

*FOR THE RULE
OF LAW*

***Bulletin
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International
Commission
of Jurists***

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ASPECTS OF THE RULE OF LAW

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FOREWORD

This issue of the *Bulletin* contains eight articles, all of them on subjects of topical interest.

Fears expressed in recent years over public security in their country by Australians have been, at least partly, responsible for the passing of an Act to amend the Crimes Act; an analysis of this amending Act, which deals with crimes such as treason, treachery, sabotage and espionage, forms the basis of the first article.

Three articles explore different aspects of fundamental human rights. In the article on Ceylon the question of the Tamil minority and its problems is closely examined, while the article on the electoral enfranchisement of women in Switzerland discusses a matter of vital interest to all countries in which universal suffrage has not yet found a place. The third article describes the proceedings of the first two cases to come before the European Court of Human Rights.

In Germany to-day world attention has been focussed on the Berlin crisis; in an article on the Labour Code of East Germany attention is drawn to another, but perhaps less dramatic, important issue in divided Germany, namely that of labour relations and the rights of workers vis-à-vis their employers in what is called the People's German Democratic Republic.

There have been a number of consequential criminal trials during the year of international interest. An article about the trial in Ethiopia of certain Army Officers, involved in the abortive "coup d'état" in December 1960, was formulated by Professor Edvard Hambro who went to Ethiopia as the Commission's special observer at the trial.

The article on Senegal contains a most interesting account of the Judiciary in this newly-independent African State and reveals what can be done by the careful and intelligent blending of certain positive features of the Common and Civil Law systems.

Finally, in a world becoming increasingly concerned with crime and social problems it is illuminating to study in our last article how the Soviet Union has in recent times extended the category of those crimes punishable with death; this article also reviews current legal research undertaken at an international level concerning the death penalty.

November 1961

Sir Leslie Munro
Secretary-General

CRIMES AFFECTING PUBLIC SECURITY IN THE COMMONWEALTH OF AUSTRALIA

In September 1960, Sir Garfield Barwick, the Attorney-General in the Australian Commonwealth (Federal) Government, moved in the House of Representatives of the Commonwealth Parliament for the second reading of a Bill to amend the Commonwealth *Crimes Act*; this Bill as amended finally passed the Parliament in December. During the interval, there were widespread public discussions, protests, strikes, deputations, letters to the press from lawyers and law teachers, and some bitter debates in Parliament in which disorderly scenes occurred; these incidents concerned provisions in the Bill relating to treason, treachery, sabotage, espionage and the breach of official secrets. Such offences constitute part of the limits of freedom of speech and activity touching political affairs in a democratic system; hence the degree of excitement caused by the new proposals. Extensive amendments were made in the course of the parliamentary debates, some initiated by the Attorney-General and some by the Opposition.

The Australian Commonwealth Parliament, like the Congress of the U.S.A., has a specific list of powers, the undefined residue of powers being vested in the parliaments of the six States. The Commonwealth's powers do not include general control of the criminal law, which is reserved to the States. But the Commonwealth Parliament has an incidental power to create criminal offences in the course of exercising its other specific powers, and to protect the constitutional system of the Commonwealth against treason, sedition, etc. It is a subject of dispute whether any part of the English Common Law of crime, which was inherited by the Australian States in the 19th century, has application in the federal field; the predominant view is that there is no "Federal Common Law" of crime. Most Commonwealth statutes create offences, usually minor in type. But the more important types of Federal offences are gathered together in the Commonwealth *Crimes Act* 1914 — 1960. In the following notes, the contentious new sections are referred to by the numbering which they will have in the *Crimes Act* when reprinted as amended.

First, treason, punishable with death. Section 24 replaces an earlier short provision with a list of five main heads. The first two deal with attacks on the Sovereign and his heir or Queen Consort; the next three deal with levying war against the Commonwealth, or assisting "by any means whatever, with intent to assist" an enemy of the Commonwealth, or instigating foreigners to invade the Commonwealth. These provisions were taken from the Queensland Criminal Code of 1899, which was based on the proposed codification recommended by the English Commission, which in turn built on the Statute of Treasons of 1351, on amending Acts of 1795, 1817 and 1848, and on the extensive judicial exegesis by which the ancient statutory law, based on purely feudal principles, had been brought into some consonance with the circumstances of a modern state. The English Commission gave no reasoned grounds for its provisions on treason, merely remarking that they reproduced the substance of the old law. The Commonwealth Government should have studied the biting observations on the shape of the English law of treason by Sir James FitzJames Stephen in his *History of the Criminal Law* (Vol. 1, pp. 245 ff.), before using so dubious a model. However, it is probable that the new provisions will be interpreted in accordance with the liberal traditions which English courts have built up in their administration of this part of the law, and in particular it is certain that no jury would convict for such offences unless the accused had a "treasonable intent" in the popular understanding of that phrase. In practice, it is probable that prosecutions will be unusual except in time of actual war, and even then it is usual for emergency legislation to create summary offences having substantially the same content but lesser punishments, under which proceedings are taken in preference to indictments under the *Crimes Act*.

Next, Section 24AA, creates a wholly new offence of "treachery", an expression previously unknown to the law of the British Commonwealth; maximum penalty, 15 years imprisonment. This covers three distinct types of offence, and it is a weakness in the draftmanship that such disparate circumstances should be included within the one interlocked Section. First, there is the offence of overthrowing the Constitution of the Commonwealth or of a State or of a "proclaimed country" (which is explained below) by revolution, sabotage, force or violence; except for the provision as to "proclaimed countries", this overlaps to a considerable degree with the existing offences of treason and sedition. Secondly, the kind of protection which the law of treason and sedition provides

for Australian governments is extended to protect the governments of any other country which Australia considers important for its own defence. The key provision here authorizes the Houses of Parliament by resolution to specify any country as a "proclaimed country" and any other country as a "proclaimed enemy" of the "proclaimed country". It then becomes an offence for any person within the Commonwealth to levy war against the "proclaimed country", to assist "by means whatever, with intent to assist", a "proclaimed enemy", or to instigate any person to make an armed invasion of a "proclaimed country". Thirdly, an attempt is made to cover the type of situation where Australian forces, whether alone or forming part of a joint force (e.g., a U.N. force), are committed against groups of persons in another country in circumstances not bringing the law of treason, or war-time emergency legislation, into force, as in the case of operations against Communist insurgents in Malaya; the Governor-General may specify by proclamation the persons against whom the Australian forces are committed, and it then becomes an offence to assist such persons "by any means whatever, with intent to assist".

Next, Section 24 AB. also creates a new legal category in establishing the offence of "sabotage", punishable with a maximum penalty of 15 years imprisonment. Sabotage is in substance malicious injury to articles used or intended to be used by the defence forces of Australia, or of a "proclaimed country" under Section 24 AA., and including articles connected with the manufacture, investigation or testing of weapons of war; the injury must be done "for a purpose intended to be prejudicial to the safety or defence of the Commonwealth". The necessary intent may however be proved from the "known character" of the accused, unless the trial judge excludes such evidence because it might prejudice the fair trial of the accused; juries must be directed that such evidence is admissible on the question of intent only. Even as so qualified, this conflicts with the general Anglo-Australian principle of excluding character evidence in criminal prosecutions.

The provisions so far described, together with earlier provisions embodying in substance the Common Law offence of sedition, are all made subject to a "Bill of Rights" Section - 24 F. - providing that citizens may in good faith show that Australian and other governments (including those of "proclaimed countries") have followed mistaken policies, or have defective constitutional structures, laws or judicial systems which should be reformed; the citizen is guaranteed the right in good faith to attempt to

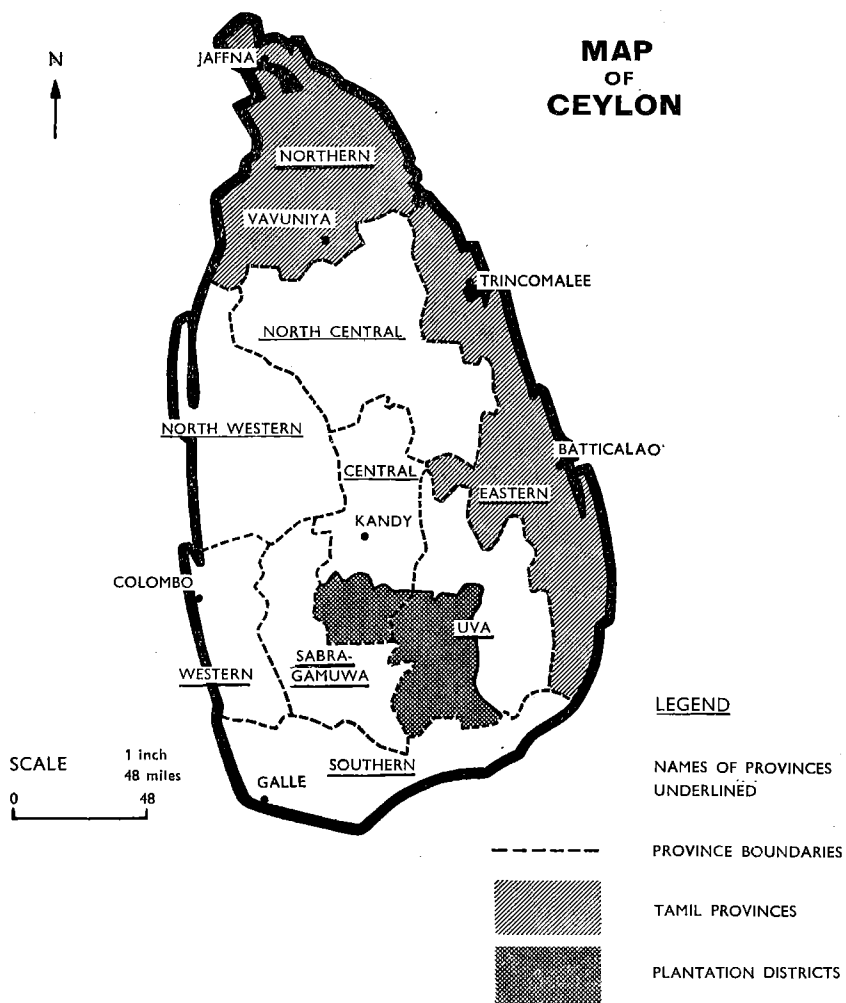
procure "by lawful means" the alteration of anything requiring reform and "to do anything in good faith in connection with an industrial dispute or an industrial matter". But this guarantee is in turn subjected to a proviso that an act is not done "in good faith" if it is for a purpose "intended to be prejudicial to the safety or defence of the Commonwealth", or intended "to assist an enemy" of the Commonwealth or of a "proclaimed country"; the substantial effect of the guarantee seems to leave it to a jury to decide whether the predominant purpose of an accused was *bona fide* political or industrial action, or was in substance an attempt to betray the interests of Australia.

Finally, Sections 77, 78 and 79 replace previous provisions on espionage and breach of official secrecy, so as to extend the scope of these offences to any kind of information about anything whatsoever, including information about opinions, if communicated to a "foreign power" (not as previously an enemy) for a purpose "intended to be prejudicial to the safety or defence of the Commonwealth or a part of the Queen's Dominions".

The substantial purpose of all these provisions is to strengthen the hand of the Government in dealing with the many new kinds of danger to the security of the Commonwealth created by "cold war" situations, and by Russian and Communist Party tactics, as illustrated by the Petrov Case in Australia (1954-5) and by similar cases in Canada, West Germany and elsewhere; a revival of Nazi-Fascist-dominated governments and tactics would create similar types of danger. The old offences of treason and sedition under English and Australian law were in general designed to deal with openly declared states of war and with hostile and revolutionary acts of an overt character. The danger in the new provisions, however, arises from the general political difficulty that there is a gradual shading off, not a sharp break, between plainly revolutionary activities using fraud and violence, which the law can properly suppress, on the one hand, and political activities of a peaceful but vigorous kind directed to securing fundamental changes in the organization of society, which the law should allow, on the other. In protecting themselves against subversion, democratic governments have a heavy obligation not to take what is for majorities an all too easy course—namely the suppression of minorities merely because they are unpopular.

The widespread public debate on the Crimes Bill contributed in considerable degree towards eliminating or modifying objectionable features in the legislation as first drafted, and the Government, and in particular the Attorney-General, deserve credit for

the extensive amendments which they mooted or accepted. Nevertheless, it is thought that the final shape of the provisions is still in many respects unsatisfactory, partly on questions of principle and partly on questions of drafting and arrangement. The general conclusion is that subjects of such difficulty and complexity, involving not only disputes about present policy but also disputes about the history and content of the criminal law, can never be satisfactorily settled in the highly contentious setting of parliamentary debate. For this reason, the method adopted by the Australian Government in procuring this change in the law was fundamentally objectionable. The problem should have been referred in the first place to either an expert legal committee, or to an all-Party parliamentary committee, which should have heard evidence and prepared at least a first draft, embodying the degree of protection against modern forms of subversion which a fair cross-section of the community considered necessary and in accordance with general principles of justice in the administration of the criminal law.



THE TAMIL QUESTION IN CEYLON

Ceylon is an island situated just south-east of the Indian Peninsula, 270 miles in length, 140 miles in breadth and with a total area of 25,322 square miles. According to the Census of 1953 the total population of Ceylon was 8,098,637 which breaks down as follows :

Sinhalese :		5,621,332
Tamil-speaking people :		
Ceylon Tamils	908,705	
Tamils of Indian origin	984,327	
Moslems	468,146	
	<hr/>	2,361,178
Burghers	43,916	
Europeans	5,886	
Malays	28,736	
Pakistanis	5,749	
Others	31,840	
	<hr/>	116,127
Total population of Ceylon		8,098,637

It should be noted that some figures for 1960 give the total population of Ceylon as 9,904,000, of which 1,086,000 are Ceylon Tamils and 1,082,000 are Tamils of Indian origin.

Recent events, particularly concerning the Tamil population of Ceylon, are summarized in chronological form below and then discussed in the body of this paper.

Chronology of Events

- 1948 Ceylon obtains complete independence. Ceylon Citizenship Act sets forth specific criteria for citizenship.
- 1949 Ceylon Parliamentary Elections (Amendment) Act, depriving Tamils of Indian origin of voting rights.

- 1956 Official Language Act results in protests, rioting and disturbances. Federal Party Trincomalee Convention demands equality of Tamil language and citizenship rights for the disfranchized Indian Tamils.
- 1957 Continued disturbances lead to Bandaranaike-Chelvanayakam Pact promising compromise settlement with respect to Federal Party demands.
- 1958 Delay in implementation of Bandaranaike-Chelvanayakam Pact. Federal Party Anti-Sri letter campaign, Sinhalese retaliation. Demonstration by Buddhist monks results in abrogation of Bandaranaike-Chelvanayakam Pact. Reaction and violence. State of Emergency declared on May 27.
- 1959 State of Emergency lifted on March 13. Assassination of Prime Minister Bandaranaike by Buddhist monk on September 25. State of Emergency declared the same day, and lifted on December 3.
- 1960 General Elections March 1960. Dissolution of Parliament. General Elections July 1960. Mrs. Bandaranaike becomes Prime Minister.
- 1961 Language of the Courts Act. Federal Party protests against implementation of Official Language Act and launches civil disobedience campaign. State of Emergency declared in April 1961 and periodically renewed. *

As indicated above a State of Emergency has been in effect in Ceylon since April 18, 1961.¹ This has been due largely to the activities of the Federal Party which began a campaign of non-violent *satyagraha* (passive resistance based upon Ghandian principles) in the Tamil areas of Ceylon as a protest against (a) the Government's attempt to implement its policy of Sinhalese as the only language of administration in the Tamil areas of northern and eastern Ceylon² and (b) the recent passing of the Language

* On September 19, 1961, in the Senate the Prime Minister replied to Senator de Souza who had said that there was no need for a continuance of a State of Emergency. Mrs. Bandaranaike said the Government would only lift the Emergency when satisfied that conditions in the two provinces concerned had returned to normal; some of those detained had been released and some emergency regulations withdrawn. Others would be withdrawn progressively. [*The Times* (London), September 21, 1961.]

of the Courts Act which provides for the progressive use of Sinhalese as the only language of judicial administration in all the law courts of the island, including the Tamil areas.³ The Federal Party's campaign was launched on February 20, 1961, and its effect was to paralyze the entire administration in the Tamil areas of northern and eastern Ceylon.⁴ Non-violent *satyagrahis* blocked the entrance to all government offices. The campaign continued for nearly two months. Towards the latter stages, the Minister of Justice summoned the leaders of the Federal Party to Colombo for talks.

The Federal Party leaders then presented their demands in early April as conditions precedent to calling off the campaign which were substantially as follows :

1. Tamil to be the language of administration for the Northern and Eastern Provinces in Ceylon while at the same time provision to be made for all Sinhalese people resident in these areas to transact business with all government departments in their own language.
2. The Language of the Courts Bill to be amended to provide for the use of Tamil in the law courts of the Northern and Eastern Provinces.
3. The Tamil areas to be given a measure of regional autonomy with regional councils as the instrument of regional government based on the lines of the Bandaranaike-Chelvanayakam Pact of July 26, 1957.⁵

On April 7, 1961, Mr. C. P. De Silva (Leader of the House) made a statement in the House of Representatives in which he said that the Government was unable to consider the demands of the Federal Party because they were in conflict with the provisions of the Official Language Act 1956 and the Tamil Language (Special Provisions) Act 1958.⁶ Thereupon the Federal Party proceeded to extend its campaign to one of civil disobedience. A parallel postal service was inaugurated in the Tamil areas (April 1961). Plans were announced for the organization of a police force for the Tamil areas, and an announcement was made to the effect that crown lands in Tamil areas were to be alienated to Tamil people by the Federal Party's organizations.⁷ The Government construed these plans of the Federal Party to be evidence of an attempt to set up a separate Tamil state, which the former declared was the

real aim of the Federal Party, and proceeded to declare a State of Emergency on April 18.⁸

The actions of the Government under the State of Emergency have been criticized as being unduly severe. Press censorship has been imposed. Sixty-eight persons have been arrested and placed under detention including fifteen of the seventeen elected Tamil members of the House of Representatives.⁹ In early October it was announced that Federal Party leaders held in detention had been released. A Sinhalese Opposition M.P., Mr. Edmund Samarakkody, belonging to the Lanka Sama Samaja Party has protested against such detentions for an indefinite length of time without those detained being produced before a magistrate and being informed of the grounds for their detention.¹⁰ The Government has, however, justified its action by the provisions of the Public Security Ordinance of 1947. [Section 5 (2) gives the Executive wide powers to make emergency regulations; also part III of the Public Security (Amendment) Act 1959 gives special powers to the Prime Minister with regard to safeguarding public security.]¹¹ Sharp criticism has also been made with respect to the behaviour of the Army in the Tamil areas. Opposition Members of Parliament have likened it to an army of occupation.¹² The Army is reported to have used brutal methods to clear the entrances to Government offices in Jaffna Town which had been occupied by Federal Party *satyagrahis*, who it is stated were not informed of the declaration of a State of Emergency or the curfew. Many women *satyagrahis* were apparently badly handled, and complaints have been made that the Army indulged in destruction of private property and resorted to brutality in treatment of passers-by.¹³ A 48-hour curfew was imposed in the main towns in the Northern and Eastern Provinces and allegations have been made that the Army interpreted this as requiring a total black-out, and stoned many houses which had their lights on during the hours of darkness.¹⁴ More serious allegations have been made by, amongst others, Senator S. Nadesan, an independent Tamil, and Mr. Edmund Samarakkody. It has been alleged that a number of women and young girls have been molested by Army men, a mosque desecrated and numerous acts of lawlessness committed.¹⁵ Senator Nadesan during a debate in the Senate produced an order of the day signed by the Prime Minister herself complimenting the troops for restoring order and urging them to maintain the tempo of the campaign.¹⁶ The situation may well deteriorate further because the Indian Tamils, working on tea and rubber plantations in Sinhalese areas, who were deprived of their franchise

by legislation in 1948 and 1949¹⁷ were described by the Prime Minister Mrs. Bandaranaike in a broadcast to the nation on April 26, 1961, as follows :

" Another threat has come to the nation from the estate Tamil labour, which has associated itself with the Federal Party movement. Two days ago (April 24), the Government was told that unless the Federal Party leaders now in detention were released and their demands in regard to language granted, the estate workers would come out on strike.

" This is a threat to which the country cannot submit. The nation cannot be held to ransom by threats of this nature, nor can the Government permit its authority to be undermined in this way. We cannot allow the Federal Party supporters in the north and east, the estate workers in the plantations and their friends and allies in other parts of the country to dictate to the Government with threats of paralyzing the economy if it does not yield to their pressure. " ¹⁸

Mr. C. Rajagopalachari, one of the leaders of the Swatantra Party in India and a former Governor-General of India, in a statement in the Swatantra Party's weekly, *Swarajya*, has expressed the sympathy of his party for the Tamils in Ceylon in their campaign to achieve their rights. He states: " The language issue is merely an outer symbol of the competition between the two nationalities. It is a battle between communities, not at all a battle of cultures or languages...The question is whether the Tamil speaking people are to be treated as equals or not. " ¹⁹

This view is elaborated upon by Mr. Tarzie Vittachi, a well-known journalist, in his account of the events which led up to and took place during the 1958 state of emergency. Mr. Vittachi presents the problem as follows :

" ... But from general observation of the forces that operate and events that take place when there are substantial minorities in a country, it is possible to say that the common factor which has been present in race conflicts wherever they have occurred, is discernible in the context of Ceylon as well : *the pressure of an economic challenge from the minority on the majority...* (Emphasis added)

" The same factor is at the bottom of the racial disturbances in Ceylon. This is more clearly seen in the open economic warfare that has been waged between the Kandyans and the Indian immigrant labour population on the tea estates. The Kandyan peasantry, through its articulate representatives, has been pressing for ten years for the repatriation of Indian labourers so that the Kandyans may fill the vacancies on the estates. A study of the speeches of most Sinhalese politicians who denounced the Bandaranaike-Chelvanayakam Pact would bear out the fact that the fear that activated their successful struggle was the possibility that the Indian immigrant labourers, numbering over 1,000,000 and the Ceylon Tamils, numbering about the same, would form a powerful alliance with which they could retain economic control of the island...

“ This economic pressure—the fear of being elbowed out of employment and business—played a substantial part in the race hatred that came to a crisis in 1958...”²⁰

In addition Mr. Vittachi points to the intensity of middle class tensions :

“ ... For the Tamils, the public service and the mercantile services had long been the principal means of earning a livelihood. Lacking the relatively vast acres of arable land enjoyed by the Sinhalese, they had turned to white-collar jobs for their economic salvation. Almost every Tamil family concentrated on getting their sons and if possible their daughters into the Government or mercantile service. They made an aim of it and when they achieved the aim they made a career of it.

“ They had certain distinct advantages in their pursuit of public service jobs. Jaffna has, per head of population, much better educational opportunities than the rest of Ceylon. Foreign missions had established schools in Jaffna many decades ago and had given the people of Jaffna a tradition of schooling... The result was that Tamils did extremely well in public examinations and were able to get the jobs they were qualified to do.

“ By 1950 the shrinking of employment opportunities became acute. ‘Educated’ unemployment was on the rise and many ...youths, frustrated and articulate, were beginning to join the Marxist parties which gave them promise of jobs and a better standard of living. The Government of the day was fumbling in a futile manner against these problems...”

Mr. Vittachi goes on to say that the Sinhalese saw that if there were fewer Tamils in the public service there would be more room for them.²¹

In light of the above it must also be noted that the recent State of Emergency is not unique or novel in Ceylonese current events. The Ceylon Citizenship Act of 1948 and the Ceylon (Parliamentary Elections) Amendment Act 1949 have been a source of friction between the Tamils and the Sinhalese.²² The effect of these acts was the disfranchisement of all persons in Ceylon (with one very minor exception) who were not citizens of Ceylon; this included the Tamils of Indian origin who had exercised the right to vote in the 1947 election.²³ It should also be added that this electoral disqualification applied to other communities as well, for example, to Burghers and Europeans. The late Dr. I. D. S. Weerawardene, one-time Senior Lecturer in Political Science at the University of Ceylon in an article entitled “The Minorities and the Citizenship Act” (in the *Ceylon Historical Journal*, Vol. 1, No. 3) condemned the Acts for their discriminatory nature. He stated *inter alia*: “the Acts have taken away the vote from a group of people who already exercised it. In the result the Ceylon Indians have virtually been denied the parliamentary seats they might have captured.”²⁴

Further Dr. Weerawardene wrote : " The Soulbury Constitution (*which is the basis of the present Constitution of Ceylon*) received minority support (without which it could not have been implemented) because it arranged to enable the minorities to win a certain number of seats. The Ceylon Indians were among these minorities. To deny them the vote is to deny them the seats. One moral undertaking has been done away with. To deny the vote to the Ceylon Indian is also to reduce the total number of seats available to all the minorities. That is a broken pledge to all the minorities." ²⁵

It must, however, be observed that the Government did make it possible for Indian Tamils to qualify for Ceylonese citizenship under the provisions of the Indian and Pakistani Residents (Citizenship) Act 1949, the main condition thereunder being 7 to 10 years residence as a qualifying period for citizenship. ²⁶

Under this Act altogether 237,034 applications for citizenship were made. Of this number 125,477 persons have already been registered as citizens, while 30,413 applications have not been finally disposed of, being either under investigation still or under appeal to the courts.

It should be finally mentioned, in connection with the subject of citizenship, that in the case of *Kodakan Pillai v. Mudanayake* ²⁷ the Judicial Committee of the Privy Council held that the Ceylon Citizenship Act of 1948 was intra vires the provisions of the Ceylon (Constitution) Order-in-Council 1946.

The Federal Party was inaugurated in December 1949. ²⁸ This Party was formed by those Ceylon Tamils who felt that the assurances of Sinhalese politicians could no longer be relied upon. They construed the disfranchisement of the Indian Tamil population as the first step in the political elimination of the entire Tamil community of Ceylon. They therefore sought to obtain some lasting safeguard for the Tamil minority in Ceylon. The existing Constitution, they felt, was no adequate protection. They considered that a federal constitution providing for a fair measure of regional autonomy in matters of local concern would be the only way by which the Tamil community in northern and eastern Ceylon could realize its legitimate aspirations without coming into conflict with the aspirations of the Sinhalese people. The Federal Party also expressed grave fears with regard to the colonisation policy of the Government and further pledged itself to win back the lost rights of the Indian Tamil community. ²⁹ At the General Election of 1956, the Federal Party emerged as the dominant

party representing Tamil opinion, and since then, at the General Elections of March and July 1960, it has maintained its leading position as the only party representing the majority Tamil opinion.

At the earlier Election of 1956, the two leading Sinhalese parties, the United National Party (which was at the time of the Election, the Governing party) and the Mahajana Eksath Peramuna (People's United Front) sought the support of the electorate to give them a mandate to implement the policy of Sinhalese as the only language of administration throughout Ceylon. The electorate gave a mandate to the Mahajana Eksath Peramuna which had as its leader Mr. S. W. R. D. Bandaranaike. In June 1956, under Mr. Bandaranaike's government, Parliament passed the Official Language Act, commonly known as the "Sinhala Only Act", which was designed to make Sinhalese the only language of administration throughout Ceylon and was to be brought into effect by 1961.³⁰ Rioting and communal violence in Colombo and Gal Oya followed the passing of this Act. At the Galle Face Green, a park near the Ceylon House of Representatives, the Federal Party Members of Parliament performed *satyagraha* while the Act was being debated in the House of Representatives.³¹ They were attacked by Sinhalese extremists. The assaults were followed by widespread looting and attacks against Tamil citizens in Colombo by an organized group of Sinhalese. Police took no action against the looters and marauders in Colombo.³² These incidents had their repercussions in the Eastern Province, which contains a majority of Tamils, where there was communal rioting between the Tamils and the Sinhalese. At Gal Oya, which is the southernmost point in the Eastern Province, a large number of deaths were reported as a result of the communal rioting.³³

The passing of the Official Language Act (note it did not in fact come into operation until January 1, 1961) was followed shortly after by a Convention of the Federal Party in Trincomalee (in east Ceylon) on August 19, 1956, at which the Government of Prime Minister Bandaranaike was called upon to concede to the demand for regional autonomy within the framework of a federal constitution and to grant citizenship rights to all Indians resident in Ceylon who had made Ceylon their permanent home. The Federal Party set a time limit of one year failing which it threatened to organize a campaign of direct action.³⁴ The months following this convention witnessed rapidly mounting communal tension. The situation was however alleviated when the Prime Minister decided to summon the Federal Party leaders for talks with a view to exploring the possibilities of a compromise settlement. The

result of these talks was the Bandaranaike-Chelvanayakam Pact of July 26, 1957. Under this agreement, the Prime Minister agreed to establish regional councils in the Tamil areas which would enjoy considerable powers in regard to local matters. The regional councils were to be given power to carry on the work of administration in these areas in the Tamil language. These regional councils were also to have control over colonization schemes of a local nature. Where major inter-provincial projects were involved the question of deciding the ratio of Tamil to Sinhalese settlers was to be settled by negotiation. This agreement was however not to be a final settlement but an interim adjustment as was stated in the document.³⁵

There was a fair measure of support for the Pact both from the Sinhalese and Tamil communities. But while sustained campaigning against the Pact was being carried on by the United National Party, implementation thereof was delayed. Meanwhile, early in 1958 militant Tamil Federalists in the north anxious to find a symbol in their struggle for linguistic equality had begun to tar over the Sinhalese character "Sri" on the registration number plates of motor vehicles. The government decided not to prosecute offenders, who might thus be labelled martyrs. In the south the impression was that the government had abdicated its authority in the Northern and Eastern provinces. When the newly arrived buses of the Transport Board were tarred by the Tamils in the north, there was a wave of reprisals on the part of Sinhalese groups against Tamil lettering in Sinhalese areas, including Tamil lettering in Government offices.³⁶ A tense situation developed and finally culminated with a group of Buddhist monks gathering at the premises of the Prime Ministers's residence demanding a written undertaking from him that he would repudiate the Pact with the Federal Party. This repudiation was duly given on April 9, 1958.³⁷ Shortly thereafter the Federal Party held its annual convention at Vavuniya (in north Ceylon) where it announced its decision to launch a campaign of direct action. This was followed by attacks against Tamils resident in Sinhalese areas with resultant large scale destruction of Tamil property and loss of Tamil life in Colombo and elsewhere. In the predominantly Tamil areas there were retaliations by Tamils against the Sinhalese, property being burned and people killed.³⁸ It was after these incidents that the Government proclaimed in May the 1958 State of Emergency.³⁹

The present emergency in Ceylon is therefore the third major crisis in a series of outbreaks commencing in June 1956.⁴⁰ Ceylon faces the problem of a multi-racial country. The Sinhalese are in

the majority and form approximately seventy per cent of the population. The Tamil-speaking people number approximately thirty per cent, or two million four hundred thousand people, of whom five hundred thousand are Tamil-speaking Moslems, the balance being Hindus and Christians. The majority of the five hundred thousand Tamil-speaking Moslems are resident in the Tamil speaking eastern part of Ceylon. Although the present Government of Ceylon has tended to characterize the whole situation as one involving language, the dispute seems to be one of a racial and religious nature also.⁴¹ The Sinhalese, who perhaps regard Ceylon as the home of the Sinhalese Buddhists, seem to view the Tamils as intruders in spite of the fact that one million of the two million Tamils trace their heritage in Ceylon back over a period of two thousand years or more. The remaining one million Tamils were brought into Ceylon by the British to work in the tea and rubber plantations.⁴²

However, the Prime Minister has tried, unsuccessfully it seems, to set at rest the fears of the Tamil minority. Mrs. Bandaranaike in a broadcast to the people on March 4, 1961, denied that the Government wished to destroy the Tamil heritage and enumerated the legal provisions which had been made for the reasonable use of the Tamil language (for example, in Tamil areas the Tamil language may be used for education up to University level); she further pointed out that the Government had sponsored an organization for the preservation of traditional forms of Tamil culture, and had established an advisory committee to safeguard the Hindu religion.⁴³

Some months earlier the Minister of Justice Senator Fernando had emphasized that Tamil would continue to be the language of the courts in the predominantly Tamil-speaking areas.⁴⁴

It is to be hoped that in light of the grave occurrences of the past five years, the intensity of feeling and tensions at present and the danger of additional incidents in the future, the Government of Ceylon will recognize the necessity for taking immediate steps to safeguard the legitimate aspirations of the Tamil minority. It may be pointed out with regard to the language problem that countries like Canada and Switzerland have 2 and 3 official languages respectively.

The urgency of such action can best be marked by the events that have been outlined above; the degree of its success will be determined by the extent to which the Government manages to provide a sound basis for the peaceful coexistence of these various races, languages and religions consistent with the Charter

of the United Nations which calls for the promotion and encouragement of respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language and religion⁴⁵ and to which end Ceylon is pledged to take action by its very membership of the United Nations.⁴⁶

¹ See Hansard, Parliamentary Debates (House of Representatives) uncorrected, Vol. 42, No. 27, columns 3965-3966 for the text of the Governor-General's message announcing the declaration of a State of Emergency.

² Official Language Act No. 33 of 1956 taking final effect on December 31, 1960 (Section 2).

³ Language of the Courts Act, 1961.

⁴ *Ceylon Observer*, April 18, 1961, p. 7. And see statement by the Honourable the Prime Minister in Hansard, *Parliamentary Debates* (Senate) uncorrected, Vol. 16, No. 9, column 744 when in reply to a question asked by Senator Doric de Souza in connection with the *satyagraha* in the north and the east, she stated *inter alia*, "we have sent troupes to Jaffna and Batticaloa as you may be aware. There is no Government in those areas today. The Kachcheris are not functioning, the offices are not functioning as a result of the *satyagraha*, and I cannot allow that to continue any further." *Note*: Jaffna is the capital city of the Northern Province. Batticaloa is the most important town in the Eastern Province. A Kachcheri is the chief administrative office of government in a provincial district.

⁵ See Communiqué issued by the Minister of Justice, published in the *Ceylon Observer*, April 18, 1961, p. 7. The details of the Bandaranaike-Chelvanayakam Pact are taken up at greater length on p. 17 *infra*.

⁶ *Asian Recorder* (New Delhi), Vol. VII, No. 25, p. 4008, column 1.

⁷ *The Observer* (London), May 17, 1961; *Keesing's Contemporary Archives* p. 18074, column two, May 6-13, 1961.

⁸ See fn. 1, *supra*.

⁹ Report by the Honourable the Prime Minister to the House of Representatives regarding the detention of 13 Tamil elected members of the House, Hansard, *Parliamentary Debates* (House of Representatives) uncorrected, Vol. 42, No. 29, column 4293; and report by the Honourable the Prime Minister regarding the detention of an additional elected Tamil member of the House, Hansard, *Parliamentary Debates* (House of Representatives) uncorrected, Vol. 42, No. 30, column 4433; for a further report by the Honourable the Prime Minister regarding the detention of another elected Tamil member of the House and of a Moslem member of the House, belonging to the Tamil Federal Party, see Hansard, *Parliamentary Debates* (House of Representatives) uncorrected, Vol. 42, No. 31, column 4561. Also for a statement

by the Honourable Senator A. P. Jayasuriya (Leader of the Senate) on April 18, 1961, regarding the issuing of detention orders in respect of 68 persons of whom 47 had already been placed under detention, see Hansard, *Parliamentary Debates* (Senate) uncorrected, Vol. 16, No. 14, column 1092.

¹⁰ See Hansard, *Parliamentary Debates* (House of Representatives) uncorrected, Vol. 42, No. 36, column 4711.

¹¹ Public Security Ordinance No. 25 of 1947, as amended by Public Security (Amendment) Act No. 22 of 1949 and Public Security (Amendment) Act, No. 8 of 1959.

¹² Mr. Edmund Samarakkody's views in Hansard, *Parliamentary Debates* (House of Representatives) uncorrected, Vol. 42, No. 32, columns 4712-4713; statement by Senator S. Nadesan, Q.C., in Hansard *Parliamentary Debates* (Senate) uncorrected, Vol. 16, No. 16, columns 1288-1307. And see Peter Robins', "Terror in the Petticoat Kingdom," *Daily Mail* (London), May 3, 1961, p. 8.

¹³ *The Times* (London), May 4, 1961. And see statement by Senator S. Nadesan in Hansard, *Parliamentary Debates* (Senate) uncorrected Vol. 16, No. 16, column 1294.

¹⁴ *The Observer* (London), May 17, 1961. And see statement by Mr. Edmund Samarakkody regarding military orders to Crown Counsel Sivarajah to put out lights in his house during curfew hours and regarding storming of houses where lights were on during curfew hours by the Army in Hansard, *Parliamentary Debates* (House of Representatives) uncorrected Vol. 42, No. 32, column 4704.

¹⁵ *The Times* (London), May 5, 1961. And see Peter Robins, *op. cit.*; and statement of Mr. Alfred Durayappah, an independent Tamil Member of Parliament in Hansard, *Parliamentary Debates*, (House of Representatives) uncorrected, Vol. 42, No. 32, columns 4744-4750; and statement of Mr. Edmund Samarakkody in Hansard, *Parliamentary Debates*, (Houses of Representatives) uncorrected, Vol. 42, No. 32, columns 4704-4710.

¹⁶ *The Observer* (London), May 14, 1961. And see Hansard, *Parliamentary Debates* (Senate) uncorrected, Vol. 16, No. 16, columns 1295-1298.

¹⁷ Ceylon Citizenship Act No. 18 of 1948 and Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949.

¹⁸ *Asian Recorder*, Vol. VII, No. 25, p. 4008, column 3.

¹⁹ C. Rajagopalachari, "The Ceylon Struggle," Swantantara Party's weekly *Swarajya*, April 29, 1961.

²⁰ Tarzie Vittachi, *Emergency '58, The Story of the Ceylon Race Riots*, (London: Andre Deutsch, 1958), pp. 94 and 95. Hereinafter referred to as *Emergency '58*.

²¹ *Ibid.*, p. 99.

²² Ceylon Citizenship Act No. 18 of 1948, and Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949, read together.

²³ *Ceylon Faces Crisis*, issued by the Federal Party of Ceylon, September 1957, pp. 13-14.

²⁴ I. D. S. Weerawardene, "The Minorities and the Citizenship Act," *Ceylon Historical Journal*, Vol. I, No. 3 (January 1952), p. 249.

²⁵ *Ibid.*, p. 250.

²⁶ Indian and Pakistani Residents (Citizenship) Act 1949.

²⁷ 1953 AC 514. Supreme Court of Ceylon's judgment reported in *Ceylon Law Reports* at 1953 54 NLR 433.

²⁸ *Ceylon Faces Crisis*, p. 22.

²⁹ Resolution No. 3 in "Freedom Series No. 1" (Sutantiran Press, Colombo). This document is also referred to as : "The Ilankai Tamil Arasu Kadchi (The Federal-Freedom Party of the Tamil-Speaking People in Ceylon) : The Case for a Federal Constitution for Ceylon as embodied in the resolutions passed at the First National Convention held on the 13th, 14th, 15th April, 1951 at Trincomalee." This latter title is more widely known.

³⁰ Official Language Act No. 33 of 1956.

³¹ *Emergency '58*, p. 104. Hansard, *Parliamentary Debates* (House of Representatives) Vol. 24, columns 756-800.

³² *Emergency '58*, p. 104.

³³ Hansard, *Parliamentary Debates* (House of Representatives) Vol. 24, columns 1713-1718, Vol. 25, columns 316-366.

³⁴ *Ceylon Faces Crisis*, pp. 23 and 24; see Appendix I thereof, pp. 29-32 for full text of the Trincomalee Resolution and demands.

³⁵ *Ibid.*, pp. 26-28; see Appendix II thereof, pp. 33-36 for full text of the Pact.

³⁶ *Emergency '58*, pp. 24-25.

³⁷ *Ibid.*, p. 29.

³⁸ *Ibid.*, pp. 44-47.

³⁹ *Ibid.*, p. 55.

⁴⁰ See Chronology of Events.

⁴¹ *Emergency '58*, p. 13.

⁴² *Emergency '58*, p. 15.

⁴³ *Keesing's Contemporary Archives*, May 6-13, 1961, p. 18073, column 2.

⁴⁴ *Ibid.*, May 6-13, 1961, p. 18073, column 1.

⁴⁵ United Nations Charter, Articles 1 (3) and 55 (c).

⁴⁶ *Ibid.*, Article 56.

THE EAST GERMAN LABOUR CODE

On July 1, 1961, a new Labour Code for the Democratic Republic of Germany came into force. From the outset this important piece of legislation became a matter of violent controversy, first between East German and West German trade unions and later among international trade union associations; at the same time it aroused lively interest among international organizations concerned with the protection of human rights.

In the following commentary it is proposed to present: a short outline of the legislative history of the Code, to sum up the role designed for it by its promoters, to discuss the attitude reflected in the Code concerning the role of trade unions and their attitude towards fundamental rights of the workers, and to highlight some of its more important provisions.

History

The Labour Code Bill was published on November 15, 1960. The Bill was the result of preparatory work of a special commission headed personally by the First Secretary of the Central Committee of the Communist United Socialist Party (SED), Walter Ulbricht. The Bill included in 13 chapters and 156 sections, "the principles of socialist labour law, the realization of socialist democracy in industry, rules on the conclusion and dissolution of labour contracts, on wages, on professional training and qualifications, on working hours, on holidays, on health and labour protection, on social insurance, socialist working discipline, on cultural and sport activities of the workers and their social welfare, the advancement of working women and youth, as well as rules on the principles and organs for the decision of labour conflicts." ¹

The Bill was then submitted for criticism to the East German trade union organizations in order to ensure what is claimed in Communist principles to be the participation of the masses in the legislative procedure. At the end of this discussion, the press agency of the "Free German Trade Union Association" (FDGB) in East Berlin reported three months later, on March 9, 1961,

that 324,790 meetings were held with 7,086,976 participants, out of whom 1,088,308 speakers had submitted 23,348 propositions and suggestions concerning the text of the Bill. It appears, however, that this mass of propositions did not affect the final draft of the Bill, since the original Bill was adopted unanimously, without any change in substance, on April 12 by the East German People's Parliament. The 23,348 suggestions for revisions seemed to affect a few minor points, mostly stylistic. These will be discussed below.

Purpose and Substance of the Code

The Code was intended to become "a textbook for the whole German working class, a textbook on its historical role and perspectives", as Herbert Warnke, chairman of the FDGB put it. It was not only designed as a fundamental Act for East German workers; but it was also intended as an example to be followed by West German workers who might be attracted by the future possibilities the Code might offer to them.

The Code, again according to official comments, claimed to show the basic changes in the situation of the working class in East Germany, and explained in detail the supposed practical results of these changes. As its Preamble put it, the Code "contributed decisively to the achievement of the superiority of socialism" which would empower the working class of both German States "to solve their historical task: to seize power from the German militarists and to force them to submit to a democratic and peace-loving order".²

The two main topics with which the Code was concerned and on the basis of which its effectiveness should be evaluated were the role of the trade unions in management and the individual rights of the workers. These two problems were the centre of the scientific analysis worked out by the "Walter Ulbricht" Academy of Legal and Political Science, and discussed at its session on December 11, 1960.³

Role of the Trade Unions in Management

In the discussion at the Academy, conducted on the highest professional level in East Germany, it was deplored that the role of the trade unions in the dictatorship of the proletariat was far from being exactly and completely ascertained by political and legal science. It was stated, however, that the Labour Code had

a correct doctrinal basis, as it adopted the Leninist view on trade unions. Lenin saw the essence of trade unions in the fact that they constituted "a school of uniting forces, a school of solidarity, a school to defend their own interest, a school of management and administration". In the present East German interpretation this meant that the basic task of trade unions was to train the working class how to employ its political power. Consequently, it was declared wholly deceptive to talk about the right to strike in connection with trade unions. The right to strike, though expressly granted by Article 14 (2) of the East German Constitution, was entirely dropped from the Labour Code with the argument that since strikes were fights against capital, they had lost their historical significance in East Germany, where the working class was in power.

Questions like the one formulated by the chairman of the West German Metalworkers Trade Union, Mr. Brenner: "What kind of trade unions are those which see their task only in assisting the fulfilment of plans designed by a bureaucracy?" were also in this discussion labelled as misleading. At the same time, the task of the trade unions was described as "the mobilizing of the entire working class for an all-out fulfilment of production plans". It was further held that the key Articles 4 and 15 of the Code stressed emphatically the duty of trade unions in cooperating in the fulfilment of production plans. There was an additional duty imposed on trade unions in organizing the competition of shock-workers for the overfulfilment of production plans. In this spirit the whole Labour Code served one main purpose; it was an important instrument in raising industrial output in the State to the level demanded by Party decisions.⁴

However, West German and other trade unions were not alone in formulating questions such as that posed by Mr. Brenner. Even *Neues Deutschland* published an article on December 7, 1960, comparing the East and West German labour legislation under the title "Where have trade unions more rights?". *Neues Deutschland* concluded, of course, in favour of the East German trade unions. The discussions of the Walter Ulbricht Academy revealed, however, that in this case *Neues Deutschland* committed a political error in the formulation of the question. The problem, stated the Academy, was not a question of more rights or less rights; what really mattered was that under Communist rule trade unions had *qualitatively new rights*, as they were now privileged to participate directly in the government of a sovereign State.⁵ This participation, however, was supposed to take place

in the political field only and not in the everyday life of the factory. Mr. Warnke stated, when presenting the Bill to Parliament, that on the level of plant management active participation of workers was impossible. The responsibility of the plant manager for the fulfilment of the production targets did not permit the sharing of this responsibility with any kind of organization of workers. The plant manager was "in charge of the Workers' and Peasants' Power" who administered the plant according to the principle of one-man rule. So all the suggestions concerning some kind of or some degree of workers' autonomy in factories were brushed aside, and the orthodox Stalinist line of organization was maintained. The only achievement resulting from the suggestions of the workers put forward in the mass consultations cited above was the change in the title of Chapter 2 from "the realization of socialist democracy in the plant" to "Management of the plant and the participation of workers". The provisions concerning the full powers of the plant manager closely resembled in the opinion of the West German Federation of Trade Unions those of the ill-famed "Law of the Regulation of National Work" promulgated by Hitler in 1934.⁶

Individual Rights of the Workers

The same doctrinal approach was used in assessing the individual rights of workers under the Labour Code. Here the problem was not—to use the same formula which had been adopted for the trade unions above—whether the individual had more rights or less rights. It was stated during the discussion mentioned above: "The decisive right of a citizen in our State is the participation in a conscious shaping of economic, cultural and, above all, political life of our Republic *as a whole*" (emphasis added).⁷

When it came to confirming the *individual rights* of the workers during the preparation of the Code, these were invariably curtailed by invoking the labour situation and the interest of the State, as conceived by the Central Committee of the SED. The following particular provisions highlight this attitude.

The Code is based on the *six day week* and a basic holiday of 12 days a year.⁸ Many of the suggestions coming from the workers requested the granting of free Saturdays, i.e., the introduction of the five day week, and 15 days basic holiday in a year. These suggestions were flatly refused, with the argument, raised during the Parliamentary debate on the Bill, that the present degree of pro-

ductivity did not permit such a reduction of the working hours, and that conditions for it should be first realized by more and better work.

In the sphere of *job security* some improvement was achieved due to pressure of public debate. The provisions of the Code restricted the right of the worker to leave his job. He was enabled to give up his job only after the "interest of society and his personal interests have been taken into account"⁹ which meant in effect that the plant manager had to agree to let him go. At the same time the worker could be dismissed provided he was given 14 days notice.¹⁰ The final text of the Code, however, does include provisions according to the terms of which up to 3 months notice of dismissal can be agreed upon in labour contracts.

Temporary assignment to another job is possible only in cases of emergency and—contrary to the original text of the Bill providing for six months—only for a period of one month at the most in a year. If this is to be prolonged for more than one month, the consent of the worker is also necessary for such an assignment.¹¹

Special Clauses of the Code

The provisions of the Code are, even with these amendments, very severe. Two clauses have been inserted to make their application somewhat more flexible. The first clause was included in the Law, which brought the Code into effect,¹² and lays down that the former provisions included in collective labour agreements in certain branches of industry or for certain classes of workers yet excluded from the scope of the Code are still valid, even if the legal rules on which they were based have been replaced by the Code. The second clause, on the other hand, provides in Article 21 for special treatment in favour of a certain group of specially qualified personnel. Thus labour contracts may contain at any time special provisions for those workers who "belong to the intelligentsia" and who have "outstanding achievements in the construction of socialism". Such provisions are in regard to the special knowledge, capabilities and responsibilities of the workers involved. This provision seems to be a conscious concession of the regime aimed at lessening the dissatisfaction of workers, evident in the recent exodus of highly trained personnel from East Germany. At the same time it provides a legal basis for the formation of a privileged new class of technicians and managers.

Effects of the New Code

The new Labour Code marks for two reasons a considerable step towards the separation of the two parts of Germany in the legal field. First, the classical German Civil Code, the BGB, was also hitherto basically the source of regulations, which were later modified, concerning labour matters in East Germany. Now the new Labour Code has taken the place of the BGB which has consequently lost its force in matters of labour relations. Secondly, there is contained in the Code special machinery for settling labour disputes in the plants.¹³ This change has had the effect of terminating the competence of the German Code of Civil Procedure (ZPO) in matters of labour disputes. The "conflict commissions", set up as early as 1953 in East German plants, are now transformed into "social organs" which have, as their basic task, the settlement of disputes between labour and management. They also serve for "the mutual education of the workers towards the maintenance of the rules of Socialist morality and the conscientious observance of Socialist law"; further they are to prosecute "small violations of criminal law". The transfer of labour disputes from the competence of regular courts to special organs acting on the basis of vague general clauses inevitably diminishes the scope of legality and gives way to mounting arbitrariness.

Conclusions

To conclude, it has to be admitted that the official East German statements on the importance of the new legislation, as indicated above in the introductory remarks, are well founded. Such an "example of Socialist legislation" should be watched closely. It is remarkable, however, that the Code clings to tendencies labelled in the Party jargon as "left wing dogmatist" or "Stalinist", the vestiges of which, it is claimed, are being eliminated from the legal system in the Soviet Union and in some countries of the people's democracies in East Europe. The East German labour policy can be contrasted to the situation in Yugoslavia where the participation of the workers in the management of their individual plants has been developed to a considerable degree invoking the same Leninist principles. Consequently the question arises: to what extent can the new East German Labour Code serve as an attractive example of Socialist legislation?

Since the new Labour Code came into force on July 1, 1961, two emergency decrees illustrate the spirit in which labour relations

are dealt with in the German Democratic Republic. On August 24, 1961, a decree came into force through an enabling act passed by the People's Parliament on August 11. This decree limits the freedom of movement of citizens. In particular cases, either as an addition to a court sentence or at the request of local authorities restriction of freedom of movement inside the German Democratic Republic may be imposed on any person together with an order for corrective labour so as "to prevent those unwilling to work to obtain personal gains in detriment to the labouring masses". This, in other words, means *forced labour*.

A decree published on August 26, in the Official Gazette, on a harvesting emergency authorizes local authorities to order any person at any time to engage in specified work at any place in the Republic. These two decrees may serve as a means of transferring those who do not submit unconditionally to the official policy of the SED to hard labour far from home.¹⁴

The severe provisions of the Labour Code, together with the two emergency decrees, which eliminated the remnants of freedom left in the Code, constitute flagrant violations of fundamental human rights, as contained in Article 23 of the Universal Declaration of Human Rights, which gives everyone, not only a right to work, but also a right to free choice of employment, and fair and favourable conditions of work.

¹ *Neues Deutschland* (East Berlin), November 15, 1960; this is the official newspaper of the SED.

² *Staat und Recht* (East Germany), No. 11/12 (November/December 1960), Supplement p. 4.

³ *Staat und Recht* (East Germany), No. 2 (February 1961), pp. 272-287.

⁴ *Ibid.*, p. 283.

⁵ *Ibid.*, p. 280.

⁶ *Das Arbeitsgesetzbuch der Sowjetzone. Dokument der Ausbeutung und Unterdrückung*, Deutscher Gewerkschaftsbund, Düsseldorf, July 1961, p. 18.

⁷ See fn. 3.

⁸ Articles 72 and 80

⁹ Article 31.

¹⁰ Article 31(5).

¹¹ Article 25.

¹² Article 2. (3).

¹³ Articles 143 to 146.

¹⁴ *Gesetzblatt*, II: No. 55/1961, page 343; *Neue Zürcher Zeitung* (Zürich), August 28 and 29, 1961.

THE REBELLION TRIALS IN ETHIOPIA

Comments by an Observer

In the beginning of December 1960 an armed rebellion took place in Addis Abebe* and certain other places in Ethiopia. Officers of the Imperial Bodyguard tried to take power and proclaim the Crown Prince as the new Emperor. However, the present Emperor, H.I.M. Haile Sellassie I, hurried back from South America where he had been on a State visit; in the meantime, the rebellion was quelled, and the Emperor returned to his capital in triumph.

On February 10, 1961, the Ethiopian press announced that the trial of the rebels would shortly take place. The International Commission of Jurists, concerned with legal developments and the Rule of Law throughout the world, immediately asked by telegram whether an observer would be admitted. The answer, received by telegram, was to the effect that an observer would be admitted, that the trial would be in public, and that all facilities would be given to the observer.

At the request of the Commission, Dr. Edvard Hambro, former Registrar of the International Court of Justice, presently Professor of Law at the Norwegian School of Economics and Business Administration, who had undertaken similar missions for the International Commission of Jurists in the past, left Bergen on February 26 and spent a week in Addis Abebe.

All help and assistance were extended to him. He was permitted to assist at the sessions of the Courts where a trained lawyer with a good command of English acted as an interpreter. He was given generous help in the Ministry of Justice from the Minister himself, the Vice-Minister and many other officials. He met a number of well-informed Ethiopians and foreign experts. He visited the prison and the military camps where the rebels were held in custody and he had the opportunity of talking to the defence counsel and to a number of the prisoners.

* This spelling follows the spelling in the official Charge; see fn. 5 below.

The early days of the first trial against the three chief accused¹ were taken up by a procedural matter of great importance. Whereas the second and third accused did not protest against the defence advocates, the first demanded a foreign lawyer.

It is stated in the Ethiopian Constitution that an accused person has the right to be defended,² but few provisions can be found to implement this right. Such indeed is often the case in a country where a serious effort has been made to promulgate modern and liberal codes but where the means of implementation are lacking, either because the necessary legal rules have not been enacted, or because the administrative apparatus has not been created, or because a sufficient number of qualified people cannot as yet be found, or because the forces of conservatism and tradition have been too powerful.

General Mangistu, the first accused, claimed that no Ethiopian lawyer could be trusted to defend him with strength and conviction. He stated that Ethiopian lawyers would all be apprehensive of political reprisals since it is difficult for most Ethiopians to distinguish between the case and the personalities. A man who actively and energetically defends a rebel might easily be thought to have favoured the revolution; this might indeed be the case in other countries. In Ethiopia, this fear is strengthened by the fact that there is no organized Bar, and no strong traditions and *esprit de corps* exist among the advocates.

If such a fear exists amongst the lawyers, the suspicion is near at hand that there is a certain lack of independence also in the Judiciary. And such would seem to be the case. It would be difficult for a judge to give an unpopular decision. The judges are not immovable. They can be dismissed at any time by the Emperor, and most of them are not trained as jurists. Some of them are not above suspicion. It also happens, it is claimed, that the administration tries to give directions to the Bench and that the Judges do not always object strongly enough. This is indeed quite contrary to accepted ideas of justice but would not always appear to Ethiopians in the same light. The Emperor's position is very exalted indeed³ and he is the source of all justice. It is a thought dear to most Ethiopians that they can obtain justice from His Imperial Majesty even if the courts have failed them. A sense of justice is considered one of the most essential traits in an Emperor.

The trials which the observer witnessed were in their form not inferior to any European trial. They were public and the

court rooms were crowded, both in the High Court and in the Supreme Court which heard the appeal of General Mangistu against the decision of not staying the proceedings until a foreign lawyer of the appellant's choice had been obtained.⁴

Representatives of the national and foreign press as well as chief news agencies were present. The judges behaved with great dignity and seemed to do their utmost to give the accused a fair hearing. General Mangistu defended his own case in the Supreme Court with courage, dignity and eloquence.

As far as the outward form and appearance of the trial was concerned, it appeared to the observer that the only serious objection which could be raised was the failure to grant permission to the accused General to have a foreign lawyer. But it must be said that it can perhaps happen also in other countries that proceedings will not be stayed, because the accused does not trust the Bar in his own country.

A case of this kind could have been heard as a big political case with great publicity. It seems that the authorities have refrained from doing so. The indictment was short and summary,⁵ concentrating on offences against Article 250⁶ of the Penal Code dealing with outrages against the Constitution, against Article 252⁷ of the Penal Code dealing with armed resistance, and Article 522 dealing with aggravated homicide.⁸

It seems strange that only three people were charged in this case. There were many more people who participated in the rebellion and who were arrested. Many have been released. It has been announced that all the private soldiers of the Imperial Guard are now free. It would seem to be a fact that a certain number of other prisoners were released every week so that the case would be much smaller than originally believed.

Nevertheless it is a matter of some concern that several hundred prisoners were kept, or are being kept, in custody without being brought before a judge in accordance with the *habeas corpus* provision of the written Constitution.⁹ They had, at the time of the hearing, been in camps or prisons for more than three months without being able to obtain the assistance of counsel. The provision of the Constitution in this respect would seem to cover only the actual law suit and not the pre-trial period. These circumstances have given rise to fear of torture being applied.

There is a widespread fear of torture. It is believed that beatings and brutalities take place in police stations and prisons.

Even if this is not the fact and even if it cannot be proved, the fear is real enough to be a factor of some importance. In this particular case, however, the observer felt that there was no evidence of torture. The fact that he was allowed to visit prisons and camps and talk to the inmates is certainly an element to be reckoned with. The prisoners were also allowed to receive visits from their female relatives, which too would seem to be an indication of the good conscience of the authorities in this case. On the other hand, it is certainly not impossible that many of them have had rough treatment at the beginning of the case under the immediate impact of the revolution. The defence counsel also stated that they had completely free access to their clients and had heard no complaints of ill treatment.

The conclusion of the observer, after a short visit, is, therefore, that a real effort has been made to conduct the trial as fairly as possible and that this has been achieved to the extent possible in a country with an autocratic government, and in the absence of an independent Judiciary and a strong and well-organized Bar.

There are many aspects of the legal system in Ethiopia which show that the country is still not living under the Rule of Law as understood in other countries; this is largely due to the traditions of the State and the exalted position of the Emperor.

Progress may be too slow to please the progressive elements, but progress is being made. New modern codes are being promulgated. A free and independent Judiciary would seem to be on the point of being created, a Law School will presumably be started in the not too distant future and a number of bright young men are being sent out every year to study law and take their place in the administration of justice.

* * *

NOTE.—The observer of the International Commission of Jurists was not able to remain for the duration of the trial and for the passing of sentence. General Mangistu was sentenced to be hanged on March 28, 1961 for his part in the abortive coup. The two other accused with the General were sentenced to terms of imprisonment: they were Captain Khifle Woldemariam (15 years) and Lieutenant Degafe Tedle (10 years). The accusations as mentioned in the body of the article above were: attempting to overthrow the government, raising an armed rebellion, and being

concerned in the shooting of 15 persons, including 6 former ministers. General Mangistu said he did not wish to appeal. The Court also ordered the property of the accused to be confiscated and that they be deprived of their rank and decorations. Ex-General Mangistu was hanged on March 30, 1961, in the public market-place of Addis Abebe.

It was announced from Addis Abebe on September 25, 1961, that in the case of Captain Khifle there had been an appeal; the Supreme Court on appeal increased the sentence and ordered Captain Khifle to be hanged. It has also been reported that other hangings have taken place.

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1. Their names will be found in the attached Charge at footnote 5.
 2. Article 52 of the Constitution of 1955 states :

“ In all criminal prosecutions, the accused, duly submitting to the court, shall have the right to a speedy trial and to be confronted with the witnesses against him, to have compulsory process, in accordance with the law, for obtaining witnesses in his favour, at the expense of the Government and to have the assistance of counsel for his defence, who, if the accused is unable to obtain the same by his own efforts or through his own funds, shall be assigned and provided to the accused by the court.”

3. See page 30.

“ By virtue of His Imperial Blood, as well as by the anointing which He has received, the person of the Emperor is sacred, His dignity is inviolable and His power indisputable. He is, consequently, entitled to all the honours due to Him in accordance with tradition and the present Constitution. Any one so bold as to seek to injure the Emperor will be punished.”

4. See page 30.
5. The Charge was given in English :

1. IN THE HIGH COURT OF ADDIS ABEBE

THE CROWN

VS

BRIGADIER GENERAL MANGISTU NOWE

The beforementioned Brigadier General Mangistu Nowe, O.C., Imperial Guard, is hereby charged with the following offence :

Statement of offence:

Outrages against the Constitutional Authorities, contrary to Article 250 of the Ethiopian Penal Code.

Particulars of offence:

Brigadier General Mangistu Nowe on the fourth day of Tahassas 1953 (Ethiopian Calendar) attempted to overthrow the Government by causing with threats of violence His Imperial Highness the Crown Prince to proclaim by means of a broadcast the creation of a new Government, which change of Government he intended to maintain with the aid of the Imperial Guard which he was commanding.

2. IN THE HIGH COURT OF ADDIS ABEBE

THE CROWN

vs

BRIGADIER GENERAL MANGISTU NOWE

The beforementioned Brigadier General Mangistu Nowe, O.C., Imperial Guard, is hereby charged with the following offence:

Statement of offence:

Armed rising contrary to Article 252 of the Ethiopian Penal Code.

Particulars of offence:

Brigadier General Mangistu Nowe on Tahassas 4, 1953, (Ethiopian Calendar) raised an armed rebellion against the Constitutional Authorities, in that he arrested Ministers of the Realm, caused the Imperial Guard to attack the First Division of the Regular Ethiopian Army and thereby frustrate any armed opposition to the ousting of the duly constituted Constitutional Authorities.

3. IN THE HIGH COURT OF ADDIS ABEBE

THE CROWN

vs

1. BRIGADIER GENERAL MANGISTU NOWE
2. SHAMBUL KHIFLE WOLDEMARIAM
3. LIEUT. DEGAFE TEDLE

The three beforementioned accused are hereby charged with the following offence:

Statement of offence:

Aggravated homicide contrary to Article 522 of the Ethiopian Penal Code.

Particulars of offence:

The three beforementioned accused together with persons now dead and others unknown on Tahassas 7, 1953, (Ethiopian Calendar) at about 4 p.m. at the Ghenet Lhul Palace, Addis Abebe, with deliberate intent to kill, killed in a cruel manner by shooting the following:

1. His Highness the late Leoul Ras Seyoum Menguesha, ex-Governor of the Tigre Governorate-General.

2. His Excellency the late Ras Abebe Aregay, ex-Chairman of the Council of Ministers and ex-Minister of Defence.
3. His Excellency the late Ato Makonnen Habte-Wolde, ex-Minister of Commerce, Industry and Planning.
4. His Excellency the late Blatta Ayele Gabre, ex-Senator.
5. His Excellency the late Major-General Mulugetta Buli, ex-Minister of National Community Development.
6. His Excellency the late Like-Mekuas Tadesse Negash, ex-Minister of State in the Ministry of Justice.
7. The late Afa Negus Ishetie Gheda, ex-Vice Minister in the Ministry of Interior.
8. His Excellency the late Blatta Dawit Ogbagsy, ex-Minister of State in the Ministry of Foreign Affairs.
9. His Excellency the late Ato Amde Michael Desalegne, ex-Vice Minister of Information.
10. His Excellency the late Ato Gebre-Wold Ingda-Worq, ex-Minister of State in the Ministry of Pen.
11. His Excellency the late Abba Hanna Gimma.
12. His Excellency the Dedjazmatch Letibelou Gebre, ex-Member of the Senate.
13. His Excellency the late Ato Lemma Wolde-Gebrial, ex-Vice Minister in the Ministry of Mines and State Domain.
14. His Excellency the late Ato Abdullahi Mumie, ex-Vice Minister of Finances.
15. The late Ato Kibret Astatke, ex-Assistant Minister in the Ministry of Interior.

Nathan Marcin
Attorney General

6. Article 250. Outrages against the Constitution or the Constitutional Authorities.

Whosoever, by violence, threats, conspiracy or any other unlawful means :

- (a) overthrows, or attempts to overthrow, suspend or modify the Constitution of the Empire; or
- (b) overthrows, or attempts to overthrow, change or destroy the Government or any constituted public, legislative, executive or judicial authority,

is punishable with rigorous imprisonment from three years to life, or, in cases of exceptional gravity, with death.

7. Article 252. Armed rising and civil war.

(1) Whosoever raises, or attempts to raise :

- (a) a revolt, mutiny or armed rebellion against the Emperor, the State or the Constitutional Authorities; or

- (b) civil war by arming citizens or inhabitants or by inciting them to take up arms against one another, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.
 - (2) Whosoever of his own free will takes part in such a movement is punishable with rigorous imprisonment not exceeding fifteen years.
8. Article 522. Aggravated Homicide—Homicide in the first degree.
- (1) Whosoever intentionally commits homicide :
 - (a) with such premeditation, motives or means, in such conditions of commission, or in any other aggravating circumstance, whether general (Art. 81), or particular duly established (Art. 83), as to betoken that he is exceptionally cruel or dangerous; or
 - (b) as a member of a band or gang organized for carrying out homicide or armed robbery; or
 - (c) to further or to conceal another crime; is punishable with rigorous imprisonment for life, or death.
 - (2) Death sentence shall be passed where the offender has committed murder in the first degree while serving a sentence of rigorous imprisonment for life.

The two Articles referred to in this Article are:

Article 81. General aggravating circumstances :

- (1) The court shall increase the penalty as provided by law (Art. 188) in the following cases :
 - (a) when the offender acted with treachery, with perfidy, with a base motive such as envy, hatred, greed, with a deliberate intent to injure or do wrong, or with special perversity or cruelty
 - (b) when he abused his powers, or functions, or the confidence, or authority vested in him;
 - (c) when he is particularly dangerous on account of his antecedents, the habitual or professional nature of his offence or the means, time, place and circumstances of its perpetration, in particular if he acted by night or under cover of disturbances or catastrophes or by using weapons, dangerous instruments or violence;
 - (d) when he acted in pursuance of a criminal agreement, together with others or as a member of a gang organized to commit offences and, more particularly, as chief, organizer or ring-leader;
 - (e) when he intentionally assaulted a victim deserving special protection by reason of his age, state of health, position or function, in particular a defenceless, feeble-minded or invalid person, a prisoner, a relative, a superior or inferior, a minister of religion, a representative of a duly constituted authority, or a public servant in the discharge of his duties,

- (2) When the law, in a special provision of the Special Part, has taken one of the same circumstances into consideration as a constituent element or as a factor of aggravation of an offence, the court may not take this aggravation into account again.

Article 83. Other circumstances.

The Court shall give reasons for applying extenuating or aggravating circumstances not expressly provided for in this code, and shall state clearly its reasons for taking this exceptional course.

9. Article 51 of the Constitution states :

No one may be arrested without a warrant issued by a court, except in case of flagrant or serious violation of the law in force. Every arrested person shall be brought before the judicial authority within forty-eight hours of his arrest. However, if the arrest takes place in a locality which is removed from the court by a distance which can be traversed only on foot in not less than forty-eight hours, the court shall have discretion to extend the period of forty-eight hours. The period of detention shall be reckoned as a part of the term of imprisonment imposed by sentence. No one shall be held in prison awaiting trial on a criminal charge the sole penalty for which is a fine.

EUROPEAN COURT OF HUMAN RIGHTS: ITS FIRST TWO JUDGMENTS

The establishment of the first international tribunal on human rights was reported in *Bulletin* Nos. 8 (December 1958) and 9 (August 1959). On September 3, 1958, the signatures of the last of the eight States required to make the jurisdiction of the European Court of Human Rights valid in international law were appended to the Convention; the judges were elected on January 21, 1959.

The Court adopted its Rules in September 1959. In April 1961, the first case was brought before it by the European Commission on Human Rights—the Lawless Case. On July 1, 1961, the Division of the Court dealing with this case handed down a substantive decision, and so finally settled a dispute involving the Government of Ireland, against which an Irish national had lodged a claim alleging a breach of the European Convention on Human Rights.

The Lawless case is particularly interesting, not only as a sign of the progress achieved in the international protection of human rights but also as a significant element of case law in international jurisprudence. A summary of the case may be useful.

On November 8, 1957, Gerard Lawless, an Irish citizen, aged 22, domiciled in Dublin, submitted to the European Commission of Human Rights an Application against the Republic of Ireland.

The Applicant alleged that he had been arrested on July 11, 1957, on suspicion of being a member of an illicit organization (Irish Republican Army) and was detained in the Curragh Camp until December 11, 1957, by virtue of an Order by the Minister of Justice under Section 4 of the Offences against the State (Amendment) Act, 1940. Lawless claimed that the fact that he was detained conflicted with the European Convention on Human Rights, and, in particular, with Articles 5 and 6, which guarantee to everyone the right of freedom and security and the entitlement to a fair trial. He claimed entitlement to damages incurred as a result of his detention.

On August 30, 1958, the European Commission on Human Rights declared his Application admissible. Pursuant to the procedure specified in the Convention, the Commission established a Sub-Committee of seven members, with Mr. C. Th. Eustathiades (Greece), the Vice-Chairman of the Commission, in the Chair, to establish the facts and to try to reach a friendly settlement. As this proved impossible, the Sub-Committee reported to the Commission in plenary meeting, and the latter adopted a report of its own. In this report, which is still a confidential document, the Commission delivered a majority opinion that the detention of G. R. Lawless did not constitute a breach of the Convention in view, first, of the public emergency existing in the Republic of Ireland at the time when the acts were committed, and, second, of the right of the Irish Government to take measures derogating from its obligations under the Convention to the extent strictly required by the exigencies of the situation, under Article 15 of the Convention.

This report was transmitted to the Committee of Ministers and to the Government of Ireland on February 1, 1960.

The date on which the report is transmitted initiates a three-months interval, during which the case may be brought before the European Court of Human Rights either by the State concerned or by the Commission. If the case is not brought before the Court, the Committee of Ministers must pass upon it.

On April 13, 1960, the Commission decided to bring the case before the Court in view of the importance of the legal principles involved.

When the case came before the Court, the Irish Government announced, in accordance with Article 21, para. 2 of the Rules of the Court, that it would appear as a party in the case.

The Government was represented before the Court by Mr. Thomas Woods, its Agent, and, after his death during the period covered by the hearings, by Mr. A. O'Keefe, Attorney-General.

The Commission appointed Sir Humphrey Waldock (United Kingdom) as its Principal Delegate and Mr. C. Th. Eustathiades (Greece) and Mr. S. Petren (Sweden) as Assistant Delegates.

When the case was brought up, several preliminary objections and questions of procedure were raised by the Irish Government and by the Commission. The Court gave rulings on these matters in its Judgments of November 14, 1960, and April 7, 1961.

The two Judgments govern the very important question of the position of the individual as Applicant in proceedings before the Court, since Article 48 does not mention individuals among those qualified to lodge complaints with the Court. Article 44 seems to go even further in stipulating that "only the High Contracting Parties and the Commission are empowered to bring a case before the Court". True, the English text of that Article allows of a much less rigid interpretation, since it simply excludes individuals from those entitled to bring the case before the Court.

However that may be, there can be no doubt that individuals can in no case be parties before the Court and can in no case "appear in a legal capacity before it", according to the phrase used in the Lawless Judgment of November 14, 1960.

Does this mean that the Court is barred to an individual? The two Judgments cited above show that this is not so, since the individual cannot possibly be divorced from litigation which concerns him in the first place. Hence, the role in the proceedings assigned to him by the Court will be dictated by the fact that he has made an Application to the Commission.

After the exchange of memorials on the substance, the Court heard, in public session from April 7 to 11, 1961, the Commission's Principal Delegate and the Attorney-General of the Irish Government. It delivered its Judgment on July 1, 1961.

The Court ruled in substance :

(a) that the detention of G. R. Lawless from July 13 to December 11, 1957, conflicted with the provisions of Article 5 [paras. (1) (c) and (3)] of the Convention;

(b) that, nevertheless, the measure taken against Lawless was justified by the Irish Government's right to take measures derogating from its obligations under the Convention under Article 15 thereof, since the Court considered that a public emergency threatening the life of the nation existed in Ireland during the period when Lawless was detained, and that such detention under the Offences against the State (Amendment) Act, 1940 was a measure strictly required by the exigencies of the situation, within the meaning of Article 15, para. 1 of the Convention.

The Court ruled, therefore, that the evidence did not disclose a breach by the Irish Government of the European Convention on Human Rights and that consequently the question of entitlement by G. R. Lawless in respect of such a breach did not arise.

This is the substance of the Court's Judgment of July 1, 1961. As the Applicant did not "win" his suit, is it to be deduced that the European Court of Human Rights and, in consequence, the entire machinery for the protection of human rights set up by the Rome Convention have come to be regarded as utterly futile by public opinion, and by jurists especially? Nothing of the sort. The Lawless case, the first to pass through all the fairly complicated stages of this machinery, has proved not only the usefulness of, but the necessity for, the Convention.

A second case is now pending before the European Court of Human Rights, stemming from the Application submitted to the European Commission on Human Rights by Raymond de Becker, a Belgian national, against the Belgian Government.

During the war (until October 1943) the Applicant was the editor of the Brussels newspaper *Le Soir* and was sentenced after the Liberation to detention for life, later commuted to imprisonment for seventeen years, for collaboration with the enemy occupier.

In 1951, de Becker was conditionally released.

Having been sentenced for an offence against the external security of the State in time of war to a penalty involving deprivation of liberty for more than five years, the Applicant became liable under, and was subjected to, the provisions of Article 123(6) of the Belgian Penal Code, whereby he was debarred for all time from, *inter alia*, publishing, managing, editing, printing and distributing, in any capacity whatsoever, any newspaper or public print. De Becker pleaded in his Application that these provisions conflicted with Article 10 of the Convention, which guarantee to everyone freedom of expression.

Having declared the Application admissible, the European Commission on Human Rights examined the facts of the case and, having failed to reach a friendly settlement, drafted a report substantively in favour of the Applicant's claim. On April 29, 1960, it brought the case before the European Court of Human Rights.

After an exchange of memorials between the Commission and the Belgian Government, the Court called for public hearings, to open on July 3, 1961.

On June 1, 1961, however, the Belgian Government introduced into the Parliament a Bill relating to the reorganization of civic functions (*l'épuration civique*), including the amendment of Article 123(6) of the Penal Code, in order, it should be observed, "to align domestic law with the Convention on Human Rights". The Bill was passed by both Houses and became the *Act of June 30, 1961*, promulgated on July 1, 1961, i.e., two days before the Court hearings. This Act relieves de Becker of his incapacities under Article 123(6), with the sole exception that any participation by him in acts within the scope of that Article of the Belgian Penal Code must not be of a political character. In other words, de Becker has recovered, under the law, the right to freedom of *non-political* expression.

At the hearing on July 3, 1961, the Belgian Government offered conclusions amounting to a request to the Court to rule that, owing to the new Act, de Becker "has no interest in pursuing his Application".

The Principal Delegate of the European Commission on Human Rights to the Court stated that he could not express his view on the Belgian Government's conclusions until he had referred the matter back to the Commission in plenary meeting.

The Court therefore decided to defer the case until October 5, 1961. Since the preparation of this article it has been learned that de Becker has withdrawn his Application. Neither the European Commission of Human Rights nor the Court, however, is bound by this withdrawal. The Court has now asked the European Commission of Human Rights and the Belgian Government to consider the effect of the withdrawal and will reconvene to hear their submissions in February 1962.

THE JUDICIARY IN SENEGAL *

In French public law the principle of the separation of powers, which has been affirmed constantly since the Revolution of 1789, is interpreted in such a manner that the powers of the Judiciary are strictly limited; this interpretation is as traditional as the principle itself and has greatly influenced the public law of many European countries. The purpose of the Revolutionary legislation was certainly to counteract the abuse by the *Parlements* of the *Ancien Régime*¹ of their very broad powers to impede any reforms attempted by the Monarch, his ministers or his executive agents. This distrust of the courts persisted long after the reasons for it had vanished and left a deep imprint on French institutions; as a result, the powers of the Judiciary were limited in two respects.

(1) *Vis-à-vis the Executive.* The Laws of August 16-24, 1790, and 16 Fructidor of Year III, forbade the courts to "bring before them the administrators on matters relating to their duties" and to "take cognizance of acts of the administration, whatever their nature"; on the basis of those old texts, even today the courts of justice refuse to deal with disputes relating to the organization or operation of any public administrative body or local authority. All such disputes fall within the competence of administrative tribunals whose jurisdiction is separated from that of the Judiciary; on the basis of their decisions a corpus of "administrative law" has gradually come into existence, also endowed with its own case-law.

(2) *Vis-à-vis the Legislature.* The Law of August 16-24, 1790, and the Constitution of 1791 forbade the courts "to halt or suspend the application of any law or laws". This prohibition recurs in Article 127 of the Penal Code of 1810, which makes any breach a criminal offence; it has always been interpreted as forbidding the judicial courts, and even the administrative tribunals,

* This article has been prepared on the basis of documentation supplied by Mr. Gabriel d'Arboussier, Minister of Justice of Senegal, Mr. Isaac Forster, First President of the Supreme Court of Senegal and a Member of the International Commission of Jurists, and Professor Roger Decottignies, Dean of the Faculty of Law, Dakar, to whom we extend our thanks.

from questioning the constitutional validity of laws. The Constitution of October 27, 1946, was the first to contain any provision by which the constitutionality of legislation was to be subject to examination; under this law, a "constitutional committee", a political body composed of members elected by Parliament was thus empowered; the "Constitutional Council" set up under the Constitution of October 4, 1958, is also a political body. In brief, under French public law the separation of powers is definitely unfavourable to the Judiciary. The solid safeguards for the independence of the legal profession do not counterbalance the relegation of the courts to the administration of penal law and the settlement of private litigation. The logic of the separation of powers requires that the courts be the custodians of the Rule of Law, but the French courts have admittedly been deprived of any power to constrain the executive power to comply with the law and the Legislature to respect the Constitution.

The organization of the Judiciary in the French Overseas Territories was based on the same principles. In each Territory, an administrative board dealt with disputes between private individuals and the local administration, subject to appeal to the *Conseil d'Etat*. The former territories of West Africa, Equatorial Africa and Madagascar are now sovereign States. French legal traditions have left an imprint so deep that these States, or most of them, have modelled their judicial institutions on those of metropolitan France. In the Constitutions of the Ivory Coast, Gabon and the Central African Republic, the distinction between the administrative and judicial courts is expressly stated. The Constitution of the Malagasy Republic also makes provision for adjudicating on matters in dispute and makes a political body—the Supreme Institutional Council—responsible for deciding on the constitutionality of laws. In Cameroun, a single special court—the State Tribunal—deals with administrative litigation. In Upper Volta, a Council for Legal and Administrative Disputes is competent to deal with administrative and constitutional cases. Provision is made in the Constitutions of several States for the establishment of a Supreme Court responsible solely for determining the constitutionality of legislation, for administrative litigation and for auditing government accounts. This Court is the *Tribunal d'Etat* in Dahomey and the *Conseil d'Etat* in Mali and the Niger.

* * *

The justification for such a lengthy introduction is that it is required, if the recent constitutional and legislative measures enacted in Senegal are to be properly understood. These measures accord competence to a sole legal organ to decide on the constitutionality of legislation and to decide administrative and judicial disputes thus recovering for the Judiciary its full powers. This entirely new development in a country with French legal traditions may soberly be described as revolutionary.

The first Constitution of Senegal, that of January 24, 1959, merely stated, in Article 17, that the powers of the Judiciary were "delegated to the Federation of Mali"; the Constitution of the Soudan Republic and of Mali contained similar provisions. On August 20, 1960, the Federation of Mali was dissolved, and Senegal's Constitution had to be adapted to the new situation. The revision was carried out very rapidly, and on August 26, the National Assembly adopted the text of a new Constitution, which is in force today. Chapter IX of the Constitution of August 26, 1960 is devoted to "the Judiciary". Article 59 states that "the Judiciary is an authority independent of the Executive and the Legislature". Article 60 makes the President of the Republic responsible for safeguarding that independence, with the assistance of a Supreme Council of the Judiciary; it also lays down the principle of the security of tenure of judges. Article 62 provides for the establishment of a Supreme Court, the organization and competence of which are to be prescribed by an organic law; in particular, the Supreme Court is to determine "the constitutionality of legislation and of international obligations".

The foundations for the new organization of Senegal's Judiciary were settled in two Ordinances, dated September 3, and November 14, 1960, and two Decrees, dated November 10 and 14, 1960. Two main principles are set forth :

- (1) at the lower level, the courts of first instance and the appeal courts have unlimited jurisdiction in civil, criminal and administrative matters;
- (2) at the higher level, the Supreme Court has the same unlimited jurisdiction.

1. Courts of First Instance and of Appeal

Ordinance No. 60-56 of November 14, 1960 on the Organization of the Judiciary lists the various courts, and specifies :

Article 1, para. 2 : " These courts shall take cognizance of all civil, commercial or penal cases *and of all administrative litigation*, whatever the status of the subject of law concerned ".

Article 3 : "...in all cases, *the courts of first instance* shall pass judgment under the ordinary law in first instance ". (Italics added.)

Furthermore, Decree No. 60-390 of November 10, 1960, states, in Article 8 : " The courts of first instance shall take cognizance of all administrative litigation, with the exception of appeals relating to misfeasance and appeals concerning electoral matters. "

Article 3 of the Ordinance of November 14, 1960, states that the courts of first instance are competent to hear "(1) all actions with a view to establishing the financial liability of public authorities, either on account of transactions to which such authorities are party, or of works ordered by them, or on account of any act on their part which has caused damage to any other party; (2) all disputes relating to the basis, rate and collection of taxes of any kind...; (3) all disputes relating to the pecuniary advantages or privileged status granted to officials of government administrations." Article 4 adds that the said courts are also competent "to interpret and determine the legality of decisions of administrative authorities" when hearing cases which have been brought before them. Lastly, Article 22 rounds off this reform by abolishing the court for administrative disputes and by specifying that any cases pending are to be brought before the courts which have become competent to hear them.

Decree No. 60-404 of November 14, 1960, lays down procedural rules to be applied when the Appeal Court and the courts of first instance hear administrative cases; it states that, subject to certain reservations, the ordinary procedural rules are applicable. Before the hearing is opened, a request must be addressed to the administrative authority concerned, which is thus summoned to state its position; if it fails to do so within a period of four months, its silence is construed as a rejection of the request. The serving of the summons does not prevent the implementation of the administrative decision complained of; but the court may order the administration to defer enforcement if irreparable damage might otherwise ensure. The Court's findings in administrative matters are always open to appeal, irrespective of the subject of litigation. Lastly, special procedures are prescribed for electoral and fiscal matters.

The competence of the tribunals of first instance in administrative matters, as defined by the provisions outlined above, corresponds closely to what is termed in French law *le contentieux de la pleine juridiction*; it covers all cases in which the findings of the court have financial implications. Two forms of administrative litigation fall outside this jurisdiction :

(a) *electoral disputes*, comprising litigation relating to the election of members of "administrative assemblies, bodies and organizations", over which the appeal court exercises jurisdiction;

(b) *claims for annulment*, as a remedy against malfeasance lodged with a view to the annulment of regulations issued by an administrative authority on the grounds of incompatibility with the law; as stated above, such cases come directly before the Supreme Court.

Be that as it may, all aspects of administrative disputes are within the jurisdiction of the judicial authorities. Apart from its intrinsic interest because of the principle involved, this reform is of tremendous scope from the practical point of view : (1) there are seven courts of first instance for the whole of Senegal—one in the chief town of each region; these courts are thus within easy reach of members of the public who can approach them much more easily than the distant administrative tribunal; (2) since administrative cases are divided among the seven courts, the preliminary investigation may thus be more rapidly completed; (3) last and most important, disputes as to competence are radically done away with; plaintiffs, defendants and their counsel will no longer have to hesitate over the choice of judges, and the courts will no longer have to plough through the complex network of subtle rules which govern the assignment of litigation under French public law.

2. The Supreme Court

As we have seen, Article 62 of the Constitution of Senegal provides for the establishment of a Supreme Court whose organization and competence are to be laid down by an organic law. Pursuant to that provision, Ordinance No. 60-17 of September 3, 1960, was issued and contains an organic law on the Supreme Court. We shall examine the functions and organization of that Court.

(a) *The fourfold competence of the Supreme Court*

The functions of the Supreme Court are laid down in Articles 1 to 6 of the Ordinance and fall into four groups :

1. The Supreme Court may set aside orders and findings of any court and decisions of the arbitration councils established in connection with collective labour contracts; it also receives applications for review, for *renvoi pour suspicion* or for *règlement de juges*.²

In this regard its functions resemble those of the French *cour de cassation*, and also those of the *cour supérieure d'arbitrage*; moreover, when the application relates to an order handed down on an administrative matter, its competence corresponds to that of the French *Conseil d'Etat*.

2. The Supreme Court hears applications for the rescinding of decisions by the administrative authorities on grounds of action *ultra vires*. In this respect its functions are those of the judicial section of the French *Conseil d'Etat*, and it is competent to annul any statutory text drawn up at any level of the administration with regard to defect of form or substance. Article 87 specifies that an order annulling an administrative action "is effective in regard to all persons".

3. The Supreme Court inspects the accounts of Government treasurers; it audits the accounts of public authorities; it supervises the financial management and accountancy of State undertakings and public establishments of an industrial and commercial nature; it supervises the directors of State public administrations; it prepares an annual report to the President of the Republic, indicating the most significant irregularities and, if need be, proposing reforms and improvements. In this regard, its functions are well outside the purely judicial field and resemble those of the French *Cour des comptes* (Audit Office).

4. Lastly, the Supreme Court determines "the constitutionality of legislation and of international commitments", and here its functions closely resemble those assigned to the Constitutional Council by the French Constitution of October 4, 1958. This supervision takes various forms. (1) The President of the Republic may apply to the Court for a declaration that a law is unconstitutional. (2) Organic laws have to be submitted to the Court. In both cases, the matter must be laid before the Court within the time-limit for promulgation which, pursuant to Article

24 of the Constitution, is fifteen days; if the Court finds that the law, or any of its provisions, is contrary to the Constitution, the law (or the relevant provision) will not be promulgated. (3) International commitments may be referred to the Court before they are ratified or approved; if the Court finds that any such commitment contains a clause contrary to the Constitution, it may be ratified or approved only after amendment of the Constitution. (4) The Court may be called upon to arbitrate between the Executive and the Legislature; for example, if the Government and the National Assembly disagree as to the dividing line between the field of legislation and that of regulation, the Court settles the matter (Articles 42 and 48 of the Constitution). Finally, the Court may be consulted by the Government regarding draft legislation and regulations, difficulties connected with administrative matters, and in general any matters which the ministers may wish to submit to it. In this capacity of adviser to the Government on legislative and administrative matters, the Court's functions are similar to those of the administrative sections of the French *Conseil d'Etat*.

(b) *The sole authority of the Supreme Court*

As we have seen, at the highest level of the Judiciary, all jurisdictional functions are concentrated in a single authority. In practice, this unity might have been destroyed, if each of the four fields of competence described above had been delegated to a specialized division of the Supreme Court. Under a cloak of formal unity and because of functional specialization, there would have been a risk that a break-away administrative or constitutional jurisdiction might have developed. The authors of the Ordinance fortunately took judicious measures to preserve the unity of the Supreme Court. (1) First of all, there are only two divisions of the Court. In principle, their functions are specialized: the first deals with applications for the setting aside of judgments, while the second deals with matters relating to public accountancy and hears appeals relating to action *ultra vires*. There is, however, no rigid barrier between the two; the division of work is in no way compulsory, and, as stated in Article 49, "the parties to litigation may not challenge the fact that a case was referred to one or other division". (2) The First President and the Attorney-General have access to all divisions and organs of the Supreme Court (Articles 24 and 26). Last and most

important, appeals on constitutional matters are heard by the divisions of the Supreme Court meeting in joint session (Article 29).

* * *

Such are the rules governing the organization and competence of the Judiciary in the new Republic of Senegal. They are a credit to the Senegalese legislator who, in the first place and without repudiating French judicial traditions, *adopted an imaginative approach* and sought inspiration in other models too. The amalgamation of administrative and judicial procedure of law is taken from Anglo-Saxon Common Law. The idea of entrusting the Judiciary with the task of verifying the constitutional validity of legislation is taken from the United States system, with the difference that the supervision is merely preventive at the stage before the legislation comes into force, and it is exercised by the Supreme Court alone. Similar provisions are to be found in the Constitution of Ireland (Article 26) and in that of Colombia (Article 90). In the second place, the Senegalese legislator has established *a simple and rational system* in which the Judiciary exercises its natural attributions in their entirety. In the last resort, it is the Supreme Court which has the power to "lay down the law" and to settle legal disputes between private individuals, between the administration and private individuals, between various administrative bodies, or between the Executive and the Legislature. Lastly, the Senegalese legislator has displayed to the highest degree *a sense of the Rule of Law*. Mr. Gabriel d'Arboussier, Minister of Justice of Senegal, was justified in stating in the report which he presented to the Lagos Conference (Lagos, Nigeria, January 1961): "In the Rule of Law, we have taken a step forward which is, so far as I know, without parallel in any other constitution." There are no longer privileged plaintiffs—the administration is answerable to the same judges as are those who are administered. The administration's respect for the Judiciary is all the more commendable since Senegal's Constitution, like that of all the new States, gives the Executive very wide powers. On the other hand, the Legislature agrees that the higher authority of the Supreme Court should coincide with that of the Constitution. The scope of this judicial arbitration is all the greater since public freedoms and those of the human being are not, as in many other countries, simply enumerated in a preamble, but are defined in the body of the Constitution: they are contained in Articles 6 to 20, in extremely explicit provisions

and they recognize, in addition to the traditional freedoms, the right to work, to education, to the protection of the family, and the right to form and to join trade unions.

In his speech at the inaugural session of the Supreme Court on November 14, 1960, President Leopold Sedar Senghor stated : " The Government and I consider the Supreme Court as one of the essential cogs in the system of public authority and as the watch-dog of our fundamental freedoms...In the Supreme Court, the President of the Republic, who is the guardian of the Constitution, will find an authority independent of the Legislature and the Executive to lay down the law."

In conclusion, we could not do better than to recall the words of Mr. Isaac Forster, First President of the Supreme Court of Senegal and Member of the International Commission of Jurists, at that same inaugural session on November 14, 1960, who in the presence of the highest dignitaries of the Republic of Senegal, the President of the Malagasy Republic and representatives of the diplomatic corps stated : " We Senegalese can bear calmly and without embarrassment the spotlight trained on us, for it lights up only institutions which are absolutely democratic. Indeed, the Governments which you represent should be reassured by the example I am giving you at this very moment of the independence of Senegal's Judiciary. Have you often seen, anywhere else, a judge take the liberties which I am taking now, in the presence of the President of the Republic, the Prime Minister, the President of the National Assembly, not to mention my own Minister, the Minister of Justice? Have you often heard, anywhere else, a judge declare publicly to the Executive: 'If your statutory deeds are illegal, we shall rescind them!' and to the Legislature: 'If your laws are unconstitutional we shall oppose their promulgation!' What better guarantees could we offer to even the most sceptical amongst you? "

¹ It should be noted that in old French law the *Parlements* were the appeal courts and their decisions were final, although subject to appeal to the Royal Council (*Conseil du Roi*).

² Under the French code of criminal procedure, *renvoi pour suspicion* occurs when the appeal court relieves a magistrate's court or criminal court of a case which it would normally be competent to try, and transfers the case to another court of the same type; *règlement de juges* is where the appeal court settles a dispute as to competence between two magistrates' courts or criminal courts where a case is before both of them simultaneously.

THE ELECTORAL ENFRANCHISEMENT OF THE WOMEN OF SWITZERLAND

Switzerland is one of the few countries in the world where the general electoral franchise is still denied to women. This omission is a violation of the general tenets of the Rule of Law, and especially of the principle that all are equal before the law. In recent years, therefore, a growing number of private and parliamentary attempts have been made to extend the electoral franchise, so far reserved for Switzerland's male citizens, to women and thus to close this gap in the Rule of Law in Switzerland. These moves have up to now had a limited success: the electoral franchise was conferred upon the women of the three French speaking cantons of Vaud, Neuchâtel and Geneva as recently as 1959 and 1960, after the issue had been decided by the necessary ballots.

There are, of course, reasons for the exceptionally slow process of introduction of the vote for women. It may serve as a timely reminder to subject these reasons to a closer analysis — not least because of the many critical voices that are being raised abroad. The underlying causes are both historical and political in character and are largely determined by the specific peculiarity of the Swiss democratic order of government by plebiscite.

1. To begin with, it should be pointed out that we know of no instance where the electoral enfranchisement of women was brought about as a result of a *general ballot* of voters. Women were given the vote either by parliamentary decision (in accordance with the provisions of the Constitution, either by amendment of the Constitution or by special legislation) or, alternatively, by "revolutionary action". The former method was employed in the United States, for example, where universal suffrage, already in existence in a number of federal States, was extended to the whole country on the basis of the 19th Amendment of August 26, 1920; or in Britain, where it was accomplished on the basis of the *Representation of the People Act of 1918*. In contrast, the electoral enfranchisement of women in Russia and Germany was preceded by the overthrow of the former regimes of these countries. In Switzerland, on the other hand, the electoral enfranchisement of women has to be enacted by

a partial reform of the Federal Constitution. Such a measure — even disregarding the necessity to overcome political and, above all, psychological obstacles — would require the consent of the majority of male voters *and* of the majority of cantons. It may seem paradoxical that only men should be able to vote on an issue that is at least as important to women. But this is explained by the fact that a Constitution may not be legitimately amended by anyone except by those who are legally authorized to do so by the Constitution itself.¹

In these circumstances, it will be appreciated how infinitely more complicated, compared with a relatively small and homogenous body as a House of Parliament, is the process of the electoral enfranchisement of women in Switzerland, and that far more substantial political, confessional, social and psychological obstacles are being encountered. To illustrate this point : a survey of the various cantonal ballots held on the subject of the partial or total suffrage of women (up to 1958 altogether 25 ballots in nine cantons and two half-cantons) has disclosed the entirely negative result that the majority of voters, between 51 and 80 per cent of them, has consistently opposed the enfranchisement of women.² Nevertheless, the encouraging fact remains that the percentage of votes opposing it has declined in favour of those advocating it.³ The result of the federal referendum on the electoral enfranchisement of women which was held on February 1, 1959, was distinctly negative : with the exceptions of the Cantons of Geneva, Vaud and Neuchâtel, where the majority voted in favour, all cantons rejected the admission of women to the electoral franchise. The total result revealed 654,939 votes against and only 323,727 in favour of the bill. Separate ballots were subsequently held in the three above cantons, and the result was the admission of women to the electoral franchise on the cantonal level in the Cantons of Vaud (on February 1, 1959, by 33,648 votes in favour and 30,293 votes against), Neuchâtel (on September 26-27, 1959, by 11,252 in favour and 9,730 against), and Geneva (on March 5-6, 1960, by 18,119 in favour and 14,624 against). Although the size of the opposing vote was still very substantial, a breach of the previously united front of the opponents of universal suffrage had now succeeded for the first time. Further evidence of the slow but steady erosion of this united front is also shown by the fact that the German-Swiss Half Canton of Basle-City has authorized its boroughs to introduce both the active and passive vote for their women in certain municipal affairs.

2. The second serious obstacle in the way of the admission of women to the electoral franchise is the following. The term "right to vote" comprehends a much wider catalogue of political rights in Switzerland than it does in any other country. These rights are not limited to the casting of a vote in national, regional or local parliamentary elections, or federal presidential elections every four or five years; to casting a vote accepting or rejecting a new Constitution, or at best to occasionally decide important political affairs by means of a national plebiscite.

The Swiss electoral franchise includes the election of the members of the parliamentary bodies of the Confederation and the cantons as well as of the communal councils, also the election of the Executive in the cantons and communes, further, the election of cantonal and communal (as the case may be) education authorities including teachers in particular, ordinary judges and magistrates, public notaries, etc.; furthermore the right to take part—on all three levels of government—in compulsory or optional referenda on constitutional, legislative and financial matters (for instance credits for school building programmes, for hospitals, for roads and so forth).

This illustrates the wide variety of rights which the electoral franchise bestows upon the Swiss citizen. Far beyond the exercise of an extensive voting right, he also has a voice in all important spheres of the political, economic and social life of his country. This again requires a high degree of political maturity, and it is widely held that this can only be acquired in the course of the constant exercise of traditional civic rights. That is why the Swiss male displays a not unnatural reluctance to confer, so to speak *uno actu*, all these political rights and opportunities to influence public affairs which are attached to this franchise upon women who can boast no previous experience in these matters. There are certainly many citizens considering this as a serious objection against the simultaneous enfranchisement of women at all three levels of national government, the cantons and the boroughs. It was also probably the principal reason for the very emphatic rejection of the federal bill of February 1, 1959.

The past developments of Swiss political institutions show that in most instances the Confederation adopted changes only after they had already proved satisfactory in the cantons. We assume that this course will specially commend itself to the question of the universal suffrage of women. Their admission to the electoral franchise in the three French-speaking cantons

is a first step—though admittedly a modest one—in the direction of its adoption in the other cantons and finally in the whole of the country. The results of the ballots which have so far taken place in the three cantons have largely disproved the arguments of the opponents of women's electoral suffrage: their participation in the ballots has neither upset the political balance (for example, the outvoting of male voters by women), nor has there been evidence of any fundamental reshuffle of voting patterns in favour of any one party (for instance of the Socialist Party, as feared in middle class circles), or religious groups (in favour of the Catholics, as expected in the socialist and liberal camps). The hypothesis that the women, for their part, did not even care to be admitted to the electoral franchise was also disproved by the aforementioned consultative ballot: in Zurich 105,587 women expressed themselves *in favour* of and only 25,655 *against* partial or general enfranchisement; the figures for Basle were 33,166 *in favour* and 12,327 *against*; and for Geneva 35,972 *in favour* and 6,436 *against*.

However justifiable the objections and reservations put forward against the general enfranchisement of women may be, it seems unlikely that they will be permanently defensible, even in the circumstances which are peculiar to Switzerland. These justifications cannot, above all, alter the fact that the withholding of the electoral franchise from women constitutes a violation of the principle of equality before the law as expressed in Article 4 of the Swiss Constitution.

It is true that according to Article 74 of the Constitution only the male citizens, on completion of their twentieth year, are granted political rights. But in today's changed society this is hardly compatible with the principle of equality as set forth in Article 4.

The only solution of this contradiction, therefore, would seem to be the passing of an Act, conferring full and equal political rights upon the Swiss woman. This unreserved equality is an integral part of all social orders based on the Rule of Law and its most significant expression lies undoubtedly in the universal suffrage of all men and women as citizens of a democratic country, amongst whose basic characteristics is the recognition of the dignity of woman as a fully equal member of the national community.

¹ Cf. Fleiner/Giacometti, *Schweizerisches Bundesstaatsrecht*, Zürich, 1959, p. 705 and on. Manfred Kuhn, Revision oder Revolution, publ. in : *Schweizerisches Zentralblatt für Staats- und Gemeindeverwaltung*, No. 21, p. 19.

² It should be pointed out here that the term "majority of voters" does not refer to the absolute majority of the total electorate. It merely refers to the majority of votes cast.

³ Cf. *Message du Conseil fédéral à l'Assemblée fédérale sur l'institution du suffrage féminin en matière fédérale*, of February 22, 1957, p. 30 on.

THE DEATH PENALTY AND THE USSR

History of the Death Penalty in the USSR

On July 21, 1961, *Pravda*, the official Communist Party newspaper in the USSR, published the following article :

The USSR Prosecutor General (*sic*) appealed to the Russian Republic Supreme Court concerning the lightness of the sentence passed by the Moscow City Court in the case of Ya. T. Rokotov and V. P. Faibishenko, sentenced on July 15 to 15 years' deprivation of freedom each for largescale speculation in currency.

The judicial collegium for criminal cases of the Russian Republic Supreme Court upheld the appeal and the case was returned for a new court hearing.

On July 18 and 19 the Russian Republic Supreme Court, consisting of Comrade A. T. Rubichev, Chairman of the Supreme Court, and two people's assessors—Comrade A. N. Vasilyev, electric locomotive engineer of the Moscow Railroad, and Comrade A. I. Maurin, tool mechanic at Plant No. 569—held an open court session to hear the criminal case against Ya. T. Rokotov and V. P. Faibishenko for speculation in especially large sums of currency.

Comrade G. A. Terekhov, senior assistant to the USSR Prosecutor General (*sic*) and legal counsellor second class, represented the state prosecution.

Comrades N. I. Rogov and V. Ya. Shveisky, defense lawyers, represented the defendants.

The Court recognized that Rokotov and Faibishenko were guilty of regularly and for purposes of profit buying large amounts of foreign currency and gold coins from foreigners and some Soviet citizens, and of selling them at speculative prices.

The Court established that Rokotov bought a total of 12,000,000 rubles' worth of currency and gold coins and had resold them and that Faibishenko had bought and resold currency in the total amount of 1,000,000 rubles (in old currency).

Rokotov and Faibishenko led a parasitic type of life and enriched themselves through the benefits created by the working people.

Considering that Rokotov and Faibishenko had committed a grave state crime, the Russian Republic Supreme Court, on the basis of Art. 25 of the Law on State Crimes, sentenced Rokotov and Faibishenko to death by shooting with confiscation of all their valuables and property.

The sentence is final and there can be no appeal.

The sentence was heard with approval by those present in the court room.¹

The death sentence was passed, with retroactive effect, by invoking Decree No. 291 of July 1, 1961, which amended Article 25 of Law of State Crimes. This decree is the latest step in Soviet legislation concerning the death penalty, which has had in the USSR a varied history.

Following the overthrow of the Czarist regime, the Provisional Government, which had been established before the Bolsheviks took over in November 1917, abolished the death penalty on March 25, 1917, but later restored it for the armed forces. It was totally abolished — much against the wishes of Lenin — on November 10, 1917, immediately after the seizure of power by the Communists, but re-introduced on January 21, 1918. On January 17, 1920, the death penalty was abolished again to be restored in May of the same year.

On May 26, 1947, a decree was issued abolishing the death penalty in peacetime.² The foreword to the decree of the Presidium of the Supreme Soviet stated :

“... meeting the wishes of the trade unions of workers and employees and of other authoritative organizations which express the opinion of broad public circles, the Presidium... believes that the application of the death penalty is no longer necessary in peacetime conditions.”

Within a matter of three years, however, on January 12, 1950,³ the same body restored the death penalty “for traitors, spies, and those seeking to undermine the State”.

The decree was promulgated

“in view of declarations received from the national republics, from labour unions, peasants’ organizations, and also from those working in the arts, to the effect that a change in the decree abolishing the death penalty is necessary...”

There was no exact definition of the crimes, since the decree did not indicate precisely the sections of the Criminal Code under which the crimes were punishable. On April 30, 1954, this decree was extended to persons committing murder under aggravating circumstances.⁴

When in 1958 the new "Principles of Criminal Legislation for the USSR and the Union Republics" were drafted, former decrees on the death penalty were incorporated in the newly drafted rules, as well as later in the new Criminal Code of the Russian Federated Socialist Republic, which came into force on January 1, 1961.⁵ Accordingly the death penalty was to be imposed on crimes of banditry and terrorism, treason, espionage, sabotage and murder.

More recently, soon after the enactment of these basic criminal codes, referred to above, the scope of capital punishment has been broadened twice.

The official Gazette of the Supreme Soviet of the USSR (Vedomosti Verkhovnoy Soveta SSSR) No. 19, 1961, contained Decree 207 of May 5, 1961 on "intensifying the struggle against especially dangerous crimes" which extended the application of capital punishment for the pilfering of State or public property in especially large amounts and for counterfeiting money on a business scale. No. 27 of the same official Gazette published Decree No. 291 of July 1, 1961, extending the application of capital punishment once more, this time for speculation with foreign currency. The decrees amended Articles 22 and 25 of the "Principles of Criminal Legislation" to include the above provisions as follows:

Capital punishment, by shooting, may be applied as an extraordinary penalty, pending its complete abolition, in cases of high treason, espionage, sabotage, terrorist acts, banditry, making for the purpose of uttering, or uttering counterfeit money or securities, conducted as a business; speculation with foreign currency or securities conducted as a business or on a large scale; violation of rules concerning foreign currency by a person who was formerly sentenced for violation of rules concerning foreign currency or for speculation with foreign currency or securities; premeditated murder under aggravating circumstances stipulated in the articles of the criminal codes of the USSR and the Union Republics establishing liability for premeditated murder; and the pilfering of state of public property in especially large amounts; and also, in wartime or under combat conditions, for other serious crimes in cases specially stipulated in the legislation of the USSR.

Capital punishment by shooting may also be applied in the cases of especially dangerous habitual offenders and persons convicted for serious crimes who, at places of detention, terrorize prisoners who have taken the path of reform, who commit attacks on the administration or organize criminal groupings for this purpose and also actively participate in such groupings.

This long, impressive list of crimes punishable by death includes murder and special crimes committed in wartime. These two categories are the standard cases for the application of capital

punishment in Criminal Codes, including military codes. Next on the list are the political crimes, such as treason, espionage, etc. In these cases the justification for the death penalty has been debated for two hundred years. In practice, however, capital punishment for political crimes is imposed by several States.

Much more striking, however, are categories recently included on the list: crimes committed at places of detention and the series of economic crimes. The commission of a crime at a place of detention is generally an aggravating circumstance in criminal law, without, however, meriting capital punishment. Such a severe measure might be reasonably explained only by a serious deterioration of the discipline at those places of detention. In the case of pilfering of State and public property and other economic crimes violating the State-run Soviet economy, one must bear in mind that State ownership of the means of production is the very basis of the Soviet social and economic system, the protection of which is considered vital. One wonders, however, if, as was declared "the growing might of the new (Socialist) world system guarantees the permanence of the political and the social and economic gains of the Socialist (Communist) countries",⁶ why does internal protection need the deterrent of the death penalty? *A fortiori*, if we recall the statement of last May of Procurator-General Rudenko :

"As Socialist Statehood gradually develops into Communist selfgovernment, persuasion and education of the masses is gradually becoming the principal method of protecting public order and fighting its violators." ⁷

Capital punishment by shooting is by any standards not a progressive method for persuasion and education of the masses.

The latest contribution to this problem from Soviet authorities are the resolutions of the recent plenum of the USSR Supreme Court.⁸ The plenum dealt with the application of the Decrees of May 5 and July 1 1961 on "Intensifying the struggle against especially dangerous crimes". It was stated that the supervisory examination of the cases of the lower courts showed serious errors in the application of the above mentioned decrees. The tribunals, the Supreme Court noted, did not realize the social danger of the economic crimes involved and meted out light sentences, something which could not be tolerated. These faults had to be remedied, the Supreme Court said, and the struggle against this type of crime was to be led with efficiency and vigour.

The Question of Capital Punishment and International Organizations

The question of capital punishment is currently being seriously discussed by international legal organizations. To put the problem in perspective, it might be useful to give an outline of the discussions being conducted by these organizations.

The question whether the death penalty is justified as the supreme punishment against offenders is not a new one in the history of criminology. Since the attack of Beccaria against it in 1764 the debate for and against capital punishment has persisted with more or less vigour through the centuries. The debates have caused the abolition of the death penalty in the criminal system of many countries. In times of emergency, however, the death penalty has been revived in some countries or at least steps towards its revival made.

The Universal Declaration of Human Rights, passed by the General Assembly of the United Nations on December 10, 1948, solemnly declared the right of everyone to life (Art. 3) and that no one should be subjected to torture or to cruel or degrading punishment (Art. 5). Accordingly, the old question challenging the justification of capital punishment can today be formulated in the following way: Is the death penalty not the most inhuman and degrading of punishments? Is it not contrary to the right of life expressed in the Universal Declaration of Human Rights?

The problem of the death penalty is now on the agenda of the United Nations. The General Assembly adopted at its 841st plenary meeting, on November 20, 1959, the following resolution:

The General Assembly invites the Economic and Social Council to initiate a study of the question of capital punishment, of the laws and practices relating thereto, and of the effect of capital punishment, and the abolition thereof, on the rate of criminality.⁹

The Economic and Social Council, on its part, adopted a resolution on "procedure for the study of the question of capital punishment,"¹⁰ in which "believing that the Council should be provided with a factual review of the various aspects of the question of capital punishment ... it requests the Secretary-General to prepare such a review ... and to submit it to the Council at its thirty-third session."

In the Third Committee of the General Assembly, the representative of Sweden when introducing the draft resolution, expressed the view that the question of capital punishment would be a suitable subject for the next study of the Commission of Human Rights. The contemplated study on capital punishment should be based, continued the delegate, *inter alia* on the relevant articles of the Universal Declaration of Human Rights and on Article 6 of the Draft Covenant on Civil and Political Rights. It appeared from discussion in this Committee that so far no exhaustive studies on capital punishment had been made on the international level. It was felt, furthermore, that such a study would not necessarily lead to the drafting of an international convention on the abolition of capital punishment.¹¹

The Secretary General of the United Nations charged Professor Manuel Lopez-Rey, former Chief of the Section of Social Defence of the United Nations Secretariat, to direct the research and to prepare material for the debate of the Economic and Social Council at its 33rd session, which is scheduled for March-April 1962.

The Council of Europe, on the other hand, formed a subcommittee in its Legal Committee to deal with the problem of the death penalty. The subcommittee, with Mr. Marc Ancel of France as chairman, held its first meeting on December 12, 1958, at the French Centre for Comparative Law in Paris. The Centre, the Criminal Law Section of which is headed by Mr. Ancel, acts as a consultant expert to the members of the subcommittee.¹²

Growing interest in the question of the death penalty is demonstrated by the international meetings held on the subject and by national campaigns aiming at its abolition. For instance, one such meeting was an international seminar dealing with the death penalty organized in April 1960 under the leadership of Professor Georgakis of the Pantios School of Political Science, in Athens, Greece, at which the International Commission of Jurists was represented by the well-known Professor Jean Graven. In England, a "National Campaign for the Abolition of Capital Punishment" was launched this year.¹³ The organizers believe that an "unmistakable expression of thoughtful and responsible opinion" will secure its abolition in England when the Government reviews the Homicide Act 1957. This Act retained five categories as exceptions in which the death penalty could be imposed and a number of executions have taken place. This abo-

litionist movement has its links with the previous efforts of the Howard League of Penal Reform.

The "French Association for the Abolition of the Death Penalty" organized on December 8, 1960, a national meeting on capital punishment, with the participation of outstanding personalities representing religious life, the French Bench and Bar, and the medical profession. A further examination of the problem was achieved on both the national and international level by a meeting of criminologists and other professional persons from different countries in June 1961; the meeting was called "Colloque de Royaumont" and was presided over by Professor Jean Graven, President of the International Centre for Criminological Studies and Vice-Rector of the University of Geneva. The International Centre for Criminological Studies is engaged in carrying out a fact-finding survey on the present state of the question, in co-operation with other international and national organizations.¹⁴

Concerning the arguments advanced for the abolition of the death penalty a summary of the most interesting resolutions of the Royaumont meeting might be of interest. This meeting of world famous criminologists was the first meeting of its type to take a stand on the abolition of the death penalty in general, including political crimes.

The meeting came to the conclusion, after a historical survey of the problem, that the abolition of the death penalty was a long, socially-conditioned process, the evolution of which could be hindered or temporarily reversed by extraordinary situations and exceptional difficulties in the life of a country. Such situation might provoke emergency and panic legislation of an exaggerated nature. According to the resolutions of the meeting, historic evolution and the observation of facts showed that the death penalty was an anachronistic survival; the primitive arguments for its justification were no longer valid for our present-day morality nor were they valid in regard to trends in modern criminal policy.

The purpose of punishment, it was said, was no longer to act as a deterrent to the individual or the public by the excessive severity of the penalty inflicted. History had taught us that punishment was not efficacious when regarded purely from the deterrent angle. Excessive severity in punishment did not diminish the amount of crime or its recurrence. One had to look to other methods to reduce the incidence of crime. The heart of the new stand taken by the "Colloque de Royaumont" was that respect for life should be absolute, not only from the ethical point of view, but

also as a requirement derived from the contemporary duties of society towards fundamental human rights. These requirements for fundamental rights were absolute and could not be derogated for any reasons, political or otherwise; they had to lead to the unconditional abolition of the death penalty. Apart from the above efforts by international organizations and national movements, one may recall in this respect the world-wide publicity given to the Chessman Case. This Case "dramatically focused on the ethical problems of capital punishment with regard to convicts who dispose of less talent, perseverance and publicity than was available to Chessman. . .".¹⁵

In view of the research begun by various competent organizations, and of the coming debates in the United Nations and the Council of Europe, it would be premature to assess the merits and demerits of the abolitionists' case or take a definite stand on the question. The Table below shows which countries have abolished the death penalty, together with the date of abolition and other relevant notes.

In some of the countries there were in the postwar years executions for "collaboration with the enemy" and related war crimes. In Argentina, Austria, the Federal Republic of Germany and in Italy the abolition of the death penalty is included in the Constitution. Other countries have special legislative acts for abolition. In Switzerland, after former partial abolition, the Federal Assembly, when replacing cantonal Criminal Codes with a Federal Code in 1937 abolished the death penalty which could only be imposed in times of emergency and for certain crimes included in the Military Code of 1927 (Art. 27).

Countries Having Abolished Capital Punishment

<i>Name of Country</i>	<i>Date of abolition</i>	<i>Remarks</i>
Argentina	1921	CC Art. 5; CP only in emergency during war for military crimes (Ley 13985, Art. 11)
Austria	1919, 1950	
Belgium		CP exist, but, since 1863, has always been commuted; CC Arts. 7-11
Brazil	1890, 1946	
Colombia	1910	
Costa Rica	1880	
Denmark	1930	CC Art. 31; but, Law of June 7, 1952, introduces CP in emergency during foreign occupation
Ecuador	1897	
Finland	1949	Law of December 2, 1949; CP only in emergency of war
Greenland	1954	
Germany (Fed. Rep.)	1949	
Iceland	1944	
Italy	1944	
Luxembourg		CP exists, but no executions since 1822
Netherlands	1881	
Norway	1902	
Portugal	1867	
Sweden	1921, 1953	
Switzerland	1848, 1874, 1937	CP only in emergency and war, as laid down in Military Code Art. 27
Uruguay	1907	
Venezuela	1863	

CC : Criminal Code

CP : capital punishment

¹ See *Current Digest of the Soviet Press*, Vol. XIII, No. 29, p. 31. The term Prosecutor General is normally translated as Procurator-General.

² *Vedomosti Verkhovnovo Soveta SSSR* (Gazette of the Supreme Soviet of the USSR), 1947, No. 17.

³ *Ibid.*, 1950, No. 3.

⁴ *Ibid.*, 1954, No. 11. For a telling account of the use of the death penalty by the secret police see Vladimir Gsovski and Kazimierz Grzybowski, *Government, Law and Courts in the Soviet Union and Eastern Europe*, 2 vols., (London: Stevens & Sons, 1959).

⁵ Enacted by the Session of the Supreme Soviet of the RSFSR, October 25-27, 1960.

⁶ *Soviet News*, No. 4545 (October 17, 1961), p. 42, in the report to the Central Committee of the Communist Party of the Soviet Union.

⁷ *Izvestia*, May 7, 1961.

⁸ *Pravda*, September 14, 1961, p. 2.

⁹ A/RES/1396 (XIV), Official Records of the General Assembly, Fourteenth Session.

¹⁰ April 6, 1960, resolution 747 (XXIX).

¹¹ *International Review of Criminal Policy*, No. 16 (October 1960), pp. 59-60.

¹² *Council of Europe News*, 1959, No. 1 (January).

¹³ *The Times* (London), April 3, 1961; *Guardian* (Manchester), April 7 and August 17, 1961.

¹⁴ *Revue Internationale de Criminologie et de Police Technique*, No. 2, 1961.

¹⁵ *Bulletin of the International Commission of Jurists*, No. 11 (December 1960), p. 60.

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