

FOR THE RULE
OF LAW

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

CONTENTS

ASPECTS OF THE RULE OF LAW

The European Social		Mongolia	20
Charter	1	Morocco	26
Ghana	9	South Africa	37
Hungary	13	Southern Rhodesia	43

No. 18

MARCH 1964

The International Commission of Jurists is a non-governmental organization which has Consultative Status, Category "B", with the United Nations Economic and Social Council. The Commission seeks to foster understanding of and respect for the Rule of Law. The Members of the Commission are:

JOSEPH T. THORSON (Honorary President)	President of the Exchequer Court of Canada
VIVIAN BOSE (President)	Former Judge of the Supreme Court of India
A. J. M. VAN DAL (Vice-President)	Attorney-at-Law at the Supreme Court of the Netherlands
JOSE T. NABUCO (Vice-President)	Member of the Bar of Rio de Janeiro, Brazil
SIR ADETOKUNBO A. ADEMOLA,	Chief Justice of Nigeria
ARTURO A. ALAFRIZ	Solicitor-General of the Philippines; former President of the Federation of Bar Association of the Philippines
GIUSEPPE BETTIOL	Member of the Italian Parliament; Professor of Law at the University of Padua
DUDLEY B. BONSALE	United States District Judge of the Southern District of New York; past President of the Association of the Bar of the City of New York
PHILIPPE N. BOULOS	Deputy Prime Minister, Government of Lebanon; former Governor of Beirut; former Minister of Justice
U CHAN HTOON	Former Judge of the Supreme Court of the Union of Burma
ELI WHITNEY DEBEVOISE	Attorney-at-Law, New York; former General Counsel, Office of the USA High Commissioner for Germany
SIR OWEN DIXON	Chief Justice of Australia
MANUEL G. ESCOBEDO	Professor of Law, University of Mexico; Attorney-at-Law; former President of the Barra Mexicana
PER T. FEDERSPIEL	Attorney-at-Law, Copenhagen; Member of the Danish Parliament; former President of the Consultative Assembly of the Council of Europe
THUSEW S. FERNANDO	Judge of the Supreme Court of Ceylon; former Attorney-General and former Solicitor-General of Ceylon
ISSAC FORSTER	Judge of the International Court of Justice, The Hague; former Chief Justice of the Supreme Court of the Republic of Senegal
FERNANDO FOURNIER	Attorney-at-Law; former President of the Bar Association of Costa Rica; Professor of Law; former Ambassador to the United States and to the Organization of American States
OSVALDO ILLANES BENÍTEZ	Judge of the Supreme Court of Chile
HANS-HEINRICH JESCHECK	Professor of Law; Director of the Institute of Comparative and International Penal Law of the University of Freiburg/B.
JEAN KRÉHER	Advocate of the Court of Appeal, Paris, France; Vice-President of the World Federation of United Nations Associations
SIR LESLIE MUNRO	Former Secretary-General of the International Commission of Jurists; former President of the General Assembly of the United Nations; former Ambassador of New Zealand to the United Nations and United States
PAUL-MAURICE ORBAN	Professor of Law at the University of Ghent, Belgium; former Minister; former Senator
STEFAN OSUSKY	Former Minister of Czechoslovakia to Great Britain and France; former Member of the Czechoslovak Government
LORD SHAWCROSS	Former Attorney-General of England
SEBASTIÁN SOLER	Attorney-at-Law; Professor of Law; former Attorney-General of Argentina
PURSHOTTAM TRIKAMDAS	Senior Advocate of the Supreme Court of India; sometime Secretary to Mahatma Gandhi
H. B. TYABJI	Barrister-at-Law, Karachi, Pakistan; former Judge of the Chief Court of the Sind
TERJE WOLD	Chief Justice of the Supreme Court of Norway

Secretary-General: SEÁN MACBRIDE
Former Minister of Foreign Affairs of Ireland
Administrative Secretary: EDWARD S. KOZERA
Former Lecturer in Government, Columbia University

THE EUROPEAN SOCIAL CHARTER

On October 18, 1961, at the Palazzo Madama in Turin, where one hundred years earlier the proclamation of a united Italy had been made, the plenipotentiaries of 13 Member States of the Council of Europe signed the European Social Charter. The efforts made by the Council of Europe to elaborate the social rights of citizens of the various countries represent an important step forward, according to one of the speakers on that occasion, one of the most important achievements of the Council of Europe. It will be recalled that the International Congress of Jurists held in New Delhi in 1959 stressed the importance of social and economic rights in the following terms:

The Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.

On what it is hoped is the eve of the entry into effect of the Charter it is fitting to draw attention to what may be described as the social and economic sequel to the more familiar rights laid down in the European Convention on Human Rights and Fundamental Freedoms signed in Rome eleven years earlier.

The story of the European Social Charter began in earnest on May 20, 1954, when the Committee of Ministers of the Council of Europe in a message to the Consultative Assembly announced its intention to prepare a "social charter" which would be the economic and social counterpart of the Convention on Human Rights of 1950 on civil and political rights. This Charter would set out clearly the common objectives of Member States in the social field and would guide the policy of the Council of Europe in this area. The Committee of Ministers set up a committee of experts, consisting of high-ranking civil servants specializing in labour law, which would prepare a draft. This Committee was called the Governmental Social Committee in order to avoid confusion with the Social Committee of the Consultative Assembly.

The Social Committee of the Assembly embarked on the same task and prepared a draft which was considered in October 1955. This draft contained very striking proposals and envisaged, e.g., the participation of labour in the management and profits of industry, the protection of savings and pensions against changes in the value of money, the right to education and the setting up of a European Economic and Social Council with an equal representation of employers, employees and the public, which would watch over the application of the Charter. The boldness of these proposals was too much for the Consultative Assembly, which rejected the draft. The Committee set to work again, this time in collaboration with the Economic Committee, and two less daring drafts were submitted to the Assembly in April and September 1956. The second draft, which created a European Commissioner for Social Affairs to watch over the implementation of the Charter, was approved by the Assembly and sent on to the Committee of Ministers, which in turn transmitted the draft to the Governmental Social Committee by a resolution (56) 25 setting out the essential principles which should guide them in their deliberations.

This Committee resumed its deliberations on the basis of this draft and in February 1958 was in a position to submit its first text to the Committee of Ministers, which then, in conjunction with the International Labour Office, called a consultative conference of governmental representatives and representatives of the main organizations of employers and trade unions of the countries concerned. This conference was held in Strasbourg from December 1 to 12, 1958, and both in the preparation of its papers and in its discussions was helped considerably by the International Labour Office. The Committee revised its draft in the light of the comments made at Strasbourg and submitted it to the Assembly for consideration in January 1960. After further discussion, the final text was prepared by the Committee and approved by the Committee of Ministers on July 7, 1961.

The European Social Charter, in the form of a convention, was signed in October 18, 1961, by 13 of the 16 Member States. Austria signed later and the only signatures remaining outstanding are those of Cyprus and Iceland. It should be noted that the Charter is a convention of the closed variety and only members of the Council of Europe may adhere to it.

In accordance with para. 2 of Art. 35, the Charter will enter into effect when ratified by at least five signatories. So far Norway, Sweden and the United Kingdom have already ratified and the

ratification procedure is well advanced in Denmark, the German Federal Republic, Italy and France. It may therefore be reasonably supposed that the Charter will come into effect some time during the present year.

The Charter consists of 38 articles in all and is divided into five parts and an appendix.

The Rights Covered by the Charter

The great disparity in the levels of social and economic development of Member States confronted the authors of the Charter with a difficult choice. They could either set out to define modest standards which would be acceptable to the less well favoured States or they could set their sights at more ambitious objectives which would provide a stimulus to those States. It has been seen that during the work of preparation the progressive tendencies of the Social Committee of the Consultative Assembly ran into the cautious wisdom of the Assembly itself. The Governmental Social Committee was in a good position to reach a realistic *via media* between these two tendencies and thus in its final form the Social Charter is the result of a compromise.

Parts I and II of the Charter define the rights which are guaranteed. Part I contains a simple declaration of intention and a brief enumeration of rights under 19 headings:

The Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realized.

(Then follows a list of the 19 rights and principles.)

These introductory provisions are a kind of preamble and create no binding obligations on the part of the signatory States.

Part II on the other hand contains a very full definition of the 19 guaranteed rights, each one the subject of a separate Article. These are the first 19 Articles of the Charter.

The question arose whether the signatory States were to be bound immediately and to the same extent by these 19 Articles. From the beginning of their labours the authors of the Charter considered that this would create an excessive burden for the economy of the less developed States and in its resolution (56) 25 the Committee of Ministers envisaged a gradual implementation of these provisions. The final version provides an original and inge-

nious solution, that of a variable group of common obligations in the manner set out in Part III (Art. 20). The principle is that each State signing the Charter must consider itself bound by at least 10 of the 19 Articles in Part II. There is a certain freedom of choice but this is limited in respect of the rights considered to be the most important. Art. 20 divides Articles 1 - 19 into two groups. The first group, of 7 Articles, covers the most important rights and principles. Here the freedom of choice is very limited and each party must accept as binding at least 5 of these Articles. A second group includes the remaining 12 Articles, where there is wider freedom consisting of a choice of 5 out of 12.

(i) The rights in the first group

First comes the *right to work* (Art. 1), which connotes an obligation on the part of governments to maintain employment at "as high and stable a level... as possible" and to allow everyone the right "to earn his living in an occupation freely entered upon". Then comes the *right to organize* (Art. 5), which gives workers and employers the right "to form local, national and international organizations for the protection of their economic and social interests and to join these organizations". The *right to bargain collectively* (Art. 6) means the development of negotiating procedures for fixing conditions of employment by collective agreements, the settlement of labour disputes by conciliation and arbitration, but also includes "the right of workers and employers to collective action in cases of conflicts of interest including *the right to strike* *"; the right to strike thus makes its first appearance in an international convention. The *right to social security* (Art. 12) means that the parties undertake, not only to set up and to maintain a system of social security, but to endeavour to raise the system to a higher level. The *right to social and medical assistance* (Art. 13) binds the State to ensure that any person, whatever his financial resources, shall receive in case of sickness the necessary medical attention. The *right of the family to social, legal and economic protection* (Art. 16) includes "such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means". The *right of migrant workers and their families to protection and assistance* (Art. 19) involves a duty on the part of the State receiving them to provide them with accurate information and to help them with their journey and settling in; a duty to secure conditions of employment and accom-

* Italics added.

modation not less favourable than those of their own nationals, and to facilitate as far as possible the reunion of the family and to permit within legal limits the transfer of workers' savings to their own country.

(ii) The rights in the second group

The *right to just conditions of work* (Art. 2) provides for reasonable daily and weekly working hours, a weekly rest period and a minimum of two weeks annual holiday with pay. The *right to safe and healthy working conditions* (Art. 3) binds the signatory governments to make safety and health regulations and to provide for their enforcement. The *right to a fair remuneration* (Art. 4) is such as to provide for each worker and his family a decent standard of living and the application of the principle of equal pay for equal work as between men and women workers. The *right of children and young persons* (Art. 7) and *employed women* (Art. 8) to *protection* is set out in considerable detail. There are such matters as fixing the minimum age of employment at 15 years, or higher for occupations regarded as dangerous or unhealthy, apprenticeship allowances, longer paid holidays, maternity leave, etc. The *right to vocational guidance* (Art. 9) and *vocational training* (Art. 10) means an undertaking to provide or maintain the necessary services which should be available free of charge both to young persons and to adults. A provision especially worthy of note is the duty to provide "facilities for access to higher technical and university education based solely on individual aptitude". The *right to protection of health* (Art. 11) includes the obligation to provide advisory and educational facilities and to prevent as far as possible epidemic, endemic and other diseases. The *right to benefit from national welfare services* (Art. 14), the *right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement* (Art. 15) and the *right of mothers and children to social and economic protection* need no explanation. The *right to engage in a gainful occupation in the territory of other contracting parties* (Art. 18) is additional to the protection generally provided for foreign workers by Art. 19 above. The workers covered by Art. 18 have a right to the liberalization of regulations governing the employment of foreign workers and a right to leave their own country.

This brief summary of the rights guaranteed by the Charter calls for some explanation and comment. The criterion of "importance" to distinguish between rights in the first and the second group does not seem to have been applied strictly. It seems that other criteria have been taken into account and that some rights

were included in the second group for one of two reasons: either because they were expressed in such vague terms that it would be impossible to enforce them, such as the provisions on "reasonable daily and weekly working hours" (Art. 2), "a fair remuneration" (Art. 4), the State's duty "to remove as far as possible the causes of ill health" (Art. 11), to create social services (Art. 14), to take "appropriate and necessary measures" for the protection of the mother and the child (Art. 17); or because they involve the existence or creation of public services which would be beyond the financial capacity of some countries, such as the provisions concerning safety and health (Art. 3), protection of employed women and children (Articles 7 and 8) and vocational guidance and training and rehabilitation (Articles 9, 10 and 15).

The Social Charter goes beyond the protection of workers by protecting as such the child, the married woman and the family (Articles 16 and 17) and by laying down the right as a human being to social and medical assistance (Articles 11 and 13).

The standards laid down by the Social Charter are to be seen as minimum obligations from two different standpoints. On the one hand, as Art. 32 clearly states, its provisions are without prejudice to the provisions of internal legislation and international conventions which in each of the signatory States might create greater rights and duties. In addition, although States are bound to recognize as binding only 10 of the 19 Articles in Part II, they are also bound (under the provisions of the first paragraph of Part I) to pursue a policy aiming at the attainment of social conditions in which all the rights and principles set out will be observed and guaranteed. The Charter fixes the aim but does not fix a time limit for its realization; it is up to each State to enact the appropriate legislation as soon as it can.

The Implementation of the Charter

Part IV (Articles 21-29) deals with methods of watching over the implementation of the Charter. The system follows in spirit that established by the constitution of the International Labour Organization for supervising the implementation of international labour conventions.

Each signatory State, when depositing an instrument of ratification at the Secretariat of the Council of Europe, indicates which of the Articles in Part II it recognizes as binding. Thereafter a report is to be sent to the Secretary-General every two years on the imple-

mentation of these Articles (Art. 21). A report must also be sent on request by the Committee of Ministers on matters dealt with by the other articles (Art. 22). Reports are to be submitted to the Committee of Experts, consisting of seven members designated by the Committee of Ministers. The International Labour Organization will appoint a representative to be present for consultation at the meetings of the Committee of Experts (Articles 24-26). The Committee of Experts will send these reports together with its observations to a subcommittee of the Social Governmental Committee consisting of representatives of each of the contracting parties. Observers from two international employers' organizations and two international workers' organizations will be present for consultation at the meetings of the subcommittee, which may also consult two representatives of non-governmental organizations in consultative status with the Council of Europe. The reports, with the observations of the Committee of Experts, are to be sent to the Consultative Assembly (Articles 27 and 28).

National reports, as well as the observations of the Committee of Experts and the subcommittee of the Social Governmental Committee and the comments of the Consultative Assembly, will be sent to the Committee of Ministers, which may make any necessary recommendations to each contracting party on the basis of the report of the subcommittee (Art. 29).

The Social Charter was envisaged as an international convention in the traditional sense, its legal effect limited to the signatory States themselves, with the result that individuals have no right to invoke these provisions before municipal courts. This follows from part 3 of the appendix, which reads as follows: "It is understood that the Charter contains legal obligations of international character the application of which is submitted solely to the supervision provided for in Part IV thereof." Safeguards under the Charter thus differ fundamentally from those set up by the Convention on Human Rights and Fundamental Freedoms of 1950. The Social Charter sets up no judicial or quasi-judicial organ to deal with individual complaints and the Committee of Ministers makes only recommendations which have no binding force.

The Social Charter and Other International Guarantees of Social Rights

Mention should first be made of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948. As is well known, the Universal Declaration

devotes considerable attention to economic and social rights but is only a declaration of principles lacking binding force. In the mind of the authors of the Declaration this was to be an introduction to two international conventions, one dealing with civil and political rights, the other with social, economic and cultural rights, the conventions to be binding on all States which signed and ratified them. The Commission on Human Rights of the United Nations prepared with meticulous care the drafts of these two conventions and it is now ten years since the Commission submitted the drafts to the Economic and Social Council (Document E/CN4/705, February 1954). It is not the fault of the Commission that the examination of these drafts by the General Assembly has been blocked. The drafts prepared by the Commission merit careful study even though they have not been given the binding force which can come only with ratification by the Member States. The general scheme of the draft Covenant on Social, Economic and Cultural rights corresponds closely to that of the European Social Charter. Although the draft Covenant goes much further, albeit in vague terms, there is also a close similarity between the provisions of the Covenant and the Charter for supervising their implementation. The Inter-American Draft Convention on Human Rights, the text of which was published in Vol. IV, No. 1 (1962) of the *Journal of the International Commission of Jurists*, is also still at the stage of a draft. This convention is original in setting out in one document the protection of both civil and political rights and social, economic and cultural rights. The enumeration of these latter rights is obviously based on the draft Covenant of the United Nations. For the protection of civil and political rights, the supervision envisaged is again that of reports and recommendations.

The only binding conventions protecting social rights at the international level are the International Labour Conventions. It has been seen that the International Labour Organization actively participated in the preparation of the Social Charter and at various stages of the work the International Labour Office drew up comparisons between the rights guaranteed by the Charter and those covered by international conventions. For details of the parallels and differences between the two see the *International Labour Review*, November and December 1961. Despite the close similarity it should be pointed out that not all Member States of the Council of Europe have adhered to all the International Labour Conventions and therefore the Charter is important even in areas covered by these Conventions. This is not to say, of course, that the two

correspond in every detail. It is especially noteworthy that the right to strike is found only in the Charter.

A number of years will be necessary before an opinion can properly be formed on the working of the Social Charter. Inevitably, as the first ratifications show, it is the States which are more highly developed socially that are more ready to accept these obligations. Those States where the application of the Charter is most needed will have a great deal to do before they can ratify the Charter, but their signature can act as a stimulus in their own countries and carry not inconsiderable weight in the debates in their own Assemblies. Whatever difficulties may delay the practical implementation of the Charter in various countries during the first years, it is clear that the Charter meets a real need. Member States of the Council of Europe are moving towards an ever more complete political and economic integration, which requires some alignment of social structures and a certain harmonization of social policy and legislation. The Social Charter provides the Member States with a blueprint. May it be no idle hope that national reports and the discussions on them will encourage efforts towards the achievement of social and economic justice.

GHANA — TOWARDS DICTATORSHIP

The International Commission of Jurists has on a number of occasions drawn attention to disturbing trends in the laws of Ghana and in particular has commented on the system of preventive detention in operation there (*Journal of the International Commission of Jurists*, Vol. III, No. 2, 1961) and on the Act creating a Special Court in 1961. Briefly, preventive detention in Ghana admits of no recourse to a judicial tribunal and applications for habeas corpus have been unsuccessful. In other words, preventive detention is a matter of executive discretion.

A Special Court set up in 1961 consists of a presiding judge and two other members sitting without a jury. Its jurisdiction extends to offences against the safety of the State, offences against the peace, and offences specified by the President. The Court is constituted by the Chief Justice in accordance with a request made to him by the President. Commenting on the introduction of this Court, the Secretary-General of the International Commission of Jurists drew attention to the excessive interference by the executive in

judicial affairs, but at that time (February 1962) the Act had not yet been invoked.

Since that time, there have been further serious incidents in Ghana involving attempts on the life of President Nkrumah. The last such attempt took place on January 2, 1964. From the point of view of both preventive detention and the independence of the judiciary, the law in Ghana has now deteriorated even further. Already, on November 6, 1963, the Preventive Detention Act of 1958 had been given a further five years of life. This meant that persons whose release was almost due could be and were retained in custody and under the law now in force may be kept for another five years. It is impossible to see respect for human rights and the Rule of Law when a man may be detained for ten years without ever being accused of any crime, let alone being tried and convicted.

The Dismissal of the Chief Justice

The Special Court recently dealt with allegations of treason against five persons, three of whom were either former Ministers or party officials of the ruling Convention People's Party. After a trial lasting over three months before a court consisting of Chief Justice Sir Arku Korsah, Mr. Justice Van Lare and Mr. Justice Akufo Addo, two persons were convicted, but the three members of the Convention People's Party were acquitted. President Nkrumah reacted sharply by dismissing the Chief Justice. The Chief Justice of Ghana holds office at the pleasure of the President, but a two-thirds majority vote of the legislature was necessary to dismiss a judge of the High Court. The reason given for the dismissal of Sir Arku Korsah was that in a matter involving the safety of the State he should have conferred with the President before announcing the decision of the Court. It was said that State security was essentially within the province of the President. The Attorney-General of Ghana condemned the decision of the Court as savouring of discrimination. On December 12, 1963, the President of the International Commission of Jurists, Mr. Vivian Bose, sent a cable to President Nkrumah expressing deep concern and pleading earnestly for revision of this decision. Mr. Seán MacBride, the Secretary-General, made a personal appeal to President Nkrumah and in a press statement commented that "the removal of a judge from office... by a government which is displeased with a legal decision strikes at the very foundation of the Rule of Law. It is hard to conceive of a more grievous blow to the administration of justice in any jurisdiction."

Interference with Judicial Decisions

Unfortunately, President Nkrumah has gone even further in the same direction. The Ghanaian legislature voted him powers at his urgent request to set aside verdicts of the Special Court, and this he did without delay. The explanation given to the Ghanaian people by radio Accra on December 24, 1963, is both disingenuous and alarming. The amendment was compared to the power of an Attorney-General to enter a *nolle prosequi*, with the effect that the case can be dropped entirely or taken up by the prosecution in another form. The difference between an Attorney-General exercising his discretion to stop a prosecution and such a decision by the Government needs no elaboration. The sentiments expressed in the British House of Commons in 1924 over the Campbell case made quite clear that this discretion must not be exercised for political reasons. Secondly, the difference between setting aside an acquittal, thereby opening the way for subsequent proceedings, and the blocking of proceedings in order that a man shall not be convicted of an offence are two diametrically different things in both form and principle. It may also be added that defining the interests of State and adjudicating on whether an accused person has been proven to act against those interests, are normally regarded as two different matters falling within the province of two different organs of State. The power given to the President of Ghana leaves him with the final decision on both. In the context of Ghana (especially in view of the use made of preventive detention, which results in the virtual stifling of opposition to the Government within the country), with the recent provision accepted by referendum that henceforth Ghana should be a one-party State (the Convention People's Party), the following doctrine as expounded by radio Accra is dangerous in the extreme: "The Judiciary is an organ of society and in our society the people are supreme; hence the institutions of our society can enjoy autonomy only up to the point that they serve the highest ideals of society."

These, then, are the reasons given for a direct interference with adjudication by a Special Court which was already objectionable as an institution because of the excessive role allotted to the executive. The fact that the new law has retrospective effect is brushed aside by unspecified references to retrospective legislation in Britain and the case of the premiership dispute in Western Nigeria. The lesson which Ghana has learnt from the United States in this matter and which "will not fail to impose itself on all African countries" is that "the judiciary in the United States

has eventually yielded to the executive ". Even a nodding acquaintance with the history of the United States and of Great Britain since the Act of Settlement in 1700 is sufficient refutation of this grossly misleading comparison. Retrospective legislation is known in many countries other than Ghana, but the customary use of this method where it exists is to relieve retrospectively and not to prejudice. It may be mentioned that in all three countries to which reference was made there is a firm rule, scrupulously respected, against placing a person in double jeopardy.

There are further chapters in this melancholy story. A law recently approved by an overwhelming majority in a referendum will enable the President to dismiss judges of the High Court and the Supreme Court as freely as he has been able to dismiss the Chief Justice. The battered remnants of organized opposition in Ghana have received another blow by the acceptance of the principle of a one-party State. After the recent attempt on the President's life, there was a further group of arrests under the preventive detention legislation and once again Dr. J. B. Danquah, President Nkrumah's defeated opponent in the presidential election, is languishing in custody. The climate of free and legitimate opposition to the Government, a prerequisite in any democratic society, African or otherwise, is scarcely propitious. If there is to be a trial for offences against the safety of the State, it will be by a special court consisting of judges dismissable at the discretion of the President, the judgement of the court being equally at the President's discretion. Should this not be sufficient, there remains preventive detention until November 1968 and no guarantee that the 1963 Act will not be renewed. The high hopes that were aroused when Ghana led the way as an independent African State in 1957 have been sadly shattered.

The principles laid down by the African Conference on the Rule of Law held in Lagos in January 1961 under the aegis of the International Commission of Jurists are opposed root and branch to the recent changes in the law of the Republic of Ghana. The Conference stressed a number of points "having regard to the particular problems of emerging States" and emphatically declared that "in a free society practising the Rule of Law it is essential that the absolute independence of the judiciary be guaranteed" and that "except during a public emergency preventive detention without trial is held to be contrary to the Rule of Law... Both the declaration of public emergency and any consequent detention of individuals should be effective only for a specified and limited period of time (not exceeding six months)." These are the principles

laid down and accepted by African jurists for application in Africa. Neither specious references to what is supposed to have happened in other countries nor the shibboleth that African conditions require different principles can override the fundamentals of a free society in any place in any time.

Future plans

Ghana has now unmistakably chosen the path of centralized personal rule. The mechanism of dictatorship is now in place, and supreme power over all organs of state is now in the hands of one man—power which, as usually in the case of a dictatorship, is said to derive from the people. The use to be made of this power was sketched out with chilling decisiveness by Radio Accra on January 24, 1964:

If we were to continue on our course towards socialism, the Judiciary, as well as any other section of the state apparatus, had to be welded into the socialist administration. The judges had to be controlled by the people, not the other way round. Osagyefo ("the redeemer", i.e., President Nkrumah) decided that the period of tinkering and patchwork was over, that a floor under all of the state machinery had to be built immediately. . . . The question of overhauling all the administrative and governmental machinery will then be taken up, but on the basis of an understanding by all officialdom that it has no career and no future except as the servants of the people. The Judiciary remains a great problem. At present, a judge on appointment is far above the people and becomes an independent power. There will be no such entrenched offices and such privileged persons in the state when the people have voted "yes" in this referendum. When the referendum is over, the history of socialist Ghana will truly begin.

It is especially sad to see these principles described as socialism. Democratic socialists are usually to be found in the van of those who resist the one-party state, arbitrary imprisonment and personal rule. Whatever may be the prime mover in Ghana's current developments, it would be tragic to see present trends attributed to a political creed which takes its stand on the dignity of man in a free society—a creed that is as vigorously opposed to dictatorship as is the Rule of Law itself.

THE SITUATION OF THE BAR IN HUNGARY

The Hungarian Bar has a long and honourable tradition. In the second half of the 19th and in the current century it took

part in the efforts, made in most parts of Europe, to establish a liberal system in the administration of justice.

After World War II, when with the change of regime from a puppet Government to a democratic coalition unpopular cases emerged in great numbers, Hungarian lawyers in many cases faced personal danger in taking up such unpopular cases. But they did not fail in their duty to defend a client, however unpopular. The People's Courts established in Hungary and other countries occupied by the Soviet Army sought to eliminate cases of enemies or potential enemies of the new regime. Courageous defences by lawyers at the trials saved many lives, since on appeal many death sentences were commuted and sometimes convictions were even quashed.

The democratic coalition came to an end with the Communist seizure of power. The Constitution of 1949 consolidated the results of the Communist take-over begun in 1948. Its Article 41 (1) outlined the aims of the Communist administration of justice in the following:

The courts of the Hungarian People's Republic punish the enemies of the working people, protect and safeguard the State, the social and economic order, the institutions of the people's democracy and the rights of the workers, and educate the working people in the observance of rules governing the life of a socialist commonwealth.

This implied that the administration of justice was based on class considerations in order to accomplish the transformation of the social order into a Communist system. In the period following the establishment of the new Constitution, the heavy hand of the courts fell not only on "class enemies" but struck everybody who might have been suspected of non-conformism, which could amount to almost the entire population except the small ruling clique. Lawyers and judges, jurists in general, were regarded as champions of the *ancien régime*. Their efforts to maintain legality on the basis of observance of the laws in force was regarded as an indication of their hostile attitude towards the new regime. The Communist Party put out propaganda that lawyers and a strict application of law were to be regarded as impediments to social change.

A leading legal scholar of what is now called the Stalinist period put it this way in 1955:

For a long time the majority of the judges shunned the new developments with extreme stubbornness. They took advantage of the fact that formally the legal system still contained a great many legal provisions from the

period preceding the liberation (1945) and in a positivistic manner, apparently blessed or cursed by the blindness of the goddess Justitia, they applied the old law and did not care about the anti-democratic and therefore erroneous result of such an application of the law. (Eörsi, Gyula: "Principal Questions on the Development of Hungarian Law in the First Ten Years of Our People's Democracy", in Hungarian, *Jogtudományi Közlöny*, 1955, No. 6, pp. 321-344.)

The "positivistic manner" of applying legal rules in force, which is a pre-requisite of any kind of legality, was severely condemned at that time as allegedly slowing down the socialist transformation of the country. Later on, the official evaluation of these events changed considerably with a change in the policy of the Communist Party. The resolution of August 16, 1962, of the Hungarian Socialist Workers (Communist) Party "revealed", in historical retrospect, widespread and serious violations committed against socialist legality, ascribing them to the harmful impact of the Stalinist "cult of personality", embodied in Hungary in the person of Rákosi, the "best Hungarian disciple of Stalin" (cf. *Bulletin* No. 15, April 1963), and efforts were undertaken to restore the function of law and the role of lawyers in Hungarian public life.

The situation of the Hungarian Bar has to be viewed against this background outlined above. In the period from 1945 to 1956 the organization of the Bar retained some degree of self-government. The government exercised supervisory power through the Ministry of Justice and its subordinated National Board of Bar Associations. Admission to the Bar, the prerequisite for law practice, was left to the discretion of the Bar. Lawyers could choose to practise individually, in partnership with others, or to join the "lawyers' collectives", organized on the Soviet pattern. At the end of the period in question, however, it was believed that about half of the lawyers were in private practice, in spite of the pressure brought to bear upon Bar associations to promote lawyers' collectives and the incentive of tax benefits granted to these collectives. Thus the lawyers enjoyed relative freedom in their practice and also in relation to their clients. On the other hand their freedom of activity in court was rather limited and with investigating police authorities they were denied the usual role of a lawyer.

The freedom of the defence counsel was limited. He could enter into the proceedings only when the trial opened, and even then had to go to much trouble to contact the defendant. He was expected to approve or go one better than the case made by the prosecution. Moreover, in political cases not all lawyers were

allowed to appear. An official list was established, containing the names of lawyers considered completely reliable and therefore privileged to appear in court in political cases.

In other instances the National Board of Bar Associations applied restrictive measures. For example, in the case of preparing applications for the release of houses from precipitated nationalization, in which to a large extent "class enemies and *kulaks*" were involved, the National Board ruled as late as 1955:

... in the period of class warfare the socialist lawyer cannot regularly furnish legal assistance to the class enemy in his alleged right. The violation of this rule is a serious disciplinary offence.

This bears no relation to the fundamental principle of equality before the law. What is called "the socialist organization of lawyers" was established in the aftermath of the Hungarian revolution, in 1958, when the great wave of repression was about to end. It coincided with the secret trial and execution of former Prime Minister Imre Nagy and was accompanied by a large scale purge of the Hungarian Bar (*Bulletin* No. 8 of the International Commission of Jurists, 1958). A number of trials were staged against lawyers, special committees were set up to revise the membership of the Bar and to purge every lawyer, who, as the official statement ran, "indulged in malpractices or participated in illegal activities during the counter-revolution". The special committees appear to have done a thorough job. In Budapest, from a total of 1,300 practising lawyers, only 720 were retained. All the others were disqualified and disbarred, which in practice meant that they could get a job only as unskilled workers. In the country the proportions of the purge were the same. For the remaining lawyers a new organization was established, private practice was suppressed, and all activities were channelled to the lawyers' collectives.

The new organization was characterized by the present Hungarian Minister of Justice in an article published in *Soviet Justice*:

The basic organizational principle for lawyers is their collective activity. Collective organization, set up *spontaneously*, has been proclaimed an *obligatory* unit of activity by the new Decree on the organization of lawyers. (Nezvál, Ferenc: "On the Administration of Justice of the Hungarian People's Republic", *Sovetskaya Justitsiya*, 1963, No. 3, italics supplied.)

Law Decree No. 12 of 1958, the new Law on the organization of lawyers, established, as mentioned above, the "lawyers' collective" as the unit and organizational framework for law practice. According to the Decree and other relevant legislation and court

practice in the five years following the Decree, these collectives are "socialist organizations" with full legal personality. The client enters into relations with the collective and not with the lawyer himself. The organization functions through the collective activity of its members carried out in a spirit of mutual help.

Deprived of any choice, Hungarian practising lawyers join these organizational units. There seems to have emerged a kind of collegial cooperation among members of the same collective, which is a natural outcome of working on the same premises and in the same field. This, however, seems to fall short of what is required by the authorities. The report of the Secretary-General of the Budapest Bar Association, delivered at their 1963 general assembly, considered that the majority did not accept the spirit of this system which had been imposed on them. The report stated, *inter alia*:

Nobody should believe that membership in a lawyers' collective means only sitting behind desks under the same roof, writing correspondence on stationery having at its head the name and number of the same collective and paying into the same treasury one's income. Mere physical togetherness has to give place to real collective activity as prescribed in the Statutes...

Without risking being wrong, one might state that the majority of the lawyers' collectives and their members are not imbued by the principle of collectivity...

(Kárpáti, László: "Elements of Collectivism in Law Practice", *Magyar Jog*, 1963, No. 7, pp. 324-328.)

The freedom of the client to choose his lawyer affords for the lawyer a basis to stand upon against regimented collectivism. The Decree of 1958 upheld the client's free choice and official statements underline that this freedom should always be assured. Only in exceptional circumstances may the leader of the collective take away a case from the lawyer thus chosen. Thus the client comes expressly to entrust a certain lawyer with his case—but he nevertheless enters into relations with the collective. The lawyer gets the official fee for his case after deduction of a certain percentage representing the expenses of the collective. The income of the collective is divided, to put it more officially, according to the work done by the members, measured by the official fees paid for the cases dealt with by the members. Efforts to eliminate big divergences in the income of the members due to differences in performance and popularity have not so far produced appreciable results.

The position of lawyers in court and before investigating authorities has improved considerably. They have a much wider

scope. At present it is recognized that the lawyer may and should employ all legal and permissible means to defend his client, or to advance his civil case, since "the realization of a justified individual interest is a primordial interest for the community as well".

A recent book by Tibor Király, *The Defence and Defence Counsel in Criminal Cases* (1962), relies on the presumption of innocence, which, though not expressed in the Hungarian legal system, is said to be nevertheless implied. The work gives an analysis of the role, rights and duties of defence counsel at every stage of the trial as well as in the pre-trial period of investigation. The Bar Association report, quoted above, notes with satisfaction a growing spirit of co-operation on the part of the police, the prosecution (the procuracy) and the courts towards defence counsel.

The policy line for the observance of law, called "the strengthening of socialist legality", restated by the 22nd Congress of the Communist Party of the Soviet Union in 1961 and adopted by the 8th Congress of the Hungarian Socialist Workers (Communist) Party in December 1962, resulted in Hungary in a certain upgrading of the legal profession from the point to which it had sunk as a result of the previous persistent hostility. A lack of social esteem and extremely restricted and oppressive working conditions resulted in a sharp decline in the number of law students and of the Bar. A shortage of lawyers became increasingly felt and was officially admitted.

One of the results of the new policy line towards lawyers, the revision of the decisions on disbarment of 1958, can presumably be ascribed to this shortage. There are reports that a number of disqualified lawyers were re-admitted, if not to the Bar and to practice in the lawyers' collectives, to take jobs as legal counsel with state enterprises, artisanal or agricultural cooperatives. Since 1962 a new image of the "socialist lawyer" is being created. The starting point can be taken in August of 1962, when the party resolution on the elimination of violations of socialist legality was issued (see *Bulletin* No. 15, April 1963).

The resolution of the Central Committee of the Hungarian Socialist Workers (Communist) Party aimed to attribute political responsibility for illegal trials and to provide "for further institutional safeguards to the effect that nobody should be punished unless he had committed a crime".

It is among these "institutional safeguards" that the resolution seems to have gone further than any previous similar "destalinization" measure of the Communist countries. It laid down as a

matter of principle that all persons who in the period 1949 to 1953 took an active part in the illegal trials should be excluded from service as a procurator, judge, or civil servant of the Ministry of the Interior.

The same month the first National Congress of Hungarian Lawyers was convened at Debrecen. Here the Minister of Justice delivered a policy speech aiming to "strengthen the confidence and respect due to the legal profession". The whole Congress stressed the paramount role of lawyers and of the law in the "construction of socialism". The Congress was given wide publicity. Thereafter the press switched over to the new policy line and paid tribute to lawyers. In sharp contrast to the practice inaugurated by the Communist press in 1945 of putting the lawyer in the role of a harmful and vicious scoundrel, newspaper editorials, radio and TV broadcasts now show the lawyer in the role of the champion of rights and justice.

Lawyers are "mobilized" in an increasing degree to develop "socialist democratism": to strengthen the backbone of local self-governmental bodies, and of the administration of justice outside regular courts. As a sign of this trend it was officially noted that at the elections of February 1963 twelve lawyers were elected to local councils in the capital. There are reports that lawyers and legally trained administrative employees are elected in an increasing number in the so-called "social courts" (Comrades' Courts in Soviet practice) to assure the proper conduct of proceedings in these bodies.

The events outlined above seem to indicate a growing attention in Hungary to some of the basic requirements of legality as well as modest and still only partial restoration of the normal functions of the legal profession. It remains to be seen whether other steps will follow.

One obstacle is the fact that those who experiment with these adjustments to the requirements of modern legal life in an industrialized society are, with a few exceptions, the same persons who, in leading administrative positions, in key posts at the Bar, the Hungarian Jurists Association or in university chairs, were extremely active in executing, explaining and justifying those very measures of Stalinism, which they now seem eager to "rectify". Only a thorough change in the leading positions in Hungarian legal life could assure the necessary guarantees that policy changes will not be handled as mere tactical moves. Besides this matter of personal positions (the problem of "cadres", in Communist

parlance,) there is the problem of constitutional safeguards of legality. At the first session of the newly elected Hungarian National Assembly in 1963, the Prime Minister predicted a revision of the Constitution, since it had become outdated with the development of socialism in the country. The expected new draft of the Constitution and the debates on it will show how far constitutional safeguards of legality, among others the independence of the Bar and of the courts, will be raised and approached. Unless considerable progress is made in this direction and embodied in the new Constitution, the situation of the Hungarian Bar, with its present subordination to the Executive, will hardly improve, and the experiments noted above will not amount to much more than a milder atmosphere for lawyers in their everyday practice. The magnitude of the task was indicated in the Bar Association report quoted above:

It is our conviction, that our lawyers will obtain *in the future* the esteem due to their place in our society, that they will receive the honour and respect which they merit for the good they do in their professional and political activities. What our lawyers asked in the past, ask in the present and the future are not special privileges, but only the cessation of a damaging discrimination against them, expressed both in general attitude and in concrete measures. There were many obstacles in the way, and we cannot omit to mention how extremely difficult it has been, and still is, to overcome prejudices against the legal profession. (*Italics added*)

MONGOLIA — THE GROWTH OF ITS LAW

In the heart of Asia one million Mongols celebrated in 1962 the 800th anniversary of the birth of Gengis Khan. The Great Khan who ruled over most of Asia and parts of Eastern Europe was praised as "the founder of the Mongol State". Among his achievements stress was laid upon his accomplishments in the field of national unity and organization and in the codification of laws. These positive results were opposed to his military conquests which were disapproved, though not vigorously. The Mongolians were able to view their history not without a certain satisfaction with their present position. They survived turbulent centuries in which their chiefs led them in adventurous military conquests. They survived another series of centuries during which they came under Manchu-Chinese domination. 1962 was also the 50th anniversary of the Mongolian declaration of independence, issued on

the occasion of the fall of the Manchu dynasty in the 1912 Chinese revolution. In the course of the current century the Mongols achieved independent statehood for their vast country of some 600,000 square miles, a country which includes much of the Gobi desert. They are situated between the two biggest countries of the world, the USSR and China.

Since 1924 a Soviet type People's Republic with close ties to Moscow, the country was admitted to the United Nations Organization in October 1961. In June 1962 it became a full member of the Council of Mutual Economic Aid (COMECON), the economic association of Communist States grouped around the Soviet Union. In December of the same year it concluded in Peking a frontier treaty with the People's Republic of China, delimiting and assuring its 2,500 miles of frontier separating it from the "Middle Empire". The country established diplomatic relations with India, Pakistan and Ceylon. The first British Ambassador presented his credentials in Ulan Bator, the Mongolian capital, in January 1963. Great Britain became thereby the first Western country establishing diplomatic contacts with Mongolia. The international status of the country has been by now universally recognized.

Membership in COMECON is regarded as the key for further development, a basic source for technical assistance and foreign aid, although in recent years Mongolia has accepted aid both from the USSR and from China. The resolution of the Central Committee of the Mongolian Popular Revolutionary (Communist) Party underlined once more:

The entry of the Mongolian People's Republic into COMECON... into the sphere of the many-sided collaboration of the socialist countries accords our country the possibility of ensuring a high rate of development of its national economy... Thanks to this fact, the MPR will be able successfully to overcome in a short period its relative lag behind the leading socialist countries with regard to the level of its economic development...

A new Constitution marked a further step in the development of internal state order on July 6, 1960. The Constitution was followed by a new Criminal Code in 1961, and by a Civil Code in 1963. One can say therefore that within the span of a few years the main body of the legal system has been reshaped. This followed what was called by the leaders of the Mongolian Communist Party "the completion of the programme of socialization". The present brief survey will give an outline of the latest legal developments.

Legal Foundations

The foundations of the contemporary Mongolian legal system were laid in the period from 1921 to 1926. Mongolian revolutionary leaders used law systematically and consciously as an instrument to help destroy the inherited social and political system, partly Mongolian partly Manchu, in order to replace it with a modern pattern of social life. Mongolia did pioneering work in modernising what had been a colony under Chinese domination. Their model for a modern social system was the Soviet legal system. As Ginsburgs and Pierce put it, "Mongolian law crossed the threshold of the 20th century under the harsh influence of radical Marxist legal thought" (*Revolutionary Law Reform in Outer Mongolia, A Study in the Impact of Soviet Legal Doctrine on a Backward Society, Law in Eastern Europe*, No 7, Leyden, 1963, pp. 207-252). Mongolia was the first backward country to have come under the influence of Soviet legal doctrine. Its early reforms constitute a good example of a "relatively autonomous and rational and withal comprehensive reception of Soviet legal theory and practice". The new People's Republic relied heavily on the work of Russian experts and advisers in the early legal reforms. The contribution of Mongolian lawyers to this development was, however, also substantial.

On the whole, the general blueprint of the Mongolian law reform movement was directly borrowed from the Soviets... but the immediate practical methods of implementation—at least in the early reform period—were but rarely copied from Moscow techniques and then only after a conscious process of adaptation of their substance to local requirements. (*Ibidem*, p. 242).

The new Constitution of 1960 is the third, following those of 1924 and 1940. These Constitutions each marked a new stage in the social transformation of the country. The present Constitution reflects the change expressed in the declaration made by Marshall Tsedenbal, Communist Party First Secretary and Prime Minister, in 1959, according to which "the last bourgeois class of independent peasants is eliminated, Socialism triumphed". The new, Socialist Constitution is aimed at preparing the conditions for what is called the construction of full-scale Socialism. The Party claims to have achieved during its forty years in power the transformation of a primitive, backward country into a modern Socialist State. The proclamation of the new Constitution implies that Mongolia is ahead in Communist development of other Asian countries, such as China, North Korea and North Vietnam.

Theoreticians of the Mongolian Communist Party attach great international importance to their achievements in social and legal development, culminating in the new Constitution. Moreover, the last section of this Constitution predicts that it will wither away. Lenin in his time considered the question of a short-cut for semi-feudal countries backward in social and economic development, so that they could bypass the stage of capitalism and advance directly into State-owned Socialism. Mongolia, so the argument runs, demonstrated the reality and feasibility of this prediction. One must remember, however, that until the final collectivization, announced in 1959, the Mongolian economy was based on the work of independent peasants and cattlebreeders, and only Mongolian industry, still very modest, was organized, from the beginning, in State enterprises. Thus bypassing was in fact realized only in industry.

The Mongolian Constitution of 1960 is based on the principles of the 1936 Soviet Constitution, reflecting at the same time current trends in the Soviet theory of State and law as well as provisions of the 1960 Czechoslovak Constitution, the first Socialist Constitution in East-Central Europe. There are no traces of Chinese influence. Among the ten chapters, divided into 94 sections, rules preserving special Mongolian regulations are also preserved. The preamble stresses the importance of unity among Socialist States and of the role played by the Soviet Union; it champions peaceful co-existence and other dominant Soviet principles in foreign affairs. It reiterates the leading role of the Communist Party in the State.

Criminal Law

A few years ago it was announced that "the rise in the cultural level and standard of living of the population, the growth of their sense of labour-responsibility" made it possible to extend mercy to "elements who had committed crimes of no special gravity or who showed honesty in their work and the capacity to reform". (See *China News Analysis* (Hong Kong), 1963, November 15, No. 493.)

The new Criminal Code of 1961 showed a liberalizing tendency in line with the Soviet criminal reform of 1958. It reduced penalties, excluded certain categories of persons from liability to certain forms of punishment and insisted on the educative and preventive role of the law. The number of crimes for which capital punish-

ment could be imposed was reduced from 220 to six: treason, espionage, sabotage, political assassination, wilful murder and banditry. This penalty had been used on a decreasing scale during the last few years. The prescribed method of execution is shooting. The scope of the death penalty is further limited by the provision that women and young people under 18, and men over 60 cannot be sentenced to death. Old people receive special treatment inasmuch as that for men over 60 and women over 50 the maximum punishment is ten years imprisonment. In the case of minors (under 18) special educative measures are prescribed. The Mongolian Government claimed that criminality declined generally and that no crimes against the State had been committed recently.

The maximum period of imprisonment was fixed by the Code at ten years, the minimum at six months. In serious cases the maximum can be extended to fifteen years. For robbery, murder and crimes committed against socialist property, special limits ranging from five to fifteen years are prescribed. Punishments include, in order of decreasing severity: imprisonment, expulsion from the place of domicile, reformatory labour, exclusion from the exercise of a particular profession or work, fining and public reprimand. Further punishments consist of: deportation, exclusion and fining, together with confiscation of property and cancellation of military and civic honours. Expulsion from the place of domicile may vary from two to five years, but the period must be clearly stated by the court imposing sentence. The development of Soviet criminal law influenced not only the new Mongolian Criminal Code; it also influenced the introduction of "Public Courts", and "Public Brigades" in Mongolia. "Participation of society in the administration of justice" is an important part of policy in the Soviet Union and in other Communist countries on the Soviet pattern; the model is Soviet Comrades' Courts and the auxiliary police force of the *druzhiny*.

The establishment of Public Courts was reported in April 1960. These social organs are elected bodies of five to nine persons, operating in industrial enterprises, state farms, agricultural co-operatives, state and public organizations, which participate in the administration of justice by a "struggle against the survivals of the past in the minds of individuals, by eradicating shortcomings and errors which contradict the standards of social morality, prevent faults which infringe existing laws and cause damage to society". Details of the powers of these Public Courts were not given, but it can be presumed that according to the general pattern they may impose fines, mete out reprimands and in certain cases order

deportation. The Public Brigades, like the Soviet *druzhiny*, assist the police in detecting and preventing crime. By the end of 1961 some 500 such brigades had been established.

Case stories are rarely published in the Mongolian press, and it is therefore difficult to draw a picture of the sort of offences which are current there. It is clear that drunkenness plays a considerable role: in 1959 76 per cent of offences against public order and 45 per cent of cases of assault were due to drunkenness.

A remarkable article of September 29, 1963, in *Unen*, the leading daily newspaper, entitled "Let us all improve the routine, culture, labour-discipline, work relations and economic system in our organizations", summed up achievements and shortcomings in the struggle against crime with special reference to Ulan Bator, the capital. The reasons and causes for the prevalence of certain crimes were adumbrated, and official policy to combat these crimes was explained. The problems were raised frankly, and the measures proposed seemed to be humane; the article further expressed the government's eagerness to obtain public support in its measures.

The cause of certain crimes, such as vandalism, seems to be the influx of manpower from the country to the towns, a common phenomenon in the wake of industrialization. In Mongolia, besides the industrialization recently accomplished, collectivization of agriculture and cattle-breeding may add further push to this influx. The new-comers in the town feel uprooted from their accustomed human relations, and isolated in the mass of city dwellers; in many cases they react by not respecting rules of proper conduct. On the other hand, existing organizations in towns seem unable to cope efficiently with the increasing burden of population. The article quoted reported that city transport was sadly lacking in regularity and that it often happened that workers were harassed by having to wait a long time for transport. This apparently has contributed to acts of vandalism and violence. In addition to these particular shortcomings, laxity seems to have pervaded the whole fabric of public organs and state enterprises. Discipline, work responsibility, accounting, the suspension of work, budgeting and supplies are so lax that opportunities and temptations abound for a series of offences ranging from embezzlement and pilfering to the classic crime of illicitly brewing beer or distilling spirits for purposes of speculation.

It is very understandable that tightening of discipline ranked high among the resolutions taken by the Party in December 1963, referred to above. The relevant passage reads:

(It is resolved) to strengthen party, state and work discipline in all branches of the national economy and culture, and to consistently perfect the system of party and state control so as to radically improve work organization and increase labour productivity in all sections of the building of socialism.

The enactment of a new Constitution, new Criminal and Civil Codes, seems to indicate that Mongolia has passed from a revolutionary situation, in which an old social system had to be replaced by a new one, to a period of normality in the new social order. The scanty information on everyday life in Mongolia shows, however, that although it is possible to transform social and economic order in the relatively short span of forty years by adapting the economic and legal system of a more advanced neighbour, it is much more difficult to fill out the new pattern with content, to induce people to change their behaviour to conform to new circumstances. Now all the means of education, propaganda, indoctrination, the social organs of civic courts and voluntary auxiliary police forces are set on this task. It remains to be seen how this effort will succeed and one can only hope that the Mongolians will accomplish the transition from nomadic life to a life of city dwellers with as much skill as they showed in manoeuvring between their two giant neighbours in the international field and in retaining their special national characteristics whilst applying the Soviet pattern of social organization.

THE TREASON TRIAL IN MOROCCO

The following report was made to the International Commission of Jurists by Mr. Erik T. Poulsson, of Norway, who visited Rabat as an Observer on behalf of the Commission. Mr. Poulsson has been an Advocate at the Supreme Court of Norway since 1927.

On December 21, 1963, I was asked to go to Rabat (Morocco) as an Observer of the International Commission of Jurists to be present at the sessions of the *Tribunal Criminel* of Rabat for the trial known as the "Conspiracy Trial". This trial, which began in November, was to be resumed on December 26, 1963. By the indictment of November 4, 1963, the accused, who number 102, are charged under various counts and in particular with having organised a conspiracy aimed at the violent overthrow of the regime

and an attempt on the life of His Majesty, King Hassan II. Since the trial concerns the political situation in Morocco, it may be useful to set out briefly some of the facts of that situation.

On November 19, 1962, King Hassan II submitted to the people a Constitution which was approved by referendum on December 7, 1962, by a large majority. The Constitution thus given to Morocco includes all the usual guarantees of human rights and the rights of the citizen. It also includes a prohibition of the one-party system. The Constitution sets up a Parliament consisting of two Houses: the House of Representatives, elected by direct universal suffrage, and the House of Councillors, elected indirectly by local councils and other bodies. It must be said that, although this Constitution retains important royal prerogative powers, it can, if applied loyally and with goodwill, provide a firm foundation for the peaceful development towards a most democratic and liberal system of government.

At the time when the Constitution was approved, there were in Morocco two main opposition parties, the *Istiglal* and the *Union Nationale des Forces Populaires* (U.N.F.P.). Between the adoption of the Constitution and the first elections to the House of Representatives the government parties formed themselves into the *Front pour la Défense des Institutions Constitutionnelles* (F.D.I.C.). In the elections for the House of Representatives on May 17, 1963, the parties stood as follows: out of 144 representatives there were 41 *Istiglal*, 28 U.N.F.P. and 70 F.D.I.C. There were thus 70 members of the government party and 69 of the opposition.

On June 15, 1963, the police arrested Monsieur Moumen Diouri on suspicion of planning an attack on the American base at Kenitra for the purpose of obtaining arms and ammunition. On July 16, 1963, the police raided a building in Casablanca where a meeting of the leaders and party enthusiasts of the U.N.F.P. was taking place. 120 persons were arrested, among them 21 of the 28 Members of the House of Representatives of the U.N.F.P. Two of these Members of Parliament were released two hours after their arrest. On July 28, 1963, the municipal elections took place and the councillors elected were in turn to elect Members of the House of Councillors. These elections were boycotted by the *Istiglal* and for its part the U.N.F.P. had been, in effect, decapitated by the arrests of July 16. Out of between ten and eleven thousand seats, the government party (F.D.I.C.) won nine thousand.

On August 15, 1963, the Minister of Justice held a press conference at which he announced that a conspiracy against the

State had been discovered, and that the conspirators had been arrested and brought before the *parquet* the day before.

Until then, the persons arrested had been kept in isolation and held by the police on police premises without reference to anyone else. According to the information that I was able to obtain, they were brought before the *Juge d'Instruction* only on and after August 15. A number of the arrested Members of Parliament were then released, so that 21 of the 28 U.N.F.P. members were present when Parliament opened in November 1963. The order of the *Chambre d'Accusation* of the *Cour d'Appel* of Rabat setting down the case for trial is dated October 30, 1963; the indictment by the *Procureur Général* is dated November 4, 1963. 102 persons are accused, 17 *in absentia*. They are charged under several Articles of the Penal Code, some of which provide for the death penalty.

The trial opened before the *Tribunal Criminel* of Rabat on November 25, 1963. The defence, which had appealed on a point of law against the order of October 30 setting the case down for trial, asked the Court to stay proceedings until the Supreme Court had decided on this appeal. On November 27, the Court accepted this submission by the defence and stayed proceedings. The Supreme Court dismissed the appeal on December 9, 1963, and the trial resumed before the *Tribunal Criminel* on December 26, 1963.

On December 27, the first accused, Moumen Diouri, gave evidence before the court. According to the reports of his deposition and reports of Moroccan and foreign newspapers, which all agree, Moumen Diouri said in particular that there had been no conspiracy against the government but a plot against the U.N.F.P. by the police, that after 34 days of continual torture he had yielded to police pressure and told them what they wanted him to say, that everything that he had told the police and the *Juge d'Instruction* was untrue, and that the *Juge d'Instruction*, Abdesseham Debbi, was present when the police questioned him and when he was tortured. On December 27, 1963, the Court adjourned the hearings until January 2, 1964.

I arrived at Rabat on the evening of December 27, too late to be present at that day's hearing. On Saturday, December 28, I was very courteously received by His Excellency, Abdel Kader Ben Djelloun, the Minister of Justice. He confirmed that he would give me every facility to carry out my task. He introduced me to Majid Ben Djelloun, the *Procureur Général*. On Monday, December 30, I was received by the *Procureur Général* and we discussed the trial at length.

While waiting for the hearing to resume on January 2, I also discussed the trial with defence counsel, read many documents and also read reports in Moroccan and foreign newspapers. I found that both were freely on sale on the streets in Rabat and that Moroccan newspapers commented on the trial and the policy of the government with a great deal of candour. I was told that the Arabic language newspapers did the same. On January 2, 3, 4, and the morning of January 6, I was present at all the hearings of the *Tribunal Criminel*. The Court is composed of three judges with a deputy and three jurors with two deputies. The President of the Court has a deciding vote. The hearings are in Arabic but I was always able to follow them without difficulty thanks to the kind assistance of voluntary interpreters, counsel, journalists, or even police officers, who very kindly placed their services at my disposal. I found that there was no restriction on the public attending the hearings and all the accused who had been arrested, 85 in number, were present. I was told that there were 53 defence counsel and I myself counted 20 to 30 at each session. There were also many journalists present and in addition to Moroccan journalists, I noted the presence of the correspondents of *Le Monde*, the *Journal de Genève*, the *Christian Science Monitor* (of Boston), of Agence France-Presse, the Mahgreb Agency, and several other agencies.

In addition to counsel and journalists, about 300 members of the public were present. Further, loudspeakers had been installed in the great Salle des Pas Perdus so that those unable to find room in the court could hear what was going on though not see it. Every day a large crowd listened to the broadcast of the hearing. I may say that the accused and their counsel had complete freedom of expression. I am most anxious to emphasise all these favourable aspects of the trial, firstly, because I shall be making criticisms later in this report, and, secondly, because in many countries, and not only in Africa, there would in similar circumstances have been no trial at all, but simply disappearances or liquidations.

In order to judge certain aspects of this case and the trial I shall consider them in relation to the principles set out in the Universal Declaration of Human Rights, which are also to be found laid down in the Moroccan Constitution of 1962. For me, the question is not whether the aspects which I criticise are more or less in accordance with the Moroccan Criminal Procedure Code; if they are, it is the Code that must be changed.

1. Arrests without warrant

As the Minister of Justice stated in his press conference of August 15, 1963, the police had been discreetly following the organisation of the conspiracy and keeping watch on its authors since 1961. The first accused, Moumen Diouri, had been arrested on June 15, 1963. The police should, therefore, have had sufficient evidence and sufficient time to obtain from a judge the warrants of arrest which they needed to carry out the large scale arrests of July 16, 1963. But these arrests were carried out with no judicial warrant whatsoever.

2. Parliamentary Privilege

Among the persons arrested on July 16 were 21 Members of the House of Representatives, elected on May 17, 1963. The arrest of these Members of Parliament was therefore a flagrant breach of the parliamentary privilege of freedom from arrest which is laid down by Article 38 of the Constitution.

3. Retention in Custody

The persons arrested in June and July 1963 were kept in custody for one or two months as the case may be before being brought before a *Juge d'Instruction*. During this time they were held not in prison but in police headquarters or other police premises, and kept strictly incommunicado, even to the extent of not being permitted to communicate with their legal advisers.

4. Torture

During the hearing on December 27, 1963, the first accused, Moumen Diouri, stated that he had suffered very severe torture at the hands of the police. This statement seems to confirm reports previously published in the press that the detainees had been ill-treated. For this reason I asked the Minister of Justice and the *Procureur Général* for permission to speak to the accused. I asked to see in particular the principal accused, Moumen Diouri, Mohamed Basri, Abderrahmane Youssoufi, and Mohdi el Alaoui. My request for permission was not granted.

When this request was refused I succeeded in getting in touch with leading members of the U.N.F.P. who had been arrested at Casablanca on July 16 and later released. For reasons of security

I cannot state here the names of these two persons, but I enclose with this letter for custody in the Archives of the International Commission of Jurists the statements which I took down from them. It appears from these statements that they were both subjected to vile and prolonged torture by the police and, further, that every day four or five detainees were tortured in an adjoining room, where the others were held. The detainees were able to hear the cries of pain of their comrades whilst waiting their turn to be tortured.

I therefore come to the conclusion that many of the detainees, if not all, were tortured by the police.

5. Retrospective Application of the Penal Code

The indictment is based on the Penal Code at present in force. This Code was promulgated on November 26, 1962, and came into effect on June 17, 1963. In respect of offences against the internal security of the State, this Code is noticeably more severe than the previous one. Some of the accused were arrested on June 15, the others in July 1963. But the police had been following their subversive activities since 1961: it therefore follows that the criminal conduct, if any, of the accused for the most part took place before the Code came into effect.

If the Court applies the new Code, this would be in violation of the principle that criminal laws should not be retrospective.

6. The Trial

(a) In the course of his deposition before the Court on December 27, 1963, the accused, Moumen Diouri, stated that *Juge d'Instruction* Abdesseham Debbi had been present whilst he was questioned and tortured by the police. This amounts, as the President of the Court rightly observed, to a very serious accusation against a judge. The question thus arose of calling Debbi, who was in Rabat, as a witness. In the exercise of his discretion, the President decided that Debbi should be called to give evidence, not in open court, but before one of the judges and one of the jurors, *in camera*, in the absence of the accused and of defence counsel, which meant that he could not be confronted by the accused or questioned by defence counsel. Despite the protests of defence counsel the Court supported the President's decision.

It cannot be doubted that the President and the Court have a discretion as to the way in which the trial is conducted, but this

discretion does not enable the Court to disregard or set aside fundamental principles of criminal procedure on the rights of the defence. These principles require that a witness should be heard by the Court which has to decide the case in the presence of the accused and of his counsel, that is, in confrontation, with the defence having the opportunity to put questions to him.

(b) Moumen Diouri also stated that he still bore marks on his body of the treatment received at the hands of the police. The defence asked for a medical examination. The Court refused this request in the exercise of its discretion. It is clear that the Court may refuse to listen to evidence which clearly has no bearing on the case or which would delay the proceedings without good reason; the facts are that all those held in custody, over a hundred in number, were submitted in the course of a single day, August 15, to a medical examination by an Army doctor, who stated that they were all physically sound.

In view of what has been said above on the use of torture, this medical examination leaves room for doubt. An examination would have been a simple matter which would not have delayed the conduct of the trial and only an expert would have been able to say whether an examination, although carried out at that stage of the day, was capable of proving anything. This raises a very important question. Even though the Court's decision comes within its discretionary power, a power which it undoubtedly has, the decision nevertheless leaves an unpleasant impression because, whatever the truth may be, it is not sufficient that justice be done but that it should be openly and manifestly seen to be done.

Conclusion

My observations on the retrospective application of the Penal Code are concerned with what might happen, and those on the refusal of a medical examination are a value judgment. What I have said on the subject of arrest without warrant, parliamentary privilege, detention in custody by the police, torture, and the accusation against the *Juge d'Instruction* relate to facts and deeds, each one of which amounts to an obvious and serious violation of the fundamental rights set out in the Universal Declaration of Human Rights, and laid down in the Constitution of the Kingdom of Morocco. These facts and these deeds are even more departures from the norms laid down by the International Congress of Jurists in New Delhi in 1959.

Deposition A *

On July 21, 1963, I went to a meeting of the U.N.F.P. and representatives from departments and districts to discuss the national political situation. At approximately 6.30 p.m. Maître Teber arrived. He was arrested by plain clothes police officers. That was when we learned that the police were there. Shortly afterwards we saw police cars arriving. Everyone stayed in the room to see what would happen. We decided to wait and not to go out. At approximately 9 p.m. the police, armed and wearing helmets, began to smash in the door with rifle butts. Maître Bouabid went out. The Chief of Police of Casablanca then said that he had orders to arrest everyone. We were all put into lorries and taken to police headquarters. There we were taken to a large room. About 15 or 20 persons as well as foreign journalists were asked to leave. They took our names and there were 19 Members of Parliament. But the police said: "That makes no difference." We were given neither blankets nor food. The following morning at 11 o'clock, we were given soup and a piece of bread. The interrogation began in the afternoon. We were called one by one before a policeman, where we gave our particulars and our connection with the U.N.F.P. We were questioned about caches of weapons, the organization of party cells, relations with foreigners. The statements were read and signed.

Afterwards, four or five persons were called out each day and they did not come back. About 12 days after my arrest, I was summoned to the *police judiciaire* at 10 o'clock at night. I was taken into an office where there were five or six policemen in plain clothes. They told me that my first statement was not satisfactory, I must tell them more: "If you tell us what you know you will not be tortured, but if you won't you will be tortured like the others." I told them that if they asked me questions I would answer them. More questions followed on weapons and the organization of party cells. I knew nothing. I was questioned about my relations with Meddi Ben Barka—U.N.F.P.—what are his plans? I replied that I did not know. They showed me a copy of *Petit Marocain* where I saw for the first time that there had been a conspiracy against the State. I knew nothing about it. I again asked them to put precise questions to me and I told them that there was no conspiracy. Then the police said: "If you do not want to talk you

* The names of the authors of the depositions given to Mr. Poulsson are not being published.

will be tortured." I had to take off my jacket, shirt and shoes. They then put me on a bench with my feet and head projecting from each end. They placed a cover on me and I was bound. I was lying on my back. They covered my face and then poured dirty water over my face. My feet were beaten and I could not breathe. I cried out and heard other people crying out in the next room. From time to time the police stopped and repeated their questions. This went on for some time. Finally, they stopped and said: "Tomorrow you will talk or you will find out that there are other methods of torture."

The following day, they did the same thing and I was told: "You know what we have? Electric shock." They also asked me questions about Basri.

A week went by. Every day we could hear men crying out. One evening the screams came from a woman. One man went mad; he had been hung up and beaten. Others were hung upside down with their head in water. I was questioned again. The same questions, the same treatment. After this nothing happened for a week.

One day a barber came. I was photographed front view, profile, and my height was measured, my finger prints and head measurements were taken and at about 9 o'clock we were taken before the policeman, four or five at a time. The photographs were there as a check and we were told to go home and to keep out of mischief and not to go to meetings, also not to leave the area.

I was released on August 17, 1963.

Deposition B

I was arrested on July 16, 1963, and released on September 10, 1963.

After some talk, followed by my answering questions, I was told to take off my coat. No sooner had I taken it off than a blindfold was placed over my eyes from behind. I could not see anything. Then I was hung up. I have no idea how or in what way they hung me up. I quickly lost all sense of feeling in my limbs and I could feel neither my arms nor my legs. Then I felt great pain and started to cry out but no one took any notice. Then I felt nothing and was even unaware when they laid me down. When I had been laid down, I felt just the same as when I was hung up and my blood seemed as if frozen in my limbs.

Some of the policemen began to move my limbs until I felt the blood flowing again and feeling returned to my body.

The interrogation began again: "Where are the weapons?" When I repeated what I had already said, some of them shouted: "Let's have the bowl." They brought a bench, stretched me out on it with my head hanging over one end. Then I was tied to the bench with rope. It was this moment that reminded me of my detention under the protectorate and the time when I was in the hands of the torturers, enemies of the people and of freedom.

Then the blindfold was taken off and a bowl of water was brought. When "Lift" was called, the end of the bench was lifted and my head went under the water. I was left like this for some time and then my head was lifted out of the water and pushed in again. This went on for quite some time. One of them pulled my head under the water with a fierce pull on my ear. The increasing suffering and the dirty water which I had swallowed made my nose bleed. When the bleeding stopped they started again. In order to get my breath I began to tell them facts which had taken place in 1953.

I was taken away in the night, blindfolded, to a farm at Dédiouna to look for weapons. One of the men, convinced that there were no arms, ordered me to take a couple of steps forward, which I did. He then told me to go down something like a ladder. When I had taken a few steps down, I felt as if I were going into emptiness. I started to feel around where I was and felt as if I was suffocating. I was doubtless in a dungeon. I stayed there all night until 11 o'clock the following morning (somebody said it was 11 o'clock). The policeman said, "If we do not find any weapons you will be taken to Rabat to go on with the torture." Then I said that there were two pistols at my wife's; I said this to gain time. My wife was not at home. The police searched all through the house but found nothing. I was taken to Rabat and again tortured. I said: "Kill me" and they replied: "No, we shall kill you bit by bit." When they brought me out it was to take me to the police. From there I was taken on my own to Rabat on Sunday morning at 5 o'clock. When I arrived at Security Headquarters, I found my comrades (here two names are given). We were blindfolded, then we had to get into the back seat of an ordinary car and we were ordered to get into a position where we could not be seen. We squeezed together against one another. One of us, I believe it was (name given), got under the seat. They put a cover over us, then two policemen sat on either side and held us.

Then the car left for an unknown destination. After about 20 minutes, it stopped. We were told to get out at a place which seemed to be a gaol. We sat down on the ground. We were kept apart from each other so as to make it impossible to communicate. After some time I began to be aware of the movements of my two comrades. There was complete silence; and in this terrible atmosphere, the only sound from time to time was the sound of the boots of the policemen or guards, and I heard something like the groans of a sick man. I listened carefully and I heard my friend vomiting; he was ill. But I could do nothing to help him. This was perhaps worse than the physical torture.

My comrade continued to vomit, but no-one came. With a groan he asked for water and went on vomiting.

While this was going on I had the feeling that it was getting night-time. We were taken out to a place where I felt that there were others. After being separated, we were ordered to sleep.

The following day, Monday, we were taken for questioning. I was interrogated four times during the day. This exhausting operation went on on Tuesday, but this time in a different way. I was taken into a cellar and ordered to undress completely. I was still blindfolded. I was stretched out on a long bench like the one in police headquarters at Moulay Chérif, but this time on my back. After I had been tied up naked, they covered me with a filthy wet piece of material. Then I was tied up again over this. I was almost suffocating. Then an electric wire was fixed to each of my two big toes. Water was poured on my feet and the current was turned on. My whole body trembled inside, for my bonds stopped my body itself from trembling. All I could do was move my head, breathe and scream with pain. When I say scream, I cannot really say whether I screamed out loud or not. All I can say is that my mouth opened and I tried to relieve myself from the pain of the electric shock that went right through my limbs. The torturers were not satisfied with this and one of them used another method at the same time as the electric current. When I opened my mouth this man put a thick cloth on my face, over my mouth and nose, and none too gently. Another poured dirty water on to the cloth; my stomach filled up. Another kept sitting down heavily on me and the dirty water came out of my mouth and the other orifices of my body.

This torture was repeated several times for several days. My eyes were full of pus and one ear went deaf. My eyes were covered with a blindfold all the time I was detained, i.e., for over 50 days. But after about three weeks I had a discharge from my eyes which

got worse and worse. A policeman, probably an officer, who realized that I was in increasing pain, ordered that I be placed on my own in order that the blindfold be removed. When it was taken off my eyes were filled up with pus. I washed them with water but received no medical treatment. Three days later the blindfold was replaced.

Then it was the turn of psychological interrogations. I was taken into a room, the size of which I could not say. Then the police fired questions at me from all sides. Whilst I remained blindfolded the questions poured out in no kind of order. I was pulled from one end of the room to the other all the time. One of them came behind me and now and again would suddenly hit me as hard as he could. I think his hands were covered with something made of plastic.

I felt as if my head would burst every time he did this. Eventually, my right ear went completely deaf and I can hear absolutely nothing with this ear. I have a loud, incessant buzzing on this side of my head... Sometimes it was the physical torture, sometimes a more terrible and painful torture when the screams of my comrades shook the silence of those terrifying cellars.

The screams never stopped, night and day, and they resounded particularly at night. I could go on but I could never describe everything. I have not told everything that happened and what I do not wish to tell is more horrible than what I have actually told.

The other detainees were either in the next room or in the cellar and could hear everything; they suffered psychologically waiting for their turn.

Under the Protectorate there was torturing of prisoners but not as terribly as now.

Mr. X was sentenced to death three times (1953-56) but was never tortured like this.

SOUTH AFRICA — THE SABOTAGE TRIAL IN PRETORIA

In December 1963, Mr. John Arnold, Q.C., a distinguished member of the English Bar, visited the Republic of South Africa on behalf of the International Commission of Jurists. The purpose of the mission was to observe the proceedings at the trial in Pretoria known as the sabotage trial or the Rivonia trial. Bulletin No. 14

(October 1962) commented on the legislation under which this trial is taking place, and Bulletin No. 17 (December 1963) commented on the early stages leading up to this trial.

The following is the statement made to the press by Mr. Arnold on December 16, 1963.

Political Background

Apartheid measures include those involving racial discrimination in employment ("job reservation"), residence ("group areas") and other matters perhaps of less economic importance but widely regarded with resentment among the African population. The laws enforcing these discriminatory measures have been and are made by representatives elected by the white population of about 3 million with a limited participation by the "coloured" population of about 1.5 million so that the Africans, who number 11 or 12 million, and the Indians, who are about a half-million, have no political power. The great majority of the elected representatives support Apartheid either in its present form or in some other form not radically different, and there is no present apparent likelihood of a departure from the system through new legislation made under the present electoral conditions. Thus deprived of parliamentary representation and of political power, the African and Indian population are placed in a situation in which they have no constitutional remedies; as a result, those who are not prepared to accept this status seek to bring about a change by unlawful means.

Juridical Background

The statutes which embody the Apartheid system are well known and require no further description. Other laws have recently been introduced, designed to prevent more effectively than was possible under the existing general criminal law the success of attempts by non-whites to change the system by a resort to unlawful means. Large powers have been voted to the Executive to suppress all political activity which the Government is not prepared to tolerate (Suppression of Communism Act), to punish summarily and severely overt acts of a criminal character, suspected of being done with a political intent (Sabotage Act), and to limit opportunities of concerting unlawful activities and improve the means of detection of such activity whether carried out or anticipated (Banning Orders and 90-Day Detention Clause).

Accordingly the repressive measures are based on enactments validly enacted by a Parliament which is not representative of the population; these enactments are so severe that there is little temptation to depart from "formal or statutory legality".

The definition of Communism in the Suppression of Communism Act is so wide that almost any political activity which is designed to change the system is deemed to be Communism. The result of this is that the Africans tend to regard any activity by whites to help them in their political objectives as Communistic, so that they are likely to fall into the error of thinking the Communists are their only friends, with possible serious long-term results for Africa and the West. It is likely that the Communists have not been slow to exploit this situation. Under the 90-Day Detention Clause, the authorities are not limited to a single period of detention in the case of any individual and can in effect keep a man locked up without trial for as long as the legislation continues in force.

Unlawful Acts of the Executive

In spite of these wide powers, some of which have been introduced only very recently, the Executive has resorted to some extent to actions outside the law:

1. In many cases, particularly in about 1958, Africans charged with offences against Apartheid laws were given the choice of working on farms in conditions differing little from slavery, instead of serving sentences for their offences. This system was stamped out by recourse to the courts, which declared it illegal.

2. Between about November 1962 and June 1963, detention without trial was fairly common in connection with criminal acts conducted in the course of the Poqo disturbances. The great majority of those thus detained were eventually brought to trial and the remainder released and, in a substantial number of cases of those brought to trial, the charges were abandoned by the prosecution before a verdict was asked for. Detentions of this sort came to an end when the 90-Day Detention legislation was passed.

3. Irregular methods of obtaining evidence or information from Africans under detention has in a substantial number of cases been the subject of evidence given by such persons in court. Non-violent duress, such as threats and promises, as well as beatings up and the administration of electrical shock treatment, have been alleged on oath in this way. Last week the judge hearing

the Cape Town trial of Dr. Alexander and others disallowed certain evidence on the ground that there was a reasonable suspicion that it had been obtained by mistreatment and that the prosecution had failed to discharge the onus of showing that it had not. The volume and character of the evidence thus given justifies the conclusion that a substantial number of cases of this sort have in fact occurred. It is difficult to gauge the extent of the abuse. It would be wrong to think that practically every policeman or special branch officer resorts to improper methods to obtain information when proper methods fail, but it is, I think, established that some of them do so.

The Independence of the Judiciary

South African judges are appointed by the Executive and there is no doubt that some "political" appointments have been made in the sense that the persons appointed have been known to be active in political support of the government party. There is not, in my opinion, any evidence to show that South African judges, whether "politically" appointed or not, have yielded to or even been subjected to any government pressure or persuasion as to the way in which they should carry out their judicial functions. The general view among the legal profession in South Africa and among informed non-legal persons holding liberal views on race questions and allied matters is that the South African judges carry out their judicial functions independently of the Executive and nothing known to me suggests that this is the wrong view. The magistrates are thought in some cases to exhibit political bias but this is at least as likely to stem from their own prejudices and ambitions for promotion as from any external directive. Their decisions and sentences are automatically subject to review by the judges, but I have no sufficient volume of knowledge as to how this works.

The Rivonia Trial (Pretoria Trial)

The charges against the accused include the commission of acts of sabotage as part of an insurrectionary movement and conspiracy to overthrow the governmental system by force. Under the legislation these charges carry a minimum sentence of five years and can be made, at the discretion of the judge, the subject of the death sentence (subject to confirmation by the President of the Republic) or very much longer terms of imprisonment. The

nature of the evidence so far disclosed suggests that there is a substantial case to be tried and that it was inevitable that the material which the prosecution is able to bring forward in evidence should have resulted in the formulation of very serious criminal charges. It is not therefore, in my opinion, a tenable view that this is a trial which should not have taken place. Nor, in my opinion, can it reasonably be stated that the conduct of the trial by the Judge President of the Transvaal is open to objection on any ground of want of fairness or impartiality.

There are certain matters connected with the trial, attributable not to its conduct but to the legal system under which it is held, which are, however, in my opinion objectionable. Firstly, under the statute a criminal act of the relevant kind, shown by the prosecution to have been wilfully committed, is deemed to have been done with a political intent and therefore subject to the especially severe penalties in the Act, unless the accused can prove the absence of political intent. Secondly, the Act specifies that proceedings under it are to be summary proceedings, and this has two grave results from the point of view of the defence. The first is that the indictment lacks the degree of particularity which would have had to be present if this were not a summary trial. The previous indictment was quashed because of a complete lack of particulars. An attempt to procure the quashing of the present indictment failed largely on the ground that, since this was a summary trial, less than the normal standard of particularity was required. The nature of the particulars given is that the accused, collectively and individually, are charged with having committed, or procured the commission, of a large number of acts of sabotage, personally and through agents; the acts are listed and the agents named but the indictment does not disclose which acts are said to be attributable to the accused individually, which agents are said to have been the agents of the accused individually, or in respect of which acts the individual agents are said to have acted as such. The effect of this is that the prosecution have in the preferment of the charges against each accused all the advantages of flexibility which would accrue to them if the only charge were one of a concerted conspiracy against the accused together, but whereas in the latter case any one of the accused would secure an acquittal if the prosecution failed to show the concert as far as he was concerned, this would not be the case here as he is also individually charged. The difficulty facing the accused is one inherent in the rules of evidence in conspiracy cases. Despite the most careful direction to a jury by a judge, there is a danger, well-recognized in Anglo-American and South African cases,

that in the welter of evidence given according to much laxer rules, guilt by association will finally emerge. In this case there is no jury, but this situation nevertheless places a grievous burden on both the defence and the judge himself.

The second matter of objection arising out of the status of the trial as a summary trial is that, because in a summary trial there are no previous proceedings of the nature of committal proceedings, the content of the evidence, both oral and documentary, which will be relied on by the prosecution is mainly unknown to those representing the accused until it is produced in the witness box. Oral witnesses are certain, and documents are likely, to be very numerous, and the absence of prior information, particularly in the case of charges of so vague and serious a nature, places the defence, in my opinion, at an undue disadvantage. There is available, as an alleviation of this disadvantage, the possibility of a successful application by the defence for an adjournment to obtain instructions and material if severe embarrassment arises from the production of evidence without warning in this way, but this is at best an inconvenient alternative to the normal system in which prosecution evidence is known to the defence well before the opening of the trial.

Defences in Criminal Trials With a Political Background

Among sections of the white population the fact that particular barristers or attorneys are frequently engaged in the conduct of defences in trials of this sort is a cause of odium. Nevertheless, the two branches of the profession have not failed in their duty of availability and sufficient practitioners can be found for these defences even at rather nominal fees. There is, however, great difficulty in finding the money to pay even these fees, and even greater difficulty in providing for the heavy out-of-pocket disbursements which are inevitable in the more substantial cases. There is an official legal aid system which in practice is not available for "political" defences. Exactly why this is so is unclear, but the fact that such defences are never conducted under the system supports the conclusion which is widely held among the practitioners most often concerned.

The accused are almost always Africans whose resources—and those of their friends—are altogether insufficient for the purpose. Until now welfare funds of one sort or another have provided enough money to enable defences to be conducted in most cases, but the claims on welfare funds are heavy in respect of the provision of subsistence for the families of detained and convicted persons,

and there exists a real danger that serious charges may go undefended for lack of the wherewithal to pay for the defence.

Pressure by the Executive on Practising Lawyers Active in Defending Political Charges

There are about 20 African attorneys in South Africa and three of these, all active in such defences, have been made the subject of legal restrictions under repressive legislation. One was placed in 90-day detention and subsequently tried and convicted on charges which included a charge (now under appeal) of perverting the course of justice by advising State witnesses not to give evidence. The other two are subject to banning orders of such a nature as to make it impossible for them to carry on their professional practice in areas from which they have been accustomed to draw clients.

So far as concerns the Bar, there is one European in 90-day detention and he was active in political defences. Another member of the Bar, during an adjournment of a trial in the middle of his cross-examination of a Special Branch officer, was threatened by that officer with the possibility of his being the subject of a 90-day order, but this was plainly the irresponsible act of an undisciplined individual. On this evidence it would be unwise to draw any conclusion that repressive legislation has been used against lawyers for the purpose of discouraging them from undertaking defences objectionable to the State. So long, however, as there is such legislation in existence, there is a potential danger in this regard.

SOUTHERN RHODESIA — HUMAN RIGHTS AND THE CONSTITUTION

Southern Rhodesia is a British colony * which has enjoyed internal self-government for some 40 years. After being associated with Northern Rhodesia and Nyasaland in the Central African Federation, the colony is now separated from these two territories on the dissolution of the Federation at the end of 1963. Paradoxically, although Southern Rhodesia is probably the most advanced and developed of British colonies in Africa, a state of affairs which existed even before the many grants of independence during the last seven years, the country is not yet fully independent and there is great opposition in Africa and elsewhere to the grant of inde-

* But the term "colony" is no longer to be used.

pendence to Southern Rhodesia as long as its Constitution remains in its present form. In short, the problem is that political power under the Constitution is wielded by a white minority outnumbered by more than fourteen to one.

Ineffectual Declarations of Rights

The Constitution of Southern Rhodesia provides a striking example of the futility of laying down human rights in the Constitution and thereafter subjecting those same human rights to the sway of a legislature which does not adequately represent the people of the country; an examination of Southern Rhodesian legislation in relation to the human rights proclaimed in the Constitution makes one wonder why the trouble was ever taken to put those human rights in the Constitution. Examples taken from the field of freedom of expression and freedom of assembly will show that the substantive rights themselves are whittled away by legislation aiming at "the protection of public order" which, in the context of Southern Rhodesia, means very largely the suppression of organized campaigns for the principle one man—one vote.

Section 65 of the Constitution reads as follows:

65 — (1) Except with his own consent or by way or parental discipline no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in, and nothing reasonably done under the authority of, any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question makes provision—

(a) which is necessary—

- (i) in the interests of defence, public safety, public order, public morality or public health; or
- (ii) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts, wireless broadcasting, television, public exhibitions or public entertainments; or
- (iii) in the case of correspondence, for the purpose of preventing the unlawful despatch therewith of other matter; or

(b) which imposes restrictions upon public officers which are necessary in the public interest.

Faint hopes are raised by the expression "which is necessary", which seems to suggest that the courts could enquire whether legislation abridging freedom of expression was in fact necessary.

The famous doctrine of the United States Supreme Court in cases on the First Amendment springs to mind—that freedom of speech could be abridged in cases of “clear and present danger” as evaluated by the Court, but one has only to read subsection (3), which drastically limits the powers of the Court to determine whether such legislation is necessary. It should, however, be noted that subsection (3) does not entirely emasculate the courts. They are required to accept a certificate by the minister of the Government that a particular law is necessary unless on hearing the complaint the court decides that the necessity of the restrictions imposed cannot be reasonably accepted without proof to the satisfaction of the court. The kind of restriction that has in fact been imposed reduces freedom of expression to vanishing point for those who do not accept the present system of Government.

The Law and Order (Maintenance) Act 1960 contains provisions authorizing the executive at its discretion to prohibit publications which it considers undesirable. The relevant formula in s. 16 (1) is “if the Governor is of the opinion that the printing, publication, dissemination or possession of any publication or series of publications is likely to be contrary to the interest of public safety or security”. It is clear that the only thing that matters is the Governor’s view of public safety or security. The subsection goes on to provide that no order prohibiting a newspaper registered under the provisions of the Printed Publications Act shall be made unless Parliament has by resolution authorized the making of such order. In a Parliament where African views cannot be decisive this is a small consolation. Penalties for acts done in connection with the printing, publication or distribution of prohibited publications were fixed at the maximum of a fine of £100 or imprisonment for one year or both or twice this on subsequent conviction. Any person who without lawful excuse has in his possession any prohibited publication or any extract therefrom may be fined £50 or sentenced to six months imprisonment or both with twice this for a subsequent conviction.

Sections 34 and 36 of this Act, as replaced by the Amendment Act of 1962, contain provisions which go far beyond the legitimate protection of public authority from sedition. Section 34 relates to verbal attacks on the police and s. 36 on public officers other than the police. There are fortunately few States in which a person may be sent to prison for uttering any word or doing any act or thing which is likely to expose the police or any section thereof to contempt or ridicule or disesteem or to engender feelings of hostility towards the police or any section thereof. There is a saving formula

“without lawful excuse”, but proof of this lies on the accused. Other public officers are protected against similar expressions and in addition against anything likely “to undermine or impair the authority of any public officer or class of public officer”. No doubt, those who have a difficult job to do in difficult circumstances need protection against obstruction and organized hostility which makes their job dangerous, but these provisions go far beyond anything necessary for such protection. One of the features of a free society which permits criticism of public officials is that much of this criticism will of necessity be ill-informed and misguided. The proper weapon with which to fight misguided criticism is reasoned reply and not criminal punishment. Obstruction, violence, and incitement thereto are another matter, but the Act is far more sweeping than is necessary to deal with these.

Wide powers exist to prohibit meetings or to prohibit individuals from attending meetings. Section 10 of the principal Act is particularly interesting from this point of view. The powers exercisable by the minister leave him a free hand to suppress all political meetings ventilating discontent with being governed by a white minority. The section reads:

10. (1) If at any time the Minister is of the opinion that by reason of particular circumstances prevailing in the Colony or in any part thereof it is desirable to prohibit or restrict the gathering of persons in order to prevent the stirring up of feelings of hostility between one or more sections of the community on the one hand, and any other section of the community on the other hand, or the making of subversive statements or the rousing of passions and emotions which are likely to occasion serious public disorder, he may by order exercise any of the following powers—

“Stirring up of feelings of hostility between different sections of the community” easily becomes an instrument and has become an instrument whereby the political aspirations of a majority governed against their wishes by a minority are denied free expression. A black community governed against its wishes by a white minority community in power as such is likely to feel hostile to the white community by that fact alone and this hostility is likely to be fomented by the implementation of the drastic laws in effect in Southern Rhodesia. Should this resentment be voiced in a public gathering or should the minister feel that this is likely he may simply prevent them from gathering.

Perhaps the most ridiculous provision in an Act which gives little cause for amusement is that contained in s. 30:

30. Any person who uses any opprobrious epithet or any jeer or jibe to or about any other person in connexion with the fact that such other person has—

- (a) undertaken, continued, returned to or absented himself from work or refused to work for any employer; or
 - (b) undertaken any duties as a member of any police reserve or of any Government department;
- shall be guilty of an offence and liable to a fine not exceeding one hundred pounds or to imprisonment for a period not exceeding one year.

Section 46 deliberately dispenses with the question of individual *mens rea* by providing that the person shall be deemed to have committed the common law offence of incitement to public violence if the "natural and probable consequences of his conduct or words" might reasonably be expected "to be public violence". Provisions of this nature too easily lead to the punishment of the foolish as distinct from the wicked.

An Inhuman Punishment

The most severe provision is that contained in s. 31A (1) of the Law and Order (Maintenance) Act 1960 as inserted by the Amendment Act of 1963. This provides for the death penalty in cases where by the use of petrol or some other inflammable liquid a person sets or attempts to set on fire a dwelling house or attempts to do this in respect of any building in which a person is present whether he knew of such person's presence or not. As is common in countries of common law traditions (and the criminal law of Southern Rhodesia largely follows English lines though not content) the judge is not given a discretion in cases of the death penalty. The question of the extreme penalty for acts of political terrorism always arouses passion and controversy, not only amongst partisans of the causes involved, but also amongst those who cherish the desire that punishments, where they are necessary, be humane and proportionate to both the crime and the offender. The Southern Rhodesian legislation does not deal with the purpose or motive of the accused in these cases of aggravated malicious damage to property and in this respect is even more to be deplored than the well-known "Sabotage Act" in South Africa, where at least it is necessary that acts of sabotage be committed with a political intention. On this point the South African legislation places on the shoulders of the accused the burden of showing that his act was not done with a political intention. The Southern Rhodesian solution is even more drastic. Political intention or any intention other than that involved in the act itself is irrelevant.

The human rights set out in the Southern Rhodesia Constitution thus become a hollow mockery as a result of legislation which denies freedom of expression to an extent which even a paternalistic

minority government should never permit, if it has a genuine concern for the dignity and the rights of those it governs. The death penalty in particular for acts in no way proportionate to this extreme measure is to be particularly condemned. Attention should be drawn not only to the Universal Declaration of Human Rights but also to the provision in sec. 60 (1) of the Constitution that "no person shall be subjected to torture or to inhuman or degrading punishment or other treatment". Subsection (3) makes it clear that this provision does not prevail over the will of the legislature. It is considered that the death penalty in Southern Rhodesia in the circumstances set out above constitutes an inhuman punishment which flies in the teeth of the standards set out, regrettably on paper only, in the Constitution of the colony itself.

Richard Mapolisa appealed to the Federal Supreme Court in Salisbury against his conviction under s. 31 (A), but his appeal was dismissed on December 11, 1963. Mapolisa's participation in an offence causing in fact only £17 10s. 0d. of damage to a dwelling house was at most that of an accessory before the fact or a *socius criminis*, as parties other than the principal are known in Southern Rhodesia. Unless Mapolisa's appeal to the Privy Council meets with success, the question whether he is put to death is in the hands of the Government. In delivering judgement dismissing the appeal on what would appear to be impeccably correct grounds from a purely legal point of view, the Chief Justice had this to say: "No doubt, normally the *socius criminis* is more lightly punished than the principal offender. But that happens when the crime which he has committed, the same crime as that committed by the principal offender, does not have by law a minimum punishment laid down for it. When it does, I can see no reason to incorporate a discretion where the legislature has provided none." The trial judge made his distaste reasonably clear. "The legislature has seen fit to take away from the court any discretion in a case such as the present. I am therefore obliged to pass the death sentence".

It has been argued that the British Government has power to act by asking the British Parliament to restore the prerogative of mercy to the Imperial Crown. Whether the British Parliament should do so is a matter going far beyond the Mapolisa case and no doubt the British Government would weigh all the issues most carefully if it were held that there was such a power consistent with the law and custom of the British Constitution. But the real problem is surely in Salisbury and not in London. It is not too much to ask that those in Salisbury who do exercise the prerogative of mercy should exercise it in the only way compatible with the condemnation in their own Constitution of inhuman punishments.

RECENT PUBLICATIONS OF THE INTERNATIONAL COMMISSION OF JURISTS

Journal of the International Commission of Jurists

Volume IV, No. 2 (Spring-Summer 1963): Reflections on the Rule of Law and in Particular on the Principle of Administrative Action; Reflections on the Rule of Law; Judicial Power and the Authority of the State in the Federal Republic of Germany; The Principle of Legality: The Rule of Law — Myth or Reality?; The Rule of Law: New Delhi - Lagos - Rio de Janeiro, Some Reflections on a Journey with Excursions to Chicago and Warsaw; The Evolving Concept of the Rule of Law — An American View; Some Thoughts on the Rule of Law; Austria and the European Convention for the Protection of Human Rights and Fundamental Freedoms; Problems involved in the Protection of Fundamental Human Rights and Liberties in the Practice of the Italian Constitutional Court; The Ombudsman in New Zealand (Part II); A Chronicle of Constitutional Cases: Judicial Review of the Constitutionality of Electoral Laws. Document: Report on a Seminar. Book Reviews.

Bulletin of the International Commission of Jurists

Number 17 (December 1963): President John F. Kennedy, Human Rights Day; Aspects of the Rule of Law in Burma, Czechoslovakia, Dominican Republic, Haiti, Nigeria, Pakistan, Rumania, South Africa, Yugoslavia.

Newsletter of the International Commission of Jurists

Number 15 (February 1964): Appointment of New Secretary-General. Members of the Commission. Missions and Tours. Observers. Press Releases: South Africa, Ghana, Cuba, Haiti, Ceylon, U.S.A. United Nations. Essay Contest. Organizational Notes. Publications. Law Student Seminars.

SPECIAL STUDIES

The Rule of Law in a Free Society (July 1960): A report on the International Congress of Jurists held in New Delhi, 1959.

The African Conference on the Rule of Law (June 1961): Report on the first African Conference on the Rule of Law, held in Lagos, Nigeria, January 1961.

The Berlin Wall: A Defiance of Human Rights (March 1962): The Report consists of four parts: Voting with the Feet; Measures to Prevent Fleeing the Republic; the Constitutional Development of Greater Berlin and the Sealing off of East Berlin. For its material the Report draws heavily on sources from the German Democratic Republic and East Berlin: their Acts, Ordinances, Executive Instruments, published Court decisions and excerpts from the press.

South African Incident: The Ganyile Case (June 1962): This Report records another unhappy episode in the history of the arbitrary methods employed by the Government of South Africa. In publishing this report the Commission seeks to remind its readers of the need for unceasing vigilance in the preservation and assertion of Human Rights.

Cuba and the Rule of Law (November 1962): Full documentation on Constitutional legislation and Criminal Law, as well as background information on important events in Cuban history, the land, the economy, and the people; Part Four includes testimonies by witnesses.

Spain and the Rule of Law (December 1962): Includes chapters on the ideological and historical foundations of the regime, the single-party system, the national syndicalist community, legislative power, powers of the Executive, the Judiciary and the Bar, defence of the regime, penal prosecution of political offences, together with eight appendices.

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

INTERNATIONAL COMMISSION OF JURISTS
2, QUAI DU CHEVAL-BLANC, GENEVA, SWITZERLAND

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