GENERAL REPORT

by

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1. INTRODUCTION.

Eight sessions of this Colloquium were held at Chicago from 8 to 12 Sept. 1957. The names of the participants, the order of proceedings and a list of the papers and documents prepared for the meetings will be found in the formal report attached. A most valuable digest of the oral discussion has been prepared by Mr J. A. Jolowicz of Trinity College, Cambridge, who had consented to act as Secretary of the Colloquium; and his digest is also attached to this report. The general reporter desires to record his great indebtedness to Mr. Jolowicz for his very helpful collaboration.

The range of the subject proposed for discussion and the number of persons participating necessarily caused much diffusion in the oral contributions and thus imposed a considerable burden upon the Chairman, Professor Milton Katz, Director of International Legal Studies at the Harvard Law School. The manner in which he discharged his duties in keeping the discussion coherent most deservedly won the admiration of the meeting. The general reporter also had the valuable collaboration as assistant reporters of Professor Harry W. Jones, Cardozo Professor of Jurisprudence at Columbia University and of Professor Paul G. Kauper of the University of Michigan Law School at Ann Arbor. They both prepared and presented papers at the meeting, and Professor Kauper also afforded the general reporter much help in the preliminary organisation of the meeting. The general reporter has great pleasure in expressing to these three persons his particular and most cordial thanks.

The presence of many of the American participants was made possible by a generous grant from the Ford Foundation; and the Law School of the University of Chicago undertook the responsibility of housing the visitors and providing accommodation for the meetings.

1. THE CHARACTER OF THIS REPORT.

In view of the nature of the discussion, and of the fact that no resolutions were (or could reasonably have been) formulated at the meeting, it was at the last session decided that the general report should not aim at conveying any conclusions which might be represented as the agreed conclusions of the meeting but should endeavour to advance the further consideration of the subject by calling attention to such of the matters arising as seemed to the general reporter to be most helpful in elucidating the topic. Whilst this course was no doubt in the circumstances the only possible course to adopt, the general reporter is conscious not only of the burden so laid upon him but also of the necessarily subjective character of the selection which he must make. However Mr Jolowicz's digest to which reference has been made, will to some extent supply the deficiencies of this report.

3. THE PURPOSE OF THE CHICAGO MEETING.

It seems to the reporter of great importance that the purpose of the Chicago meeting should be borne in mind. The Chicago meeting was held within the general framework of the Unesco plan, agreed in 1956, to promote intellectual contact across what has been termed the Iron Curtain by arranging meetings between lawyers operating in Communist systems and those operating in non-communist systems. The word, 'East', was used to distinguish the first from the second, 'West'. The impropriety of these words is evident since the majority of the countries in the East are not communist nor even communistic; but the terms may be accepted with reference to Europe and as indicating the intention of the original organisers of the plan to establish contact between Soviet Socialist lawyers (whether Russian or East European) and primarily lawyers nurtured in systems of law existing in, or origi-

nating from, Western Europe. It is in this sense that the words East and West must here be understood.

At a Conference between "Eastern" and "Western" representatives in Feb. 1956, it was agreed that it might be helpful to hold a discussion on, amongst other subjects then agreed, the underlying principles or main characteristics of the " Eastern " system as contrasted with the "Western" systems, more particularly as the "Eastern" representatives alleged that, when so contrasted, the "Western" systems would be found to belong to one and the same species (described by them as bourgeois systems of law) and to agree with each other in their essential characteristics.

It is no doubt an assumption that representative "Western" systems would be found to agree in characteristics which could be described as main or essential or fundamental, but this assumption was acceptable as a hypothesis and was so accepted.

The purpose of the Chicago meeting was accordingly to take some representative "Western" systems and to enquire whether the assumed agreement between them would be found to exist and if yes to discover in what it consisted. Four systems of law were for this purpose primarily selected - namely the French, the German, the English, and that prevalent in the U.S.A. The selection was so made as to provide a considerable variety of "Western" systems - two belonging to what has been called the Civil law family and two to the Common law family, one in each having and the other not having a court empowered to pass upon the constitutionality of the acts of the legislature. Moreover though these four systems were primaly selected for consideration, it was not intended to exclude from the discussion other "Western" systems of law; and, they were not excluded. Papers were thus also prepared for example on the Italian, Scandinavian, Mexican and Turkish legal systems and were found to be most helpful in the discussion.

It was part of the agreement that a subsequent Colloquium would be held in Eastern Europe at which the characteristics of the Communist system of law would be discussed, and a meeting for this purpose has been arranged at Warsaw in September 1958.

It is proposed that a third meeting should be held at a later date at which the results of the first two meetings would be considered together.

4. RULE OF LAW AND LÉGALITÉ.

At the Conference in Feb. 1956, when contrasting the Communist system to the "Western" systems, the "Eastern" representatives claimed that that system embodied what they termed the concept of "Socialist legality". As the convenient contrast to socialist legalty, the term used was, in English, the Rule of Law: which, as defined by Dicey, was stated by him to be the main main characteristic of the English legal system and is generally recognised so to be. The French representative was content to take as a sufficient translation "le principe de la légalité", though in their paper M. le Conseiller d'Etat Letourneur and Professor Drago prefer "la suprématie de la règle de droit", or Hauriou's phrase "le règne souverain de la loi". The German accepted translation was "Rechtsstaat". Each of these translations is imperfect and tends to divert the attention to a different aspect of the legal system. Moreover a lawyer in the U.S.A. is more likely to speak of "government under law" or "due process" or "equality before the law" rather than of the Rule of Law. It is at the outset therefore to be noted that all of these terms, which are not strictly convertible, are intended to indicate what are believed to be the characteristic qualities of the systems to which they refer; and the hypothesis accepted was that there is an important and significant area of agreement as regards these characteristic qualities between the various systems considered.

5. A SUGGESTED METHOD OF PROCEEDING REJECTED.

One of the matters which, in the discussion as heid, appeared to the reporter to be a critical and decisive issue was the method to be adopted in seeking to discover and define the area in which agreement existed between the four systems mainly considered. Even if the existence of such agreement is assumed there is between the four systems not merely a divergence but an apparent contradiction as regards institutions which both appear to be, and

are by the lawyers of the relevant systems believed to be, fundamental to each system. For example in the U.S.A. and now in Germany "government under law" or a "Rechtsstaat" is inconceivable unless there is both a written constitution and a court competent to control the constitutionality of the acts of the legislature. The English and the French systems deny the necessity of such a court, and the English would seem to go so far as to deny even the desirability of a written constitution. On this matter the most complete and categorical contradiction lies between the German and the English systems. Moreover the very term "Rule of Law" was used by Dicey to indicate not merely a characteristic of the English system but one which distinguished it from, and opposed it to, the French: the critical difference for Dicey being the unitary and universal jurisdiction of the English High Court, as contrasted with the limitation of the French judicial tribunals and the existence of a droit administratif.

In this situation it appeared to some prima facie plausible, and even tempting, to seek to find the area of agreement between the systems - or the comparative law concept of the Rule of Law by treating as unessential to that notion, and as capable of being left out of further consideration, any institution or characteristic of any system which was not found reproduced in all the other systems identified as "Western". The slogan proposed was that "only that which is common can be regarded as essential"; and the proposed slogan was commended both as the classical method of scientific abstraction and as a necessity for the scientific propriety of the enquiry undertaken.

Dissent from this view was expressed at the meeting. It may, however, be allowed that the proposed method may have some utility, on the casual or heuristic level, as a rough and ready method of drawing attention to some very elementary aspects of the Rule of Law, at least if considerable latitude is permitted to neglect actually existing variations as irrelevant at some undetermined point depending upon the whim or instinct of the observer. For example according to this method it may perhaps be possible to call attention to the fact that a Rule of Law entails the existence of a court before which a person accused, of, say, crime is entitled

to defend himself - at least if we suppose ourselves, as most lawyers would, to have an a priori understanding of "court", "accusation", "crime" and "defence' independent of the fact that in each system important variations would appear in what is offered as concrete examples of them. And moreover it may be useful to call attention to such an elementary notion at any rate when seeking to contrast a Western system to a system in which an accused's attempted defence of himself is regarded as itself an offence and as an aggravation of his alleged offence.

Nevertheless it seems necessary to attempt a somewhat more penetrating or intelligent type of comparative legal study if adequate results are to be expected from our investigation. The point at issue touches the method and nature of comparative legal studies and since our enquiry into "the Rule of Law as understood in the West" is undoubtedly of this class, the point is fundamental to our undertaking and as such requires further examination.

The first objection to the method here rejected of seeking common characteristics in the manner proposed is that it introduces, covertly, an arbitrary element in the selection of what is identified as common to all the systems: either by treating as irrelevant, beyond a point arbitrarily selected, existing differences or variations between systems, or by assuming an a priori knowledge of the institution in question. The arbitrariness involved should be demonstrated by an examination of the particular set of characteristics offered as common in this sense by a particular commentator, but that is clearly out of place in a report such as this.

Secondly the method requires a considerable denudation of the concept of the rule of law; and an attempt to avoid the arbitrariness indicated above would lead to an extreme denudation. Such a denudation would result in the Rule of Law being regarded as consisting merely in the regular function of governmental organs in a organised society, and the concept would become so indeterminate as to include regimes such as Hitler's. It was however generally agreed at the meeting that the rule of law has a peculiarly rich positive content and constitutes a most valuable social achievement of a highly developed type of society.

Thirdly the method supposes it to be possible to make an immediate direct and mechanical comparison between systems of law, to distinguish by simple inspection elements which are common from those which are not and, what is even more odd, assumes that the removal of the non-common elements would leave some residue in each which would remain intelligible and could be regarded as common. So far from being scientific such a method would seem to be based upon on anthropology and indeed a morphology which if it ever existed has long been recognised to be gravely mistaken.

Fourthly the method rejected does not give any, or any sufficient, attention to the fact that a system of law, whether customary or enacted, is a conscious human product and, as such product, has a purpose and uses means which, if historically accidental, are adapted, and more or less well adapted, to attain that purpose. There may be an identity of purpose between systems using differing means to attain the same purpose, and consequently an analogy or equivalence between such different means: and conversely apparently similar institutions may, considered in the entirety of the system, be characteristically different as there adapted to divergent purposes.

6. THE METHOD PROPOSED FOR ADOPTION.

Accordingly, in a comparative legal study on the scale and at the level proposed at Chicago, what appears to be required is

(a) A determination of the purposes or the hierarchy of purposes which the particular legal systems aim to attain, and a consideration of the similarity or dissimilarity of those purposes.

(b) An inquiry into the manner in which the individual system seeks to attain its purposes, especially into the institutions of which it makes use for their attainment. It would appear to be of special interest to the comparative lawyer to obtain as intelligent and penetrating a view as posible of the *function within a given system* of particular institutions, and of the analogies, equivalences or dissimilarities between institutions as operating in different systems.

(c) The determination of (a) and (b) above leads to a consideration of the utility or necessity of particular institutions, and of the greater or less adequacy with which they have been adapted in the given system to the end which they are intended to attain. This consideration is the result of pre-eminent value on the practical level to be expected from comparative legal studies, for it best enables the lawyer to propose the improvement of his own system of law, with a due regard of its own peculiarities, in the light of the information concerning *its own* functioning which he has obtained from the enquiry into the functioning of other systems.

7. THE SUBJECT MATTER OF THE ENQUIRY.

The subject matter of the enquiry is and must remain the selected systems of law as they actually exist. We are for example not concerned with the purposes or ends which a legal system *ought* to have; we are concerned with the purposes and ends which the given legal systems do have, and with actual extent to which the existing institutions functioning within that system attain those ends. The enquiry is into positive systems of law, by way of observation and induction. Nevertheless it should endeavour to be a penetrating or intelligent enquiry.

If the major premiss proposed is accepted - namely that a system of law is a human product which has a purpose or a set of purposes and that we are studying its fuctioning and means of functioning - it is to be observed not only that the end or purpose of a human product can be ascertained even though the product does not fully attain that end (provided that there be some degree of successful attainment) but that the end will both transcend the product and yet give the product the characteristic qualities which it has. In a purposive human making it is the end desired which brings the thing made into existence; the end causes the thing to be that which it is to the extent which it achieves success and yet nevertheless it remains an external standard by which the comparative success or failure of the thing made is judged, bearing in mind the extreme improbability of a complete success.

A lawyer immersed in his own system of law is no doubt habitually insufficiently concerned to judge the institutions, which he is engrossed in manipulating, in terms of their success or failure to attain the purposes to which they are directed, or indeed even to assess those purposes at all. It is one of the objects of comparative legal study, and in particular of a study such as this, both to induce an assessment of those purposes and some consideration of the success or failure of institution of diverse systems.

This manner of studying legal institutions is particularly requisite if the end desired or sought by them is a specially important or complex end. The end of the legal systems proposed for study does evidently appear specially important and complex; for one of the ends of a developed legal system is the satisfaction of the sense of justice of the community. Indeed historically the desire of justice has been the most powerful agent creative of law. Even if what constitutes justice may from time to time escape definition, the sense of injustice directed and concentrated to particular points historically has had in an extreme measure both explosive and creative force.

An intelligent comparative study of legal systems of the kind proposed, therefore, while remaining an observational and inductive enquiry into positive systems of law, requires not only an enquiry into the purposes and the hierarchy of the purposes, which the particular system seeks to attain and into the institutions used by that system to attain those purposes as those institutions there actually function and into the possible equivalence of diverse institutions, but also an assessement of the utility or inutility of the particular institutions and of the relative success or failure of an individual institution or set of institutions.

8. EQUIVALENTS.

So far as the reporter personally is concerned the most valuable result of the Chicago conference was the classification for him of the *method* by which the enquiry could adequately be undertaken. He also found exceptionally helpful and enlightening the notion of *equivalence* of function of different institutions in different systems,

not only as avoiding the categorical contradictions which would appear between similar systems if they were more superficially considered, but also, and more especially, as illuminating the real function in a familiar system of institutions whose importance might not otherwise be sufficiently appreciated. For example he has been led to suppose that the insistence, to be found in e.g. the German system, of the necessity not only of written constitution in some respects unalterable and containing a detailed catalogue of human rights but of a court capable of passing upon the constitutionality of the acts of the legislature may well be illustrative primarily of the anxiety and of the need (explicable enough in view of the recent history of that nation) to take there all possible steps to secure not merely the independence but the effective autonomy of a judicia body. In the French and English systems where (and especially in the English) no such insistence is evident, the lack of that insistence seems sufficiently explained by the fact that judicial autonomy has actually been otherwise attained, in England historically over a long period of time and in a spectacular degree, in France at the Conseil d'Etat in a manner which is most surprising and to an extent a priori incredible. This confrontation has further led him to enquire whether the actual autonomy of judicial power (which evidently exists in the United States of America to a supreme degree), however it may historically or consciously or accidentally have been secured, is not a more important ingredient of the rule of law as it has actually been attained in those systems than the independence of the judge which has been much more canvassed. He suggests that this notion of the autonomous power of the judge, which is distinguishable from his independence in function vis à vis the Executive, may well be a basic ingredient of the rule of law as actually existing in the four systems.

9. LEVELS OF DISCUSSION.

It was evident from the discussion in Chicago, and indeed it was expressly there stated, that the enquiry into the rule of law could usefully be carried on at widely separated levels. As between lawyers belonging to similar systems it was sensible, and indeed natural, to assume the existence of an agreed general framework and to concentrate attention upon a specific set of institutions

dealing with a problem which was regarded as important within that framework - for example the adequate protection of a person accused of crime.

It seemed to be generaly agreed that, at this level of discussion, an exceedingly important subject was the control of Executive action by the judicial organs, and indeed some persons spoke as if they believed that the entire question of the rule of law was concerned with this subject exclusively. It was further agreed that within this subject a special and particular crux was caused by the new and vastly increased duties put upon government in that form of society which is known as the Welfare State. It may be noted that one or two of the participants were of opinion that the notion of the Welfare State was as such incompatible with, and disruptive of, the rule of law. This opinion was rejected by the overwhelming majority but within that majority the degree of suspicion with which the Welfare State was regarded and the estimate formed of the magnitude of the danger which it constituted varied between very wide limits. However with the discussion of the Welfare State the enquiry tended to move to a different and more generalised level. It seemed. however, to emerge that it might be useful to distinguish the traditional liberties which the Western systems had effectively secured and the machinery which had been established for their maintenance from te problem of the equitable distribution of the new rights resulting from the community's assumption of "Welfare" duties: the traditional liberties and the framework within which they operated being in a Western society assumed to exist, though these liberties were evidently basic and primary in a more generalised view of the rule of law.

10. LEGAL PROCEDURE.

It was also suggested that, in addition to recognising the utility and need of different levels of discussion, it might be helpful to direct attention to different fields of enquiry. In a manner which should again be described as heuristic, there such fields were indicated as possibly useful and they were after much discussion identified for this purpose as "procedure", "institutions" and "values".

Of these the area and meaning of "procedure" is the easiest to define. A group in which common law lawyers predominated would evidently be led to attach the utmost importance to the process of hearing and decision before a court, and indeed to find in that process the essence of a rule of law. It is that process which in their view gives reality to the system. It is surely valuable to emphasise this view and not only to seek to elaborate what in the systems concerned is regarded as a sufficient "due process" - which would include the status of the judge and of the legal profession as well as the more technical rules of procedure - but to judge any system offered for consideration by the efficiency with which, and the area over which, such process was actually applied by that system. The rule of law is not an abstract conception; it is to be sought for, and found, as a going concern in a particular society; and a test of its reality is not the mere existence of courts but the extent and efficacity of their actual operation.

Whilst it would be mistaken in any way to minimise the importance of this aspect of the rule of law, it is to be noted that it is unlikely to be over-looked by any body of Western lawyers. Indeed they would assume as natural and self-evident the existence within a legal system of some reasonably effective due process, and would be concerned to seek to improve it. What is important is that they should appreciate - which frequently they do not - what a remarkable achievement it is of their form of society that due process should there exist, to the extent to which it does exist. It is certainly not something which can be taken for granted, nor can it be assumed without more to exist in other systems. The existence of a due process and its effective application over a significant area of social conduct is without doubt a condition of the rule of law.

11. INSTITUTIONS.

What however was more notable at the Chicago meeting was the desire evidenced, and that by a group of lawyers, not bo exclusively or excessively concerned with the Courts only when considering the nature of the rule of law. To this way of thinking, the courts and their process (however important or critical) were one only of a set of institutions from whose appropriate functioning

the rule of law depended. As it was well put, the conventions and procedure of Parliament and their continuance in England was surely not less important for the continuance there of a system which could be recognised as embodying a rule of law than the maintenance of the rules of evidence in the trial process. And similarly it was suggested that while the judicial control of the administrative was no doubt a characteristic of the rule of law the internal conventions and practices, the ethos, of the administration was scarcely less important to secure the actual realisation of the rule of law. Parliament and even the Civil Service were as they existed say in England surely also institutions responsible for the coming into being of the rule of law as it there existed and not less necessary for its continuance.

Some mention was made, as of an appropriate example, of the Police in England. It would be difficult to exaggerate the importance of the exemplary standard of conduct attained by them as a factor in securing in England the standard in the administration of criminal justice there attained. It was no doubt true that the police in England were subject to a strict and most effecacious type of judicial control. But it would be quite unrealistic to find in that control, however critical or essential it might be, the sole or the sufficient cause of the English police system. The police themselves, as they there existed, were themselves an institution created by forces not dissimilar to those which created the courts also and the law itself; and if subordinate, still in their own right they exercised a function in a way which made it both a characteristic and a component part of the rule of law as it there existed.

The reporter wishes to note that he thought particularly valuable this insistence upon the importance to the rule of law of institutions existing outside as well as within the field commonly regarded by lawyers as the field of law; of the interdependence of such institutions and of their cooperation in securing that which is identifiable as a rule of law. It is helpful to a lawyer to remember that the Courts and due process itself are one only of a set of institutions which as coordinated in function secure the realisation of a rule of law. The institutions referred to were not merely the grander institutions of a body politic - the Legislature, the Judiciary,

the Executive and parts of the executive such as the police - not merely institutions of evidently immediate reference to a continuance of responsible government such as independent political parties and a free press - the real importance of which it would be difficult to exaggerate - nor cardinal institutions within the law such as the institution of trial but also an indeterminate collection of institutions which might be described as more or less stable associations of persons for a purpose or a function (especially where the function or purpose assumes a dominating role) and which may vary from a club or business to a Trade Union. It seemed to the reporter of great importance that lawyers particularly should not forget the relevance of such institutions as component and cooperating factors, especially in the form in which they happen to be coordinated, to the continuance of the rule of law with which they are concerned.

12. VALUES.

A consideration of the importance to the rule of law of institutions outside the area of what has been termed lawyers' law, and of the range and variety of such institutions, leads to a consideration of the forces, drives or desires which cause these institutions to come into being, of the purposes which these institutions are created to satisfy, and of the values or ideas embodied in them. The Rule of Law as achieved in the West appears here as the result or product of such forces, ideas or values, and of their crystallisation into coordinated institutions. Again this approach appeared to the reporter to be valuable and significant.

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

the given system was a characteristic of the rule of law. What impressed the reporter was the extent to which appeal was made to concepts which appeared to be concepts of natural law and the generality of the acceptance of such concepts.

What in this field also impressed the reporter was the dynamic character attributed to the Rule of Law by especially some of the American lawyers. The Rule of Law was by them considered as the instrument of organised society whose objective was the creation of a community in which a man was enabled to fulfil himself by the full development of his capacities. The great resources of a society are the energies of the human beings composing it. The object is to allow and encourage the coordinated release of those energies, and the method is to enable human beings to make responsible and effective decisions, and to foster the development of their legal and practical capacity to make such decisions. The Rule of Law is a phenomenon of an organised free society and the mark of it.

On this level a critical aspect of the Rule of Law is not only and not so much the separation of powers - which clearly is a characteristic of a system which attains to a rule of law - but rather the diffusion of power: no longer with the negative purpose only of checking the arbitrary use of power by particular persons or groups (though that purpose is also attained) but with a positive purpose of encouraging the responsible use of power.

Institutions which help to diffuse power and to encourage the responsible and coordinated exercise of it are both the result of the forces or desires which cause a rule of law to come into being and also powerful means of maintaining and extending the rule of law.

An interesting observation made in this connection was that insufficient attention had been paid, especially in the American report, to the phenomenon of federalism which in a world of increasingly large units was a peculiarly apt method of combining the integration of the unit with a diffusion of power within it.

It is to this notion of diffusion of power that may be attached

a question to which considerable attention was devoted - namely the danger which arises from the concentration of power not so much in a state organ (for there the danger is recognised) but in a group outside the state organisation, (of which the pressure group in the U.S.A. is an instance). To the ancient and continuing need of defending the individual against the state there should be added the need especially in the welfare state type of community of defending the state, or the general intrest, against the drive of an organised group using legitimate power exclusively for its selfish interest. In an apathetic or an insufficiently vigilant society such a group could establish, and has e.g. by "capturing" an influential body succeeded in establishing, a monopoly of power which involves a disruption of the institutions of the rule of law. When the existence of an effective rule of law in a particular society is being considered it is not sufficient to consider the formal system only of its government; what should also be considered is the actual exercise within that formal system of power and control. Indeed it is possible that power should formally be to such an extent diffused that it cannot effectively be exercised according to the form. In such a case the probability is that power is effectively exercised by an irresponsible caucus in a manner which actually is detrimental to or subversive of a rule of law.

13. CONCLUSION.

The reporter wishes to repeat that it is not his purpose to attempt to summarise the Chicago Colloquium, but rather, according to his instructions, to attempt to specify that line of further consideration which, emerging from the discussion, seemed to him most likely to lead to a more adequate appreciation of the topic proposed for enquiry. He can call attention (particularly in paras 9-12) to a few only of the observations which most impressed him but he hopes that he as given a sufficient indication of how and why he has been led to recommend the method of dealing with the subject which is stated in paras 6-8.

It seems to him that rule of law as it exists in Western Society is a high achievement of that society and that it can usefully or fruitfully be studied only as a going concern in that society. In

such a study of a going concern what is required is at once some specification of its characteristics, an intelligent appreciation of the institutions from whose coordination it depends, some understanding of the causes which brought it into being and an estimate of manner in which it is dealing, and can deal, with its newly emerging problems.
