

*FOR THE RULE
OF LAW*

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

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BRAZIL AND LATIN AMERICA

In *Bulletin* No. 17 of the International Commission of Jurists (December 1963) it was pointed out in an article entitled "The Dominican Republic and Latin America" that events in the Dominican Republic could not be treated in isolation from events in Latin America; the impact and significance had already been felt far beyond its boundaries. In the Dominican Republic military forces had overthrown the first freely elected government since 1924. The *Bulletin* went on to say that this overthrow

is not an incident that can be shrugged off as an example of Latin American immaturity, nor can it be used as support by those who preach that it is hopeless for democratic institutions to survive on that continent. It is, rather, a bitter lesson to be learned by all whose sincere desire is the fullest realization of the dignity of man, the achievement of which in the end rests today with those who have the courage to stand for their principles and be counted at a time when it is fashionable or advantageous to be indifferent.

The Military Coup d'Etat

Six months after the military coup d'état in the Dominican Republic, the army has overthrown another constitutionally elected regime in the largest country of Latin America. Beginning March 31, 1964, a military coup d'état in Brazil overthrew the regime of President Goulart. The fundamental question arises again whether the military, on the pretext of saving the country, have the right to overthrow a constitutional government by unconstitutional means.

President Goulart was effectively overthrown by April 2, 1964, in a military coup which was fortunately bloodless. The accusations made against him by the military leaders of the coup were of trying to introduce a dictatorship of the extreme Left, of violating the Constitution, and of increasing his personal power at the expense of that of Congress. The 1946 Constitution of Brazil is based on a presidential regime which, as with all systems of presidential regime, provides for a separation of powers. Congress may not force the President to resign and the President may not dissolve Congress. The President may interpose his veto on laws

passed by Congress; Congress may refuse to pass Bills introduced by the Executive if it considers them undesirable. Some writers consider this type of regime as non-viable because of the possibility of conflict, indeed deadlock, between the Legislature and the Executive. Be this as it may, in Brazil the military did not wait for Congress to pronounce on the changes which President Goulart had sought to introduce in the realm of political and agrarian reforms. It is perfectly clear that if the democratically-elected Legislature of Brazil chose to reject President Goulart's proposals, or to accept them, it would in either event be acting in accordance with its constitutional role. It is difficult to find any justification for the overthrow of President Goulart by the military without waiting for Congress to express its views on his proposals. If Congress had rejected him, then presumably the military would not have considered it necessary to intervene. If, on the other hand, Congress had accepted the proposals, the pretext on which the military intervened would have been less defensible than it actually was. The Brazilian Constitution enables Congress to protect itself against encroachments of power by the President and it is precisely this role of Congress that the military took upon themselves. Whether or not President Goulart was a good or bad executive, Left-wing or Right-wing, efficient or inefficient, he was the constitutional President of Brazil and constitutional methods existed to restrain him from accomplishing any of the three things of which he was specifically accused by the military. The obvious conclusion to be drawn from the fact that the military did not wait for Congress to pronounce upon President Goulart's proposals is that they feared that Congress might accept them. Any pretext of acting in the higher interests of the Constitution or to protect the Constitution against the activities of President Goulart is self-evidently hollow.

Something of the real nature of the situation which led the military to take matters into their own hands may be obtained by examining the proposals which President Goulart wished Congress to accept. It should first be pointed out that there had, for some time, been a conflict between the President and Congress, which had a majority of ultra-conservative members. Further opposition to the President came from several State Governors of similar persuasion to the majority of Congress and a political crisis between Congress and the President was obviously likely.

President Goulart's Proposed Reforms

President Goulart's programme was to "transform an archaic society into a modern society authentically free and democratic". A small agrarian reform had already been effected by a decree of March 1964. In order to proceed to a more sweeping reform President Goulart had asked Congress in his annual report of March 15, 1964, to approve amendments to the Constitution in order to carry out political and agrarian reforms. The opposition to the President regarded his projects as subversive and Communist in inspiration. Whatever they were, the fact remains that the military intervened before waiting for the decision of Congress on these proposals. A reform already effected by decree concerned three per cent of the land surface and covered non-cultivated land less than ten kilometers on either side of part of the federal communications system. Such land had been the object of fearful speculation. More fundamentally, the project of agrarian reform aimed to abolish the abuses of *latifundia* and to strengthen the peasant economy at the individual level. In Brazil 62% of cultivable land belongs to 3% of the population; 0.5% is divided up into 400,000 parcels of less than 5 hectares; there are 9 million landless peasants of whom 4 million are not paid wages in money.

As political reforms, President Goulart wished to give the right to vote to illiterates and to those on military service, and asked for universal suffrage. He also proposed that his programme of reform should be submitted to a popular referendum in which all Brazilian citizens aged eighteen and over would be entitled to vote. The political merits of President Goulart's proposals may have been open to question; this was a matter on which the Brazilian Congress should first of all pronounce. These reforms certainly seem, unless there be some hidden sinister significance, to be entirely in accordance with the Universal Declaration of Human Rights in respect of both political and social rights and in accordance with the social and political rights included within the concept of the Rule of Law as elaborated at the International Congress of Jurists in New Delhi in 1959. Moreover, the late President Kennedy expressed his approval of this social programme as entirely in conformity with the spirit of the Alliance for Progress. The precise merits of President Goulart's programme and of the Alliance for Progress are matters on which, no doubt, political judgments will differ. It would, however, seem more than a little incongruous to label as Communist a programme which met with the approval of President Kennedy, or which in principle is self-

evidently necessary for the proper advancement of human dignity in a country where the disparity between rich and poor is still of frightening proportions.

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Something of the measure of the respect for fundamental rights which is held by the new military regime in Brazil can be gauged from its actions since assuming power. The land reform concerning non-cultivable land adjacent to the federal communications system was abrogated. Approximately forty members of Parliament have been divested of their seat in Parliament, censorship of the press has been established, approximately 8,000 persons have been arrested, and all likely opponents of standing at the forthcoming presidential election have been deprived of their civil rights. Something of the political outlook of the government supporters can be gauged from the statement made by Afranio de Oliveira, a deputy of the National Democratic Union, that "the Nation does not need reforms but order and work. We did not carry out the revolution to give the vote to illiterates or to elect sergeants." The Government under the new Head of State, General Castello Branco, has promised a policy of reforms and cleaning up. Now that he has installed himself in power he has consolidated the precarious powers which he held by virtue of the *pronunciamento*. There would seem to be no obstacle to the accomplishment of these promised reforms. Whether they will be carried out and, indeed, the shape they will take remains to be seen, but whatever their shape the International Commission of Jurists cannot view otherwise than with concern the seizure of power in breach of the Constitution.

EMERGENCY LAWS IN THE FEDERAL REPUBLIC OF CAMEROON

The Federal Republic of Cameroon is the result of the association formed in 1961 between the territory that had been under the trusteeship of France until 1960 and the part of the territory that had previously been under British trusteeship. Two years earlier, during a special session held from February 20 to March 13, 1959, the General Assembly of the United Nations had voted in favour of terminating the French trusteeship on January 1, 1960, and holding a referendum prior to April 1, 1960, for the purpose of consulting the population under British trusteeship as to their future. On acquiring independence, formerly French Cameroun drew up a unitary constitution which was approved by a referendum on February 21, 1960, and promulgated on March 4. The first elections for the National Assembly took place on April 10. In the British Cameroons, the northeast part of the territory declared itself in favour of union with Nigeria while the southwest part voted in favour of association with former French Cameroun. Because of this association, Cameroon took the form of a Federal State composed of two Federated States, one French-speaking (East Cameroon) and the other English-speaking (West Cameroon). The unitary constitution of March 4, 1960, had become inapplicable and, consequently, was replaced by a federal constitution dated September 1, 1961. The Federated States have their own constitutions, dated November 1 and October 26, 1961, respectively.

The Republic of Cameroon met with many difficulties at the outset. Before independence, the trusteeship authorities in the French zone had to cope with attacks from an extremist nationalist party, the so-called *Union des populations du Cameroun* (UPC). Outlawed in 1955, the UPC intensified its activities outside the law. In December 1956, under the leadership of Ruben Um Nyobé, the UPC launched an active revolt and took over, often by means of violence and terror, control of the southwest part of the country, mainly in the coastal province of Sanaga. After the death of Um Nyobé and the surrender of 2,000 rebels, the revolt tapered off at the end of 1958; disturbances continued to occur, however,

in those areas where the Bamileke ethnic group is predominant, particularly along the border with British Cameroons and among the non-tribal population of the large towns. In the second half of 1959 terrorism took a toll of 300 victims, and a state of emergency had to be declared in Douala, Yaoundé and the Bamileke region. On the very eve of independence, December 30, 1959, a series of terrorist assaults caused 40 deaths and the UPC declared that the struggle would continue.

On January 6, 1960, President Ahmadou Ahidjo, head of the provisional government of the new State, declared his intention to enforce law and order while accepting the principle of a referendum on the new institutions. As already mentioned, a constitutional referendum was held on February 21, 1960. Despite orders given by the UPC to abstain from voting and a fresh outbreak of terrorism that produced 100 victims or more in the Dschang region, 77 per cent of the registered voters participated in the referendum. Sixty-five per cent voted in favour of the draft constitution, while the opposition managed to obtain 35 per cent of the votes and proved to have strong backing in Douala and Yaoundé. The government considered itself strong enough to be able to lift the ban under which the UPC had remained for five years, and this party was able to present candidates at the elections held on April 10, 1960. The National Assembly which emerged from those elections included 60 deputies of the government party, the *Union camerounaise*, and 46 deputies of the opposition, 22 of whom belonged to the UPC, 11 to the *parti démocrate camerounais* (PDC) and 13 to various parties of lesser importance. Among the leading members of the opposition elected were M. Théodore Matip, who assumed leadership of the "legal" group of the UPC (while the diehards of the "revolutionary" group remained in hiding), and M. André-Marie M'Bida, head of the PDC, who returned after 14 months of voluntary exile in Guinea. M. Ahmadou Ahidjo was elected President of the new Republic.

The federal constitution of September 1, 1961, included temporary provisions which based the stability of the Federal State on the authorities already set up in the two Federated States. Thus, the President of the Republic of Cameroon (West Cameroon) was to be, until the end of his current term of office, President of the Federal Republic (Article 51), while the Prime Minister of East Cameroon was to be, for the duration of the same term, Vice-President of the Federal Republic. The assemblies already elected in the two States were to assume the functions of the legislative

assemblies provided for in their constitutions (Article 53). Lastly the federal National Assembly was to be composed, until April 1, 1964, of deputies appointed by the members of the legislatures of the two States, 40 of whom were to come from East Cameroon and 10 from West Cameroon (Article 54).

When the federal constitution came into force the opposition had, as we have seen, an appreciable representation in the Assembly of West Cameroon, elected on April 10, 1960. In the Assembly of East Cameroon, elected in December 1961 the *Cameroun People's National Convention* (CPNC) counterbalanced the government party, the *Kamerun National Democratic Party* of Mr. John Ngu Foncha, Prime Minister and federal Vice-President. The Federal Republic of Cameroon was then one of the very few French-speaking African States where the opposition was represented in Parliament. So far the principle of multi-party democracy had been faithfully observed by Mr. Ahidjo's government, despite the difficulties it had encountered in maintaining order throughout the country.

Soon, however, the two government parties, the *Union camerounais* (UC) and the *Kamerun National Democratic Party* (KNDP), under the leadership of the federal President and the federal Vice-President, respectively, were to join forces. To slide from there into a regime very similar to a single-party system was an easy step. In July 1962, the Fourth Congress of the UC met at Ebolowa and the question of fusing the two parties was openly raised. The government arrested four members of Parliament who were leaders of the opposition and the drafters of a manifesto opposing such a fusion. M. Charles Assalé, Prime Minister of East Cameroon, asserted the UP's role to propose and carry out the unification of all political groups in the country. This policy was to reach its consummation two years later. On April 26, 1964, when elections were held for the first time for a new federal Assembly, the UC-KNDP coalition carried all the seats by an overwhelming majority.

* * *

It must now be shown how by legal means President Ahidjo succeeded, within the framework of apparently democratic institutions, in eliminating all opposition and subjecting government and legislative bodies, at the level both of the Federation and of the Federated States, to the control of a single party. Incidentally, the long list of individual rights guaranteed in the preamble of the

unitary constitution of March 4, 1960, is no longer found in either the federal constitution of September 1, 1961, or the constitutions of the two Federated States. Article 3 of the federal constitution does, however, expressly mention the freedom to form political parties and groups.

The government of Cameroon apparently made use of three texts, all three federal legislation.

1. In the first place, no sooner had the federal institutions been set up than the government issued federal ordinance 61/OF/4 of October 4, 1961, setting up a certain number of standing military courts.

2. A few months later it issued federal ordinance 62/OF/18 of March 12, 1962, "for the repression of subversive activities". In addition to Articles 1 and 2, which, respectively, punish anyone who incites another to resist the application of laws and anyone who brings public authorities into contempt or ridicule, the ordinance includes a third Article which imposes a punishment of five years' imprisonment on

any person who publishes or reproduces any false statement, rumour or report or any tendentious comment on any true statement or report if such publication or reproduction is likely to bring any public authority into hatred, contempt or ridicule.

3. But the key to the new legislation is Federal Act No. 63-30 of October 25, 1963, supplementing ordinance 61/OF/4 and amending ordinance 62/OF/18. The spirit of this new law is to transfer the trial of all offences of the slightest political hue to the military courts and to enable these courts to administer exceptionally swift and rigorous repression. The most important provisions are described below.

(a) In addition to the standing military courts set up by ordinance 61/OF/4, the government may set up temporary military courts by decree and, at the same time, define their territorial jurisdiction.

(b) The jurisdiction of the military courts covers any offences relating to the internal or external security of the State or to the law concerning arms; moreover, it extends to all offences mentioned by ordinance 62/OF/18 "for the repression of subversive activities", which offences formerly came within the jurisdiction of the *tribunaux correctionnels* (ordinary courts dealing with all save minor offences and the most serious offences); lastly

On the express demand of the Minister for the Armed Forces any standing or temporary military court shall acquire jurisdiction to try wilful homicide, arson, or wilful assault or wounding occasioning death.

The most serious offences under ordinary law may therefore be brought, if the Minister wishes, before the military courts. The law states that the Minister's demand may be made "at any stage of the proceedings" up to final judgment, and that the court concerned shall cease to have jurisdiction.

(c) The President of the Federal Republic may, on the proposal of the Minister for the Armed Forces, enable any prefect or federal inspector to order a preliminary inquiry on any question touching the internal or external security of the State or subversion.

(d) No appeal may be made against any judgment of a standing or temporary military court to the Supreme Court of either Federated State. But

The Keeper of the Seals, the Minister for Justice, may, with the consent of the Minister for the Armed Forces, order a retrial by another military court or, if the judgment has been rendered by the standing military court of Buea, by the same court with different judges.

(e) In addition to the principal punishment, the military courts are bound to order confiscation of all the convicted person's property, unless he can show that he acquired it lawfully; moreover, they may order confiscation of property lawfully acquired and future property.

(f) The provisions of the law, including the denial of appeals, apply forthwith to pending proceedings. Proceedings pending in ordinary courts shall "as of right be transferred at their existing stage to the military courts".

It is obvious that these provisions taken together arm the government with formidable powers. The punishment of "tendentious comments on any true statement or report", which means, in fact, punishing the expression of opinion, is entrusted to military courts whose judgments are not open to appeal but can be upset by the government referring the case to another court of the same level.

* * *

Even before the last two of the above texts came into force, a dramatic incident had awakened world opinion to the fact that repression was going to excessive lengths. On February 1, 1962, some thirty suspects arrested at Douala were locked in a freight

car and sent to Yaoundé. This took place during the hottest season of the year. The distance between Douala and Yaoundé by rail is 307 kilometres and the trip takes about twelve hours. When the freight car was unlocked on arrival at Yaoundé, twenty-five of the prisoners were dead. The government did everything in its power to hush up this incident; the bodies were buried in a paupers' graveyard, care being taken to attract no attention, and the Catholic clergy, who had heard of the affair, were forbidden to perform any funeral services. The Catholic hierarchy refused to obey the injunction to remain silent and voiced its indignation in its publication, *Effort camerounais*. The editor of this newspaper was immediately deported. On the other hand, no measures were taken against persons responsible for the death of the prisoners.

At the beginning of July 1962, the Ebolowa Congress and the manoeuvres of the *Union camerounaise* to rally the opposition provided Mr. Ahidjo's government with an opportunity to apply the ordinance of March 12, 1962, "for repression of subversive activities". A duplicated document some ten or twelve pages long, dated June 15, 1962, was circulated among political circles. It was signed by four deputies of the federal National Assembly: M. André-Marie M'Bida, former Prime Minister and leader of the PDC; M. Charles René-Guy Okala, former Minister of Foreign Affairs and leader of the Socialist Party of Cameroon; Dr. Marcel Bebey-Eyidi, leader of the Labour Party of Cameroon; and M. Benjamin Mayi-Matip, Chairman of the Parliamentary Group of the UPC. The authors of this document stated that they "enthusiastically" accepted the idea of forming a front of national unity, which the UC and the KNDP had proposed two months earlier in a joint communiqué; but they reproached the leaders of the UC for basing their tactics on a misunderstanding and aiming at the pure and simple absorption of the other parties; in polite and moderate terms they stressed what separated their conception of national unity while maintaining divergent tendencies from the opposite notion that minority groups should yield before the undivided authority of a single government party. The government replied by arresting the four signatories to the manifesto a few days before Congress opened and sending them before a *tribunal correctionnel* in pursuance of ordinance 62/OF/18 of March 12, 1962, relating to repression of subversive activities. On July 11 the court sentenced the four accused to thirty months' imprisonment and a fine of 250,000 francs. This was a grave step; this case did not involve the struggle to put down terrorism that had at times led the government to overstep its powers in the

interest of maintaining law and order. Moreover, the signers of the document had clearly expressed their opposition to any form of terrorism or direct action at the very moment when one of the leaders of the extremist UPC, Emma Ottou, was creating a stir on joining the government party. Obviously, the Government's only motive was to get rid in one blow of various opponents capable of legally questioning its authority.

Act No. 63/30 of October 25, 1963, the provisions of which, as we have seen, were applicable to pending proceedings, enabled the government to intensify repressions still further. Two high-ranking members of the UPC, Tankeu Noe and Makande Pouth, who were prosecuted for terrorism but who denied having taken part in any criminal action, had been sentenced to hard labour. Using the powers it held under the new law, the government quashed the judgment and referred the case to a military court, which condemned the accused to death. A deputy, Oyono Mimboé Simon, member of the clandestine UPC, was sentenced to life imprisonment. In September 1963, following the assassination of M. Noe Mopen, a deputy of the Legislative Assembly of East Cameroon, another member of this Assembly, M. Pierre Kamden Ninyim, former Minister of Public Health, was arrested along with 17 other persons and charged with complicity in the murder. Judged by the military court of Yaoundé, although he had denied any part in the assassination of his colleague and the public prosecutor had been unable to produce any direct evidence of his complicity, he was sentenced to death on October 30, 1963, and executed in January 1964. During January 1964 alone 15 persons condemned to death by the military courts were executed at Yaoundé and Douala.

There is no doubt that in the short term President Ahidjo's strong-arm policy is paying off, inasmuch as the elections of April 26, 1964, for the federal National Assembly were a resounding triumph for his party. Obligated to observe the outward forms of liberalism, he rejected the principle of a single list of candidates which prevails in many African States and authorized the opposition to conduct a campaign and put up candidates against those of the U.C. But in fact the parties of the opposition have been decapitated and brought to submission. The UPC decided to put up no candidates. The other parties abstained from running candidates in four electoral districts out of six. There was no really close race except at Yaoundé, where the PDC presented against the UC, for the ten seats to be filled, a list of candidates headed by Mme André-Marie M'Bida, wife of the former Prime

Minister, who is still in prison. But the outcome was decided beforehand. In the country as a whole, the UC-KNDP coalition obtained 93.5 per cent of the votes cast and all the seats in Parliament. The parties making up the opposition were able to muster only 129,517 votes as against 1,863,614 for the government parties. The Federal Republic of Cameroon was distinguished for a long time from its neighbouring countries by the fact that the opposition was represented in Parliament. Since the last elections it has fallen into step with the majority, with the government party alone being represented in Parliament. It is to be hoped that the federal government of M. Ahidjo and M. Foncha, sure of the stability it enjoys by virtue of the UC and the KNDP exercising exclusive control over the federal and local assemblies and administrations, will put an end to the emergency measures and special courts, will cease to consider every sign of disagreement as a form of subversion, and will allow the representatives of the opposition the right of free expression.

A VICTORY FOR VIGILANCE IN CANADA

There was a vivid demonstration recently in Canada of the importance and value of constant vigilance on the part of the public as a safeguard of the freedom of the individual from the possibility of arbitrary administrative action.

The demonstration followed the introduction by the Attorney General of Ontario, one of the Provinces of Canada, of a Bill, numbered Bill 99, being "An Act to amend The Police Act".

Section 14 of this Bill proposed that the Police Act, a provincial enactment, should be amended by adding Sections 39 (c), 39 (d) and 39 (e) to it. By the proposed new Section 39 (c) the Ontario Police Commission, an administrative, non-judicial, body, was empowered to enquire into and report to the Attorney General upon any matter relating to, *inter alia*, the extent, investigation or control of crime and for the purpose of such inquiry to summon any person and require him to give evidence on oath, *in camera* or otherwise, and to produce such documents and things as the Commission deemed requisite.

The proposed new Section 39 (d) provided that the Commission should have all the powers to enforce the attendance of witnesses and to compel them to give evidence and produce documents and things as are vested in any court in civil cases and then vested the Commission with the jurisdiction set out in subsections 2 and 3 which provided as follows:

- (2) Where a person, being present at an inquiry and being required by the Commission to give evidence,
 - (a) refuses to be sworn;
 - (b) having been sworn, refuses to answer the questions that are put to him;
 - (c) fails to produce any writings that he is required to produce; or
 - (d) refuses to sign his deposition,without offering a reasonable excuse for his failure or refusal, the Commission may, by warrant, commit the person to prison for a period not exceeding eight clear days.
- (3) Where a person to whom subsection 2 applies is again brought before the Commission and again refuses to do what is required of him, the Commission may again commit him to prison for a period not exceeding eight clear days and may commit the person to prison from time to time until the person consents to do what is required of him.

The proposed new Section 39 (e) provided further that the chairman of the Commission might authorize one or more members of the Commission to conduct any inquiry that the Commission might conduct, and that each member so authorized might exercise the powers and perform the duties of the Commission.

The Bill was introduced in the provincial legislature in the afternoon of March 19, 1964. Its introduction immediately raised such a storm of protest against the proposed powers of the Police Commission that on the following day the Premier of Ontario announced that the Bill would be completely re-examined. Three days later the Premier accepted an amendment proposed by the leader of one of the opposition parties and the legislature passed the Bill to the Legal Bills Committee with instructions to delete Section 14 from it. On the same day the Attorney General who had introduced the Bill resigned.

The opposition to the Bill was striking. *The Globe and Mail*, one of Toronto's leading newspapers, carried a front-page editorial describing it as a Bill of Wrongs. The protests against it came from various walks of life, from members of the Ontario Legislative Assembly of all parties, members of the Canadian Parliament, religious leaders of various faiths, prominent lawyers and law teachers and members of organizations concerned with the maintenance of civil liberties. The Canadian press dispatches of the protests appeared in newspapers across the country.

One of the protests against the proposed Bill was that it deprived a person called before the Commission of the right to be represented by counsel. A review of the Bill indicates that this criticism was unwarranted. The Bill did not take away the right to be represented by counsel.

The basic objection to the Bill—an unanswerable one—was that it empowered the Ontario Police Commission, a non-judicial body, or one of its members, to call any person, not charged with any crime or offence, and imprison him indefinitely for terms not exceeding eight days at a time for refusing to answer a question put to him. It was this power that led to the description of the Bill as a "Police State" Bill.

When the Bill was finally enacted this objectionable power of the Police Commission was removed from it.

Efforts were made to justify the grant to the Police Commission of the extraordinary powers referred to. It was contended that they were necessary in order to enable the authorities to deal effectively with alleged organized crime in Ontario. Such a contention might

receive acceptance in a totalitarian or "police state", but there is no justification for it in a country that is concerned with ensuring that the individual is safeguarded from the possibility of arbitrary action. As the Premier of Ontario put it, some other way of dealing with crime must be found.

Nor can the granting of the powers to the Police Commission be justified by the fact, if such is the case, that similar powers are possessed by other provincial bodies such as, for example, the Ontario Securities Commission.

The defeat of the objectionable features of Section 14 of the Bill was a victory for a vigilant public opinion that was outraged by the possibility of injustice being done to an individual by the exercise of the extraordinary powers referred to and determined that such possibility should be eliminated.

The public outcry against Bill 99 in its original form had another notable result. On May 1, 1964, the Premier of Ontario announced that a Royal Commission had been appointed to undertake "an exhaustive inquiry into civil liberties and human rights in Ontario". The inquiry will be conducted by the retired Chief Justice of the High Court of Ontario. Its results will be awaited with great interest.

THE NEW PRESS LAW IN CHILE

In a social climate seething with innumerable problems, mostly of an economic or political nature, a number of incidents have occurred in Chile as a result of a controversial draft law on the press which for various reasons has been the subject of criticism from diverse sources.

It is intended here to give a brief summary of the origins, antecedents and general features of the new law, now in force, and in this way try to discover its flaws and ascertain the reasons why it has been so widely criticized.

The very name by which it is known to the public at large—the “gag law”—already gives an indication of its nature. Properly called the “Law on Abuses of the Freedom of Publications” this new press law, which came into force on February 22, 1964, after lengthy and open criticism by all organs of the press, amends Legislative Decree No. 425 of 1925, a decree which was, it should be noted, issued by a dictatorship. The severity of that decree is accentuated still further by the new law. On the ground that it was out of date and therefore inadequate, its scope has been extended by the new law to radio, television, the cinema and all other media of expression.

Antecedents

The new “gag law” has provoked a considerable outburst by the Chilean press. It owes its existence to the exclusive backing of the three parties forming the so-called Democratic Front, namely, the Radical Party, the Liberal Party and the Conservative Party. All other political groups voted against it. The National Association of Journalists and various organs of the press also attacked it. Some newspapers took an ambivalent attitude, for the most part for political reasons. The Chamber of Deputies approved the law at the very moment that a demonstration was being held in protest against the adoption of this measure by Congress.

The magazine *Clarín* violently attacked this law, by which it claimed to be directly affected. The law originated with the

Ministry of Justice, whose head, Enrique Ortuzar Escobar, had been the victim of a ruthless political campaign carried out by *Clarín*. A number of its editors were arrested and tried; some are still in prison. *Clarín* is the organ of the opposition with the widest circulation and is also the most outspoken. In attacking this law *Clarín* began by denouncing a number of irregularities discovered with respect to customs authorities, allocation of foreign currency and the dollar black market. In very direct terms *Clarín* exposed these facts in an article headed "This is why they wanted the gag law".

On February 22, 1964, the day on which the law came into force, *Clarín* appeared with a blank first page bearing the same heading: "This is why they wanted the gag law."

El Mercurio, a conservative paper, expressed its approval of those provisions of the law that protect the privacy and reputation of the individual and curb sensationalism, but stated that journalists belonging to the Association should continue their efforts to have "the other aspects of the law" amended. *Diario Ilustrado* gave its full support to the law. This daily is a conservative paper and backs the Government. Consequently, it is a target of the papers of the opposition. *La Nación* also approved the law, but this paper is controlled by the State, its principal shareholder.

The Popular Action Front (FRAP) and the Christian Democratic Party (PDC) voted against the law on the ground that it would introduce severe censorship of the press in a country characterized by democratic traditions. The debate reached a climax on June 26, 1963, when students of journalism from the University of Chile flooded the Chamber of Deputies with a shower of notes from the galleries and some of the deputies came to blows.

The debate on the draft law gave rise to strikes and all kinds of demonstrations for several months. The opposition press and the deputies of the FRAP, in particular, feared that enforcement of the law would mean the end of popular and caustic tabloids such as the *Clarín* of Santiago. Painters, writers, intellectuals, hospital workers, students and trade unions vehemently opposed the law, along with the non-conservative press. The Students' Centre of the School of Journalism of the Catholic University was an exception. However, the National Press Association and the National Assembly of Journalists categorically condemned the law as being tantamount to "gagging" the press. In spite of public protests, the Senate passed the law. Here again a confron-

tation took place between the Democratic Front and the FRAP and PDC. The Archbishop of Santiago reproved the PDC and all Catholics who supported the law's proposal to commercialize television. He pointed out, with the approval of the Left, that to free television from the control of the universities would amount to turning it over to the handful of men who comprise the financial elite.

Some Aspects of the Law

According to the new law, it is now an offence in Chile for a newspaper to exceed 500 words in reporting a crime. This has left editors perplexed.

A report on ordinary offences becomes *sensational* or illegal when:

the heading covers more than three columns or its type is over half a centimetre high or the report exceeds 500 words; the ink used for the reports is different from that used for the rest of the paper;

broadcasting of such news on radio or television takes up over three minutes' time in any one hour.

Supporters of the law claim that these limits are intended "solely as a guide" to help the courts to determine when a report is sensational. In the eyes of its adversaries it is a "gag law", in other words an infringement on the freedom of the press.

Editors who wish to publish a photograph or drawing of a person connected in some way with a violent crime, whether as the suspect, the victim or a parent of either, or of the weapon used, must now obtain written authorization from the court hearing the case. The law prohibits publication of

official agreements or documents of a confidential character. Those agreements or documents which the law or an administrative ruling under the law so considers, or those whose publication may by their nature seriously harm national interests, shall be deemed to be of such a character.

Other Sections strengthen existing laws against libel and false information published or broadcast with malicious intent.

When the law is broken the owner of the newspaper is primarily responsible. If individual responsibility cannot be established, it extends to the editor and then, on down the scale, to the printer, the distributors and even to the newspaper vendors. Advertisers who continue to sponsor a radio or television programme that has broken the law are held responsible, as are script writers, commentators and announcers.

Broadcasting false news, when malicious intent is proved, may result in a prison sentence of up to three years. Sensationalism is punished by a fine equivalent to two or three months' salary.

Of the amendments which the new law makes to Decree No. 425 with respect to abuse of freedom of publication, the extension of that decree to all media of communication should first be mentioned. Under the new law,

daily newspapers, magazines, periodical publications, pamphlets, advertisements, notices, posters, banners or emblems that have been offered for sale, distributed or displayed in public places or during public meetings, as well as radio, television, cinema, loudspeakers, photographs and, in general, all means used to pick up, record, reproduce or transmit the spoken word, regardless of the process used or its visual representation, shall be considered media of communication.

Thus, the law alters and increases the penalties incurred by the publication of "false news" and adds:

The same penalties shall be applicable to anyone who publishes or circulates official agreements or documents of a confidential character.

Article 29, which refers, *inter alia*, to so-called sensational news, was the article most strongly opposed by journalists. They also rose up in protest against the paragraph of this article which provides that "photographs, drawings, engravings or graphic representations in general that are related to crime, offences or suicides, shall not be published without the written authorization of the competent court". It should be mentioned that the "gutter press" or what in Chile is known as the *cronica roja* is extremely popular: not a day goes by without the publication of crude photographs and accounts.

Criticism in Other Latin American Countries

El Comercio, the oldest Peruvian newspaper, spoke against the recent press law and, in doing so, agreed with an editorial published in the daily *La Prensa* of Buenos Aires. To quote *El Comercio*:

When at the beginning of this year the so-called law on abuses of freedom of publication was passed, restricting newspaper information in criminal activities, we voiced our disapproval of this measure, describing it as an infringement of the freedom of the press. In this we coincided with the opinion of many newspapers in other countries. Now that some time has elapsed and the Chilean law has come into force, it is fitting to comment on it in the light of its results, as *La Prensa* of Buenos Aires has just done in an editorial.

The well-known Argentine daily considers that, as is to be expected, the enforcement of the above-mentioned law is causing serious difficulties for the press in the neighbouring Republic. The extent of such difficulties is grasped when one considers the problems that Chilean journalism will have to solve in order to condense all criminal news to 500 words under brief headings, while at the same time being forbidden to publish photographs of persons connected with crimes unless specially authorized to do so.

In practice the newspaper problems involved in abridging news in this way are insoluble and, as a result, the only thing that can be done in order to comply with this unsound law is to lower the quality of news services, and this means subordinating the interests of the readers, who are fully entitled to be duly informed. Moreover, this is a negative law, and for the time being it is producing the opposite effect from that desired, for it tends to encourage criminal activities, as *La Prensa* of Buenos Aires points out at the end of its editorial: "Meanwhile it is to be feared that under the law on "abuses of freedom of publication" those persons who will be content with the provisions in force are not those who are involuntarily or accidentally implicated or involved in criminal offences but the professional criminals, since these provisions tend, in the last analysis, to prevent their offences from being made public sufficiently."

Prosecutions of the Press

One of the pending prosecutions under the new press law was instituted against the *Nuevo Mundo* broadcasting station for a commentary concerning certain deputies which was alleged to be defamatory. The second involves the evening paper *Ultima Hora* and was instituted on the application of a deputy, José Foncea, for an article considered defamatory. Two others affect the magazine *Clarín* for libellous information concerning the President of the Republic and for "inciting subversive activities" in an editorial. A fifth prosecution has been brought against the weekly *Izquierda* for libel, on the application of a Liberal Senator, Julio von Malhenbrock.

The editor of the humorous magazine *El Pinguino*, Guido Vallejas, was sentenced by the trial court to 61 days' imprisonment and a fine equivalent to 10 days' minimum wages for violating Article 19 of the so-called "gag-law", as a result of proceedings instituted against the magazine by a private party for a publication contrary to public decency. Vallejos, who is also the owner and editor of the magazines *Flash* and *Mi Vida*, appealed to the Court of Santiago. *El Pinguino* is sold in all Spanish-speaking countries and is a picaresque review.

In some of the cases—and the list of the proceedings cited here is not exhaustive—action was taken because of criticism levelled against the policy of the Administration, which has recent-

ly been the target of extremely severe attacks. The independent press and the opposition press have been especially active in this respect. Considering the heated political atmosphere in Chile because of the proximity of the presidential elections, which are to be held at the end of this year, one can readily understand why the opposition has denounced the press law as a political manoeuvre. The Christian Democratic Party, for example, accused the official daily *La Nacion* of failing to observe the law in articles dealing with the case of Serge Molinari, a leader expelled from that Party for having been involved in contraband.

In a statement to *Clarín* the Christian Democratic Party's presidential candidate, Mr. Frei, accused the government of wasting time on the draft law instead of concentrating on the serious economic problems caused by a 45.4 per cent rise in the cost of living in 1963. Salvador Allende, a Socialist Senator and the presidential candidate of the Popular Action Front (FRAP), bluntly declared that the "gag law" would prevent objective and thorough information on free elections from being published and would rule out any popular protest. This Senator submitted to the Senate a draft law intended to repeal the law on misuse of publicity. *El Clarín* affirmed some time ago that of the then four presidential candidates, three—Allende, Frei and Prat—opposed the law, thus showing that a strong popular reaction against it existed.

General Observations

The aim of this law is to prevent, by means of severe sanctions against journalists, newspapers and broadcasting stations, the publication and circulation of news relating mainly to cases in the courts in ways or forms considered by the authorities to be sensational.

Without overlooking the excesses which are often committed in publishing such news and reports and without excusing the systematic and exaggerated exploitation of news relating to conduct contrary to law and morality, it must nevertheless be recognized that such abuses cannot be corrected by repressive regulations which end in curtailing freedom of information and, as a consequence, run the risk of being converted into means whereby the press can be censored prior to publication. In any case this is a question of ethics which comes under the particular responsibility of the newspapers concerned, as the National Association of Journalists of Santiago pointed out.

TEN YEARS OF THE CHINESE PEOPLE'S CONSTITUTION

The adoption of the Constitution of the People's Republic of China ten years ago in 1954 was hailed as an event of enormous historic significance in the political and legal life of the country. The Committee for Drafting the Constitution was headed by Mao Tse-tung himself. The report on the Draft Constitution to the First National People's Congress, the newly constituted supreme legislative body, was delivered by Liu Shao-Chi, who later succeeded Mao as Chairman of the People's Republic. The report claimed the Draft Constitution to be "an epitome of the historical experience of the Chinese people's revolutionary struggle over more than a century as well as an epitome of the historical experience of Chinese constitutionalism in modern times". The reporter was proud to present the Draft as a "product of the international socialist movement", in the drafting of which the constitutions and the constitutional experience of the Communist states, headed by the Soviet Union, have been widely drawn upon.

The impact of the Soviet example on the new Chinese social and state order has been great indeed. Mao Tse-tung formulated this influence in the following terms (*On People's Democratic Dictatorship*, 1949):

The Chinese were introduced to Marxism by the Russians. Before the October Revolution, the Chinese were not only unaware of Lenin and Stalin, but did not even know of Marx and Engels. The salvoes of the October Revolution brought us Marxism-Leninism... Follow the path of the Russians—this was the conclusion.

Like the constitutions which served as its models, the Chinese Constitution of 1954 was based on three principles: class struggle, party rule and democratic centralism. It is not only a fundamental law; it includes also a statement of policies and programmes to be followed in a specific phase of class struggle; it outlines the "general line" of the Party for the period of "transition to Socialism".

"Democratic centralism", embodied in Article 2, means in Mao Tse-tung's interpretation a system which is "at once democratic and centralised, that is, centralised on the basis of democracy and democratic under centralized guidance", a guid-

ance given by the Central Committee of the Communist Party of China.

By applying the experiences of other ruling Communist parties to Chinese circumstances, the Drafting Committee claimed to have forged a mighty weapon to achieve the social transformation in that vast country and at the same time to have brought into complete harmony the rights and duties of the people. Liu Shao-Chi's report said on this point:

Under the system of people's democracy and socialism, the masses of the people can see for themselves that personal interests are indivisible from the public interests of the country and society; and that they are one and the same...

The Constitution was to assume the supreme role in the country's life and in the activities of its citizens and state organs. The duty of every citizen, whether a private person or a government agent, a Party member or not, to observe the Constitution unconditionally as a "fundamental law on the basis of which the present struggle is to be carried on" was strongly stressed in the introductory report. It was expressly proclaimed in Articles 18 and 100 of the Constitution. The implementation of the Constitution is subordinated to the lofty aim stated in the *Preamble*:

The system of people's democracy—new democracy—of the People's Republic of China guarantees that China can in a peaceful way banish exploitation and poverty and build a prosperous and happy socialist society.

Without going into details of constitutional development and comparison with other constitutions, the following outline should show the basic trends in the application of the Constitution as a fundamental law in the first ten years of its existence in carrying out social changes in the country. It is proposed to start with three basic aspects of social change: family relations, land reform and re-organization of industry, to continue with general problems of codification and the observance of legality, and to conclude with the legal implications of centralised planning.

Family relations

Article 96 of the Constitution proclaimed:

Women in the People's Republic of China enjoy equal rights with men in all spheres of political, economic, cultural, social and domestic life.

The State protects marriage, the family and the mother and child.

This Article sums up the provisions of the Marriage Law of May 1, 1950, which based the new Chinese marriage system on "the free choice of partners, on monogamy, on equal rights of both sexes, and on the protection of the lawful interests of women and children". It prohibited bigamy, concubinage, child betrothal, interference with the re-marriage of widows, the exaction of money or gifts in connection with marriages; it fixed the marriageable age at 20 years for men and 18 for women, prescribed compulsory registration of marriages with the local administrative agency and permitted divorce when husband and wife both desire it or when mediation by the district people's government and the court machinery has failed to bring about a reconciliation. The Law assured equal status for husband and wife in the possession and management of family property, free choice of occupation and free participation in work or in social activities for both. The Law was drafted, as it was officially announced, after careful and extended study of local marriage customs in different part of China and utilizing a comparative study of the marriage laws of the Soviet Union and other Communist states. Its importance was held comparable only to that of land reform in abolishing China's centuries-old feudal system. It was intended to bring to an end the compulsory feudal marriage system under which both men and women had no free choice of marriage partners, these being chosen for them by their parents—a practice which led to the widespread prevalence of child-marriage. Under the old system polygamy was openly connived at and whilst divorce was possible on the application of husbands, it was made practically impossible for women. The old feudal family traditions rendered it out of the question for a widow to re-marry. The new Law was intended to re-shape completely the basic unit of social life: the family.

Land Reform

The relevant provision of the Constitution, Article 8, reads:

The State protects the right of peasants to own land and other means of production according to law.

The State guides and helps individual peasants to increase production and encourages them to organize producers' supply and marketing, and credit cooperatives voluntarily.

The policy of the State towards rich-peasant economy is to restrict and gradually eliminate it.

The primarily agrarian society of pre-war China, in which

85 per cent of the population was engaged in agriculture as a livelihood, was confronted with two major problems: the growing agrarian population and the scarcity of agricultural capital. The new Communist leadership used three means to cope with the problem: (1) land reform, (2) cooperatives, (3) rural communes.

Land reform was carried out immediately after the takeover of the country from 1949 to 1952. The rural population was classified into six classes: landlord, semi-landlord, rich peasant, well-to-do middle peasant, poor peasant and farm labourer. Expropriation of agricultural properties of the first three classes in favour of the last two was carried out in a descending sequence. The properties of landlords and rich peasants were expropriated in a movement accompanied by mass trials and executions. It was estimated that the properties of ten million households were confiscated. Redistribution of land was undertaken in the limit of the rural administrative units known as *hsiang*, each consisting of several villages. According to official reports some 700 million *mou* (116.7 million acres) of land were redistributed to 300 million peasants. Based on these figures each person received on an average 2.3 *mou*, or a third of an acre of land. Because of this splitting of small parcels, land reform in itself could not solve the basic problems of agrarian economy, nor did it promote productivity in general. It certainly had favourable political effects for the government among those who have become owners of the parcels. The policy conformed to Article 8, particularly to Section 3, on "restricting and gradually eliminating rich peasant economy". The speed of the process as well as its methods are open to discussion.

Agricultural cooperatives were introduced in two stages to increase production. Elementary cooperatives were organized during 1952-1954. This was followed in 1956 by organization of "higher" types of cooperatives, similar to the Soviet *kolkhoz*. By joining such a cooperative (or by being recruited into one) the peasant's means of production, his land, animals, etc., were transferred from private to collective ownership. The transformation of the independent peasant households into single-management and common ownership collective farms gave rise to serious problems: indifference to common property, upsurge of the mortality rate of animals, and other signs of resistance on the part of peasants.

Rural communes were organized all over the country from 1958. Difficulties experienced during former stages of agricultural reforms did not prevent the Party leadership from embarking on

a much more ambitious programme, grandiose in vision, which promised not only to overcome all former difficulties, but also realize a comprehensive, all-round, all-inclusive socio-economic unit which would bring about total mobilisation of labour and the distribution of goods according to need—the ultimate communist goal [see this *Bulletin* No. 10, (January 1960)].

The communes showed a strong tendency to abolish not only private but also personal property as well as the family unit. It seemed that Article 8, Section 1, on the right of the peasant to own land, had definitely been superseded and that Article 96 on the protection of the family had undergone a basic change in interpretation. The organization of several tens of thousands of men and women in communes was intended to solve the serious shortage of labour and capital caused by the strained industrialization of the “Big Leap Forward”, which was to serve as a forced “take-off” for Chinese economy.

According to Professor Cheng Chu-Yuan the aim was to release some 90 million women from 120 million peasant households to take part in productive labour and at the same time to remedy the shortage of capital by cutting the peasants’ share in total agricultural income from 70 per cent (1956) to 30 per cent (1959). Investment was to be increased by adding 70 per cent of the total income so achieved. This gigantic scheme brought about the opposite of the proposed aim: the thorough-going regimentation of agricultural production led to a general crisis in Chinese agriculture.

Nationalization

Key provisions of the Constitution regarding means of production are Articles 5 and 10.

Article 5. At present, the following basic forms of ownership of means of production exist in the People’s Republic of China: State ownership, that is ownership by the whole people; cooperative ownership, that is collective ownership by the working masses; ownership by individual working people; and capitalist ownership.

Article 10. The State protects the right of capitalists to own means of production and other capital according to law.

The policy of the State towards capitalist industry and commerce is to use, restrict and transform them...

The transformation of “capitalist industry” was carried out carefully, gradually, and, unlike the expropriation of landowners, by payment of compensation.

The legal technique used to carry out the desired change was the establishment of joint state-private enterprises; thereby the means of production came to be jointly owned by their former owner and the State. The setting up of joint enterprises came to culmination in 1956. At the end of the year joint enterprises constituted 99 per cent of the private industrial establishments. Then the government assessed the total value of the private shares in the joint enterprises and announced that it amounted to 2.4 billion *yuan*, equivalent to one billion US dollars. The government started to pay off compensation for these shares, annually about 120 million *yuan*, equivalent to US \$50 million, to shareholders numbering about 1,140,000.

The payment of compensation was to continue until 1962. However, because of the economic crisis in 1962, and in order to assure the continued cooperation of the shareholders in production, payment was extended to 1965. Once the compensation is paid, the joint enterprises will become unequivocally the property of the State. By the establishment of joint enterprises the entire industrial production of the country was placed at the disposal of the State to be utilized under a unified economic plan. The former owners became government-appointed employees executing centralised plans; at the same time their know-how in management was assured for the purposes of these economic plans.

Legal Development

The Constitution of 1954 was intended to mark the beginning of a more orderly development in the legal life of the country after the revolutionary phase of turmoil and repression. A new stage of political stability and economic construction was to be accompanied by a gradual build-up of the legal system. This aim was hardly followed up. The Chinese legal system has only a few basic statutes on land, marriage, counter-revolutionaries, but codification is entirely missing. There is no criminal code, no civil code, no codes of procedure. What is more, the existing laws contain many vague and conflicting provisions. This lack of precise legislation and comprehensive codes was a subject of complaints during the "Hundred Flowers" period in the spring of 1957 when a number of prominent jurists, some of them Communist Party members, raised the issue of "no law to rely on" and pleaded for the establishment of a stable and elaborate system of law, as well as for less interference in the activities of the judiciary (see this *Bulletin*, Nos. 7, 8).

On August 3, 1957, the newspaper *Kwang Ming Jih Pao* claimed that some 4,018 laws and ordinances of the regime refute "the fallacious views of the bourgeois rightists that China had never paid essential attention to legislation and that there was no law among Government and judicial organs". The year before, however, Liu Shao-chi, then Chairman of the National People's Congress had promised in his political report to the Central Committee of the Communist Party of China (CPC) the systematic codification of a fairly complete set of laws and putting the legal system of the country on a sound footing.

The work of codification did not get further than the stage of promises, since, as Premier Chou En-lai stated in 1957, "it is difficult to draft civil and criminal codes before the completion in the main of the socialist transformation of the private ownership of the means of production and the full establishment of socialist ownership of the means of production".

The year 1957 brought the campaign called "letting a hundred flowers blossom and a hundred schools of thought contend", which, in Mao's own words, was "put forward in the light of the specific conditions existing in China and in response to the country's urgent need to speed up its economic and cultural development". It brought about a temporary increased measure of freedom of speech and, with it, increased criticism on existing conditions. Thus, e.g., Ku Chih-chung, a well-known lawyer and journalist in Shanghai, in citing Article 85 of the Constitution on equality before the law, Article 89 on freedom from arrest except on the basis of a court's decision, Article 87 on freedoms of speech, of press, of assembly, of association, showed that these and other provisions of the Constitution were disregarded, and stated that "everybody considers the Constitution useless paper". This statement was made in June 1957; two months later came the following denunciation from the Communist Party:

Ku Chih-chung made a shameless attack on the Constitution. He will learn that the Constitution protects the freedom of the People; but he will be disappointed if he hopes that the Constitution will protect the freedom of speech, press and assembly of traitors, counter-revolutionaries and rightist elements.

Ku Chih-chung and all other critics were obviously classed in the category of the latter, the "non-people".

In his speech "on the correct handling of contradictions among the people" made in February and released in June 1957, Mao Tse-tung defined the term "the people" as embracing "all classes, strata and social groups which approve, support and work for the

cause of socialist construction, while those social forces and groups which resist the socialist revolution . . . are enemies of the people". Criticism was obviously assimilated to "resistance to the socialist revolution".

Mao, acknowledging "certain contradictions between the government and the masses", proclaimed, as Stalin did, the intensification of class struggle on the way to constructing socialism and called for the use of dictatorship in order "to solve the contradictions between ourselves and the enemy within the country", viz., by suppressing them.

Indeed, the speech heralded a new "general line" of the Party and was followed on August 3, 1957, by a decree on internment camps for labour training. Those subject to labour correction include persons who have refused to be transferred to another job and those who interfere with the work of others without reason. [For comment on this decree, see this *Bulletin*, No. 7 (October 1957).] Somewhat belatedly and due to changes in the political outlook of the two countries, the same criticism was voiced by the Soviet government newspaper *Izvestia* in May 1964. It was said that in the campaign against so-called rightist elements, the decree of the Chinese State Council on labour correction gave administrative bodies the right to confine practically any Chinese citizen in a special camp for an indefinite period without investigation or trial. According to information given by *Izvestia*, many hundreds of thousands of people suffered from this crude violation of the elementary democratic rights and liberties of the citizen.

With this administrative measure of internment camps and the silencing of every criticism by the "rectification campaign", the stage was set to launch in 1958 the biggest economic venture of the Chinese Party: the people's communes.

The setting up and the subsequent transformations of the people's communes were accompanied by a permanent "class struggle" of varying intensity. The 8th Term 10th Plenum of the Central Committee in 1962 foresaw a long-term class struggle. Since that time it has been reiterated that there are still people who "do not change until they die and prefer to go to meet their god with a head of granite", as Mao Tse-tung said. Such men, explained the Peking *Daily Worker* of October 12, 1963, can do two things: "They may kill, cause fire and destruction, organize reactionary secret societies, or they may pretend to be progressive, penetrate deep, spread reactionary thoughts to corrupt the cadres and the masses of revolution and then grab power." The article

then went on to say that workers and peasants and even old party cadres are not exempt from contamination by revisionism and bourgeois ideas, which by now corrupted entire countries. Traces of harmful ideas are found in everybody; this must be combated.

Indeed, if Ku Chih-chung found the Constitution useless paper in 1957, what can be said on the observance of this fundamental law since 1957, when the use of ruthless force by the dictatorship of the proletariat has been declared a major means in the "correct handling of contradictions"? The Drafting Committee of the 1954 Constitution used to a great extent the example of Soviet constitutions. Since that time there has been a marked divergence in the legal development in the two respective countries. While the attempts to "put the legal system of China on a sound footing" started with the Constitution were abandoned as early as 1957, the USSR codified a considerable part of its legal system from 1958-1961 and Soviet jurists are engaged in reviving the concept of Socialist Legality, intended to become a universal concept for all Communist countries. Even by this limited measure the Chinese legal order shows glaring inadequacies. According to the *Izvestia* editorial cited above, the violation of Socialist Legality has become a practice in the State life of China. Party agencies play the part of a "commanding force" in the activities of the local organs of power, including the judiciary and the procuracy. If judges complained in 1957 of interference by the Party in their activities, this now assumes such proportions that the secretary of a district Party Committee sometimes tells a judge to leave the court and begins hearing cases in his place. The absence of elections for the People's Congress since 1958 is illegal. The highest legislative body has already exceeded by two years the term of office granted it under the Constitution. At the same time the legislature has not passed any major bills in recent years and holds its sessions, as a rule, behind closed doors.

The tenth anniversary of the Constitution finds the implementation of its provisions in a deplorable condition. The Constitution itself puts, by its "democratic centralism", a very high degree of centralized power in the hands of those in power. This centralized power was even further increased from 1957 by the setting aside of a series of Constitutional provisions. Whether by such an enormous concentration of power it became possible to achieve the aim of the Constitution to "banish exploitation and poverty and build a prosperous and happy socialist society" will be briefly reviewed in the concluding paragraph.

Planning

The establishment of joint enterprises in industry and the transformation of agricultural cooperatives into people's communes have provided the basis for an economy with highly centralized planning. The central planning committee, set up in 1952 and reorganised nearly every two years, worked according to the Soviet model elaborated in the period of industrialization under Stalin. During the first Chinese Five Year Plan the State economic planning system formulated and implemented its problems with great rigidity. In building up heavy industry and communications, considerable results were achieved. However, by 1958, when the whole economic power of the country was centralized in the hands of the political leadership and legal constitutional safeguards preserving the rights of the citizen were thrown overboard, planning completely lost touch with realities and it was supposed that, with this highly centralized all-embracing State system, everything could be achieved by these extremely powerful means and by mobilising hundreds of millions of people.

The inauguration of the "Big Leap Forward" in 1958 strained the economy to the utmost and overburdened it. The frequent raising of major industrial and agricultural targets caused the planning apparatus to fail in its basic functions. When an unprecedented famine and a stream of refugees to Hong Kong alerted the planners to the unrealities of their "Big Leap Forward" plan, and when they reviewed the balance of the three chaotic years 1958-1960, they lost confidence in production statistics. From 1961 no overall economic plan or statistics were published; only short announcements were issued on the increase in output compared to the previous year. The famine was alleviated by huge purchases of grain in Canada and in Australia, and by a reversal of all-out collectivization. Though the rural communes were maintained, the substance of the system has been completely altered. In the December 12, 1963, issue of *Red Flag*, the CPC theoretical weekly, Teng Tzu-hui, head of the village works committee of the Party Central Committee, wrote:

At the present stage the commune members (peasants) besides doing their work in the collective are allowed to carry on domestic industries and to use a small private plot of land; these private activities serve as a complement to the collective economy.

On the basis of Professor Cheng Chu-Yuan's *Communist China's Economy (1949-1962)*, the process of economic trans-

formation in China can be assessed in the following balance sheet.

The transformation of agriculture succeeded in the period of land reform which eliminated anomalies of land distribution (together with the landlord class as a whole). Difficulties arose from the moment when the government embarked on collectivisation of agriculture on the Soviet model, rather than following the Japanese example. Japan, with a denser population than China, by maintaining a private farming system and utilising intensive methods of cultivation, achieved a high acreage production compensating to a great extent for the shortage of arable land. Collectivisation, on the other hand diminishes the peasant's interest in production. Professor Cheng finally notes that the establishment of people's communes, by "overtaking" the Soviet Union in the construction of Communism, has let this trend go to its logical conclusion.

Agriculture is an unsolved problem in every Communist country. Collectivisation facilitates control over the major part of agricultural production, but diminishes the productivity of this sector, increasing at the same time the productivity of "private plots". Pushing collectivization and planning to the extreme not only encroaches on fundamental human rights, it also creates a vicious circle in economics. One may admit that the vicious circle is a particularly difficult one in the vast developing country of China. According to Professor Cheng, the key to this vicious circle lies in the fact that China has a backward economy with a high population and small capital resources. Inasmuch as agriculture constitutes the foundation of the national economy, no strict central planning system can function correctly. Meanwhile, since agriculture plays the decisive role, any one-sided development of industry will eventually be checked by the backward agricultural sector.

The example of China under its new Constitution points to two conclusions.

It shows that in a country where the rural population is predominant and most of the people live close to the bare margin of subsistence, leaving little room for capital formation, it is possible, by central, totalitarian control of the economy to launch a modern industrialisation plan and carry on a series of drastic transformations in the economic institutions. It also shows that totalitarian economic control may originally facilitate a take-off in economic development but cannot sustain its continuous development.

Planning faced with no legal limitations seems unable to resist the temptation to overstep the limits of reality and to overstrain the economy to the verge of collapse.

Apart from economic considerations, socialist transformation and changing the pattern of social stratification, originates new problems. After the elimination of landlords, rich farmers and capitalists, the State becomes the sole owner of the economy. The conflicts which arise now are those between the people and the new rulers.

The problem of how to eliminate excesses in centralised planning and to give more autonomy to local units and more rights to the individuals cannot be avoided.

There is a widely shared opinion among western scholars of Chinese law, now also joined by Soviet authorities, that since 1957, with the suppression of the "Hundred Flowers" movement and the emergency decree authorising detention without trial, the Chinese legal system has deteriorated in a way well-known from studying the history of other ruling Communist Parties. Such deterioration seems to come almost inevitably after the first years of economic "take-off", started by the new government when over-ambitious economic planners lead to economic disasters and to the complete abandonment of the elementary tenets of law. The personal rule of Stalin in the USSR from 1934-1953, the turn of the Chinese revolution in 1957, the "permanent emergency" in Cuba under Fidel Castro are outstanding examples in three continents. How far such deterioration can be remedied later on is still an open question with which the USSR and some Communist countries of East Europe are strenuously experimenting in their efforts to "de-Stalinize" their countries, and to strengthen Socialist Legality.

GROWING ROLE OF NATIONAL ASSEMBLIES IN EASTERN EUROPE

The constitutional development of East European countries showed in recent years a marked tendency to enlarge the field of activity of their respective National Assemblies. According to constitutional provisions in Soviet-type People's Democracies, National Assemblies are the highest organ of State authority. This provision has, however, remained until now only on paper. In fact, the Assemblies meet once or twice a year, for a few days, to listen to the proposal for next year's economic plan and to adopt it unanimously together with all the decrees enacted during the year by central State organs on the basis of their delegated authority. They were properly described by critics as "rubber stamp Assemblies".

This divergence between constitutional theory and political practice is now to be gradually eliminated, it is announced by statesmen and constitutional lawyers in these countries.

In an interesting and scholarly study, *New Elements in the Development of Socialist Constitutions*, published in 1962, Hungarian Professor István Kovács devoted a considerable part of his treatise to the problem of legislative assemblies. Viewing history in retrospect, he conceded that historical circumstances, particularly the lack of parliamentary traditions and Stalinism, were adverse to legislatures in fact playing the prominent role in the life of the State as written in the Constitutions.

A development towards the realization of the constitutional role of assemblies was started during the fifties in Poland and Yugoslavia, the author continues. In 1961 the idea of building up the federal Legislature as the central organ of both the State and of social organizations was incorporated in the new Programme of the Communist Party of the Soviet Union adopted at its 22nd Congress in Moscow. According to this Programme the USSR Supreme Soviet *should* become in due course the supreme integrating organ for all activities of state organs as well as of social self-management.

The development of National Assemblies is expected to continue. In Professor Kovács' view, in order to realize the claims raised,

reforms to be carried out should include a reshaping of the whole electoral system. Further on, National Assemblies should be permanently active, perhaps even with deputies devoting their activities entirely to their legislative tasks, and in "much closer contact with the broad masses of the people", i.e., with the electors. The author advanced even the possibility that by delegating groups of members to each other's National Assemblies by "mutual representation and control", Socialist States may achieve a kind of "internal co-ordination", without any supra-state international body.

Any substantial role of the National Assembly immediately raises, however, the problem of the relationship between the Legislature and the ruling Communist Party of the country. This relationship, it has been held, is better left completely vague. The Communist Party as the supreme social organization in a country directs all State and social organizations by *political* and not by *legal* means. This *de facto* situation is supposed to have only one legal aspect: the reference in the Constitution to the "leading role" of the Party. Based on the blank authorization of its "leading role", the Party permeates by its directives practically all aspects and phases of the activities of State and social organizations. Attempts to codify this "leading role" are bound to lead to a limitation of the all-embracing principle of leadership and as such, according to Kovács, should be rejected.

It is true that the precise definition of rights and duties always limits the arbitrary use of power. To impose such limitations on power has been for centuries the aim of those who wanted a "rule of law and not of men". Events which have occurred in East European countries since the publication of the book in question seem to justify some of its general propositions on constitutional legal techniques. On two fundamental issues, however, namely, on "internal co-ordination" and on the problem of Parliament-Party relationship, the author's cautious reformism seems to have missed the point. The states of East Europe, instead of moving closer together for "internal co-ordination" in constitutional or economic matters, manifest a growing desire for more independent action. Contacts between Legislative Assemblies are assured only by mutual visits of parliamentary delegations. The idea of any kind of "internal co-ordination" receded into the realm of unreality for the foreseeable future.

On the other hand, the following short survey will show that attempts to enlarge the powers of National Assemblies in the

life of the State are announced in countries of East and Central Europe.

Poland

The 1952 Constitution of the People's Republic of Poland in its Article 15 contained the usual formal declaration on the National Assembly (the *Sejm*) as the "highest agency of state power", modelled on the 1936 Soviet Constitution. Until 1955, however, the National Assembly acted at its short semi-annual sessions only to approve legislation enacted on delegated authority. In 1955 the internal working organization of the *Sejm* underwent major readjustments, rendering it more capable of considering legislation as well as merely passing it. In subsequent sessions during 1956 great efforts were made to increase the *Sejm's* prestige and powers and to make it the main workshop of legislative activity. A new electoral law was enacted. In this law, the pledge made by Gomulka that people would be allowed "to elect and not only to vote" was in effect reduced to choosing between candidates placed on the official single-ballot list. The number of candidates on this single list was, however, larger than the number of seats, and the voters therefore received a limited choice among the official candidates. Demands that the National Assembly should meet throughout most of the year, both in plenary sessions and in committees, have been satisfied since the elections of 1957. Besides this increased role for the *Sejm* in legislating, the Chamber of Control for State Finances has been re-established as an organ of control, subordinated only to the *Sejm*, to supervise the State budget and economic plans, as well as the implementation of provisions for the protection of public property and financial discipline. This solution has much in common with the classical financial control organs of a parliamentary regime.

In the last few years the continuous functioning of the *Sejm*, without really challenging the paramount power of the Executive, affords an interesting example of a Communist type of Parliament elaborating its own procedures and serving as a nation-wide forum for discussion. The development of "socialist democracy" continues to figure in the Programme of the Polish Communist Party, adopted at its Congress in June 1964. Wladyslaw Gomulka, First Secretary of the Central Committee of the Party, in his report to the Congress pledged further consolidation of the role and significance of the *Sejm*, stressing its controlling functions:

It is advisable that the Government present the plans and budget to the *Sejm* at least two months before the end of the year, in order to enable every deputy to gain a precise knowledge of the documents and to prepare for effective work at the session of the *Sejm* commissions...

With this development, Poland no doubt gives one of the examples in East Europe for "fraternal countries" to follow in developing the work of their National Assembly.

Yugoslavia

Yugoslavia played and is playing an outstanding role in the attempts to build up a new type of Parliament as the central state organ. *Bulletin* No. 17 (December 1963) considered the Yugoslav Constitution of April 7, 1963, from the aspects of constitutionality and legality. It came to the conclusion that legal safeguards incorporated in the new Constitution, culminating in the establishment of a Constitutional Court, are of considerable value from the viewpoint of the Rule of Law. This Constitution established a multicameral Federal National Assembly in which the Federal Council is flanked by four specialized Councils: for economics, education and culture, social affairs and public health and for politico-organizational affairs. According to Article 163 of the Constitution, the Federal Assembly is the supreme organ of state power and at the same time of social self-management. Its Standing Orders adopted in February 1964 were elaborated in order to assure the effective participation of deputies in legislation. Bills are presented, not in complete form but only in outline, and elaboration in the Assembly and its committees is expected in the course of prolonged exchange of views and criticism. The definitive text to be voted upon is drafted after these debates. Edvard Kardelj, President of the National Assembly, made an important policy statement in the course of the debate of the Standing Orders (*Tanyug*, February 4, 1964). In a historical retrospect he outlined developments since World War II. His analysis was that in the post-war period, because of political circumstances, the Executive had wide powers, and in the struggle against forces of the old system democratic forms were restricted. This implied also that the Communist Party has exercised the dictatorship in the name of the proletariat. The Federal Assembly was not an independent body. This should now change. Rejecting both the Western type of Parliament as "classical bourgeois" and that of the dictatorship of the proletariat as "bureaucratic", Yugoslavia, Kardelj said, aims at realizing "direct socialist demo-

cracy" in which the Federal National Assembly should become *really* the highest organ of political power, as proclaimed by the Constitution, "an autonomous working body in which all opinions whose point of departure is socialist society and not a reversion to the past, must find expression on terms of equality".

Concerning Party-Parliament relationship, he announced that the League of Communists of Yugoslavia (the Party) and the Socialist Alliance (the People's Front Organization) should continue to fulfil their tasks as educational and political organizational factors to create a socialist "consciousness" among citizens. They should no longer interfere by command or regimentation in the work of the Assembly. Their position as an intermediary between the people and the authorities should cease.

The right of the Socialist Alliance to put forward nominations for important posts in administration was laid down precisely in the 1963 Constitution (Articles 208, 221, 223).

On the other hand, one has to take into consideration that the Constitution does not contain any precise provisions on the political activity of the Party. Section VI of the Preamble states in general that "by the force of historical evolution, the League of Communists of Yugoslavia has become the organized leading force of the working class and the toiling people in the construction of socialism. By its ideological and political orientation the League is the principal promoter of political activities in the conditions of socialist democracy and social self-government..."

This vague formulation leaves, according to Krivič and other Yugoslav constitutional lawyers, complete autonomy for the Communist Party in its basic political activities and an unchallenged monopoly of political power. Thus it is rather doubtful that the National Assembly could become a really independent organ without a change in this unlimited political power of the Party. In any event, it will be interesting to follow the development outlined above and to see how far the Yugoslav Federal National Assembly will be able to achieve an independent position. Meanwhile the Yugoslav experiment did not fail to impress other Central European countries under Communist rule. The steady improvement in inter-State and inter-Party relations in this part of Europe and visits to some of these countries by a delegation of the Yugoslav National Assembly headed by its President Kardelj may also have contributed to the fact that these countries devote growing attention to expanding the role of their National Assemblies.

Czechoslovakia

Before the national elections in June 1964, reported in *Bulletin* No. 19, President Novotny expressed the need to enhance the role of the National Assembly "as a working institution of deputies" and as a supreme supervisory power vis-à-vis all State bodies. On May 19, 1964, after the conclusion of discussions with the Yugoslav Parliamentary delegation, which left the country on May 14, the Central Committee of the Communist Party of Czechoslovakia published a decision "on augmenting the activities of the National Assembly" which summed up and elaborated the policy statements of the President quoted above. According to this decision, the work of the National Assembly must be urgently developed in the new election period in the following directions: (1) the exercise of its control over all State agencies through a system of effective measures; (2) the thorough implementation of the principle of the Constitution that the National Assembly is the supreme organ of State power in Czechoslovakia and the sole comprehensive legislative body, elected to direct the whole system of elected and executive organs. To achieve this, it was conceded that it will be necessary to implement more fully several key articles of the Constitution. For instance, it will be necessary to call plenary meetings of the National Assembly at regular intervals and to publicize these meetings fully. The Premier will submit regular reports to the National Assembly on the Government's activities. Assembly deputies will have more opportunities to ask questions and there will be more time available, because of longer and more frequent plenary meetings, for members of the Government to reply orally to questions. The Praesidium of the National Assembly will also submit regular reports on its activities and on any measures adopted between meetings of the National Assembly, since, when not in session, the jurisdiction of the Assembly will continue to be delegated to its Praesidium. The Praesidium directs also the development of the Assembly's foreign relations. This involves contacts with other parliaments and international organizations.

Bulgaria

In Bulgaria the December 1962 session of the National Assembly enacted a law by which the Assembly increased its own role in legislation by bringing before Parliament matters which had hitherto been dealt with through decrees of the Council of Ministers. The preparation of a new Constitution was announced and pro-

mises were made for regular and prolonged meetings of the National Assembly (see *Bulletin* No. 15). These promises, however, were not kept, and the short semi-annual meetings of the Assembly continue to approve *en bloc* decrees issued by the Praesidium on the basis of its delegated authority.

Recent meetings of National Assemblies

Sessions of the Rumanian Grand National Assembly in December 1963, of the Bulgarian National Assembly in June 1964, of the Hungarian National Assembly in June 1964, and of the Supreme Soviet of the USSR in July 1964 showed how strong the *vis inertiae* of established procedures is. These Assembly sessions, lasting a few days, were still limited to listening to policy statements of prominent members of the Executive and to passing after short and formal debates the bills submitted to them. True parliamentary work remained scanty, though signs pointing to efforts in this direction can certainly be observed.

The Chambers of the Yugoslav National Assembly and the Polish *Sejm* were in 1964 practically continually in session, debating in committees and in plenary sessions a series of important laws.

Trends towards increasing the role of Legislative Assemblies, stronger in some and weaker in other countries, as outlined above, form part of the general effort to modernize Communist legal systems; they may lessen the gap existing between the requirements of the highly industrialized European society of the sixties and also legal techniques moulded basically under a rigidly regimented and wasteful industrialization programme of the early Soviet Five Year Plans.

THE GAMBIA — RETROSPECTIVE COLONIAL LEGISLATION

The use made of retrospective legislation has long been a subject of concern to those interested in the maintenance of the Rule of Law, and is generally to be condemned on principle. An Act of Attainder is always to be deplored; an Act of Indemnity not necessarily so. (See, e.g., Clause I of the *Conclusions* of Committee III of the International Congress of Jurists in New Delhi, 1959).

The use of retrospective legislation to validate what was invalid does not always admit of clear-cut acceptance or censure. The upheaval that can be caused by failure to observe some technical requirement, discovered long after, must always be weighed against the importance of that technical requirement in relation to the public interest. It is also important that this be done by a properly representative legislature, and the steam-roller technique against a helpless minority is to be deplored. The gravest problems arise where a legislature retrospectively legalises the election of its members, divided usually into Government and Opposition.

From this point of view the recent litigation in England on the retrospective validation of the elections in the Gambia is of great interest. In this case the colonial power came to the rescue of the invalidly elected majority and legalised their position. Whatever the internal rights and wrongs in terms of the true interests of the Gambia on the eve of its independence, this action is sure to be viewed in other countries as a justification for their own course of conduct if they decide in circumstances of political difficulty to extricate themselves from an awkward legal situation by recourse to retrospective legislation. Western Nigeria, which had, after an adverse judicial decision, retrospectively validated the position of Chief Akintola as Prime Minister, was not slow to point the comparison in June 1963, immediately upon the promulgation of the British Order-in-Council for the Gambia.

The Gambia case is also of immense interest to those who follow the evolution of the British Commonwealth in its steady progress towards decolonisation. The relationship between dependent territories and the British Government and Parliament has long

been a subject of intricate legal and political subtleties. Some of these complexities have been given an airing in the courts in the recent litigation on the Gambian elections. Progress towards decolonisation is one of the burning topics of the day, and the use of retrospective legislation raises fundamental issues; this article is designed to explain the legal issues involved.

The Colony and Protectorate

In February 1965 the protectorate and colony of the Gambia are due to become an independent State, the last British dependency in Western Africa to do so. In the course of its progress towards independence one of Britain's ever-dwindling number of colonies has thrown up a constitutional problem of far-reaching importance. As is common in English law the technical question involved is one of extreme simplicity, *viz.*, the interpretation of a statute, but in reality a basic question of constitutional law has arisen behind this deceptively simple question.

The constitutional position of a protectorate is said to differ from that of a colony in British constitutional law and in addition the position of colonies also varies according to the type of colony. A protectorate is under the authority of the British Crown (i.e., government), and although in practice there may be little difference between the administration of some colonies and some protectorates, the legal distinction between the two is that, while a colony is part of Her Majesty's Dominions, a protectorate is not. The powers of the Crown in relation to protectorates are governed by the Foreign Jurisdiction Acts, 1890 to 1913. In 1910 it was held by the English Court of Appeal in *R. v Crewe, ex parte Sekgome* that an act of the Crown in a protectorate in relation to a native inhabitant is an act of state which cannot be questioned in an English court. In this sense an act of state simply means an exercise of power over which the courts decline jurisdiction and as such essentially resembles the notion of political questions as applied by the Supreme Court of the United States and the notion of *acte de gouvernement* as applied by the French Conseil d'Etat.

In a colony, on the other hand, the inhabitants are citizens of the United Kingdom and Colonies and as such British subjects, provided, of course, that they satisfy the rules applicable to the acquisition of citizenship. The acts of the Crown in a British colony are subject to the jurisdiction of the English courts, in sharp contrast to the position in a protectorate.

The future independent State of Gambia will be made up of what is now the colony on the coast and the protectorate stretching inland.

The 1962 Elections to The House of Representatives

As a step in the process of preparing the colony and the protectorate, which were administered together, for independence, elections to the legislative assembly, the House of Representatives, were held in 1962. These elections were held under the new Constitution, which granted internal self-government. The procedure laid down for holding the elections in the protectorate was not followed, and the elections were held on the basis of a Register of Voters which was held to be invalid by the Gambia Court of Appeal. This position was accepted by the Crown, and in the result the election of twenty-five members was held to be invalid and the House of Representatives improperly constituted. The defect in the Register was that it should have been a revision of the lists compiled in 1959, but it was in fact based on new lists compiled in 1961. Mr. Duncan Sandys, the Secretary of State for Commonwealth Relations and the Colonies, told the British House of Commons on May 28, 1963, that it would "obviously have been improper to leave this wholly unrepresentative rump" (the members for the colony and the four nominated chiefs' representatives) to determine how a new register should be compiled. The British Government was faced with the fact that no valid new elections could take place without a new register, and it was decided to pass an Order-in-Council retrospectively validating the 1961 register and therefore the 1962 elections. This in fact was done on May 30, 1963, when the Gambia (Validation) Order-in-Council, 1963, was promulgated. This action raised the important question of constitutional law, whether the Crown had such power. The results of the election were that out of 32 seats, the People's Progressive Party, hitherto the Opposition, won 18, the Democratic Congress Alliance, one, and the United Party, the former Government Party, 13.

The Constitutional Position

The colony of Gambia is a settled colony, i.e., territory inhabited by settlers and which had prior to settlement no proper system of law. Until 1887, changes in the law of a settled colony could only be effected by an Act of the United Kingdom Parliament, but the

British Settlements Act of that year gave the Crown power to legislate for British settlements. Further, the Crown's prerogative powers to grant representative institutions to a settled colony still existed, but in such a case, once a legislature has been set up, the Crown may no longer legislate for the colony, as long as the representative legislature continues to exist and to function. The importance of the 1887 Act for the purposes of this article is that it gave the Crown power to alter the constitution of a settled colony. It will be noted that the defect existed in the protectorate of Gambia and there was apparently no defect in the elections within the colony; hence the reference by Mr. Sandys to the "unrepresentative rump", which consisted of eleven members. On June 29, 1964, Mr. Mamadi Sabally and Mr. Ebrima Daour N'jie brought an action in the Queen's Bench Division of the High Court in London, claiming that the Gambia (Validation) Order in Council, 1963, was "*ultra vires*, invalid, null and void or of no effect in law". Both Mr. Sabally and Mr. N'jie are members of the United Party of Gambia, which had been defeated in the election.

On July 20, 1964, the Court of Appeal unanimously affirmed the judgment of the High Court dismissing the action. The result of the election therefore stood retrospectively validated. Leave to appeal to the House of Lords was refused. The reasons given by Lord Denning, the Master of the Rolls, in the only judgment delivered, concern issues of wide general importance for dependent territories in the British Commonwealth. Lord Denning dealt in his judgment with the position of the Crown vis à vis the courts in a protectorate and of the Crown's powers in relation to settled colonies under the prerogative and under the British Settlements Acts, 1887 and 1945. He pointed out that acts done in a British protectorate are acts of state, but his decision does not appear to be based on that ground. He also held that legislative institutions had ceased to exist and function in the Gambia when the 1962 elections were held to be invalid. This observation, though of considerable importance, is clearly not the basis of his decision, since the Crown had acted, not under the prerogative, but under the powers conferred by the British Settlements Acts. The first point to consider here was whether these Acts, which were supposed to apply to settled colonies, also applied to protectorates; it will be recalled that it was the elections in the protectorate that had been invalidated. In Lord Denning's view, Section 2 of the 1887 Act was in sufficiently wide terms to legislate not only with regard to the actual British settlement in question, but also with regard to the adjoining protectorate.

Lastly, the point arose whether the wording of Section 5 was sufficient to enable the Crown to make orders having retrospective effect. The Section enabled the Queen in Council to "make and when made, to alter and revoke orders for the purpose of this Act". It was held that there was no basis to the contention that this did not authorize retrospective legislation. There is no doubt, of course, that the British Settlements Acts could specifically authorise retrospective legislation; the question before the court was one of pure interpretation, viz., whether the Act had in fact done so by general words.

It thus emerges that the Crown may legislate for a protectorate, at least when it is administered together with a settled colony, on the same basis as for the colony. It also emerges that this power can be retrospective in operation. Whether the Crown chooses to do so will depend on political considerations which are of extreme importance and which will be studied closely by those who follow the progress of the dependent territories of the British Commonwealth towards independence. Already the Gambia Independence Conference has ended in London on July 30, 1964, in a walkout by the Opposition delegates, led by a former Chief Minister. The Opposition believes that the election through faulty registers has brought to power against the general will the present Prime Minister and Cabinet of the Gambia. The Opposition is asking for new elections before independence but it does not appear likely that these will be held.

Stripped of legal technicalities, of which there are many, the real issues behind an affair of this kind are: (1) whether the use of the wrong register was a means of rigging the election, and (2) whether, if the error was made in good faith, it was sufficiently substantial to raise doubts whether the election was a real reflection of the wishes of those entitled to vote under the proper Register in operation. These are matters which aggrieved parties are entitled to raise if they have any basis on which to make such allegations. The second question appears to be the vital one in the Gambia and it is open to serious question whether retrospective legislation validating the election is demonstrably in accordance with the result that would have been reached in any event.

POPULAR REPRESENTATION IN THE IRISH PARLIAMENT

The last *Bulletin* (No. 19) of the International Commission of Jurists contained an article on "The Election Laws of Japan". This article was a study of the complex provisions in the Japanese election laws which have been meticulously designed to prevent electoral abuses. While the electoral provisions in the Japanese laws may perhaps be more detailed than those in most other democracies for the historical and other reasons given in that article, they nevertheless reflect the attention which many written constitutions based on the democratic principle of popular representation pay, notwithstanding differences of emphasis, to the problem of ensuring that the people are fairly and truly represented in the legislature.

The aspect of the problem emphasized in the Japanese electoral laws is the elimination of electoral abuses. In this *Bulletin* the Commission invites attention to another aspect of the same problem emphasized in the Constitution of the Republic of Ireland, namely, the ensuring, so far as it is practicable, that representation is adequate and that the ratio between the number of elected members and the population for each constituency is the same throughout the country.

The relevant provisions of the Irish Constitution are as follows: Article 16 (2) of the Constitution provides:

- 1° Dáil Eireann (The Chamber of Deputies) shall be composed of members who represent constituencies determined by law.
- 2° The number of members shall from time to time be fixed by law, but the total number of members of Dáil Eireann shall not be fixed at less than one member for each thirty thousand of the population, or at more than one member for each twenty thousand of the population.
- 3° The ratio between the number of members to be elected at any time for each constituency and the population of each constituency, as ascertained at the last preceding census, shall, so far as it is practicable, be the same throughout the country.
- 4° The Oireachtas (The Parliament) shall revise the constituencies at least once in every twelve years, with due regard to changes in distribution of the population, but any alteration in the constituencies shall not take effect during the life of Dáil Eireann sitting when such revision is made.

- 5^o The members shall be elected on the system of proportional representation by means of the single transferable vote.
- 6^o No law shall be enacted whereby the number of members to be returned for any constituency shall be less than three.

Pursuant upon the recommendations of the Oireachtas, an Electoral (Amendment) Act was passed in 1959. It was an Act to fix the number of members of Dáil Eireann, to revise constituencies and to amend the law relating to the election of such members. It contained a Schedule setting out the number of members which each constituency could return. In determining the revision of constituencies, the Oireachtas based its decisions on the population statistics revealed in the last preceding census, namely, that of 1956.

Section 2 of the Act provided that Dáil Eireann shall after its dissolution, which was due to occur after November 25, 1959, consist of 144 members. Section 3 provided that those members shall after the aforesaid dissolution represent the constituencies specified in the Schedule to the Act.

The Schedule to the Act listed 39 multi-member constituencies, each returning 3-5 members. On the basis of the 1956 census, the ratio of members returned to the population in the different constituencies varied between 1: 16,575 in the case of Galway South to 1: 23,128 in the case of Dublin South (West). The national average ratio was 1: 20,127.

Although this variation was not very great having regard to similar variations in other countries, the validity of the Electoral (Amendment) Act 1959 was nevertheless challenged before the High Court in the case of *O'Donovan v. the Attorney-General* (1961). In this case, the plaintiff, a citizen of Ireland, sought a declaration that Sections 3 and 4 of the Electoral (Amendment) Act 1959 and the Schedule thereto were invalid inasmuch as they were repugnant to the Constitution and in particular to the provisions of Article 16 set out above. The plaintiff's complaints were: (1) that the ratio between the number of members to be elected, after the Act of 1959 comes into operation, for each constituency and the population of each constituency, as ascertained at the 1956 census, is not, so far as it is practicable, the same throughout the country as is required by the terms of Art. 16 (2) (3^o) of the Constitution; and (2) that the Oireachtas did not, in revising the constituencies, have due regard to changes in distribution of the population as it is required to do by the provisions of Art. 16 (2) (4^o) of the Constitution cited above. In particular,

he said that due regard was not had to the increase of population within the geographical County of Dublin nor to the decrease of population on the western seaboard.

As regards Dublin City and County, the 1946 census indicated a population of 636,193 while the 1956 census indicated 705,007, an increase of 68,814. While the Act of 1947 gave that area 30 deputies, the Act of 1959 gave it only one more. It was argued that on the basis of the national average of deputies there should have been an addition of 3 deputies. On certain other bases of approach that area should have had 4 additional deputies. The argument in regard to the decrease in population on the western seaboard was similar.

In a long and considered judgment delivered by Mr. Justice Budd, the High Court found for the plaintiff on both grounds and accordingly declared Sections 3 and 4 of the Electoral (Amendment) Act 1959 repugnant to the Constitution and therefore invalid.

Following upon the finding that the Electoral (Amendment) Act 1959 was invalid, Parliament passed a new Bill entitled "An Act to Fix the Number of Members of Dáil Eireann and to Revise their Constituencies and to amend the Law Relating to the Election of such Members". This Bill, which contained many modifications introduced in view of the judgment of the High Court in *O'Donovan v. Attorney-General*, was referred under Article 26 of the Constitution by the President to the Supreme Court for a decision on whether or not it was repugnant to the Constitution or to any provision thereof. The question was argued before five Judges of the Supreme Court, who, after due examination of the provisions of the new Bill in the light of, *inter alia*, the same principles which were applied in the *O'Donovan* case, namely equality as far as was practicable, held that the new Bill was not repugnant to the Constitution.

A STAND ON THE RULE OF LAW IN TANGANYIKA

In common with a number of other East African countries, Tanganyika suffered a serious army mutiny in January 1964. On May 11, 1964, 14 non-commissioned officers and men were sentenced by a special military court for their part in the mutiny. One sergeant was sentenced to 15 years imprisonment, a sergeant and nine others to ten years, and three others to five years each; five others were found not guilty. The mutiny was in connection with pay, promotion and prospects. On May 12 a strong editorial was published in *The Nationalist*, the newspaper of the ruling party, the Tanganyika National African Union, and the sentences were sharply criticised as too lenient. On May 13, President Nyerere issued a statement through the Government Information Services in which he stressed that any attempt to interfere with these sentences would be to do exactly that for which the soldiers have been condemned, the abrogation of the Rule of Law. This statement is all the more noteworthy in that President Nyerere said that the Government shared the feeling that the penalties imposed bore no relation to the seriousness of the offences and the damage which was done to the country by the mutiny.

President Nyerere's statement said: "The soldiers knew that there were laws about the way they should behave and that there was machinery to deal with any grievances they had. By leading a mutiny the convicted soldiers invited people to break the peace and to abandon law. We saw something of the results of the absence of Law in the succeeding hours. The Rule of Law is the basis on which rests the freedom and equality of our citizens. It must remain the foundation of our State. We must not allow even our disgust with the mutineers to overcome our principles."

The Presidential Commission on the Tanganyika Constitution

In February 1964, the *Tanganyika Gazette* by General Notices invited members of the public to submit memoranda on the subject of suggested changes in the Constitution of Tanganyika and of the Tanganyika National African Union (the ruling Party) and in the practice of government that were necessary, in order

to bring into effect "a democratic one-party State". Memoranda were to be sent to the presidential commission.

In response to this invitation, the President of the Tanganyika Law Society wrote to the Presidential Commission on April 22, 1964, setting out the principles which his Society felt should govern the Commission in its recommendations. This letter amounts to a strong assertion of the principles underlying the Rule of Law and is of much wider interest than the territorial limits of Tanganyika itself. The International Commission of Jurists is pleased to publish by kind permission this affirmation of constitutional standards from the professional association of practicing solicitors in Tanganyika. After an opening paragraph explaining the occasion for the letter and referring to the Notices in the *Tanganyika Gazette*, the letter reads as follows.

"As lawyers our first concern is naturally to ensure the preservation of the Rule of Law and the independence of the Judiciary. We regard these two concepts as touch-stones of a representative democracy. We feel that the concept of a representative democracy and the concept of African Socialism are not irreconcilable. The two can co-exist as complimentary forces.

"To take the Rule of Law first, we would emphasise that it is only by preserving this that we can have a peaceful and well ordered society. Two of the greatest human ideals underlie these concepts. Firstly, it implies that all power in the State should be derived from and exercised in accordance with the law. This will ensure that there is no arbitrary use or abuse of power. Secondly, it will ensure respect for the extreme value of the human personality within the framework of the law. Without the one we can not have the other. The authors of the Universal Declaration of Human Rights stated in the Preamble to this basic instrument of human freedoms, 'It is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.'

"The Constitution should provide that, except during a period of emergency, legislation should as far as possible be delegated only in respect of matters of economic and social character and that the exercise of such powers should not infringe upon fundamental human rights. In all cases of the exercise of emergency powers, any person who is aggrieved by the violation of his rights should have access to the courts for determination whether the power has been lawfully exercised. As Albert Camus had occa-

sion to comment in *The Fall*, 'The worst of all human tortures is to be tried without law.'

"Fundamental human rights are not peculiar to any particular political system, country, race or community. They are something basic. All human beings in whatever country desire to lead peaceful well-settled lives and the Government must respect this desire and to this extent the Government must limit its power. 'The theory of fundamental rights implies limited Government. It aims at preventing the Government and legislature from becoming totalitarian, and in doing so it affords the individual an opportunity for self-development.' By incorporating these rights in the Constitution we ensure their strict enforcement.

"We regard the following as the fundamental and inalienable rights of Mankind:—

1. The Right to Life
2. Freedom from Inhuman Treatment
3. Freedom from Slavery
4. The Right to Liberty
5. Cultural and Educational Rights
6. The Right to Property
7. Freedom of Expression
8. Freedom of Peaceful Assembly and Association
9. Freedom from Discriminatory Legislation
10. Freedom of Worship.

"A provision should be incorporated in the Constitution stating that all laws which are repugnant to or inconsistent with or take away or abridge the fundamental rights are null and void.

"The second cardinal principle of the Rule of Law is the irremovability of the Judiciary who must guarantee security of tenure until death or retirement at an age fixed by statute. Safeguards must be provided against the arbitrary removal of judges. Such removal should only take place under exceptional circumstances and then only after the matter has been lawfully considered by a body of judicial character.

"The High Court must have unfettered power to safeguard and enforce the rights guaranteed under the constitution. To this end, the particular remedies such as the writs of habeas corpus, certiorari and mandamus, etc., available under all democratic legal systems should also be available here.

"The law must not be the preserve of the rich. If we want to produce a truly representative democracy, we must ensure that all rich and poor have equal access to the law. The State must

set up machinery to provide adequate legal advice and representation to all those threatened as to their life, liberty, property or reputation who are not able to pay for it.

“ With regard to the division of power, we would categorically state that power of a public authority being held in trust for the people, there should be no division thereof between two bodies one of which is purely political. We have no objection to both the National Assembly and the National Executive of TANU continuing in existence provided there is no division of power between them and that the National Assembly remains the sole seat of power. As a matter of Constitutional provision TANU shall be the only political party.”

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