

# DIGEST OF DISCUSSION

by

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## INTRODUCTION

The formal programme of the colloquium's discussions ostensibly provided each session with a sub-heading to the extremely broad topic, "The Rule of Law as Understood in the West", and these sub-headings suggest that the discussions can be summarised under two main titles. The earlier sessions were appointed for the consideration of the general topic on a geographical basis - a presentation of particular national ideas followed by discussion thereof - while the later sessions were appointed for the consideration of a more specific topic - the impact of the Welfare State upon the Rule of Law, and the closely associated topic of the Rule of Discretion in Administrative Law and its Relationship to the Rule of Law. At the first session, however, some concern was expressed at a more or less rigid division of subject matter upon a geographical basis, and though the earlier papers had been prepared, and were presented on such a basis, the discussion following each paper was not limited to elucidation of and comment upon the national viewpoint presented. A high level of generality was maintained at nearly all times, and much of the discussion following the presentation of a paper followed it in time only, and not in content. Even when the colloquium passed from more general matters to the specific problem of the Welfare State, this generality was to some extent maintained. It is necessary, therefore, in attempting a digest of the colloquium's proceedings, to avoid too close an adherence to the chronological sequence of events, and it is not even possible to distinguish too

rigidly between discussion of the Rule of Law itself and discussion of the "Welfare State" aspect of the matter.

The following digest of the proceedings has, therefore, been divided into three parts. Part I contains a summary of what was said - principally by the paper speakers - which related specifically to the situation in the countries under consideration. Part II consists of a summary of what was said - again mainly by the paper speakers - with particular relevance to the "Welfare State" aspect. Part III contains a summary, under various sub-headings, of the general discussion without regard for chronological sequence.

It is to be observed that in none of these Parts is any attempt made to reproduce the actual words used, save in occasional quotations for the written papers, but it is hoped that the following pages contain a reasonably accurate summary of what was said. The secretary - who is responsible for this digest - wishes to apologise in advance to any participant in the proceedings of the colloquium who feels that his views have either been misrepresented or given insufficient prominence.

## PART I

### Section I: The Rule of Law in the United States

In introducing his paper Professor Kauper pointed out that the expression "Rule of Law" is not one habitually used in the United States. The equivalents are rather "Supremacy of Law", or "Government under Law", and the use of these expressions indicates the traditional emphasis in the United States upon restraint of Governmental power and authority.

The American conception is largely determined by the country's constitutional experience. The existence of a federal system leads inevitably to a written constitution defining the spheres of authority of Federal Power and of the States respectively, and this in turn leads to the conception of limited authority. There is a distrust of central power and an emphasis on freedom of the person.

Foremost among American institutions, and one given great emphasis, is Judicial Review. The constitution itself is fundamental law, not only thereby being itself fit for interpretation by the courts, but giving rise directly to the judicial power to review acts of the legislature and if necessary to pronounce them unconstitutional.

"The fundamental character of the Constitution is recognised in its provisions that permit amendment only by a process that requires the concurrence both of two thirds of the two houses of Congress and three fourths of the States. This view of a relatively permanent fundamental law means a rejection of popular sovereignty in the sense that the will of the temporary majority as reflected in the decisions of a popularly elected legislative body is itself subject to legal restraint."

The division of authority, or separation of powers, is enshrined both in the Constitution of the United States and in the Constitutions of the several States. It is designed to prevent the concentration of power and is regarded as vital to a system which attaches great importance to restraint on governmental power. Obviously the judiciary plays an important part in preserving the separation of powers by examining the validity of executive acts and administrative proceedings, as well as by examining the constitutionality of acts of the legislature. It is interesting to observe that the judicial power itself is also limited. Not only is the jurisdiction of the federal courts subject to limitation by Congress within the limits of the judicial power as defined in the Constitution, but the Supreme Court has formulated a series of self-imposed limitations. For example the Court has said that some types of question are "political" or "non-justiciable", and hence are subject to final determination by one of the other two departments of government.

Evidently those responsible for drafting the Federal Constitution thought that a formal catalogue of fundamental rights was unnecessary, but the first eight amendments (The Bill of Rights) a formal catalogue was in fact introduced into the Constitution shortly after its adoption. All state constitutions contain a similar catalogue, and most Americans today regard a catalogue of fundamental rights as essential. Not only is it, in itself, an educational

vehicle, but it provides a more reliable guide for the courts than do the unformulated notions of the judges. The Bill of Rights enumerates both substantive and procedural rights, such as freedom of speech, press, assembly, and religion on the one hand, and the rights to speedy and public trial, indictment by Grand Jury, trial by jury, right to counsel, right to confrontation and the double jeopardy limitation on the other. However the largest single source of formal constitutional rights protected on a federal level against the states is the Fourteenth Amendment adopted in 1868, and in particular the "due process" and the "equal protection" clauses.

Though the "due process" clause has operated as a source of substantive rights, and has in recent years impinged upon such matters as freedom of speech, it has been most fruitful in the field of procedural safeguards. Though the Supreme Court has held that not all the procedures set forth in the Bill of Rights are fundamental - notably the right to indictment by Grand Jury and the right to jury trial - the clause has as its central notion that of a fair trial involving at least a dis-interested tribunal and the right to counsel.

The "Equal Protection" clause has its principal significance today as a weapon with which to fight discrimination and it is used to invalidate legislation which employs an inherently unreasonable classification. Classification based on race or religion, for example, is inconsistent with the "equal protection" clause. At the present time the principal achievement of the "Equal Protection" clause has been the recent declaration by the Supreme Court that law-imposed racial segregation is invalid.

The traditional American approach to "The Rule of Law" has basically indicated the freedom of the individual from arbitrary action and the limitation of governmental power. At the present time, however, the whole conception of rights is undergoing change. New rights created by statute are regarded as fundamental, and while previously the government was regarded as dispensing a privilege which it was entitled to withhold, there is

today a new conception of equality of right to the enjoyment of public benefit. "The recent decisions sustaining the public employee's right to be free from discharge on arbitrary grounds or in violation of stated standards or procedures (see *Peter v. Hobby* 349 U.S. 331 (1955) and *Cole v. Young* 351 U.S. 536 (1956) and the current litigation on the question whether the Secretary of State must state grounds for denying a passport and whether he must grant the applicant a hearing (see e.g. *Bauer v. Acheson* 106 F. Supp. 445 (1952) are evidence of the new direction in the protection of human rights."

Professor Kauper's paper ends with these words: — "To emphasise judicially enforceable restraints upon the exercise of governmental power as the essence of the rule of law is to ignore the important consideration that the whole system of government under law is designed to promote positive purposes in the ordering of human affairs. Even the traditional view that government was to serve the limited function of providing the conditions of internal peace and security necessary to the individual's pursuit of liberty and happiness rested on the notion that private power was to be restrained by law according to the demands of reason, justice and liberty. Rule of Law must mean freedom from private lawlessness and anarchy before it can mean anything at all. And the development of the administrative welfare state means a broader view of the positive function of government as the common agency to promote the wider distribution of goods as a means of enlarging the individual's economic security and well being.

Viewed pragmatically, then, the rule of law means the maintenance of the kind of legal order and governmental operation which, in the restraints it imposes and the benefits it confers, derives its central inspiration from the freedom of the individual to go his own way in the cultivation of his capacities and interests free from fear and arbitrary restraint, which stimulates freedom of opportunity, which recognises freedom of voluntary association, which reflects a basic mistrust of the centralization of power in the hands of private groups or public authorities, which rejects the conception that the freedom men enjoy is by tolerance or sufferance of government and insists that government is itself subject

to law and is one agency among others in our pluralistic society for promoting freedom and the common good. It is in the perspective of these ideas, indigenous to American life and thought, that our formal constitutional structure assumes its significance."

After Professor Kauper had concluded his observations the only comment immediately related to the substance of what he had said was to the effect that attention must be directed to a disparity between theory and practice in the United States. There are, for example, large areas such as the hearings before Congressional Committees in which the right to counsel does not exist. In some areas - such as the enforcement of school desegregation within the States - the problems are not even solved in theory. Despite appearances there is, it was contended, a serious problem of the realisation of the rule of law in the United States.

#### Section II: The Rule of Law in France.

The paper in this subject is reproduced in full elsewhere, and the summary here is limited to the topics dealt with by the speakers *viva voce*. These topics were the control of the constitutionality of legislation and the control of the legality of acts of the administration.

##### *Control of the constitutionality of legislation.*

While it may be conceded that there is both a political and a moral aspect to possible violations of the written constitution by the legislature, and it is undoubtedly true that the acts of the legislature are controlled by the force of public opinion, these limits are limits belonging rather to political science than to law. From the strictly legal point of view the legislature is the direct representative of the people and may be thought of as the nation itself, physically present. It follows, therefore, despite the existence since 1946 of the *comité constitutionnel*, that acts of the legislature constitute supreme law and it is inconceivable that a judge should decide against the expressed will of the legislature. That will is itself the will of the sovereign people.

Moreover there is in practice an almost complete identity

between the legislature and the "pouvoir constituant". Though an amendment of the Constitution requires a special majority in the Assemblée Nationale and the Conseil de la République, can only be initiated by the Assemblée Nationale, and must be submitted to a constituent referendum if the special majority is not attained, there is no appreciable real inroad into the supremacy of the legislature. In fact, if an act is passed by the legislature in apparent conflict with the constitution, the result is not that act is invalid but that the Constitution is modified.

In short, although France has a written Constitution it is impossible in any form of proceeding to challenge the constitutionality of an act of the legislature. The Conseil d'Etat has reiterated on numerous occasions: "En l'état actuel du droit public français, un moyen tiré de l'inconstitutionnalité de la loi n'est pas de nature à être discuté devant le Conseil d'Etat statuant au contentieux".

Though there may be, and doubtless are, political and moral limits on the powers of the legislature, there are no legal limits whatever.

#### *Control of the Legality of Acts of the Administration.*

On the other hand there is a very real and positive control of the acts of the administration. This was not always the case, and under the ancien régime the executive was regarded as having complete and unfettered power. Today, however, and for more than 100 years the Conseil d'Etat has exercised an effective control whereby the executive is prevented from acting outside the powers conferred upon it by the legislature. This control is exercised over all levels of the executive branch of government from the Président de la République down to the lowest fonctionnaire, and takes the form of annulment of all illegal acts of the executive.

The individual has recourse to the Conseil d'Etat by a simple and cheap procedure, and annulment of an administrative act can be granted on various grounds. These grounds are:—

1. The legal incompetence of the executive authority responsible.

2. Failure on the part of the authority to observe the forms required by the relevant law. This covers more than unimportant formalities since the required forms may contain important procedural safeguards for the protection of the individual. For example a civil servant cannot be discharged without the opportunity to defend himself before a disciplinary body consisting partly of his colleagues, and unless reasons for his dismissal are given.
3. The intrinsic illegality of the act in question. This involves the important notion of *détournement de pouvoir*. If the Conseil d'Etat finds that a power has been used for a purpose other than that for which it was granted by the legislature, the act will be annulled even though done in accordance with the formal requirements of the law. Obviously the notion of *détournement de pouvoir* gives the Conseil d'Etat extensive powers.
4. Violation of the "rule of law". This comprises more than one concept:
  - (1) Violation of the provisions of the Constitution. The Conseil d'Etat has clear power to control the constitutionality of the acts of the executive.
  - (2) Violation of the provisions of the ordinary law; i.e. of acts of the legislature.
  - (3) Violation of executive orders. This denotes the important principle that an executive department, once it has made general regulations under a delegated power, must not depart from these general regulations in any individual case.
  - (4) Failure to comply with the decision of either a civil or an administrative court.
  - (5) Violation of the "*principes généraux du droit*". Since France is a country having a system of written law, the development of the *principes généraux du droit* through the decisions of the Conseil d'Etat is perhaps the most striking aspect of judicial control of the executive in



France. The *principes généraux du droit* should not be regarded as the products of natural law thinking since they have, by the force of case-law, the same efficacy and sanction as the written law, but they are nevertheless not to be found in any part of that written law. Though some expression of fundamental rights and freedoms is contained in the written law, and the juridical basis of the *principes généraux du droit* is said to be "l'interprétation par le juge de la volonté présumée du législateur", the reality is that the Conseil d'Etat considers that certain principles are not written because their existence is so clear that they need not be written. By the use of the *principes généraux du droit* the Conseil d'Etat is enabled to fill the gaps left in the written law and thereby to increase its protection of individual rights. The list of the *principes généraux du droit* is a long one and only a few examples may be given here. By a series of decisions the Conseil d'Etat has established, for example, the right to freedom of opinion, the right to liberty and integrity of the person, the right to a hearing prior to all acts of the executive affecting an individual's moral or material rights - even though these acts are not of a penal or quasi-penal nature -, and the rule against retrospective acts of the administration.

In connection with the control exercised by the Conseil d'Etat it is to be observed that its power to annul acts of the executive can only be exercised on the ground of illegality. It cannot annul for "inexpediency" or "inopportunity", for to do so would be for it to arrogate to itself the executive function. Thus if the legislature confers a wide discretionary power upon the executive the Conseil d'Etat can only annul the act in question if the administrative authority lacked competence, or if there has been failure to observe the necessary forms, *détournement de pouvoir*, or violation of the "rule of law". Where, however, the executive authority is only empowered to act if certain conditions are fulfilled, the Conseil d'Etat will conduct its own investigation to determine whether these conditions are in fact fulfilled. This it will do even though it must

then make for itself a value judgment of fact. Thus, for example, a prefect has power to forbid a political meeting if, but only if, the meeting would involve a threat to public order. If the prefect's act in forbidding a meeting is challenged, the Conseil d'Etat will verify for itself whether a threat to public order existed. It is not enough that the prefect himself honestly considered that such a threat existed.

In the discussion following the paper-speakers, one or two points in the French system were further elucidated. It was made abundantly clear that the effect of a decision of the Conseil d'Etat was to avoid the act of the executive completely. The decision operated, not merely in favour of the applicant to the Conseil d'Etat, but *erga omnes*. Again the extent of the powers of the Conseil d'Etat was emphasised. It no longer places a burden of proof on one of the parties before it, but gives its decision on all the evidence available. In one case, for example, the Chef de Cabinet of the Ministry involved supported his Minister's act before the Conseil d'Etat on one - valid - ground, but had previously stated to the Press that the act had been done on a different - invalid - ground. The act in question was annulled.

The question of the tenure and independence of a judge of the Conseil d'Etat was also discussed. It was pointed out that these judges, unlike the judges of the civil courts, have no legal security of tenure, but may be dismissed in the same way as any other civil servant. To this it was answered that though the judges of the Conseil d'Etat may have no formal security of tenure, there has been, for nearly one hundred years, a firmly established tradition that they are in fact not subject to dismissal. Even their promotion is strictly upon seniority. Thus any fear that they may be influenced in their decisions by hope of preferment for fear of dismissal is obviated. It is even possible to say that a judge of the Conseil d'Etat has legal security of tenure since, if the tradition referred to were disregarded by the executive, the Conseil d'Etat would itself almost certainly annul the dismissal.

Finally the French speakers emphasised that in their view the exercise by the Conseil d'Etat of its control over the executive

is essential to the maintenance of the rule of law. Without this control the rule of law would lack an effective sanction, and it may be said that French thinking in this connexion is analogous to American thinking on the subject of judicial control of the legislature.

### Section III: The Rule of Law in Great Britain.

Prof. Goodhart began by drawing attention to the fact that there was, in Great Britain, a profound difference between the Rule of Law in theory and the Rule of Law in practice. The difference is largely derived from Dicey's use of the expression "Rule of Law" itself, and the idea is more happily expressed in Bracton's statement, "The king is subject not to men, but to God and the law". This idea may be said to involve essentially the protection furnished by the law against arbitrary rule; it stands for government by principle and not government by arbitrary will.

Prof. Goodhart posed the question, to what extent is protection given in Great Britain against arbitrary rule, and dealt with it under three heads - The Executive, The Judiciary, The Legislature.

1. The Executive. Protection against arbitrary action by the executive depends upon the relationship existing between the executive and the legislature. In a totalitarian state the executive has full control of the legislature which thus cannot act independently. In a democracy, on the other hand, the legislature has complete, or at least important control over the executive. The control of the executive by the legislature is, in Great Britain, not less important than its control by the judiciary.

Legislative control of the executive is not restricted to the provision and withholding of monetary supplies. The legislature exercises an immediate and effective control over every act of every civil servant and Minister of the Crown. The Minister is responsible to Parliament, and this is far from being mere theory. The institution of "Question Time" is of great practical importance. There are over six hundred Members of Parliament each of whom, on the average, writes approximately ten letters per day asking questions

of the various Ministres. These questions are answered immediately by correspondence, and if the answer is unsatisfactory the Member concerned puts down a question to be dealt with publicly in the House. Thus the Minister has to explain the conduct of his department to the House, and will, of course, himself call for an explanation from the civil servant concerned. It is a fact that the individual civil servant is most anxious to avoid if at all possible that a parliamentary question be asked, and the importance of the control exercised over the executive by the legislature can scarcely be over-emphasised.

Judicial control of the executive also exists in Great Britain, and here too the law in action differs from the law in theory. An officer of the executive branch of government is personally responsible for the consequences of any act done by him in excess of his powers, and this rule is an active force in promoting observance of the law by such officers.

It is sometimes difficult to determine the extent of the executive's powers, and here a distinction may be taken. In some instances, especially where the liberty of the subject is involved, the law may limit the executive's powers very strictly. Thus, for example, a police officer is given very little discretion in deciding whether or not he should make an arrest. Again in the field of compulsory acquisition of land for public purposes, the executive's powers are tightly defined.

On the other hand there are cases in which the discretion given to the executive is wide. Strict limitation of the powers of the executive obviously can only operate to protect the individual for so long as Parliament is content to maintain that limitation, and the tendency today is to grant increasingly wide discretion to the executive.

This tendency has given rise to difficulty since where a wide discretion exists the only function for judicial control is to ensure that the discretion is honestly exercised. In the absence of bad faith on the part of the executive the courts are powerless.

It may be asked why Great Britain has no institution such as the Conseil d'Etat of France. The answer is that such an institution

runs counter to the doctrine of Ministerial responsibility and to the control of the executive by the legislature. The Minister would, if such an institution existed, hand over his responsibility to it, and Parliament would lose its all important control.

2. The Judiciary. Nothing is worse than a judicial tyrant, and it is therefore important to consider what control of the judiciary itself exists. In this connexion, moreover, the enquiry must not be restricted to the "ordinary courts." The "judiciary" is to include any body having the duty of making decisions on the evidence before it.

The judiciary is controlled by three rules:

- (1) It must obey the Acts of the legislature.
- (2) It must act in accordance with precedent.
- (3) Most importantly, it must decide in accordance with some principle, and there cannot be an arbitrary judgment on the part of the court.

It is true that not all of these controls apply to all administrative tribunals, and these often give no reasons for their decisions. The Report of the Committee on Administrative Tribunals and Enquiries recommends, however, that these tribunals should, in future, be required to give the reasons for their decisions.

3. The Legislature. The individual is protected against arbitrary government by the legislature by two formal rules:

(1) Though the courts are obliged to comply with and enforce Acts of Parliament, they can only recognise and enforce Acts which are validly enacted (i.e. if they have been enacted in accordance with the proper forms).

(2) Subject to the provisions of the Parliament Acts, agreement between the House of Lords and the House of Commons is essential if the will of Parliament is to become law. In every case the passage of time between the formulation and the enactment of a new law affords the individual some protection.

More important, however, are those "conventions" which,

though not enforceable by the courts, yet have greater binding force even than an Act of Parliament. For example:—

- (1) Parliament will not, in time of Peace, grant power to make arbitrary arrests.
- (2) Parliament will not authorise the arbitrary seizure of property by the State.
- (3) Parliament will not act so as to violate the independence of the judges. It is inconceivable that the Act of Settlement be repealed, and its repeal would be a breach of the Constitution.
- (4) Parliament will not destroy the relative freedoms of association and of the Press.
- (5) Parliament will not destroy the right to existence of an organised opposition.

Mr. Justice Devlin, who followed Prof. Goodhart, said that there were two essential things, that the sovereign power itself be subject to the law and that there be an independent body to declare what the law is. He did not agree with Prof. Goodhart that control of the executive by the legislature was as important as had been contended and thought that the ability of the Government to use the Whip made it almost as true that the executive controlled the legislature as that the legislature controlled the executive. This is particularly true in major matters of policy, and it is, of course, for the executive itself to decide what constitutes a major matter of policy. On the other hand Mr. Justice Devlin thought that judicial control of the executive was more important than Prof. Goodhart would admit. The ordinary courts could act in all cases except those in which Parliament had removed the courts' jurisdiction, and even in those trials in which the outcome was favourable to the executive it was open to the judge, if he saw fit, to criticise its conduct.

The rule of law is concerned with those fundamental rights which are contained in the law itself and is thus not concerned with the exercise by the executive of a discretion entrusted to 't

by Parliament. If such discretion is exercised against the interests of the individual, the private Member of Parliament can and does act on that individual's behalf, but this is unconnected with the rule of law. The action of the private Member of Parliament may be described as a process for securing the proper behaviour of the executive outside the rule of law.

The basic feature of the rule of law is that questions of law are for the courts and not for the executive. It is essential that the executive submit legal issues or decision by the courts, and in England this is secured only by the willingness of the executive to submit or of the legislature to compel the executive to submit. The questions must therefore be asked whether the executive does in fact submit and to what extent is the judiciary really independent of the executive.

Mr. Justice Devlin then proceeded to deal with the second of his two questions.

The judges are appointed and paid by the executive, and the enquiry must be whether the executive makes improper use of its position in this regard. Judges in England may divided into three categories:—

- (1) Judges of the Supreme Court. These are appointed for life and are virtually irremovable.
- (2) Judges of the inferior courts. These are appointed until a retiring age and may be removed by the Lord Chancellor.
- (3) Judges of the administrative tribunals.

In the case of the first two classes no judge is in fact removed, and it is inconceivable that judges should be removed for decisions unfavourable to the executive. Judges of the administrative tribunals are, however, appointed for a limited period, and may be influenced by their desire to secure reappointment. There is some danger here, even though the executive does not consciously fail to renew an appointment by reason of its dislike of decisions previously given. However, where a person is appointed to hold a special enquiry - as in the Crichton Down case - there is a real danger that a man

will not be reappointed if he gives an unpopular decision, and this is inevitable since the particular branch of the executive concerned makes its own appointments for the purpose of such special enquiries.

It may be said, therefore, that if one's concept of fundamental rights is restricted to rights presently recognised by the law, there is no reason for concern. If, however, one includes, for example, the right to full enjoyment of property, one is moving into the area of operation of the administrative tribunals, and thus into possible danger.

Mr. Justice Devlin then referred to the salaries of judges of the Supreme Court. Their salary was fixed by Parliament in 1837, and remained at the same level until 1952 when Parliament provided an increase. In theory therefore, the judges' salaries are fixed by Parliament, and the executive cannot influence the judges through its control of public money. In fact, however, the judges' salaries depend more and more upon the executive. Creeping inflation involves a steady reduction in the real value of the salaries and brings with it the need for periodical review. This review is largely dependent upon the executive for its initiation, and there is, therefore, a theoretical possibility of influence. This possibility has not yet been realised.

After Mr. Justice Devlin had concluded his remarks disagreement was expressed with Dr. Goodhart's view that the legislature exercises an effective control over the executive, and with his contention that the institution of a "Conseil d'Etat" would derogate from the doctrine of Ministerial responsibility. It was observed that in France and in the Federal Republic of Germany such an institution exists alongside and works in harmony with Ministerial responsibility. The Conseil d'Etat deals with infringements of the law, while the doctrine of Ministerial responsibility is concerned rather with questions of a political nature.

#### Section IV. Government under Law in Germany.

Professor Dr. Rupp opened his remarks by observing that it is the German view that strength is to be derived from a written



and stable constitution providing for guaranteed human rights, separation of powers and judicial review of both executive and legislative action by independent courts. Only thus, it is felt, can the rejection of totalitarianism be adequately secured. A system of independent courts having the power to review legislation has at least an educational value, and even if not called into action provides a substantial degree of stability by its mere existence.

Independent courts and judicial control are both features of the Rechtsstaat as it is given expression in the Constitution (Grundgesetz) of the German Federal Republic, but though the concept of the Rechtsstaat has borrowed heavily from 19th Century ideas, which are thought of as the negation of Nazism, Rechtsstaat does not only mean, "a state in which the activities of the executive are permanently subject to legal rules which are implemented and safeguarded by independent and impartial courts of law". The Constitution designates the state both as "Rechtsstaat" and as "Sozialer Rechtsstaat".

There has been some confusion as to the nature of this conception, and it has even been stated that "Sozialer Rechtsstaat" is a contradiction in terms, but the problem is simpler than has been thought. No more is meant than that in pursuing the ends of the society, both the legislature and the executive are bound by the principles of the Sozialer Rechtsstaat, and the judiciary should not act in such a way as to paralyse this. On the other hand neither the legislature nor the executive may ignore the civil rights of the individual.

The Weimar Constitution provided a particular process for its amendment, but the use of this process was not in fact necessary. If a statute in violation of that constitution had to be passed, all that was necessary was that it be passed with the special majority required for an amendment to the constitution. It was not required that the constitutional document itself be amended. This led both to a whittling away of the constitution and to the result that the constitutional document itself was at variance with reality. It must not be forgotten that Hitler came to power within the terms of the Weimar Constitution.

Having learnt from this experience, the Constitution of 1949 contains a number of provisions aimed at preventing its repetition:

- (1) Some articles of the constitution cannot be altered at all. These include the provision that Germany is Rechtsstaat and that it is a Federal State, and the articles providing the guarantees of liberty, the separation of powers and the independence of the judiciary. Other articles may be amended by the appropriate process, but it is now required that the constitutional document itself be amended.
- (2) The constitution provides a written guarantee of individual rights to safeguard the dignity of man. This catalogue of rights is the same as that found in other Western constitutions.
- (3) The constitution provides that the executive must comply with the requirements both of the constitution and of the ordinary law. The position here is much the same as in France.
- (4) The constitution provides for the separation of powers. In this connection it is to be observed that the delegation of legislative power is severely restricted. The Statute delegating a particular power must define both the limits and the policy of the delegated legislation contemplated, and this rule is strictly enforced by the Federal Constitutional Court. The court has, in fact, declared more than one statute to be void for breach of this requirement.
- (5) The constitution provides for the independence of the judiciary. There are both State and Federal Courts, but their organisation is not as in the United States. At the lower level of jurisdiction all are State Courts and Federal Courts are only found at the higher level. There are five superior Federal Courts:
  - i. The Court for civil and criminal appeals.
  - ii. The Federal Administrative Court.

- iii. The Court for Labour cases.
- iv. The Social Security Court.
- v. The Court for Tax appeals.

Finally, above all these courts there is the Federal Constitutional Court.

The independence of the judiciary is safeguarded in the constitution by two rules. First that no judge may receive orders from either the executive or the legislature and secondly that no judge may be removed from his office otherwise than by impeachment.

There is, of course, the problem that a judge may be over-independent, and thus render decisions out of line with contemporary trends. In order to obviate this danger judges are elected by a committee consisting of the Ministers of Justice of the States, the Federal Minister of Justice, and of members elected by the lower house of the Federal Legislature. A similar point of view is indicated by the method of election of judges of the Constitutional Court, but it is felt that these judges should derive a special authority from the mode of their election. Accordingly the ordinary election committee does not operate, and instead judges of the Constitutional Court are elected by a two thirds majority of the Federal Legislature. Moreover there is applicable to these judges not only the ordinary form of impeachment but also a special form of impeachment for violation of the basic principles of the constitution.

Under the Weimar Constitution both the ordinary and the administrative courts had assumed the right to control legislative action, and this power the courts still have. In fact the individual's right of recourse has been enlarged since the War. But where a question of the constitutionality of a statute arises, in order to achieve uniformity of decision, only the Federal Constitutional Court can declare a statute unconstitutional. A lower court, if a question of constitutionality is raised in litigation before it may hold the statute in question to be valid, but if it forms the view that the statute is unconstitutional it must refer the question to

the Federal Constitutional Court. The jurisdiction of that court is not appellate - it even accepts the view of the lower court that the question of the constitutionality of the statute is relevant - and it merely decides the single issue of constitutionality. When it has reached its decision on this single matter the lower court must conclude the case in the light of that decision.

The Federal Constitutional Court also deals with disputes between the States, disputes between the States and the Federal Government, and even disputes between departments of the Federal Government if constitutional questions arise. There is even the possibility that the constitutionality of legislation be considered *in abstracto* if the matter is brought before the Court by the Legislature concerned. Finally every individual has the right to petition the court if he is injured in his constitutional rights by the act of a public authority or by a judicial decision, and has been unable to obtain redress in the lower courts.

The German system thus sets up extensive provisions for judicial control, and it can even happen that questions of a political nature come before the Court. It is felt, however, that Germany can only remain a Rechtsstaat if all disputes of all kinds are ultimately settled by an independent court of law.

## PART II

### Section I : The Rule of Law and the Welfare State.

In opening his remarks Professor Jones emphasised that for him at least, though the emergence of the Welfare State sets a hard task for the Rule of Law, there is nothing essentially incompatible between the two. Though the limitation of public power is one of the important purposes of the Rule of Law, this by no means exhausts its meaning. It is also, and importantly, concerned with the regularity of procedures, and lawyers must not disdain to consider the mechanics of the Rule of Law. Procedural guarantees such as the preservation of the right to a fair hearing are so important as to rank as ends in themselves.

In discussing his topic Professor Jones made use of four connotations of the Rule of Law which had previously been sug-

gested by the Chairman, in order to set a framework for the particular problems of the Welfare State :

1. Limitation on the powers of the executive. This notion has an increased importance in the Welfare State. The State is more powerful and more pervading. It is a dispenser of benefits, a manager of enterprises and a large scale employer of labour. Power once widely distributed is concentrated in the hands of the State, and the ordinary citizen is inclined to look at the State rather with affection than with a healthy attitude of distrust or suspicion. The all-giving State is a dangerous Leviathan which it is difficult, but vital, for the Rule of Law to keep in check.

2. A conception of individual rights. In the Welfare State new rights are "mass-produced" and of an ever more varied character. Under the Welfare State, therefore, the encounters between the citizen and the State are greatly multiplied, and there is the danger that these new rights will not receive protection of the same quality as that afforded to the more traditional rights of the individual. The Rule of Law must ensure that these encounters amount to honourable confrontations in which the citizen's viewpoint is properly taken into account. Justice must not only be done, but must manifestly be seen to be done.

3. A code of values rooted in the population. Provided that these values include fair procedures and independent and reasoned hearings, this can be accepted as part of the Rule of Law in the Welfare State. But the values of the Rule of Law are those seen as fundamental by an independent judiciary and Bar rather than those which are thought of by the ordinary man in the street. The attitude of the community at large provides insufficient safeguards, and there is the danger, if this alone be relied on, that the community be deceived by the prospect of short term gains so that the long term aims of the Rule of Law will be lost.

4. The existence of processes within the society which give effect to the value of the Rule of Law. Effective remedies are more important than abstract declarations, but within the Welfare State it is equally important to achieve an internal tradition of fair treatment for the individual. If an agency of the Welfare State can achieve

an "ethos of adjudication" this will do more to preserve the Rule of Law than will external control. In fact the Rule of Law can exist in the Welfare State without external control, but its preservation is better secured if there are added to the administrative process itself layers of parliamentary and judicial control. On the other hand responsibility left with the administrative agencies can itself contribute to the "ethos of adjudication" and the extent to which it is desirable for external control to go is a matter of some doubt.

Certain features of administration may, however, be suggested as the minima for the protection of which judicial control is required :

- (1) Every person whose interests are affected by a decision of the State must have the right to a meaningful "Day in court". It is not necessary that the hearing take place in the "ordinary" courts, or that all the formalities associated with such courts be observed. As a practical matter, in any event, this cannot be achieved in the Welfare State. Nevertheless the Rule of Law requires that the finest possible procedure for adjudication be adopted, and this at least involves the right to counsel and a full opportunity for the citizen to state his case.
- (2) The official charged with deciding an issue between the citizen and the State must be independent in the sense that he is uninfluenced by ministerial directions or by thought of personal advantage. Difficulties under this head arise within the Welfare State both by reason of the great multiplicity of decisions which have to be made and because of the doubtful ability of administrative agencies to remain impartial.
- (3) The decision must be a reasoned decision and must take account both of the relevant general principle and of the concrete human situation. Decision upon fixed general principle alone can well amount in itself to a negation of the rule of law, and is certainly contrary to the Anglo-American common law tradition. Undue generality is as bad as the enforcement of arbitrary will, and judicial review is required as a safeguard against too rigid an application of the administrator's blue-print.

In conclusion Professor Jones suggested three essential differences between the Welfare State and a totalitarian state:

- i. The Welfare State is not all pervading. Almost all matters of a non-economic nature are left to the individual.
- ii. There is an important philosophical difference. The Welfare State is not an end in itself nor a metaphysical entity. It exists only for the benefit of its citizens.
- iii. The Welfare State acknowledges the Rule of Law. A totalitarian state which recognises the rule of law is no more than a logical prank, and cannot exist in practice.

#### Section II : The Role of Discretion in Administrative Law and its Relationship with the Rule of Law.

In order to set the framework for his observations Dean Stason began by stating the notions which, for him, were central to the Rule of Law. These were :

1. There must be a comprehensive and widely conceived body of law promulgated by the supreme law-making power of the State or deriving its force as case-law.
2. Decisions on specific questions must be reached by the application of this body of law impartially and indiscriminately.
3. Decisions must be made by trained and impartial personnel, though not necessarily by the "ordinary courts".
4. The general body of law must apply to the Government of the State and its officials as well as to public.

Administrative discretion may be defined as the freedom of choice in reaching a decision which is given to an administrative official. If the official can decide upon ad hoc considerations, free from the restraints of a general principle, then he can exercise an administrative discretion. Administrative discretion may be absolute or it may be limited by the statute which creates it, and it is found in various forms in most contemporary systems of government. There is, in fact, a fourfold division of the legal framework in which administrative discretion exists :

- A. Power may be given to various agencies of government to create or interpret rules applicable to the subject matter of their control. These rules have the force of law, but they are created under a general authority from the legislature, often given in the vaguest terms. Thus power may be given to regulate wages in a manner "suitable to the public interest".
- B. Power may be given to decide cases after notice and opportunity for hearing has been allowed. This includes, for example, the power to grant and withhold licences and is very widespread. Here too vague standards such as "public interest" are commonly laid down by the enabling statute and the authority making the decision necessarily has recourse to ad hoc considerations.
- C. In the Welfare State power is often given to officials to make decisions without a hearing. The distribution of Welfare State benefits, the issue of permits, authorisations and the like, and also the granting of Government contracts are often delegated to administrative authorities without any guiding principles being laid down and the administrative officials concerned are limited in their discretion only by the implied requirement that they act reasonably.
- D. In the ordinary administration of the law discretion must be given to officials. The traffic policeman exercises a discretion in directing the traffic.

This last kind of discretion may be regarded as normal and requires no further comment, but the first three are abnormal and run counter to the Rule of Law in various ways :

- (1) To the extent that discretion admits ad hoc considerations it is contrary to the rule of law ideal that there must be a body of law which is both comprehensive and widely conceived (see 1. above).
- (2) To the extent that decisions are made upon ad hoc considerations the possibility of partiality and discrimination is admitted, contrary to the rule of law ideal that decisions be reached by the impartial and indiscriminate application of general rules (see 2. above).



- (3) The admission of ad hoc considerations, especially in those cases in which no hearing is required, is contrary to the rule of law ideal that decisions should be made by trained and impartial personnel.
- (4) The possibility of legal favouritism of the government inheres in administrative discretion, and in so far as it is found, is contrary to the rule of law ideal that the body of law applies equally to the public and to the government and its officials (see 4. above).

In these circumstances it is sound to take the position that administrative discretion present a hazard to the Rule of Law, but it is difficult to see what protection can be afforded in the complex scheme of modern government. There is much to be said for the French solution of the Conseil J'Etat, from which standard of administrative morality are derived, but it is noteworthy that the recent Report of the Committee on Administrative Tribunals and Enquiries (Great Britain) which attempts the solution of some of the difficulties, does not address itself to a major part of the problem, the area in which discretion operates without the necessity for a hearing.

The Task Force of the second Hoover Commission (United States) tackled some of the problems and made certain recommendations. In particular it recommended:

1. That Congress establish an organisation to review statutes which delegate a rule making power, in order to secure that precise standars are laid down. (n. Compare the position in the Federal Republic of Germany, pp. 8/9 ante. J.A.J.)
2. That the Administrative Procedure Act be amended so as to broaden the scope of judicial review. Particularly, there should be review for "clearly unwarranted exercise of discretion".

Dean Stason concluded by saying that while he recognised that administrative discretion is a necessary concomitant of modern government, its scope should be minimised so far as possible. It is the antithesis of the rule of law.

**Section III : Discussion - The Rule of Law and the Welfare State.**

In general the participants in the discussion agreed with Professor Jones' thesis that the Rule of Law and the Welfare State are not incompatible, though it was also agreed on almost all hands that the emergence of the Welfare State has made the task of the Rule of Law immeasurably harder. The Welfare State, with its concentration of power, and particularly economic power, in the hands of the government, together with the great increase in the scope of administrative discretion, necessitates close scrutiny of the institutions existing in a given country which operate to protect the individual citizen.

Of the countries primarily under consideration by the colloquium only France seemed content with the safeguards and protections for individual rights presently existing, but nevertheless there was a broad measure of agreement that the Rule of Law can and must survive in the Welfare State. Some speakers expressed the view that the distrust of administrative agencies and the need for judicial or other external control could be over-emphasised. Why should it be assumed that an agency of the Welfare State entrusted with wide discretionary powers will necessarily violate the individual's fundamental rights? Professor Jones had spoken of the "ethos of adjudication" and it might well be that this could be obtained without external control. In Sweden, for example, there are many areas of administration in which judicial control does not operate and in which reliance is confidently placed upon administrative tradition.

Most participants felt, however, that to rely upon a tradition of fairness and impartiality within the administration itself, without the possibility of control, even if not necessarily involving a denial of the Rule of Law, nevertheless involved too great a threat to the Rule of Law or its values to be regarded as satisfactory. The Rule of Law can survive in, and is not inconsistent with, the Welfare State, but the need for procedural braces for the Rule of Law is greater in the Welfare State than in the nineteenth century "Law and Order" State.

On the other hand there were a number of participants who

did not agree with the thesis that the Welfare State is not incompatible with the Rule of Law, and in particular Professor Velasco, relying largely on the experience of Mexico, expressed the view that the two could not co-exist. He agreed that if the Welfare State means no more than a political organisation providing such services as education, pensions and so on, then it is not directly opposed to the Rule of Law. Logically, perhaps, the two can stand together. But a State which grants substantial benefits to its citizens must by the nature of things be led to wholesale intervention in the economy of the country. Yet economic freedom is essential to the existence of the Rule of Law, and even if a certain minimum of economic intervention can be tolerated, if, as must be the case in a Welfare State, such intervention is at all extensive it will destroy the Rule of Law.

### PART III

#### Section I : Values and the Rule of Law

As a logical postulate the Rule of Law has no necessary connection with any theory of fundamental values and can exist as well in an autocracy as in the most liberal of democracies, but so formalistic a view of the Rule of Law did not commend itself to the participants in the colloquium. On the contrary it seemed to be generally agreed that "The Rule of Law as understood in the West" involved more than the mere compliance by the sovereign power in a state with the rules of the positive law of that state. There was, in fact, a large measure of agreement that the Rule of Law has some positive content capable of being expressed in terms of fundamental values, but the attempt to isolate these values and to discover the common core of agreement said to exist in the "West" produced at least three different approaches which it is convenient to set out at this stage.

#### A. *Comparative Analysis of National Institutions.*

This approach, though not denying that the Rule of Law has its positive content, maintains that values are the product a more or less formal analysis, upon a comparative basis, of those institu-

tions which are common to the "West". All purely national institutions are to be ruled out of account, and the remainder, the features found to be common to the countries of the West, will represent the common core of agreement between them. In fact, it was contended, upon a truly comparative analysis which is careful to distinguish between the institutions themselves and the technical details of the operation of those institutions, six features common to the West can be discovered. These do not include a rigid written constitution, strict separation of powers (as conceived in the United States) or judicial review of the constitutionality of legislation, but were said to be as follows:—\*

1. The existence of traditional fundamental rights and liberties together with their traditional safeguards. Political rights, such as a democratic franchise, are included in these traditional rights, but they do not include such matters as the freedom or unimpairability of contracts or a complete separation between church and state such as is mandatory in the United States. It is not essential that there be a formal catalogue of these rights and liberties, nor that they be considered as antecedent or superior to the state itself. They need not be binding either upon the legislature or upon the "Pouvoir Constituant".
2. The existence of a body of fixed, consistent and general legal rules binding upon the organs of the state, both administrative and judicial. The character of these rules - whether statutory or judge-made - is unimportant, as is also the existence of delegated legislation, whether or not this provides for the exercise of discretion by the executive or the judiciary, and whether or not it makes use of such general criteria as "hardship", "fairness", or "gute Sitten".
3. The existence of an independent judiciary, with security of tenure, acting in conformity with general rules. The actual mode of appointment to the judicial office is unimportant - it may be by popular election or by appointment by the executive or some other body specially created for the purpose.

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(\*) This view was put forward chiefly by Prof. Rozmaryn, who subsequently elaborated his opinion in the *Revue Internationale de Droit Comparé* 1958, Vol. 10, p. 70.

4. The safeguards of a fair trial in the courts. These safeguards include meeting the requirements of "due process of law" such as an impartial tribunal, a public hearing, a meaningful "day in court" and the right both to counsel and to a reasoned decision. On the other hand such matters as the right to cross-examination, whether procedure is mainly oral or mainly written, the nature of the rules of evidence, the right to trial by jury, the nature of the indictment and the nature of the "instruction" are unimportant.
5. The requirement of a legal basis for administrative acts (*Gesetzässigkeit der Verwaltung*). This necessarily includes both the liability of the state for acts done by its officials in excess of their powers - though its liability may be established before "ordinary" or "administrative" courts - and due administrative process (i.e. the existence of the right to an antecedent hearing and to a reasoned decision). A substantial number of matters often considered under this head are, however, not essential. These include: —
  - (a) The nature of the legal basis - whether it rests on statutory or judge-made law.
  - (b) Whether the "ordinary" legal rules apply to acts of the administration or whether there is a special body of "administrative law".
  - (c) Whether the administration has a discretionary power or not.
  - (d) Whether there are or are not "administrative tribunals".
  - (e) The legal status of such officials as "examiners" (as in the United States) or "inspectors" (as in Great Britain).
  - (f) Whether a "quasi-judicial" function is recognised or not.
6. Judicial control over acts of the administration on questions of law, to ensure the conformity of such acts with the law. Here too a number of matters often considered are in fact unimportant: —

- (a) Whether the control is exercised by the "ordinary courts" or by special administrative courts.
- (b) Whether the control is restricted to questions of law or whether it includes review of the exercise of fact-finding and discretionary powers (cf. the French doctrine of *détournement de pouvoir*).
- (c) Whether the control is based upon a principle of general admissibility ("general Klausel") or on a sufficiently broad system of specific actions and remedies.
- (d) Whether or not there is a theory of "Crown privilege" (e.g. as regards the non-disclosure of documents).

It was emphasised that questions of degree may be involved in this analysis. If, for example, the fundamental rights are substantially curtailed, or if delegated legislation is so prevalent as virtually to displace the legislative activity or the functions of Parliament, then the Rule of Law is in danger. Quantitative changes can lead to qualitative modification of institutions, reflecting on the Rule of Law itself.

These observations, however, serve to define the analytical or "institutional" approach to the Rule of Law. It is not necessary to view the problem from a philosophical standpoint or to include in the Rule of Law the remote aims of Society. The values of the Rule of Law are those which are inherent in its institutions, and the values common to the West are those which are inherent in the institutions which are themselves common to the West.

#### *B. The Rule of Law and its Purpose.*

In contrast to the adherents of the institutional approach were those who believed that the best way to discover the common core of agreement in the West was to maintain the enquiry at a high level of generality and to concentrate upon the purpose for which the Rule of Law fundamentally exists. Institutions form an important part of the mechanics of the Rule of Law, but it is the underlying purpose of the Rule of Law itself which must be discovered.

More than one such purpose was suggested during the con-

ference, and the three principal suggestions are summarised below: —

1. At its highest level of generality the approach through the purpose of the Rule of Law sought to focus attention not upon what was called the "area of disaster" alone, but rather upon the purpose of organised society in general. It was emphasised that the resources of a society are no more than the sum of the abilities of the individual human beings who go to make up that society, and therefore that its fundamental purpose must be to create a community with a community life which will best assist the individual to develop and to release his potentialities as a human being. "Responsibility is the great developer of man", and this purpose can therefore best be served by placing the individual in a position in which he can exercise an effective choice between alternative courses of action. The significance of the Rule of Law, therefore, is not to be found by an examination of the specific institutions associated with it, nor even in its operation to protect the individual against "disaster". It lies in its ultimate objective, the creation of the possibility in the society for its individual members to develop themselves through their ability to exercise free but responsible choice between alternatives.

2. At a slightly lower level of generality, but maintaining the approach through the purpose of the Rule of Law, it was suggested that a measure of agreement existed in the West that the purpose of the Rule of Law was the preservation of those features of society which made possible changes in the general values and notions of the society. The Rule of Law, it was said, has a two-armed strategy. One is essentially procedural and connotes the maintenance of the orderly and rational application of general values and notions, but to consider this alone is not enough. Its essential purpose is to enable the society, through popularly controllable means, to change those same general values and notions. The purpose of the Rule of Law is not to preserve a particular set of values, but to preserve the ability of the society at large to change them.

3. A third approach directing attention to the purpose of the Rule of Law maintained that to the ordinary man the rule of

Law meant that he has a reasonable expectation of being able to realise his aspirations. This he cannot do if power, and particularly economic power, is so concentrated as to destroy his freedom of action. In the Welfare State the principal problem confronting the Rule of Law is the fact that the Government is possessed of great economic power, but the problem is not simply a conflict of ideology between public and private economies. Over-concentration of economic power in either governmental or private hands inevitably threatens the individual's freedom of opportunity, and the central purpose of the Rule of Law, to which attention should be directed, is the removal of this threat by the dispersal of power, especially economic power, throughout the society.

### *C. Values and Institutions.*

To many of the participants neither the institutional approach nor the approach through the fundamental purpose of the Rule of Law was satisfactory. On the one hand it was maintained that though one may sympathise with the objectives said to be the purpose of the Rule of Law, yet to treat them as part of the Rule of Law was to go outside its generally acknowledged scope: the lawyer and the Rule of Law are concerned with what had been called the "area of disaster". On the other hand to restrict the values of the Rule of Law to those which derive exclusively from those institutions which happen to be common to the West is to ignore the forces in society which bring those institutions into existence and thus to exclude from consideration the notions which are fundamental to the rule of law itself. Institutions may make values more explicit, but they are meaningless unless they are themselves informed by values. There must be and are certain basic and elementary ideas which are the true begetters of the institutions commonly associated with the rule of law.

Since the Rule of Law is concerned with the area of disaster, and in particular with the protection of the individual against disaster, the problem is, essentially, to discover what in the West constitutes a "disaster". The answer to this is, in the most general terms, the arbitrary interference, probably but not necessarily by the State, with the fundamental rights of the individual. Though



complete and overall agreement as to the nature and extent of those fundamental rights may not exist - in fact theories of fundamental individual rights will vary both with time and place - some conception of the existence of such rights, coupled with a desire within the society to afford them the protection of the law, is thus the essential feature of the rule of law. It is this conception and this desire, moreover, which produces the institutions commonly associated with, or even regarded as, the rule of law in the West.

To insist upon this as the underlying basis of the rule of law, however, is not to minimise the importance of institutions to the rule of law. The Rule of Law is not restricted to a conception of individual rights ; it includes the desire of the society to protect those rights by law, and for this procedural safeguards are essential. It may even be the case that some of these safeguards are so important as to merit characterisation as part of the individual's fundamental rights, but at all events there must be institutions within the framework of the rule of law if the society's desire to protect the individual against the arbitrary invasion of his fundamental rights is to be realised.

#### Section II : The Place of Judicial Control.

Of the four countries primarily under consideration, two, Germany and the United States, recognise judicial control as an institution for the review and, if necessary, the annulment of legislation as unconstitutional. France and Great Britain, on the other hand, have accepted in full the doctrine of the supremacy of the legislature and regard it as heretical to suggest that a court might hold an act of the legislature to be invalid. On the other hand the legal systems of all four countries recognise the existence of a judicial power - whether or not in the "ordinary courts" - to review and if necessary to annul the acts of the executive. The representatives of Germany and the United States, moreover, were inclined to regard judicial control of the legislature as an integral and essential part of the Rule of Law, while the representatives of France and Great Britain, obviously enough, were not. They were inclined, however, and this is particularly true of France, to regard judicial control of the executive as essential to the Rule of Law.

It may be said, in fact, that they regarded judicial control of the executive in much the same light as the others regarded judicial control of the legislature.

On these facts it is possible to maintain dogmatically, in accordance with the institutional approach (p 14), that while judicial control of the executive is part of the Rule of Law as understood in the West, judicial control of the legislature is not. This conclusion, however, being based simply upon a direct comparison between the legal systems concerned, is not as such satisfactory to those who prefer a less pragmatic approach. On the one hand it was argued that in those countries in which judicial control of the legislature does not exist, there must be some other institution performing essentially the same function, while on the other hand it was pointed out that judicial control of the executive is not of universal application over all acts of the executive, and that there are in fact areas of administration in some countries at least where the administrative authority has a wide discretion and is subject to no direct control by the law.

The question must be asked, in general terms, whether judicial control as such is a necessary component of the Rule of Law, or whether it is merely part of the mechanics of a legal system for the protection of the Rule of Law. The answer to this question, derived from the discussions as a whole, is of interest both for its own sake and as showing one aspect of the colloquium's view of the Rule of Law as understood in the West.

In discussing control of the legislative organ of government both the French and the British representatives pointed out that while legislature may, in strict theory of law, be completely omnipotent, there are in fact many factors which produce the result that certain things "are not done" by the legislature. Not only are there the British "conventions of the Constitution" which may in one sense be regarded as legal limits to the legislature's omnipotence, but the force of public opinion and other political or sociological factors exercise a very real control over the acts of the legislature. Moreover these factors have full opportunity to be effective since the deliberations of the legislature are public and

extend over an appreciable period of time, while the members of the legislature, or at least those having the final word as to whether or not a measure shall become law, are the elected representatives of the people. An act of the legislature is a public act and the result of the deliberations of an elected body. It was at one stage actually stated that these features of the legislative act are themselves the backbone of the Rule of Law as understood in the West.

These observations are, of course, equally true of the countries which recognise judicial review of legislation, and it was suggested, therefore, that judicial review of legislation, though it may be necessary in a particular country, is necessary only as part of the means of enforcement of the Rule of Law, and not as part of the Rule of Law itself. What is really essential to the Rule of Law is that there should be limits, "factual" or "legal", to the powers of the legislature.

In the case of acts of the executive, despite the fact that all four countries recognised judicial review to a greater or lesser degree, some participants tended to decry its importance and to emphasise rather the importance of an administrative tradition. Particularly during the discussion of the Welfare State the point was made that it need not necessarily be assumed that an administrator will act otherwise than in accordance with the law or so as to interfere unwarrantably with the individual's rights. It is possible, it was said, to build up and rely on a satisfactory administrative tradition in which an "ethos of adjudication" is achieved, within the administrative organ of government, and if this is done, the Rule of Law will be as well secured as by full judicial control. In other words it was contended that judicial control of the executive is no more a part of the Rule of Law than is judicial control of the legislature. Both are merely techniques for securing the rule of law itself.

Nevertheless the general trend of the discussion indicated that control of the executive by some disinterested tribunal was essential to the Rule of Law. Though the explanation of this was never expressly stated it is possible to extract an explanation from the course of the discussion as a whole, and to justify the con-

clusion, arrived at dogmatically by the "institutional approach" that while judicial control of the legislature is no more than an adjunct to the Rule of Law as such, judicial control of the executive by some disinterested tribunal - not necessarily the ordinary courts - is an essential part of the Rule of Law itself.

It has already been observed that an act of the legislature is public and follows the deliberations of the elected representatives of the people. The legislature, therefore, whether subject to judicial control or not, contains built in controls and limits upon its apparent powers. Judicial control of the legislature, moreover, is not and cannot be a final and unbreakable thing. If the written constitution, the foundation of judicial control of legislation in the modern state, obstructs legislation which the operation of a democratic process - amendment of the constitution - shows to be desired by the people as a whole, judicial control can be circumvented.

An act of the executive, on the other hand, is of an entirely different character. It is not, normally, public, it is not, normally, general in effect, and it is not the outcome of the deliberations of the elected representatives of the people. Without judicial control, therefore, the executive, however sound and effective its administrative tradition and however justifiable its acts, would be at best a benevolent despotism, and whatever the Rule of Law may mean, it does not, except on the most legalistic of views, include a despotism, however benevolent.

Judicial control of the executive, therefore, is an essential feature of the Rule of Law as understood in the West. Judicial review of legislation, where it exists, is, however, no more than an adjunct to the Rule of Law; it is part of the mechanics of the Rule of Law, not part of the Rule of Law itself.

### Section III : Separation and Distribution of Powers.

The consideration given to the place of judicial control directs attention to the importance of a distribution of powers within the State, and it was suggested that the conception of the "separation of powers" is something common to the "West". Detailed discussion of such topics as the extent of judicial control of the executive,

of the necessity for a written constitution defining the scope of the powers of the various organs of government and of other related matters indicated that there was no common theory of the ideal distribution of powers within the State, but in all countries of the "West" there does exist a strict division of power of some kind, and a real sentiment that this is vital to the Rule of Law.

On more than one occasion attention was drawn to the need for definition of the concept of "arbitrariness", though no finally satisfactory answer was ever given. Nevertheless a broad understanding of the meaning of arbitrary conduct probably exists, and it can be said that arbitrary conduct on the part of a government against an individual citizen is the antithesis of the Rule of Law. It follows that the prevention both of arbitrariness and of the possibility that any one organ of government acquire the power to act arbitrarily is essential, and it is to this end that the separation of powers exists. It provides the necessary checks and balances to produce effective limits upon the powers of an organ of government, and so prevents, or at least inhibits, arbitrary action.

It is not only within the organs of government themselves, however, that power must be distributed. The dangers of over concentration of economic power, whether in public or private hands, has already been mentioned (p. 55), but bodies outside the government can acquire power of a non-economic nature as well as purely economic power, and if this becomes over-concentrated in the hands of one or more "pressure groups", the Rule of Law is endangered. This aspect of the problem was discussed by Professor Dr. Spanner under the rubric of "The Protection of the General Interest against Particular Interests", and his observations are summarised below.

"Particular Interests" may be broadly defined as the interests of individuals and of groups of individuals - the latter being of the greater significance in the present context. The "General Interest" is more difficult to define, but may be said to be the interest of the community as a whole. It is not, however, the mere negation or suppression of particular interests, since it is in the general interest that a just balance be maintained between particular interests and the interest of the community.

Written constitutions ordinarily contain provisions aimed at the avoidance of unreasonable preference of and unreasonable interference with particular interests. Notions of equality before the law bind the legislature as well as the executive and the judiciary, and this requires not only that basically equal things be treated equally, but also that basically unequal things be treated unequally. These principles are endangered whenever particular interests, and especially the interests of political parties, become too powerful.

As an instance of the dangers inherent in a situation in which group interests become too powerful, Professor Dr. Spanner cited the experience of Austria under the coalition government. The existence of two major political parties, neither of which is in opposition is leading to the unilateral treatment of all public affairs and decisions upon proposed legislation are made by the leaders of these parties rather than by the members of Parliament themselves, with the result that Parliament has no more than formal functions. Moreover the existence of the coalition produces the result that the agreement between the two political parties has become almost a law - but a law outside the Constitution. This is an extremely dangerous situation, especially since under this agreement appointments to public corporations and to the civil service are made in accordance with the proportion of votes cast in favour of each party.

Moreover other groups, in particular the Trades Unions and the Chambers of Commerce, have extended their influence through the political parties into all spheres of economic and even political life. Safe seats in Parliament are reserved for their representatives and there is thus a personal union between Parliament on the one hand and the Trades Unions and Chambers of Commerce on the other. During the post war period of inflation this led to the result that, for example, agreements were reached between the Trades Unions and the Chambers of Commerce on such matters as wages and prices, and the content of these agreements automatically passed into law, Parliament having no function other than formally to enact legislation in accordance with the agreements.

Professor Dr. Spanner urged that the only way in which the

dangers of the over-powerful group interest can be obviated is by the operation of a constitutional court, which, by reason of its independence from outside influence is the best agency to determine what constitutes the general interest and which can invalidate legislation interfering unduly with that interest.

It seems, therefore, that he allied himself with those who regarded judicial control of legislation as essential to the Rule of Law. It may be suggested, however, that judicial control of this kind only becomes necessary to the protection of the general interest where the political situation is such that group interests can and do acquire so much power that their particular interests are preferred to the general interest. If the situation in a particular country is such that they do not acquire sufficient power to subvert the ordinary legislative process, then the general interest will be sufficiently safeguarded without the need for a constitutional court. What is essential to the Rule of Law is that there exists in the community a balance of power which will ensure that the general interest is not sacrificed to the particular.

#### Section IV : The Generality of Legal Rules; Equality before the Law; The Reasoned Decision.

In his paper on the Role of Discretion in Administrative Law and its relation to the Rule of Law, Dean Stason said that administrative discretion was the anti-thesis of the Rule of Law (p. 48) and this observation draws attention to the importance to the Rule of Law of general legal rules. Unless the law is general, normativism is lost and a real danger exists that government will become arbitrary; that the outcome of encounters between the individual and the state cannot be forecast; and that equality before the law - itself said to be a principle of the Rule of Law - will be lost. Law and the word here connotes the rules governing the conduct of administrative agencies as well as statute and judge-made law - must be general. Nevertheless, as was pointed out, for example in discussion of the Welfare State and the Rule of Law, (p. 45) undue generality may be as bad as arbitrariness in producing injustice for the individual. Government according to fixed and rigid general principles may be no better than government by absolute discretion.

The same apparent contradiction can be observed in discussion of the principle of equality before the law. Unequal treatment of individuals by the law may be said to be the negation of the Rule of Law, yet equality of treatment by the law, if too literally interpreted, may involve the neglect of important distinctions between cases and thus lead not to equal justice for all, but to equal injustice.

Although this contradiction appeared during the colloquium's discussions - at times there was talk of the importance of general rules and at times there was talk of the importance of treating unequal things unequally - there was in fact no fundamental misunderstanding of the true principle involved. The difference lies rather in the context in which a particular statement is made than in its true meaning. What is really involved in the notion sometimes expressed as "government by principle" is the ability of a court (which expression includes all persons and bodies having the duty of making decisions in individual cases to accept valid distinctions and to reject invalid ones. The Supreme Court of the United States, relying upon the "equal protection" clause of the Fourteenth Amendment, will invalidate legislation which employs an "inherently unreasonable classification" (p. 27) and this notion expresses the concept which underlies the principle that legal rules must be general. The Rule of Law does not require that a given rule be applied indiscriminately to all persons whatever the circumstances of the particular case, but it does require that the same rules be applied generally unless there be a sound reason to the contrary. Moreover, if such a reason does exist the Rule of Law requires that a different rule be applied. Equal things must be treated equally, but it is just as important that unequal things be treated unequally.

If the Rule of Law requires that a decision take into account the circumstances of particular cases and give due regard to the relevant distinction between cases, does it follow that decisions must be given with reasons? In the sense that the decision must be based upon reasonable grounds the answer is obviously "Yes". But does the Rule of Law go further and require that the persons before the court and the public at large be informed of the reasons for the decision?

Viewed analytically it would seem that this question is related



rather to the procedural safeguards of the Rule of Law than to the Rule of Law itself. Provided that the decision is in fact made for valid reasons, the requirement that those reasons be made public would seem unnecessary. Nevertheless there was a substantial consensus of opinion that publication of the reasons for a decision is itself required by the Rule of Law and that the right to an expressly reasoned decision is substantive and not merely procedural.

To some extent this view may represent the feeling of many that if a court is not required to give its reasons it will in fact tend to decide without having a clear recognition of those reasons itself or even without having adequate reasons at all. On this view the substantive and procedural aspects of the matter are inseparable. The view was also taken, however, that the substantive Rule of Law itself required that reasons be given, and it may be suggested that this view relates back to the requirement that legal rules be general but be applied with due regard to valid distinctions between cases. Only if reasons are given, and a body of principle thus built up in any given area of the law can the equal and the unequal be identified. The publication of reasons is therefore essential if the concepts of government by principle and of the generality of legal rules are to be secured.

It may be added, as a footnote to this Section, that there was some discussion of the importance of the publication of dissenting opinions. In some countries it is the regular practice for judges who do not agree with the decision of the court of which they are members to state publicly the reasons for their dissent, while in others the publication of a dissenting opinion is forbidden. On the merits of this particular matter three views were expressed. First that failure to publish dissenting opinions was itself contrary to the Rule of Law. Secondly that there are sound reasons for maintaining the secrecy of the judges' deliberations and for the publication only of a majority opinion. France, for example, takes the view that the publication of dissenting opinions is not only not required by the Rule of Law, but that their publication, at any rate in the particular circumstances of French society, would have a positive detrimental effect. Finally the view was expressed that it was wholly immaterial whether or not dissenting opinions were published.

**Section V : The Place of the Written Constitution in the Rule of Law.**

Judicial control of the legislature depends, in the modern state, upon the existence of a written constitution, and therefore the place of a written constitution in the Rule of Law has, by implication, already been dealt with to some extent. Written constitutions, however, as well as providing for judicial review of legislation also provide express formulation of at least two other matters commonly regarded as essential parts of the Rule of Law - fundamental human rights and the separation of powers.

Both the German and the Italian representatives emphasised that for them a rigid written constitution was an essential safeguard against a possible return to totalitarianism, and it was thereupon observed that the desire to give express formulation to the fundamental rights of the individual and to the doctrine of the separation of powers seems to arise after a period of upheaval in which these features of the Rule of Law were threatened if not altogether lost. England, with its long and more or less uninterrupted history not only has no written constitution, but, it was said, shows a marked disinclination for the formulation of any far-reaching principles, while the people of the American Colonies - who were in large measure people of a similar tradition to the English - were moved to produce a written constitution, to which the Bill of Rights was added at an early date, upon the emergence of the United States from the Revolutionary War. The suggestion was therefore made that it is a sense of danger to fundamental rights which historically leads to their formulation, and thus that the existence of such rights must not be regarded as the result of an exercise of the sovereign will.

To this suggestion it was answered not only that some states - Israel, for example - have come into existence after a period of upheaval, yet have not had recourse to a written constitution, but also that the express formulation of principle in a written constitution does not necessarily provide a complete or final statement of principle. Thus it was argued that the Constitution of the United States is in truth only partly written and that the "meaning" of the actual words of the constitutional document has undergone sub-

stantial change since their adoption. Moreover, it was pointed out, though there is in England no written constitution, there is no lack of formulation of principle, for example in Magna Carta and the Bill of Rights.

The accuracy of the contention that it is a sense of danger that leads to a written constitution was not admitted, but the conclusion that the essential features of the Rule of Law derive from something other than the exercise of the sovereign will met with general agreement.

The true source of the values of the Rule of Law, even in those countries having written constitutions is to be found in the patterns of behaviour and beliefs of the people, and their crystallisation through the institutions of the legal system is a continuous process. What the forces are which produce these patterns of behaviour and beliefs is a matter only doubtfully within the province of lawyers, though it may well be a matter deserving of study. At all events, though many of the participants of the colloquium were inclined to emphasise the importance to the maintenance of the Rule of Law of the written constitution, in general it seemed to be agreed that, like its offshoot judicial control of legislation, the written constitution itself is neither the source of the values of the Rule of Law nor an essential part of those values.

#### Section VI : The Right to a Fair Hearing.

The course of the discussions indicated a general consensus that the right to a fair hearing constituted an important feature of the Rule of Law as understood in the West. The concept of the right to a fair hearing, however, involves two problems which, though discussed to some extent, were never entirely solved; in what circumstances does the right to a hearing arise, and what is a "fair" hearing?

It cannot be the case that whenever an individual is affected, even adversely, by an act of the executive organ of the government, that he must invariably be given a hearing if the Rule of Law is to be satisfied. Reference has already been made to the "normal" exercise of discretion in the administration of the law (p. 46) and

the point is too obvious to require further explanation. On the other hand it is probably equally obvious at first sight that whenever it is sought to impose a penalty upon an individual, he must be given a hearing, and it was actually suggested that this may be the only case in which the Rule of Law demands that a hearing be given. If this is accepted, however, it would seem that the subsidiary problem of defining a "penalty" becomes crucial and the real problem is not solved but only postponed. Is a man "penalised" when his property is expropriated and compensation duly paid? While it may be true that a man is only entitled to a hearing before the ordinary court if he is subject to a penalty in the sense in which the criminal law uses that word, it was generally accepted that he must be granted a hearing before at least an "administrative tribunal" in other circumstances (p. 45).

No clear view emerged from the discussions of the necessary extent of the right to a hearing, and it is clear that in matters of detail differences must necessarily exist between the various legal systems of the "West". The Rule of Law, therefore, does not involve the right to a hearing in particular defined circumstances, but that there are circumstances, including but going beyond those in which the individual is subject to a criminal penalty, in which

What, then, is a "fair" hearing? To a large extent this is a question of technical procedure to be decided by the particular legal system concerned, but probably some minima can be stated. First it was generally agreed that the hearing must be before an "independent" judge. It was recognised that a judge may be too independent (e.g. p. 42) but certainly a judge will not be independent if he is obliged to accept instructions on a specific case either from the executive organ of government or from any other source. Moreover the Rule of Law requires that the danger of improper influence over judges be removed so far as possible by ensuring that the judge has nothing personally to gain or lose from his decisions. No particular method of removing this danger is necessarily the correct one, provided that there exists at least a convention that the judge has security of tenure. In the case of judges of the French Conseil d'Etat, for example, a judge may theoretically be removable at the pleasure of the executive, but

in practice he has such security of tenure as to make him wholly free from the possibility of improper influence (p. 33).

In those countries recognising judicial control of the legislature the judges of the "ordinary" courts have a degree of independence of the legislature not vouchsafed to those of countries recognising the supremacy of Parliament. The question of the independence of the judge is, therefore, to some extent linked to that of judicial control. There seemed no inclination, however, to argue that a judge is not independent if he is absolutely bound to follow the dictates of the legislature, and probably, therefore, the requirement that the judge be independent means no more than that he must be free from the possibility that his decisions be influenced by the executive.

The other aspect of a "fair hearing" which seemingly is required by the Rule of Law is that the individual have a meaningful right to be heard, and to be assisted by counsel. The right to counsel is not recognised throughout the legal systems of all countries of the "West" but where this is the case it was indicated that the situation was unsatisfactory. As to the right to be heard, there was general agreement that if a hearing is to be "fair" the individual must be allowed to state his case and to defend himself with complete freedom. His denial of a criminal charge, for example, must not be held against him in any way.

No final statement of either the extent or the nature of the right to a fair hearing emerged from the discussions, therefore, but despite its vagueness it was generally accepted that this right forms an essential feature of the Rule of Law as understood in the West.

#### Section VII : Statements of the Rule of Law as Understood in the West.

At an early stage of the suggestion was made that the colloquium should proceed by way of progressive approximations to a statement of the Rule of Law as understood in the West, and several general statements were accordingly made during the discussions. Some of these general statements have been noticed elsewhere in this digest, particularly in Section I of this Part, but others have

so far received insufficient attention. It is convenient to conclude, therefore, with summaries of the more important of these general statements.

1. The "Rule of Law" is an expression whereby one tries to give reality to something not readily expressible, and the prime reason for this difficulty is that the expression, "the Rule of Law" contains, but is not the same as the concept of "The Rights of Man".

The Rule of Law must not be reduced to the area of conflict between the individual and the State, nor yet to the scope of judicial intervention. To the man in the street the Rule of Law represents a complex of notions which are independent of the written law and even of actual decisions, but which constitute the juristic reserve to secure the protection of the individual both against the State and against other individuals. One may, therefore, think of the Rule of Law as something separate and distinct from actual rules of law.

This approach leads to insoluble problems of natural law, and accordingly must not be pressed too far, but in all countries of the West there is an underlying feeling of the need for legality and juristic order, and it is upon this point that the Western nations come together.

There are various alignments of institutions normally associated with the Rule of Law among the various legal systems of the West, and these alignments follow no particular pattern. Thus on the question of judicial control of legislation France and Great Britain are together on one side, and Germany and the United States are together on the other. In the area of criminal law, however, France, Germany and some jurisdictions, including the Federal jurisdiction, of the United States take the view that criminal offences must be defined in the written law, while Great Britain and the other jurisdiction of the United States recognise the existence of "common law" crimes. Finally, so far as the techniques for the protection of the person accused of crime are concerned, France and Germany take one approach while Great Britain and the United States are in agreement on an altogether different approach.

These differences, however, must not be over-emphasised. All countries of the West recognise that the Rule of Law has a positive content. This content is different in different countries, but it is real, and the conviction that it exists and must be secured, principally, but not exclusively by the "ordinary" courts, is the fundamental core of agreement amongst the countries of the West as to the meaning of the Rule of Law.

2. The Rule of Law is based upon the liberty of the individual and has as its object the harmonising of the opposing notions of individual liberty on the one hand and public order on the other. It exists to secure the common good, individual liberty and justice.

If the problem of the Rule of Law as understood in the West is approached only through the legal safeguards of the individual one may well end in purely formal positivism, while abstract consideration of notions of the "common good" leads to a dangerous accidental situation. The balance must be maintained between them, and this is achieved by the notion of "justice". "Justice" has, it is true, a variable content and cannot be strictly defined, but at a given time and place there is an appropriate standard of justice by which the balance between formal positivism and wide notions of the "common good" can and must be maintained.

3. There is an important difference between the concept of the Rule of Law as the supremacy of law over the government and the concept of the Rule of Law as the supremacy of law in society generally, and it is the first concept, with its connotation of the protection of the individual against arbitrary government which is the only feature common to the West. Consideration of the alternative concept can lead only to confusion with different systems which conceive of law as a general social discipline but which do not envisage the protection of the individual against the government. There are legal systems in which the government itself is the best existing protection for the individual, and it is to this that the Western Rule of Law, which emphasises the protection of the individual against the government, is opposed.

The distinction between this principle of the Rule of Law

and the varying means for achieving it must be borne in mind. Different techniques can be adopted in countries with different social conditions to achieve the same ends, and the Rule of Law must not be conceived of as being linked to any particular techniques. But it is fundamental, nevertheless, that there must exist some technique for forcing the government to submit to the law, for if such a technique does not exist the government itself becomes the means whereby the law is achieved, and this is the very antithesis of the rule of law.

4. Much emphasis is placed upon the supremacy of the legislature in some countries of the West, but it must not be concluded from this that the Rule of Law depends only upon the positive law of the time. The Rule of Law involves a profound legality which is both superior and anterior to the positive law, so that it can well be conceived that certain rules of the positive law are actually contrary to the rule of law. The Rule of Law may be expressed in the positive law, but essentially it consists of values and not of institutions. Fundamentally the Rule of Law as understood in the West connotes that climate of legality and of legal order in which the nations of the West live, and in which they wish to continue to live.

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## DOCUMENTS AND PAPERS CIRCULATED

- Doc. No. A — Preliminary Memorandum of November 1956 by Prof. **C. J. Hamson** of Trinity College, Cambridge.
- Doc. No. B — Paris Meeting (4-5 Jan. 1957) on Chicago Colloquium on The Rule of Law 1957.
- Paper No. 1 — The Rule of Law in the United States by Prof. **Paul G. Kauper** of The University of Michigan.
- Paper No. 2 — Government under Law in Germany by Prof. Dr. **H. Rupp**, Judge in German Constitutionnal Court.
- Paper No. 3 — The Rule of Law in Italy by Prof. **G. Treves** of the University of Trieste.
- Paper No. 4 — The Critical Points of the Rule of Law as understood in the Northern Countries (Denmark, Finland, Norway, and Sweden) by Prof. **Nils Herlitz** of the University of Stockholm.
- Paper No. 5 — Some Oversimplified Remarks on Government under Law in the Middle Ages with Reference to England by Prof. **S. E. Thorne** of Harvard University.
- Paper No. 6 — The Protection of General Interests against Particulars by Prof. Dr. **Hans Spanner**, Erlangen, Germany.
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