

1969

Conference of European Jurists on the Individual and the State

Sean MacBride

Recommended Citation

Sean MacBride, *Conference of European Jurists on the Individual and the State*, 3 INT'L L. 603 (1969)
<https://scholar.smu.edu/til/vol3/iss3/11>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

Conference of European Jurists on "The Individual and the State"

To mark the International Year for Human Rights, the International Commission of Jurists organized during 1968 a Conference entitled "The Individual and the State: The Essential Legal Elements for the Protection of the Individual." This Conference was held at the Council of Europe, Strasbourg, on the 26th and 27th October 1968. It was attended by one hundred and thirty European jurists from Austria, Belgium, Denmark, Finland, France, the Federal Republic of Germany, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom, and by eight non-European invitees as well as a number of observers from international organizations.

Background

The International Commission of Jurists is a non-governmental organization dedicated to the support and advancement of those principles which constitute the basis of the Rule of Law. To this end it seeks to mobilize the jurists of the world and to advance and fortify the independence of the judiciary and the legal profession. During the past years, the Commission has achieved considerable results in its systematic action to promote the Rule of Law among jurists in Asia and Africa. Conferences in Bangkok, 1965, Colombo, 1966, Dakar, 1967, and Bangalore, 1968, developed the themes of the previous International congresses held in Athens, New Delhi, Rio and Lagos and further elaborated on the key importance of the Rule of Law in developing countries.

*SEAN MACBRIDE, Secretary General of International Commission of Jurists; graduate, University College, Dublin; King's Inn, Dublin (Barrister at Law); sponsor and signatory Geneva Red Cross Conventions; chairman, International Peace Bureau; chairman, International Executive Amnesty; Foreign Minister for External Affairs for Ireland.

EDITOR'S NOTE: The Conclusions reached at the European Conference on "the Individual and the State" follow on page 609.

It is however a commonplace that the Rule of Law is nowhere safe and the Commission was aware that attention had to be equally focussed on areas where the Rule of Law is all too often taken for granted. Indeed, even in Europe today a regime which violated the most fundamental human rights is tolerated to an extent that it was hoped would be impossible when the European Convention for the Protection of Human Rights was adopted. It is all too clear that machinery to secure the implementation of human rights is meaningless unless the will to apply it exists.

It was therefore thought appropriate to avail of the occasion of Human Rights Year to invite European jurists to re-think their attitude to human rights, and to convene an international Conference in Europe.

The Problem Posed

The problem of the protection of the individual against arbitrary use of power by the State is universal. However, the structure of the modern state is every day becoming increasingly complex, entailing a greater encroachment by the public authority into more and more fields. The citizen is consequently in need of increasingly complex machinery and procedures providing him with protection and remedies against injustices. The problem is to protect the individual not only from abuse of political power but also from bureaucratic autocracy or from simple administrative errors. The Commission considered that it would be appropriate to hold a discussion of this kind in Europe. Most European states have a long background of political independence and have throughout the centuries developed their own institutions and procedures. While these have the same objectives they differ in their institutional and procedural methods very radically. They also need adaptation to meet modern developments.

Valuable contributions were made by several distinguished non-European jurists such as Mr. Eli Whitney Debevoise (New York), Professor John Carey (New York) Judge T.S. Fernando (Ceylon) and Professor L.F. Goldie (New Jersey).

The Problem Examined

The jurists at the Strasbourg Conference examined five of the most typical institutions or procedures which provide citizens with a remedy against the state in the various European legal systems. These were the French *Conseil d'Etat*, the special *Administrative Courts* such

as those in Federal Germany and in Austria, the *Ombudsman* or *Parliamentary Commissioner* in Scandinavia and Britain, the *Habeas Corpus* procedure used in Britain and the *Procurator*, which, with some small variations, is the system in force in the USSR and other communist countries. There are of course other well known remedial institutions or machinery in the world for the protection of the individual such as the Civil Liberties Bureau of Japan and the Latin-American procedure of Amparo. However, it was decided to limit this particular discussion to the procedures and institutions in use in Europe.

It became apparent during the two days of discussion that the difficulties which emerged were not those of the objectives to be reached. All the participants clearly agreed that one of the greatest responsibilities of the modern state towards its individual citizens is to provide adequate, efficient and effective mechanisms for the protection of their fundamental rights and freedoms, not only against infringements by fellow citizens, but also against infringements by the State itself. These 'fundamental rights and freedoms' have already been defined in the Universal Declaration of Human Rights (1948), and their realization has been accepted as the common aspiration of all men. In Europe, the European Convention on Human Rights has provided a system of machinery for the implementation of these rights which has further brought home to Europeans the duty of respecting human rights not only in principle but in practice.

Nevertheless, the problems of priorities and of procedure in the attainment of these common objectives still arise among jurists of differing European formation, used to thinking in terms of the institutions and procedures available in their own jurisdictions.

For example, much discussion centered on the concept of State Responsibility which, for a French lawyer, is the concept whereby the State can be held liable for damage to an individual resulting from its operations, quite apart from the question of fault. On the other hand, an English lawyer will hold that the State will only be liable where a tort or breach of duty has caused damage. Both views would agree that the State should be responsible for the damage it causes, but to reach agreement on the extent to which this responsibility should go meant the merging of the two opposite views to arrive at the consensus of opinion to be seen in Paragraph 14 of the Conclusions.

Another problem which arose concerned the question of Extra-Ju-

dicial Protection. Although all the participants agreed that some form of extra-judicial protection was essential for correcting administrative errors or abuses, their views on the form this protection should take were varied. In the Scandinavian and some other countries the institutions of the Ombudsman or Parliamentary Commissioner has proved invaluable. His duties are primarily to investigate complaints by citizens against the administration. He has power of access to official files and documents, he may order an investigation, or he may make recommendations to the legislature. However, in Germany, Austria and in France, administrative abuse of power or maladministration is entirely the concern of the Administrative Courts or the Conseil d'Etat. These systems, although valid in their own spheres, lack the flexibility of the Ombudsman system and Conclusion 17 reflects the strong support for the Ombudsman concept as a necessary adjunct to judicial protection.

The Conclusions

The Conclusions reached by the participants as the result of the discussions are reproduced below and form an interesting whole.

The Preamble reflects the European awareness of the collective duty to protect human rights by the rule of law. It recalls that the function of the legislature in a free society is to endeavour to give full effect to the principles of the Universal Declaration and that the Rule of Law depends upon effective government capable of maintaining order and promoting social and economic development on the one hand and upon adequate safeguards against the abuse of State power on the other. The Preamble also refers to the new dangers to human rights presented by the technological evolution and by the expanding scope of State regulation in all spheres of human activity.

The operative part of the Conclusions then sets out the Essential Legal Elements for the protection of the individual. Many of the points consist simply of a reaffirmation of accepted principles, some represent the emergence of new thinking, particularly in regard to the section on Administrative Acts. In general, the twenty-two paragraphs represent a comprehensive view of the consensus of legal thinking in Europe on the protection of the individual.

The Conclusions are followed by a section entitled "General Recommendations." The Conference realised that it is very well to

discuss the safeguard of human rights in Europe where the structure to ensure their protection is already entrenched. In many parts of the world concern with human rights is not on an equally sophisticated level, and the greatest needs are basic, such as education, economic security, free elections. For this reason the General Recommendations set out certain essential prerequisites in all societies and advocate certain extra measures for the effective protection of human rights. Also in this section the Conference made some recommendations concerning the international protection of human rights. In particular an international jurisdiction to provide effective implementation machinery in the form of a Universal Court of Human Rights is encouraged.

The protection of human rights and the maintenance of the Rule of Law are tasks that face lawyers all over the world. The European jurists hope that the Conclusions of this Conference may help lawyers everywhere to set the standards for the proper realisation of these aims.

European Conference on The Individual and the State

The Essential Legal Elements to Ensure The Protection of the Individual

Strasbourg, 26 - 27 October 1968

Conclusions

Preamble

WHEREAS the Universal Declaration of Human Rights recites that it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, and enumerates the human rights and fundamental freedoms which States have undertaken to promote and observe,

AND WHEREAS by the European Convention on Human Rights (1950) the Member States resolve to take the first steps for the collective enforcement of certain of the Rights set forth in the Universal Declaration and guarantee the enjoyment of the rights and freedoms set forth in the European Convention,

AND WHEREAS by Article 2 paragraph 1 of the International Covenant on Civil and Political Rights (1966) each State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

AND WHEREAS by Article 2 paragraph 2 each State party to the said Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant,

RECALLING that the International Commission of Jurists has, at its Congress of New Delhi (1959), stressed that it is a function of the legislature in a free society under the Rule of Law to endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights and to create and maintain the conditions which will uphold the dignity of man as an individual, which dignity requires the recognition of his fundamental rights,

AND RECALLING that the International Commission of Jurists has, at the Congress of Rio de Janeiro (1962) on 'Executive Action and the Rule of Law,' concluded that the Rule of Law depends upon effective government capable of maintaining order and promoting social and economic development on the one hand and upon adequate safeguards against the abuse of State power on the other,

AND RECALLING that the Assembly for Human Rights held at Montreal in March 1968 and the United Nations International Conference on Human Rights held at Teheran in April/May 1968 recognised that many aspects of modern technological evolution presented new dangers to human rights and to human dignity and recommended that a study be undertaken in this field,

AND REALISING that one of the primary responsibilities of the State towards the individual is to provide adequate and effective mechanisms for the protection and furtherance of his fundamental rights and freedoms;

NOW THEREFORE this European Conference of Jurists adopts the following Conclusions:

Part I Essential Safeguards

1. *Guarantee of Rights*

Fundamental human rights and freedoms should be guaranteed by law, preferably by a written constitution.

2. *Separation of Powers*

The principle of separation of the legislative, executive and judicial powers of the State should be respected.

3. *Independence of the Judiciary*

The independence of the judiciary should be secured. Such independence implies freedom from interference by the executive and legislature and freedom to interpret and apply the laws of the land in accordance with the Rule of Law and the fundamental principles of justice. In order to ensure the independence of judges it is essential that their appointment should be free from political interference or patronage; they should enjoy full security of tenure and should receive adequate remuneration which cannot be altered to their disadvantage during their term of office. (For more detailed requirements see New Delhi Conclusions on the Judiciary and the Legal Profession under the Rule of Law.)

4. *Availability of Remedy*

Remedies should be provided by Law against infringements of the rights of the individual, by State organs, public authorities or individuals.

5. *Speed of Remedy*

Judicial process should provide for the disposal of cases without undue delay

Civil and criminal proceedings should be free from unnecessary procedural difficulties and technicalities, which result in undue expense or delay and present other obstacles to the speedy vindication of rights. To obviate delays it is essential that there should be an adequate number of judges and court officials.

6. *Fair Hearing*

There should be fairness and objectivity in judicial and quasi-judicial proceedings. This entails not only an objective tribunal, giving each party a fair and equal opportunity to present his case, but also the existence of an adequate system of legal aid.

7. *Judicial Appeal and Review*

There should be an effective right of appeal from the decisions of a lower court to at least one higher court. Administrative acts which may injuriously affect the rights of the individual should be subject to judicial review.

8. *Availability of Evidence*

The defence in a criminal case, a party to a civil action and a party before an administrative tribunal should have access to all oral and documentary evidence relevant to his case or to the matter under investigation, and effective machinery for compelling the attendance of witnesses and for ensuring the production of documents is essential. In any cause in which the State or a public authority is involved, the State should not be allowed to prevent the production of relevant documents or other evidence unless the court comes to the conclusion that the security of the State, or the fair administration of justice, would be seriously prejudiced by such production.

9. *Safeguards Against Retroactive Legislation*

Constitutional or legal safeguards should ensure that the rights of an individual are never adversely affected by retroactive legislation or regulations.

10. *Provision Against Double Jeopardy*

Due regard should be had for the principle, "Nemo bis vexat in eadem causa."

Part II Administrative Acts11. *Legal Basis*

Public authorities may only make decisions that are based on

existing law, and in furtherance of the object envisaged by the law under which they are made.

12. *Prior Consultation*

Where an executive or administrative order ultimately affects the rights or interests of individuals, the public authority concerned should consult the organisations or groups interested in the measure contemplated and give to interested individuals a reasonable opportunity to present their views.

13. *Motivation for Order*

When an administrative order is made which affects or is likely to affect the rights of the individual, the reason for the order should be fully stated.

14. *Concept of State Responsibility*

The State should be liable for damage arising from the negligence or wrongful acts of its executive and other organs. Under the concept of State responsibility, the State should also be liable in principle for damage resulting from those of its operations which cast upon an individual a burden which is unreasonable in relation to the rest of society, particularly when his ability to earn his livelihood, his family rights or his property rights are adversely affected.

15. *Minimum Requirements for Quasi-Judicial Acts*

Save in periods of genuine public emergency, where an executive or administrative body has a discretionary power to make orders amounting to an adjudication affecting the rights and interests of an individual, the following requirements should be observed

- (a) There should be adequate notice to the interested parties of the contemplated measures and the reasons therefor.
- (b) The interested parties should have an adequate opportunity to prepare their case, including the right of access to all relevant data.
- (c) The interested parties should be given the right to be heard, to present evidence and to meet opposing arguments and evidence.

- (d) The interested parties should be given the right to be represented by counsel or other qualified person.
- (e) Notice of the decisions reached and of the reasons therefor should be communicated without undue delay to the interested parties.

Part III Extra-Judicial Protection

16. *Administrative Protection*

Consideration should be given to the provision of simple, inexpensive extra-judicial remedies within the administration itself for correcting administrative errors or abuses. Any such extra-judicial remedies should be capable of being grafted upon the existing legal and political systems.

17. *Ombudsman System*

The institution of "Ombudsman," now operating in Denmark, England, Finland, Guyana, New Zealand, Norway, Sweden, and Tanzania, has proved of considerable assistance both in protecting the rights of the individual and in achieving a more efficient administration. An institution of this or a similar nature would be a valuable adjunct to the existing judicial safeguards in any jurisdiction, especially in countries which do not have a system of Administrative Courts.

Part IV: Control Over Assumption of Emergency Powers

18. *Restriction on Assumption of Emergency Powers*

The restrictions on the assumption and exercise of emergency powers as set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations Covenant on Civil and Political Rights, should be the minimum adopted in any State. Steps should be taken by every State to have at least these restrictions embodied in its basic law.

19. *Judicial Control*

There should be a system of judicial control over the assumption and exercise of emergency powers by the executive with a view to

- (a) determining whether the circumstances have arisen and the conditions have been fulfilled under which the powers may be exercised; ✓

- (b) limiting the extent to which such emergency powers may be exercised in derogation of the fundamental rights of the individual; and
- (c) giving the courts a supervisory jurisdiction to ensure that emergency powers are used for the specific purpose for which they were granted, and that they are not exceeded. The courts should have the power to grant effective remedies in cases of misuse or abuse of emergency powers.

20. *Confirmation by Legislature*

Wherever the executive power is legally authorised to declare a state of emergency, the declaration should be compulsorily referred to the legislature for confirmation within the shortest possible time. The legislature should retain control over the duration of emergency periods, which should only be extended from time to time when the legislature is satisfied that extension is needed.

21. *Periodic Legislative Review*

An obligation should be imposed upon the executive power to submit its programme and procedures to legislative review from time to time during an emergency.

22. *Safeguards Against Continuing Arbitrary Confinement*

During periods of public emergency, legislation authorising preventive detention should contain safeguards for the individual against continuing arbitrary confinement by requiring in each case a prompt hearing and decision upon the need and justification for the detention. Such decision should always be subject to judicial review.

* * * *

General Recommendations

The principle task of the Conference was to set out the specific legal elements necessary to ensure the protection of the individual; these are embodied in the Conclusions of the Conference. Realising, however, that the proper safeguard of human rights cannot be assured solely by domestic legal remedies and that a proper political, social and

economic structure is an essential prerequisite for the effective protection of human rights, the Conference makes the following General Recommendations:

1. *Economic and Social Rights*

The establishment and observance of standards that recognise and foster not only the political rights of the individual but also his economic, social and cultural rights and security—in accordance with the European Social Charter (1961) and the International Covenant on Economic, Social and Cultural Rights (1966)—is one of the first essentials.

2. *Public Opinion*

A further essential is a society of citizens conscious of their rights, resolute in their support of the institutions designed to safeguard them, and vigilant against erosion of the right to receive and impart information, the rights of free expression, assembly and petition and civil and political rights in general.

3. *Education*

It follows that there must be an adequate scheme of education in principles of human rights which utilises to the full all modern means of mass communication such as radio, television, films, newspapers and publications. Further, human rights should figure prominently in the curricula of schools and in the education of public officers.

4. *Free Press*

In order to ensure that the public is conscious of its rights and maintains its interest in human rights' problems, it is essential that there should also exist a free press, which not only truly represents different shades of public opinion, but also provides a medium for the expression of different points of view and of general or individual grievances.

5. *Elections*

A system of periodic and genuine elections on the basis of universal and equal suffrage by secret ballot must form the basis of government authority.

6. *Periodic Review*

To ensure that laws and procedures conform to the provisions of the Universal Declaration of Human Rights, there should be a system of periodic review of legislation. A competent body should be authorised by the legislature to examine existing legislation and formulate appropriate suggestions to better secure the rights of the individual and their protection.

7. *Advisory Institutions*

A valuable adjunct to State organs of protection would be an institution or institutions to examine the causes of infringements of different rights of the individual and to recommend legislative and administrative measures to prevent such infringements by State officials and other persons.

8. *Earlier Conclusions*

The individual rights which should be safeguarded are enumerated in the Universal Declaration of Human Rights, and the relevant international conventions; they have in many instances been defined by earlier Congresses and Conferences of the International Commission of Jurists, particularly the Congress of New Delhi (1959), the Conference of Lagos (1961), the Congress of Rio de Janeiro (1962), the Conference of Bangkok (1965) and the Ceylon Colloquium on the Rule of Law (1966). Accordingly, this Conference has not attempted to redefine them all.

In the light of present day evolution, the Conference considers that special attention should be drawn to two other Conferences of the International Commission of Jurists, each held to examine a specific right in depth, namely the Nordic Conference on "The Right to Privacy (1967) and the Bangalore Conference on "The Right to Freedom of Movement" (1968). The Conference also wishes to draw special attention to the Conclusions of the United Nations Seminar held at Kingston, Jamaica, in 1966 on "Effective Realisation of Civil and Political Rights at the National Level" and other recent United Nations Seminars on human rights.

9. *International Jurisdictions*

While the protection of the individual is most effectively safeguarded at the national level, international judicial and other

effective supervision is also necessary. In order to give full effect to the provisions of the Universal Declaration, regional conventions and other arrangements should be encouraged. Such conventions should provide effective implementation machinery analogous to that provided by the European Convention on Human Rights. Consideration should also be given to the setting up within the framework of the United Nations of a Universal Court of Human Rights that could act as a final court of appeal in all matters related to human rights. In any international machinery provided, the right of individual petition is regarded as essential. Consideration should also be given to the establishment of an international jurisdiction to deal with crimes against humanity.

10. *United Nations High Commissioner for Human Rights*

The adoption of the proposal now before the General Assembly of the United Nations for the establishment of a U.N. High Commissioner for Human Rights with an independent status should be encouraged.

11. *Ratification*

Finally, this Conference urges every country

- (a) to adhere to the principles embodied in the European Convention for the Protection of Human Rights and Fundamental Freedoms (including Article 25 and the Articles relating to the jurisdiction of the Court), and those in the European Social Charter;
- (b) to sign and ratify the International Covenant on Civil and Political Rights (including the Optional Protocol), the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all forms of Racial Discrimination; and
- (c) to take early steps by legislation or otherwise to ensure the effective existence in its legal and administrative structure of the essential and basic elements necessary for the protection of the individual.