

PRELIMINARY MEMORANDUM OF 26 NOVEMBER 1956

by

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THE RULE OF LAW AS UNDERSTOOD IN THE "WEST"

- i. (i) The subject of study proposed for the Colloquium to be held at Chicago in September 1957 is *The Rule of Law as understood in the "West"* considered on a comparative scale.
- (ii) The "West", in this definition taken from the minutes of the International Committee of Comparative Law, is there contrasted to the Soviet Socialist countries. The subject adopted by the I.C.C.L. is an adaptation of the third head proposed to Unesco by the meeting held in Paris in February 1956 to consider subjects to be discussed by lawyers with a view to promoting East-West understanding. It is proposed by the I.C.C.L. that a colloquium to study the concept of "légalité" as understood in Soviet Socialist countries, complementary to the Chicago Colloquium, be held in Europe in 1958; and it is hoped to consider jointly the results obtained at these colloquia in subsequent years at other meetings. In order to maintain contact and continuity, Socialist jurists will be invited to attend the Chicago colloquium, and Western lawyers the European colloquium
- (iii) It has further been agreed (whether or not it was so decided) that the comparative "Western" range envisaged in the I.C.C.L.'s decision is sufficiently covered by taking the case of two "Western" civil-law count-

ries, France and Germany, and two common-law countries, England and the United States of America.

2. (i) Professor Hamson was appointed Rapporteur Général for the Chicago Colloquium and was asked to draft a preliminary report to aid the discussion to be held there. Again it was agreed (whether or not it was decided) that in the preparation of this report the assistance would be available of Professor René David (France), Professor Konrad Zweigert (Germany) and the American professors Paul G. Kauper and Harry W. Jones; and the rapporteur was given authority to ask for reports from other individuals.
3. (i) The rapporteur proposes to keep strictly to the terms of reference of the Chicago Colloquium — the Rule of Law as understood in the "West" considered comparatively — both *negatively* by excluding matters (such s.g. as the reception of foreign law) which do not seem to him immediately germane and *positively* by including any topic which seems to him basic to that concept whether or not there are political or prudential reasons for avoiding the topic.
 - (ii) The purpose of the report, and of the colloquium, is to attempt to formulate what the Western concepts in fact are when they are considered comparatively over four systems of Western law.
 - (iii) Similarly while it is not the purpose of the Chicago Colloquium to consider problems of reception neither is it its purpose to restrict discussion to representatives of the four systems which have been chosen for comparison. In particular reception of a Western system of law by a country outside the Western group of nations may have enabled the jurists of the receiving country to have a special and privileged insight into the characteristics of the Western Rule of Law which they have received.
4. It seems best at this stage of the preparation to

list headings suitable for inclusion in the report as topics germane to the adequate discussion of the Western concept of the rule of law. The purpose of the January meeting is not to exclude any such topic (except on the ground that it is *not* germane) but both to add topics which have been omitted and, if it is possible, to make suggestions about the comparative importance of the various topics — though no doubt here the individual predilections of the various commentators will influence their opinions. The rapporteur should state that he does not at present see the logical order in which the topics should be taken, nor what is the necessary or *natural line of discussion* which he should suggest to the Chicago Colloquium. He would be especially glad of any enlightenment which his colleagues could afford him on this point. Indeed a clarification of the line of discussion may well turn out to be the most important function of the Paris meeting in January.

5. Before listing heads of topics, attention should be drawn to Professor David's proposal that a topic which is stated in Section III of his memorandum of 3 November 1957 should be considered. He refers to *Pekelis Law and Social Action* (Selected Essays by Alexander H. Pekelis, edited by Milton R. Konvitz, Cornell University Press, 1950) and describes the subject as a determination "du domaine qui est, dans les divers systèmes, assigné à l'idée de Droit", as distinguished from the manner in which the rule of law is assured within its appropriate domaine. This is clearly a matter of considerable interest. It is a "realistic" approach to the immediate social relevance of Law Courts rather than an examination of the concept of the rule of Law itself but it may be regarded as a reasonable preliminary to that examination. If it is so regarded, seeing that it is detachable, the rapporteur suggests that Professor David be asked to prepare a paper on it for the Chicago Colloquium and that the report should take due notice of

such a paper if prepared. (English social life would provide many instances where very important activities are effectively regulated by rules which have no immediate legal sanctions — e.g. labour relations, the security of tenure of civil servants, even the obligations of insurers (by Lloyd's committee) and the whole gaming industry (Tattersall's Club), etc., etc., though it may be suggested that the regulating institutions are themselves sustained by the legal system].

6. Attention is also drawn to annex 5 of the Report of the Feb. 17-21, 1956 Colloquium at Paris which set out preliminary headings under title of "The Concept of the Rule of Law and "Légalité". The first five of them are reproduced hereunder from the French version.

I. Nature et conditions de la légalité : ce que cette notion évoque dans le public et chez les juristes. Dans quelle mesure d'autres éléments que la loi formelle sont-ils pris en considération dans les différents pays; influence du type et de la structure de l'Etat sur la notion de légalité; séparation des pouvoirs et unité des pouvoirs; la hiérarchie des sources du droit.

II. Des garanties de la personne dans le procès pénal.

Légalité des peines ou analogie en droit pénal — Garantie contre un internement arbitraire — Garantie de la légalité de l'organisation de l'instruction préliminaire.

III. Contrôles juridictionnels et non juridictionnels de l'Administration.

Comment on garantit que l'Administration agisse conformément au Droit.

IV. Rapports entre organisations étatiques ou collectivisées.

Rapports entre l'acte administratif de planification et le contrat, l'autonomie des entreprises.

V. *Organisation et fonctions du ministère public.*

Etude comparée de cette question dans les pays socialistes et non socialistes.

These subjects were agreed upon for the purpose of *joint* discussion with the Soviet countries. They should nevertheless be included as topics in the report presented to the Chicago Colloquium as clearly coming within the *Western* rule of law concept even though No. IV would be of particular interest in Soviet countries. It is believed that most of them reappear in a different order or context in the list which follows.

7. Attention is similarly drawn to Mr. Norman Marsh's statement on the Meaning of the Rule of Law in Bulletin No. 5 of the International Commission of Jurists. He there suggests that there are "two major fields of concern" :

A. Human Rights

B. The way in which legal systems make possible respect for human rights, the relevant principles including

- i. the independence of the Judiciary
- ii. the answerability of the Executive
- iii. the right to independent legal representation
- iv. the control of the Public Prosecutor's office (if it exists) and of the police.

8. To take first a part of No. 1 of Annex 5 : should the question be asked how far is the concept of the rule of law (in the four countries to be considered) determined by the structure of their political system? Is it a critical difference that e.g. the U.S.A. has a federal constitution and a court which can pass upon the validity of the acts of the legislature whereas the English system is a unitary one in which an Act of Parliament cannot be questioned? Or is this difference a relatively unim-

portant difference between an active and a dormant sovereign? Does the notion of a rule of law depend upon a separation of powers within the state? Can a rule of law exist in an absolute monarchy? Does the Western notion of a rule of law imply and require a particular political structure, and if yes of what kind?

9. Whatever may be the answer to the questions in para. 7, the Western lawyer habitually assumes when considering his notion of a rule of law that there is a Court of Independent judges applying and declaring the law. Is this independence a fundamental assumption and condition of a rule of law? It is evidently a confused notion insufficiently examined. Independent of what, to what extent, *for what purpose*? The underlined question especially seems critical: why do we suppose that the judges should be independent?

10. (i) To elaborate some of the questions involved in the independence of the judges: no doubt this independence is an aspect of the notion of the separation of powers, itself a most confused notion. Attention has been mostly directed to the relation between the judges and the executive; and perhaps we begin to understand what we require this relationship to be, though some comparatively minor questions remain: e.g. is judicial independence compromised if the judge is subject to a disciplinary process at the instance of a minister of justice or of the public prosecutor? Is it a sufficient safeguard if the disciplinary court consists of fellow judges, Is security of tenure essential? If yes, of what sort? [The recent Turkish experience seems here particularly relevant, and note the experiments and debates in France and Germany about methods of promotion]. Is an English judge not independent because he can be removed by a joint resolution of both Houses of Parliament?

- (ii) If the relationship between the judiciary and executive has been to some extent explored, the relationship

between the judiciary and other powers in the state has been ignored. Yet our notion of a rule of law would seem to depend upon the existence of a particular kind of relationship. In England and in France it would be heretical to suggest that the judge is independent of the legislature. (Note by contrast the extremity of the independence of the U.S. federal judge in respect of the only existing effective federal legislature). But in what sense is the judge independent if he must do exactly what the legislator tells him, if he is the instrument of the legislator, a particular determinate power of the state? Does the English and French doctrine assume the existence of a particular type of legislature acting in a particular manner? Is that assumption recognised and is it justified? What is the type of legislature, and of its method of action which is assumed? (It would be relevant here to be informed of the postwar debate in Germany on the judge's "duty to resist". Equally relevant would be an account of the opposite fear in the early history of the United States of the independent professional judge who might have been regarded as a remaining royal representative. What was the course of debate on this matter in the United States in the late 18th and early 19th centuries? Why was popular election for a limited term then advocated? Why is such a method of appointment now generally regarded as suspect?)

- (iii) In England the independence of the judge is an aspect of the power, position and authority of the body of judges, and of their historical status as an *autonomous* lawmaking body. (Note the importance which Dicey, who is much more perspicacious than his present day commentators, attributed to the *fact* that in England public liberties spring from the private rights declared and established by the common law — i.e. principally by the judges). Is independence valuable and important only insofar as it establishes or maintains this status? Is this power and authority more important than a tech-

nical independence in a particular respect? Note the remarkable analogy in France of the Conseil d'Etat and of its self-made "principes généraux du droit". Is it this autonomy of some "principles of law" which modern constitutions seek to establish by "declarations of right"? Is this the purpose of "Human rights" conventions? What is the importance, to our notion of the rule of law, of the status of the judge and of the "autonomy" of the law? [Subsidiary questions of considerable factual interest arise : to what extent does the English judge actually retain his status? What is the status and position of the German judge? In whom is judicial power effectively vested in France?].

(iv) The English lawyer would attach much importance to the organisation of the legal profession generally and its relation to the judge. He would suppose that the organisation in England greatly supports the position of the judge.

(v) The suggestion therefore is that the independence of the judges, a most ill-defined concept, conceals or involves a number of basic ideas which may be in part extralegal and which probably are critical for the Western notion of the rule of law.

¶ 1. (i) The Western lawyer similarly assumes that the rule of law involves a procedure before an independent court in the nature has been given to formulating the nature of the trial and, especially, its purpose. Particular points have in the various systems been established, mainly as decisions upon what amounts to a denial of justice; e.g. that a person cannot be judge in his own cause, that the parties concerned have due opportunity of preparation (and ? a right to independent legal advice and representation), that the process be "contradictoire", that the parties be heard in public, that the process issue in a judgment giving reasons (quaere to what extent this last requirement would be recognised in England), etc., etc.

- (ii) Does our notion of the rule of law carry with it as a necessary implication a particular kind of trial and if yes what kind? What complementary institutions does this kind of trial assume; e.g. does the publicity of a trial mean that there should be a right to report it and to comment upon it?
- (iii) Closely connected with the notion of a fair trial is the protection in the procedure of the person suspected or accused of crime. This requirement is however so evidently important that it deserves a separate heading and indeed is often regarded as one of the fundamental "human rights" (e.g. the European Convention: Rome 4 Nov. 1950). It is moreover a well-worn topic of the rule of law or of "due process".
- (iv) Less attention has been paid to the requirement both of publicity and of reasoned judgment. Is the publicity "in terrorem"? Is the trial intended as a spectacle to impress? Has publicity any other and different essential object and if yes what? [Cf. the English reiterated maxim "it is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done" ([1924] 1 K.B. 256, 259; and note that the English form of trial entails a quite peculiar degree of publicity). *Why* is it important that a trial should be public? Is it intended that there should be a concurrence in the conclusion by members of the public? Similarly with the need of a reasoned judgment. Is it intended that judgment should not be an act of authority but an act of reason justifiable as such to reasonable men? Is there an appeal to reason, and what is the relevance or importance of such an appeal if it exists?
- 12 (i) The Western lawyer also assumes that a rule of law necessarily means an *effective* rule of law. He is not concerned with a catalogue of abstract rights: he is concerned with what actually occurs in the relevant

community — law as it is reflected in conduct. A critical question in a community claiming to live under a rule of law are in fact realised in that community. What are methods or institutions designed to procure this actual realisation? [Professor David in section 4 of his memorandum notes as subjects of enquiry the *ministère public*, right of action of associations, right to prosecute (*action populaire*), methods of enforcing judgments, etc.]. Is there a minimum of such methods or institutions which are requisite?

- (ii) Does not a rule of law imply a community capable of realising it and actually realising it? Does not this imply a particular relationship between the law (the lawmaking-declaring-enforcing agencies as well as the law itself) and the community? What is that relationship? Is it of a constant and necessary sort? How do the four nations selected as representative compare in this respect? [Perhaps in this context we may examine the "crises" to which Professor David orally referred, who suggested as an example the Dreyfus case in France. What are comparable examples elsewhere?].

13. In paras. 8-12 above some question on the Rule of Law are put from a perhaps unusual angle. It must however be borne in mind that traditionally the subject is considered as raising the following (amongst other) questions :

- i. Can a system, even if efficiently organised, be said to secure a rule of law unless it secures to the members of the community some at least of the now generally recognised Human Rights? What is the catalogue of these rights as recognised in the four countries taken for comparison? [A useful elementary account is *Colliard. Les Libertés publiques. Dalloz 1950*]. Is there a minimum requisite of such rights?
- ii. Prominent among such rights is the right of a

person accused of crime to a fair trial and to protection against pressure or ill-usage especially between the time of his arrest and the time of arraignment. A comparative study of the manner of proceeding against an individual accused of crime in the four systems would evidently be of the highest interest, especially if it aimed at establishing what is jointly regarded as at least the minimum protection, and the efficacy of the methods used to secure that minimum. ([A document prepared for the 1952 Cambridge Conference sets out a list of questions considered relevant.]

- iii. Critical questions, closely connected with ii above and referred to both by Professor David and Mr. Marsh, concern the power of the police and the control thereof, the office of Public Prosecutor and generally of the Ministère Public.
- iv. The more generalised question, of which iii may for some purposes be regarded as an instance, is the control of executive action and administrative determination so as to protect the individual or to provide him if aggrieved with a remedy — the field covered in France by the admirable *contrôle juridictionnel de l'administration* as exercised by the *Conseil d'Etat*. An analysis of the *principes généraux du droit* recognised by the *Conseil d'Etat* may well provide a concrete example of what is properly understood as a Rule of Law, at least over the considerable field covered by their jurisdiction. An equally valuable result would be provided by an analysis of "due process of law" and "the equal protection of the law" as understood by the United States Supreme Court in a somewhat different field.

PARIS MEETING

A meeting was held in Paris on 4th and 5th January 1957, to consider the form of the preliminary report to be submitted at Chicago and to make suggestions for the course of the discussion to be had there.

Present : Bertrand*, David, Hamson, Jolowicz, Lawson, Letourneur*, Lipstein, Marsh, Zweigert. (* during part of proceedings only).

Documents. In addition to Professor Hamson's memorandum dated 26 Nov. 1956, a questionnaire by Mr. Marsh dated 1 Nov. 1956, a note by Professor David dated 3 Nov. 1956 and a note by Prof. Zweigert dated 28 Dec. 1956, were taken into consideration.

The main decisions reached or recorded at the meeting were, as regards the scheme of the colloquium :

(i) That the main colloquium on the Rule of Law for which Professor Hamson was to act as rapporteur would, in accordance with the decision taken at Barcelona, be entitled "The Rule of Law as understood in the West" but would continue for four days (Sunday, 8 Sept. to Thursday, 12 Sept. 1957 inclusive).

(ii) That a subsidiary colloquium entitled "The Rule of Law as understood in under-developed countries with particular reference to India" would if desired by the U.S.A. committee follow upon 13th and 14th Sept. The responsibility for organising this colloquium would rest with the U.S.A. committee: but Dr. Lipstein consented, if requested, to assist in the preparation of a statement on the position in India without, however, acting as rapporteur.

(iii) That the countries specially to be examined in the

main colloquium would be France, Germany, the U.K., and the U.S.A.; but that particular reports would be requested from other countries (including South American countries) and that a report on Turkey would be included in the main colloquium. No report should be excluded from the main colloquium on the ground only that it emanated from a country included in the subsidiary colloquium; but a report to be included in the main colloquium would have to be concerned with the Rule of Law as understood in the West and not with the technical details of the law in a "receptionist" country.

A main decision reached as regards the course of the discussions at Chicago was that the colloquium should if possible fall into two about equal parts; that the *first part* (A) should be concerned with the fundamental of traditional ideas inherent in the Rule of Law and that a *second part* (B) should be concerned with the impact of the Welfare State upon the notion of the Rule of Law.

AS REGARDS PART A.

(a) It was suggested that a short statement (say about 2000 words) should be procured from representatives of each of the four main countries upon the critical points of the Rule of Law as understood in that country. It would be of interest to compare the notion of legalité or Rechtsstaat to the notion of the Rule of Law itself: for example is legalite or Rech'sstaat not separable from a notion of basic human rights (on which in principle the Common law is neutral); and is Rechtsstaat contrasted to Justizstaat which seems to have affinity to the Rule of Law as understood in the U.K.

(b) It was unanimously agreed that the Rule of Law must be regarded as having a positive content and a purpose of the colloquium was to begin to consider some part of that content. The suggestion was rejected that a Rule of Law necessarily existed wherever there was an established framework of government.

(c) It was agreed that the independence and the impartiality of the judges was an essential element of the Rule of Law,

and that the colloquium could suitably be concerned, in this part, with an examination of what was meant by this independence and impartiality.

(d) It was suggested that when attempting to state the meaning of the Rule of Law in the West, authors should be asked to bear in mind the probable criticisms of Eastern jurists. For example: What is the relation of the rule of law to capitalist institutions? ; is the Rule of Law a sham to protect vested interest ; to what extent is the rule of law connected with the doctrine of laissez faire? It might be that the same formal institutions in East and West derive from quite different principles: for example Soviet legality might be concerned with the enforcement of discipline, the Rule of Law with the protection of the individual but that both would make use of one and the same instrument such as a fact-finding court. [Is the object of judicial process accuracy?]

(e) It was suggested that the notion of equal treatment, of the equal respect of human rights was an essential element of the Rule of Law. If yes, are there basic human rights in the absence of which a Rule of Law would cease to exist, and what is the content of those rights? Or is the Rule of Law to be regarded as mainly a matter of procedure? Should a distinction be taken between established civilised societies and other societies?

(f) In view of the evident diversity existing between the four main countries the question should be raised of the relevance to the Rule of Law of the existence of a constitutional court capable of reviewing the validity of acts of the legislature.

(g) It was suggested that some consideration should be given to the modern dangers encountered by the Rule of Law. One example given was legislation in appearance general but in fact dealing with a particular case only. A more general subject was the exercise of the police power. Within this more general subject would fall the dangers arising from current police practices: a highly specialised topic mooted was the illegal procuring of evidence.

AS REGARDS B.

Under the general headings of the Impact of the Welfare State upon the Rule of Law, two main subjects were considered : (a) the defence of the general interest against particular encroachments and (b) the utilisation of the judicial process in the administration.

(a) The traditional Rule of Law was concerned mainly with the protection of elementary individual rights *against* the state. But in the Welfare State very many rights or privileges depend upon *positive* action on the part of administrators (e.g. the grant of a licence, which may be vital to the well-being of an individual, the obtaining of education or medical treatment etc.). A right here becomes a fair share in, or an equal chance to, a benefit; and an individual is injured by another, or by a group of others, obtaining more than their fair share. Even in the payment of taxes, the fact that some pay *less* than they should means that the amount to be found by the others is increased. The traditional remedies are available only to the tax payer who has, in his view, been overcharged. Means require to be devised, it would seem, to protect the public interest against the undue encroachment of the individual or organised group of individuals; and the equal enforcement of the law appears to take on a new sense. "Pressure groups" are but one example of this phenomenon. A main question therefore is: what steps have been taken in the various countries to ensure the equal enforcement, in this sense, of the law? In countries where the public prosecutor exists, the question is concerned with one aspect of the public prosecutor's office. What also is concerned is the supervision and control of the administrators.

(b) A connected question is the introduction of the judicial element into the administration of the Welfare State. The multiplication in e.g. the U. K. of specialised tribunals evidences the fact that it has been considered necessary to link the administration with bodies which appear to resemble courts; but it is difficult to establish any criterion to decide *when and for what purposes* it is desirable or essential to introduce this judicial element into the

administration. The absence of such a criterion may mean both that a tribunal is a sham or is employed uselessly to do a job which it cannot reasonably be expected to do and that a tribunal is not used when it ought to be. What functions belong to a tribunal in the administration of the Welfare State? What methods should be employed by such a tribunal? How is the proper functioning of a tribunal rightly instituted to be supervised and controlled?

(c) It was also noted that consideration should be given to the general question of the effect of the Welfare State upon basic human rights. Well known instances would be the effect of very extensive planning upon rights of property, and the effect of the direction of labour upon the liberty of the person.

It was also agreed that the preliminary report might well follow an order or method different from the course proposed for the discussions at Chicago; and liberty was reserved to the rapporteur general to draw his report in such fashion as he judges appropriate in the light especially of the particular reports received.
