

*FOR THE RULE
OF LAW*

***Bulletin
of the
International
Commission
of Jurists***

CONTENTS

ASPECTS OF THE RULE OF LAW

Foreword	1	East Germany	27
Algeria	5	Hungary	43
Cyprus	20	United Nations	51
Dominican Republic	23	United States	56

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Member of the Geneva Bar, former First Secretary
of the International Court of Justice

Administrative Secretary : EDWARD S. KOZERA,
Former Lecturer in Government, Columbia University

FOREWORD

The Secretariat of the International Commission of Jurists is entering into a final period of intensive preparations for the African Conference on the Rule of Law to be held in Lagos, Nigeria, January 3-7, 1961. One of the main objectives of the Conference will be to bring together for the first time members of the legal profession from a majority of African States for an exchange of experience and views on the future development of African legal institutions and procedures. It is essential that close intellectual relations should develop across African borders and the Commission hopes that its initiative in this field will bring positive results in the form of an increased cultural interchange between African lawyers of the Common Law and of the Civil Law training.

The many representatives of the Commission who have had the opportunity to travel in Africa were greatly impressed by the desire shown by lawyers of various countries for a close co-operation with international organisations as well as on an individual basis. These world-wide contacts should be fostered and encouraged to permit a fruitful exchange of ideas and information on the legal systems of countries with long traditions of independent government under the Rule of Law on the one hand, and of countries with ancient traditions of customary law blending with modern European codes on the other. It is only through such relations that the lawyers of different backgrounds can learn to appreciate the positive and discern the negative features of various systems without the reserve, if not bias, which often springs from insufficient knowledge of the historical and sociological bases of specific foreign institutions.

The general theme of the African Conference is "Government Action, State Security and Human Rights". The study of the relevant topics will be undertaken in three Committees; one on Human Rights and Government Security—the Legislative, the Executive and the Judiciary; the second, on Human Rights and Aspects of Criminal and Administrative Law; and the third, on The Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society. Consultations with African friends revealed the timeliness of the Conference

and the great importance attributed to this agenda. The International Commission of Jurists is aware of the crucial role of the lawyer in the development of adequate standards of public service in the newly independent countries. A government under the Rule of Law is of necessity the final objective of all jurists who keep faith with ethical principles in which their profession is rooted. A proper balance between the exercise of various governmental functions and the dedication of all branches of administration to the principles of the Rule of Law are as essential for the fullest and continuous blessings of freedom as are the independence of the Judiciary and the freedom of the Bar. The Commission believes that the debates in Lagos will lay the groundwork to fruitful long-range co-operation with its many friends among the African jurists. [The objectives of the Conference are discussed in more detail in the *Newsletter* of the International Commission of Jurists, No. 9 (September 1960)].

The importance of an unfettered exercise of the functions of the Judiciary and of the Bar has been repeatedly stressed in recent developments around the world. The readers of this *Bulletin* will find articles dealing with alarming situations compounded by the subservience of the organs of justice to the political commands of the State. The continuing persecution of the freedom-seeking people of *Hungary* cannot but evoke bitter memories of their ordeal by foreign military intervention in 1956. In *East Germany*, the administration of justice had to participate in a "spontaneous" drive to dispossess thousands of independent farmers and to compel them to join collective farms. The Government achieved its purpose by methods clearly violating the constitutional and legal provisions of the German Democratic Republic itself. In the *Dominican Republic*, an entrenched totalitarian regime defies international concern over its abusive practices and continues to jeopardise the peace and freedom of its citizens.

The vigilance of the jurist and the courage of the practising lawyer are put to a special test whenever a critical internal situation endangers the peace and stability of their country. In *Algeria*, and to a certain extent in metropolitan *France*, the bloody conflict affects increasingly the high traditions of fundamental rights and civil liberties of the French nation. The objectionable practice of preventive detention is being resorted to on an increasing scale. Newspapers and books criticising the methods applied in investigation and prosecution are being seized without judicial control. The right of defence appears at times to be seriously impaired as administrative measures replace orderly judicial

procedures and the exercise of the legal profession falls under a political scrutiny.

Conversely, elaborate procedural guarantees, complicated by judicial and administrative problems of a federal system, created in the *United States* an anomalous situation culminating in the execution of a criminal twelve years after his trial and conviction. The Chessman case, a *cause célèbre*, has been analysed in this issue. Although it does not belong among instances of general and systematic violations of the Rule of Law with which the Commission is concerned, it raises problems of substantive and procedural law which—removed from the emotional and political elements that beclouded them—must invite attention of every scholar and practitioner of law who strives for the fullest meaning of justice in our complex society. The Commission is aware of the fact that even in those countries where the Rule of Law is fully applied, there remains room for improving procedures.

To report in the *Bulletin* favourable developments of the Rule of Law is always a gratifying task. One such positive achievement is discussed in the article on the new Constitution of the *Republic of Cyprus*. The Commission wishes to underscore the example set by months of patient negotiations between the interested parties which had to overcome obstacles and problems of unusual proportions. The constitutional arrangement devised in the case of Cyprus could serve as a guide in some other complicated situation of multi-national communities.

The *Bulletin* usually contains at least one item on the work of international organisations related to the aims and purposes of the Commission. In this issue, the 1960 Annual Conference of the *United Nations* Commission on Human Rights is discussed. The task it undertook was a very difficult one and its results, however partial, justify hope in further progress of international negotiations for the settlement of major outstanding problems of human rights.

It was planned to include in this *Bulletin* a study on the developments in *Turkey* where a progressive deterioration of the political climate and of the protection of civil liberties was followed by a revolution that brought into being a transitional regime of the Committee of National Unity headed by General Gürsel. During the months preceding this overthrow of the Government of Prime Minister Adnan Menderes, the International Commission of Jurists has been seriously worried about measures affecting constitutional freedoms and especially the freedom of the press. A paper on this subject was being prepared when the coup of May 27,

1960, reversed the situation. On October 21, 1960, an unprecedented mass trial of some 450 members of the former government and of the parliamentary group of the Democratic Party opened at Yassiada. The Commission does not wish to comment on these proceedings in their initial stage but has delegated Mr. Raymond Nicolet, a prominent Geneva attorney, to act as its observer at the trial.

By the time of publication of the next issue of the *Bulletin*, there will be in the hands of the readers a special study on the alarming situation in South Africa. It will be available in English and French. While the international Survey on the Rule of Law continues, reports are under way on the legal conditions in Spain, Cuba and the Dominican Republic. Other research projects are being considered for the near future. In the next issue of the *Bulletin* readers will find first results of this extensive activity which reflects not only the complexity of the problems of the Rule of Law in various parts of the world but also the scope of the Commission's international responsibilities.

November 1960

Jean-Flavien LALIVE
Secretary-General

THE ALGERIAN CONFLICT AND THE RULE OF LAW

The hostilities in Algeria have entered into their seventh year. The anniversary of the incidents that marked their beginning evoked strong emotions which will have found their expression in an international debate in the United Nations General Assembly. The International Commission of Jurists has consistently followed a policy of an objective analysis and evaluation of documented facts. It cannot proceed from political considerations and wishes to reserve judgment on the issue of the national or international character of the conflict. Its only concern is whether fundamental human rights and basic principles of procedural fairness continue to be observed or become increasingly curtailed. It is important to note that the French Government's thesis of an internal rebellion would appear to commit its agencies to an even more scrupulous respect for the Rule of Law than if the country had declared itself at war with an external enemy.

Yet the International Commission of Jurists has lately been receiving information and reports which establish beyond reasonable doubt the serious and systematic infringement of human rights and civil liberties committed in the daily practice of military tribunals, police and other government agencies in direct violation of the French Constitutions of 1946 and 1958. The concern felt by the Commission over these regrettable developments was expressed on various occasions. In Bulletin No. 7 (October 1957, pp. 14-20), appeared an analysis of the newly introduced state of emergency and of other measures applied in Algeria under special powers granted to the Government by the French National Assembly. Reference was made to the resolution of the General Assembly of the French National Section of the Commission, held in Strasbourg in September 1957, which stressed the traditional role of the judiciary as the guardian of individual liberties and the best guarantee of fundamental rights.

In Bulletin No. 9 (August 1959, pp. 8-11) a cable was reprinted as sent by the Secretary General of the Commission on August 8, 1959, to General de Gaulle, expressing hopes that the French Government would institute an impartial inquiry which would alleviate the doubts of a great many members of the international legal community over the strict adherence to the Rule of Law in the proceedings before

military courts and in the detention camps in Algeria. Regrettably, no action has been taken on this request and the fears of world public opinion in general and of jurists in particular have since considerably increased.

The speech of General de Gaulle of September 16, 1959, raised the hopes of all who saw in the principle of self-determination the solution of the problems in Algeria. The improvement of the political climate brought about by this statesmanlike address was fostered further by the invitation to representatives of the leaders of the Algerian movement for independence (FLN) to participate at the preliminary talks which were opened at Melun, France, on June 24, 1960.

The expectations of both parties attending this meeting have, however, failed to materialise. As a result, positions hardened, military operations broadened, terror and repressive measures multiplied and the danger of the internationalisation of the conflict has grown.

The deterioration of the political situation is necessarily accompanied by mounting pressure under which the administration of justice suffers both in Algeria and in metropolitan France. The International Commission of Jurists reacted to such alarming developments. The meeting of its Executive Committee in London, June 18-19, 1960, requested the Secretariat to undertake, in co-operation with the French National Section of the Commission, a comprehensive study of the legal elements arising out of the Algerian conflict. Again, the Geneva meeting of the Executive Committee of October 14-16, 1960, discussed the Algerian situation in the light of the most recent events, and passed the following resolution:

The Executive Committee of the International Commission of Jurists, noting the prolongation of the unhappy conflict in Algeria with its attendant suffering to innocent victims and concerned at repeated allegations that the provisions of the Geneva Conventions for the protection of the victims of war, of August 12, 1949, are not being observed in this conflict; that methods of criminal investigation and trial procedures contrary to those normally accepted by France and other civilised countries are being employed; that proper rights of defence are denied; and that the conflict has resulted, both in Algeria and in metropolitan France, in curtailment of individual freedom and of the liberty of the press;

1. Invites "Libre Justice", the French Section of the International Commission of Jurists, to report to the International Commission of Jurists generally upon these matters and in particular on the application of the various legislative enactments in particular cases;

2. Instructs the Secretariat of the Commission to study the relevant legislative enactments dealing particularly with:

- (a) detention without trial,*
- (b) the treatment of prisoners,*

- (c) the right of defence,
- (d) the liberty of the press,

in the light of similar legislation in other civilised countries and to report thereon to the Executive Committee.

3. *Resolves* to give further consideration at its next meeting to the problems involved on the basis of the reports received.

Throughout the period of increasing tension, the Commission was gratified and encouraged by the support and co-operation received from its French National Section. In February 1960, at the request of the Commission, "Libre Justice", set up a committee under the chairmanship of Judge Marc Ancel, of the Court of Cassation, to investigate the case of three French lawyers who took temporary refuge abroad and claimed that their personal freedom was jeopardised as a result of their legal activities on behalf of Algerians accused before French tribunals. The committee, while noting that the lawyers in question failed to respond to its inquiry, stressed that measures of administrative detention such as were applied in two cases of Paris advocates, must not be imposed on lawyers for reasons of their professional activities. Conversely, the committee concluded that lawyers themselves are not above the law and cannot escape disciplinary or penal sanctions should they violate their professional or legal obligations.

A particularly impressive manifestation of the position of French intellectual leaders was the Colloquium convened on July 1-2, 1960, in the ancient abbey of Royaumont near Paris, and attended by a number of prominent judges, teachers of law and practising lawyers. Three resolutions were passed: one stressed the pre-eminence of civilian power, the second dealt with legal conditions for self-determination and the third, considering the guarantees of the freedom of the individual, declared that "the war in Algeria has brought in its wake not only a multiplication of inadmissible violations of civil liberties in the application of criminal procedure and particularly in the stage of police investigation, but also a genuine abasement of judicial institutions..."

Three of the leading members of "Libre Justice" have played a major role at the meeting of Royaumont: Judge Maurice Rolland, of the Court of Cassation, whose report on the guarantees of the freedoms of the individual laid the foundation to the abovementioned third resolution, Judge Marc Ancel, also of the Court of Cassation, and Mr. Raymond Castro, Doctor of law and advocate at the Court of Paris.

Mr. Castro has kindly agreed to write for this issue of the Bulletin the following article which points out the elements of the

French legislation and administrative practice that appear most seriously at variance with the principles of the Rule of Law espoused by the Commission. The text below is a translation from the French original.

Mr. Castro writes:

For six years now, in a conflict often obscured by political passions, the Algerian insurrection has juxtaposed two equally legitimate rights: on the one hand the State's right of self-defense—defined as a natural right in Article 51 of the Charter of the United Nations—and on the other hand individual liberties, guaranteed by the preamble of the French Constitutions of 1946 and 1958.

The right of the State to defend itself does not apply solely to dramatic circumstances such as foreign war or armed insurrection. It is exercised daily, just as the human organism constantly defends itself, until death, against the changes in its functions.

In the French legislative arsenal the provisions of the Criminal Code and the Code of Criminal Procedure are weapons available to the State at all times for the exercise of its right of self-defense. In the event of foreign war or armed insurrection, a *state of siege* can be declared, granting exceptional powers to the military authority for the maintenance or re-establishment of order.

The Algerian insurrection, which broke out on November 1, 1954, put to the test the resources of this legal arsenal.

It would have been possible to declare a state of siege in Algeria. But that would have placed all powers in the hands of the Army, towards which the Government of that period nourished a certain lack of confidence, justified to some extent by subsequent events. It therefore resorted to a *state of emergency* unknown in French law until that time. This in turn was replaced by *special powers* granted to each succeeding Government and still in effect.

State of siege, state of emergency, special powers—all three result in more or less the same measures (control or prohibition of publications and assemblies, search and seizure, confiscation of arms, etc.) which have been customary everywhere and in every age in analogous circumstances.

In metropolitan France, where there was no insurrection but only terrorist activity, but where, nevertheless, the wounding or death of thousands occurred, the legal problem was more awkward. To declare a state of siege or a state of emergency would have been untimely and would have exceeded the require-

ments of the situation, but to maintain the rule of ordinary law would have rendered the authorities helpless in face of the operations of the terrorists and their partisans.

A solution was sought both in special legislation, introducing measures borrowed from war-time legislation into a peace-time system of national life, and in amendments to the Criminal Code and Code of Criminal Procedure with reference to crimes or minor offences endangering the safety of the State.

Administrative Internment

One of the most strongly criticized among such measures was administrative internment which provoked non-violent manifestations without precedent in France.

In 1939 and 1944, administrative internment, i.e., internment without trial, had been applied to "persons dangerous to national defence or public safety". The creation of internment camps seemed a natural consequence of the state of war and of the state of siege which had been declared. And yet it had never been possible in the past to intern a person during a state of siege on grounds of his appearing dangerous.

The Algerian rebellion was to bring back internment camps, even though the very idea was rejected with horror, both by the authors of the law establishing the state of emergency and by its opponents. The term "administrative internment" appeared in legislative texts only after internment camps had existed in Algeria for three years—a rather disgraceful fact.

It might be argued that such camps were no less justified than those set up in France during World War II. Does not French legislation on the state of siege provide similar measures affecting civil liberties in case of armed insurrection, as it does in case of a foreign war?

The question of the legitimacy of such camps arises in fact only with regard to the territory of metropolitan France, where they reappeared in 1958. Do terrorist activities there constitute sufficient justification?

In order to answer this question, it would be necessary to know the exact degree to which administrative internment has been effective in curbing terrorism and what the consequences would be if such camps were abolished. Opinion is divided on this point.

Recently, still more men have been torn from their homes for a period that is to be of longer or shorter duration, as a measure of security.

During Mr. Khrushchev's visit to France, for example, aliens whose presence on French soil seemed to threaten the safety of the Soviet statesman were sent to Corsica. When the French Prime Minister visited Algeria, "activists" of European origin were sent to France where they were kept in compulsory residence, and so on. A new category of displaced persons was born.

As such measures, always explained by security reasons, multiply and in turn affect persons with different if not actually opposing beliefs, the question arises as to whether decisions on their application may be left exclusively to the executive power or its agents, subject to no higher authority.

The present trend in France is not one of supervising and narrowing the scope of the Executive's action. For over a century it was not possible in that country to declare a state of siege except by the promulgation of a law. Article 36 of the present Constitution authorizes the Council of Ministers to proclaim it by decree, for a twelve-day period.

Proclamation of a state of emergency also required legislation. A recent Ordinance makes it possible to impose it by decree, again for twelve days.

In this way the executive power can henceforth decree, subject to no control and on its own initiative, a state of siege or a state of emergency and thus authorise itself to restrict considerably and even suppress essential liberties.

A certain degree of anxiety as to the future must be experienced when it is seen to what extent certain governments tend to identify the State or the Nation with themselves.

To return to the matter of administrative internment, the question has been asked whether it would be possible to have the system "humanized". Could not some procedure be devised, short of trial and ordering to internment, whereby at least unjustified internments could be avoided?

This would be in accord with Article 78 of the Geneva Convention of August 12, 1949, relative to The Protection of Civilian Persons in Time of War, which, while it recognises internment without trial "for imperative security reasons", calls for provisions to be made for "the right of appeal of persons interned".

This document refers of course only to the relationship between an Occupying Power and the inhabitants of the occupied territory. But any State that had signed the Geneva Convention could hardly refuse to its own nationals the safeguards it would be bound to grant to nationals of an enemy power whose territory it might occupy.

The legislation that established administrative internment during the Second World War and since the outbreak of the Algerian conflict also provides for *Commissions de Vérifications* to be set up to advise the Minister of the Interior. The latter is, however, not bound to follow their counsel and does not always do so. Such bodies cannot therefore operate as courts of appeal in the sense of the Geneva Convention.

In order to appeal against administrative internment a detainee must know the ground upon which the decision rests. This information is usually withheld from him.

This creates a vicious circle indeed. When a person is subjected to administrative internment instead of being prosecuted in court, it is because information exists indicating that he is dangerous but no evidence is available that could be produced in court. Such information generally comes from sources whose identity the police wish to withhold. In many cases, to disclose the information would be to reveal its source.

All this is understandable, but how can a person defend himself against information the nature of which is unknown to him and which may come from an envious competitor, or from a wife eager to regain her freedom, as has often been the case? To make use of the right of appeal prescribed by the Geneva Convention, a knowledge of the facts is required. The court of appeal, however constituted, cannot evaluate the information which led to the internment without assistance from the interned person or from his legal representative.

Various efforts made to introduce a measure of jurisdictional control into the process of administrative internment would not therefore seem destined to succeed.

Seizures of Books and Newspapers

The Algerian conflict has increased the incidence of seizures of books and newspapers. In 1957 there were in metropolitan France eighteen instances of such seizures and in 1959 a total of twenty-one; statistics for 1958 are not available.

In its report to the President of the Republic concerning the draft legislation on the state of siege, the Conseil d'Etat had written, on July 18, 1849: "It would be unthinkable that, either in a fortress exposed to the enemy or to mutiny or in any other town or community of the Republic, the foreign or internal enemy should find auxiliaries or allies against the Government of the Republic in writers who would uphold their cause and make propaganda for them."

This is the motive for which the law of August 9, 1849, concerning the state of siege, empowered the military authorities to prohibit publications deemed to be "of a nature to excite or encourage disorder". This law is still in force. A stage of siege having been declared in 1939, censorship was established from the start of the war.

In Algeria, as we have said, it was not a state of siege but a state of emergency that was established. Section II of the Law of April 3, 1955, empowered the administrative authorities to "take all steps necessary to ensure control of the press and publications of all kinds". The same applies under the system of special powers which succeeded the state of emergency.

Those provisions were not applicable in French territory where, to refer to the terms of the above-quoted report, there were a number of writers and journalists who sustained, more or less openly, the cause of the Algerian rebels and even urged insubordination and desertion.

Books and newspapers were seized under the provisions of Section 30 of the Code of Criminal Procedure which, in case of emergency, authorize the prefects "personally to take the necessary action in order to ascertain the crimes and misdemeanours specified above or to instruct the competent officers of the police in this respect". In his exercise of this right the prefect is bound to inform the *Procureur de la République* and to send the case before the judiciary within a period originally fixed at 24 hours but recently extended to five days.

Section 30 of the Code of Criminal Procedure replaced Section 10 of the Code of Criminal Investigation which, after long attacks by liberal circles, had been repealed in 1933. Yet by that time democracy in France was on the defensive: the powers of prefects had to be re-established only two years after their repeal, although they were now applicable only in case of acts against the security of the State.

In the Senate, in 1935, the Minister of Justice had laid emphasis on the fact that the prefects should, in case of emergency, confine themselves to ascertaining that there had been a breach of law; the judiciary authority would then immediately undertake an independent examination of the case and reach a decision as to whether it should be submitted to the courts. The Minister asserted that executive power should do no more than take the preliminary action preparatory to instruction.

The conclusion might have been drawn that, by analogy with the provisions of the Press Law, which in certain circumstances

empowers the investigating judge to seize publications, the prefects would content themselves with seizure of four copies of the incriminating text—a number sufficient to ascertain a breach of law. This was, however, not the case following orders from one Minister or another, the Prefects have seized the entire edition of certain newspapers and even of some books. The latter, however, are not sold, like newspapers, within a few hours of printing, so that urgency—the only possible valid motive for the prefects' action—could hardly be invoked.

Various explanations, which are more or less ingenious, have been put forward to justify this practice. They are unconvincing. The true nature of these seizures is evident from the fact that they are generally not followed by actual accusations or prosecution, so that there is no opportunity for a court to pronounce upon the guilt of the journalist or writer and hence on the justification for the seizure.

Under the circumstances, serious doubt may subsist as to this justification and up to the present time newspapers have failed to obtain compensation for the sometimes quite heavy losses caused by the seizures. A recent order of the *Conseil d'Etat* does however open up new prospects.

The fact that prefects, who carry out seizures, and Ministers who order them, are not answerable to the Government, gives rise to serious abuses. It lends credence to the suspicion that repeated and perhaps unjustified seizures are no more than an attempt to ruin or to silence the few opposition mouthpieces which are the most frequently attacked.

The reasons advanced in support of such seizures—or, conversely, in support of the writings in question—show the complexity of the problem.

On the part of the Government, the need is pointed out to preserve the morale of the Army or of the nation and the trust of the nation in its Army, and to prevent “a veritable moral betrayal of the youth of France who are fighting in Algeria with the certainty that they are fulfilling a national duty”.

On the part of the newspapers seized, the informative function of the press is naturally invoked, as is the freedom of expression, in which connection the Government protests that it seeks only to combat excesses of the press. But it is difficult to decide where proper information—the expression of a permissible opinion—ceases, and activities dangerous to the security of the State begin. Where do rights end and abuses begin? A system whereby it is not possible to know in advance what is permitted and what

prohibited, is the worst system possible and one can understand the proposal made recently by a well-known journalist who suggested the reinstatement of censorship policy "as in wartime".

In this field, successive Governments have considered only the warlike aspect of the Algerian conflict. They can then refer to the precedents established in 1914 and 1939; it was definitely not permitted, during those two wars, to spread doubt as to the rightness of the country's course of action or the means employed to achieve victory. How could men go out to kill and be killed if the cause they defended was discredited each day, and their action censured?

Writers and journalists argue on other grounds. They see the political and even the moral aspect of the Algerian problem, on which every citizen is certainly entitled to his personal opinion. But an opinion is valid only if based upon real facts and not upon some "official version".

To know the truth is not only a right, it is a duty. Did not Renan say: "There is no power in the world that can prevent a man from publishing what he believes to be true"?

But when, and where, was it ever permitted to tell the truth, the whole truth, in wartime? War and truth are as irreconcilable as justice and administrative internment.

The Decree of February 12, 1960, and the Ordinance of June 3, 1960

Terrorist activities periodically call forth protestations against the slowness of procedure and the leniency of some sentences. This is particularly the case whenever a crime excites public indignation by its horror. The public cannot understand why a criminal should be sentenced months, sometimes years, after the crime when his guilt is proven; it wants an immediate and implacable sentence.

After an extraordinary jury session in the *departement du Nord*, during which many North Africans had been sentenced, the members of the jury adopted a resolution demanding that: "To meet exceptional circumstances, there should be appropriate methods of investigation and repression, intended first and foremost to safeguard law and order. The heavy, complicated formalism of the Code of Criminal Procedure would no longer appear to meet the situation. It would be appropriate to turn these cases—criminal or not—over to courts legally empowered to pass sentence without delay, as in the case of *flagrante delicto*."

More recently, the Préfet de police of Paris, attending the funeral of a member of the police force killed by Algerian terro-

rists, said : " It is natural that our Codes should endeavour to guarantee individual liberty *in all its forms*, even that of a suspect. But this system cannot possibly be applied to terrorism, which is outside the pale of law. " Such a statement tends indeed to " out-law " terrorism in every sense of the term, and to deny terrorists the safeguards granted to the worst criminal under law, an action to which no jurist could subscribe.

The Government was not deaf to the general outcry for a more rapid process of meting out justice to terrorists. Many recent legislative texts answer this demand.

The first, the Decree of February 12, 1960, concerns the operation of military justice in Algeria.

The Algerian rebellion had led to a great extension of the powers of military tribunals, both in Algeria and in metropolitan France, where an Ordinance dated October 8, 1958, made it possible to bring before military justice a whole catalogue of crimes and minor offences committed in order to assist, directly or indirectly, the rebels in the Algerian *departements*.

Procedure in those tribunals was, until recently, that provided for in the Code of Military Justice under which, even in wartime, the accused has the same safeguards as if he were appearing before an ordinary criminal court and the rights of the defense are respected.

However, a Decree dated March 17, 1956, made it possible to summon directly before a military tribunal, without prior investigation and without delay, persons caught *flagrante delicto* participating in certain actions, even when the offense was a capital one. The Code of Military Justice did not permit such summons even in wartime.

The Decree of February 12, 1960, has upset the rules of procedure followed in Algeria before military tribunals.

According to unofficial comments, the purpose of the change was to reduce the time limit for the appearance of the accused before the military tribunal " while maintaining the fundamental safeguards granted by French law ". If this were true, no one would be found to complain, the acceleration of justice—whether civil or penal—being the desire of all French jurists.

These basic safeguards spring mainly from the fact that, since the reform of 1897, an accused person may be assisted during the pre-trial investigation by a lawyer who is notified of all procedural acts and may cause any action to be taken which he believes will serve the cause of truth, and to whom certain means of recourse are open against the main decisions of the investigating judge.

The 1897 reform had for some time been reproached for having turned the investigating judge into a "powerless policeman" who could do nothing more than record the results of the police investigation (which precedes the investigation proper, entrusted to a judge) and was unable, in practice, to add to it anything really new.

The development of the police investigation, deplored by many prominent jurists, arose, it was argued, out of "a phenomenon of social flexibility spontaneously opposed, by a reflex action proceeding from natural laws, to aggravations of criminality".

In other words, the safeguards granted to accused persons during the pre-trial investigation were alleged to undermine society's defence against an overwhelming wave of crime evaluated by some, even before the beginning of Algerian terrorism, at many times the 1939 figure.

The procedure worked out by the Decree of February 12, 1960, on military tribunals in Algeria, satisfies the opponents of the 1897 reform. It allows no participation by the lawyer in the investigation procedure before such tribunals.

Such procedure is directed by a Military Procurator who has powers of both prosecution and inquiry and carries out his investigations without being obliged to follow any particular form.

Until he is brought before the military tribunal, which may be a month or two after his arrest, the accused is detained *incommunicado* and guarded by the police without an opportunity to communicate with the outside world, including his lawyer. Prior to appearance before the tribunal he may not even know the nature of the acts supposed to have been committed by him, the charges brought against him or the penalties to which he is liable.

The lawyer's role, which begins only when it has been decided to bring the accused before the tribunal, has to be fulfilled under extremely difficult conditions. He is allowed only 48 hours in which to communicate with the accused, to acquaint himself with the case and be heard—confining himself to "summary observations"—by the President of the tribunal. As the appearance before the tribunal may take place within six days after the "summary observations" were made, the lawyer may find himself with a total of only eight days in which to examine the brief and prepare his case.

An Ordinance dated June 3, 1960, this time referring to the military tribunals of metropolitan France and the "repression of certain crimes committed to assist the rebels in Algerian

departements " is inspired by the same motives as the Decree of February 12, 1960.

Where such crimes are " flagrant " and their author has been arrested, no pre-trial investigation is necessary. Inquiries are conducted by the police, without intervention on the part of the investigating judge, which automatically excludes the lawyer. They may not last longer than one month, after which the accused must be brought before the military tribunal " as a matter of urgency ".

The desired acceleration of procedure before military tribunals, has thus been obtained both in Algeria and in metropolitan France. But has not the " speed limit " been exceeded, beyond which there is in reality no true justice but only a pretense of justice?

What distinguishes one from the other is the opportunity given the accused to defend himself and be defended. True justice should not allow the defence to be suppressed or placed at such disadvantage with respect to the prosecution that the role of the defence counsel is so debased that his presence is merely a formality for what is but a semblance of justice.

Counsel must be able to play his part, which consists of gathering and presenting elements favourable to the accused and contesting or refuting evidence introduced against him. A learned author, Professor Carbonnier, has very rightly stated that the science of law is a *science du contradictoire* and therein lies its originality. Where there is no possibility to contradict, there is no longer any law or justice. Nor is there any freedom.

The Ordinance of June 4, 1960

In concluding, it is important to mention here the profound modifications resulting from the Ordinance of June 4, 1960, in the texts of the Criminal Code and Code of Criminal Procedure as they refer to crimes and minor offenses against the safety of the State.

The previous development of those texts would alone have been a matter for an extensive study—and a most rewarding one. Suffice is to say that it shows a gradual increase in penalties and a constant extension of the powers of military tribunals, even in peace-time.

The significance of this development cannot escape us. It shows the State engaged in a struggle with pressing dangers against which it endeavors to defend itself. For over twenty years, France has been living in an almost continuous state of tension which has resulted, from the legal standpoint, in progressive severity of

legislation with respect to the security of the State on the one hand, and on the other, when even such increased severity appeared to be insufficient, in special legislation enacting such "exceptional measures" as administrative internment. But when a protracted exceptional situation tends to become the rule, we may ask whether it is not our era itself that should be called "exceptional".

The main innovation introduced by the Ordinance of June 4, 1960, consists in the suppression of the former distinction between the State's internal security and its external security as it arose from the difference between internal enemies or foreign enemies.

The question arises whether this suppression is not inspired by the widely advocated doctrine of the subversive or revolutionary war in according to which France has to deal with but one opponent who chooses to manifest his fundamental and irreversible hostility by fomenting internal troubles or by supporting them when they broke out spontaneously.

Viewed from such angle, there would indeed be no room for the traditional distinction between the internal and external security of the State.

The question may then be legitimately asked whether it would not be logical to abolish the distinction between peace-time and war-time which however was still preserved in the Ordinance of June 4, 1960. Is not the subversive or revolutionary war a permanent conflict opposing without respite and throughout the world two systems which struggle for supremacy?

The advocates of this doctrine emphasise the importance in this gigantic albeit often invisible combat of psychological weapons, of the necessity to defend public opinion against subversive actions. The permanent war would thus lead to a permanent mobilisation of minds, entailing, as in any other war, important restrictions of the freedom of expression.

To accept this notion would mean to cancel the stake of the struggle and to destroy those very liberties which are supposed to be saved.

The paper by Mr. Castro brings into sharp focus the three major elements of concern to jurists of liberal beliefs: the practice of administrative internment, the seizures of newspapers and books and the exceptional provisions in criminal procedure. It is apparent that these three sources of concern apply beyond Algerian borders and affect directly life in Metropolitan France.

A comparison of these legal developments with the Conclusions of the New Delhi Congress¹ brings out the degree of their incompatibility with the principles of the Rule of Law.

Administrative internment, inasmuch as it reflects arbitrary policy withdrawn from judicial review, is impliedly but clearly condemned by Sections IV and VIII of the Conclusions of the Committee on the Executive and the Rule of Law.

The seizures of books and newspapers constitute acts of the Executive which directly and injuriously affect the person or property or rights of the individual and, in absence of judicial review, amount to a breach of the Rule of Law.

The Ordinances on criminal procedure of February 12 and June 4, 1960, are in opposition to practically all Conclusions of the Committee on the Criminal Process and the Rule of Law, in particular Sections III, IV, V and VII.

It should be noted that doubts about the legality of recent French legislation and administrative measures were voiced by such prominent Frenchmen as M. Maurice Garçon, Member of the French Academy and practising lawyer of the greatest international renown².

The International Commission of Jurists has adopted the Conclusions of the Congress of New Delhi as its guiding directives for the evaluation of legal standards and of the observance of the Rule of Law in individual States. Even the young, newly independent countries, while taking into account their political, social and economic conditions, recognise the Conclusions as a yardstick. Yet that is exactly why the situation in France appears particularly alarming. This is not a totalitarian state, nor a young nation in the throes of inevitable difficulties of growth and construction, but an ancient country with a great liberal tradition which has repeatedly set a noble example to freedom-loving people everywhere. It is comforting to note that various influential and highly respected French groups and organisations have recently spoken up in defence of this priceless heritage. Foremost among them are the highest authorities of various religions, traditionally restrained in their comments on matters of policy and government. The assembly of French Cardinals and Archbishops, convened in Paris on October

¹ For the full text of the Conclusions, see *Newsletter of the International Commission of Jurists*, No. 6, March-April 1959, and *The Rule of Law in a Free Society*, a Report on the International Congress of Jurists, New Delhi, 1959, pp. 4-14.

² See articles by M. Garçon on the seizures of newspapers in *Le Monde*, April 18, 1958, and on the provisions of criminal procedure in *Le Monde*, June 25, 1960.

12-14, 1960, issued a solemn declaration asserting that "it is never permitted, not even to uphold legitimate rights or to assure the triumph of a cause deemed just, to have recourse to intrinsically perverted means. Their use, while degrading the conscience, leads but to one certain result, namely, to a continuous postponement of the hour of peace". The meeting of the French Protestant Churches, held in Montbéliard on October 29-November 1, 1960, issued a joint declaration on Algeria urging the reopening of negotiations on the largest possible scale and on a basis where "the essential would not be a question of prestige and particularly not a matter of unconditional surrender or of unconditional independence but a discussion of an equitable status for all the communities who live together in Algeria and a safeguard against any reprisals".

The tenth anniversary of the European Convention of Human Rights—which France alone has still to ratify—offers an opportunity to express the hope that the great responsibilities carried by that country towards the peoples of Algeria as well as of the metropolitan territory will be discharged in a way worthy of a nation that has inspired the world with the ideals of liberty, equality and fraternity.

THE CONSTITUTIONAL SYSTEM OF THE REPUBLIC OF CYPRUS

On February 11, 1959, an accord was reached in Zürich between the Governments of Greece and Turkey. On February 19, 1959, the representatives of the British, Greek and Turkish Governments, as well as spokesmen of the Greek and Turkish communities on Cyprus, signed an agreement that laid the foundations to a final settlement of the Cyprus problem. (See *Bulletin* No. 9, August 1959, pp. 11-12.)

A Mixed Constitutional Committee that resulted from these successful negotiations and was composed of leading legal experts of Greek and Turkish nationality completed on April 6, 1960, its difficult task to fill the frame set up in Zürich and London with specific constitutional provisions. The British authorities were not represented on this Committee but when the Draft Constitution was submitted to Her Majesty's Government they informed the other interested parties that they had no comments on it. Thus, after almost a year of complicated negotiations, the Committee's assignment was fulfilled.

While the Committee was still working on the Draft Constitution, Presidential elections were held on December 14, 1959, with the result that there were elected Archbishop John Makarios, head of the Cypriot Orthodox Church and of the Greek community on Cyprus, as President; and Dr. Fazil Kutchuk, head of the Turkish community on the island, as Vice-President.

Between April and July 1960 the President-elect had to face a series of violent attacks, emanating both from the extreme Right-wing Nationalists (General Grivas) and from the pro-Communist Party, Akel. His position was complicated by the unsettled controversy over British sovereignty over about 120 miles of military bases on Cyprus territory. The Archbishop was able to surmount these difficulties and agreement was eventually reached with the British Government limiting its extraterritorial rights on Cyprus to 99 square miles round the Dhekélia and Akrotiri Royal Air Force bases.

These preliminary steps having been taken, independence was proclaimed on August 10, 1960, and the new Constitution came immediately into effect. This extremely complicated and long document, totalling 199 articles plus the treaties of alliance and guarantee, establishes an equally intricate state structure. For the purpose of the *Bulletin* its principal provisions can be enumerated :

(1) After Part I, which defines what are considered to be the Turkish and Greek communities and other such matters, Part II enumerates the fundamental rights and liberties of the citizens of the new Republic. These rights are to a great extent those provided for by the Universal Declaration of Human Rights, though this is not expressly stated, as well as certain rights and liberties whose protection seemed necessary as a result of the specific conditions in Cyprus. Among others, the right to social security should be mentioned, as well as the right of the citizen to remain within, and enjoy the privileges of, his community.

(2) According to Part III, the Executive power is held jointly by the President and the Vice-President. The President is always to be a member of the Greek community and the Vice-President a member of the Turkish community. Certain of the attributions of the Executive are to be exercised jointly by the two, some by the President alone, and others by the Vice-President alone. It is important to note that both have a veto right on any decisions of the Council of Ministers or laws voted by the House of Representatives.

The Council of Ministers is appointed by and functions under the authority of the President and the Vice-President. Ministerial responsibility may be implied though it is not expressly stated in the Constitution.

(3) Under Parts IV and V, legislative power is held by the House of Representatives and by the Communal Chambers, which constitute the legislative authority in matters reserved to the competence of the two communities. The House legislates on matters of general interest while the Chambers legislate on matters of communal interest. There is incompatibility between the position of member of the House and of one of the Chambers. Any recourse made in connection with any matter relating to any conflict between the House and one or both of the Chambers shall be brought before the Supreme Constitutional Court.

(4) Part VI lists a certain number of independent officers of the Republic. Their appointment is made jointly by the President and the Vice-President. These officers are :

- (a) the Attorney General and the Deputy Attorney General,
- (b) the Auditor General and the Deputy Auditor General,
- (c) the Governor and the Deputy Governor of the issuing Bank,
- (d) the Accountant General and the Deputy Accountant General.

(5) Part VII establishes a public service composed of 70% Greeks and 30% Turks. The general principles inspiring this service are those of the British Civil Service. Part VIII establishes that the armed forces will be composed of 60% Greeks and 40% Turks.

(6) Part IX sets up the Supreme Constitutional Court composed of a Greek, a Turkish and a neutral judge, appointed jointly by the President and the Vice-President of the Republic. The first President of the Court appointed for 6 years is a German national. The Supreme Constitutional Court is to pass on any matter relating to an interpretation or violation of the Constitution and particularly on any dispute arising out of the separation of powers established under the Constitution.

(7) With the exception of matters brought to the Supreme Constitutional Court and of those provided for under Arti-

cle 152, section 2, para. 4 (Communal Civil Courts, which have jurisdiction in matters regulated by the Civil Law of the two communities) the judicial power is exercised by the High Court and its subordinate courts. The High Court is composed of two Greek, two Turkish and one neutral judge.

(8) Finally, under Article 173, separate municipal councils are set up in the five largest towns of the Republic.

This sketchy outline of the very complex constitutional situation indicates the difficulties that caused the long delays in the adoption of the constitution. Its authors have attempted to find a solution to a series of unusually complicated problems and any impartial observer will undoubtedly admit that the work they accomplished is admirable. On the dawn of Cyprus independence the International Commission of Jurists is happy to wish the new Republic and its leaders the greatest success in their endeavours.

THE CRISIS IN THE DOMINICAN REPUBLIC

The Resolution passed on August 20, 1960, by the Organisation of American States at its meeting in San José (Costa Rica) and condemning the regime of Dictator Rafael Leonidas Trujillo Molina, turned once more the attention of the world on a country where most serious violations of the Rule of Law have been for some time a source of growing concern to students of Latin American affairs. The International Commission of Jurists has taken special interest in the recent alarming developments and secured therefore the cooperation of Professor Julio Cueto-Rua, a Professor of Law and former Minister of Argentina, who agreed to undertake on its behalf a mission of inquiry to the Dominican Republic. The readers of the *Newsletter* of the International Commission of Jurists (No. 9, September 1960, p. 5) were informed of the failure of this initiative because of the Dominican Republic's refusal to consider the visa application made by Professor Cueto-Rua and a subsequent direct request addressed by the Secretary-General of the Commission to the Ministry of Foreign Affairs at Ciudad Trujillo. A press release issued by the Commission on August 5, 1960, stated that "the present Government of the Dominican Republic willingly and deliberately refused to permit an impartial and professionally qualified observer...to conduct an objective

investigation of charges that the Dominican authorities are systematically violating human rights and the principles and procedures of the Rule of Law." The Commission pledged itself further to prepare a report on the situation in the Dominican Republic and requested its friends possessing evidence on violations of human rights in that country to forward it to the Commission's headquarters in Geneva.

On August 20, 1960, the countries represented in San José resolved to apply the provisions of Article 19 of the Charter of the Organisation of American States and to undertake collective action with the purpose of severing diplomatic relations with the Dominican Republic and imposing economic sanctions in the form of limitations on foreign trade, including a total prohibition of commerce in armaments and instruments of war. These unprecedented measures were passed in consequence of the unanimous condemnation of the Dominican Republic's interference in the domestic affairs of Venezuela which culminated with the attack on the life of President Romulo Betancourt on June 24, 1960. Files submitted to the Permanent Secretariat of the Organisation of American States by the then Minister of Foreign Affairs of Venezuela, Ignazio Luis Arcaya, contained proof of a direct participation of John Abbes Garcia, the chief of the Dominican Secret Service, in the preparations of the attack on President Betancourt.

The implementation of the Declaration of San José brought strict sanctions and diplomatic isolation upon a country that has been since 1929 a private domain of the Trujillo family. In anticipation of the resolute attitude of the American States, measures had been taken that implied a certain liberalisation of the regime. On August 3, 1960, the resignation was announced of President Hector Trujillo, a half-brother of the dictator, who was succeeded by Dr. Victor Balaguer, a well-known historian on the moderate edge of the Dominican political monolith. Simultaneously, other members of the Trujillo family were replaced in key positions by men unrelated to the dictator. The Generalissimo himself was appointed chief delegate to the General Assembly of the United Nations in New York while his son and heir-apparent, General Rafael Trujillo, Jr., was relieved of his former duties as Chief of Staff and sent on a diplomatic mission abroad. It seemed further that a certain measure of freedom would be granted in the country's political life: in addition to the ruling Party, the dictator's own *Partido Dominicano*, two new political groups—one of left-wing orientation—were brought into existence and given, during the

month of August 1960, comparative freedom to agitate. The legalisation of a left-wing organisation coincided with indications of a rapprochement between the regime and the Cuban Government of Dr. Fidel Castro. Finally, President Balaguer announced an impending general amnesty of political prisoners; the Dominican Senate has approved a bill to that effect on September 15, 1960, but the exact scope of the amnesty and the form of its implementation have not yet been made known. It appears, however, that an undetermined number of political prisoners has already been released.

Despite these promising signs, the situation deteriorated once again in September. The *Movimiento Popular Dominicano* that had proclaimed its solidarity with Fidel Castro's theories on socialist and nationalist revolution was silenced and its headquarters sacked by a mob in the presence of impassive policemen. The same fate befell the offices and archives of *Quisquevano*, the second of the newly formed authorised parties that played the role of a moderate centre opposition. The comparative freedom of association granted in August was withdrawn and all political meetings regardless of their tendency are forbidden. Equally shortlived was the newly proclaimed liberal policy on public information. Bulletins and leaflets published by the new parties and any other printed matter containing criticism of the government are being seized by the police. Thus a strict monopoly on public information has been re-established in the hands of the Government, which operates the broadcasting stations *Voz Dominicana* and *Radio Caribe* as well as the newspapers *El Caribe* and *La Nación*.

The alarm expressed by impartial observers over the application of torture has not been relieved. The International Commission of Jurists continues to receive reports and depositions on most reprehensible practices of police inquisition. At the palace of the *Seguridad Nacional* of Ciudad Trujillo and at the penitentiary of Victoria excesses are alleged to be particularly violent. The inmates, men and women, are reportedly forced to be present at the tortures of their fellow-prisoners—often members of their own family. Opposition sources claim that many persons, especially those of socially lower background, were shot before the examining judge has even had an opportunity of taking cognisance of the charges brought against them.

The independence of the magistrature and the freedom of the Bar continues to be trodden under the heavy foot of the regime. Judges whose rulings displease the Government face arbitrary

dismissal. The work of the Bar proceeds under permanent surveillance by the police. While more than 50 Dominican advocates are at the time of this writing in exile, those of their colleagues who continue to practice in the country are exposed to serious potential danger.

In the light of these disturbing events, it is worthwhile commenting on a recent action of the Government of the Dominican Republic which was apparently designed to confuse the international legal community. At the beginning of July 1960 a number of distinguished and highly renowned jurists were invited to join local experts and visit Ciudad Trujillo as guests of the Government. The group was composed of :

Lic. Emilio Portes Gil, Former President of Mexico
Lic. Enrique V. Corominas, Former President of the Organisation of American States
Professor Marcel Roussin, University of Ottawa
Dr. Geoffrey Hornsey, Dean of the Faculty of Law, University of Leeds
Lic. Genaro V. Vasquez, Former Attorney General of Mexico
Lic. Arturo Despradel, Member of the Dominican Congress
Lic. Hipolito Herrero Billini, President of the Supreme Court of the Dominican Republic
Lic. Ambrosio Alvarez, President of the University of Santo Domingo
Lic. Carlos Sanchez y Sanchez, Dean of the Faculty of Law, University of Santo Domingo.

The Government of the Dominican Republic submitted to this group an inquiry consisting of one principal and a number of accessorial questions. The main question referred to a note presented by the Government of the Dominican Republic on July 2, 1960, to the Council of American States and protesting against the attempted invasion by Cuban forces of the region of Constanza. One of the accessorial questions elicited an opinion on a report of June 6, 1960, prepared by the Peace Committee of the Organisation of American States which criticised strongly the legal practices of the Dominican Republic. The group of jurists found the report of June 6 tinged with partiality. On the principal question it approved the stand taken by the Dominican Republic. Its report concluded with a declaration stressing the necessity "to abstain from any intervention by one country in the internal affairs of another".

The Government of the Dominican Republic has given extensive publicity to these answers. Such publicity should not, however, delude the reader into believing that the group of distinguished jurists approved the way in which the country is governed. It will be noted that the questions submitted to the visiting lawyers were carefully chosen and referred only to marginal issues, the

views on which by no means constitute judgment on certain deplorable abuses of justice. It is the inadequacy of civil rights and the absence of personal security in the Dominican Republic which require the International Commission of Jurists to follow closely the future developments in that country and to keep its readers informed of the progress in the struggle for the re-establishment there of respect for fundamental human rights in conformity with the ideals and legal traditions of most Latin American states.

COLLECTIVISATION IN EAST GERMANY

During the spring of this year the International Commission of Jurists was called upon to consider the alarming situation which had arisen in East Germany as a result of a campaign to induce all remaining independent farmers to join agricultural co-operatives. This campaign was launched by the Government at the national level and was supported by all Party-controlled political and social organizations. The manner in which it was carried through gave rise to serious concern with regard to the legality of the measures applied. The Commission therefore decided to send Dr. Edvard Hambro, Professor of Law at Bergen, Norway, and formerly Registrar of the International Court of Justice, to Berlin as an observer. Professor Hambro was in a position to collect on the spot a considerable volume of documentary evidence and statements from refugees concerning the collectivisation campaign; he was also able to interview a number of farmers who had fled from East Germany. His report to the Commission is incorporated in this paper.

Collectivisation and the Rule of Law

Before describing the collectivisation campaign undertaken in East Germany (the German Democratic Republic) in the early part of 1960, a question of principle must be examined. The legality of an act of collectivisation—in other words the transfer of private property to social or State ownership—cannot be judged on the basis of a preconceived notion of the illegality of such measure. Collectivisation as a means of taking over private property for the purpose of establishing communal or State ownership is based on a political decision, taken by the competent

bodies, which is outside the scope of legal assessment. The International Commission of Jurists has therefore not taken a stand in favour of either State or private ownership. For the Commission the decisive factor is rather that any community may, by the free choice of its citizens, opt for one or the other form of ownership.

Yet interference with private property rights, even if performed in the name of social or economic progress, does not justify a deliberate and systematic violation of human rights. State ownership and private ownership in themselves are neither good nor evil; and the existence of either of these forms of ownership does not in itself constitute a denial of human rights. The decisive factor is the manner in which the act of nationalisation or collectivisation is carried through and the ultimate purpose it is intended to achieve. Such measures of economic policy and the means employed to implement them are compatible with the principle of the Rule of Law in so far as they are applied in pursuance of a decision reached freely and democratically and as suitable compensation is granted to the persons affected. If these conditions are fulfilled an act of collectivisation may correspond to the freely expressed will of the people and become an integral part of a social order based on the Rule of Law.

Thus in considering the collectivisation campaign which took place in East Germany during the early part of 1960 the International Commission of Jurists refrained from making any attempt to pass judgment on the *principle of collectivisation as an instrument of economic policy* underlying that campaign. The question with which it is concerned is whether—and, if so, to what extent—the collectivisation measures taken in this specific case were *compatible with the principle of the Rule of Law*, and in particular to what extent the guaranteed basic rights and constitutional, statutory and other legal provisions were respected in the application of these measures; to what extent all-out collectivisation corresponded to the freely expressed will of the population; whether adequate compensation was guaranteed and finally what legal safeguards existed for an individual who felt that his rights were threatened or infringed.

Collectivisation as Part of the Communist System

One of the basic tenets of communist policy has always been the abolition of private ownership of the land. It should be

stated here that according to communist doctrine the transition from private to communal and State ownership is part of the historically irreversible evolution towards communism which is considered to be the highest form of government, of society and of economy. The belief in the inevitability of this trend is a fixed and immutable dogma which determines the policy of the State and finds suitable expression in the legislation of the communist countries.

One of the main aims of the policy of the Soviet occupation authorities in East Germany from 1945 onwards was the expropriation of the big landowners without compensation, a policy pursued in all people's democracies. However, the peculiar situation of Germany and the division of control between the four Allied powers had to be taken into account by the Soviet Union and subsequently by the East German Government. Initially, the only measure in this field was a moderate land reform (expropriation and dividing up of all estates of over 100 hectares in area) while the peasants were assured that no action to collectivise their land was contemplated.

With this consideration in mind the United Socialist Party (*Sozialistische Einheitspartei Deutschlands, SED*) drew up a draft constitution which contained almost word for word the guarantee of private land ownership incorporated later in the Constitution of the German Democratic Republic of 1949, Article 24, paragraph 6 of which reads as follows :

“ After this agricultural reform has been effected (i.e., the expropriation of the large estates), the peasants are guaranteed private ownership of the land.”

It is thus established that neither the ruling Communist Party, nor the framers of the Constitution committed themselves immediately to the application in East Germany of the economic doctrine of collectivisation; on the contrary, they were moved by political expediency to condone temporarily private ownership of the land.

It was not until some years later, when two separate States had been constituted on German soil and the German Democratic Republic was establishing itself more firmly, that the attitude of the SED (and consequently of the Government controlled by it) towards collectivisation began to change. During the next few years collectivisation was pressed more vigorously, the Government and the Party both invoking the inevitability of this economic trend towards communism.

On December 31, 1959, the cultivated area of East Germany was distributed between the two sectors as follows :¹

Socialist sector	53.0%	(1950: 5.7%)
(of which, agricultural production co-operatives)	(41.5%)	
Private ownership	47.0%	(1950: 94.3%) ²

This indicates that between 1950 and 1959 the proportion of land belonging to private farms decreased by about half while the proportion held by the socialist sector rose from a mere 5.7% to 53%.

Legal Status and Forms of Agricultural Production Co-operatives (Landwirtschaftliche Produktions-Genossenschaften, LPGs)³

In December 1952, only a short time after the adoption in the same year of the "Programme for the Building-up of Socialism", a First Conference of Agricultural Production Co-operatives was convened at which three sets of model by-laws were agreed upon. It was claimed that they had been framed and adopted by three villages independently and in full freedom from any external influence. The by-laws were approved by the Council of Ministers and published in the official Gazette No. 181 of December 30, 1952. They regulate the establishment and organisation of the co-operatives which are—as Walter Ulbricht, the first Secretary of the SED, put it—the concrete expression of the "principle of gradual transition to large-scale socialist production", a principle which "should smooth the road leading to LPGs for peasants who are still hesitant". These three sets of by-laws are still valid today. The differences between them concern the extent to which the members relinquish control of the property appurtenant to their farms (in particular, livestock, implements and equipments, farm buildings, etc.) and, as a corollary, the extent of the powers of the co-operative. However, no steps were taken

¹ According to information published by the Central Statistical Office of the German Democratic Republic. See *Dokumentation der Zeit* (East Berlin) 12th year, No. 213, 1960/9, p. 19.

² At about the same time 81% of all cultivated land was held by the collectivised sector (State and co-operative farms) in Czechoslovakia, 77% in Hungary, 97% in Bulgaria, 83% in Albania and 75.5% in Rumania. In Poland, however, the percentage was small, about 15%.

³ It has to be stressed here that the co-operatives as understood in the practice of communist countries cannot be compared with freely constituted co-operatives based on a voluntary membership.

to establish general legislation applicable to all types of co-operatives until the middle of 1959. An Act of June 3, 1959, made these three sets of by-laws mandatory for co-operatives of all types, and they now form the legal basis for the by-laws of every co-operative.¹

The following are the characteristics of the three types of LPGs :

Type 1

Only the arable land is placed at the disposal of the co-operatives; all other land, together with the means of production, remain the personal property of their owners and at their disposal. The general meeting of members may, however, decide, without formally converting the establishment into a co-operative of a higher type, that farm buildings and livestock shall be made common property.

Type 2

In addition to the arable land, all draught animals and motor traction machinery required for co-operative cultivation and other machinery and equipment are pooled as well.

Type 3

All the land (i.e., not only the arable land but also pasture land, woodland and all other areas) is placed at the disposal of the co-operative. On entering the LPG, each member makes available to it not only his tractors, machinery, implements, farm buildings and cattle but also buildings, livestock and equipment not required for the use of "his own household"—a concept which is defined in considerable detail.

All co-operatives have the following major characteristics in common :

1. None of the three types envisages any transfer of ownership of the land. On the other hand, it is to be noted that the several plots of land placed at the disposal of the co-operative are amalgamated into a single unit. All boundary stones and other marks between individual plots are removed. If a member wishes to leave the co-operative he is entitled to a parcel of land equivalent to that brought into the LPG by him but not to that particular plot. Consequently, withdrawal from a co-operative, apart from its economic and political consequences (to return land to private ownership is to fly in the face of the principle of "the inevitability

¹ *Gesetzblatt der DDR*, Part 1, No. 36, June 12, 1959, p. 577.

of socialist evolution " and consequently of the socialist nature of the State itself) entails certain disadvantages. A member who withdraws is assigned a plot of land on the border fringe of the co-operative or one whose soil is poorer. The member has thus in fact lost his specific property, and in the event of withdrawal he is merely entitled to demand that other land be made over to him in compensation. Conversely, every member of a co-operative must face the fact that the land he has placed at the disposal of the co-operative may at any time be used to compensate a withdrawing member without any regard to his wishes in the matter. Thus on joining a co-operative the peasant loses all effective safeguards of his ownership of the land.

Another limitation of the exercise of the peasant's property rights consists in a provision restricting his right to sell the land brought into the co-operative to a narrow category of specially qualified buyers, namely the State, the co-operative itself or a fellow-member who owns little or no land.

2. Entry into co-operatives of all types was to be on a voluntary basis. This principle was clearly established as early as 1952, when Walter Ulbricht, addressing the Second Conference of the SED, made the following statement :

"I consider it essential to state categorically from the rostrum of this Conference that such co-operatives must be organized on a purely voluntary basis and that the application of any compulsion to farmers with regard to this question is inadmissible."¹

The voluntary nature of membership was reaffirmed in Article 1 of the Act of June 3, 1959, which reads as follows :

"LPGs are socialist large-scale agricultural production units formed by the free association of working peasant families, working gardeners, agricultural workers and other citizens who are willing to take part in the process of co-operative production."

The East German authorities and the SED have specifically emphasized that in accordance with this legal principle, the farmers who had joined the co-operatives did so voluntarily. Yet it is

¹ *Protokoll der II. Parteikonferenz der SED* [Dietz Verlag (East Berlin), 1952]. In this connection it is interesting to recall that in the Soviet Union, Lenin himself opposed the bringing of any pressure to bear on the farmers. For instance, in his speech to the Eighth Congress of the Russian Communist Party on March 23, 1919, he said: "Nothing is more stupid than the very idea of applying coercion in economic relations with the middle peasant." (Moscow, Foreign Languages Publication House, 1952, Vol. II, p. 186.)

established that during the three-month period February-April 1960 the collectivisation campaign resulted in almost as much private land being converted as during the seven years 1952-1959. It will be seen from the table on p. 30 that on December 31, 1959, only 53% of all arable land was held by the "socialist sector" (45.1% by LPGs), whereas on April 10, 1960, or three-and-a-half months later, the proportion had risen to over 90%, and in a few more days the process of collectivisation was completed throughout the country. Thus on April 24, 1960, Walter Ulbricht in a speech to the East German People's Chamber (Parliament), was able to announce that since the beginning of 1960 over 250,000 peasants, together with their families had joined the co-operatives.¹

Even admitting that in the course of the general collectivisation drives large numbers of peasants were won over by the ostensible advantages of co-operative farming as described to them, general experience and the well-known resistance of peasants against any suggestion to give up their land make it improbable that total collectivisation could have been achieved in such a short time on a voluntary basis. Consequently, the background to the collectivisation campaign and the matter in which it was carried through must be examined with a view to determining whether any infringements of the law were committed.

Reasons for the Collectivisation Campaign

An analysis of the political and economic situation in general and that of East Germany in particular clearly shows that in deciding to undertake a collectivisation campaign in the early part of 1960 the East German Government was moved primarily by political considerations.

From the economic point of view it appears from an analysis of East German statistics or calculations based thereon² that in spite of many difficulties farms owned by individual peasants were operating at no less profit than the co-operatives.

Quite apart from the fact that by no means all the co-operatives had obtained satisfactory results or increased production (and that consequently there was no urgent need for further collectivisation

¹ BBC Summary of World Broadcasts, Second Series, No. 318, April 27, 1960, C 1.

² See, *inter alia*, Siegfried Goellner: "Das Bauernlegen in Mitteldeutschland" in *SBZ-Archiv* (Cologne) No. 7, 1960; *Statistische Praxis* (East Berlin), No. 2/1960, p. 32.

on economic grounds), the campaign took place at a time of year when any major change in production methods can easily upset the whole cycle of cultivation.¹

On the other hand, there were political considerations which must be known and taken into account when forming a judgment on the ways and means used to further the process of collectivisation.

The establishment of two separate entities with radically different political, social and economic systems within the former boundaries of Germany, together with the decreasing likelihood of an early reunification of the country, forced the East German Government to concentrate more and more on the consolidation of its own communist structure. Consequently the reorganisation of the State and the economy on communist lines was pressed forward with. This reorganisation involved the eradication of all remaining traces of the capitalist system, i.e., private artisans and small shop-keepers, and above all peasants, who had so far been sheltered from the effect of socialisation to a considerable extent by the constitutional provisions guaranteeing their ownership of the land.

The date officially fixed for the completion of the process of general collectivisation of agriculture in East Germany was May 8, 1960, the anniversary of the capitulation of Germany and just over a week before the beginning of the Summit Conference scheduled for May 16.

In a speech made at the eighth session of the Central Committee of the SED, Walter Ulbricht confirmed in the following terms the impression that total collectivisation was intended to bring about a *fait accompli* in economic policy which the Summit Conference would have to take into account as an irreversible situation :

“ The spirit of Camp David is the spirit of peaceful co-existence, that is to say, non-interference in the internal affairs of other countries. Thus the two parties who met at Camp David (i.e., the Soviet Union and the United States) have agreed, as a basis for their discussions, that they will not attempt to influence the course of social and political affairs in other countries.

“ The step which the peasants in the German Democratic Republic have taken is in line with this interest in peace and

¹ It can be seen from statements appearing in the East German press towards the end of July that even at that stage serious food shortages had developed in the German Democratic Republic, to offset which, among other things, agricultural produce had had to be imported.

the spirit of Camp David. It is an excellent thing that the peasants in the German Democratic Republic have shifted to co-operative production in LPGs before the Summit Conference has taken place, for in doing so they have demonstrated that they desire a secure and lasting peace. They themselves have helped to establish a solid foundation for peace in the German Democratic Republic and to strengthen the country as a bastion of peace. This step, taken before the Summit Conference, is of particular importance for in taking it the peasants have upset the calculations of all the speculators in Bonn who are working to undermine the German Democratic Republic, the first peace-loving German State . . . ”¹

It is thus clear that the collectivisation campaign which took place during the early part of 1960 was undertaken in the context of a primarily political objective to which the East German Government attached special importance and consequently fixed a time limit for its achievement—a factor of major significance when considered in relation to the question of whether the principle of voluntary accession was respected.

The Campaign Itself²

1. Duration

The actual campaign lasted from February to April 1960, i.e., it was completed before the target date of May 8.

2. Scope

The campaign was aimed at all remaining private farmers, who owned between them 43 % of all the arable land in the German Democratic Republic. Its objective was to induce these farmers to join co-operatives of one of the three above-described types.

3. Legal basis

There was no legal basis (Act, decree or other statutory instrument) on which farmers could be compelled to join. No such provision is to be found in the Act of June 3, 1959, concerning LPGs, the Act of October 1, 1959 concerning the Seven-Year Plan or any other statutory instrument. The campaign was speci-

¹ *Neues Deutschland* (East Berlin), April 1, 1960.

² In connection with this section see “Die Zwangskollektivierung des selbständigen Bauernstandes in Mitteldeutschland” (Bonn/Berlin, April 1960), a series of documents published under the auspices of the Government of the Federal Republic of Germany (herein after referred to as *Documents*).

fically based on the principle of voluntary entry into the co-operative.

4. *Methods used*

An investigation into whether basic rights were infringed during the collectivisation campaign (and if so, which rights) must inevitably be focussed upon the methods resorted to in the course of the campaign (see pp. 27-28). The following considerations must be taken into account :

(a) It is established that as collectivisation spread the individual farmer was in a variety of ways placed in an unfavourable economic position vis-à-vis the State-promoted co-operatives. Examples of this discrimination can be seen in the priority given to co-operatives in respect to supplies, in their preferential treatment with regard to deliveries and in the substantial tax advantages granted to them.¹

(b) At the beginning of the campaign the press and the radio, a large number of Government officials and thousands of members of Party-controlled political and social organizations were ordered to take part in the campaign to induce peasants to join the co-operatives.

(c) It is typical for the machinery of government in a communist State in which there is no separation of powers that the Courts of law were also instructed to give their support to the collectivisation campaign. The following paragraphs are taken from an article on "The Promotion of Socialism in Rural Areas by the Courts," published in *Neue Justiz*, the official journal of the Ministry of Justice, the Supreme Court and the Attorney-General of the German Democratic Republic.²

"The Courts are part of the unified executive authority of the State, and must therefore, like the rest of the machinery of this State of workers and peasants, use their influence to the full for the achievement of the main tasks of the economy. In the domain of agriculture these tasks are to raise production to such an extent that the steadily growing demand for agricultural products can in an ever-increasing measure be met from the country's own resources and that an end be put to the social and cultural backwardness existing in the villages. To achieve these aims it is

¹ See, e.g., Decision of January 28, 1960, concerning the revision of the measures for the promotion of co-operatives of type 3 (Gesetzblatt der DDR, Part 1, February 19, 1960, No. 10) and Decree of April 14, 1960, concerning the remission of inheritance tax (Ibid., Part 1, April 30, 1960, p. 248).

² No. 21, November 5, 1959.

essential that all personnel of the Courts and all peasants, whether private farmers or members of co-operatives, should be made to realise that these objectives can only be achieved through the consolidation and continual expansion of large-scale socialist economy.

"The Courts can make a decisive contribution towards the achievement of these objectives by the manner in which they dispense justice as well as by their political work among the masses."

Thus the policy of criminal justice and the courts applying that policy were directed toward the implementation of the collectivisation policy. In another article in *Neue Justiz* concerning "The Role of Criminal Law and the Administration of Criminal Justice in the Socialist Reorganisation and Development of Agriculture," by Hans Weber, appears the following:

"The machinery of criminal justice must help to isolate the enemies of socialist reorganisation and to show them in their true nature as reactionaries and enemies of the people. In this way the elements among the private peasants who are considering entry into LPGs will be sheltered from these reactionary influences and will be able to reach a decision in real freedom, that is to say, in the spirit of the laws of socialist development."¹

At the end of the collectivisation campaign, Hilde Benjamin, the Minister of Justice, was able to state: "The part played by the personnel of all the organs of the administration of justice is a proof of their convictions, i.e., that the victory of socialism is the primary concern of every citizen of the German Democratic Republic."²

(d) At the beginning of the campaign thousands of "agitators" (members of the political parties, members of political and social mass organisations, trade-union officials, etc.) were sent to the villages to convince the peasants by "personal interviews" of the advantages of membership in the co-operative. They took up their quarters in schoolrooms or other premises in the villages. Often, too, they were billeted directly in the farmsteads. They usually

¹ No. 3, February 5, 1960, p. 83. On the contribution of the administration of justice to the further consolidation of the LPGs see W. Fritzsche and A. Hexelschneider: "Durch den neuen Arbeitsstil der Justizorgane die sozialistische Entwicklung in der Landwirtschaft fördern!". Ibid., No. 12, June 20, 1960, p. 393.

² In an address to the Eighth Plenary Meeting of the Central Committee of the SED. Ibid., No. 8, April 20, 1960, p. 253.

remained in the village until all the peasants had signed an agreement to enter a co-operative. Often one group of agitators was followed by another. Members of the SED had sometimes written instructions from Party authorities to stick to their task until they had induced the respective farmer or farmers to join the co-operative.¹

Many farmers were promised various advantages if they would agree to join the LPGs ; conversely, some of them were threatened with sanctions if they refused. They were charged with economic crimes,² threatened with criminal proceedings on account of trips to West Berlin, informed that their children allowances would be reduced, etc. In many instances they were detained on some pretext or other and not released until they had agreed to join the co-operative. In some cases the homes of recalcitrant farmers were floodlit and loudspeakers were set up in front of them.

In many places peasants who persisted in their refusal to join a co-operative were invited to meetings and discussions at which they were called upon to explain the reasons for their negative attitude. A peasant who failed to attend such a meeting would receive a written invitation from the Mayor's office to attend a "discussion on the socialist reorganisation of the village". If he failed to appear he was threatened with "legal proceedings".³

There were cases in which farmers were taken to the Mayor's office by members of the People's police or the State Security Service (SSD); there they found themselves face to face with a group of Party or State officials (chairman of the local council, public prosecutors, members of the People's police, etc.). During the discussions with the agitators the recalcitrant farmers were offered a chance to join an LPG, thus showing that they were supporters of "progress" and of "the building-up of socialism" and "peace-loving citizens", or to refuse, which would be taken as proof that they were "enemies of socialism" and consequently "warmongers" and "supporters of West German militarism".

¹ See photocopy of instructions given to a member of the SED, which contained the following sentence: "These instructions are valid until you have persuaded the above mentioned peasants to join the Morgenröte-LPG in Niedermühlen." (*Documents*, No. 112, p. 106.)

² Statement of E. Kurts and photocopy of the sentence of the Penal Chamber of the Wanzleben District Court (in the files of the Commission).

³ Photocopies of such invitations will be found in *Documents*, No. 130-133, p. 126-127.

It has been stated by several witnesses that during the collectivisation campaign many villages were cut off from all communication with the outside world.

Members of the People's police were brought into the villages in exceptionally large numbers; guards were placed in stations and trains to apprehend fleeing peasants. There are cases on record in which the accounts of peasants in the Peasants' Marketing Co-operatives were blocked to prevent them from escaping.¹

Towards the end of the campaign more and more material began to appear in the East German press describing the success of the campaign and making it perfectly clear to peasants who had so far refrained from joining co-operatives that further resistance would be entirely useless.

Such methods enabled the collectivisation campaign to be completed before the deadline of May 8.

The use of all the measures and procedures described above has been established from verified statements of eye-witnesses, which are in the possession of the Commission.

Breaches of the Law

It is clear from the events described above that various infringements of the law, and in particular those mentioned below, have been committed; the latter are particularly serious as they constitute recurrent violations of fundamental rights which are guaranteed in the Constitution of the German Democratic Republic itself.²

1. Article 8 of the Constitution of the German Democratic Republic reads as follows :

¹ See *Documents*, No. 47, p. 50 (statement by Herbert Zingelmann). In this connection it is interesting to note the increase in the number of refugees who escaped from East Germany during the period March-June 1960, viz.

	March	April	May	June
(1) Number of refugees . . .	13,442	17,183	20,285	17,888
(2) Of which, persons engaged in cultivation and stock- raising	1,448	1,999	2,259	1,496
(2) as percentage of (1) . .	10.8	11.6	11.2	8.4

² This section does not deal with the general legal situation in the German Democratic Republic, but solely with events which were typical of the collectivisation campaign as a whole.

“Personal freedom, the inviolability of the home, secrecy of mails and the right to reside in the place of one’s choice are guaranteed...”

(a) *Personal freedom* : The infringements of these basic rights will be examined in connection with violations of the principle of freedom to choose whether or not to enter a co-operative (see p. 41).

(b) *Inviolability of the home* : ¹ From the testimony of witnesses it is clear that this fundamental right was violated in a large number of cases. The compulsory billeting of agitators on peasants, the floodlighting of farmhouses at night and the fact that agitators remained in farmhouses for hours even after being requested to leave all come under this head.

(c) *The right to reside in the place of one’s choice* (read together with Article 10, paragraph 3, of the Constitution, which states that “every citizen has the right to emigrate”): During the campaign this right was curtailed by such measures as the confiscation of identity papers, the blocking of savings accounts, the posting of guards around farm premises and checks and arrests of fleeing peasants. In these and other ways the peasants were prevented from choosing their residence or emigrating legally.

2. Article 20 of the Constitution reads as follows :

“Peasants and persons engaged in commerce and handicrafts will be assisted to develop their private initiative...”

The campaign to induce the peasants to join the co-operatives was in flagrant contradiction with this constitutional guarantee of support for private farmers. Not only were they given no support, but in addition various measures (such as increases in delivery quotas, restrictions of access to the services of the motor tractor stations, etc.) were taken to hamper their activities with a view to inducing them to join the co-operatives. The continued operation of a private farm was thus made increasingly difficult, if not impossible, particularly from the economic point of view; finally, as the process of collectivisation gathered momentum private farming became for all practical purposes impossible.

3. Article 24 (6) of the Constitution states that :

“After this agricultural reform has been effected the peasants are guaranteed private ownership of the land.” ²

¹ Violation of the domicile is a punishable offence under Article 123 of the Penal Code.

² This provision should be considered together with Article 22, which provides that “Property is guaranteed by the Constitution.”

The question of whether the constitutional guarantee of private ownership of the land granted to the peasants was violated by the collectivisation campaign cannot be answered until it has been established whether :

— private property rights were in fact curtailed or abolished by the collectivisation process; and, if so,

— whether collectivisation was achieved by pressure of physical or psychological compulsion which violated the freedom to limit or abdicate one's property rights.

(a) Here it is necessary to recall what was said on pp. 30-33 above namely that although *in law* entry into a co-operative does not involve a transfer of ownership, *in fact* the entrant loses his property (see p. 32).

(b) As regards the principle of voluntary entry into co-operatives, evidence available clearly shows that peasants were subjected to pressure of a physical as well as psychological nature. That such pressure was brought to bear in a great variety of ways is clearly established by the mere fact that the agitators disregarded certain basic individual freedoms (inviolability of the home, personal freedom and security). Further confirmation can be found in the fact that in practice the peasants had no alternative but to join co-operatives. They were offered the choice of agreeing to join a co-operative or of being stigmatised as "enemies of socialism, freedom and progress", isolated economically and threatened with criminal proceedings—which meant that in fact they were given no choice. The foregoing also implies that Article 8 of the Constitution of the German Democratic Republic, which guarantees the fundamental right of personal freedom—and which, if it means anything at all, guarantees the right to make free from any form of pressure all personal decisions of such a nature as to have a radical effect on one's private life (of which the decision to give up the ownership of one's land and to join a co-operative is certainly one)—was generally and systematically violated. One of the most essential signs that freedom of choice exists is that where such a decision has to be taken the same legal safeguards apply to a negative decision as to a positive one. The person concerned must have a genuine choice between two or more alternatives, which he can assess according to his own judgment and choose one freely on his own responsibility without fear of sanctions of any sort. During the collectivisation campaign in East Germany the peasants had no such freedom of choice.

It is clear that, generally speaking, during the collectivisation campaign in East Germany fundamental rights of the section of the population at which the campaign was directed were regularly and systematically violated, even though they were guaranteed in the East German Constitution itself. The procedure applied against the East German independent farmers constitutes also a breach of the Universal Declaration of Human Rights, adopted by the United Nations in 1948, particularly with regard to its Article 3 (right of personal freedom and security), Article 9 (protection against arbitrary arrest), Article 12 (right of privacy), Article 13 (right to choose one's place of residence) and Article 17 (right of private ownership).

Legal Remedies

In conclusion, the question of whether the peasants had any remedies against the collectivisation measures will be briefly examined.

1. First, it must be remembered that joining a co-operative was not the enforcement of an administrative measure, but an ostensibly voluntary act. Thus the peasants were deprived of the right of appeal (action for annulment, appeal to the administrative courts, etc.). Moreover, according to the statements of the witnesses, particular care was taken to ensure that the voluntary nature of the application for membership was specifically mentioned in each agreement, thus making it impossible for an ordinary or administrative court to give any judgment on the legality of the application.

2. The administrative jurisdiction provided for by Article 138 of the Constitution of the German Democratic Republic ceased to exist as a result of the administrative reform of 1952.¹

3. As there is no constitutional court there is no possibility of appeal on constitutional grounds.

4. Even supposing *in theory* that the matter could be brought before an ordinary court on the grounds that the decision was attended by circumstances actionable in civil or criminal law (violation of domicile, duress), *in practice* the courts serve as an instrument for the implementation of state policy (see pp. 36-37). The purpose of the courts, as laid down in Article 2 of the Act

¹ On the highly unusual way in which this reform was put into effect see W. Schulz: *Die Verfassung der Deutschen Demokratischen Republik* (Frankfurt/Herrenalb, 1959), p. 51.

on the Organisation of the Judiciary, is to contribute to "the victory of socialism". No further explanation is needed to show that the peasants could in practice expect no protection from courts to which such a task had been assigned. In this connection, attention must be drawn to the fact that any expression of opposition to collectivisation was considered as agitation or propaganda against the State and the socialist system and punishable under Article 19 of the supplementary Criminal Code (subversive propaganda or agitation). It should also be mentioned that, according to the testimony of a number of witnesses, public prosecutors very often took an active part in the campaign.

It may therefore be concluded that the peasants had no legal remedies against the measures that led to the full collectivisation of the East German agriculture.

RECENT LEGAL DEVELOPMENTS IN HUNGARY

A decree on a partial amnesty issued by the Hungarian Presidential Council and published in the official Gazette *Magyar Közlöny* of April 1, 1960, draws again the attention of public opinion to the legal situation in Hungary. As will be remembered, the International Commission of Jurists was repeatedly seized with disturbing events in that country, namely, the suppression of fundamental human rights and the systematic violation of the Rule of Law after the Revolution of 1956 and in the years after;¹ a short note on important trials held in the course of 1959 has been published in *Bulletin* No. 9.² It may now seem appropriate to give a brief outline of some main features of the legal developments in Hungary in the recent past to permit a better evaluation of what the present regime understands by the reinstatement of "socialist legality" and whether that avowed intent signifies a genuine trend towards the Rule of Law.

As in every Communist country, "socialist legality" is the basic principle of legal policy in Hungary; its consolidation became the primary concern of the new Government after the uprising

¹ *The Hungarian Situation and the Rule of Law*, the Hague, 1957; *The Continuing Challenge of the Hungarian Situation to the Rule of Law* (Supplement to the Report of the International Commission of Jurists published in April 1957) June 1957, The Hague; *Justice in Hungary Today*, Third Report of the International Commission of Jurists on The Hungarian Situation and the Rule of Law, February 1958, The Hague.

² *Bulletin* of the International Commission of Jurists, No.9 (August 1959), p.31.

in 1956. According to numerous statements of high ranking State and Party officials, the regime claimed to be successful in this respect and it was not without satisfaction that the First Secretary of the Hungarian Workers (Communist) Party, Janos Kadar, could state in his report at the 7th Party Congress in November 1959: "It is to the special credit of the Ministries of the Interior and of Justice that—working under very difficult circumstances—they have during the past three years completely restored socialist legality in our country, so that in our country no crime remains unpunished but also no innocent people are punished."³

In referring to the "very difficult circumstances" Kadar was obviously thinking of the time after the uprising, when the majority of the Hungarian judiciary observed passive resistance and the regime could restore order only by means of an extraordinary jurisdiction applying a continuous repression and openly violating fundamental human rights and liberties. The Hungarian authorities nevertheless maintained that there was no deviation from "socialist legality", which they invoked in justification of drastic measures applied against the so-called "counter-revolutionaries"—people who have taken part in the revolution. Thus, after the secret trial and execution of Imre Nagy and his associates, Mr. Kadar stated that a correct administration of justice required that "counter-revolutionaries" be punished without regard to their position.⁴ In this sense, Mr. Kadar added, the execution of Imre Nagy did not constitute a breach of the given word but an inescapable consequence of Nagy's breach of oath on the Constitution, which could not remain unpunished even in the case of a Prime Minister. It will be remembered that Imre Nagy was given a safe-conduct signed by Mr. Kadar himself. This measure did not prevent his arrest, trial and execution.

It soon became evident that for the Hungarian authorities it was less the crime itself than the political and social background of the defendant for which he was to be punished. In fact, the term "social danger", as developed in Soviet law, was given a somewhat different interpretation in Hungary with regard to people involved in the uprising. The full repressive effect of punishment was inflicted upon all people considered as "class enemies and traitors", whilst only educational measures were

³ *Népszabadság*, December 1, 1959.

⁴ *Népszabadság*, July 1, 1958.

applied to "misled" workers who confessed their faults and were ready to expiate their political errors. The sentences therefore were based not on positive law but on political expediency with the effect that in some cases "counter-revolutionary actions" did constitute a punishable crime, in others not. The Supreme Court formulation is the following :

"To acquit people who were temporarily misled is as important a task for the judiciary as to convict and punish severely the counter-revolutionaries."⁵

Practice of the Supreme Court after the uprising shows that a "class enemy", e.g., a former small capitalist or former landowner, cannot be treated as "misled".⁶

The question of sentencing somebody as "enemy of the working people" becomes delicate if the accused belongs to the working class himself. For such cases (very numerous in this period), the following rule was declared :

"A person committing a crime against the authority of the working class cannot invoke the fact that he himself belongs to the working class;⁷ if he has adhered to his hostile views also after consolidation, he cannot be regarded as 'deceived or misled'. "⁸

The interpretation of "counter-revolutionary actions" was exceptionally broad; two Supreme Court decisions illustrate its scope :

"It is immaterial that the accused did not seek to re-establish a capitalist regime and pretended to fight for socialism. A system which does not accept the leading role of the Communist Party and is hostile to the Soviet Union cannot be a dictatorship of the proletariat even if it professes to be socialist. It is immaterial that they refrained from actual violence. Events amply proved that between violent and law-abiding counter-revolutionaries there is only a difference in time and methods. All aim finally at the overthrow of the regime."⁹

⁵ 1687 BH 1957; BH is the abbreviation of the official Collection of Court Cases published monthly by the Hungarian Supreme Court. The first number indicates the current number under which the case appears in the collection.

⁶ 1973 BH 1958, 1747 BH 1957, 1972 BH 1958, 1746 BH 1957.

⁷ 1537 BH 1957.

⁸ 1889 BH 1958.

⁹ 1809 BH 1958.

Or in another case :

"The accused took part in organising the Hungarian Revolutionary Youth Party, held mass meetings, asked with other demonstrators in front of the United States Embassy for United Nations intervention and attempted after November 4 to escape to the West. The sentence of seven years imprisonment is raised to fifteen."¹⁰

In spite of a complete blackout on political trials and of repeated assertions issued by State authorities that "all (political) investigation and procedures were concluded a long time ago" reports on new imprisonments and executions have reached the outside world.¹¹ Some arrests have been later admitted, as happened in the case of Professor Istvan Bibó, former Minister of State in the Nagy Cabinet and the leaders of the Budapest Workers Council, Sandor Bali and Sandor Racz.¹² Furthermore, for many months persistent reports have been reaching the West and telling of continued executions of Hungarians for the part they played in the 1956 Revolution. These reports—often containing precise factual details—were however consistently denied by the Government.

Sir Leslie Munro, the Special Representative of the General Assembly of the United Nations on the Question of Hungary, referred at his press conference in Geneva on April 8, 1960, to particularly alarming reports concerning a group of minors :

"Unfortunately reports of the execution of a number of young people persist and have aroused in recent months the greatest anxiety in many parts of the free world. Further denials by Hungarian Party and Government spokesmen have not allayed this anxiety. If the authorities in Budapest have nothing to hide in this grave matter they should welcome a visit by me to Hungary which would be in accordance with the wishes of the great majority of the Member States of the United Nations and which would enable the United Nations through me to ascertain the facts of ever continuing reports of such executions. Denials and public assurances in the past by Hungarian leaders have not always been such as to encourage belief in their genuineness, as the fate of Imre Nagy and others unfortunately proves."

Against these charges, the Hungarian Minister of the Interior, Bela Biszku, affirmed at the Party Congress on December 3, 1959 :

¹⁰ 2001 BH 1958.

¹¹ *Bulletin*, No. 9, pp. 31-32.

¹² *Rudé Právo*, Prague, April 10, 1959.

"I can state with full responsibility that there was not and is not in our prisons a single minor among convicts or persons under investigation."¹³ This statement is clearly refuted by a decision of the Hungarian Supreme Court which raised the punishment of a group of building construction apprentices to five, six and six and a half years for associating in a movement to overthrow the regime. "These young men of 17-18 who received appropriate education in a State college were entirely capable of realizing the real significance of their deed," says the Supreme Court opinion in this case.¹⁴

Official statements to the contrary notwithstanding, it may well be assumed that there is still a considerable number of people imprisoned because of their participation in the 1956 uprising, an assumption which was indirectly confirmed by the Amnesty of March 31, 1960.

The decree granting the amnesty and published in the official Law Gazette No. 27 of April 1, 1960, can be summarised as follows :

1. The sentences of those who have been sentenced for crime against the State committed before May 1, 1957, to not more than 6 years' imprisonment shall be suspended;
2. Clemency shall be granted to those who were sentenced for war crimes and anti-democratic crimes before December 31, 1952, and who have completed ten years of their sentence.
3. Punishments of mothers sentenced before March 31, 1960, for not more than one year and who have a child under ten shall be remitted;
4. Amnesty shall be granted to Hungarian citizens who were sentenced to reformatory work by a court before March 31, 1960.
5. Internment for security reasons shall be abolished.
- 6-10. give details on applying the above rules.
11. Punishments for offences against police, fire precaution and local council regulations before March 31, 1960 shall be annulled.

A short analysis of the terms of this amnesty is needed to evaluate its scope and importance and to bring it in proper perspective from the viewpoint of the general legal situation.

Paragraph 1 provides for the *suspension* of those sentences for crimes against the State, committed before May 1, 1957, and not

¹³ *Népszabadság*, December 4, 1959.

¹⁴ 1601 BH 1957.

exceeding six years. This should actually affect the "freedom fighters". It has, however, to be kept in mind that this is not a full pardon, consequently, the execution of the sentence is only interrupted and can be resumed at any time if the person concerned violates the law under which he was sentenced. The threat of being imprisoned again therefore remains and gives the Government a legal pretext for surveillance of and pressure on these people.

It has to be further emphasized that the bulk of the participants in the 1956 revolution are not affected by this or any other provision of the 1960 amnesty. Those many who were sentenced to death have, of course, not been amnestied; neither were those whose sentences exceeded six years. According to Law-Decrees 4/1957, Article 5 and 34/1957, Article 23 (1) the sentence for counter-revolutionary crimes is death. On the basis of Article 94 of the Official Compilation of Valid Rules of Substantive Criminal Law (BHO) death sentence may be imposed if the accused has at the time of the commission of the crime completed his sixteenth year of age. In case of attenuating circumstances the Court has the power to impose, in lieu of the death sentence, life imprisonment or imprisonment for a period from five to fifteen years. Another aspect bearing on the number of persons who were probably released is the fact that four years after the Revolution a good many of the prisoners should have been released anyhow in view of the fact that after serving two-thirds of their sentence they were eligible for parole.

The provision of paragraph 2 grants a full *pardon* to those persons who were sentenced before December 31, 1952, for war crimes "against the people" and who have served ten years of their sentence. The number of these persons seems to be very small, since most of the political prisoners sentenced by the Communist regime were in fact released during the revolution of 1956 and had either been arrested again for their participation in that revolution or had fled abroad. It is not possible to determine how many persons who have received life sentences prior to 1953 were released since the paragraph provides only for those persons who have "served ten years of their sentences". In general, Article 33 (2) of Law-Decree No. 17 of 1954 in implementation of the Hungarian Code of Criminal Procedure provides for the conditional release of persons who have served fifteen years of their life sentence; it is not possible to state on the basis of the amnesty-decree what attitude towards life sentences the Government has taken and whether it considers the conditional release as applicable in these cases.

Paragraph 4 grants a full pardon to those Hungarian citizens who had been sentenced to corrective educational labour before March 31, 1960. This covers those persons who were sentenced from one month to two years for minor offences (violation of public property, speculation, etc.) whereas persons who actively participated in the uprising or other people arrested for any reason in connection with it, are not affected. It might safely be concluded that there is quite a number of workers, State employees, etc., who have violated State discipline and in whose case applies the principle of the educational purpose of penalties imposed on members of the working class. There is no doubt that the amnesty has some meaning to these people and may positively influence their attitude towards the regime.

The above considerations apply *mutatis mutandis* also to paragraph 11 of the amnesty decree.

Internment for security reasons will be abolished by virtue of paragraph 5. There exists an interesting divergence between the wording of the official text in the Law Gazette and the preliminary announcement of the amnesty by the Hungarian news agency MTI,¹⁵ the latter speaking of the abolition of *an* internment camp, the former referring to the abolition of internment camps as such. This provision appears to be primarily a political measure and is at the same time the first official admission that such camps still existed. It will be recalled that the public security detention camps were abolished in the time when Imre Nagy was Prime Minister, i.e., in July 1953, but were reinstituted shortly after the revolution on December 13, 1956.¹⁶ The text in the Gazette speaks of the institution of internment for security reasons without reference to the number of camps then in existence. Reports from private sources in Hungary indicated that there was definitely more than one such institution in use.

Until June 1958 only "politically dangerous elements" were sent to them, i.e., people who were alleged to be directly or indirectly connected with the uprising or were merely suspected of "counter-revolutionary activities". The persons interned at these camps were generally not convicted of a crime but simply sent to the public security camp on grounds of suspicion existing about their political attitude. It is therefore quite possible that the camp inmates will be screened before their release and those

¹⁵ *Népszabadság*, April 1, 1960.

¹⁶ Text of Law-Decree in *The Hungarian Situation and the Rule of Law*, 1957, pp. 77-78.

who appear to be dangerous to the regime put on trial and sentenced, as was the case in 1953 when the camps were abolished for the first time.

Besides the "politically dangerous" persons of whom freedom fighters constituted the majority, the Hungarian Government has been sending to these camps since June 1958 criminal elements (hooligans, notorious drunkards, etc.). The total number of inmates is estimated at 2,000-3,000 persons.

In connection with this amnesty, six prominent personalities of widely differing background and record were singled out for special consideration. Their politically motivated release focused on many other public figures who have remained in gaol or whose fate is still unknown.

In view of the aforesaid it becomes apparent that the actual effect of the amnesty is limited indeed. The narrow scope of its operation has been confirmed in a press statement made by the Hungarian Minister to London, Mr. Szilagyi, on April 1, 1960, asserting that about 200 persons would be released under the terms of the amnesty.¹⁷ This figure contrasts with a sober estimate of about 35,000 inmates of Hungarian gaols, one half of whom are believed to be political prisoners.

This short analysis shows that the most important question, namely, whether the Rule of Law is being re-established in Hungary, still remains open. It is important to observe that the regime of "summary jurisdiction" in the form introduced in January 1957 continues to be applied. The Law-Decrees establishing the extraordinary jurisdiction rendered by the "People's Benches" and the practice of these exceptional courts show that any opposition continues to be viewed as a counter-revolutionary crime still triable summarily. Their small, highly centralised judicial apparatus is kept to deal with political crimes because the ordinary rules of socialist legality are considered too cumbersome or lenient for these cases. Due to their summary jurisdiction every Hungarian citizen over sixteen years of age is faced with repressive measures: in the first place death, and in the case of attenuating circumstances, imprisonment for over five years. The very simplified oral procedure is dominated by the prosecutor, and political lay judges constitute a majority over their legally-trained president.

Ordinance No. 1 of 1957 of the Minister of the Interior relating to expulsion from domicile and placing under police

¹⁷ *The Times* (London), April 2, 1960.

supervision of certain persons, is also still in vigour. In this matter the Supreme Court ruled that the legality of a police order concerning police supervision—actually a tightly controlled assignment to residence—cannot be attacked in court; this procedure remains within the exclusive competence of the police.¹⁸ The police has been entirely reorganised around the nucleus of the security police, identical with the AHV of Rakosi's Stalinist regime.¹⁹

Finally, the whereabouts and living conditions of those Hungarian men, women and children whose deportation to the Soviet Union was reported by the United Nations Special Committee on the Problem of Hungary to the General Assembly in 1957,²⁰ and of some of those Hungarian refugees who returned to their country, remains unknown. Disquieting reports on their fate have reached the outside world.

As long as clear and unequivocal answers to these questions cannot be given by Hungarian authorities and the ban on a fact-finding visit of the United Nations Special Representative persists, the world legal opinion will share the International Commission of Jurists' apprehension over the continued denial of the Rule of Law in Hungary.

THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS

The United Nations Commission on Human Rights has as its main purpose the promotion of the universal recognition of human rights and of effective guarantees of their exercise. All current issues in this field are dealt with at the annual meetings of the Commission which are held alternatively in New York and Geneva. This year's conference took place in Geneva from February 29 to March 18, 1960 and, was highlighted by the discussion on three major topics, namely the adoption of a Declaration on the Right of Asylum, the setting up of so-called National Advisory Committees on Human Rights and the prevention of

¹⁸ Criminal Division 310 BH 1959.

¹⁹ *The Times* (London), October 22, 1960: "Repression under Kadar regime".

²⁰ Doc. A/3592/XV.

discrimination and protection of minorities. Since these problems are of general interest and have some bearing on the activities of the International Commission of Jurists, it might be useful to give a brief account on some aspects involved in the debates. They show the scope of activities as well as the limitations of an international body such as the Human Rights Commission with its 18 members representing the most divergent ideological, political and social tendencies.

1. The question of the right of asylum was already placed on the agenda of the thirteenth session of the Commission in 1957 where a Draft Declaration on the Right of Asylum was submitted by France. This draft was commented on and amended by the Governments of the Member-States of the United Nations and its specialized agencies and accordingly revised by the French delegation. It was now again submitted to the Commission which discussed at length its four articles and eventually adopted the Draft Declaration by 15 votes to none, with 3 abstentions [3(XVI)]. The question raised by the Soviet Union whether such a declaration falls under the Commission's frame of reference was answered in the affirmative by a majority of the members. It was held that the question of asylum was fundamentally a human rights problem. The Draft Declaration, an elaboration of Article 14 of the Universal Declaration of Human Rights, was intended as an instrument that would stress the right of every State to grant asylum in the exercise of its sovereignty (Article 1), define the responsibility of the international community for the safety and well-being of persons granted asylum and its duty to alleviate the burden of countries of first asylum (Article 2). It became, however, very soon evident that most of the States, while agreeing to these general principles, were not willing to accept any restriction of their sovereignty that could possibly be imposed on them by the Declaration. So one of the main objections to Article 2 was that it could imply that the State offering asylum had the obligation to accept United Nations inspection or supervision in regard to conditions affecting the persons granted asylum. Some delegations referred in this context to Article 2, para. 7 of the United Nations Charter pointing out that the safety and well-being of these persons were the exclusive concern of the respective State.

Nobody could actually deny this right to any State but it might nevertheless be asked whether in cases of emergency humanitarian considerations should not be expressed in stronger terms. The problem of asylum, closely connected with that of refugees, calls urgently for a solution on an international scale by means of a

closer collaboration amongst the affected States. Such necessity becomes particularly apparent in instances of an influx *en masse* where a country is no more in the position to grant asylum to all people entering its territory because of economic and political reasons. The question may then arise of the right of such State to reject people seeking asylum rather than to endanger the security and welfare of its own population. Article 3 of the proposed Declaration embodied a provision—the so-called principle of *non-refoulement*—envisaging a situation where a person seeking or enjoying asylum could be denied entry at the border or returned to the country he had fled from, even if his life or liberty were seriously threatened. When discussing this aspect the members of the Commission were divided in two groups: the first (consisting mainly of representatives of Afro-Asian countries) pleaded for the maintenance of the State's sovereignty and *implicite* its right to be free in granting or refusing asylum for reasons of its own security and welfare, while the other (mostly European States) stressed the humanitarian duties of the States which should oblige them to deviate only in exceptional cases from the principle of *non-refoulement*. To weaken the very purpose of the Article by allowing broad exceptions would make it lose its meaning and value. In fact, there are many instances, such as the afflux of Tibetan refugees, where a State is not able to accept all people seeking asylum, but where it may, instead of sending them back, arrange for them to be transferred to and taken over by another State. It is precisely in such cases that an internationally accepted agreement seems to be the best approach towards a problem which transcends national boundaries and consequently cannot be solved on a national level. Thus viewed, the final wording of the Article which had to take into consideration the above described divergent views appears unsatisfactory. It reads now as follows :

“ No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights should, except for overriding reasons of national security or safeguarding of the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well-founded fear of persecution endangering his life, physical integrity or liberty in that territory.”

Balancing rights with duties, Article 4 is intended to commit the persons enjoying asylum not to “engage in activities contrary to the purposes and principles of the United Nations”.

It is, of course, self-evident that a State must retain its right to reject persons whose activities are directed against its law and order. The general terms of the Article, however, are open to broad interpretation and may serve as a pretext to expel a person on more arbitrary grounds. Experience has shown that there are various and quite divergent views on what is considered as being "contrary to the principles of the United Nations" and that unless there is a general agreement on this point such provisions may well cause difficulties, if not serious controversies, in their practical application. The main obstacle lies in the variety of the ideology and political practice of the member States which makes any international agreement contingent upon compromise acceptable to all, but for that very reason often devoid of the necessary effectiveness.

2. A significant example of such a difference of opinion became manifest when the Commission discussed the setting up of National Advisory Committees on Human Rights. This topic was placed on the agenda of the Commission upon the proposal of Mr. R. S. S. Gunawardene, from Ceylon, its former Chairman, with the following statement: "National advisory committees on human rights, properly instituted and consisting of prominent personalities, would be of great assistance to governments in advising regarding standards of human rights and in solving national or local human rights problems". The functions of such committees could be, *inter alia*, (1) to study current problems of human rights on the national or local level and to make recommendations to the government thereon; (2) to advise the government on any matters, legislative or administrative, relating to the observance of human rights; (3) to hold annual or periodic conferences or seminars on human rights; (4) to make annual or periodic surveys on how human rights are observed; and (5) to assist the government in preparing periodic reports on human rights to the United Nations and in making studies on specific rights or groups of rights."

While the general purpose and principles of the project met with almost unanimous approval of the Commission's members there was considerable dissent on what basis these advisory bodies should be set up. The Soviet Union questioned whether they should exercise any advisory or supervisory functions and stressed that at any rate governments should not be placed under any obligation to consult, or to seek the advise of, such bodies. Each government should develop its own machinery, or make its own arrangements, in which process it might take into account

the views of unofficial bodies. It was recognised that the relationship between informal and independent public opinion and public authorities was hard to define. In this context the Soviet delegate asked—and this again was rather significant for the variety of views and opinions represented in the Commission—what the expression “independent opinion” could possibly mean. No common definition could be found, as the terms “impartial”, “objective” and “free from political influence or official instructions” put forward by many delegations were unacceptable to the Soviet Union who on her side apprehended independent opinion as a term which contained “the seeds of the concept of opposition to the government”. In deference to this objection, the word “independent” was eventually dropped. It was, however, stressed by some representatives that the sponsors of the Resolution did not think that human rights committees should be dependent on governments, lest they become an instrument instead of an advisory body to the Government. In the adopted Resolution the Commission “invites Governments of United Nations Member-States to stimulate, in such manner as may be appropriate, the formation of such bodies which might take the form, *inter alia*, of local human rights committees or national advisory committees in the field of human rights, or to encourage them where they already exist” [Res. 2 (XVI)].

3. The third item on the Commission's agenda was the debate on “Manifestations of anti-semitism and other forms of racial and national hatred and religious and racial prejudice of a similar nature”. The discussion was based on a Draft Resolution submitted by the Sub-Commission condemning manifestations of anti-semitism such as occurred in the beginning of 1960. All representatives unanimously branded these manifestations as a threat to freedom of religious belief and expression. They dissented, however, on the wording of the draft itself. The delegates of the Communist countries (Soviet Union, Ukrainian Soviet Socialist Republic and Poland) attacked very severely the Federal Republic of Germany and its Government thus shifting the issue on a purely political level. They reviewed the atrocities committed by the Hitler Regime in the past in their own countries and denounced the anti-semitic manifestations in West Germany as evidence of a revival of Nazism and of a policy of aggression. They expressed the hope that the Commission would act promptly to prevent a recurrence of such unfortunate events, stressing the importance of taking immediate and effective steps to eliminate the danger of Nazism which has in their opinion found

“in certain countries” favourable conditions for development. Such measures should among others include the elimination from public life of any influence inciting racial and national hatred. Apart from the fact that anti-semitic manifestations had occurred in numerous countries on both sides of the ideological divide, some delegations regretted that it was less the important issue itself than a specific political objective which was viewed in the declarations of some members of the Human Rights Commission. After a lengthy debate a resolution was eventually unanimously adopted which was firm in condemning the manifestation of anti-semitism but free from any specific reference to a given country [Res. 6 (XVI)]. Although the Human Rights Commission has, in spite of many conflicts of opinion achieved at its Sixteenth Session, some positive results, many important issues remain unsettled or were disposed of in a non-committal form of a compromise the vague wording of which cannot conceal the divergent positions of the members.

THE CASE OF CARYL CHESSMAN

As a matter of long-established policy, the International Commission of Jurists does not scrutinize individual cases of controversial decisions unless they set a pattern of a general and systematic denial of the Rule of Law. Though the present article deals with an isolated case, it is discussed here because of the universal meaning of the issues involved and in the belief that there is in our world no country in which the Rule of Law—however highly developed—could not be further improved and adjusted in its application to the ever-growing social conscience and responsibility of a democratic society.

The death sentence and execution of Caryl Chessman, an American convicted on seventeen counts of crimes including kidnapping for purposes of robbery with infliction of bodily harm, armed robbery, attempted rape, forcible acts of sexual perversion and car-theft, has created an international *cause célèbre* which few non-political trials of individuals have matched in recent times. The Chessman case became a testing ground of the forces for and against death penalty; it became also a basis for attacks on the United States administration of justice and, beyond that, on America's social system. An objective legal

analysis of the circumstances that led to Chessman's execution 12 years after his trial and conviction has to avoid considerations of political and sociological nature and to leave to the competent authorities to establish by democratic processes the respective nation's approval of or opposition to the death penalty.¹ The International Commission of Jurists does not propose to take a stand on this issue. The *Conclusions* of the Committee on Criminal Procedure and the Rule of Law at the International Congress of Jurists in New Delhi (January 1959) stated :

"The Rule of Law does not require any particular penal theory but it must necessarily condemn cruel, inhuman or excessive measures or punishments, and supports the adoption of reformatory measures wherever possible."

However, the question was raised by many responsible jurists whether the twelve years intervening between the Chessman trial and condemnation, and his execution, did not in fact constitute "cruel, inhuman and excessive punishment" inasmuch as the convict was exposed to mental suffering and anguish caused by the continued uncertainty of his fate and compounded by eight previous detentions in the death cell immediately preceding a scheduled execution. Though it is true that the period which elapsed between Chessman's sentencing and execution was unusually long, the cause of the delay was not a disregard of the prisoner's human rights but rather a meticulous concern over his rights of defence.

The evidence on which Chessman was convicted on June 25, 1948, appears to have been overwhelming and has never been successfully attacked. Serious doubt persisted, however, on the applicability of paragraph 209 of the California Penal Code that provided for kidnapping in general a maximum prison term of 25 years, but left within the discretion of the jury to impose the death penalty if the victim was "carried away" for purpose of "robbery or ransom" and "suffered bodily harm". In the crucial instance, Chessman robbed a couple seated in a parked car and then forced the girl to follow him for a distance of 22 feet to his own car where he abused her sexually without raping her. The three questions, whether the removal of the victim at this

¹ In the United States, six states have abolished capital punishment entirely and three more have limited its application to especially qualified cases of some offences. In Europe, the United Kingdom maintains the death penalty for instances of aggravated murder. Eire, France and Spain are the other West European countries where capital punishment is still on the statute books.

short distance amounted to kidnapping, whether it took place "for purpose of robbery" and whether forcing of the victim to commit an act of sexual perversion amounts to inflicting "bodily harm" are of course debatable; their interpretation in a sense unfavorable to the defendant had particular meaning in view of the requirement that all three elements be present to warrant the exercise of the jury's discretion to impose the death penalty. Yet it has to be noted that California courts established earlier precedent in interpreting paragraph 209 in such an extensive way; a restrictive change of the law that removed doubts as to its scope did not take place until 1951.

Apart from this argument, all the many appeals lodged by Chessman during the twelve years of his legal struggle in American courts revolved around procedural matters, especially the issues arising from Chessman's pleading on his own behalf and from the alleged deficiency of the trial transcript completed by a substitute after the death of the reporter from his original notes in personal shorthand. In civil cases, the death of the reporter before his transcription and certification gives the trial court the discretionary power to set aside the judgment and order a new trial (California Code of Civil Procedure, paragraph 953e). But, "by some quirk, in California legislation this does not apply to criminal cases" (Denman, C. J. in 219 F2d 162, at 164).

Eleven of Chessman's appeals reached the Supreme Court of the United States. This unprecedented number will be better appreciated in view of the fact that the Supreme Court of the United States is not a regular ultimate appellate instance from decisions of State courts; it may intervene only on complaints of a denial of "due process of law" guaranteed by the 14th Amendment to the United States Constitution. Such denial must be of a nature violating "civilized standards of law" and "shocking to the universal sense of justice". In two instances, the majority opinion of the Supreme Court was favourable to Chessman. It found in 350 US 3 (1955) that the charges of fraud made by the appellant on grounds of conspiracy between the newly appointed reporter, his nephew by marriage, the deputy District Attorney in charge of the case and two police officers involved in pre-trial investigation, "set forth a denial of due process of law in violation of the 14th Amendment". The case was then remanded to California courts on October 17, 1955. Again, on June 10, 1957, pursuant to Chessman's appeal on grounds of denied personal appearance at hearings that settled the controversial record of

the trial, the Supreme Court overruled the California Court of Appeals and issued an instruction to enter orders appropriate to allow California a reasonable time to give Chessman "a further review of his conviction upon a properly settled record" (354 US 156).

A dissenting opinion written to this 5:4 decision by Justice Douglas with Justice Clark concurring stated that "the conclusion is irresistible that Chessman is playing a game in the courts, stalling for time while the facts of the case grow cold". It was also pointed out that Chessman listed a total of more than 200 objections to the rough draft of the trial transcript submitted by the newly appointed reporter. About eighty of those were accepted and Justice Douglas emphasized that while some of the objections were specific, some merely claimed "that the reported version of certain testimony was garbled or incomplete or inaccurate". In sum, he saw "no important, significant prejudicial error" in the appealed record.

An impressive survey of legal remedies used by Chessman in fighting the 1948 sentence is listed in an appendix to Justice Douglas's dissenting opinion in 354 US 156, at 173-177. It supplied adequate evidence of procedural fairness in the Chessman case. Yet the indignation voiced in many parts of the world over his execution has been less concerned with legal formalities than with the morality of an act of justice delayed for twelve years of intermittent hope and resignation.

Contrary to widespread popular belief, the President of the United States does not have the power to pardon a convict under state jurisdiction. His authority extends only to "offences against the United States", i.e., proceedings before Federal Courts. Nor did the Governor of California possess the right to grant pardon or commute the sentence in Chessman's case. The Constitution of that State prevents him from using this right with respect to an offender who had twice before been convicted of felony, unless a majority of the Supreme Court of California approved. In the case of Chessman, who has since 1938 spent but two years at liberty, the Supreme Court consistently refused to recommend clemency.

The Chessman case highlighted the inadequacy of a kidnapping legislation that permits capital punishment in cases hardly discernable from common robbery. It also raised the legitimate question whether the 1951 change of California's paragraph 209 of the Penal Code, exempting robberies where the victim was merely detained from the application of the death penalty, should

not have retroactively benefitted Chessman. Significantly, a meeting of the American Law Institute in Washington approved on May 18, 1960, a provision of its Model Penal Code under which the maximum penalty for kidnapping would be life imprisonment, and then only in case the victim did not return alive. The demand for "proportionality" between crime and punishment was raised in connection with the Chessman case by responsible lawyers in many countries who hesitate to approve putting to death a person who did not himself kill.

The multiplicity of Chessman's appeals and the ensuing delays in the procedure prompted a study by the American Bar Association to limit reasonably such appeals where they would result in an unwarranted obstruction of justice. It should be added that this problem is further aggravated in the United States by delays resulting from the complicated relationship of State and Federal jurisdictions. Many jurists—American as well as non-American—were startled and even shocked by the realisation that the delay caused by an elaborate use of available legal remedies has in the end produced the opposite of the legislator's intent. While offering to the convict the fullest protection of the law, the procedure enabled him to defer the expiation of his crime until both to a large section of the public and to Chessman himself the execution came to mean a vindictive act of a society to whom the criminal's debt had already been paid in the length of his detention, in the recurrent fear of impending death and in the resourcefulness displayed in his own defence. Thus, in 1960, the public image of Chessman did no more correspond to that of the convict of 1948, nor indeed was his personality the same. There remains the disturbing question whether, after exacting its due after twelve years of jail and legal controversy, *summum jus* has not, to quote the ancient Roman law axiom, resulted in *summa injuria*.

Viewed from a different angle, the case has also dramatically focussed on ethical problems of capital punishment with regard to convicts who dispose of less talent, perseverance and publicity than was available to Chessman during his legal battle with the American justice.

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