

FOR THE RULE
OF LAW

**Bulletin
of the
International
Commission
of Jurists**

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ASPECTS OF THE RULE OF LAW

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No. 13

MAY 1962

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FOREWORD

The popularity of the *Bulletin* among the readers of the Commission's periodicals has been attested anew by the great interest shown in the articles of the last issue (No. 12, November 1961). Requests were received for permission to reprint the articles on the death penalty, on Ceylon and on Senegal, and the study on the franchise of women in Switzerland has produced a positive response from a number of women's groups as well as individual readers. This widespread positive reaction proves that the usefulness of the *Bulletin*, which helps in succinct form to keep the international legal community informed of topical developments in various countries of the world, has been recognized and appreciated by the subscribers to our periodicals. The friends of the Commission realize that the preservation and strengthening of the Rule of Law in the national community is a *conditio sine qua non* of increased respect for the Rule of Law on the international scale.

While the Commission has so far abstained from studying problems of international law, save generally as they affect observance of human rights, it is not unconcerned about events that threaten to weaken the respect for law in relations between sovereign States. Since the end of the Middle Ages, when nations evolved into distinct national entities, various rulers and governments have sought to bring about an international consensus to refrain from violence and to settle outstanding problems through impartial mediation or around the conference table. The increase in the destructiveness of modern weapons and the shrinking of distances on the globe and beyond it, have brought about such a close interrelation of all peoples that no conflict, however limited in its initial scope and importance, can safely be expected to spare all of humanity from the effects of direct involvement.

The universal character of the last two World Wars has made this correlation unmistakably clear. Unless the international political institutions develop in proportion to man's potential for destruction, there will be no safe foundation of the Rule of Law anywhere.

The Covenant of the League of Nations of 1919 attempted in Articles 12, 13, 15, and 16 to commit Members of the League to a peaceful settlement of their potential disputes.

Article 12

1. The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture, they will submit the matter either to arbitration *or judicial settlement* or to inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators, *or the judicial decision*, or the report by the Council. (Italicized text as amended and in force from September 26, 1924.)

Further:

Article 13

1. The Members of the League agree that, whenever any dispute shall arise between them which they recognize to be suitable for submission to arbitration *or judicial settlement*, and which can not be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration *or judicial settlement*. (Italicized text as amended and in force from September 26, 1924.)

As an added safeguard, the Covenant provided that:

Article 15

1. If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration *or judicial settlement* in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary-General, who will make all necessary arrangements for a full investigation and consideration thereof. (Italicized text as amended and in force from September 26, 1924.)

Specific sanctions were formulated for the case of violations of these commitments:

Article 16

1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

The lack of universality and common purpose aspired to by the League of Nations has reduced this first system of international security to impotency and final destruction. The League of Nations, to quote a recent statement from the rostrum of its successor organization, "died when its members no longer resisted the use of aggressive force". The tragic consequences of their failure have, during the years 1939-1945, increased the sense of urgency in the afflicted peoples and their leaders for the creation of a more effective instrument for peaceful solutions of conflicts arising between individual Member States. Chapter VI (Pacific Settlement of Disputes) and Chapter VII (Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression) of the Charter of the United Nations, deal in Articles 33-51 with such problems:

Article 33

1. The parties to any disputes, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

In addition to these provisions and to a sanction of direct United Nations military action "should the Security Council consider that measures provided for in Article 41 would be inadequate, or have proved to be inadequate" (Article 42), the

Member States of the United Nations are specifically bound by their unqualified commitment under Article 2, Paragraph 4 of the Charter:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Most recently, the binding character of the obligation to refrain from violence, arising from the Charter of the United Nations, has come to the fore in connection with some urgent problems of emergent nations. The instability brought into the field of international relations by the theories on "just" and "unjust" aggressive wars tends to affect the universal agreement against the use of violence which was the very foundation of the idea of the United Nations. The world organization has since its inception actively striven "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" (Charter, Article 1, Section 2). As early as 1949, *The Economist* of London reflected correctly the then prevailing atmosphere:

... the mood of world opinion, in so far as it is fairly represented at the United Nations, is hostile to the concept of colonialism and inevitably regards with suspicion much that is done by Europeans in Africa. America by tradition, Russia by ideology, the Asiatic and Arab states by memories of dependence, the South American republics by national self-consciousness, are all committed to the view that the dependence of one people upon another is an evil thing and can be tolerated only in the certainty that it will soon come to an end.

With the increased momentum of the African developments toward a system of sovereign States, the General Assembly of the United Nations exhorted its Member States as follows:

... immediate steps shall be taken, in trust and non-self-governing territories, or all other territories which have not yet attained independence, to transfer all power to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom. (Paragraph 5 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, of December 14, 1960.)

By a Resolution, adopted on November 27, 1961, in implementing this Declaration, the General Assembly established a Special Committee of seventeen members

... to examine the application of the Declaration, to make suggestions and recommendations on the progress and extent of the implementation of the Declaration, and to report to the General Assembly at its Seventeenth Session... and to carry out its task by the employment of all means which it will have at its disposal within the framework of the procedures and modalities which it shall adopt for the proper discharge of its functions.

The *Law of Lagos* has put the International Commission of Jurists on record as declaring that "the Rule of Law cannot be fully realized unless legislative bodies have been established in accordance with the will of the people who have adopted their Constitution freely". The ability of the people to govern themselves is of course a prerequisite of genuine freedom and of a successful development of national institutions. Education remains the cornerstone of democracy. As conditions for the final independence of non-self-governing territories continue to improve, it would be indeed tragic if the few universally recognized elements of international law that have been throughout the last century painfully emerging from a world where Might was Right were to be sacrificed to an impatient impulse or to political expediency.

Precariously balanced between peace and war, the world can find its ultimate salvation only in an unequivocal renunciation of violence. Responsibility for the universal adoption of this principle is shared equally by those who are committed by their membership in the United Nations to an enlightened and sincere policy of setting their dependent peoples on the course of independence, and by those who have recently entered the international stage, assured of the best wishes and active support of their sister nations.

In the final analysis, the United Nations will in this dynamic period of world history be judged by its ability to bring about peaceful changes. Its prospects of success are contingent upon the unqualified acceptance by all Members, great and small, old and new, of the duties as well as of the rights arising from the Charter.

LESLIE MUNRO

POLITICAL SHOW TRIAL IN ALBANIA

From May 15 to 27, 1961, a political show trial was staged in Albania. A political show trial is always a sign in a country that there is something profoundly wrong both in the body politic and in the administration of justice. It shows that law is misused to eliminate—liquidate is the communist expression—opposition by force and to exact thereby complete subservience. A political show trial may often be staged with the maximum possible publicity aimed at diverting attention from other aspects of the regime on which a policy of silence is more expedient. One such aspect is the existence of administrative measures which can deprive a citizen of his liberty without reference to the courts. A political show trial is like an iceberg: the visible top hints the existence of a massive bulk hidden under the water.

The recent Albanian show trial is of a very definite pattern: it revives the species of political trial established by Andrei Vyshinsky, Chief Soviet Prosecutor during the time of the Great Purge, ordered by J. V. Stalin from 1936 to 1938 and dealt with in another article in this *Bulletin*.

The Albanian trial under review was copied down to the smallest detail from this Soviet example. It was brought before a Special Judicial Council of the Supreme Court of the Albanian People's Republic set up for this case by a special Decree No. 3,260 a few days before the beginning of the trial, on April 27, 1961. Four Army officers were selected to sit as judges under the chairmanship of the President of the Supreme Court. The indictment listed the customary charges: a complicated conspiracy inspired by "American imperialists" and organized by secret service agents of hostile neighbours. The alleged aim of the conspiracy was a *coup d'état* to overthrow the "People's regime" led and represented by Enver Hoxha and Mehmed Shehu. It was by such an accusation that Marshal Tukhachevsky and accomplices were accused in 1937 of preparing a "Bonapartist *coup d'état*" against Stalin.

The Albanian indictment stated:

... the American imperialists and Greek monarcho-fascists, in co-operation with Yugoslav revisionists would use the activities of this criminal organization as a pretext for landing their troops and intervening with the Sixth Fleet from the sea in order to destroy the people's regime and install a capitalist regime.

The accused Rear-Admiral Teme Sejko and his 9 co-defendants were shown as vile scoundrels whose only aim since the beginning of their careers was to undermine the State. The Prosecutor, posing in the role of a Vyshinsky, cited ideological authorities freely and abundantly to support his charges:

Lenin has said: "History does not know any popular movement, however deep and strong, that did not have its vile scum." And it is precisely you ... the accused who are the scum of our people ... Most of the members of this hostile organization are the sons of great landowners, of agas who used to exploit our dispossessed peasantry to the utmost. They are politically and morally degenerate, careerists, ambitious men who are prepared to sell what is most sacred: their fatherland and honour.

All the accused, due to pretrial preparation in the old tradition of such trials, confessed everything. In such a trial there are only accused, and no defendants in the proper sense of the word. The accused indicts himself and his accomplices when interrogated during trial. The character of the interrogation of Rear-Admiral Sejko is best illustrated by the following passage taken from a report broadcast by Radio Tirana on May 17, 1961, and monitored by the British Broadcasting Corporation, from which source the Albanian quotations are taken.

Prosecutor:

Who would seize power? [in case of the alleged *coup d'état*]

Accused:

The enemies of the people.

Prosecutor:

This is to say, accused Teme Sejko, that all the blood shed during the national liberation war, the labour and sacrifices of our people during these 17 years, all the victories of the people's revolution were to be liquidated. Yes or no?

Accused:

Yes.

Prosecutor:

After all that, how should the people regard you?

Accused:

As what we are, enemies.

The Prosecutor drew the inevitable conclusions from this kind of interrogation:

As prosecuting counsel I consider that the indictment brought jointly and severally against the accused has been proved and their guilt established by *their admission* during the preparation of the trial and during the trial itself by *their mutual accusations*, by the testimony of witnesses and by other evidence.

After 13 days of trial conducted in the above manner and as was officially stressed "in open court, with many workers of the capital attending", the Special Judicial Council passed sentence of death by shooting on the accused Teme Sejko, Tahir Demi, Abdyl Resuli and Hajri Mane; prison sentences ranging from 15 to 25 years were passed on the other 6 accused. The sentences were duly carried out. To make the show trial complete, publicity was arranged for the approval of the working people. Radio Tirana broadcast on May 28, 1961:

The Party Central Committee and Comrade Enver Hoxha have received many telegrams from all over the country. In these telegrams the workers express their thanks and deep gratitude for the timely discovery of the monstrous plot staged by the sworn enemies of the people and promise to sharpen their revolutionary vigilance and their steel-like unity around the Party and its Central Committee headed by Comrade Enver Hoxha.

Political show trials are condemned by non-totalitarian States and public opinion. But now even one totalitarian state has condemned a show trial in another totalitarian state. Rather unexpectedly, some months after the end of the Albanian trial, Soviet leaders attacked very sharply "the regime of terror" implanted in Albania. In the ensuing political and ideological controversy between the Soviet and Albanian leaders, the Soviet legal arguments were widely and strongly used. Albanian communist leaders were accused before the 22nd Congress of the Communist Party of the Soviet Union (CPSU) in October 1961 with flagrant violations of socialist legality, with resorting to force and with arbitrary rule in their endeavour to retain power. Professor Konstantinov writing in *Kommunist*, the ideological organ of the Central Committee of the CPSU, evaluating the Albanian events, compared the lawless acts of Hoxha and Shehu with those of Yezhov and Beria in Stalin's time in the Soviet Union. He also drew attention to the importance of "administrative" measures designed to eliminate undesirable persons without trial, quoting a decree issued early in 1960 "On Internment and Exile

as Administrative Measures " which has made it possible to intern and detain any person in Albania without observing even the semblance of law.

This short review of events, facts and allegations centring around the trial of Admiral Sejko shows that the Vyshinsky-type communist political trial is still practised in Albania. The purpose of such a trial is to eliminate "deviationists", i.e., opposition or possible opposition factions inside the Communist Party. This device against inner-party opposition was widely used for a long time in the Soviet Union and, in imitation of the Soviet example, in other countries in Eastern Europe. To cite only a few cases: the Slansky trial in Czechoslovakia, the Rajk trial in Hungary, and to some extent the Imre Nagy trial in 1958 in Hungary.

The grave danger of this device consists in hiding violence under the mask of law. Within the group in power one faction imposes its will upon another faction. The roles become reversed and opinions held become grounds for charges of treason which are then preferred against the dissenters. The settling of political differences by the use of prosecutor and hangman is a contemptible method of giving arbitrary rule a semblance of legality. Even this semblance of legality cannot be maintained for long. Such trials are later, with the change in the political situation, revealed as what they always were, the most flagrant violations of legality. The reappraisal of such trials may culminate in the building of a monument to the executed victims, as has happened in the Soviet Union in the case of the rehabilitation of the victims of Yezhov, Vyshinsky and Beria. On the evidence of the trial reviewed above, the Albanian Communists are considerably behind in this field.

CONSTITUTIONAL CHANGES IN CUBA

The constitutional history of Cuba centres around what may be termed the "myth" of the 1940 Constitution. This Constitution was at the time the direct and full expression of the constitutional power of the Cuban people. The Constituent Assembly met specially and proclaimed the new Constitution from the steps of the National Capitol on July 1, 1940. This Constitution remained in force from October 10, 1940, until March 10, 1952.

It was then that a *coup d'état* led by Fulgencio Batista destroyed the power of the constitutional President, Carlos Prío Socarrás, whose term of office ended seven months later. This interruption in the constitutional rhythm of Cuba was to have serious consequences.

The provisional regime established after March 10, 1952, issued a Constitutional Act, approved by the Council of Ministers of Cuba, which referred to "the Revolution as the source of law". The Council of Ministers empowered itself to reform this Constitutional Act and actually made use of these powers on two occasions.

On November 3, 1954, the presidential elections promised on March 10, 1952, were finally held, and Fulgencio Batista was elected. Under the so-called Transitional Constitutional Act of January 27, 1955, it was declared sufficient for the President-elect to assume office in order that the 1940 Constitution should become effective again. On February 24, 1955, Fulgencio Batista took the oath of office as President of the Republic of Cuba, and the 1940 Constitution was automatically restored.

In December 1956, following the landing of a group of men under the leadership of Fidel Castro in Oriente province, the Batista Government suspended the constitutional guarantees for a period of 45 days. The suspension of constitutional guarantees affected at first only the provinces of Oriente, Camagüey, Las Villas and Pinar del Río and was kept up until December 1958, through successive renewals of 45 days at a time, when it

went into effect for the whole country. Castro's invasion provided the Batista regime with a pretext to ignore the 1940 Constitution which Batista had "restored" in 1955.

Fidel Castro based his whole revolutionary strategy on the pledge to restore the 1940 Constitution.

In the brief of this cause there must be recorded the five revolutionary laws which would have been proclaimed immediately after the capture of the Moncada barracks and would have been broadcast to the nation... The first Revolutionary Law would have returned the power to the people and proclaimed the Constitution of 1940, Supreme Law of the Land, until such time as the people should decide to modify or change it...

This was how Fidel Castro expressed himself on October 16, 1953, in his own defence before Batista's court, after the unsuccessful assault on the Moncada barracks.

On January 1, 1959, following Batista's abdication from power, Fidel Castro took over peacefully. The 1940 Constitution was then "restored" and lasted exactly 13 days. It was on January 13, 1959, that the series of reforms of the oft-demanded and praised 1940 Constitution began.

The introductory statement to the first reform, which was to be repeated every time the Council of Ministers so ordained, declared:

The Revolutionary Government, fulfilling its duty to the people of Cuba, interpreting the will and the beliefs of the people, and faced by the urgent necessity to use its constituent power to pave the way for legislation that will meet the needs of the Revolution, using the full powers vested in it, agrees that the following constitutional reform be approved, adopted and proclaimed.

This decision of the Revolutionary Government to "use its constituent power" without restriction marks the beginning of the end of what may be regarded as the constitutional restoration of Cuba.

From then on, everything was to be "constitutional".

The 1940 Constitution had been reformed five times by February 7, 1959, that is, in less than five weeks. These reforms suspended the provision for the irremovability of judges, established the principle of the retroactive effect of penal legislation, provided for confiscation of property of political offenders, extended the death penalty to political offences, modified the system of provincial and municipal local government and removed

from the Court of Constitutional and Social Guarantees the power to hear appeals against unconstitutional action by collaborators or accomplices of the former regime.

On February 7, 1959, the Fundamental Law of Cuba was proclaimed by the Castro regime; the 1940 Constitution thereby disappeared. Like Batista's Constitutional Act of 1952, the Fundamental Law repeats almost word for word most of the texts of 1940. But what matters most is not what is kept but what is altered. The details of the Fundamental Law are not examined here; it is sufficient at the moment to discuss the body established under the title of Council of Ministers.

Under the Fundamental Law, the Council of Ministers becomes the supreme organ of the Cuban Government. Article 119 states that legislative power is exercised by the Council of Ministers, i.e., that the Council of Ministers takes over all functions of the legislature—the Congress—as set up by the 1940 Constitution.

Article 135 provides for the President of the Republic to be assisted by the Council of Ministers. The President appoints the Ministers [Article 129 (*m*)], and designates one of them as Prime Minister.

At the same time, however, Article 134 states that “in the case of absence, incapacity or death of the President of the Republic, he shall be replaced, either temporarily or permanently, as the case may be, by the person designated by the Council of Ministers, by agreement of two-thirds of its members”. This was what actually happened upon the resignation of the first President of the new Cuban regime, Don Manuel Urrutia Lleó. His resignation was presented to the Council of Ministers, who met on June 18, 1959, accepted the resignation and appointed Osvaldo Dorticós Torrado as his successor.

This privilege of the Council of Ministers is seen to be of great importance if it is noted that the Fundamental Law contains no provision regarding the method of appointing the President, or his period of office, since Article 140 of the 1940 Constitution, referring to these matters, was left out of the Fundamental Law.

From the constitutional point of view, this means that the first President of Cuba in 1959 came to office spontaneously. He then appointed his Ministers, designated a Prime Minister, and handed his resignation to his own nominees, who appointed his successor.

Under Article 232 of the Fundamental Law (which subsequently became Article 229 owing to the deletion of parts of the

original text), the Council of Ministers may amend the Fundamental Law. Such amendments may be "specific, partial or complete", it is added in Article 233.

To sum up, the Council of Ministers has the following powers: (a) it is the legislative organ; (b) it assists the Executive; (c) the Prime Minister is in charge of general government policy and deals with administrative questions in conjunction with the President of the Republic; (d) it appoints the President of the Republic, in the case of absence, incapacity or death, as well as resignation of the incumbent; (e) it is the constituent organ.

Examination of the Council of Ministers and its powers recalls the regime set up by the Constitutional Act of Batista in 1952.

The President (of the Republic) will be nominated by the Council of Ministers. It is no longer the people—it is the Council of Ministers. And who elects the Council of Ministers? It is the President who is free to appoint and change Ministers as he sees fit. Question: Who elects whom in the end? Is this not the problem of the chicken and the egg that no one has yet solved?

That was what Fidel Castro wrote about the Constitutional Act proclaimed by Batista in 1952.

The facts demonstrate that it is Fidel Castro and his closest collaborators who decide the appointment of Ministers, military commanders and President. So Castro recounts in his *History Will Absolve Me*:

One day 18 rogues got together. Their plan was to assault the Republic and loot its 350 million dollar annual budget. Treacherously and surreptitiously they succeeded in their purpose. "And what do we do next?" they wondered.

One of them said to the rest: "You name me Prime Minister and I will make you generals." As soon as this was done, he rounded up a clique of twenty men and told them: "I will make you my Cabinet and you will make me President."

In this fashion they nominated each other generals, ministers and president and then took over the treasury and government, lock, stock and barrel.

These words of Castro were of course not meant as a description of his own action, but of the tyrant Batista.

The Fundamental Law has been amended 15 times in two-and-a-half years. Together with the five reforms of the Constitution of 1940 during the first six weeks of Castro's rule and the adoption of the Fundamental Law, the Council of Ministers has

used its constituent power on 21 occasions: from January 1959 to August 1961 (the last date for which information is available) the constituent power has been used in Cuba once every 46 days.

With rare exceptions, the reforms have been due to the need to deal with some specific political problem. The growing opposition to Castro has been met by extending the powers of the Government. The death penalty, the general confiscation of property, deprivation of citizenship and "counter-revolutionary" offences have been extended in their terms, each constitutional reform covering a larger number of persons liable to such penalties.

The reforms have been inspired by the anxiety to maintain a semblance of legality. After each constitutional reform of the principles protecting the lives, freedom and property of Cuban citizens (by the Council of Ministers as constituent organ), legislation has been adopted (also by the Council of Ministers as legislative organ) empowering any Minister (all of whom belong to the Council of Ministers) to dispose freely of the lives, freedom and property of Cuban citizens, without any restriction whatsoever.

Batista's statutes contain an article that has not received much attention but which furnished the key to this situation and is the one from which we shall derive decisive conclusions. I refer specifically to the modifying clause included in Article 257, which reads: "This constitutional law is open to reform by the Council of Ministers by a two-thirds quorum vote." Here mockery reached its maximum.

Not only did they exercise sovereignty in order to impose upon the people a Constitution without the people's consent and to install a regime which concentrates all power in its own hands; but also, through Article 257, they assume the most essential attribute of sovereignty—the power to change the basic and supreme Law of the Land. And they have already changed it several times since March 10. Yet, with the greatest gall, they assert in Article II that sovereignty resides in the will of the people and that the people are the source of all power...

Such a power recognizes no limits. Under its aegis, any article, any chapter, any clause—even the whole law—can be modified...

These words, with which Fidel Castro indicted Batista's constitutional farce in 1953, are the best description that could be given of the present in Cuba from the constitutional viewpoint.

Detailed study of the five amendments to the 1940 Constitution by Castro's regime, the adoption of the Fundamental Law and the 15 subsequent reforms gives irrefutable testimony to the chaotic process of concentration of power under Castro's rule.

THE SPECIAL COURT OF DAHOMEY

The emergence of independent African states and their achievement of full sovereignty has in the past few years brought about varied patterns of constitutional systems and diverse forms of administration of justice. Common to most of them is a strong emphasis on the power of the Executive to preserve internal peace and to safeguard external security. The absence of deep-rooted traditions of political life has necessarily affected the value attributed in these countries to the existence of some of democracy's most cherished characteristics, such as the positive role of the opposition in government. The parliamentary system in Africa is still in its early stage of development and the historical respect for the authority of the chieftaincy is not conducive to the full appreciation of the constructive task which may be performed by a loyal opposition. Finally, the requirements of a speedy and efficient construction of a new political, economic and social structure seem to more radical minds to militate against a free give and take of different opinions which has to be based on often time-consuming negotiations and leads but to compromise solutions. Instead the way marked by a discussion within the top circle of the ruling Party and a subsequent unqualified acceptance of its decision has been followed in a growing number of African countries and seems to be gaining in appeal throughout the continent.

The lack of use for a constructive opposition outside the framework of the ruling Party has silenced many of those personalities who were left in political isolation without an opportunity to contribute to the shaping of the destiny of their countries. As long as their hopes could reasonably be set on the proverbial "one right of democratic opposition", namely, the chance of getting back to power by constitutional means, the situation caused little inconvenience. In the last two years, however, developments have occurred in a number of countries which indicate a trend to perpetuate the rule of the governing Party —

or of a unitary bloc formed by a group of parties — by making it increasingly difficult for the opposition to assert itself in a genuinely free election. Under such circumstances, the restlessness of the opposition grows in direct proportion to the ruthlessness of the forces in power; there ensues a mutual suspicion of authoritarian tendencies on the one hand and of subversive trends on the other. Strong-hand measures are being justified by the fear of conspiracy and the vicious circle thus created is not conducive to cooperation and national unity; it may also become a dangerous challenge to the Rule of Law.

In a number of countries, there have been passed in the course of the last two years laws establishing courts of special jurisdiction to deal with acts of individual or collective terrorism, disturbances of public order, internal rebellion, conspiracy and acts against the integrity of the state territory. Such laws are on the statute books of Ghana, Guinea, Mali, Mauritania, Togo, Dahomey and Senegal. In many instances special courts created under their authority are strictly limited in time and competence. There are countries, such as Senegal, where the court set up for such purpose has never entered into action. The International Commission of Jurists had an opportunity to observe the functioning of the Special Court of the Republic of Dahomey on the occasion of a major political conspiracy trial held at Cotonou in December 1961. The following is a report on the impressions gathered at this trial.

On May 23, 1961, there was arrested, in Cotonou, Theodore Hessou, Deputy Mayor of that city and head of the office of information and propaganda of the Union Démocratique Dahoméenne (UDD), an opposition party formally dissolved in April 1961. The UDD did not join in November 1960 with other parties in the creation of a national bloc called Parti Dahoméen de l'Unité (PDU). Negotiations on its possible integration into the bloc were, however, in progress at the time of these events. On the next day, May 24, a conference of the PDU announced the exposure of an anti-state conspiracy and attacked Hessou as the main agent of the plot. On May 29, members of the UDD leadership were received by the President of the Republic and informed of the seriousness of the charges against their Party. Soon afterwards, they were arrested. Besides Justin Amohadegbe, leader of the Party, and a number of his closest cooperators, there were also apprehended three individuals allegedly hired to apply occult forces to facilitate a murder plot against the President and Vice-President of the Republic and two members of the Cabinet. The

Government further announced the disclosure of widespread preparations for terrorist activities including secret stores of ammunition, grenades, mines and other weapons and explosives. The plotters were alleged to have conspired with foreign support to overthrow the legal government.

The arrest and detention of the leadership of the UDD had presumably occurred under the authority of Law No. 61-7 of February 20, 1961, on Public Security. It was noted, however, that a Decree of the Ministry of Interior and Security, provided for in Article 1 of this Law, as a basis for any single administrative internment of persons "whose activities endanger public order and security, the standing of the State, or tend manifestly to compromise the build-up of the Republic of Dahomey and, consequently, the national cohesion and unity", had never been issued in the case of Justin Ahomadegbe and his fellow-detainees.

From the day of their arrest, the prisoners were held *incommunicado* in the jail of Porto Novo where they were sent without any specific detention order in violation of Dahomeyan legislation forbidding directors and wardens of public jails to accept prisoners without such previous order. In addition, the Law No. 61-7 provides, in Article 1 for administrative detention in "special establishments" rather than in ordinary jails.

On August 14, 1961, there was passed Law No. 61-40 on the setting up of a Special Criminal Court for a period of six months. According to its provisions, the Court would consist of three professional judges, from among whom there would be appointed the President, and of four assessors and two substitute assessors. A Commissioner of the Government would prosecute before the Special Court on charges of crimes and delicts against the security of the State. Sentences of capital punishment would be submitted to the President of the Republic for a consideration of grace. There would be no appeal procedure against other punishment.

On November 22, 1961, the prisoners detained without hearing since May 23 were formally charged by the newly appointed Commissioner of the Government at the Special Court. During the intervening period, the regime of most of the detainees had been relaxed; some were even paroled to their families. The main political figures, however, remained in Porto Novo jail. Mr. Ahomadegbe had, during the six months, been permitted but one short visit by his wife.

Despite repeated efforts, lawyers chosen by the accused were not permitted to peruse the file of the case and to study the act

of accusation. They finally procured the documentation on December 2, 1961, two days later than the court-appointed counsel. They had to acquire at considerable expense private transcripts of the single copy available at the Court. Most of the lawyers had to study the relevant material during the early stages of the trial.

The trial of Justin Ahomadegbe and his co-accused began at Cotonou on Tuesday, December 5, and was concluded on Saturday, December 8, 1961. Presiding over the Special Court was L. Ignacio Pinto, a distinguished lawyer and at that time Ambassador of Dahomey to the United States, appointed Judge for the occasion. His colleagues on the Bench were Honoré Ahouansou, a career judge, and Antoine Fidegnon, a former police officer who was in charge of the preliminary investigation of the accused and subsequently appointed judge in June 1961. The four assessors, who according to the law were not to be government servants, were François Covi, Member of Parliament, Miss Basilia Chokki, Director of the Office of Family Compensations and Allowances and a Member of the Central Committee of the ruling Party, M. Ambroise Dossou-Yovo, a civic leader of Ouidah and member of the dissolved opposition party, UDD, and Arsène Kinde, since the summer of 1961 Director of Police and Security and former Secretary-General of the National Assembly.

M. Gregoire Gbenou, a professional judge, was appointed Commissioner of the Government (public prosecutor).

An impressive array of foreign and local lawyers appeared in defence of the accused. Lawyers from France, the Ivory Coast, and Togo, joined with Dahomeyan practitioners in a spirited defence which, apart from occasional political attacks by the Commissioner of the Government, was unfettered and given free course by the President. The defence maintained that the Special Court was unconstitutional inasmuch as two of its three professional judges had never served on the Bench before; one, M. Fidegnon, had no previous legal training.

The President of the Court has to be credited with a meticulous attention to procedural fairness. He sharply rebuked the authorities at one instance when a government witness was brought to Cotonou handcuffed and left to sleep in front of the Court House on the night before the hearing. In a couple of instances, defence witnesses vanished from their waiting room at the time of being called to testify; though they were seen immediately afterwards, they were declared unavailable when needed and

stricken from the list of witnesses. Most of the prisoners complained of having been beaten and intimidated to sign statements of guilt which most of them revoked at the Court hearing.

The main and striking procedural irregularity of this trial occurred on the eve of the last day, after Judge Honoré Ahouansou walked out of the Court conference room and refused to continue the deliberation on the verdict. He questioned the independence of the Special Court and the impartiality of some of its members. The doubts about proceeding with the trial under such circumstances were resolved by the Government by means of an over-night nomination as Judge of one of the assessors, Miss Basilia Chokki, who did in fact don the next day the purple robe and take her seat on the Bench. Furthermore, one of the assessors, M. Dossou-Yovo, having failed to appear for the last day's session, was replaced by one of the substitutes, Boniface Nobime, an auctioneer and retired civil servant, while Miss Chokki was succeeded by the second substitute, Alfred Aymard Bossou, prefect of the region of Porto Novo under whose jurisdiction were placed the accused during their detention. Thus on the final day of the trial there appeared one new professional judge and two new assessors; yet the proceedings were wound up before this new tribunal despite strenuous protests of counsel who, with one exception, refused to participate in the last stage of the trial.

At the outcome, three of the fifteen accused were acquitted. The chief defendant, Justin Ahomadegbe, was given five years of detention, Theodore Hessou fifteen years of forced labour and the remaining ten accused sentences of fifteen, ten and five years of forced labour or detention.

In a particularly painful aftermath of the trial, an arrest warrant was immediately issued against Judge Ahouansou whose house was occupied by police on the day following his withdrawal from the Special Court. The Judge succeeded in crossing the border into Togo, but was arrested there and extradited to Dahomeyan authorities who are holding him as of this writing in administrative detention.

In conclusion, it may be stated that the observation of the Cotonou trial bore out the apprehension of the International Commission of Jurists over extraordinary judicial proceedings. The element of political justice imposes on such proceedings from the beginning a heavy presumption of partiality, the more so as the legislation establishing such jurisdictions seems more often than not designed to fit particular requirements of doing away with

unwanted opposition. In most cases, both the prosecution and the defence are playing for political stakes; the former, however, appears free to interpret the rules of procedure and the very provisions of the Special Court legislation as it suits its needs. The discrediting of the opposition rather than the finding of justice may indeed become the *raison d'être* of such proceedings, much to the detriment of the Rule of Law.

The gradual achievement of governmental stability in the new African countries may in due time dispose of the need for Special Courts. It is to the credit of the young states that these exceptional measures have been so far applied sparingly and that irregularities such as described above constitute exceptions from the usual level of the African administration of justice.

THE GROWTH OF EXECUTIVE POWER IN GHANA

In this article it is proposed to examine the significant political and legal events that have recently taken place in Ghana.

The New Constitution

Since achieving independence in 1957 governmental power in Ghana has become more centralized, particularly after the abolition of the Regional Assemblies in 1959. At the same time the power of the Chiefs has steadily declined. On July 1, 1960, under its new Constitution Ghana became a sovereign unitary Republic in the Commonwealth with a Presidential form of Government. Dr. Kwame Nkrumah, formerly Prime Minister, became President after defeating at the polls the only other Presidential candidate, Dr. J. B. Danquah, the doyen of the Ghana Bar (also Chairman of "Freedom and Justice", the Ghana National Section of the International Commission of Jurists). The President is both Head of State and Chief Executive and appoints the judges; his powers can be compared to those of the President of the United States.

Ghana unlike some other recently independent African States has not enshrined in its Constitution a charter of human rights. But under Article 13 (1) the President after his assumption of office must make a "solemn declaration" of fundamental principles. The President declares his adherence to the following principles, amongst others :

... that freedom and justice should be honoured and maintained...

... that no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief...

... that subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law.

The Supreme Court at Accra held in August 1961, in the appeal of *B. O. Akoto and seven others*, that the Presidential Declaration in Article 13 (1) did not "create legal obligations enforceable by a court of law".

One other interesting point about the Constitution is the provision in Article 2 for the surrender of sovereignty towards the "realization of African unity". In December 1960 a union was announced between Ghana, Guinea and Mali, in which there was to be common diplomatic representation and a common economic and monetary policy.

Party Politics

Ghana has been governed by the Convention People's Party (CPP) for a long time. The CPP won the first general election held in 1946, and then won again in 1949 and 1956. Since independence there have been five clear years of CPP rule. Despite the victories of the CPP in the by-elections in 1959 in Ashanti, always considered an opposition stronghold, it is difficult to gauge how much popular support the CPP has at the present time. The last General Election was in 1956 and the next election is not scheduled until 1965. Parliament decided in 1960 to extend its life for another five years without an election; political justification for this prolongation was found in the apparent support for government policies shown at the time of the plebiscite held in 1960 to decide whether to change to a Republican form of government. The fact, nevertheless, remains that nine years without an election in peacetime is a long time in a democracy.

In the National Assembly in 1956, 72 seats were held by the CCP and 32 by the Opposition parties. In six years the number of Opposition M.P.s in Parliament has dropped dramatically. Today there are 8 Opposition M.P.s out of the 114-seat National Assembly. Bearing in mind that there has been no General Election for 6 years the reason for this drop can be ascribed to a number of causes. Some Opposition M.P.s have "crossed the floor", some have left or fled the country and some others have been arrested and placed in preventive detention.

Since 1958 many people drawn from the rank and file of the United Party (the name by which the Opposition party is known) have also been placed in preventive detention. Thus 43 persons, many of them members of the United Party, were arrested and

detained at the end of 1958. In December 1960, 118 persons were detained, 30 of whom, it was alleged, were members of the United Party. In October 1961, 50 persons were detained, almost all of them prominent members of the Opposition. The following month a very large number of persons were detained. Finally early in February it was reported that another 80 persons had been arrested for, it was believed, political reasons. No figures giving the numbers detained have ever been published by the Government but it is thought that there are now more than 1,000 persons detained, though some of them may not be political detainees. It has also been reported earlier this year that 9,000 Ghanaians have found in neighbouring Togoland asylum from "political persecution".

Conspiracies against the Government

The main reason for these mass detentions appears to be to safeguard the Government's own position and to minimize the possibility of a *coup d'état*. Two "conspiracies" against the Government have been discovered in the last three years. After the discovery of the first plot in 1958 a Commission of Inquiry, composed of a prominent Ghanaian and two British members of the Ghana Judicial Service, was appointed to investigate the allegations. The Commission unanimously found that two M.P.s had been engaged in a conspiracy to carry out at some future date in Ghana an act for an unlawful purpose of a revolutionary character. Further a majority of the Commission found that a conspiracy existed among four persons, including the two M.P.s and also an Army officer to assassinate the Prime Minister and carry out a *coup d'état*; the Chairman, Mr. Justice Granville Sharp, in a minority report maintained that this latter conspiracy was unproved.

The second conspiracy was uncovered by the Government in October 1961, when 50 persons were arrested and placed in preventive detention. Among those arrested were Dr. J. B. Danquah, Mr. J. Appiah, the deputy leader of the parliamentary United Party, and three other M.P.s. In September there had been a wave of serious strikes of government workers in Sekondi-Takoradi, which originally appeared to have been sparked off by the severe economy budget of the previous July. In a White Paper concerning the conspiracy published last December it was stated that "the conspiracy consisted of an attempt to create a state of chaos

and confusion by terrorist outrages, illegal strikes in essential services, sabotage and intimidation with the object of providing an excuse for a *coup d'état* by the Army". But no Commission of Inquiry has been appointed and no person has been brought to trial in connection with the October conspiracy.

Liberty of the Person and Preventive Detention

During its 5 years of independence Ghana has had a reasonably stable period of government. It is true that a State of Emergency has been declared on three separate occasions but the emergency has never lasted long. As far as is known there has been very little loss of life due to violence. In respect of the maintenance of public order this has been a good record. Despite this background the Ghana Government has never hesitated to use the Preventive Detention Act 1958 to remove from the scene its political opponents. By this Act a person may be placed in preventive detention for acting in a manner prejudicial to the security of the State for a period of up to 5 years (on occasions it can be 10 years) even though there is no State of Emergency. No criminal charge need be preferred against the detainee, who may however file a writ of *habeas corpus*, although practice has shown that the writ is never efficacious in Ghana. In the appeal case of *B.O. Akoto and seven others*, already mentioned above, the Supreme Court ruled that the Preventive Detention Act was *intra vires* the Constitution. A full analysis of the Act is contained in the *Journal of the International Commission of Jurists*, Volume III, No. 2, of Winter 1961.

Here mention must be made of one important aspect of the operation of the Act. It appears now that those persons arrested and detained under the Act will never be brought to trial. There is a Common Law presumption that a man is innocent until he is proved guilty. This presumption applies to a man who has committed an offence. However in the case of the detainees they have not been even charged with having committed an offence. Furthermore it is evident under the Act that a man may suffer five years imprisonment on mere suspicion of guilt; and such a suspicion might be attributable to only one Police Officer and be unlikely to stand up to scrutiny in an independent court of justice. The Government White Paper of December 1961 speaking of those persons arrested in connection with the 1961 conspiracy cynically asserts that it would be comparatively easy to

obtain a conviction of the detainees in a court but that in a developing country "the letter of the law should not be enforced in all its severity. The execution of political prisoners is something which should only be done in the last resort. Preventive detention makes it possible to avoid exerting the full rigour of the law..." Apart from the shocking sophistry of this argument, it means that the Executive has pre-judged the issue; it has, in fact, usurped the role of the Judiciary.

The remarks made in December last by Mr. T. Adamafo, the Minister of Information, at a Press conference confirm the belief that in Ghana the power of the Executive has increased at the expense of the Judiciary. The Minister stated, again concerning the October conspirators, that the Government did not wish to try the conspirators and then execute them because after a period of "reorientation", which could be either active or passive, they could become useful citizens. Readers of this *Bulletin* will require no reminding of the extremely distasteful and sinister nature of the word "reorientation".

Finally in connection with preventive detention it is worthwhile to recall the *Conclusions* reached by the African Conference on the Rule of Law held at Lagos in January 1961 under the *aegis* of the International Commission of Jurists :

No person of sound mind shall be deprived of his liberty except upon a charge of a specific criminal offence; further, except during a public emergency, preventive detention without trial is held to be contrary to the Rule of Law.

The Special Court

The Criminal Procedure (Amendment) Act 1961 was passed at the end of last October. By this Act a Special Court, a new division of the High Court, was set up to deal with certain crimes namely either an offence against the safety of the State such as treason, or an offence against the peace, such as unlawful assembly, or an offence "specified by the President by legislative instrument".

The features of this Act which give rise to serious criticism are as follows :

(i) There is no appeal from the decision of the Special Court. The jurisdiction of the court as has been noted already includes the offence of treason which is punishable by death.

(ii) The court will be constituted by the Chief Justice in accordance with a request made to him by the President. In this way the Chief Executive will directly interfere with the day to day administration of justice, and can personally ensure that the panel of judges is composed of persons sympathetic to the regime. (It has already been observed that the President appoints judges).

(iii) To give full effect to the law the President may make by legislative instrument, which is a form of delegated legislation, any necessary adaptations of the Criminal Procedure Code. This means that the Chief Executive can suspend the rights of an accused person, for example, by denying the right to call witnesses and by eliminating all right to counsel. Now it will be recalled that at the New Delhi Congress, held in January 1959 by the International Commission of Jurists, it was stated in the Report of Committee II: "...in no event shall fundamental human rights be abrogated by means of delegated legislation." Section 3 of the Act has left the door wide open for precisely this kind of abrogation.

(iv) There will be no trial by jury before the Special Court. This is a curious development because the new Criminal Procedure Code of 1960 has tended to extend the use of the jury system in the administration of Criminal Law in Ghana.

Before this Act was passed into law there was much argument about it in the National Assembly. Eight persons (all of them Ministers or Deputy Ministers) spoke in favour of the Bill at its second reading while seven persons spoke against the Bill. One of those speakers opposing the Bill was Mr. Gbedemah (for a long time the Ghana Finance Minister and until September 1961 Health Minister), who spoke first of the Preventive Detention Act which he said had originally been passed in all sincerity but had now become "an instrument of terrorism". Then turning to the Bill under consideration he said :

If we are to learn from experience, this is a Bill which when passed into law would soon show that the liberty of the subject is extinguished for ever. To-day, there are many people whose hearts are filled with fear — fear even to express their convictions. When we pass this Bill and it goes on the Statute Book, the low flickering flames of freedom will be for ever extinguished.

It should be added that it was reported on January 16 that Mr. Gbedemah, in company with Mr. Botsio another former Minister, had been advised by the Central Committee of the Convention

People's Party "to take the necessary constitutional steps to resign as a party member of the National Assembly". Normally in democratic assemblies an M.P. is elected by and represents the interests of his constituents. It is not the business of the Party to call upon an M.P. to resign his Parliamentary seat.

The Press and Freedom of Expression

A grave event occurred in Ghana when the freedom of the Press was seriously threatened with the passing of the Criminal Code (Amendment) Act in 1960. This Act purported to impose censorship on the Press when it was considered necessary by the Government. The law provided in effect that whenever the President was of the opinion that there is a "systematic publication of matter calculated to prejudice public order or safety, or the maintenance of public services or the economy of Ghana" or a person is "likely" to publish such matter, then the President may make an "executive instrument" requiring that "no further issue of the newspaper, book or document shall be published". Alternatively the President can say that no further issue shall be published unless it is subject to censorship.

The only Opposition newspaper, the *Ashanti Pioneer*, was subjected to censorship in September 1960 because it often criticized the Government; thereafter the paper could only appear if its contents were censored by the Government. The International Press Institute at Zurich protested at the time against this measure. The Government lifted its control over the *Ashanti Pioneer* in May 1961. But a resident censor was again located at the editorial offices at the time of the September 1961 State of Emergency. At the end of last January it was reported from Ghana that the editor and four members of the staff of the paper had been placed in preventive detention and the issue of January 29 suppressed.

Towards the end of 1961 a number of foreign correspondents were ordered to leave Ghana for writing articles which were unpopular with the Government. The Government White Paper of 1961 censured a number of English newspapers, including *The Times* of London, for "...inventing false news in order to disparage the country..."; it should be noted that news policy for the radio is closely controlled now by the Government and that the daily relay of the BBC's Radio Newsreel (from London) has been suspended.

Commission's Representative Refused Entry to Ghana

In January this year, a distinguished Indian, Mr. R. P. Mookerjee, who is a retired Judge of the Calcutta High Court, visited on behalf of the Commission certain countries in Africa with the object of studying legal institutions and situations. While at Freetown in Sierra Leone, Mr. Mookerjee received shortly before he was due to arrive at Accra, Ghana, the following telegram originating from the Ghana Government :

MR. JUSTICE MOOKERJEE A RETIRED INDIAN HIGH COURT JUDGE AND FORMER DEAN LAW SCHOOL CALCUTTA UNIVERSITY VISITING NUMBER OF AFRICAN COUNTRIES INCLUDING GHANA BELIEVED ARRIVING IN ACCRA FROM FREETOWN SUNDAY 21 JANUARY 1962 AT 1440 HOURS ON FLIGHT GH 846 STOP GRATEFUL INFORM JUSTICE MOOKERJEE ENTRY REFUSED REPEAT REFUSED.

No reason was given for the refusal of entry. It should be pointed out that Mr. Mookerjee was already in possession of a valid entry permit and was in all ways properly documented. His entry to Sierra Leone, Liberia, Nigeria and the Sudan, the other countries he visited in Africa, was not, of course, refused and full facilities were extended to him in these countries.

Conclusion

It would be idle to pretend that recent events in Ghana have strengthened the Rule of Law in that country. On the contrary the high expectations of 1957 have not yet been fulfilled. The ideals expressed in the President's Declaration of Fundamental Principles under the Constitution appear to be empty of meaning. The power of the Executive has increased to a dangerous point at which it seems that neither the Legislature nor the Judiciary can act as an effective counter-balance. The consequences of this accumulation of power are dire. Political discrimination is widely practised. The liberty of the subject is disappearing. The independence of the Judiciary is in doubt and in one instance already mentioned above sadly compromised. It is questionable now as to whether lawyers are really able to practise their profession freely; for instance it is significant that no applications have been made by lawyers for the writ of *habeas corpus* in the case of the detentions of the prominent Ghanaians last October. It has been seen above that true freedom of the Press does not exist. There is

absolutely no room for complacency that freedom of speech especially in respect of the teaching profession will be preserved. There are already some counterindications. For example a significant editorial in December 1961 in the Government controlled *Ghanaian Times* seemed to point indirectly towards a limitation of academic freedom when it advocated strong measures of instant dismissal against "reactionary lecturers" who aimed "to miseducate our youth". Moreover the Minister of Education himself, Mr. A. J. Dowouna Hammond, has said the Government would impose the "strongest sanctions" against any educational units using academic freedom to sow seeds of indiscipline and disloyalty to the State among students. Any movement towards the limitation of academic freedom would for one thing spell out the end and failure of the fine work initiated at the young Law School at the University of Accra. Finally, the activities of the Commission's National Section, "Freedom and Justice", have, with the arrest of the Chairman, come to a standstill.

Fears held by the Commission about legal developments in Ghana have not been set at rest by the refusal of the Government to permit Mr. Mookerjee to enter Ghana. One of the *Conclusions* reached at the above mentioned African Conference on the Rule of Law was as follows :

... The Conference requests the International Commission of Jurists to investigate, examine, consider and report on the legal conditions in Africa and elsewhere with particular regard to the existence of the Rule of Law and the observation of fundamental human rights.

THE GENERAL ELECTIONS IN PORTUGAL

Apart from developments in the still confused situation in Angola, three events in recent months have focused the spotlight on Portugal: the general elections of November 12, 1961; the invasion of the Goa enclaves by Indian troops; and the failure of an attempted armed rising in Bêjá. The Goa incident alone would call for a lengthy study, while the Bêjá incident lasted only a few hours and does not seem to have entailed any consequences. The elections of November 12, 1961, on the other hand, merit some attention, since they reveal some aspects characteristic of the Portuguese "new State".

Two studies on legality in Portugal have already been published in preceding issues of the *Bulletin of the International Commission of Jurists*, in October 1957 and December 1958 (No. 7, pp. 34-44, and No. 8, pp. 41-45). The first of these articles gave some details on the electoral system and pointed out that no Opposition candidate had ever been returned to the National Assembly and that at the last elections the Opposition had refrained from putting forward any candidates. It may first be helpful to give some details on the general rules governing the conduct of elections.

Since the constitutional reform of 1959 the President of the Republic is no longer elected by universal suffrage, but by an electoral college composed of members of both Chambers and representatives of the local corporations. The electoral body is now called on to elect only the members of the National Assembly. Under the terms of Article 85 of the Constitution, as revised in 1959, the Assembly is composed of 130 deputies, elected by direct suffrage for a term of four years by "voting citizens". One hundred and seven seats are allotted to representatives of the metropolitan territory (for a population of eight and a half millions) and twenty-three to representatives of overseas provinces (for a population of nearly eleven millions); as is readily apparent, this distribution is far from being even.

The formula employed in Article 85 of the Constitution furthermore gives it to be understood that there are "non-voting citizens". Two Legislative Decrees of 1945 do, in fact, impose

very strict conditions, regarding both the electorate and eligibility for the National Assembly. Under Legislative Decree No. 35,426 of December 31, 1945, the conditions for the electorate vary according to sex, with the exception of a condition common to all voters, i.e. that they have attained their legal majority. Men must either be able to read and write in Portuguese or pay a tax of at least 100 escudos; women must, in addition, furnish evidence of having attained a certain level of secondary or technical education; those deprived of all electoral rights include, apart from individuals who have been convicted of certain offences, persons " professing opinions contrary to social discipline and the independence of the State ". Under the terms of Legislative Decree No. 34,938 of September 22, 1945 the conditions for eligibility for the National Assembly require, besides the above mentioned conditions for the electorate, that the eligible persons can read and write and are not suffering from certain physical disabilities. Reasons entailing exclusion from the electorate apply, *a fortiori*, to rules for eligibility. Finally, persons who acquired Portuguese nationality by naturalization or those who lived abroad during the five preceding years are not eligible. Obviously, under such conditions and in view of the low school-attendance rate, electoral rights, even in the metropolitan territory, are the privilege of a minority. According to the latest census the population of the metropolitan territory was 8,510,799, of whom 4,807,965 had attained their legal majority at the date of the last elections; of the latter, only 1,235,902 (about 15 per cent. of the population) were entered on the electoral registers.

The poll appears even less representative if the regulations governing electoral operations are recalled in the context of a regime strongly repressive towards civil liberties. Political parties were dissolved in 1926, and only the National Union, inspired and supervised by the Government, has legal existence. All publications, whether periodical or not, are subjected to severe advance censorship. Finally, the Government, in the special tribunals and the even more summary procedure of administrative internment, has at its disposal formidable means of intimidation. Thus it can well be imagined that the Opposition movements, forced to go underground, deprived of a legal basis of existence and with no means of voicing opinion, are in no position to wage an election campaign. Furthermore, the electoral registers are drawn up by the administrative authorities, who, not being subject to any supervision, have every opportunity to eliminate voters suspected of holding subversive opinions.

During the electoral period of 30 days preceding the poll, public meetings are tolerated, but demonstrations on the public highway are strictly prohibited. Voting is, in principle, public and free, but the returning officers are civil servants appointed by the Government. These same officials undertake the counting of the vote. The candidates are not allowed to have agents represent them inside the polling booths; there is therefore no guarantee of the honesty of the poll or of the count.

Despite these discouraging circumstances, the above mentioned Opposition movements had decided to make a big effort to join forces, clarify their positions and contest the November elections. The first step taken by their leaders was to draw up a joint programme. Special committees devoted earnest efforts to this task for several months. The experts' reports were summed up in a document of about 40 pages entitled *Programme for the Democratization of the Republic*, signed by the 60 persons who had collaborated in preparing it. The text was submitted to the President of the Republic, the President of the Council, Ministers and the principal authorities in the country. It was made public on May 11, 1961, at a press conference organized by Azevedo Gomes and Luis Camara Reys, former Ministers of the Republic and leaders of the Opposition, and was made available to representatives of the Press. The principal points of the *Programme* were: the immediate restoration of civil liberties; the reform of the electoral law; the bringing into force of a statute for political parties; the release of political prisoners; the rehabilitation of civil servants dismissed on the grounds that they held subversive opinions; the restoration of trade union freedoms; the dissolution of the National Union and similar organizations; the disbandment of the political police and the special tribunals; the institution of legal proceedings against those guilty of certain political tendencies and of currying favour; and, finally, strict adherence by Portugal, in the field of foreign policy, to the principles of the United Nations Charter.

Government reaction was immediate and brutal. On the evening of May 11, it circulated to the Press agencies a "note of rectification" in which it denounced the Opposition move as an attack on the moral unity of the nation, a unity made more than ever necessary by the events in Angola. Distribution of the *Programme* was, of course, strictly prohibited. Many of its signatories were subsequently detained and interrogated by the police. Several were arrested and interned, often under inhumane condi-

tions, by order of the Government. The Lisbon Bar was hard hit: during August and September Dr. Fernando de Abranches Ferrao, Vice-President of the Order of Advocates, Drs. Mario Soares, Gustave Soromenho, Mario and Carlos Cal Brandao, Acacio de Gouveia and Eduardo de Figueiredo, all advocates at the Lisbon Bar, were taken into custody by the political police and imprisoned without benefit of legal procedure. On September 15, it was the turn of Mr. Ramos da Costa, a well-known economist. On September 1, however, Dr. Pedro Gois Pitta, President of the Order of Portuguese Advocates, had written in very strong and dignified terms to the Minister of Justice protesting against the treatment meted out to his colleagues. On September 26, Drs. Carlos Cal Brandao, Acacio de Gouveia and Eduardo de Figueiredo were freed on bail.

On September 22, one of the signatories to the *Programme*, Mr. Adao e Silva, submitted to the office of the President of the Council a new document entitled "*Demands*". The text, which had been drawn up jointly by several of the authors of the *Programme*, informed the Government of the conditions on which the Opposition was prepared to participate in the elections. The document demanded, in particular, that the Opposition candidates be given the same facilities for their election propaganda as those on the Government list; that the persons arrested be freed; that the agents of opposing candidates participate on an equal footing in the counting of the vote; and, finally, that publication of the *Programme* be permitted. Four days later Mr. Adao e Silva was, in turn, arrested. A further wave of arrests followed in early October, including, in particular, that of another Lisbon advocate, Dr. Arlindo Vicente, and three advocates in Oporto.

On October 11, the opening day of the election campaign, Dr. Correia de Oliveira, Minister of the Interior, stated that the elections would take place on the date fixed, despite the pressure from several quarters that they be postponed. Going on to criticize the Opposition *Programme*, he accused it of calling into question the very foundations of the corporate State and of aiming to turn the elections into a plebiscite on the fundamental structure of the nation. On October 12, the deadline for submitting lists of candidates expired. By that time, the Opposition had submitted 66 candidates (Liberal, Catholic or Socialist) in ten constituencies, including, in particular, Lisbon, Oporto, Coimbra, Braga, Santarem, and in Mozambique. On October 20, the *Manifesto Addressed to the Nation by the Candidates of the Democratic*

Opposition was delivered to the Head of the State, Admiral Americo Tomaz. The demands formulated in this document included the following: for the overseas provinces, the immediate implementation of measures designed to improve conditions for the indigenous populations; regarding the election itself, examination of the electoral registers by the candidates' agents, complete freedom of assembly and expression, and inspection by the candidates of operations in the polling booths. The Government paid no heed to these latter demands. On October 31, it did, however, finally authorize publication of the *Programme for the Democratization of the Republic*, large extracts from which figured in the Press that very evening. But on November 3, the Office of the Public Prosecutor ordered the institution of proceedings before the Lisbon Magistrates' Court against 25 of the signatories to the *Programme*. Among the accused were eight advocates from Lisbon and six from other cities, including all the persons named above.

On November 7, five days before polling-day, the number of Opposition candidates had fallen to 59, in eight constituencies. The candidates put forward in Santarem and Mozambique, in particular, had been rejected by the Administration as not complying with the conditions required for eligibility. It was at this juncture that, during a Press conference presided over by Mr. Azevedo Gomes, the leaders of the Opposition made public a declaration to the effect that the Opposition was withdrawing all its candidates *en bloc*. They based this decision on the fact that their candidates had not been given access to the electoral registers, had had no means of putting forward their views and that under these conditions it was impossible to hold really free and honest elections.

The die had, therefore, already been cast when the polls opened on November 12, and the election of the 130 candidates of the National Union was a mere formality. Three days earlier, President Salazar had broadcast over the State radio a "call to the Nation", in the course of which he placed the responsibility for sabotaging the elections on the Opposition parties. The poll passed off without incident, and, for the whole country, attained the respectable average of 66 per cent. of the voters registered.

FREEDOM OF THE PRESS IN SOUTH ASIA

The Commonwealth Press Union (CPU) holds conferences every five years. The 9th Conference of the CPU was held in October 1961 in India and Pakistan and was attended by some 80 delegates from 12 Commonwealth countries. The Conference provides a convenient occasion for a short review on the freedom of the Press as it exists today in five countries in South Asia. The countries examined, not all of which are Commonwealth countries, are Burma, Ceylon, India, Nepal and Pakistan.

Burma (a non-Commonwealth country)

Article 17 of the Constitution of the Union of Burma declares:

There shall be liberty for the exercise of the following rights subject to law, public order and morality;

(i) the right of the citizens to express freely their convictions and opinions...

Freedom of the Press is, then, in general guaranteed under the Constitution. At the same time statutory restrictions have for long existed on the freedom of the Press. For example, Section 3 of the Press (States Protection) Act 1923 reads:

whoever edits, prints or publishes or is the author of any book, newspaper or other document which brings or is intended to bring into hatred or contempt, or excites or is intended to excite disaffection towards...the Government or Administration...shall be punished with imprisonment which may extend to 5 years or with fine or with both.

The Press (Emergency Powers) Act 1931 lays down wide powers for government control of printing presses and newspapers. There are provisions for the seizure and destruction of unauthorized newspapers. Neither of these pre-independence Acts has been repealed.

Since the country's independence in 1948 the Press in Burma has had a stormy history. Censorship has at times been enforced; newspaper offices have been raided and the contents thereof

confiscated, for publishing news and opinions not approved by the Government. In 1954 the Government, wisely yielding to public pressure, abandoned the introduction of a contemplated Press Bill. The Bill was aimed at making criticism, i.e., "defamatory allegations or charges", against public servants, including Ministers, a criminal offence. In 1961 it was reported that no less than 15 Burmese journalists had been arrested for their journalistic activities.

In November 1961, twenty-two newspapers in Burma protested in an identical article against the restriction by the Government of the freedom of the Press. It is likely that the Burma Press used the occasion of the CPU Conference at New Delhi in neighbouring India as a suitable pretext to petition the Government in this way. In a speech at a journalists' gathering in December, U Nu, the then Prime Minister of Burma, promised to restore the freedom of the Press in Burma. He said that he had already instructed the Minister concerned to prepare for the abolition of all undesirable laws curtailing Press freedom. In the meantime charges against the newspaper Editors (U Sein Win and U Tun Fe) were being dropped by the Government. Finally a Press Council would be formed in cooperation with the International Press Institute at Zurich. The Prime Minister indicated that the reforms would be introduced in the session of Parliament beginning in February 1962. In view of the *coup* carried out by General Ne Win on March 2, the outlook for the Press in Burma is at present obscure.

Ceylon

The paramount question in Ceylon today concerning the Press is whether or not the Government will force through its proposed Press Council Bill and completely eliminate thereby Press freedom from Ceylon. The draft of this Bill, which purports transferring control of the Press to the Government, was first introduced in May 1961. The Bill provides for the establishment of a Press Council, five of whose seven members would be nominated by the Government. This body would have the right to decide whether any newspaper was to be published at all. To practice as a journalist a person would require a licence issued by the Council. In October 1961, the Ceylon Government Parliamentary group urged the Government to take over the independent newspapers issued by Associated Newspapers of Ceylon Ltd. and Times of Ceylon Ltd. and vest their ownership in public corporations. Both these newspaper groups, the two largest in Ceylon, opposed

the return to power at the last General Election in July 1960 of Mrs. Bandaranaike's Government.

Censorship of the Press in Ceylon has been imposed on a number of occasions in the last four years under the Emergency Regulations. This censorship has extended to news entering and leaving the country as well as to news within the country.

The Constitution of Ceylon does not make specific provision for fundamental human rights. Such rights are secured as necessary under the provisions of specific Acts. Since Ceylon is without built-in constitutional guarantees on freedom of expression, it is not surprising that wide concern for the Ceylon Press has been expressed in many quarters in view of the nature of the proposed Press Bill.

India

Part III of the Constitution of India is devoted to Fundamental Rights. Article 19 reads as follows:

(1) All citizens shall have the right—

(a) to freedom of speech and expression...

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

It appears then that freedom of speech and expression is first guaranteed by clause (1) and then a limitation is made by clause (2). Consequently there are in force State laws which do in fact considerably limit the right to freedom of expression. Thus Section 9 (I A) of the Madras Maintenance of Public Order Act 1949 authorized the State Government

for the purpose of securing the public safety or the maintenance of public order... [to] prohibit or regulate the entry into or circulation, sale, or distribution in the Province of Madras or any part thereof of any document or class of documents.

The Supreme Court has showed itself vigilant in upholding the Constitution and has struck down on a number of occasions provisions of State laws that have impinged on the freedom of the Press and were not saved by Article 19 (2) of the Constitution.

Thus it was held in the case of *Romesh v. State of Madras* before the Supreme Court that the above cited Section 9 (I A) fell outside the scope of the authorized restrictions under clause (2) of Article 19 of the Constitution, and was therefore void and unconstitutional.

Mr. Joseph Minattur in his interesting study *Freedom of the Press in India* concludes that in practice "the Indian Press can compare well with the press in many other democratic countries in its freedom from governmental interference". Despite the existence of Acts such as the Press and Registration of Books Act 1867 and the Press Emergency Powers Act 1931, in general the freedom of the Press in India can be confirmed by reading its newspapers. For instance *The Indian Express* (biggest daily circulation in India) last November called forcefully for the dismissal of the Indian Defence Minister, following new Chinese incursions across the northern border areas of India. Again, last December the weekly *Swarajya* criticized strongly Indian action against Goa. There is, however, another side to the coin. A speaker at the CPU Conference reminded his audience that the Punjab Government had in August 1961 invoked its emergency powers to ban from the State of Punjab the publication of news of world interest on the occasion of Master Tara Singh's fast over a demand for a Punjabi-speaking State. The result of the ban was that the people in the Punjab were without the ordinary sources of information.

It is heartening to note that Indian journalists do not take for granted their Press freedom and last year, at about the time of the CPU Conference, organized two seminars in India on the activities of the Press; the subject of one was "The Press and the Elections" and the other "Privileges of Parliament and the Press".

Nepal (a non-Commonwealth country)

Newspapers have been having an unhappy time in the last six months in Nepal. During the turbulent present with armed rebels undermining the authority of the state, the Government retains very strict control over the Press in this country by means of its Security Act.

On October 15, 1961, the Government banned the weekly newspaper *Naya Samdesh*. One month later, on November 17, *Samai*, a daily newspaper published in Katmandu (capital of Nepal), was banned by the Government for six months. Prior

to this ban, the paper had been critical of the Government. A day later, the daily *Philingo* was closed down by the Government; it had been critical of the Nepalese Foreign Minister. At the same time the Government imposed censorship on all newspapers coming into the country. The Katmandu magistrate had the task of scrutinizing all incoming papers, which were mainly from India, and confiscating any at his discretion. On December 8, the daily paper *Swatantra Sanachar* was banned for criticism of the Government.

It was reported during last December that King Mahendra had restored to his people the fundamental rights which were suspended at the end of 1960. Freedom of speech is one of the liberties restored, but there are no indications that the banned newspapers are again in circulation.

Pakistan

On October 10, 1958, the President of Pakistan, Iskander Mirza, suspended the 1956 Constitution and appointed as Chief Administrator of Martial Law, General Ayub Khan. Since that date the country has been ruled by a military regime, though General Ayub Khan became President in November, 1958.

The suspended Constitution provided in its Preamble for "freedom of thought, expression, belief...". Further, in Part II under Fundamental Rights, Article 8 read as follows:

Every citizen shall have the right to freedom of speech and expression, subject to any reasonable restrictions imposed by law in the interest of the security of Pakistan, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

The Chief Administrator of Martial Law, in his official capacity, was at once empowered to make Martial Law Regulations, which, it was laid down in the initial Order by President Mirza, could not be challenged in a court of law.

Martial Law Regulation No. 36 read as follows:

Whoever by word of mouth or in writing or otherwise

(a) brings into hatred or contempt the Armed Forces or any part or member thereof... shall be punished. Maximum punishment—14 years...

Although freedom of the Press has never been formally abolished in Pakistan, the effect of the Martial Law Regulations (such as No. 36) was to silence criticism of the regime. Journalists were

arrested and sentenced under the Regulations and the *Pakistan Times*, an important opposition paper, was taken over by the Government. Ever since the early days of the military regime there has been no real freedom of expression although it must be added, in fairness, that the regime has introduced many necessary reforms and respected the independence of the Judiciary.

When President Ayub Khan opened the CPU Conference at Rawalpindi on October 28, 1961, he stated that the Freedom of the Press in Pakistan would be restored when the promised new Constitution was promulgated in the spring of 1962. The only proviso was that the freedom would be subject to law and morality and the interests of the security of the nation. The new Constitution was promulgated by the President on March 1; it grants freedom of expression subject to the afore-mentioned proviso.

Conclusion

To summarize, it can be said that while there is no room for complacency freedom of the Press in principle exists in India; soon, if the new Constitution is implemented the freedom will be restored in Pakistan. In Burma, the situation is again obscured. In Nepal with the restoration of fundamental liberties the prospects have improved. The outlook in Ceylon is bleak. All friends of that country trust wiser counsels will prevail and the Press will not be nationalized. A government-controlled Press would be a retrograde step, and it is always harder to restore liberties than to deny them.

RECENT DEVELOPMENTS IN SOUTH KOREA

The South Korean Government headed by Dr. John M. Chang, which was installed following the general elections of June 1960 after the fall of Syngman Rhee, was overthrown by a military *coup d'état* on May 16, 1961. It was replaced by a "Military Revolutionary Committee" under Lieutenant-General Chang Do Yung. This Committee proclaimed martial law throughout the country, and governed by means of emergency orders after the dissolution of Parliament. It prohibited all parties and public meetings, shut down airports and harbours, closed schools and banks and imposed severe censorship of the Press. The communiqué issued by Lt. Gen. Chang stated as grounds for his seizure of power the corruption and inefficiency of the Government and its failure to take a strong line against the Communists. It also declared that the aims of the new Military Revolutionary Committee are to strengthen resistance to Communism, to respect the principles of the United Nations Charter, to develop closer ties of friendship with the United States and the other allies in the free world, to eradicate corruption and "other accumulated ills", to strengthen moral principles and national feeling and to overcome rapidly the country's economic and social plight.

Lt. Gen. Chang subsequently increased his cabinet of high-ranking officers, the Military Revolutionary Committee, which was given the new title of Supreme Council for National Reconstruction (S.C.N.R.).

By obtaining the official resignation of the former Prime Minister, Dr. Chang, and of his Ministers and by forcing the President of the Republic, Posun Yun, to withdraw his resignation, Lt. Gen. Chang endeavoured to give his military government the appearance of legal continuity.

On May 30, 1961, the Supreme Council suspended the Constitution, which had already been largely suppressed by the declaration of martial law. A temporary constitution was proclaimed, under the official title of "Act Respecting Extraordinary Measures for National Reconstruction". It names the Supreme Council as the highest organ of government, to retain its function until

elections are held. These elections are not to be held until the revolution has achieved its aims.

On July 3, 1961, it was reported that Lt. Gen. Chang resigned from his posts as Prime Minister and President of the Supreme Council. He was replaced by General Pak Chung Hi, the man who was really behind the revolution of May, 16. Soon afterwards Lt. Gen. Chang was arrested together with 43 other officers on charges of planning a counter-revolution and conspiring to murder General Pak. Others arrested were Dr. Chang and several of his Ministers who were already confined to their homes. This time the grounds were support of Communism.

General Pak's military regime remains in power and the political situation seems to have become somewhat more settled. General Pak announced in August 1961 that South Korea was to have a new constitution by March 1963, to be followed by general elections, after which the military government was to cease in the summer of 1963. Until the beginning of the year named for the elections all political activity was banned.

The Legal Situation

Since May 16, 1961, the form of government in South Korea has been a military dictatorship and the state of martial law remains in force, although in a less severe form. The highest organ of government is the "Supreme Council for National Reconstruction", composed of high-ranking officers. The "Act Respecting Extraordinary Measures for National Reconstruction" gives it practically unlimited power and states that the fundamental rights of Korean citizens, as codified in the Constitution now suspended, should remain in force, "provided that they are not in conflict with the purposes of the revolution". This wording provides the Government with such extensive powers that it must be regarded as a *de facto* suspension of the Constitution, a view confirmed by practice. The Supreme Council has issued various stringent Acts and Ordinances aimed at attaining the purposes of the revolution, in particular to combat Communism, as well as economic offences and corruption. On July 4, 1961, for example, two Acts were passed that provide for heavy terms of imprisonment for activities abetting Communism and the death penalty for infiltration by Communists from North Korea. Many of these Acts are either wholly (e.g., the Act concerning penalties for election frauds) or partly retroactive. An Ordinance dated June 1, 1961,

transferred jurisdiction over criminal offences of a political or economic nature and some of a general nature to military courts. In addition the military Government issued on June 21, 1961, an Act based on Section 22 of the Act Respecting Extraordinary Measures for National Reconstruction, dealing with the formation, composition and powers of a revolutionary court and public prosecutor's office. This court consists of two chambers, consisting respectively of five and of seven officers or military legal advisers appointed to be judges. The chairman of this court and the public prosecutor are appointed by the President of South Korea acting upon the recommendation of the Supreme Council. The sentences pronounced by the first chamber are either hanging or life imprisonment. Its decisions may be referred for appeal to the second chamber as contrary to the Constitution or the law. The powers of the revolutionary court include conviction for activities contrary to the interests of the State or the revolution, whether committed before or after May 16.

In addition to these military courts the ordinary Legislature continues to operate, having jurisdiction over criminal and civil cases not specifically referred to military jurisdiction by Act or Ordinance.

After the installation of the military regime severe repressive action was immediately initiated, particularly against political opponents, whether supporters of Communism, of the former Syngman Rhee regime or of the Chang cabinet, although similar action was directed against persons who had tried to profit from corruption, black marketeering and so on. Thousands were arrested and many sentenced to long terms of imprisonment. On the 16th anniversary of the liberation of Korea, on August 15, 1961, Major General Pak Chung Am, the chairman of the revolutionary court, announced the release of several high-ranking officers who had been arrested on May 16. Newspapers reported that on the same day 5,630 others were released in Seoul and 9,325 others had their sentences reduced. These figures throw a significant light on the extent of the purge described above. Since its institution in June 1961 the revolutionary court has pronounced 14 death sentences and except in two cases they have been carried out. Those executed included several former Cabinet Ministers and supporters of Syngman Rhee, the ex-President of the military government, General Chang Do Yung, and his secretary, the socialist politician Choi Baek Keun and three employees of a socialist newspaper.

Freedom of the Press

It can often be observed that one of the first actions on the part of a government that comes to power by way of a *coup d'état* is to place far-reaching restrictions on the freedom of the Press. This is done in order to deprive the opposition of a valuable propaganda instrument, at least until the situation has stabilized. The most common method is to introduce stringent censorship and to ban opposition publications. The South Korean military government followed this same method, imposing severe censorship of the Press soon after it seized power. Journalists were prohibited from publishing any material in conflict with the aims of the military government or likely to assist enemies, abet a counter-revolution or jeopardize law and order. Publishers or journalists failing to follow these instructions were sentenced to heavy terms of imprisonment. The Supreme Council further decreed that every paper had to possess all necessary technical equipment, including its own rotary or flat-printing press, and that every news agency must have the necessary facilities for transmission and reception of news, as well as an exchange system with a foreign agency. As a result, 70 of the 110 daily newspapers and all 400 weeklies had to shut down. Of the 180 news agencies in South Korea only five survived. This drastic action is directed partly against opposition papers and as such certainly amounts to a violation of freedom of the press. Partly, however, it was also "a necessary move in order to do away with pseudo-journalism frequently guilty of blackmail", as stated in an official communiqué by General Chang Do Yung, but also echoed in the press in South Korea.

Since the fall of Syngman Rhee's Government in April 1960 and the subsequent abolition of the Press licensing system over 70 dailies and some 170 news agencies had been set up. In January 1961, according to official sources, over 1,200 publications were registered, as opposed to 500 for the same month in 1960. As the International Press Institute in Zurich, Switzerland, reported, in March 1961, before the *coup d'état*, 61 reporters were arrested for blackmail and numerous publications closed down, since they had not brought out a single number in the preceding months. The Press had itself protested against this boom of new papers and agencies, and the Association of Korean Newspaper Proprietors decided in April 1961 to set up a "Korean Committee for Ethical Standards in Publishing" in order to clean up the profession (see *Report of the International Press Institute*, Vol. 10, No. 1, Zurich, May 1961). These plans were thwarted

by political events, yet the fact that they were under consideration shows that the military government had good reason for some of its actions. The above-mentioned restrictions on freedom of the Press regarding specific subjects were largely repealed at the end of May as part of a general ease-up in the State of Emergency. However, several reporters and publishers have since been arrested and sentenced.

It is hard to say to what extent the allegations of blackmail or support of Communist intrigue may have been justified in individual cases. The situation is startlingly illuminated by a report by the International Press Institute that the editor and a reporter of South Korea's leading daily, the *Donga Ilbo*, were arrested by the military authorities, quite obviously because of an article indicating that military rule should end before the United Nations General Assembly debated the question of South Korea. Press reports stated that the Supreme Council issued a bill in August 1961 concerning registration of daily newspapers, news agencies and periodicals. The Korean Press fought violently against this bill, which contained various severe restrictions and provided for penalties, saying that it was incompatible with the constitutional guarantee of freedom of the Press. Suk Jae Lee, the chairman of the sub-committee on legislation and jurisdiction of the Supreme Council, then stated that the provision to which objection was taken, and in particular the penalties announced, would be amended.

The death sentences against three journalists were denounced as a particularly flagrant violation of freedom of the Press. On August 28, the revolutionary court sentenced to death Cho Yong Soo, editor of the socialist daily *Minjok Ilbo*, which had been banned on May 16, together with two of his staff, alleging support for the policy of the Communist regime in North Korea. Their appeal was turned down by the revolutionary court and Cho Yong Soo was executed on 21 December despite numerous protests and pleas for mercy to General Pak. In January 1962 the death sentence against the two other journalists, An Shin Kyoo and Song Chi Yung, was commuted to life imprisonment.

The scanty information coming from South Korea does not permit a full picture to be provided. On the one hand, it would seem that the military government has in fact succeeded by way of rigorous action in overcoming certain evils, and in achieving progress in its endeavours to create order. On the other hand, the virtual removal of fundamental rights and the activities of the military courts with their drastic sentences give cause for serious misgiving.

THE SITUATION IN TIBET

Since the report of the International Commission of Jurists on *Tibet and the Chinese People's Republic* was published in July 1960,* the situation in Tibet has not altered substantially. But the Commission is obliged to follow developments most closely, for the people of Tibet continue to live under Chinese domination and a forcibly imposed ideology and social order, with hunger, forced labour and deportation compelling thousands of Tibetans to flee and with the most fundamental human rights violated every day.

Although the situation of the oppressed Tibetan people has remained the same, by and large, some changes in Tibet itself call for comment, as well as the recent resolution on Tibet by the United Nations and the Dalai Lama's statement concerning the principles of a future constitution for a free Tibet.

The Preparatory Committee for the Autonomous Region of Tibet, a body installed by Peking, held its fifth plenary session from April 2 to 14, 1961. Both its decisions and extracts from its debates were reported by Radio Lhasa and the *Peking People's Daily*. On the opening day Pabala Choliehnjamje, the Deputy Chairman of the Preparatory Committee, announced that socialist transformation and in particular the collectivization of Tibet in the next 5 years would not be pursued for the time being. Two days later Radio Lhasa confirmed this decision, which would seem to have been reached in Peking last autumn. It also reported that the representative of Peking in Tibet, Chang Ching-Wu, Secretary of the Labour Committee of the Chinese Communist Party, had announced that all efforts were to be concentrated on consolidating the achievements of the democratic revolution in Tibet. He also made the announcement that socialist transforma-

* A previous report was published in 1959 under the title *The Question of Tibet and the Rule of Law* and an article in No. 10 of the *Bulletin of the International Commission of Jurists* (January 1960) dealt with the United Nations General Assembly resolution on Tibet.

tion in the coming five years would not be pursued for the time being. Several speeches revealed that this political swing was due to the urgent need for increased agricultural production. At the same time it was indicated that the undiminished resistance of the Tibetan people to the general policy of the Chinese Communist Party and to its agricultural policy in particular meant that either compromises or further coercion were needed. This new line from Peking was confirmed by the news that reached the press of the free world in May that General Tan, the commander in Lhasa, had been ordered by Peking to apply a less rigid policy. The same reports went on to say that Peking had ordered this ease-up in order to give the Tibetans time to build their own system of reform and to construct a socialist Tibet as proposed by the Panchen Lama in 1960.

Despite this ostensible relaxation, which is in fact no more than an admission of Peking's military, political and economic failure in Tibet, the situation of the Tibetan people continues to worsen. The flow of refugees again increased in the second half of 1961, and their accounts, combined with the United Nations debate and resolution, and the statements by the Dalai Lama, clearly show that food requisitioning by the Chinese occupation forces has caused a catastrophic famine and that their reign of terror imposes inhuman punishment, forced labour and deportation, thus threatening the Tibetan people with extinction. The Chinese show particular zeal in promoting communist indoctrination, in fighting Tibetan religion and in installing their own people. Despite severe handicaps and setbacks, Tibetan opposition continues in the form of passive resistance and violent guerrilla battles. Last November fighting in the north-eastern region was particularly widespread, and Chinese jet bombers had to be brought into action.

The seriousness of the situation was reflected in the decision to place the question of Tibet on the agenda of the Sixteenth Session of the United Nations General Assembly. On December 20, 1961, a draft resolution submitted by Malaya, Ireland, El Salvador and Thailand was adopted by 56 votes to 11, with 29 abstentions. Only the Soviet bloc voted against. In the course of the debate, a number of speakers supporting the motion have stressed the importance of the enquiry and conclusions of the International Commission of Jurists on the question of Tibet. The resolution recalls the resolution of October 21, 1959, and the General Assembly expresses its grave concern at the events in Tibet, including the

suppression of the distinctive cultural and religious life which the Tibetan people have traditionally enjoyed. This resolution is somewhat more outspoken, although still moderate in tone, in noting the evident and serious violation of fundamental human rights and freedoms. It demands the cessation of practices which deprive the Tibetan people of such rights and freedoms, including their right to self-determination, and calls on Member States to make all possible efforts towards achieving the purposes expressed in the resolution.

Some two months before the debate on Tibet, on October 10, 1961, a statement by the Dalai Lama concerning the basis for the future constitution of a free democratic Tibet was published in Delhi. He said in the preamble: "I am firmly convinced that our exile will not last forever. I believe that Tibet will again be free relatively soon and that the Tibetans will regain the right to determine their destiny. The Tibetan constitution will be based on the Buddhist religion and on the Declaration of Human Rights. We intend to create a temporal and spiritual religion of the people by the people."

The guiding lines for a new constitution, described by many papers as a draft constitution, provide for the Dalai Lama to be the head of the government and the religious leader, assisted by a cabinet appointed by him. In specified circumstances the Dalai Lama may be relieved of his duties, in which case he would be temporarily replaced by a regency council, and a parliament would then be elected by popular vote. This one-chamber legislative assembly would guarantee proper representation of the spiritual and temporal interests of the Tibetan people. A Judiciary would be set up, independent of parliament and administration. It would be guided in the exercise of its functions by the principles of a free society under the Rule of Law. The document further provides for regional, legislative, judicial and administrative authorities to be set up. It concludes by stating that the future constitution would have to define and guarantee the fundamental rights of Tibetans and that particular attention must be devoted to the formation of a competent and responsible-minded civil service, in order that the necessary political, economic and social reforms should be carried out in the spirit of the constitutional principles. The personal representative of the Dalai Lama stated that a conference of Tibetans living in India would shortly be convened by the Dalai Lama to take place in Delhi and discuss the proposed constitutional principles.

SOCIALIST LEGALITY IN THE SOVIET UNION AS APPRAISED BY THE 22nd CONGRESS OF THE CPSU

The 22nd Congress of the Communist Party of the Soviet Union (CPSU) held in October 1961 in Moscow dealt among other problems with that of "socialist legality". The programme adopted by the Congress claimed that "a strict observance of law and order" should be assured (*Soviet State and Law*, November 1961). The concept of socialist legality does not coincide with "legality" as understood in the non-communist world, called in Marxist terminology "bourgeois legality". This is not the place to enter into detailed analysis of the two terms; may it suffice to draw upon the definition in the Soviet Legal Dictionary concerning socialist legality. According to this definition, socialist legality is one of the fundamental methods of realizing the dictatorship of the proletariat. It consists of the unconditional and strict execution of laws and statutes by all State organs, legal bodies and citizens, in conformity with the aims and interests of the working people, as — it may be added — formulated by the Central Committee of the CPSU. Socialist legality serves to strengthen the Constitution and the socialist economic system of the Communist state. The content of socialist legality and its aims, continues the definition, are changing according to the historical development of the Soviet Union, only the basic claim of observance of actual laws remaining unchanged. Impartial administration of justice by an independent Judiciary is excluded from the concept. On the contrary, according to the Marxist-Leninist theory of the State, the Judiciary is but one of the branches of an indivisible State power, the leading organ of which is the Communist Party. Judges have the task of contributing by their proceedings and by their decisions to the strengthening of the power of workers and peasants as an official legal publication in the German Democratic Republic has asserted.

It is likely that the definition of socialist legality will largely be rewritten in the next edition of the Soviet Legal Dictionary on account of the following considerations.

First, as stated at the 22nd Party Congress, the Soviet Union has entered into a new phase of its economic development. This in itself is enough to cause changes in the concept of socialist legality according to the definition quoted above. Secondly, socialist legality has needed strengthening because it has become distorted in what is officially called " the period of the cult of the individual ".

The Congress of 1961 was not the first at which attention was drawn by Soviet leaders to distortions of socialist legality. In 1956, at the 20th Party Congress, a denunciation of violations of socialist legality involving abuse of power took place in secret session. In 1961 a more detailed condemnation of the same crimes was made before the publicity of the Congress itself and of the world Press. A whole historical period, defined as starting in 1934 and ending in 1956, underwent a thorough, critical reappraisal from the point of view of socialist legality. Parallel with this reappraisal a redrafting of the Soviet legal system has been under way. At the 20th Party Congress K. Ye. Voroshilov, at the time Chairman of the Presidium of the USSR Supreme Soviet, declared in his speech :

The Presidium of the USSR Supreme Soviet should do everything in its power to speed up preparation of legislative acts provided for by the USSR Constitution which will substantially systematize our legislation and will be an important way of further strengthening socialist legality. At present drafts of a new Criminal Code and a new Code of Criminal Procedure have been prepared. These codes will play an important role in strengthening the socialist legal system and in ensuring protection of civil rights. (*XX. S'ezd KPSS 1956*, Vol. 1 p. 561 Gospolitizdat, Moscow)

Since then new criminal and civil codes have been enacted, and at the 22nd Party Congress the coming replacement of the Soviet Constitution of 1936 was also announced. To put the new development of socialist legality, proclaimed in 1956, into historical perspective so as better to contrast it with its past breaches, the truth concerning former violations of legality had to be established.

Speakers at the 22nd Party Congress stated that there had been a period in which there were systematic breaches of socialist legality. This period had begun on December 1, 1934, with the murder of Sergei Mironovich Kirov, the Leningrad Party Secretary. Responsibility for all the faults of this period has now been put on the initiator and hero of the cult of the individual, J. V. Stalin.

N. S. Khrushchev said in his closing remarks at the 22nd Congress on October 27, 1961 :

Stalin elevated temporary limitations of inner-party life and Soviet democracy to the norms of inner-party and state life. He cruelly flouted the Leninist principles of leadership and permitted arbitrariness and abuses of power ... Then followed those days so difficult for our Party and country, when no one was protected from arbitrariness and repression ... until the 20th Congress of our Party ... restored justice and demanded that the distortions that had taken place be eliminated.

What did happen in those difficult days? The Congress recalled the memory of the Great Purge in 1936-39, which was the climax of this tragic period. According to Western estimates, the number of victims over a period lasting more than twenty years may amount to 15 to 20 million people. The number of prisoners in concentration camps was estimated in 1953, the year of Stalin's death, when abolition of these camps was started, as being seven to eight million, the victims belonging to all strata of Soviet society. Official arguments in favour of this mass repression can be found in a condensed form in *The History of the Communist Party of the Soviet Union (Bolsheviks)* [abbreviated CPSU (B); the word *Bolshevik* was dropped from the name of the Party in 1952]. The official English edition from 1954 stated on this topic:

In 1937 new facts came to light regarding the fiendish crimes of the Bukharin-Trotsky gang ... who had long ago joined to form a common band of enemies of the people ... The trials showed that these dregs of humanity ... had been in conspiracy against Lenin, the Party and the Soviet State ever since the early days of the October Socialist Revolution ... These contemptible lackeys of the fascists forgot that the Soviet people had only to move a finger, and not a trace of them would be left. The Soviet court sentenced the Bukharin-Trotsky fiends to be shot. The People's Commissariat of Internal Affairs carried out the sentence. The Soviet people approved the annihilation of the Bukharin-Trotsky gang. (pages 537-539)

Comment outside the Soviet Union on this lawless repression, which continued after 1939 though on a lesser scale than during the Great Purge, was constantly and vehemently branded as "slandorous and reactionary" by Soviet authorities and the Soviet Press. Soviet criticism concerning the collection of documents on violations of legality in the Soviet Union and in the People's Democracies, published in 1955 by the International Commission of Jurists and entitled *Justice Enslaved*, was held in similar terms. In Chapter V on "Arbitrary Arrest, Confession

and Testimony Obtained by Extortion" the International Commission of Jurists stated:

Article 127 of the Constitution of the USSR guarantees the citizens of the USSR the inviolability of the individual. This Constitution further declares that a citizen may be arrested only by order of a court or with the authorization of the Public prosecutor ... similar provisions are in force in all other countries of the Communist realm ... However the methods used by the secret police, the State security service and all other criminal prosecution authorities are directly opposed to these constitutional provisions. Articles 5 and 9 of the Universal Declaration of Human Rights are deliberately disregarded and violated.

There is a steady flow of evidence of arbitrary arrest, torture, and cruel and humiliating treatment of accused persons and sentenced prisoners. Confessions are being extorted by the police and organs of the State Security Service all over the Communist realm.

In 1955 these violations of human rights were in the Soviet Union still called the "annihilation of the lackeys of the fascists". At the 22nd Party Congress in 1961, the Secretary of the CPSU, N.S. Krushchev, spoke on the same subject thus:

Here among the delegates there are comrades — I do not wish to name them so as not to cause them pain — who spent many years in prison. They were being "persuaded", persuaded by quite definite techniques, that they were either German or British or some other kind of spy. And several of them "confessed". Even in cases when such people were told that the accusation of espionage had been withdrawn, they themselves insisted on their previous testimony in order to put an end to the torment and to die as quickly as possible.

Of the victims of trials, of the inmates of concentration camps detained without trial and vilified as "pigmies, insects, dregs of humanity", it was stated on the same occasion:

People have spoken here (before the 22nd Congress) with pain about many innocent victims among outstanding Party and government figures. Such outstanding military commanders as Tukhachevsky, Yakir, Uborevich, Kork, Yegorov, Eideman and others fell victim to the mass repressions ... The Presidium of the Congress has received letters from old Bolsheviks in which they write that in the period of the cult of the individual outstanding Party and State figures, such loyal Leninists as Comrades Chubar, Kosior, Rudzutak, Postyshev, Eikhe, Voznezensky, Kuznetsov and others died guiltless. The comrades propose that the memory of the outstanding party and state figures who fell victim to completely unjustified repression ... be perpetuated. A monument should be erected in Moscow to the memory of the comrades who fell victim to arbitrary rule.

For the sake of historical accuracy it must be recalled that in March 1939 Stalin conceded before the 18th Congress of the CPSU (B):

... it cannot be said that the purge was not accompanied by grave mistakes. There were unfortunately more mistakes than might have been expected. Undoubtedly, we shall have no further need of resorting to the method of the mass purge.

To seal this promise the chief executioner in the mass purge, People's Commissar of the Interior Yezhov was removed and replaced by Lavrenti P. Beria. There were also instances of subordinate officials being sentenced for abuse of authority. However, in spite of the promise given by Stalin himself, the statement published on the downfall of Beria in December 1953 and the commentaries thereon revealed further flagrant breaches of socialist legality and abuse of power. Whatever the circumstances of Beria's death might have been, the official statement announced his trial and execution together with six of his top deputies in the Security Service. The charges publicly made against him amounted to "the liquidation of hundreds of thousands of the best sons and daughters of the Soviet people".

The 22nd Congress of the CPSU seems to have made new commitments for the strengthening of socialist legality. The closing remarks of N. S. Khrushchev might become very significant if this line remains unchanged and Soviet jurists use the possibilities opened up to the best advantage. Mr. Khrushchev told the plenary session of the 22nd Party Congress:

It is our duty to make a thorough and comprehensive study of all such cases arising from the abuse of power ... We are obliged to do everything possible to establish the truth now ... It is now too late to bring death back to life, as the proverb says. But it is necessary that all this be recorded truthfully in the history of the Party. This must be done so that phenomena of this sort can never be repeated in the future. (Stormy, prolonged applause).

Condemnation of arbitrary rule in an outspoken manner calling violations of law by their proper name is a first step towards establishing legality. Systematic redrafting of codes with a view to including real and not illusory guarantees for the rights of the citizen provides a foundation on which legality can be built. In this way socialist legality might indeed acquire a new content.

The decisive test of legality is the day-to-day administration of justice. A basic requirement necessary to ensure the proper administration of justice is that the Judiciary must be impartial and independent from any outside influence and, in the Soviet Union, specifically from the Communist Party. To delve further into

the various functions of the body politic: legality depends in the last analysis on the existence of a free and constructive opposition who offer the electorate an alternative policy to that of the government. Respect for differing opinions creates that democratic atmosphere in which the independence of the Judiciary and the resultant fair administration of justice can become more than just a dead letter of the Constitution or an unfounded claim.

Both at the 22nd Congress of the CPSU and in the months following it, it has been seen that the concept of socialist legality is in a state of flux. The dictatorship of the proletariat was to be replaced by what is called a "Soviet democracy of a classless society, of the people as a whole". Elaboration of a new theory on State and Law and on socialist legality has been started. The Statutes of the CPSU adopted at its 22nd Congress have introduced a new system of election for Party posts to achieve a higher degree of inner-party democracy for the repeatedly avowed purpose of checking arbitrary rule. Persuasion, i.e., reasoned argument, and education has to replace coercion. The new thinking of the 22nd Congress of the CPSU raises the question: how far can coercion in the building of Communism be replaced by reasoned argument and education based on a new version of socialist legality? Would this not, in fact, mean the end of Communism?

The extension of the death penalty for economic crimes in 1961 in the Soviet Union, discussed in No. 12 of this *Bulletin*, and new extensions in February of this year, the debates around the new Soviet Civil Code, which brought to surface strong conservative trends on many important points, show that the reshaping of the legal system and of legal ideas will not be easily or quickly achieved. Furthermore this reshaping has to start against the background of today's situation, the origins of which date back to Stalin's time, a burdensome inheritance in the field of socialist legality. As long as the administration of justice remains an instrument of State policy and as long as judges apply laws according to instructions of Party or governmental organs, the people of the Soviet Union will stand as defenceless before their courts as they stand helpless before their Party's monopoly of power, compelled to bear the consequences of errors and mistakes which are bound to occur on a large scale under conditions of totalitarian power. Time only can tell how far the above mentioned efforts will approach the aim of "socialist" legality, or, even better, legality without qualification.

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International Commission of Jurists, Basic Facts: A brochure on the objectives, organization and membership, history and development, activities and finances of the International Commission of Jurists.

Published in English, French, German and Spanish
and distributed by

INTERNATIONAL COMMISSION OF JURISTS
6, RUE DU MONT-DE-SION, GENEVA, SWITZERLAND

HENRY STUDER S.A., PRINTERS, GENEVA, SWITZERLAND