CURRENT LEGAL PERIODICALS

Some Legal Problems Arising out of the Establishment of the Allied Military Courts in Italy. Ian Campbell. International Law Quarterly: 192-206.

The writer of this article, lately Chief Judicial Officer, H. Q. Allied Commission for Italy, gives a short review of the constitution and work of the Allied Military Courts in Italy.

The courts were of three grades, Summary, Superior and General, the power of sentence limited in the case of the first to one year's imprisonment or a fine of 50,000 lire, while the General Military Court, composed of a senior legal officer and two other officers, could impose any penalty. The law enforced was set out in a number of proclamations and orders which declared certain acts to the prejudice or safety of the Allied Forces to be punishable by death, imprisonment or fine and provided that any person accused of a violation of Italian law might be tried and punished as provided by that law.

The Courts had no jurisdiction over members of the Allied Forces, but it was decided that Italian troops did not come within that definition. Under international law there was no right to establish military courts in territory under Italian government administration, but this right was obtained by agreement implemented by Italian legislation. Theft and looting from military depots in southern Apulia reached such proportions that courts were established there temporarily in regular session.

Difficulties encountered were the lack of reliable interpreters and of qualified and experienced lawyers. According to a Sicilian advocate, the Allies had liberated the people from the rule of the Fascists but had delivered them over to the rule of the interpreters. While many of the Italian advocates were men of great intelligence and experience, thay could not understand Anglo-American legal procedure and often the chief contribution of defense counsel to the proceedings was "a speech of great length, delivered with great fluency and wealth of gesture, but irrelevant to the points in issue and largely devoted to emphasizing the immense number of the accused's children and other dependents".

The prevalent offences were spying, possessing firearms or explosives, damaging, stealing or having property of the Allied Forces, interfering with communications, forgery and killing members of the forces. Espionage cases were particularly difficult to decide.

The rules of evidence adopted in English and American courts were generally followed, but the Courts had to be on their guard against receiving confessions obtained by Italian police by force or threats. In a forgery case where a confession was refused and the accused was acquitted he "was so surprised that he fainted in court, and was heard to remark as he came to, that he was confidently expecting to go to prison for many years". This willingness to acquit, where the evidence was not conclusive, and the reasonableness of sentences, earned for the Courts "a considerable reputation for fairness".

Some 150,000 cases were decided by the Allied Military Courts in Italy and while Mr. Campbell, by reason of his connection with them, will not say that they carried out their duties "in such a way as to earn the respect of the Italian people, judiciary and lawyers", he feels that the members of the courts can await the verdict of history with confidence.

The Supreme Court and Civil Rights: 1946 Term. Osmond K. Fraenkel. Columbia Law Review: 953-978.

Judged by his work in the 1946 term, the influence of the new Chief Justice of the United States Supreme Court seems to have "leaned uniformly to the conservative side". In cases involving civil liberties in every instance, except where there was unanimity, his vote was against "the claim that liberty had been infringed".

Chief Justice Vinson came from the outside "into a Court sharply divided". Of thirty civil liberties cases heard in the term, sixteen would have resulted differently had a single vote been cast the other way. The Chief Justice, therefore, may, in Mr. Fraenkel's opinion, be held responsible for "the trend away from upholding the rights of the individual, which, for the first time in many years, characterized the Supreme Court at this Term". While there were "some surprising shifts of position in particular cases", the other members of the Court seem in the main "to have kept to their former general positions". Justices Black, Douglas, Murphy and Rutledge were most frequently in dissent.

The decision in *Harris* v. *United States*, in which the Supreme Court divided "unusually", evoked much criticism. It had to do with the extent to which law officers without a search warrant may search premises at the time of making an arrest with a warrant. Harris was suspected of forgery, but nothing was found relating to this crime. In the search made at the time of the arrest, however, the law officers came upon some draft registration cards

to which he had no right. He was indicted for their possession and moved, unsuccessfully, to prevent the use of the cards as evidence. He claimed that his rights, under the Fourth Amendment to the Constitution, had been violated.

The majority of the court upheld the seizure on a number of unrelated grounds. The writer is very critical of the Chief Justice's opinion, which he says "ran afoul of" the well-settled rule that a search cannot be made good by what is found and, besides, his statement leaves doubt as to how far officers should be allowed to go in making a search.

Justice Frankfurter said, "Stooping to questionable methods neither enhances that respect for law which is the most potent element in law enforcement, nor, in the long run, do such methods promote successful prosecution".

Justice Jackson was at least as vigorous in speaking of "the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desirable".

Haupt v. *United States* was the only treason case; in large measure it repudiates the *Cramer* case of the 1944 term. Both arose from aid given to saboteurs who landed on American shores in 1942. In the earlier case it was held that the need for two witnesses, required by the Constitution, had not been met. In the *Haupt* case the defendant had sheltered his son and helped him to get a car. With but one dissent the court decided in favour of the conviction. Justice Douglas, who had dissented in the *Cramer* case, concurred in this one, stating that he could see no difference between them, but preferred the later decision.

Two cases resulted from the Hatch Act, with its restrictions on the political activity of government employees. Justice Reed wrote the majority's opinion in both. It was held that no constitutional rights were infringed since expression of opinion was not restricted, but only political activity, and that "was nothing new". Justice Douglas in a separate dissent in one of these cases distinguished between administrative and industrial employees. The real evil, he said, lay in "the coercive power of those on top". It should not be allowed to result in a "denial of rights to those at the bottom". What would be the position if, as in England, state ownership were inaugurated? Would it then be just to debar hundreds of thousands of workers from political activity?

Cases of this kind will be on the increase "due to the President's loyalty order" and possible legislation along these lines.

Looking back over the civil liberties decisions, of which these are but a few, the writer's conclusion is "that few new

principles were expounded and no old landmarks obliterated". Some earlier rulings were modified, if not expressly overruled, in such a way as to cause doubt and uncertainty, as in the *Harris* and *Haupt* cases, while "new areas were touched upon" in the cases that grew out of the Hatch Act. Great divergence developed in the interpretation of the Fourteenth Amendment. The majority, however, "adhered to the accepted view that only where fundamental principles of justice had been violated could federal courts interfere with state convictions". The hope is expressed that at the next session the current trend, unfavorable to civil liberties, will be reversed. (G. F. FISHER)

Statements to the Police as Evidence. Wm. Jardine Dobie. 59 The Juridical Review. 122–130.

Increasingly it is becoming the case that statements to the police are not evidence, says the writer of this article. The principles now applied are of recent origin, not yet fully developed.

The admission of such statements depends largely on the position of the person finally accused. There may have been no charge or arrest; he may have been detained on suspicion, or charged and apprehended; or may have been brought before a court and duly committed to prison. The over-riding consideration in all such questions is that of fairness to the accused. The cases referred to here were decided between 1926 and 1947 in Scotland's High Court of Judiciary.

A statement made during investigation, where no charge has been made, will generally be admitted unless there is some manifest unfairness in so doing. The test appears to be not merely that there has been no charge or arrest, but that the police were not then in possession of evidence to justify such a step, since the possession of evidence and the withholding of the charge in order to obtain an unwary reply would obviously be unfair.

Where there has been a detention on suspicion the position is one of "some delicacy", and Lord Anderson in the *Aitken* case, [1926] J.C. 83, considered that the court should be more jealous to safeguard the rights of one so detained than where there has been a formal accusation. A statement obtained at this stage would be receivable in evidence only if truly voluntary and made after the usual caution. If the detained person has asked for and been refused the services of a solicitor, that would indicate unfairness and call for the rejection of any statement then made.

In *Aitken's* case, and the more recent one of *Rigg*, [1946] J.C. 1, the circumstances were "strangely parallel". In the former,

where the test of fairness was first laid down, consideration was given to age, physical and mental condition, lack of a solicitor, interrogation and doubt as to warning. The more recent trend indicates that interrogation or a failure to warn would mean rejection of the statement as evidence. In the *Rigg* case, a youth of seventeen was cautioned and was advised that he could have a solicitor or relative present. Without solicitor or relative, however, he made a statement of some 700 words. The court rejected it as evidence, since its contents showed that it could not have been obtained without interrogation.

One who has been charged and apprehended is in much the same position, the difference as seen by Lord Anderson being that an arrested person has a definite charge against him. If the police have done their duty he has been cautioned and is entitled by the statute to the services of a solicitor. In either case, however, the caution must be adequate and be understood, and it must be sufficiently related in time to the statement. Interrogation, inducement, threat or other form of pressure will vitiate it as evidence. This applies also to a statement made after a questioning.

When the accused has been formally committed by a court, he is no longer in the custody of police but under the protection of the court and any statement then made to the police is inadmissible.

One incidental point has arisen in two cases. Is a statement, made by one charged with a certain crime, admissible if the ultimate charge is for a different crime? In the case of *Cunningham*, [1939] J.C. 61, the original charge was assault to the danger of life. Then the victim died and murder was charged. The statement was admitted. In *Willis* v. *H. M. Advocate*, [1941] J.C. 1, one accused of murder had made an incriminating statement which was allowed in her trial for culpable homicide, since the *species facti* was the same. The Court of Appeal had no fault to find in those circumstances, but expressly reserved the question whether such a statement is admissible where the trial is on a graver charge than that under which the statement was obtained. Accordingly, this is still an open question. (G. F. FISHER)

Legal Aspects of Drug-Induced Statements. Len. M. Despres. 14 University of Chicago Law Review: 601–616.

In recent years certain drugs have been used most effectively by psychiatrists in the treatment of the mentally ill, so as to obtain "uninhibited expression" by the patient. In the United

States the same drugs have been used in the investigation of crime and have received publicity in the newspapers as "truth serums". The most sensational instance was in the *Heirens* case in Chicago in June 1946.

Heirens, a seventeen-year old boy, had been arrested for attempted burglary and, when questioned, appeared to be feigning amnesia. One of his fingerprints indicated a connection with a recent murder. The authorities had sodium pentothal administered by a psychiatrist and learned that Heirens had committed three murders and a number of burglaries.

It is quite clear that the drugs so used do not constitute "truth serums". They produce a state of mind in the subject in which he is unable to survey critically his responses to questions, but those responses may be the hidden truth, fancy or the suggestion of the questioner. The use of drugs is an improved, but nevertheless the same "method employed from time immemorial by the colonel in the mess to discover the qualities of the newest subaltern".

A confession obtained when the suspect was under the influence of a drug, involuntarily administered by the authorities, would, as such, be excluded from evidence here, as in the United States, by the rule against the admission of involuntary confessions. As Mr. Despres says, however, such a convenient method of obtaining information from suspects will nevertheless continue to be favoured by the police. The legal implications become very wide, for the use of drugs would enable the authorities to discover many things and give them unlimited opportunities for oppression. "On technically sufficient warrants, persons might be arrested and subjected to interrogation. Under the influence of drugs, their secrets, their wishes, their subconscious hostilities, would soon become police property, and many private details, better left hidden, could be used to embarrass or destroy the subject." An action for assault, or for an injunction, would be small protection to the suspect.

This article suggests that, so long as the criminal law remains devoted to the principle of punishment, it is necessary to go beyond merely excluding confessions obtained when the subject is drugged. A confession obtained afterwards, by relating the facts learned in the examination under a drug or otherwise using it, ought, and probably would be excluded. In *Rex* v. *Booher*, [1948] 4 D.L.R. 795, a confession made shortly after an examination under hypnosis was rejected by the Supreme Court of Alberta, as influenced if not induced by the hypnosis. It is most

important, in order to prevent oppression of the public, that the use of evidence obtained as a result of information gained in an involuntary examination by the use of a drug should be excluded. American courts permit, with certain limitations, the use of evidence discovered as a result of a confession that would not itself be admissible. But unless the courts prohibit the "fruit of the poisonous tree" the way remains open to police oppression.

A subsidiary problem arises from the absence of privilege for statements made to one's physician. The very proper use of drugs in psychiatric treatment is likely to disclose the commission of crimes. Such information ought to be made privileged, either by statute or by the courts.

It is possible that Mr. Despres goes too far in condemning entirely such a potentially useful aid to investigation, and *quaere* whether, as the use of drugs in psychiatry becomes a well-established technique, there is not a great deal to be said for the admission of the results of examination by "narcoanalysis", properly interpreted by an expert witness, and of matters learned thereby and independently proved. (JOHN H. H. DEPEW)

Certification: A Proposal to the Bar. Albert I. Kegan and Louis G. Melchier. 42 Illinois Law Review: 413–423.

It is suggested here that boards should be established to certify competent specialists in certain fields of law. At the present time a client who needs legal advice has no way of finding out which of the many lawyers listed in a telephone book, or in any other list available to the public, are qualified to deal with his particular problem. The result is that people either do not consult lawyers if they can avoid it, consult the wrong lawyers, or go to unauthorized practitioners of law.

Unauthorized practice by laymen is said to be "mushrooming" tremendously today because they are "unhampered by ethical restrictions on advertising and solicitation". Real estate brokers sell property and do all the legal work for both parties; notaries public draw wills and advise on estate matters; architects draft contracts, and scientific consultants, engineers, physicians and scientists "advertise far and wide their special worth in lawsuits"; advertising agencies represent that their copy will pass certain legal tests because of their knowledge of the law; trade mark service bureaus advertise search services and look after registrations, for substantial fees; and administrative agencies will permit laymen, with no special educational qualifications whatever, to represent "clients" in matters before them.

The work of unauthorized practice committees, and public warnings and advertisements by bar associations, have not proven effective in curbing unauthorized practice. Enforcement of statutes prohibiting it is difficult "and often politically inexpedient". Since most legal service is rendered outside the courts, in advice given in law offices, the preparation of instruments and negotiations between parties, the lay adviser does not need to appear in court.

The method suggested for bringing a client and the right lawyer together, and thus providing the community with legal service of the highest quality, is the creation of boards, federal or local, which would examine lawyers and issue certificates guaranteeing their "reasonable competence" in particular fields. This would be supplemented by "listing by specialty in classified public directories". The American Medical Association now has fifteen "specialist boards" and the certification idea is spreading in other professions. The adoption of such a system would not, alone, cure the ills of the profession "but its acceptance would be at least a start in the economic modernization of the bar".

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LE BAVARD SANS CRÉDIT

Lalethros est un loquace. Il est doué d'une rare faculté de s'exprimer avec aisance. Les mots lui viennent plus vite que les pensées. On pourrait presque se demander s'ils ne les conduisent pas. On écoute Lalethros avec plaisir et, comme il le sait, il a tendance à abuser de son talent. Il a conscience que, quoi qu'il dise, sa parole sera agréable et ses formules heureuses. Il improvise sans préparation sur n'importe quel sujet. Il peut parler indifféremment pendant dix minutes ou pendant deux heures. Il ne médite pas avant de parler. Il en résulte qu'il n'approfondit rien, n'étudie pas les dossiers qu'on lui confie et se préoccupe peu de la valeur de la démonstration qu'il se propose d'entreprendre. Il se fit à la promptitude de son esprit et à la complaisance de son débit. On aime l'entendre, mais il ne se fait pas écouter. Il charme, mais ne convainc pas. On attache peu d'importance à ses avis. S'il intéresse pour lui-même, on ne prend pas garde à la cause qu'il défend. Il avait l'étoffe d'un orateur utile, il n'est qu'un bavard sans crédit. (Me Maurice Garcon: Essai sur l'éloquence judiciaire. Paris, 1941)