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FUNDAMENTAL GUARANTEES OF THE PARTIES IN CIVIL LITIGATION

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Under the Auspices of the International Association of Legal Science

LES GARANTIES FONDAMENTALES DES PARTIES DANS LE PROCÈS CIVIL

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préparées à la requête de l'UNESCO
sous les auspices de l'Association Internationale des Sciences Juridiques

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PREFACE

In early 1970 the International Association of Legal Science (I.A.L.S.) invited its Italian branch, the Italian Association of Comparative Law, to organize the 1971 Conference of the I.A.L.S. in Italy. The invitation was accepted and Florence was selected as the seat of the Conference.

At its September 1970 session in Moscow, the Executive Committee of the I.A.L.S., under the chairmanship of the Association's 1968-70 President, Professor John N. Hazard of Columbia University, chose for the Florence Conference's discussion the topic "Fundamental Guarantees of the Parties in Civil Litigation," and requested me to act as the General Reporter. A number of experts in the fields of civil procedure, constitutional law, and international law were then invited to submit reports and to participate in the Conference together with the Members of the Association's Executive Committee, its former Presidents, Secretaries General, and Directors of Scientific Work.

Signed by Professor Denis Tallon of the University of Paris, the 1965-71 Director of Scientific Work, and by myself, the following letter was circulated among all prospective Reporters in December 1970:

1. For the first time, the International Association of Legal Science has chosen civil procedure as the framework for its annual Conference, to be held in 1971 in Florence under the auspices of the Italian National Committee of the I.A.L.S. and the Florentine Institute of Comparative Law.

The particular topic chosen for discussion — the fundamental guarantees of the litigants in civil proceedings — is one of the most important aspects of civil procedure, and, to our knowledge,

has never been the subject of a discussion on a world-wide comparative level.

A growing number of nations has given constitutional status to some procedural guarantees of civil litigants. This trend, a typical aspect of what has been called " modern constitutionalism, " might be exemplified by both the " due process " clause in the oldest of the modern Constitutions, that of the United States, and by the guarantee of " publicity " of judicial proceedings in the Constitutions of the Soviet Union and the People's Democracies (see, e.g., *Art. 111 of the U.S.S.R. Constitution).*

Our tentative suggestion is that the National Reporters should emphasize those guarantees which have, in their respective countries or groups of countries, assumed constitutional *status. Of course, this " constitutionalization " might have quite a different meaning and practical impact, depending on a number of circumstances, including: (a) the " rigid " or " flexible " character of the Constitution; (b) the written or unwritten character of the Constitution; (c) the existence of a system of judicial review of the constitutionality of legislation and other state action. It is certainly desirable that each National Reporter give adequate, although brief, information about these circumstances.*

Even guarantees which have not assumed a strictly " constitutional " status should be discussed, insofar as their " fundamental " character is, one way or another, judicially relevant and practically sustained by the statutes, the courts, or tradition. For instance, we anticipate that the English report will probably discuss those ingredients which are essential to what an English lawyer thinks of as " fair trial " and " natural justice. "

International documents may have a very important bearing on our topic. For example, Art. 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms extends to civil proceedings the guarantees of an independent and impartial court established by law and of a fair and public hearing within a reasonable time. An analysis of the decisions of the Commission and the Court of the European Convention will be, no doubt, of great interest for our discussion.

2. To be sure, the topic chosen might well appear to be too broad for a Conference of only three or four days.

The discussion above has indicated one advisable limitation on the scope of our topic: insofar as possible, those rules which are constitutionally or internationally guaranteed should be given primary, if not exclusive, attention. In addition, we propose the following criteria to reduce our topic to workable proportions:

(a) First of all, we recommend that only those rules be discussed which have a practical, not merely a " doctrinal " or academic,

significance in the respective country or group of countries. In other words, we are not expecting a theoretical analysis of the procedural maxims; rather, we are expecting a realistic picture (based as much as possible on court decisions) of the actual guarantees of litigants in a civil case;

(b) Constitutional or fundamental guarantees of civil proceedings might be separated into (i) guarantees concerning the judiciary, e.g., *independence and impartiality; (ii) guarantees concerning the parties proper, such as their right of action and defense, their right of effective access to court, their right to counsel and legal aid; and finally (iii) guarantees concerning the unfolding of the proceeding and the proof-taking,* e.g., *adequate notice, admissibility or exclusion of illegally obtained evidence, publicity and orality of the hearing, and written form of the decisions including their grounds (see, for example, Art. 111 of the Italian Constitution). Admittedly, these divisions are rather artificial. Indeed, guarantees respecting the judiciary might also be seen from the point of view of the parties who have a right to a judge who is impartial, independent, " lawful "* (gesetzlicher Richter: *Art. 101 of the* Bonner Grundgesetz), *and " subject only to the law "* (e.g., *Art. 112 of the Soviet Constitution). Moreover, the guarantees concerning the unfolding of the proceeding can also be seen from the point of view of the parties' rights as well as from the point of view of the judge's and the parties' respective roles in controlling litigation. For instance, both the guarantee of adequate notice and the right to present evidence without unreasonable limitations are nothing but manifestations of the more general parties' right to a fair hearing or right of defense. Although somewhat artificial, these divisions may be of some help, however, in defining and restricting the scope of our topic. It is recommended that the Reporters' discussions focus only on those guarantees which secure a fair hearing to the parties, and in particular on the right to be heard, the right to counsel, and legal aid. Thus, for example, it will not be the conference's task to discuss the judiciary* per se *(selection, tenure, promotion, removal, organization, etc.), but only — if at all — incidentally from the point of view of the constitutional or fundamental rights of the civil litigant to an effective hearing.*

Sixteen reports were submitted to the Conference, twelve of which were dedicated to single national systems, one to the European Convention on Human Rights, and three to large groups of systems (one to the European People's Democracies and two to Latin America). Following the I.A.L.S.'s tradition,

the general report was not submitted in writing in advance; rather, it was finalized only after the Conference in order to benefit from the oral discussions.

The Conference was held in the Palazzo dei Congressi in Florence from the 5th to the 9th of September, 1971. Twenty European, American, Asian and African countries were represented by the Conference's participants. Four working sessions were held. The 600-page verbatim transcript constituted the basis from which a summary of the discussions was prepared; it is printed at the close of this volume and is, in my view, no insignificant part of the present publication.

The reports were left with their authors for revision until the beginning of 1972; they can be considered updated to that time.

Of course, the field covered by the seventeen reports collected in this volume is a very growing and changeable one. To exemplify, the U.S. Reporter informed the Conference's participants that he had to change parts of his paper radically after the U.S. Supreme Court rendered its important decision in the Boddie *case.*[1] *Nevertheless, the principal conflicts and trends in this field are very clear and, in this light, even notable changes such as those brought about by the* Boddie *decision are not at all unexpected. Indeed, in my opinion the remarkable and lasting importance of the wealth of research and information gathered in this volume rests in its demonstration of an essentially common core of values and a common stream of evolutionary developments which appear throughout the world. Such values and trends cut across the boundaries of single national systems and groups of systems notwithstanding the multitude of differences not only in procedural techniques but also in the traditions, ideologies, and socio-economic structures at the basis of those techniques. The " fundamental " guarantees of civil litigation thus appear to act, in the words of two out-*

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[1] Boddie v. Connecticut, 401 *U.S.* 371, 91 *S. Ct.* 780, 28 *L. Ed. 2d* 113 (1971).

standing proceduralists and writers, Piero Calamandrei and Benjamin Kaplan, as those " drops of water " that " reflect the sky ": [2] *they faithfully reflect fundamental conflicts, trends, and aspirations of present-day societies. What finally emerges is the design of a renewed conception of justice — of a growing constitutional, international, and social dimension of justice; of courts more accessible to all; of judges concerned with real, not only formal, equality of the parties; of procedure intended to work both more fairly and more efficiently: in a word, of a judicial system more responsive to the challenging demands of our time.*

" Fundamental " values represent, perhaps, aspirations rather than reality. Indeed, rather than satisfaction, one of the characteristics of our time is growing discontent with the administration of justice, civil as well as criminal. Yet it seems clear to me that the only way to overcome such discontent and the people's feeling of alienation from " official " justice, is to implement a more accessible, human, and equitable justice by effectuating in the national and international judicial systems those new values that appear to present-day minds as " fundamental. " If this is true, then the significance of the following materials will endure far beyond their usefulness as stores of factual information.

Before closing this brief introductory remark it is my pleasant duty to thank the International Association of Legal Science, its present President, Professor Viktor M. Tchikvadze of Moscow, and its former President, Professor Hazard, for the honor conferred upon the Italian Association of Comparative Law, the Florentine Institute of Comparative Law, and myself, to organize the Conference and to publish its proceedings. In these tasks I had the good fortune to profit from the collaboration

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[2] P. Calamandrei, *Procedure and Democracy* 76 (New York University Press, 1956); B. Kaplan, " Civil Procedure — Reflections on the Comparison of Systems, " 9 *Buffalo Law Review* 409, 432 (1960).

of Professor Tallon, who undertook editorial responsibility for the reports in French. Both of us constantly benefited from the help and advice of the International Association's Secretary General, Dr. Veikko O. Reinikainen. Dr. Vera Bolgár of the University of Michigan came to Florence to give her invaluable assistance by revising, with skill, patience, and good humor, the language of some reports and the form of all; both myself and Professor Tallon wish to express our deepest appreciation to her. Finally, I thank UNESCO — the sponsoring organization of the I.A.L.S. —, the Calouste Gulbenkian Foundation, and the Italian Research Council for financial support in connection with the research for, and publication of, this volume; the Florence Center of Comparative Judicial Studies, funded by the Giovanni Agnelli Foundation, for its constant organizational and scientific collaboration; as well as the Florentine Palazzo dei Congressi, the Chamber of Commerce of Florence, the Tourism Offices of Florence and Pisa, and the Villa I Tatti for helping to assure the working and touristic success of the Conference.

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