of absenteeism among married women, thus dislocating the whole team.

The Court observed that it was not impressed by the reasons given for retaining a rule of this kind. The only difference in the matter of absenteeism that could be seen was in the matter of maternity leave. But such absence could be easily provided for by having a few extra women as leave reserves. This could hardly be a ground for such a drastic rule which required women to resign on marriage. The appeal was, therefore, allowed.

Mr. Justice Wanchoo made the following further observations:

It is the married working woman's intermittent preoccupation with the home that is at the root of the belief that employment and marriage are mutually exclusive. It is a pity that this is being made out to be a conflict between

basic human rights, the right of the child to the mother and the right of the woman to work. In reality, it is only a question of reconciling certain basic facts.

The married woman who works because of necessity or because she has a strong sense of social purpose or a desire to participate in the economic activity of the nation must be considered as making two kinds of contribution to society and to the nation. One directly in the sense of productive work done in an office or factory or laboratory or school room and the other indirectly and without payment to society as a mother. The latter must, of course, remain the first charge upon a woman; if withheld, it would make society extinct!

But just because motherhood is taken for granted as the natural function of woman and because from it she often derives the deepest psychological satisfaction, it does not make it any less "labour", and I am not speaking biologically, it is "labour" even in terms of manhours of work.

Women themselves have accepted both these roles gladly. They have only to be helped to harmonize the two through the creation of certain facilities like nurseries, part-time employment opportunities, maternity leave benefits and re-orientation courses in certain careers.

For an employer to argue, as I understand employers are now arguing in mines, quarries, textile factories and other fields of employment, that male employment provides better economic returns, is like a parent arguing in India today that he has a right to have as many children as he can support. The present trend of thinking is – or should be – to look at these issues not from an individual but from a national point of view.

Editor's Note:

At the time of going to print, this and some other Indian judgments that follow had not yet been reported in Indian Law Journals or Reports. This explains the absence of any reference to local Reports. In view of the importance of these judgments they will no doubt be reported locally in due course.

Supreme Court of Pakistan

FREEDOM OF ASSOCIATION

ABDUL A'LA MAUDUDI v. GOVERNMENT OF WEST PAKISTAN

(P.L.D. 1964 S.C. pp. 672-792)

Criminal Law Amendment Act (XIV of 1908) confers naked arbitrary power on a provincial government acting ex parte to ban all activities of a political party – imposes unreasonable restrictions on right of association – violates Fundamental Right No. 7 (part II, Chapter I) of the Constitution of Pakistan (1962) and is therefore void.

Before Cornelius C. J., S. A. Rehman, Fazle Akbar, Kaikaus and Hamoodu Rehman JJ.

Majority judgment of Rehman, Fazle Akbar, Kaikaus and Hamoodu Rehman JJ, Cornelius C. J. dissenting.

Fundamental Right No. 7 embodied in the Constitution of Pakistan relates to Freedom of Association and runs thus:

Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of morality or public order.

The Criminal Law Amendment Act (XIV of 1908) purported to confer arbitrary power on a Provincial Government to ban a political party on an ex parte view of its activities. Any such decision of the Provincial Government was not subject to judicial review. In the above case the Supreme Court of Pakistan held that the Act in question was void as violating Fundamental Right No. 7 because it sought to impose unreasonable restrictions on the right to form associations.

Per S. A. Rehman J.: "The legislature in its wisdom has thought it fit to provide in this Act that no action should be taken unless the highest tribunal in the country has first delivered its verdict on the question raised. Judged in the light of this criterion, the 1908 Act confers a naked arbitrary power on a Provincial Government to put an end to all activities of a political party and thus to virtually kill it on an ex parte and one-sided view of its activities. This unguided discretion is subject to no check, judicial or otherwise, and has potentialities of becoming an engine of suppression and oppression of an opposition party, at the hands of an unscrupulous party in power (p. 734)."

Per Fazle-Akbar J.: "The provisions of the 1908 Act being penal in nature cannot possibly be regarded as reasonable restriction on fundamental right. It in effect destroys the right of association for an indefinite period without hearing or trial merely on the subjective satisfaction of the executive. Indeed such a law can in no constitution of the world reasonably be described as coming within that expression (p. 744)."

Per H. Rehman J.: "The basic principle underlying a declaration of fundamental rights in a constitution is that it must be capable of being enforced not only against the executive but also against the legislature by judicial process and this is the basic principle that has been incorporated into our Constitution by the combined effects of the new Article 6, paragraph (c) of cl. (2) of Article 98 and cl. (3) of Article 133 of the Constitution as amended by the Constitution (First Amendment) Act, 1964 (I of 1964) (pp. 783-784)."

Federal Supreme Court of Nigeria

FREEDOM OF EXPRESSION

THE QUEEN v. THE ASSOCIATED PRESS OF NIGERIA LTD.

((1961) 1 All N.L.R. 199)

Publishing false news likely to cause fear and alarm contrary to Sec. 59 (1) of the Criminal Code - Sec. 59 (1) is not invalidated by Section 25 of the Constitution - Section 25 of the Constitution relating to freedom of expression guarantees nothing but "ordered freedom" - it cannot be used as a licence to spread false news likely to cause fear and alarm to the public.

Before Ademola C. J., Brett, Mbanefo, Taylor and Bairamian LJJ.

Section 25 of the Constitution of the Federation of Nigeria, promulgated on 1st October 1963, guarantees freedom of expression in the following terms:

25. (1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.
- (2) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society –
- (a) In the interest of defence, public safety, public order, public morality or public health;
 - (b) for the purpose of protecting the rights, reputations and freedom of other persons, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating telephony, wireless broadcasting, television, or the exhibition of cinematograph films; or
 - (c) imposing restrictions upon persons holding office under the state, members of the armed forces of the Federation or members of a police force.

The Defendants were charged, *inter alia*, with publishing false news likely to cause fear and alarm, contrary to S. 59 (1) of the Criminal Code of Nigeria.

Held: S. 59 (1) of the Criminal Code is not invalidated by Section 25 of the Constitution.

In its judgment the Court observed as follows: "Suffice it to say that s. 24 (now s. 25) of the Constitution of the Federation relating to fundamental human rights guaranteed nothing but *ordered freedom*, and that the section of the Constitution cannot be used as a licence to spread false news likely to cause fear and alarm to the public."

Federal Supreme Court of Nigeria

Dr. CHIKE OBI v. THE DIRECTOR OF PUBLIC

PROSECUTIONS

((1961) 1. All N.L.R. 186))

Sections 50 and 51 of the Nigerian Criminal Code made printing, publishing or distributing seditious matter an offence – these Sections cannot however be interpreted as preventing fair criticism which was reasonably justifiable in a democratic society – person has a right to criticise, canvass and censure the acts of government so long as he keeps within the limits of fair criticism – clearly legitimate and constitutional to criticise by means of fair argument the government of the day – what is not permitted is to criticize the government in a malignant manner tending to affect the public peace.

Before Ademola CJ., Brett, Mbanefo, Taylor and Bairamian LJJ.

The Defendant distributed a pamphlet containing an attack on federal ministers, alleging that they were using their offices to fill their own pockets and were not interested in the well-being of the people. He was charged in the High Court of Lagos with sedition under Section 51 (1) (c) of the Nigerian Criminal Code, which reads:

Any person who. . . .

(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication shall be guilty of an offence.

Section 50 (2) provides, in so far as relevant, as follows:

A seditious intention is an intention

(a) to bring into hatred or contempt or to excite disaffection against the Government of Nigeria as by law established

(c) to raise discontent or disaffection among Her Majesty's subjects or the inhabitants of Nigeria.

But an act, speech or publication is not seditious by reason only that it intends:

(i) to show that Her Majesty has been misled or mistaken in any of her measures; or

(ii) to point out errors or defects in the Government or Constitution of Nigeria, or of any Region thereof, as by law established, or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(iii) to persuade Her Majesty's subjects or the inhabitants of Nigeria to attempt to procure by lawful means the alteration of any matter in Nigeria as by law established; or

(iv) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Nigeria.

Having regard to the Constitutional guarantee of freedom of expression contained in Article 25 (1) and (2) of the Nigerian Constitution, the High Court of Lagos referred for opinion to the Federal Supreme Court of Nigeria the question as to what constituted seditious intention and what amounted to seditious publication within the meaning of Section 52 (a) and 51 (c) of the Nigerian Criminal Code.

Held:

1. Sections 50 and 51 did not prevent fair criticism which was reasonably justifiable in a democratic society.

Per Ademola CJ.: "The effect of this definition in considering the section, to my mind, is that a person has a right to discuss any grievance or criticism, canvass and censure the acts of government, and their public policy. He may even do this with a view to effecting a change in the party in power or to call attention to the weakness of a government so long as he keeps

within the limits of fair criticism. It is clearly legitimate and constitutional by means of fair argument to criticise the government of the day. What is not permitted is to criticize the government in a malignant manner, for such attacks, by their nature, tend to affect the public peace."

2. On the question whether truth can be a defence, the truth of the matter published is a relevant consideration in deciding whether a person's only intention was as set out in the exceptions to Section 50 (2), but is not *per se* a defence.

3. On the argument that those acts can be prohibited under the Constitution which are directed to affect public order the Court observed:

"It was argued that a law is only valid if the acts prohibited are, in every case, likely to lead directly to disorder. It seems to me that this is taking too narrow a view of the provision, for it must be justifiable in a democratic society to take reasonable precautions to preserve public order, and this may involve the prohibition of acts which, if unchecked and unrestrained, might lead to disorder, even though those acts would not themselves do so directly. This Court must be the arbiter of whether or not any particular law is reasonably justifiable."

4. Per Brett LJ.: "Due weight must be given to the role of the legislature as the guardian of democratic society. The courts must approach legislation as something which has been considered as reasonably justifiable in a democratic society by a majority of the elected representatives of the people of the Federation. The very fact that the legislature has enacted the law is a factor which the courts should take into account in their review of its reasonableness."

Editor's Notes:

1. Section 25 of the Constitution of the Federation of Nigeria has already been reproduced under the Queen v. the Associated Press of Nigeria Ltd. ((1961) 1 All N.L.R. 199) reported above.

2. The High Court of Lagos tried the accused on the basis of the directions on the law given by the Federal Supreme Court and the accused was convicted on the facts.

Conseil d'Etat, France

FREEDOM OF MOVEMENT

MINISTER OF THE INTERIOR v. MADAME VICINI

(Judgment No. 62.214 of 20.1.65)

Rights of nomads - Prefect could only regulate the movements and the stay of nomads within his area of administration in the interests of public health, security and peace - a permanent and absolute order prohibiting camping and stay in the whole or in part of his area is illegal - such order infringes the fundamental right of the individual to freedom of movement.

This case, which was an appeal preferred by the Minister of the Interior against a judgment of the Administrative Tribunal of Nice dated October 16, 1963, raised the question of the right of nomads to freedom of movement and the right of Prefects (representatives of the Government in districts) to impose restrictions on this freedom in the areas under their administration.

The Administrative Tribunal of Nice had declared *ultra vires* an order of the Prefect of the *Alpes-Maritimes* which prohibited the camping and the stay of nomads on the territory of 79 communes of his region. The order also had rejected the prayer of Madame Vicini for a cancellation of the order on the ground that the Prefect had exceeded his powers in making it.

The *Conseil d'Etat* dismissed the appeal of the Minister of the Interior and affirmed the judgment of the Administrative Tribunal in favour of Madame Vicini.

In the course of its judgment the *Conseil d'Etat* stated that having regard to the terms of Article 107 of the *code de l'administration communale*, a Prefect could take all measures necessary within his area for the maintenance of public health, security and peace. He could only regulate the movements and the stay of nomads for the purpose of avoiding any danger to public health, security and peace. But a Prefect infringes the fundamental right of the individual to freedom of movement when he prohibits permanently and in absolute terms the camping and the stay of nomads in all or in part of the areas under his administration. Consequently, in the absence of exceptional circumstances, the Prefect of the *Alpes Maritimes* could not legally within the framework of the powers which he possesses under Article 107 mentioned above, make a general prohibitory order.

Referring to two other statutes relied on by the Minister of the Interior in support of his appeal, the *Conseil d'Etat* observed that there was no other legal enactment which provided a valid basis for the Prefect's order.

Federal Supreme Court of Nigeria

WILLIAMS v. MAJEDODUNMI

((1962) 1 All. N.L.R. 324)

Every citizen entitled to move freely throughout Nigeria - the movement or residence of any person within Nigeria could be restricted only in the interests of defence, public safety, public order, public morality or public health - Restriction Order under Emergency Regulations served on a legal practitioner - he files Court Application challenging the validity of the order and wishes to appear in person - he ought not to be deprived of this right unless the needs of public order clearly require it.

Before Ademola CJ., Brett, Mbanefo and Taylor LJJ.

Article 27 of the Constitution of the Federal Republic of Nigeria provides that:

- 1) Every citizen of Nigeria is entitled to move freely throughout Nigeria. . .
- 2) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society:
 - a) restricting the movement or residence of any person within Nigeria in the interest of defence, public safety, public order, public morality or public health;
 - b)”

Under regulation 2 (1) (a) of the Emergency Powers (Restriction Orders) Regulations 1962, the Defendant, the Administrator of Western Nigeria, served a restriction order on the Applicant requiring him to be and remain within three miles of his home.

The Applicant, a legal practitioner, wished to challenge the validity of the order, and as a first step filed a motion on notice in the Federal Supreme Court for an interlocutory injunction to restrain the Defendant from enforcing the order pending the hearing of an action which the Applicant intended to institute against the Defendant for a declaration that the restriction order was invalid.

The Defendant had at first informed the Applicant that he would grant him permission to attend the Federal Supreme Court to argue the motion for the interlocutory injunction, but later refused him permission because others subject to similar restriction orders had asked for similar concessions. The Applicant thereupon moved the Federal Supreme Court *ex parte* for an interim injunction restraining the Defendant from restricting the Applicant pending the hearing of the interlocutory injunction.

The Court upheld the Applicant's submission that he could not be compelled to instruct counsel and ought not to be deprived of his right to appear in person unless the needs of public order clearly required it. It found the explanation given by the Defendant to the Applicant of his change of mind proof that public order did not require it, and issued an injunction restraining the Defendant from preventing the Applicant attending the hearing of his application.

Court of Appeal of Trinidad and Tobago

FUNDAMENTAL RIGHTS DURING EMERGENCY

BECKLES v. DELLAMORE

(Magisterial Appeal No. 440 of 1965)

The Constitution provides for the protection of the principal fundamental human rights - legislation passed during a period of public emergency and declared to be in force only during such period shall have effect notwithstanding these provisions - however, such legislation must be reasonably justifiable for the purpose of dealing with the situation existing during that period.

*Before Sir Hugh Wooding, C.J., Hugh McShine, J.A., and Phillips, J.A.
Delivered on December 18, 1965.*

Pursuant to his powers under the Emergency Powers Ordinance (ch. 11, no. 10) the Governor-General declared that a state of emergency existed in areas specified in a proclamation issued on March 9, 1965. The areas specified constituted substantially the sugar-growing areas in which a strike was on foot arising out of disputes within the sugar workers' union. In the words of Wooding, C.J.:

"A group calling themselves the freedom fighters were seeking to oust the executive from leadership of the union and the struggle had involved the entire labour movement in the country, most of the unions giving support to the freedom fighters. Violence was being committed and threatened. Intimidation was widespread. The factories had to be closed. In the appellant's own words, 'there was a crisis in the sugar industry'. On top of all this came controversy over the Industrial Stabilisation Bill which the freedom fighters and the unions supporting them were vehemently campaigning against. To them it was anathema because, in the language of the pamphlet of which the appellant was in possession and in respect of which he was charged, the Bill was interpreted as putting an end to free labour and collective bargaining and as replacing them with forced labour and fiat."

The Governor-General issued the Emergency Regulations, 1965, in accordance with the provisions of the Emergency Powers Ordinance, and the appellant was convicted of an offence under section 7 (1), which is in the following terms:

No person shall have in his possession or under his control any document of such a nature that the dissemination of copies thereof is likely to lead to a breach of the peace or to cause disaffection or discontent among persons in the protected area.

On appeal the appellant contended that the regulation was void by virtue of section 4 of the Constitution which provides:

An Act of Parliament that is passed during a period of public emergency and is expressly declared to have effect only during that period shall have effect notwithstanding sections 1 and 2 of this Constitution, except insofar as its provisions may be shown not to be reasonably justifiable for the purpose of dealing with the situation that exists during that period.

This contention was rejected, the Chief Justice stating, "In my assessment, therefore, it was an explosive situation with which the Regulations were designed to deal. Accordingly, it is in my judgement impossible to hold that regulation 7 (1) was shown not to be reasonably justifiable for the purpose of dealing with the situation which then existed."

Editor's Note:

Sections 1 and 2 of the Trinidad and Tobago (Constitution) Order in Council, 1962 set out and provide for the protection of the principal fundamental human rights.

Supreme Court of India

SADANANDAN v. THE STATE OF KERALA

It is a paramount requirement of the Indian Constitution that even during an emergency the freedom of the citizen cannot be taken away without the existence of some justifying necessity specified by the Defence of India Rules themselves - protracted emergency and continuous exercise of wide powers conferred under it tend to make the conscience of the authorities exercising these powers blunt to this requirement - casual and cavalier attitude towards fundamental rights can ultimately pose a serious threat to the basic values on which the democratic way of life in India is founded.

Delivered on February 16, 1966.

In this case one G. Sadanandan, a kerosene dealer of Trivandrum, detained under the Defence of India Rules, was released by the Supreme Court, the Court holding that the orders passed by the State of Kerala against him were *mala fide*. The Court also directed the respondent State to pay the costs of the petitioner fixed at Rs. 500.—.

The Chief Justice, Mr. Gajendragadkar, observed that the Court had no alternative but to accept the plea of the petitioner that the order of detention after October 24, 1965 was totally invalid and unjustified. The Chief Justice said:

When we come across orders of this kind by which citizens are deprived of the fundamental right of liberty without a trial on the ground that the emergency proclaimed by the President in 1962 still continues and the powers conferred on the appropriate authority by the Defence of India Rules justify the deprivation of such liberty, we feel rudely disturbed by the thought that the continuous exercise of the very wide powers conferred by the Rules on the several authorities is likely to make the conscience of these authorities insensitive, if not blunt, to the paramount requirement of the Constitution that even during an emergency the freedom of the Indian citizens cannot be taken away without the existence of justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which conceivably results from the continuous use of such unfettered powers may ultimately pose a serious threat to the basic values on which the democratic way of life in this country is founded.

The Chief Justice observed that it was true that such cases were rare but the presence of even such rare cases constituted a warning to which it was their duty to invite the attention of the appropriate authorities.

Their Lordships had had occasion to criticise affidavits filed by appropriate authorities in support of detention orders in writ proceedings but they had not come across an affidavit which showed such an amount of casualness as in the present case. This affidavit, filed by the Home Secretary,

Kerala Government, was so defective and in many places so vague and ambiguous that it was not known which authority, acting for the respondent State of Kerala, in fact examined the case against the petitioner and what was the nature of the material placed before such authority; the affidavit does not contain any averment that, after material was examined by the appropriate authority, he reached the conclusion that he was satisfied that the petitioner should be detained with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community. The statements made by the Home Secretary did not appear to have been made after due deliberation.

Supreme Court of India

STATE OF BIHAR v. RAMBALAK SINGH

Order of detention made under the Defence of India Rules challenged - habeas corpus petition filed under Article 226 of the Constitution dealing with writ jurisdiction of High Courts - High Court has jurisdiction to grant bail although order of detention was made under the Defence of India Rules - the exercise of jurisdiction was however 'inevitably circumscribed' by considerations which were special to such proceedings and which had relevance to the object intended to be served by the order of detention - essential to bear in mind the distinction between the existence of jurisdiction and its proper exercise.

Before Gajendragadkar C.J., Shah, Sikri, Ramaswamy and Satyanarayanaraju JJ.

Decided in January 1966.

The Patna High Court passed orders that Mr. Rambalak Singh (a detenu under D.I.R.¹) be released on bail of Rs. 500 with two sureties of Rs. 250 each pending the disposal of the habeas corpus petition filed by the detenu in the High Court. The order further mentioned that the advocate appearing for the detenu in the High Court gave an undertaking to the Court that, during the pendency of the proceedings when the petitioner was on bail, the petitioner would not indulge in any prejudicial activity or commit any prejudicial act. Against these bail orders of the High Court the State of Bihar filed an appeal in the Supreme Court seeking the decision of the Supreme Court on the question of law relating to the jurisdiction of the High Court in granting bail in such cases and not on the correctness of the actual bail orders passed by the High Court in this case.

The Constitution Bench of the Supreme Court held that in dealing with habeas corpus petitions filed under Article 226 of the Constitution (dealing

¹ Defence of India Rules.

with writ jurisdiction of High Courts) where orders of detention passed under Rule 30 of the Defence of India Rules are challenged, a High Court has jurisdiction to grant bail. But, the Bench added the exercise of jurisdiction was 'inevitably circumscribed' by considerations which were special to such proceedings and which had relevance to the object which was intended to be served by orders of detention which were properly and validly passed under the said rules.

Article 226 of the Indian Constitution reads as follows:

226 (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(2) The power conferred on a High Court by clause (1) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

The Chief Justice, Mr. Gajendragadkar (who delivered the judgment), disposing of the appeal said that if an order of bail was made by the Court without full trial of the issues involved merely on *prima facie* opinion formed by the High Court, the said order would be open to challenge that it was the result of improper exercise of jurisdiction.

His Lordship also added that it was essential to bear in mind the distinction between the existence of jurisdiction and its proper exercise. The Constitution Bench also pointed out that improper exercise of jurisdiction in such matters must necessarily be avoided by the Courts in dealing with applications of this character.

The Supreme Court also observed that the jurisdiction of the High Court to pass an interim order 'does not depend' upon the nature of the order (that means the detention orders challenged in the main habeas corpus petition) but upon its (High Court's) authority to give interim relief to a party which was auxiliary to the main relief to which the party would be entitled if it would succeed in the petition.

"We must hasten to emphasize", the Supreme Court observed, "that, though it had no hesitation in affirming the jurisdiction of the High Court in granting interim relief by way of bail, in such cases, there were certain 'inexorable considerations' which were relevant to proceedings of this character and which inevitably circumscribed exercise of the jurisdiction of the High Court to pass interim orders of bail to the detenu concerned. The Court also added that this jurisdiction of the High Court was 'very narrow and limited'. That being so, the Supreme Court said that if the High Court took the view that on *prima facie* case, the allegations made in the main writ petition disclosed a serious defect in the order of detention which would justify the release of the detenu, "the wiser and more sensible and reasonable course to adopt would invariably be to expedite the hearing of the writ petition and deal with the merits without any delay."

"The Courts would inevitably be anxious to protect the individual liberty of the citizens on 'justiciable' grounds and within the limits of their (Courts') jurisdiction. But in upholding the claim for individual liberty, within the limits permitted by law, it would be 'unwise' to ignore the object which the orders of detention were intended to serve."

The Supreme Court added that an 'unwise' decision granting bail to a party might lead to consequences which might be prejudicial to the interests of the community at large and "that is a factor which must be duly weighed by the High Court before it decided to grant bail to a detenu in such proceedings."

The Supreme Court also observed that "in actual practice it would be very difficult" to come across a case where, without a full enquiry and trial of the grounds on which the order of detention was challenged by the detenu concerned, it would be reasonably possible or permissible to the Court to grant bail on *prima facie* conclusions reached by the Court at an earlier stage of proceedings.

However, as the counsel for the State of Bihar stated before the Supreme Court that the State filed this appeal in the Supreme Court against the Patna High Court's orders (releasing the concerned detenu on bail, pending the disposal of the *habeas corpus* petition filed by the detenu in the High Court challenging the validity of the orders of detention passed against him under D.I.R.) for the purpose of getting a decision from the Supreme Court on the 'important question of jurisdiction of the High Court' raised by the High Court's orders of bail in such cases and not for the purpose of challenging the correctness, propriety or reasonableness of the very orders passed by the High Court, the Supreme Court did not consider the correctness of the orders in question passed by the Patna High Court. On the 'bare question of jurisdiction', the Supreme Court decided in favour of the High Court and dismissed the appeal preferred by the State of Bihar.

Supreme Court of India

STATE OF MAHARASHTRA v. SANGZIVI

No restrictions other than those prescribed under sub-Rule 4 of Rule 30 of the Defence of India Rules can be imposed on a detenu under Defence of India Rules – attempt to impose on him a restriction not so specified amounts to interference with his personal liberty – in cases of such interference the High Court could issue an appropriate writ or direction, in terms of Art. 226 of the Constitution, to the authority concerned.

Before Subba Rao, Wanchwoo, Shah, Sikri and Ramaswami, JJ.
Decided in September 1965.

Mr. Prabhakar Pandurang Sangzivi, the respondent-detenu, was detained in the Bombay district prison under Rule 30 (1) (B) of Defence of India Rules.

While in detention he wrote a book entitled "Anuchu Antarangaat" (Inside the Atom) with the permission of the State Government. The book was purely of scientific interest. As the detenu's request to permit him to send the manuscript to his wife for the purpose of publication was not acceded to by the authorities, he filed a writ petition in the Bombay High Court.

The Bombay High Court, allowing the petition, said that the civil rights and liberties of a citizen were in no way curbed by the detention orders and that it was open to the detenu to carry on his activities within the conditions governing his detention.

The State Government of Maharashtra appealed to the Supreme Court of India against the decision of the Bombay High Court.

Dismissing the appeal, Mr. Justice Subba Rao (who delivered the judgment of the Court) said that, if the appropriate authority seeks to impose on a detenu a restriction not so specified, the said authority will be interfering with the personal liberty of the detenu in derogation of the law whereunder he is detained. If that happens, his Lordship added, the High Court could issue an appropriate writ or direction, in terms of Article 226 of the Constitution (dealing with writ jurisdiction of the High Courts, etc.) to the authority concerned in accordance with law.

The Court found that there was no provision in the Bombay Conditions of Detention Order (which governs the conditions of a detenu detained under Rule 30 of Defence of India Rules by Maharashtra State Government) dealing with the writing or publication of books by a detenu. There was, therefore, the Court said, no restriction on the detenu in respect of that activity. The Supreme Court also held that the said conditions regulating the restrictions on the personal liberty of a detenu were not privileges conferred on him, but were the conditions subject to which his liberty could be restricted.

If the argument of the State (according to which conditions regulating the restrictions on the liberty of a detenu conferred only certain "privileges" on the detenu) were to be accepted, the Supreme Court said then it would mean that the detenu could be "starved to death" if there was no condition providing for giving food. In the matter of the liberty of a subject, the Supreme Court said that such a construction "shall not be given" to the said rules and regulations, unless for compelling reasons.

Supreme Court of India

RIGHTS OF AN EMPLOYEE

SALEM ERODE ELECTRICITY DISTRIBUTION CO. v. THE WORKMEN

All employees entitled to equality of treatment and equality of opportunity - an industrial establishment cannot have two sets of standing orders, one governing existing employees and another governing new entrants.

*Before Gajendragadkar C.J., Wanchoo, Hidayatullah, and Ramaswami JJ.
Delivered on November 3, 1965.*

In the above case the Supreme Court held that an industrial establishment could not have two sets of standing orders certified under the Industrial Employment Standing Orders Act, one governing existing employees and another new entrants.

The appellant had framed standing orders to govern the service conditions of its employees and these were duly certified under the Act in 1947. In 1960, the appellant wanted to modify the standing orders relating to leave and holidays. Under the new scheme, the old conditions of service were to continue to apply to the existing employees whereas the new standing orders would govern the fresh entrants.

The certifying officer appointed under the Standing Orders Act declined to certify the new service conditions, and this decision was upheld by the appellate authority. In appeal before the Supreme Court, it was contended that the modified conditions of service were fair and applied only to new entrants while the rights of the existing employees were preserved. The certifying officer had erred in law in refusing to certify them.

The Supreme Court upheld the decisions of the certifying authority refusing to certify the modified standing orders submitted by the appellant. In its judgment, the Court observed that the provisions of the Act contemplated only a single set of standing orders for all the employees of the establishment and there was no scope for having two separate sets.

Constitutional Court of Germany

RIGHT TO LIFE AND SECURITY OF PERSON

DECISION OF THE FIRST SENATE, OF JUNE 30, 1965

(1 BvR 93/64. Reported in BVerfG 18/112)

Death penalty – abolished by Article 102 of the Basic Law of the Federal Republic of Germany – Decision to abolish one of profound legal and political importance – it is a recognition of the fundamental worth of human life – in France, however, murder is punishable with death – order made for extradition of the complainant to France on a charge of murder – extradition for an offence punishable with death not contrary to Basic Law – nor is it inconsistent with Article 2 (2) of the Basic Law which provides that everyone has the right to life and security of person – the Universal Declaration of Human Rights, in spite of its emphatically humanistic character, refrains from adopting any position in relation to the death penalty.

An order had been made for the extradition of the complainant to France on a charge of murder, which is punishable in France with the death penalty which had been abolished in the German Federal Republic where it is expressly prohibited by Article 102 of the Basic Law. The Constitutional Court made the following observations:

"The abolition of the death penalty does, it is true, signify more for the German Federal Republic than the mere suppression of one of the various forms of punishment in the system of penal sanctions employed hitherto. It is a decision of profound legal and political importance. It contains a recognition that takes a deliberate stand against the values of a political regime for which the individual life was of little significance and that for this reason was guilty of massive abuse of its arbitrarily assumed power over the life and death of its citizens.

In view of the state of the law and of public opinion in the world today, it cannot be stated that the death penalty is so glaringly inconsistent with the stage of civilization that has at present been reached that the states which have abolished it are permitted or even called upon to impose their point of view, and thus lay claim to superior conception of legal ethics and discriminate on this point against foreign legal systems. . .

. . . The Universal Declaration of Human Rights of the United Nations, in spite of its emphatically humanistic character, refrains from adopting any position in relation to the death penalty, and thus does not reject it. The European Convention on Human Rights accepts it as a possible form of punishment, as does the European Extradition Treaty."

Held:

1. Extradition for an offence punishable by means of capital punishment is not contrary to the Basic Law, nor is it inconsistent with Article 2 (2) of the Basic Law, which provides that "Everyone has the right to life and security of person."
2. Article 102 of the Basic Law does not prohibit the German authorities from contributing in any way to the imposition and execution of the death penalty by another state.

Supreme Court of Japan

RIGHT TO CHOOSE ONE'S OCCUPATION

CASE OF KEI-SHU

(Supreme Court Reports, Civil, Vol 17, No. 12, p. 2437)

Article 22 of the Japanese Constitution guarantees to the individual the right to choose his occupation – the Road Transportation Law prohibits transportation by private cars for consideration – constitutionality of this provision challenged – however the provision was held valid – individual rights cannot be exercised in such a manner as to severely injure the public interest – the right to choose one's occupation should be exercised within the framework of laws made in the interests of order and good government.

Decided by the Grand Bench on December 4, 1963.

The appellant was prosecuted for violating Article 101 of the Road Transportation Law, which prohibits transportation by private cars for a consideration. The appellant alleged that the above provision was unconstitutional because it denied him a right "to choose his occupation" guaranteed by Article 22 of the Constitution. It was argued that the prohibition as such had no justifiable grounds, and that it was only to serve as a protection of the interests of the existing motor transportation businesses. The Supreme Court upheld the constitutionality of the provision, saying that frequent transportation by private cars for a consideration might lead to a breakdown of the licensing system, which was set up justifiably in order to secure proper business practice in motor transportation.

SUPREME COURT OF THE UNITED STATES
RIGHT TO VOTE

HARMAN v. FORSSENIUS

(380 U.S. 528 - 1965)

A Virginia law providing that an otherwise qualified citizen may vote in federal elections only if he had either paid a poll tax or duly filed a certificate of residence held invalid - right to vote cannot be denied or abridged for reason of failure to pay tax - Virginia law in conflict with Twenty-fourth Amendment of the United States Constitution effective from February 4, 1964.

The Twenty-fourth Amendment to the Constitution which was declared ratified on February 4, 1964, provides that:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

A Virginia law had prior to 1963 required payment of a poll tax as a prerequisite to voting in both state and federal elections. In anticipation of the amendment's adoption, the state enacted a statute amending its election laws to provide that an otherwise qualified citizen might vote in federal elections only if, at least six months prior to each election in which he desired to vote, he had either paid a poll tax or filed a certificate of residence. The poll tax as the exclusive requirement for state elections was retained.

The plaintiffs sought a declaration that this statute was unconstitutional and an injunction against its application. A three-judge court granted the

relief requested on the ground that the Virginia election laws, as amended, provided voting qualifications for federal elections different from those required of voters for the most numerous branch of the State Legislature, in violation of article I, section 2, and the Seventeenth Amendment to the Constitution.

In an opinion by Chief Justice Warren, the Supreme Court of the United States affirmed the decision of the lower Court, basing its opinion, however, solely on the ground that the Virginia provisions violated the Twenty-fourth Amendment. Justice Harlan concurred in a separate opinion. The Court stressed the broad language of the amendment, which prohibits not only the denial but also the abridgment of the right to vote.

The Judicial Committee of the Privy Council
(on Appeal from the Supreme Court of Ceylon)

INDEPENDENCE OF THE JUDICIARY

**THE ATTORNEY-GENERAL OF CEYLON v. LIYANAGE
AND TEN OTHERS**

Change of sovereignty in Ceylon produced no change in the powers of the Judiciary which continues to be independent of political, legislative and executive control – the Constitution's silence as to the vesting of judicial power was consistent with its remaining where it had lain for more than a century, namely, in the hands of the Judicature – the Criminal Law (Special Provisions) Act and the Criminal Law Act, both of 1962, were clearly aimed at particular known individuals – they lacked generality and were retrospective in character – the added fact that the Acts compelled the Judges to sentence each offender on conviction to not less than 10 years imprisonment and to order confiscation of his property, irrespective of whether the part he played in the conspiracy was grave or trivial, constituted a grave and deliberate incursion into the judicial sphere – it deprived the Judges of their normal discretion in the matter of appropriate sentences – if such Acts were valid the judicial power could as well be absorbed by the Legislature – the Acts were invalid and the convictions therefore could not stand.

*Before Lord MacDermot (Lord Chief Justice of Northern Ireland) President,
Lords Guest, Morris of Borth-Y-Gest, Pearce and Pearson.*

Decided on December 2, 1965.

In this case the Judicial Committee of the Privy Council quashed the convictions of 11 men sentenced at the Coup Trial in the Ceylon Supreme Court in April 1965 to 10 years' imprisonment with confiscation of all their property.

After a long and complicated trial all 11 were found guilty on three counts of conspiracy to wage war against the Queen and to overawe and to overthrow the Ceylon Government.

Argument in the Privy Council appeal was limited to a preliminary point raising the question of the validity of the special legislation - the Criminal Law (Special Provisions) Act and the Criminal Law Act, both of 1962, under which the men were tried and sentenced.

Lord Pearce, who delivered the Privy Council's judgment, said the detailed story of the coup d'état and how it was foiled at the very last moment was set out in a White Paper of the Ceylon Government issued on February 13, 1962.

This set out the names of thirty alleged conspirators and the parts played by them. All the accused were named in it.

It concluded with the observation: "It is also essential that a deterrent punishment of a severe character must be imposed on all those who are guilty of this attempt to inflict violence and bloodshed on innocent people through the country for the pursuit of reactionary aims and objectives. The investigation must proceed to its logical end and the people of this country may rest assured that the Government will do its duty by them. It was clear that the first Act was directed towards the participants in the coup and it was given retrospective force", Lord Pearce observed, "It provided that the Minister of Justice could direct that they should be tried by three judges without a jury.

"It also provided that the three judges could be nominated by the Minister. The Supreme Court upheld a preliminary objection that the power of nomination conferred on the Minister was invalid and the second Act was enacted providing that the Chief Justice could nominate three judges."

Counsel for the appellants continued that the Acts offended against the Constitution in that they amounted to a direction to convict the men or to a legislative plan to secure their conviction and severe punishment, and thus constituted an unjustifiable assumption of judicial power, by the Legislature, or an interference with judicial power, which was outside the Legislature's competence and was inconsistent with the severance of power between Legislature, Executive and Judiciary which the Constitution ordained.

In the course of the judgment Lord Pearce observed that the joint effect of the Ceylon (Constitution) Order-in-Council 1946, and the Ceylon Independence Act of 1947, was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State.

Those powers, however, as in the case of all countries with written Constitutions, must be exercised in accordance with the terms of the Constitution from which the power derived.

In Ceylon the change of sovereignty did not in itself produce any apparent change in the constituents or the functioning of the Judicature. So far as the courts were concerned, their work continued unaffected by the new Constitution, which manifested an intention to secure in the Judiciary a

freedom from political, legislative and executive control.

The Constitution's silence as to the vesting of judicial power was consistent to its remaining where it had lain for more than a century, in the hands of the Judicature.

The Acts of 1962 were clearly aimed at particular known individuals who had been named in a White Paper and were imprisoned awaiting their fate. Such a lack of generality in criminal legislation need not of itself involve the judicial function and their Lordships were not prepared to hold that very enactment in this field must inevitably usurp or infringe the judicial power. Each case must be decided in the light of its own facts and circumstances.

In the present case their Lordships had no doubt that there was an interference with the functions of the Judiciary.

"The true nature and purpose of these enactments are revealed by their conjoint impact on these specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted", Lord Pearce said.

"These alterations constitute a grave and deliberate incursion into the judicial sphere. Quite bluntly their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences.

"They were compelled to sentence each offender on conviction to not less than 10 years' imprisonment and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial."

Lord Pearce said in conclusion: "If such Acts as these were valid the judicial power could be wholly absorbed by the Legislature and taken out of the hands of the judges. It is appreciated that the Legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting lightly.

"But that consideration is irrelevant and gives no validity to acts which infringed the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were *ultra vires* and invalid."

It was agreed between the parties that if the Acts were invalid the convictions could not stand and the appeals would therefore be allowed.

Editor's note:

The judgments of the Supreme Court of Ceylon in the abortive and final trials of this case are reported in the *Digest of Judicial Decisions* appearing in the last Volume of this Journal under the headings "Independence of the Judiciary" and "Retroactive and Discriminatory Legislation" respectively. See *Journal of the International Commission of Jurists* Vol. VI, No. 2 (Winter 1965) pp. 325 and 334.

Supreme Court of Spain

**DISTINCTION BETWEEN OFFENDING NATION
AND REGIME****ATTORNEY-GENERAL v. R. M. JOSE**

(R: 4.772/65)

Offences against the Spanish Nation – criticism of the regime not necessarily offence against the Nation – in matters of criminal law a clear distinction must be drawn between the concepts of Nation, State and Regime – The Nation is an elevated entity consisting of different spiritual and material elements – it must be distinguished from the organs and persons representing it for the time being.

President: D. Julio Calvillo Martínez.

Decided on October 25, 1965.

During a hearing by the Court of Public Order in a case against one R. M. José, the President of the Court directed a member of the armed police to remove the prisoner's handcuffs. When the policeman complied with the Court's instructions, the prisoner stood up in the dock and said in a normal tone: "I wish to continue wearing the handcuffs which I am obliged to carry under this regime that oppresses and imprisons the workers."

The Court sentenced him to two years' penal servitude on the ground that he had offended the Spanish Nation in terms of section 123 of the Penal Code.

On appeal, the Supreme Court declared the decision of the Court of Public Order null and void and acquitted the accused.

In its judgment the Supreme Court observed that in matters of criminal law there was a clear distinction between the concepts of "Nation", "State" and "Regime". The scope of these concepts was not the same. Having regard to the law and the circumstances of this case, there was no alternative but to conclude that the accused, a modest employee in an administrative grade, neither had nor claimed to have any intention that his criticism of the regime, as the representation of a political set-up, might be interpreted as directed against the nation which had been defined in a Supreme Court decision of May 25, 1959 (R: 1.797/59) as "an elevated entity constituted by different spiritual and material elements."

In order to come within the ambit of the criminal provisions in question, the attack must be directed against the nation, and not against the organs representing it for the time being within the existing political framework.

Thus, the appellant could not be found guilty of the offence for which he was sentenced, because the facts proved could not constitute the offence in question. Nor could these facts constitute any other offence against the external security of the State, as Book II, Title I limits such other offences to

crimes against the peace and integrity of the State, crimes against international law and the crime of piracy.

Federal Supreme Court of Nigeria

RIGHT TO APPEAR IN PERSON

WILLIAMS v. MAJEDODUNMI

(1962 - 1. All N.L.R. 324)

Every citizen entitled to move freely throughout Nigeria - the movement or residence of any person within Nigeria could be restricted only in the interests of defence, public safety, public order, public morality or public health - restriction order under Emergency Regulations served on a legal practitioner - he files Court Application challenging the validity of the order and wishes to appear in person - he ought not to be deprived of this right unless the needs of public order require it.

(For facts, see page 143 above).

Court of Appeals of New York

**RIGHT TO COUNSEL -
INCRIMINATING STATEMENTS MADE IN HIS ABSENCE**

PEOPLE v. FRIEDLANDER

(16 N.Y. 2d 248)

Defendant, whose premises were searched on a valid warrant, retained counsel who was allowed to consult with her - defendant later interrogated by police officer in the absence of her counsel - inculpatory admissions made by defendant during such interrogation - she had not been warned in advance of her right to counsel or to remain silent - held that the inculpatory

admissions were wrongfully admitted in evidence and fresh trial ordered.

Decided on November 24, 1965.

Pursuant to a valid warrant, the defendant's apartment was searched in connection with alleged book-making activities and certain materials were seized. On the same afternoon, the defendant was taken to the District Attorney's office for questioning. Later that evening, the defendant's attorney appeared and was allowed to consult with his client, after which he requested a police officer to arrest and arraign his client. He received no reply and then left. Late that night, that same officer interrogated the defendant in the absence of her counsel, and during the interrogation she admitted to ownership of certain seized materials. So far as the record showed, she had not been warned in advance of her right to counsel or to remain silent, nor did it appear that she requested counsel or declined to answer questions. The Court of Appeals held that it was a prejudicial error to receive these inculpatory admissions in evidence. The authorities, knowing that the defendant was represented by her counsel who had requested them to arrest and arraign his client, nevertheless - after the counsel had left - elicited damaging admissions from her. A fresh trial was ordered.

Supreme Court of the United States of America

RIGHT TO FAIR TRIAL

ESTES v. TEXAS

(381 U. S. 532 - 1965)

*Televising a criminal trial of widespread public interest
- inherent deprivation of an accused of due process of
law.*

The accused was charged with swindling before a Texas District Court. Notwithstanding his objections, portions of his trial and pre-trial hearing had been televised to the public. He was convicted and appealed to the Texas Court of Criminal Appeal which upheld the finding of the trial court. He then applied for a writ of certiorari to the Supreme Court of the United States. The writ was granted and the accused's conviction was subsequently reversed on the ground that the televising of the trial violated the constitutional guarantee of due process, even in the absence of any showing of "isolatable prejudice."

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Bulletin of the International Commission of Jurists

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