

*FOR THE RULE  
OF LAW*

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

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## **POLITICAL REHABILITATION AND PARASITE LEGISLATION IN BULGARIA : CONFLICTING TRENDS**

The 8th Congress of the Bulgarian Communist Party, held in November 1962, adopted the line taken by the 22nd Congress of the Communist Party of the Soviet Union (1961), and—though somewhat belatedly—adopted what it claimed to be measures of “destalinization”, symbolized in the political field by ousting Prime Minister Yugov from the Government and the Party. In the legal field, the preparation of a new Constitution was announced. A law was passed on December 27, 1962, which increased the role of the National Assembly by bringing before Parliament matters which had hitherto been dealt with by decrees of the Council of Ministers.

A Decree on an amnesty, promulgated on December 30, 1962, is also interpreted as part of the policy of “destalinization”, as a measure to correct judicial “errors” committed during the Stalinist and post-Stalinist period. To support the idea that “destalinization” is under way in Bulgaria, the amnesty, the biggest in the history of the Bulgarian People’s Republic, applies also to political crimes, a quite unusual provision in Communist penal policy. On this subject Radio Sofia announced on December 30, 1962, that

The Presidium of the National Assembly has promulgated a decree under which over 4,000 convicts are pardoned and wholly relieved from serving their prison terms, while 2,000 are partially pardoned. The majority of the convicts pardoned had been sentenced for economic or criminal offences; 500 of the convicts had been jailed for political crimes. Now there are only a few convicts left in Bulgarian prisons serving sentences for political crimes.

The number of the “few” political prisoners remaining in prison is not precisely given. Nor have any figures been issued as to the total number arrested for political crimes.

The amnesty does not apply to recidivists and hardened criminals, an expected limitation, or to those convicted of misuse

of large sums of public money, or gross hooliganism. While it can by no means be qualified as general, it nevertheless appears rather sweeping. To underline its far-reaching importance in the life of the nation, the government has announced that it will close two prisons which in future will be used for economic purposes.

It is also interesting to note that while in the USSR penalties for economic crimes are increasing and the death sentence is more and more the punishment for seemingly minor offences, the Bulgarian authorities have made it a point to mention that a large number of those released under the amnesty had been previously sentenced for economic crimes, even if those who "misused large sums of public money" were expressly exempt from the application. It will be interesting to note whether Bulgaria will follow the Polish move to introduce the death penalty for crimes classified as "economic".

The rehabilitation of Traicho Kostov, the former First Secretary of the Bulgarian Communist Party, who was executed at the end of a show trial in 1949, was announced by the central daily of the Party, the *Rabotnicheskoe Delo*, on December 27, 1962. It was stated "he became the victim of illegal repressive measures in the period of the cult of personality". His rehabilitation follows an action of a similar sort in the Soviet Union (See No. 13 of this *Bulletin*) and in Hungary, dealt with later in this *Bulletin*. Its aim is stated to be the correction of errors, to draw a line, as it were, under the period in which Socialist Legality was violated, and to herald the coming of a new era. It was noted that the rehabilitation of Kostov was more demonstrative than had been the case with the reinstatement of other Communist leaders in the USSR and Hungary. He was proclaimed "Hero of Socialist Labour" and honoured by having public institutions and streets renamed after him.

However, Bulgarian Government policy on criminal law legislation has taken at the same time a step towards intensifying the struggle against those "who refuse to live by honest work".

Decree No. 325 of August 4, 1962, passed by the Presidium of the National Assembly, is a piece of so-called "parasite" legislation of the Soviet type. Like the decree of the RSFSR (Russian Socialist Federated Soviet Republic) of May 4, 1961, the Bulgarian Decree starts by invoking the constitutional right of every citizen to do useful work and his correlative constitutional duty to engage in an honest job of work for the community. Those who do not accept the duties derived from a Socialist way

of life and do not work in a Socialist manner qualify as "leading a parasitic way of life", which is declared illegal. Following the Soviet model, the Bulgarian Decree terms as "parasites" those adults capable of work who, while avoiding socially useful work, are living from an income derived from "exploitation and speculation". The definition and interpretation of such activities are blurred and dangerously uncertain; for instance, the cultivation of land, the running of motor vehicles, the employment of labour, may all involve exploitation. Furthermore, the Decree introduced another category of "parasite" activity; those persons are also punishable who commit "other anti-social acts". The vagueness of this formulation gives further discretionary and indeed arbitrary power to organs authorized to apply sanctions in the fight against "parasites". Under the Bulgarian Decree, punishment may amount to banishment and compulsory labour. The executive committee of the local council—an administrative organ—may impose such penalties for periods of from six months to two years; ordinary courts from two to five years. Both the Soviet and the Bulgarian Decrees recognize the jurisdiction of Comrades' Courts over those "parasites" who acquire, through their employment in factories, privileges of workers but are in fact occupied with private enterprise activities and live from resources obtained by non-productive means. It is alleged that such persons use their employment only as a facade to cover their anti-social activities and undermine labour discipline at their place of work. In such cases a "group of toilers" working together with the "parasite" has also a right to judge and sentence him to banishment, subject to confirmation by the executive committee of the local administrative authority, whose decision is final.

The Bulgarian Decree stresses that the procedure before the courts is generally public and that sentences may be reduced if the behaviour of the "parasite" indicates an improvement. Both Decrees assign special tasks for the militia and the prosecutors in regard to the exposure of "parasites" and the verification of all facts relating to the circumstances of the alleged parasitic way of life. The militia, the procurators, and all public and social organs are invited to take an active part in this struggle.

Soviet "parasite" legislation has given rise to numerous misapplications. A. Tsvetkov, a colonel in the militia, drew attention to some abuses under these laws in *Sovetskaya Yustitsia*, the organ of the Supreme Court of the RSFSR, in which he had

published a letter. The author listed cases where invalids, retired people and pregnant women were banished as "parasites". No doubt the publication of his letter represented some concern among the authorities over widespread abuses.

The absence of adequate safeguards in this basically extrajudicial procedure is a serious shortcoming in the developing concept of Socialist Legality and opens the door to still further abuses and encroachments on the rights of citizens. It is regrettable that the Bulgarian Decree has followed the pattern of Soviet "parasite" legislation which permits such deplorable abuses.

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## MILITARY RULE IN BURMA

*The Burmese situation has given rise to some disquiet in legal circles throughout the world. In a Press Statement released on August 7, 1962, the International Commission of Jurists expressed its concern for the future of the entire legal system in Burma and welcomed a clarification of the stand of the present Burmese Government with regard to the Rule of Law.*

*In view of numerous requests for information, the International Commission of Jurists followed up its Press Release by sending in November 1962 a distinguished Australian lawyer, Mr. Edward St. John, Q.C., to Burma to examine the general position and to present to the Commission his observations. The following is based largely on Mr. St. John's report.*

On March 2, 1962, by a bloodless *coup d'état* Army officers under the command of General Ne Win siezed political power in the Union of Burma. U Win Maung, the President, U Nu, the Prime Minister, all the members of his Cabinet, U Myint Thein, the Chief Justice, and other important persons including the Parliamentary leaders of the Shan minority group—perhaps some one hundred persons in all—were arrested and detained.

The Chief Justice, the Prime Minister and the Cabinet appeared to have been held under guard at Army Headquarters, while the rest of the detainees have been held in gaol. So far as is known, these persons have come to no harm while in detention. One of

the detainees, Sao Shwe Thaik, a former President of the Union, died subsequently in confinement, but apparently of natural causes.

It is useful to pause for a moment to examine the causes of the military intervention. Although some of the causes are intimately related to problems running far back in Burmese history, it would appear that the absence of strong democratic traditions, the inexperience of political leaders and incompetence and corruption in the administration are some of the important factors that combined to invite a military dictatorship as soon as a real division occurred in the ranks of the previously all-powerful Anti-Fascist People's Freedom League. Although U Nu himself had a reputation for being a man of integrity, he left the reins of government largely in the hands of others.

Some of the more immediate causes of the military *coup* that deserve mention were problems arising from U Nu's attempt to impose Buddhism as the State religion and the pressures of separatist minority groups which threatened the security of the State. The Army appears to have feared that U Nu would fail to take the strong action which the situation required.

The Army, having seized power, dissolved Parliament and has since ruled by decree. The Constitution of 1947 has not been revoked or suspended, but as the decrees are entirely unconstitutional, obedience to them necessarily connotes acceptance of the new regime and abandonment of the former Constitution.

The present political position is clearly brought out by the succinct test of the following relevant decrees:

*Declaration / Notification No. 20*

9th March, 1962

*Vesting of Powers with the Chairman  
of the Revolutionary Council*

It is hereby declared/notified that the Revolutionary Council vests the Chairman of the Revolutionary Council with all powers, legislative executive and judicial, with effect from the 2nd March, 1962.

By Order,

Colonel Saw Myint,  
Revolutionary Council of Burma

*Declaration/Notification No. 22*

12th March, 1962

The Chairman of the Revolutionary Council declares/notifies as follows:  
So long as this Declaration remains in force, it is hereby declared that whenever the expression 'President of the Union' occurs in any existing

law, there shall be substituted therefor the expression ' Chairman of the Revolutionary Council '.

This order shall be deemed to have come into effect on the 2nd March, 1962.

Boh Ne Win,  
General,  
Chairman of the Revolutionary Council  
By Order,  
Colonel Saw Myint,  
Revolutionary Council

*Declaration No. 28 of the  
Revolutionary Council*

30th March, 1962

The Chairman of the Revolutionary Council declares as follows:

So long as this Declaration is in force, the expression ' Revolutionary Government ' shall be substituted for the expression ' the Cabinet ' ; the expression ' Chairman of the Revolutionary Government ' for the expression ' Prime Minister ' , and the expression ' Member of the Revolutionary Government ' for the expression ' Minister ' , whenever such words or expressions, occur in any existing law.

Boh Ne Win,  
General,  
Chairman of the Revolutionary Council  
By Order,  
Colonel Saw Myint,  
Revolutionary Council

On April 30, 1962, the Revolutionary Council issued a policy declaration entitled " The Burmese Way to Socialism ". In general this declaration affirms traditional Socialist (as distinct from Marxist) objectives; democracy will be developed only in such form " as will promote and safeguard the Socialist development ". The following excerpts contain some of the main points in the policy declaration:

1. The Revolutionary Council of the Union of Burma does not believe that man will be set free from social evils as long as pernicious economic systems exist in which man exploits man and lives on the fat of such appropriation. The Council believes it to be possible only when exploitation of man by man is brought to an end, and a socialist economy based on justice is established; only then can all people, irrespective of race or religion, be emancipated from all social evils and set free from anxieties over food, clothing and shelter, and from inability to resist evil, for an empty stomach is not conducive to wholesome morality, as the Burmese saying goes; only then can an affluent stage of social development be reached and all people be happy and healthy in mind and body.

Thus affirmed in this belief the Revolutionary Council is resolved to march unswervingly and arm-in-arm with the people of the Union of Burma towards the goal of socialism.

...



10. In order to carry out socialist plans such vital means of production as agricultural and industrial production, distribution, transportation, communications, external trade, etc., will have to be nationalized. All such national means of production will have to be owned by the State or co-operative societies or collective unions . . . Amongst such ownerships State ownership forms the main basis of socialist economy . . .

...

13. A socialist democratic state will be constituted to build up a successful socialist economy. A socialist democratic state is based on and safeguards its own socialist economy. The vanguard and custodian of a socialist democratic state are primarily peasants and workers, but the middle strata and those who will work with integrity and loyalty for the general weal will also participate . . .

14. . . . In the Union of Burma also, parliamentary democracy has been tried and tested in furtherance of the aims of socialist development. But Burma's 'parliamentary democracy' has not only failed to serve our socialist development, but also, due to its very defects, weaknesses and loopholes, its abuses and the absence of a mature public opinion, lost sight of and deviated from the socialist aims, until at last indications of its heading imperceptibly towards just the reverse have become apparent. The nation's socialist aims cannot be achieved with any assurance by means of the form of parliamentary democracy that we have so far experienced.

The Revolutionary Council therefore firmly believes that it must develop, in conformity with existing conditions and environment and ever changing circumstances, only such a form of democracy as will promote and safeguard the socialist development . . .

In doing so national private enterprises which contribute to national productive forces will be allowed with fair and reasonable restrictions.

...

19. The Revolutionary Council will therefore carry out such mass and class organizations as are suitable for the transitional period, and also build up a suitable form of political organization.

Although this policy declaration is critical of parliamentary democracy and asserts that the aim of the Revolutionary Council is to establish a Socialist economy based on justice, the socialism it visualizes is vague and lacks definition. Perhaps one reason for the failure of the Revolutionary Council to make its political philosophy more explicit, after its first news conference in March 1962, is that the Council itself continued to be uncertain which way to move in implementing its programme.

On July 4, 1962, the Revolutionary Council adopted "The Constitution of Burma Socialist Programme Party for the Transitional Period of its Construction". The object of this document appears to be the creation of a single party or political community based on Burmese culture. It was felt that the creation of a strong Socialist single party would help preserve Burma as a sovereign entity.

The Party visualized by this document is to be completely dominated in the first instance by the Revolutionary Council; it is to be a "Cadre Party, meaning a party which performs such basic party functions as recruiting nucleus personnel called cadres, and training and testing them by assigning duties, etc. . . . When the party constructional work is done and the cadre party blossoms into the party of the entire nation", the party is to be re-organized "on the principle of democratic centralism", its committees being elected by popular vote (i.e., of *members*). Persons are to be admitted to membership first as "candidate members" and then as "full-fledged members", only by the Revolutionary Council. A strict code of discipline is prescribed.

Commenting on this document, Mr. Edward St. John observes in his report:

Although other political parties are not in terms proscribed, the new Party was obviously contemplated as a party of tried and tested élite which would lead the nation, and work in close cooperation with the Revolutionary Council. All in all, although the word "Communist" is not used, one cannot fail to be reminded, reading this document, of the organization of the Communist Party, and the role it plays in Communist states.

Mr. St. John adds, however:

I have said that the Constitution of the Burma Socialist Progressive Party is reminiscent of the Communist Party in its structure and anticipated function; it is fair to add that the present regime differs in practice from the familiar Communist pattern in many respects: Buddhism is still the religion of the mass of the people, and there has been no attempt to suppress or discourage it; there has been nothing in the nature of a personality cult of General Ne Win who scarcely shows himself; wealth as such has not come under attack, nor has there been any attempt to liquidate or degrade the monied classes; although the Government has attempted to infuse some drive and enthusiasm from the top downwards, there has been no ruthless disregard of individual rights.

Many Burmese politicians voiced their opposition to the use of the contemplated Burma Socialist Programme Party as an instrument of one-party rule. For a long time the Government took no steps to form this Party, but commencing from March 16, 1963, application forms for membership are being sold at 50 pyas a copy (about ninepence) from offices opened for the purpose at every police station. Employees of government departments, boards, corporations or factories desirous of joining the Party will have to make application for admission through their respective offices and need not therefore buy application forms.

Reference must now be made to the position of the Judiciary under the new regime. By a Decree of March 30, 1962, the old Supreme and High Courts were abolished and the nine judges, including the Chief Justice, were dismissed. The Chief Justice, who was among the detainees, appears to be still under detention. A new Chief Court was set up to exercise the function of the former Supreme and High Courts. In the circumstances, grave doubts must be felt as to the independence of the Judiciary in the future as all security of tenure has been lost.

Among other developments, perhaps the most disquieting is the promulgation on June 10, 1962, of a new law called the Special Criminal Courts Act. Under this Act, special criminal courts can be created by notification, stating their place of sitting and their jurisdiction. A notification creating a special court can vest the court with jurisdiction to try "any of the offences punishable under the existing law". The purpose of setting up special courts was declared to be the necessity to deal effectively and promptly with acts of insurrection, crimes against public safety and crimes endangering life, property, national culture and the national economy.

Each special court consists of a Chairman and two members, and if there is a difference of opinion, the decision shall be given according to the opinion of the majority. No legal or other qualification is prescribed for the Chairman or members, although it is provided that in order that there may be justice and fairness in the trial of cases, there shall be a special legal adviser attached to each special court, who is to be "a suitable person" appointed by the Revolutionary Government with such powers and duties as may be prescribed.

A special court may proceed with the hearing in the absence of the accused, although this does not appear to be contemplated as a normal procedure. On conviction, a special court may impose any one of the following sentences: death, transportation for life, imprisonment for a period not below three years, or a fine. The findings of such a court, to be effective, must receive the approval of a Confirming Authority consisting of three members. The Confirming Authority may either set aside or uphold the findings or reduce or increase the sentences. Only in case of sentence of death or of rigorous imprisonment for seven years or more would an appeal lie to the Chief Court from the decision of the Confirming Authority.

In regard to the present economic position in Burma, it is not remarkably better or worse under the new regime; insecurity in

rural areas still persists; after years of fighting, insurgent groups under various banners, or as mere bandits and outlaws, terrorize the countryside and hinder the work of rural reconstruction so essential to the rehabilitation of the Burmese economy. The new dictatorship, however, hopes in the near future to attend to many urgent needs of the nation.

The Burma Economic Development Commission (commonly referred to as the BEDC), an Army organization which began its life as the Defence Services Institute controlling retail stores for Army personnel, now bestrides the national life as a mighty industrial and commercial colossus and is the chief instrument of nationalization and socialization. Privately-owned enterprises are being taken over at an increasing tempo, and it appears obvious that private enterprises of any size or importance will shortly cease to exist as such in the Burmese economy.

The most recent and important event in the process of nationalization was the sudden take-over of all private and commercial banks on February 23, this year. In all 24 banks, 10 national and 14 foreign, have been taken over by the Revolutionary Government which has declared that it considers the nationalization of private banks an absolute necessity. It remains to be seen whether adequate compensation will be paid and if so when.

Legal circles throughout the world are watching the Burmese scene with interest. They are quite aware of the difficulties which a newly independent country is encountering in the attempt to build up democratic institutions. However they wonder whether it is necessary, in order to overcome the said difficulties, to resort to measures such as the setting up of special courts and the creation of a single government-sponsored party. Under the Rule of Law measures of this kind are highly questionable.

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## THE CEYLON COUP D'ETAT TRIAL

On February 18, 1962, the Parliament of Ceylon introduced, and passed with retroactive effect, an Act entitled The Criminal Law (Special Provisions) Act. The purpose for which this Act was passed was clearly to introduce special provisions for the arrest, detention and trial of certain members of the Armed Forces and a few civilians who were alleged to have been concerned on January 27, 1962, in a conspiracy to overthrow the government. Besides doing this, the Act also sought to alter and enlarge the conception of conspiracy hitherto known to the Ceylon criminal law by giving it the widest possible meaning.

The obnoxious features of this Act were principally

- (1) its retroactive character;
- (2) its provision for arrest without warrant and police detention for a period of 60 days without charges being laid;
- (3) the power it conferred on the Minister of Justice, a political executive, to nominate three judges from among the judges of the Supreme Court to try the accused persons; the Act declared that the constitution and jurisdiction of the Court so nominated by the Minister could not be called in question in any Court, whether by way of writ or otherwise.

Twenty-four persons were charged under the Act. The trial commenced on July 18, 1962, and the preliminary legal submissions took several weeks. In view of the importance of the issues involved, the International Commission of Jurists sent an observer to the trial, Professor G. Tallin, Q.C., Dean of the Law School, University of Manitoba, Canada. The Registrar of the Supreme Court provided Mr. Tallin with special accommodation as well as with other necessary facilities to observe the trial. On an application made by him to the Court he was also furnished with copies of day-to-day trial proceedings.

The sittings of the Court were open to the public and from the outset the accused were represented by experienced counsel. Viewed in the light of the *Conclusions* arrived at by the International Congresses of Jurists held at Delhi in 1959 and at Rio

de Janeiro in 1962 and also by the African Conference on the Rule of Law held in Lagos in 1961 regarding the duties of the legal profession *vis-à-vis* the Rule of Law, it is indeed heartening, but not surprising, to find that so many busy and eminent legal practitioners were prepared, on an occasion when fundamental rights were in jeopardy and the independence of the Judiciary itself was threatened, to sacrifice so much of their time for the most part without remuneration on a lengthy case.

The Supreme Court of Ceylon consisted in the past of the Chief Justice and eight other judges. The new Act provided for the appointment of two more judges, making a total of eleven, and purported to empower the Minister to nominate three judges out of these eleven to constitute the special Bench. The special Bench nominated by the Minister to hear the case consisted of two judges who had been appointed before the Act and one of the two newly appointed judges.

It was strenuously argued by the defence as a preliminary issue that the Court had no jurisdiction to try this case for these reasons, *inter alia* :

(1) that the provisions of the Act in question conferring on the Minister of Justice the power of nomination or selection of judges were *ultra vires* the Constitution inasmuch as they interfered with the exercise of the judicial function and were in derogation of the powers of the Supreme Court under the Ceylon (Constitution) Order-in-Council;

(2) that the power of nomination had hitherto been invariably exercised by the Judiciary as part of the judicial function, and such power could not be reposed in anyone outside the Judiciary.

It should be noted that, although the Ceylon Constitution is a written one, it does not contain clauses guaranteeing the fundamental rights of the individual as, for example, in India; nor does it contain entrenched clauses providing for a mutually exclusive separation of powers or functions, as, for example, in the Constitutions of Australia or the United States of America. Nevertheless, the Court in its judgment delivered on October 3, 1962, while rejecting certain of the other defence arguments relating to the question of jurisdiction, unanimously held with the arguments of the defence set out in the preceding paragraph. In the result, the Court upheld the preliminary point that it had no jurisdiction to hear the case.

It was urged by the Attorney-General that the power to nominate was a purely administrative power and could be reposed in

a person who formed no part of the Judicature. The defence claimed, however, that the power to nominate judges, although it might have the appearance of an administrative power, was itself so inextricably bound up with the exercise of strictly judicial power or the essence of judicial power that it was itself part of the judicial power. The defence also invited the Court to consider the spirit of the Constitution and referred to Paragraph 396 of the Report of the Commission on Constitutional Reform, September 1945, wherein the Commissioners stated:

We would, therefore, make it amply clear that in recommending the establishment of a Ministry of Justice we intend no more than to secure that a Minister shall be responsible for the administrative side of legal business, for obtaining from the Legislature financial provision for the administration of Justice, and for answering in the Legislature on matters arising out of it. There can, of course, be no question of the Minister of Justice having any power of interference in or control over the performance of any judicial or quasi-judicial function, or the institution or supervision of prosecutions...

In upholding the defence contention the Court observed as follows in regard to the power of nomination:

If that power is vested in an outside authority, it will legally be open to such authority to exercise that power to prevent a particular judge or judges from exercising any part of the strictly judicial power vested in them by the Constitution as judges of the Supreme Court. The absurdity of such a possible result will be more marked if, instead of the position of a Puisne Justice of the Court, the position of the Chief Justice himself be considered. Under a provision of law of this nature it seems to us legally possible to exclude the Chief Justice himself from presiding in the Court of which he is the constitutionally appointed Head. The exercise of the power to nominate can then in practice result in a total negation of the judicial power of a judge or judges vested in them by the Constitution.

Then, again, if the power to nominate or select judges can be constitutionally reposed in the Minister on the ground that it is no more than an exclusively administrative act, we can see nothing in law to prevent such a power being conferred on any other official, whether a party interested in the litigation or not. The fact that the power of nomination so conferred is capable of abuse so as to deprive a judge of the entrenched power vested in him by virtue of his appointment under section 52 of the Order-in-Council, or at least to derogate from that power, is a consideration which is not an unimportant one in deciding whether the conferring of this power by section 9 on a person who is not a judge of the Supreme Court is *ultra vires* the Constitution.

The Court further held that even if the view were taken that the power of nomination was *intra vires* the Constitution, such

a view would offend against that cardinal principle in the administration of justice which has been repeatedly stated by judges, namely, that justice must not only be done but must appear to have been done. In applying the above principle to the circumstances of this case the Court made the following illuminating observations:

A Court cannot inquire into the motives of legislators. The circumstances set out above are, however, such as to put this Court on enquiry as to whether the ordinary or reasonable man would feel that this Court itself may be biased. What is the impression that is likely to be created in the mind of the ordinary or reasonable man by this sudden and, it must be presumed, purposeful change of the law, after the event, affecting the selection of judges? Will he not be justified in asking himself, "Why should the Minister, who must be deemed to be interested in the result of the case, be given the power to select the judges whereas the other party to the cause has no say whatever in a selection? Have not the ordinary canons of justice and fairplay been violated?" Will he harbour the impression, honestly though mistakenly formed, that there has been an improper interference with the course of justice? In that situation will he not suspect even the impartiality of the Bench thus nominated?

... Guiding ourselves by these tests and those applied in other cases we have examined, we find it difficult to resist the conclusion that the power of nomination conferred on the Minister offends the cardinal principle as restated by Lord Hewart. For that reason, even had we come to a different conclusion regarding the validity of Section 9 of the Criminal Law (Special Provisions) Act, we would have been compelled to give way to this principle which has now become ingrained in the administration of common justice in this Country.

Regarding the Criminal Law (Special Provisions) Act, Professor Tallin commented as follows in his report to the Commission.

It would be difficult to think of any legislation more deliberately conceived to deprive a specific group of men of the possibility of finding an effective defence to an accusation than the Criminal Law (Special Provisions) Act, with its retroactive provisions, its sections authorizing arrest and search without warrant, detention for long periods without charges being laid, and the use of confessions regardless of how or from whom obtained. That such provisions are inconsistent with the Rule of Law as understood by the Commission is readily apparent.

Dealing with the conduct of the Court, Professor Tallin observed:

It would be impossible to make any adverse criticism of the attitude or conduct of any members of the Court. All apparently listened with close attention and courtesy to all the arguments advanced. While they interrupted counsel on both sides on many occasions, the interruptions did not appear to be made with any intent to disconcert the speaker,



but rather indicated a desire to appreciate and understand the arguments being advanced, and to obtain further elaboration of some point that counsel had not made sufficiently clear. There was certainly no attempt to cut short any presentation or deprive counsel of any opportunity to put forward any argument.

Professor Tallin further observed that as far as the proceedings in Court were concerned, it would be impossible to assert that the accused were not being given a fair trial according to the highest standards of court practice.

The International Congress of Jurists held in New Delhi in January 1959, where judges, lawyers and jurists from 53 countries assembled to interpret the principles underlying the Rule of Law, had declared that an independent Judiciary was an indispensable requisite of a free society under the Rule of Law. This principle was reaffirmed at the African Conference on the Rule of Law held in Lagos in January 1961 and once again at the International Congress of Jurists held in Rio de Janeiro in December 1962.

The passing of the Criminal Law (Special Provisions) Act undoubtedly constituted an attempt by the Executive to interfere with the independence of the Judiciary in Ceylon, as was pointed out in a press statement by the International Commission of Jurists released on April 2, 1962. However, the Bench in this Ceylon trial, constituted as it was of judges nominated by the Executive, held that it had no jurisdiction to hear the case for the very reason that it was so nominated. That the attempt by the Executive to interfere with judicial independence in Ceylon was unsuccessful is a fact that redounds to the credit of the Supreme Court of that country.

In these days when the cardinal principles of the Rule of Law are being violated with impunity in so many countries, it is certainly refreshing to all those who subscribe to the Rule of Law and fight for its establishment and preservation to find delivered by the judges of a newly-independent country a vital judgment, which will always be regarded as an outstanding contribution towards the development of the connected principles of the separation of powers and the independence of the Judiciary.

It must also be observed that the Ceylon judgment will provide a useful judicial precedent for the recognition of the Rule of Law principle of separation of powers by the courts of countries which have written Constitutions but whose Constitutions do not con-

tain entrenched clauses specifically providing for the separation of powers. To those individuals and institutions throughout the world interested in seeing the Rule of Law upheld in all countries, the importance of this judgment cannot be overemphasized.\*

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## SPECIAL COURTS IN FRANCE

### I

The timeliness of a discussion on the question of special courts in France has been shown by the recent debates in the French Parliament over the passage of a Bill to institute a *Cour de Sécurité de l'Etat* (National Security Court). The solutions adopted by the French Parliament, under the pressure of circumstances, form a complex pattern. It would seem useful, therefore, to give an outline, albeit a sketchy one, of the latest legislative measures in relation to those which preceded them.

It is important to keep in mind certain basic elements of French judicial organization concerning penal matters. A tri-partite classification of offences corresponds to a similar division in the jurisdiction of civil law. The most serious offences, termed *crimes* (serious felonies), are dealt with by the *Cours d'Assises* (Assize Courts). Lower courts judge *délits* which are offences involving imprisonment or fines. Minor statutory offences, called *contraventions*, are judged by police courts. Traditionally special courts play only a sporadic role in French law. It should be noted in passing that the *Haute Cour* (High Court of Justice) is able to judge the Head of State or Ministers in cases of treason. More important, practically speaking, are the military courts, at the moment called *Tribunaux Permanents des Forces Armées* (Permanent Courts of the Armed Forces) which judge offences committed by military personnel during their period of active service. The procedure

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\* Note: In view of the judgment in this case, the Criminal Law (Special Provisions) Act was amended conferring the power of nominating the Bench on the Chief Justice in substitution for the Minister of Justice. The Chief Justice accordingly nominated another Bench of three Judges. When these Judges assembled on January 16, 1963, the President of the Court announced that it would not be in the interests of justice for them to hear the case as one of the Judges had in his capacity as Attorney-General advised the Crown on certain matters relating to it. A third Bench was then nominated by the Chief Justice. The trial is now proceeding before this third Bench.

in these courts follows the Code of Military Justice, which has a rather autonomous place in French criminal law but which provides considerable protection for civil rights as well as the rights of the defence.

The Code of Criminal Procedure which came into effect in December 1958, in addition to revising the "old" Code of Criminal Procedure contained provisions in Sections 697 to 706 which have been in effect since the Decree of July 29, 1939, empowering military courts to judge, in time of peace as well as war, crimes against the external security of the State, with the exception of certain offences committed during peacetime. The events which took place in Algeria after November 1, 1954, increased the jurisdiction of the military courts. A Decree of October 8, 1958, greatly enlarged the competence of military courts by bringing under their jurisdiction a series of crimes for "aiding directly or indirectly the rebels in Algeria". This tendency was accentuated by the Decree of June 4, 1960, under which the fundamental distinction between the external and internal security of the State was blurred. In similar vein, a Decree of February 12, 1960, and an Ordinance of June 3, 1960, set up new expeditious procedures which greatly hampered the rights of the defence, first before the military courts in Algeria, and secondly before all military courts, including those in France, entrusted with the prosecution of crimes committed in connection with the Algerian war.

## II

These last laws came into effect just at the time hope for a peaceful solution to the Algerian problem had become more of a reality; General de Gaulle's statement of September 16, 1959, in which he declared the right of the Algerian people to self-determination, marks a turning point. It was at that moment subversive activities changed sides. Neo-Fascist groups were formed in Algeria and France, with the more or less explicit help of the extreme right wing of Parliament and a portion of the Army staff, whose overt aim was to block the liberal policy of the Head of State. The uprising of a part of the European population in Algeria on January 24, 1960, marked the beginning of this revolt. After the surrender of the rebels, both military personnel and civilians, who were responsible for sedition, were prosecuted. The government used the powers conferred upon it by the Decree of June 4, 1960, to bring the cases under military

jurisdiction. This is why the *Tribunal Permanent des Forces Armées* of Paris was called upon to judge what was known as "The Trial of the Barricades"; these trials took up all the Court's time for several months.

Up to that time the French Government had been able to utilize the measures, devised against the Algerian nationalists, in its battle with the European adversaries of its Algerian policy. However, with the military *coup* of April 22, 1961, the subversive struggle took a new form. A directory composed of four high-ranking officers declared itself in possession of all civil and military power in Algeria and barely concealed its intention of spreading this insurrection to France. Meanwhile the loyalty of the Army and the administration wavered in the balance. General de Gaulle met this crisis by issuing two decrees on the same day proclaiming a State of Emergency throughout France. On April 23, he decided to use the powers granted him by Article 16 of the Constitution which authorizes the President of the Republic to take "whatever measures the circumstances require" when the institutions of the country are "clearly and gravely menaced". This emergency period lasted a little more than five months, until September 29, 1961. In the interim two of the leaders of the insurrection, General Maurice Challe and General André Zeller, were arrested and transferred to France. The insurrection had in the meantime collapsed. Nevertheless the subversive forces had not abandoned the battle but with growing audacity, under the new title of OAS (Organization of the Secret Army) had extended their activities in Algeria and France with the approval and complicity of various elements of Parliament, the administration and the Army. During the remainder of 1961 and throughout 1962 they increased the number of murders, assaults and outrages, created zones of dissension in Algeria and tried to dislocate the public administration of France in their attempt to arrive at power through the use of terror.

Faced with this exceptionally serious danger the government was forced to take equally serious steps. The security of the country required that the leaders of this subversive activity and their accomplices be promptly and firmly tried. The usual courts and normal procedures seemed ill-adapted to this task. The *Tribunal Permanent des Forces Armées* had come off badly in "the Trial of the Barricades". The solution adopted by the President was to form one or more special courts which could try crimes against the security of the State and its institutions as long as such crimes continued, and the composition and procedure

of which would be adapted to the exigencies of their task. In practice, the establishment of these special courts proved difficult and the Legislature has been forced to modify their structure several times in less than two years. Before going into details it might be useful to recall several dates. The history of these special courts, since the attempt at a military takeover in Algeria, may be divided into three periods.

First phase: General de Gaulle, using the emergency powers granted him by Article 16 of the Constitution, set up the *Haut Tribunal Militaire* (High Military Tribunal) by Decree on April 27, 1961, and the *Tribunal Militaire* (Military Tribunal) on May 3, 1961.

Second phase: A Decree of May 26, 1962, abolished the *Haut Tribunal Militaire*; a Decree of June 1, 1962, set up a *Cour Militaire de Justice* (Military Court of Justice).

Third phase: The *Conseil d'Etat* (Council of State) by its decision of October 1962 annulled the Decree of June 1, 1962; on January 15, 1963, the Act instituting the *Cour de Sûreté de l'Etat* came into effect.

### III

This vacillation on the part of the legislators seems disconcerting at first. However, under a variety of titles, the courts which have just been enumerated have certain characteristics in common which are worth stressing before describing individual differences of structure.

*Ratione loci*, the competence of all of these courts extends to the entire French territory. As for their competence *ratione materiae*, it is almost the same for all of them. It should be immediately noted that, in spite of a rather hazy nomenclature, the *Tribunal Militaire* was not a lower court or court of appeal for the *Haut Tribunal Militaire*; they both dealt with the same category of offences. Under the terms of the Decrees of April 27 and May 3, 1961, they were competent to judge crimes against national security and army discipline "committed in connection with the happenings in Algeria . . . if these crimes were committed during the period emergency powers were in effect". The definition of their competence was made clearer by a Decree of April 14, 1962, whose terms were used again in relation to the *Cour Militaire de Justice* and the *Cour de Sûreté de l'Etat*. In addition to the very flexible term "crimes against national security" there is a long list of offences ranging from theft to breach of trust, all

of which fall under the jurisdiction of the special courts if they were committed "in relation to individual or group attempts to substitute an illegal authority for that of the State".

The way in which cases have been brought before these courts is identical. The laws concerning the *Tribunal Militaire*, the *Haut Tribunal Militaire* and the *Cour Militaire de Justice* state that they may be summoned "by decree". The Act of January 15, 1963, provides that a case may be referred to the *Cour de Sûreté de l'Etat* by the Public Prosecutor "upon receipt of a written order from the Minister of Justice". There is another important point which all the special courts have in common: where a case is referred to one of these courts by the above-mentioned procedure all other judicial proceedings begun before any other court on the same matter must cease immediately and completely. In other words, the jurisdiction of special courts takes precedence over all the ordinary courts.

It is in their composition that these courts differ most. Nevertheless, with the exception of the *Cour Militaire de Justice*, composed of five officers, professional judges balance the number of high ranking officers. Furthermore there is no exception to the rule that all members of this court, civilian or military, are appointed by decree.

#### IV

The *Cour de Sûreté de l'Etat* established by the Act of January 15, 1963, held its opening session on February 26. It replaces the *Tribunal Militaire* and the *Cour Militaire de Justice*. The special courts will be dealt with as follows: first those which were created during 1961 and 1962, and secondly the one designated to replace them.

The *Tribunal Militaire* established by the Decree of May 3, 1961, continued to function until its place was taken by the *Cour de Sûreté de l'Etat* on February 26, 1963. As seen previously its competence was the same as that of the *Haut Tribunal Militaire* and the *Cour Militaire de Justice*. It was presided over by a judge of the *Cour de Cassation* and composed of various Divisions, whose number had been fixed by a Decree of June 26, 1961, at three. Each Division was composed of a judge of the *Cour de Cassation* or *Cour d'Appel*, plus another professional judge and three high-ranking officers. The prosecution was under the authority of the military prosecutor assisted by various legally qualified officers.

Any decision of the *Tribunal Militaire* concerning the basis of the accusation was subject to appeal.

The *Haut Tribunal Militaire*, created by the Decree of April 27, 1961, was presided over by a career judge who was either a presiding judge or a judge in the *Cour de Cassation*. It also comprised eight judges, viz., the Chancellors of the Orders of the Legion of Honour and of the Liberation, a member of the *Conseil d'Etat*, two presiding judges of the *Cour d'Appel* of Paris and three high-ranking officers. It is important to remember that, like those of the *Tribunal Militaire*, all of its members were appointed by decree.

The prosecution consisted of the Public Prosecutor attached to the *Cour de Cassation* assisted by one or more lawyers. Under the terms of Section 8 of the Decree "no appeal can be formulated against any decision of the *Haut Tribunal Militaire*". Although it might bring its case before either the *Haut Tribunal Militaire* or the *Tribunal Militaire*, the government usually reserved its most important cases for the former. It was precisely before the *Haut Tribunal Militaire* that the four Generals, of the ephemeral Algerian directorate were arraigned: Maurice Challe, André Zeller, later Edmond Jouhaud and finally Raoul Salan. This court was abolished by Decree of May 26, 1962.

The *Cour Militaire de Justice*, established by the Decree of June 1, 1962, unlike the preceding courts, included no professional judges. Presided over by a high-ranking officer, it included four other officers of varying rank. The prosecution was composed of one or more officers, who were designated like the judge by decree. According to the terms of Section 10, the decisions of this court and measures taken by the presiding judge and Public Prosecutor were final. This provision excluded appeals for a new trial. Furthermore to cut short wearisome discussion on procedure, another Decree of June 1, 1962, formally precluded an appeal on grounds of procedure.

Not only the *Haut Tribunal Militaire* but the *Tribunal Militaire* and the *Cour Militaire de Justice* are now things of the past, having been superseded by the new *Cour de Sûreté de l'Etat*. It is still interesting, however, to note certain procedural characteristics followed by each of these three courts. It is true that both in the investigation stage and during the trial their procedure deviated a good deal from the customary rules of law.

As far as the investigation of the case is concerned French criminal law is based on two fundamental principles:

(a) in criminal matters a preliminary investigation is obligatory;

(b) in criminal cases as well as in cases of minor statutory offences, responsibility for the investigation belongs to the presiding judge, whose decisions are jurisdictional acts which are grounds for appeal; doubtless the Public Prosecutor is kept informed of the proceedings but he does not intervene directly; in other words the prosecutor proposes and the judge disposes. The special procedure employed by the three special courts proceeds in the opposite direction. Thus when the Public Prosecutor considers the facts are sufficiently established by a police or gendarme investigation he can omit the stage of preliminary investigation and bring the accused before the court directly. Further when there is a preliminary investigation it is conducted by the Public Prosecutor; this is probably the most important deviation from the general procedures of criminal law, for the responsibility and consequently the powers of the arraigning judge are conferred upon the very person who initiates the prosecution. The Prosecutor and his staff may issue warrants for arrest and detention, decide on, without the possibility of an appeal, requests for bail, conduct the questioning and searches, assemble statements of witnesses, cross-examine them, and decide when enough information has been secured to warrant sending the accused to trial.

In the procedure followed by the court trying the case the Act of January 2, 1959, is referred to as the Organic Law of the *Haute Cour de Justice*. Nevertheless, according to the terms of Sections 33 and 34 of this Act, decisions concerning the guilt of the accused and his sentence were to be made on the basis of an absolute majority which is contrary to the practice of courts of criminal law where decisions are made on basis of a qualified majority. In the *Cours d'Assises* (Assize Courts) the only court of law confronted with this question, it is stated in Section 359 of the Code of Criminal Procedure that "all decisions unfavourable to the accused, including those which reject attenuating circumstances, shall be made by a majority of not less than eight votes". As a *Cour d'Assise* is composed of three judges and nine members of the jury it only requires five votes to block such a decision. In the *Tribunal* or *Cour Militaire* the most severe sentences could be imposed by three votes against two.

But it is the *Cour Militaire de Justice* which, during the nine months of its existence, has perverted most shockingly the general principles of penal law and disturbed the organization of the



Judiciary. To begin with the circumstances under which it was created a few days after the abolition by decree of the *Haut Tribunal Militaire* were inauspicious. It is no secret that the *Haut Tribunal Militaire* had paid for its existence with the sentence it pronounced in respect of General Salan—judged in certain quarters to be too lenient. In its place was instituted a court whose decision was final, in which there was no kind of appeal and from which professional judges had in principle been eliminated. This substitution *ab irato* for a court of unusually special jurisdiction of one with even wider special powers did not conform at all to the traditions of French law.

The most serious cases were brought before the *Cour Militaire de Justice* just as they had been brought before the *Haut Tribunal Militaire*. During the months following its inception, the Court pronounced, amongst other sentences, two sentences of death, one of which was carried out. In the absence of any appeal from the decisions of this Court, the lawyer of the other condemned man had the idea of attacking in the *Conseil d'Etat* the Decree of June 1, 1962, which had established the *Cour Militaire de Justice*. He argued that this law, contrary to the Decrees of April 27 and May 3, 1961, was not enacted within "the period of emergency powers" during which Article 16 of the Constitution could be applied and was merely based on the Act of April 13, 1962, which authorizes the President of the Republic to take such legislative or regulatory measures as shall be necessary, by act or decree to fulfill the conditions of the agreement signed by the provisional government of the Algerian Republic and France. By instituting a special court the Head of State had exceeded the limits of his legislative authority. The *Conseil d'Etat* after considering the question in plenary session gave its judgment on October 19, 1962. In explaining its decision, the *Conseil d'Etat* noted that the creation of the Court itself did not constitute an abuse of authority but that the circumstances which had motivated the delegation of legislative powers did not justify the importance and gravity of certain provisions of the Decree, particularly those concerning procedure and the exclusion of any means of appeal, which were in conflict with general principles of criminal law. The *Conseil d'Etat* therefore annulled the Decree of June 1, 1962.

This decision posed a difficult question as it had stripped the *Cour Militaire de Justice* of its legal existence as well as invalidating the verdicts it had given. The President of the Republic, exercising his right of pardon, commuted the death sentence still pending to imprisonment and the government submitted to Parliament a

Bill which was passed and became an Act on January 15, 1963. This Act established the *Cour de Sûreté de l'Etat*. A particular provision of the Act rendered valid retroactively the Decree of June 1, 1962, as well as "acts, formalities and decisions taken in application of this enactment".

It could reasonably be believed that this provision only aimed at past events; in any case the establishment next of the *Cour de Sûreté de l'Etat* removed every reason for the existence of the *Cour Militaire de Justice*. It was thus very surprising to learn during January 1963 that the Head of State had issued an order bringing before the *Cour Militaire de Justice* 14 of those persons accused of being involved in the attempt to assassinate him on August 22, 1962. This resuscitation of the *Cour Militaire de Justice* was, in fact, manifestly contrary to the spirit of the Act of January 15, 1963. In fact, the life of the Court was threatened by the terms of the latter Act, which laid down that the *Tribunal Militaire* and the *Cour Militaire de Justice* would cease to exist when the *Cour de Sûreté de l'Etat* was established. Now, the trial which had begun on January 28, 1963, was clearly going to last several weeks and, without doubt, would last beyond February 25, the date envisaged for the establishment of the *Cour de Sûreté de l'Etat*, which would replace the *Cour Militaire de Justice*. To overcome this difficulty the government had an Act passed by Parliament modifying the Law of January 15, 1963, and prolonging the existence of the *Cour Militaire de Justice* until the end of the trial in progress. As a result of these laborious manipulations the *Cour Militaire de Justice* was able to bring the trial to an end on March 4, 1963. Six of the accused were condemned to death and eight others to various terms of imprisonment. Three sentences of death were pronounced *in absentia*; in regard to the other three persons convicted, the accused were all present at the trial. One of them was executed on March 11, while the other two had their sentences commuted to life imprisonment. As for the decision of the military judges, everyone is entitled to his own opinion. But from the point of view of respect for the Rule of Law it is to be profoundly regretted that this decision was given by a Court, the existence of which had been declared illegal by the *Conseil d'Etat*, and the continued functioning of which was an affront to the ordinary principles of penal procedure.

## V

The *Cour Militaire de Justice* ceased to exist as soon as its decision of March 4, 1963, had been given. It coexisted for

several days with the *Cour de Sûreté de l'Etat* which was set up as from February 26, 1963; this latter court henceforth assumes *in toto* all the powers of the former special courts. Act No. 63-23 of January 15, 1963, laid down the organization and functions of the *Cour de Sûreté de l'Etat*. Moreover another Act, No. 63-22, also of January 15, 1963, purports to amend certain of the provisions of the Penal Code and Code of Penal Procedure. In taking this initiative with legislative reform immediately after the referendum and parliamentary elections of October 1962, an occasion when a majority of the electorate reaffirmed its confidence in the Head of State, the government has shown its willingness to reconcile a defence of the institutions with a return to traditional penal procedure. The *Cour de Sûreté de l'Etat* is without doubt a special court but the rules which govern its composition and functions are in the main inspired by the ordinary principles of criminal law.

The Court is divided into a sentencing body and an investigating body. The former, presided over by the senior president of the Court, includes two judges and two high-ranking officers. The second is composed of three judges. The Court may, if necessary, be supplemented by temporary divisions instituted by decree, whose composition will be identical to that of the sentencing body. The judges and officers appointed to sit on the Court are designated by a decree for a period of two years, after receiving the opinion of the *Conseil Supérieur de la Magistrature* on the appointments. In addition, three investigating judges are attached to the court. The Public Prosecutor's staff includes a prosecutor and two lawyers under the direct authority of the Ministry of Justice. The permanent seat of the Court will be established by decree. Furthermore, the presiding judge may convene the court anywhere on French territory.

The important point to stress is that the rules for investigation and arraignment are the same as those for criminal law with a few exceptions. For example, the time a suspect may be detained by an officer of the police before charging him and bringing him before a judge is ten days, rather than two as in Section 63 of the Code of Criminal Procedure. The procedure will follow the rules which apply to the lower courts. The Court will make its decisions according to the procedure followed in a *Cour d'Assise*. Finally and above all, an appeal lies from the decisions of the Court to the *Cour de Cassation*.

During debates in the two Houses of Parliament, the composition of the Court and its rules of procedure, such as those con-

cerning detention, gave rise to long discussions. In the near future the Court will have brought before it approximately 350 cases which were to have been tried by the former special courts. The future of the Court will, of course, depend on developments in France. The sooner the situation there will permit the total abolition of special courts, the better will be the outlook for a full return to the Rule of Law.

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## **THE TRIAL OF BOGDAN STASHYNSKY IN THE FEDERAL REPUBLIC OF GERMANY**

The trial of Bogdan Stashynsky took place in Karlsruhe before the Third Criminal Division of the German Federal Supreme Court from October 8 to 19, 1962.

Stashynsky was an agent of the Soviet intelligence service. In this capacity he had on October 12, 1957, murdered, with a spray gun containing prussic acid, the well-known Ukrainian political exile Dr. Lev Rebet, who was living at the time in Munich. On October 15, 1959, he had used a modified double-barrelled pistol of the same type and similarly loaded to kill the Chairman of the Ukrainian Nationalists Organization, Stefan Bandera, who also lived in Munich. This organization, together with the sister organizations of other nations like the Bulgarian National Front, the Czechoslovakian National Committee, the Estonian Freedom Movement, the Rumanian Free Front, etc., belongs to the "Anti-Bolshevist Block of Nations". Stashynsky further performed espionage tasks as an informer for his Soviet employer punishable for having dealings of a treasonable nature under Section 100 (e) of the German Penal Code.

The Stashynsky trial caused a great stir both in and outside Germany. This has been explained in the following way by Chief Public Prosecutor Kuhn in his legal argument before the Court:

The organization, in whose service the accused was employed, was not some obscure group of political extremists, but the KGB, the State Security Committee of the Ministerial Council of the Soviet Union. And this fact is the most alarming and horrifying fact ascertained during this trial. Indeed, this fact and no other makes this trial sensational. The accused, his deeds and his guilt recede completely into the background when compared to the startling fact that the initiative and all the decisive measures with regard to these murders were taken by a Head of State. The accused is thus of necessity degraded to the role of a petty recipient of orders, as it were to the role of an illegal official hangman, which was

what he really was. By this statement we are not referring to the extent of his guilt, but merely wish to shed light objectively on the role he played in the murders.

How had Stashynsky come to fall into the hands of the German legal authorities so long after committing the murders? After long preparation he had succeeded in fleeing from East to West Berlin with his wife on August 12, 1961, the day of his only child's funeral. There he reported, through the mediation of West Berlin police headquarters, to officials of the United States. He was then brought to West Germany, where criminal proceedings against him began. Here he made a full confession, as he had resolved to do from the first, giving a detailed account of his criminal acts and his relations with the Soviet intelligence service. He reported, *inter alia*, that after murdering Bandera he was presented in Moscow with the Order of the Red Banner "for the successful execution of an important government task" by no less a person than Shelepin, the Chairman of the KGB. The diploma was signed by Voroshilov, the Head of State, among others. The award had of course to be kept secret and, contrary to the usual custom, no mention of it was made in *Pravda*. But Stashynsky later received a testimonial from the KGB which in veiled terms confirmed the task he had carried out and the award. He produced the original testimonial in court, where, it was agreed, it was undoubtedly genuine. In view of their extraordinarily suspicious nature, all of Stashynsky's incriminations and self-incriminations have been very painstakingly followed up by the German Criminal Investigation Department. Most of them could be checked, and insofar as this was done they proved correct in every detail, which led the President of the Third Criminal Division to adopt the following view in his oral judgment:

Externally this murder trial has unfortunately proved beyond doubt that so-called co-existence and so-called Socialist Legality by no means exclude so-called individual terrorism—all of them terms used in the Communist vocabulary. Stalinism is dead. But individual murderous terrorism still lives on. The real change which has taken place thus had not the least connection with legality: the Soviet secret service no longer commits murder arbitrarily and of its own accord. Murder is now only carried out at the explicit orders of the government. Political murder has now, as it were, become an institution. A co-plaintiff has very aptly quoted from Djilas' book *Talks with Stalin*: "Stalin's world has not disappeared, its character ... has been preserved unchanged."

Individual terrorism now threatens those who are an obstacle to the repatriation plans of the Soviet regime. Rebet and Bandera were such persons.

On completion of the taking of evidence before the Court, the Chief Public Prosecutor moved that the accused be sentenced "to penal servitude for life on two charges of murder, and to three years imprisonment for having dealings of a treasonable nature under Section 100 (e) of the Penal Code and Section 7 of Appendix A of the Agreement relating to the Occupation Troops, with payment of the costs of the proceedings". Defence counsel besought the court to find the accused guilty only of *aiding and abetting* murder in both cases, and of treasonable dealings. The Court—and this may at first seem surprising—paid due regard to defence's recommendation and decided on a total of 8 years penal servitude. The Court based its legal qualification of Stashynsky's homicidal crime as simple abetment on the following considerations:

In this connection the Court, after a careful study of court practice and the views of jurisprudence, agrees with the opinion of defence counsel; in neither case was the accused the principal in the first degree of a murder though he carried out the acts of killing alone, but only a tool and accomplice. The principals in the first degree, that is to say the murderers, are those persons who were responsible for planning and plotting the murders down to the last detail as regards the victims selected, the place, time and method of murder, and instructed the accused to carry them out within a limited space of time, and gave him the instrument and means with which to carry out the murders. Stashynsky followed their instructions exactly. They must therefore be held responsible for his entire action in the legal sense as murderers. Since they hold high-ranking offices in the sovereign territory of a foreign power, they are withdrawn from our efforts to ensure that justice is done, although in the long run no one can escape his just punishment. As far as the accused is concerned, many legal experts hold the opinion that a person who commits a deed entirely on his own must without exception always be condemned as the principal in the first degree. This argument sounds plausible, but on closer consideration gives rise to serious misgivings. The main misgiving has actually already been indicated with remarkable unanimity by all those involved in this trial, including the co-plaintiffs, who are not legal experts: since there are States in the world today which plan murders, order that they shall be carried out and ideologically train certain of their subjects to do so, the individual who is obliged to live in such a prison atmosphere is certainly in a strange and unusual position inasmuch as *his* State designates as meritorious and necessary, actions which all civilized States condemn and punish as crimes. This holds good internationally, not only amongst States but also likewise in the case of a change of regime in Germany. I am referring to National Socialist Germany and men like Eichmann. Those who morally resist such negative forces, stand alone within the masses when confronting them. Those who succumb to these forces, succumb to a skilful, overpowering, officially controlled mass influence; they do not succumb to incentives which come under the general category of criminology. The above-mentioned objective theory regarding the principal in the first degree does not take these facts into sufficient consideration. It is moreover confined to the presupposition

that we are still living in a morally uniform and stable world. And for this reason we cannot agree with this theory.

Nor has the Federal Court ever agreed with this theory. On the contrary, all its Criminal Divisions have always decided that even a person who commits a crime with his own hands can nevertheless be the accomplice of some other person. This was the decision reached by the First and Fourth Criminal Division in 1961 and 1962. The Fifth Criminal Division had added an important amendment, which has also been approved by us; namely, that the fact that someone commits a crime with his own hands must be taken as an important indication that such person is the principal in the first degree. This applies in this case, but does not incriminate the accused any further. In short, he is not the Eichmann type who joyfully obeys his "Führer" and carries out the orders he receives with even greater emphasis. As a co-plaintiff aptly said, the accused was at the time in question a poor devil who acted automatically under pressure of commands and was misled and confused ideologically. In his innermost heart he was repulsed by these crimes which had been planned down to the smallest detail; he was not part of them; he had no personal interest in them like a hired assassin has; he only appeased his conscience with difficulty and temporarily; he was not eager to commit the murders, even though he was, unfortunately, successful. He was a typical example of an abused tool of high-ranking wirepullers, an accomplice and henchman in the truest sense. For this reason it is just and fitting to condemn him only as an accomplice. This does not, however, imply a fundamental mitigation of the court practice in cases of murder.

The conviction of Stashinsky for simple abetment of murder did not gain unanimous approval in German legal circles because the indictment rested on the so-called subjective doctrine concerning complicity, while important representatives of German criminal jurisprudence uphold the material and objective doctrine. The latter rejects every distinction between the guilt of the principal in the first degree and the accomplice's guilt made according to the criterion of voluntary action. It bases its judgment on the act itself and the distribution of actual responsibility among the participants, on the principle that the active role distinguishes the principal in the first degree and the passive role the accomplice. In the written opinion on which the judgment was based, the High Court dealt more thoroughly than in the oral opinion with this material and the objective doctrine concerning complicity, raising, *inter alia*, the following objections to it:

It is disputable whether this doctrine's criterion, which is hereinafter declared decisive, of the active role is not being taken in far too narrow a sense simply as meaning palpable collaboration, making no allowance for any psychological factor, mental constraint or compulsion affecting the participants. It is true that a convenient criterion for distinguishing between the guilt of the principal in the first degree and abetment is the result, but this involves considerable simplification, and with it the danger that the offenders could no longer be judged in the fairest possible way...

The material and objective doctrine might perhaps be clearer when used in sentencing only those offenders who follow motives known to the criminologist, and follow them against the background of a community whose ethical views are still essentially consistent, and whose political situation is to some extent stable. It overlooks the fact that this clearly applies to only a section of present day criminal activity.

Political murders have, of course, always been committed in Germany as in the rest of the world. But in recent times certain modern States have let themselves be influenced by radical policies, like Germany's National Socialism, even into planning political murders or massacres and then ordering the execution of such atrocities. The simple recipients of such orders are not driven by the motives revealed by criminology, or other similar personal motives, when they commit this kind of officially prescribed crime. Moreover, they find themselves in the morally confusing and inescapable situation of being hired to commit the most heinous crimes by their own country, which has come, through skilful mass propaganda, to be regarded by many people as the incontrovertible authority.

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## **"DESTALINIZATION" IN THE HUNGARIAN JUDICIARY**

The Central Committee of the Hungarian Socialist Workers' Party (HSWP, i.e., the Communist Party) passed on August 16, 1962, a lengthy Resolution concerning "the termination of illegal trials staged against members of the workers' movement during the years of the cult of personality". In the Resolution only the period 1949-1953 is scrutinized. Violations of Socialist Legality are analyzed with the object of discovering their causes and conclusions are drawn with the object of avoiding a recurrence of such violations.

Politically the Resolution is in line with and constitutes a local application of similar decisions of the 22nd Congress of the Communist Party of the Soviet Union (CPSU) held in October 1961 (Cf. No. 13 of this *Bulletin*). Its avowed aim was to contribute to the preparation of the 8th Congress of the Hungarian Socialist Workers Party held in November 1962, in Budapest. The Resolution announced that a Special Committee was constituted in 1961 by the Central Committee of the HSWP to review all political trials of the Stalinist period, supposed to be confined in Hungary between the years 1949 and 1953. Of the work done by the Special Committee, the Resolution said:

The cases decided on trumped up charges can now be definitively settled. The Central Committee issued all the necessary orders to list the victims of the cult of personality, to commemorate their names, and to proceed with rehabilitations omitted in previous years. It takes steps to attribute political responsibility—neglected until now—draws ideological con-



elusions from past experience and provides for further institutional safeguards to the effect that nobody should be punished without having committed a crime.

It is among these "institutional safeguards" that the Central Committee Resolution, cited above, seems to go further than any previous similar "destalinization" measure of the Communist countries. In Paragraph III (3) of the Resolution the Central Committee decreed

The expulsion from the Party of 17 persons who either politically, or as procurators, judges, agents of the State security organs were responsible for carrying out illegal proceedings.

The names of the respective persons were published in the September issue of *Pártélet* (Party Life).

Moreover, in Paragraph III (4) the Central Committee resolved as a question of principle to exclude from service as procurator, judge, or functionary of the Ministry of the Interior all persons who, in the period mentioned, took an active part in the holding of illegal trials. Persons who were members of the Party's Central Control Commission or the officials thereof, participating in disciplinary proceedings connected with the illegal trials, were also barred from service in the above-mentioned Offices, as well as in party disciplinary work. Those who, for whatever reason, corrupted the process of meting out justice, and perverted it into a farce, were disqualified from service in a period aimed at improving legality.

Yet the 17 persons singled out for public infamy and expelled from the Party and from their professions represented only a small part of the whole organization, the members of which, under the orders of the Party leadership of that period, applied with a greater or lesser degree of conviction and zeal laws which were biased, and at the same time inflicted inhuman suffering on their fellow citizens. The role of the 17 is clearly that of scapegoats, whose purge merely symbolizes a public declaration of the Party to improve the administration of justice. Accordingly these measures, if they are to have any real meaning, can only be a beginning and there must follow a thorough reorganization of the Procuracy, Judiciary, and the Law Faculties in Hungary aimed at implementing the rationale of the Resolution: those who corrupted justice have no place therein. Finally and above all, the determination of what is justice must be taken out of the hands of the Party if justice is to have any reality.

A Decree on an amnesty was announced by Prime Minister Kadar at the first session of the newly-elected Hungarian National

Assembly on March 21, 1963, under which pardoned prisoners were to be released at the latest by April 4, 1963. The amnesty might be a first step in the general direction of putting into effect some of the postulates laid down in the Reports submitted to and in the Resolutions passed by the General Assembly of the United Nations on the question of Hungary.

Below is a summarized version of a radio broadcast from Budapest on March 22 by the Minister of Justice on the subject of the amnesty:

The Decree applies to all political prisoners, civilian and military, who perpetrated anti-State crimes between 1945 and the proclamation of the amnesty. Pardon applies to those who were involved in the *counter-revolution* (emphasis added) of 1956 and to those who in the Stalinist era abused their authority and "violated Socialist Legality". Exception is made, however, in cases of crimes of espionage and treason. In the case of common criminals sentences are reduced depending on their duration. Terms of imprisonment of less than one year, fines and corrective or educational forms of punishment are remitted. Exception is made in the case of murder, wilful homicide, robbery, arson or destroying of Socialist property (other "economic crimes" are included in the amnesty). Both political and common criminals are deprived of the benefit of the amnesty if they are recidivists. There is also a possibility of individual amnesty: persons who do not come under the above mentioned measures may ask the Presidential Council for pardon. The amnesty applies also to those Hungarian subjects who have left the country illegally.

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## ELECTIONS IN LATIN AMERICA : PARAGUAY, NICARAGUA, ARGENTINA AND PERU

### Introduction

In its attempt to define the main features and fundamental principles of the Rule of Law, the International Congress of Jurists assembled in New Delhi, in January 1959, adopted the following *Conclusion* in respect of the function of the Legislature:

The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of this personality.

In the *Conclusions* of the New Delhi Congress it was made clear that the Legislature, in order to live up to the above defined task, must be "elected by democratic process and not subject, either in the manner of its election or otherwise, to manipulation by the Executive". Election by democratic process is based on every-

one's right to free suffrage, the exercise of which must be secured in such a manner that the result of the election reflects the genuine will of the people.

The right to suffrage has correctly been recognized as one of the basic Human Rights and has therefore been included in Article 21 of the Universal Declaration of Human Rights of the United Nations. Paragraph 3 of this Article defines some principles aimed at guaranteeing the free exercise of this right. It reads as follows:

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

From the point of view of the Rule of Law it is imperative that the above requirements be met in all the phases of electoral procedure, e.g., the proper compilation of an electoral roll of voters, the decree promulgating the election day, primary elections within the parties to choose the candidates, the registration of parties and candidates participating in the election, the electoral campaign, the process of voting, the process of counting votes, the official announcement of and the confirmation of the results of the election, and the taking of their seats by the winning candidates

In 1963, several Latin American countries are holding or have held general elections to choose a President, Vice-President and other national and local officials. Among these countries, Paraguay, Nicaragua, Argentina and Peru present certain features of interest to the readers of this *Bulletin*.

## **Paraguay**

Elections were held in Paraguay on February 10 of this year. President Stroessner was, as expected, re-elected. A State of Emergency existed in Paraguay to February 9, 1963, the day before the elections, when it was lifted. It was reimposed on February 11.

The background to the elections forms an interesting chapter in the struggle for the preservation of Human Rights in Paraguay. The details are worth recounting.

After the *coup d'état* in 1954 which ousted President Federico Chaves, the Paraguayan Congress designated Thomas Romero Pereyra as President; he immediately called for elections on July 11, 1954, as a result of which General Stroessner was elected President. The conduct of these elections was severely criticized and aroused great indignation. Stroessner was re-elected in the general election

of 1958 for a constitutional five-year term which expired in February 1963. At its convention on September 22, 1962, the Revolutionary Party (*Partido Colorado*) nominated Stroessner as its candidate for the Presidency.

This nomination drew heavy criticism from the opposition which considered a third candidacy for Stroessner as tantamount to a second re-election, forbidden by Paraguay's 1940 Constitution. The government countered this by stating that the Constitution prohibited re-election for two full five-year terms in office but that during his first term General Stroessner had only held office for a period of four years completing the legal term of the previous President, Federico Chaves. Article 47 of the Constitution of Paraguay states that "the President of the Republic will have a term of five years in office and may be re-elected for one more term".

The opposition parties, i.e., the Liberal Party, the Febrerista Revolutionary Party and the Christian Social Democratic Movement, protested to President Stroessner in a note dated February 7, 1962, that "they would not stand in the 1963 general election unless they received assurances that the State of Emergency would be suspended during the pre-electoral period as a guarantee of fair, democratic practices, and a general amnesty declared by March 15, 1962, at the latest". The note added that "failure of the government to comply with these conditions would be interpreted as inability or lack of willingness to keep the promise your government made" and that "in this event, the political groups we represent decline all responsibility for stifling this much desired procedure for re-establishing institutional democracy, on which the attention of our people and the hopes of America are now focussed".

President Stroessner's reply was forthcoming. It stated that a general amnesty was a matter for Congress to decide, and Congress was in recess until April 1962. Instead of suspending the State of Emergency, he prolonged it for another 90 days.

Nevertheless, unexpected developments occurred in Paraguay. A group of young Liberal Party leaders announced that it was necessary for Liberal Party candidates to stand in the general election and consequently called a party meeting which, on September 10, 1962, set up a Revolutionary Directorate of the Liberal Party, whose terms of reference were to organize the participation of the Liberal Party in the February 1963 elections. The Directorate of the Liberal Party representing members favour-

ing not running in the elections, interpreted this move as one which involved its replacement by the Revolutionary Directorate and lodged a complaint with the Central Electoral Board requesting that it be recognized as the sole executive body of the Liberal Party. The Central Electoral Board, an agency of the Stroessner Government, predictably recognized the new Revolutionary Directorate as representing the Liberal Party. The old Directorate of the Liberal Party considered its new rival as collaborating with the dictatorship. It contended that the new body would render Stroessner's dictatorship a service by lending an aura of legality to the balloting in February of 1963 and making the elections appear a free and open contest. The young Revolutionary Directorate countered that in view of the present situation in Paraguay there was no alternative but to carry the battle for democracy wherever it could be fought and that this was in fact an opportunity to defend democratic ideals by championing legal opposition to the government. At best this group hoped to obtain the representation which the electoral law granted to the minority and, with the seats it gained, to undertake the task of re-establishing institutional democracy in Paraguay in accordance with the express desire of all.

In assessing the results of the recent general election in Paraguay the following factors must also be borne in mind. Nearly a third of Paraguay's total population of 1,800,000 is in exile in Argentina, Brazil and Uruguay, and many leaders of the opposition parties are outside the country. More than many other Latin American countries, Paraguay has a tradition of strong, dictatorial government, a practice which does not favour the development of a healthy civic attitude among its citizens. The economic situation is desperate and too much reliance is placed on dictatorial rule to raise the level of the standard of living through unfounded demagogic statements. These and other reasons have undoubtedly influenced the atmosphere and outcome of the elections held in Paraguay on February 10 of this year, in which 710,000 citizens—men and women—were registered as electors; altogether 70% of the electorate voted.

As mentioned above, the government suspended the State of Emergency the day before the election, but reimposed it the day following the elections.

### **Nicaragua**

This Central American Republic also elected last February a new President and Vice-President, and new Senators and Deputies. A large number of political parties competed, although an impor-

tant opposition party, the Conservative Party, led by Fernando Agüero, abstained. The most important pre-electoral criticism centred around the provisions of the Electoral Law. Legal critics referred to the following two points.

First, the composition of the electoral "courts" was unsatisfactory. These courts are the Supreme Electoral Tribunal (established by Section 14 of the Electoral Law), the Departmental Electoral Tribunal (Section 21) and the Local Electoral Tribunals (Section 27), which are bodies responsible for the complete local administration of the elections including the control of the polling stations.

Electoral courts at all levels are composed of five members each, three belonging to the official or government party and two from the leading opposition parties. Of the three government representatives on the Supreme Electoral Tribunal, one is appointed by an absolute majority of both Houses of Parliament; the second member is appointed by a majority vote of the Supreme Court of Justice and the third "by the political party having obtained the greatest number of votes in previous elections of top-level officials" (Section 14 of the Electoral Law), in other words the party which elected Luis Somoza Debayle into office as President of Nicaragua.

Members are appointed to the Departmental Electoral Tribunals in the following manner: the Supreme Electoral Tribunal elects the President and one judge to the tribunal. A third electoral judge is elected by the political party in power and the two remaining judges by the two leading opposition parties.

Finally, members of the Local Electoral Tribunal are designated in the following manner: the President and one judge are appointed by the Departmental Electoral Tribunal, another judge by the political party in power; the fourth judge by the leading opposition party and finally the fifth judge by the second most important opposition party. In this manner, the electoral machinery remains in the hands of the government, with a three to two supremacy at all levels.

The opposition considered this system dangerous in view of the fact that there were no guarantees as to the impartiality of the government representatives. The problem is further complicated by the fact that all electoral courts count votes; in particular the Supreme Electoral Tribunal has the task of making the final voting figure returns, of validating the elections and of announcing the result of the election and declaring elected the President and

Vice-President of the Republic and the Senators and Deputies (Section 107).

The second objection to the present Electoral Law of Nicaragua was that it made no provision guaranteeing checks on the authenticity of the ballot papers tendered at the polls, other than the examination made by representatives of opposition parties at the polling station. Under present law no provision is made for ensuring that the ballots counted by the Local Electoral Tribunal at the polling stations are the same as those finally counted by the Supreme Electoral Tribunal. The Electoral Law only requires that "the President [of the Local Electoral Tribunal] shall attach the relevant official ballot seals, i.e., those for the election of candidates at a national level and those for candidates at a local level. The seal will be affixed to a corner on the back of ballot paper." (Section 76)

The opposition pointed out that no provision was made for a countermark or signature by one of the electoral judges representing the opposition parties to ensure that the ballot papers in the final count were the same as those counted by the Local Electoral Tribunal. This absence of guarantees made it possible for any one of the electoral judges representing the government party to validate with impunity any ballot papers not actually cast during voting.

These objections to the Electoral Law, apart from other practical problems, prompted the traditional Conservative Party to request the presence at the elections of the Inter-American Human Rights Commission of the Organization of American States. The Commission sent several observers; no report of the mission has yet been published.

Elections were held on February 3, 1963. Dr. René Schick, the official government party candidate, was elected President. During election day a number of people were killed in disorders which were firmly suppressed by the National Guard under General Somoza Debayle, brother of President Luis Somoza Debayle. The leader of the Conservative Party, Dr. Fernando Agüero, was under house arrest on February 3, but was released afterwards.

## **Argentina**

The Argentine Government has announced that general elections at national and provincial levels will be held throughout the country on June 23, 1963. These elections will follow in the wake of one of the most serious institutional crises in the country's

history of 150 years of independence. The background of the crises is as follows.

The freely-elected constitutional government of Arturo Frondizi had called for certain country-wide elections on March 18, 1962. On that day over 9,500,000 Argentine citizens—men and women—voted in the elections for 12 provincial Governors and 84 members of the National House of Representatives and, in both the Federal District and 18 out of the 24 Provinces, for the whole membership of the Provincial Senate and House of Representatives. It is generally agreed that these elections, as indeed the whole electoral process, took place under conditions of complete freedom.

Several political parties participated in the elections, the ones with the greatest support from the voters being: the *Union Civica Radical Intransigente* (UCRI), President Arturo Frondizi's party, the *Union Civica Radical del Pueblo* (UCRP), the main opposition party, and the political groups based round the former authoritarian-minded *Peronista* party, which received their instructions from ex-President Juan Peron, living in Spain, and the support for which mainly emanated from the trade unions. These last groups functioned in the various Provinces under different names or as a part of a number of diverse political alliances. It was the first time since President Peron was deposed that *Peronistas* were allowed to stand for election and, in the Province of Buenos Aires, which by its wealth and population represents almost one-third of the whole country, they actually put forward their own candidates.

The elections were convened in accordance with the existing electoral system and the various political parties complied with the formalities imposed by the electoral regulations. These parties willingly participated in the elections together with groups representing *Peronista* tendencies. The Armed Forces concurred, tacitly at least, in the holding of the elections and in the electoral process by maintaining the peace on Election Day.

On March 19, 1962, the Minister of the Interior announced that preliminary voting returns showed that the *Peronista* candidates for Governor had triumphed in five Provinces: Buenos Aires, Chaco, Tucuman, Rio Negro and Santiago del Estero, and that *Peronista* candidates had secured 43 seats out of 192 in the National House of Representatives.

When the result of the elections became known, the reaction came without delay. President Arturo Frondizi issued Decree



No. 2542 (published in the Official Bulletin of the Argentine Republic on March 21, 1962) proclaiming the "intervention" of the Federal Government in the five Provinces in which *Peronista* candidates had triumphed. By intervention is meant the right, under the Constitution, of the Federal Government to substitute its own agents of Government, called *interventores*, for the local Governor and his government. Section 3 of the Decree reads: "The intervention affects not only the provincial and municipal authorities in office but also those which may have been elected in election held on March 18, 1962." The effect of the Decree was that final election results were annulled.

A crisis followed. The Armed Forces deposed President Frondizi and installed in office José María Guido, provisional President of the Senate, under the terms of Law No. 252 which is concerned with the vacancy in the Presidency. Frondizi is being detained on Martín García Island at the discretion of the Executive which is in fact subordinated fully to the Armed Forces; he has neither consented to resign nor agreed to leave the country. It will be left to a later article to analyze the causes and the events leading up to this crisis, and the steps taken by the acting Government of Argentina during this period. But after a struggle for power within the Armed Forces, the country now appears to be on the road to what is known in Argentina as the "electoral solution".

But the country faces a serious politico-institutional crisis: the Executive has dissolved Congress, leaving the country without a Legislature; the Armed Forces have been intervening openly in political affairs; the permanent influence of the ex-dictator is felt in the movement of the pro-Peron masses, which apparently favour personal authoritarianism; there is a crisis in democratic party leadership; the general atmosphere is one of mutual disbelief and mistrust. This constitutes the background to the "electoral solution".

The unfortunate experiment of the Peron dictatorship, which lasted until September 1955, and the annulment of the elections held on March 18, 1962, cast a menacing shadow over the elections called for June of 1963.

International legal opinion is focussed on two of the many serious and important aspects of the problem: first, political discrimination against Communists and *Peronistas*; and, secondly, the lack of conviction that final results will be accepted whatever the outcome of the elections.

It is obvious that even if the principles concerning the existence of the Legislature, as enunciated in the introduction to this article,

are carried out, elections alone cannot provide Argentina with sound solutions to the crisis it is now undergoing. In situations of this type, it must be remembered that the apparent or formal application of laws is not sufficient to give full force to the Rule of Law. All citizens, leaders included, must develop an attitude of mind which deeply respects legal institutions at all times. This alone can promote harmony, the very foundation for the existence of a nation. And what is at stake in Argentina is this very existence. Since this article was prepared, an unsuccessful military *coup* took place against the government of José Guido on April 2.

## Peru

General elections for the President of the Republic, Senators and Deputies were held in Peru on June 10, 1962. Order was maintained during the elections by the Armed Forces which, some months previously, had warned against several instances of apparently illegal registration of voters. The Armed Forces recommended that the National Electoral Board rule that the military registration or identity card of Peruvian citizens should serve as the official document for voter registration. The Electoral Board agreed. Elections were held in a generally normal atmosphere. Ballots went mainly to three parties: *Alianza Popular Revolucionaria Americana* (APRA), *Acción Popular* and *Union Nacional Odrista* (UNO), the latter headed by the former President and dictator of Peru, General Manuel A. Odría. None of these parties obtained an absolute majority of votes. The Constitution of Peru provides that "the President of the Republic is elected by direct suffrage" (Article 135) and that

in order to be proclaimed President of the Republic by the national electoral board, it is necessary to have obtained the majority of the votes, provided that this majority is not less than one-third part of the valid votes.

If none of the candidates has received the required majority, the national electoral board shall inform Congress of the result of the count.

In this case, Congress shall elect the President of the Republic from among the three candidates who have obtained the largest number of valid votes. (Article 138)

Although none of the candidates obtained an absolute majority, the APRA announced that its candidate, Victor Haya de la Torre, had been vetoed by the Armed Forces; in any case the almost thirty-year old opposition to APRA by the Armed Forces and its candidate was already in evidence before the day of the election. This faced Congress with the choice of complying with the Armed

Forces' veto and proclaiming one of the two remaining candidates President, or of designating a person the majority of Congress considered suitable.

The leaders of the three parties which received the most votes met several times in an effort to reach an agreement on who was to be the next President. The *Accion Popular* Party, led by Fernando Belaunde Terry, broke off negotiations and demanded the prompt designation of an honorary committee to determine which candidate would be elected by Congress. In the meantime, Haya de la Torre (APRA) and Odria (UNO) reached an agreement which, according to the terms of a joint *communiqué*, apparently meant that when Congress met on July 28, it would designate Odria as President with the consent of APRA.

On July 13, 1962, the Joint Chiefs of Staff of the Armed Forces publicly reiterated that an electoral fraud had been perpetrated. In spite of this, the Armed Forces stated that the final decision rested with the National Electoral Board. This body approved the elections and thus indicated that there were no grounds for declaring them fraudulent, as the Armed Forces had claimed. The Cabinet resigned almost simultaneously. Only ten days remained before the expiration of the constitutional term of President Prado. On July 18, the Armed Forces deposed President Prado and declared the elections null and void, claiming that fraudulent acts had been committed by several officials of the Executive and by the National Electoral Board. A junta was set up and one of its members, General Ricardo Pérez Godoy, was sworn in as President. Immediately, the *de facto* government of Peru issued a Decree calling for general presidential elections on the second Sunday of June, 1963. The junta affirmed that all political parties would receive equitable treatment in the 1963 elections. President Prado was detained on a naval vessel but released shortly after.

Another of the measures taken by the junta was the creation of a committee to draft a new electoral law. This committee was composed of seven representatives: one each from the Supreme Court, the national Bar association, the Faculties of Law of the Catholic University and the San Marcos University, and the three above-mentioned political parties. The representatives of the political parties had consultative status but could not vote. At the beginning of February 1963, the junta governing Peru declared a national State of Emergency and ordered the arrest of more than three hundred persons. According to the government decree, there was a vast plot led by Communist forces and some APRA extremists.

The social situation in Peru has been shaken by several mining strikes. The most representative political parties adopt attitudes which are difficult to reconcile with the interests of the country. Within the Armed Forces, there are revolutionary elements who do not believe in the politicians' ability to govern Peru in modern times. Moreover, the Armed Forces have unfettered power. All these factors may affect the coming elections. Under these circumstances, the main question is to know whether or not the government or the Armed Forces will keep promises to allow freedom of action for all political parties, and whether they will respect the results of the forthcoming election. Or whether the Armed Forces will act, as they did on July 18, 1962, in the role of supreme judges of the elections.

On March 3, 1963, the President of the military junta, General Ricardo Pérez Godoy, was deposed by the Armed Forces and General Nicolas Lindley López appointed in his place. The Armed Forces, in a *communiqué*, reaffirmed their faith in democracy, their respect for the laws of the Republic and their firm decision to hold elections in June of the present year. In spite of these promises General Pérez Godoy's removal is but another sign of the political instability of Peru.

In view of their previous experiences, political as well as military leaders must exercise extreme caution and responsibility in the next six months. Only in this way can new life be breathed into institutional democracy in Peru.

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These brief commentaries provide a basis for thought on genuine elections and the Rule of Law.

Violations of the requirements of the Rule of Law in relation to genuine elections might be classified under the following two heads:

laws which violate the principles of the Rule of Law: for example, a discriminatory law;

just laws which are misapplied: for example, the case of an electoral law guaranteeing the electoral right of every citizen to vote which is not upheld in practice. There may be as many forms of violation as there are individual stages in the electoral process. There may be pre-electoral fraud, fraud during balloting, fraud during counting, substitution of votes after the provisional count, etc. Finally electoral rights may be violated

after the final official results are known by nullification of the elections either by the government or by a *coup d'état*, as recently occurred in both Argentina and Peru.

All cases of electoral fraud, in any electoral phase, are a symptom of a deeper disorder. It is obvious that healthy institutional government, under the Rule of Law, does not automatically result from formal and apparent compliance with laws. This is only the superficial aspect of the problem. There is, however, a deeper aspect related to the content of the Rule of Law. Where reference is made to genuine elections, as in the Universal Declaration of Human Rights, this reference concerns what must be done in practice. This implies the active, willing participation of citizens in government through the political leaders of the country. All this presupposes a constant effort on the part of government, of educational institutions and of political parties to educate citizens: a task all too frequently overlooked. All citizens must learn to respect the law and the liberty of others. Without these basic elementary conditions, the mere appearance of legality or compliance with certain superficial formalities is useless.

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### WORKERS' COURTS IN POLAND \*

The so-called "Workers' Social Courts" (*Spoleczne Sady Robotnicze*) started to function in Poland in October 1960, first in the Province of Wroclaw in Lower Silesia and since mid-1961 in other parts of Poland. About forty such courts were in existence in Poland by October 1962; their distribution over the country appeared rather uneven. Eighteen of them, almost one-half of their number, were still concentrated in the Province of Wroclaw, while the north-eastern part of the country had yet to be introduced to this new experience.

The unusual feature of the Polish experiment with this type of lay court is the absence of any legislative enactment such as preceded or immediately followed the large scale establishment of Comrades' Courts in the Soviet Union (Decree of the Supreme

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\* For the material on which this article is based we are indebted to Professor L. Kos-Rabcewicz-Zubkowski, Professor at the Department of Slavic Studies, University of Montreal, member of the Bar of the Province of Quebec, and former member of the Warsaw Bar.

Soviet of the Russian Socialist Federated Soviet Republic of July 3, 1961), of Peoples' Courts in Czechoslovakia (Law of April 18, 1961) and Bulgaria (Law of June 20, 1961), and of Social Courts in Hungary (Law of October 13, 1962). The Polish Workers' Courts were brought into existence by a conference of special activists and lawyers who decided in Wroclaw on October 6, 1960, to establish such courts in 16 factories in lower Silesia. The Provincial Committee of the United Workers' Party (i.e., the Communist Party) in Wroclaw was credited with the initiative.

It should be noted here that this was not the first attempt to set up social courts in Poland. In February 1946, a Decree was issued establishing Citizens' Courts and in October 1955 the trade unions passed a resolution on their own Comrades' Courts; both projects failed however to gain public support and had to be abandoned. In 1958, an experimental Workers' Court was set up in Stalowa Wola in Rzeszow Province, but this remained an isolated venture. Polish writers speculated that the negative response may have been due to "the lack of a universally felt social need" for such courts, but the reluctance has been not less apparent in government circles. Minister of Justice Marian Rybicki maintained in October 1959 that the question of social courts must be examined with great caution. He emphasized the dangers arising "whenever beautiful and correct concepts are placed in the hands of real people acting under specific conditions and in a specific moral climate". The Minister's attitude was echoed in 1959, in *Trybuna Ludu*, the Party's newspaper, in more forceful language by a member of the Polish Association of Jurists whose main concern was the impartiality of the social courts:

The conditions and environment within which these courts would act would not favour the development of impartiality. It should be remembered that every community, especially those in rural areas, is woven with an intricate network of dependencies and interests, kinships, friendships and acquaintances, while, on the other hand, numerous groups within it are, in turn, separated by various antagonisms, conflicts and prejudices... Could the judging panel of a social court maintain the impartiality while remaining—as it would—under constant pressure of such influences? Of course it would be difficult, if not downright impossible.

Despite this guarded attitude of legal circles, the Polish Workers' Courts are claimed to be a spontaneously created institution. Individual courts are expected to be set up by a resolution of the workers of a plant. The statute or by-laws (*regulamin*) of the court has also to be approved by a workers' meeting. It is however not denied that the impetus for action can as a rule be

traced back to the Party or to the directing organ of the trade union (*aktyw*) which also provides material on the court's organizational principles.

Various reasons have been given to justify the creation of social courts. A Polish writer summed them up as follows:

The leading idea which guided the initiators of the workers' courts was the desire to create a new instrument for shaping socialist relations among people in industrial plants. This particularly meant strengthening the protection of social property and certain features in staff relations.

The Polish theory asserts that the resort to social courts is not an extra-judicial—in fact, extra-legal—extension of the competence of ordinary courts and, through its informality, a direct threat to the principle *nulla poena sine lege*. Rather, the Workers' Courts are presented as a flexible instrument of social justice, protecting as it were, the working population from the strict application of penal laws for minor offences against labour discipline, such as became a dreaded practice under the Polish Decree of March 4, 1953. On the other hand, the Soviet claim that the social courts are an example of the transfer of State function to the masses and thus of the incipient withering away of the State does not appear to be stressed in Poland. Writers consider them as component parts of Socialist democracy and a contribution to self-government in factories.

The practice of social courts in several East European countries varies, with the Polish system maintaining a more conservative line. The Workers' Courts in that country are being created only in major industrial plants, while in the USSR, Czechoslovakia and Bulgaria collective workers in villages also have their courts as do tenants in urban housing units.

There is also a marked difference in the scope of offences justiciable before the social courts. The Polish Workers' Courts deal mainly with minor thefts (50% of all cases), disturbance of the public order (hooliganism), personal insults, and certain matters concerning family relations (obligation of support and maintenance between parents and children, marital quarrels, annoying fellow tenants), while the social courts in other People's democracies are also being seized of cases concerning breaches of labour discipline and rules relating to tenants and, by consent of the parties, may even adjudicate on minor personal property claims.

According to the present practice and in contrast to other People's democracies, Polish Workers' Courts do not as a rule impose penal sanctions but rather issue advisory opinions for

organs which are authorized to award penalties, e.g., the management of the State enterprise in matters of labour discipline, or the office of the State Procurator in cases involving minor breaches of the Penal Code. "But," according to Jan Górski, a commentator who described the Courts in detail in *Nowa Kultura* in October 1962, "the public examination of a case in a factory in the presence of the usually large group of colleagues is, in the opinion of the offenders and staff alike, a strong moral sanction in itself."

Judgments consisting of a reprimand or warning are usually considered as binding decisions of the Workers' Courts against which no appeal lies. However, at least one case of a complaint to the procurator has been cited in Polish legal literature. By way of contrast, Czechoslovak legislation on People's Courts provides for appeal to the State Courts. There is no formal appeal available in the USSR, but the executive committee of the local Soviet or the competent trade union committee may in certain cases request the Comrades' Court to re-examine the case and review its decisions. A similar practice obtains in Hungary.

Judges are elected in Poland by an assembly of all the workers in the respective enterprise. The Bench is composed of three judges. In practice, names of suitable candidates are "suggested" by the leading element of the Party faction in the factory (*aktyw*). In general, no qualifications are required; it seems, however, that some by-laws stipulate that a judge must be over 26 years old.

While in theory the jurisdiction of the Workers' Courts in Poland is not limited to manual workers but covers white collar workers as well, in practice these courts deal mostly with cases involving the former. An inquiry in Lower Silesia yielded the figure of 94% manual workers among the accused before local Workers' Courts. In comparison with this number, the representation of the clerical staff on the bench—69 out of 173 in 16 courts—seems to be disproportionate. One half of all judges included in the inquiry were reported to be Party members.

The Polish Workers' Courts can be seized of individual cases in the following manner:

- (1) the plant management can, with the consent of the State Procurator, file charges with the Workers' Court rather than with the office of the Procurator;
- (2) the State Procurator, the State District Court or the administrative penal collegia can transfer to the Workers' Court a case of which they have already been seized;



- (3) the authorities mentioned under (2) above can assign a case to the Workers' Court at the latter's request;
- (4) a private citizen can file his complaint with the Workers' Court but only against a fellow-employee subject to the same jurisdiction.

The procedure is informal. The chairman of the court may appoint a prosecutor but more often than not he presents the indictment himself. The chairman may also appoint someone to defend the accused from among his fellow workers. This procedure, too, is not obligatory and in practice all employees present at the hearing have the right to voice their opinions and to take a stand for or against the accused. Again, citing Górski:

It is characteristic that the workers adopt an active attitude in this regard. Of a total of 57 cases investigated from this angle, there are 347 statements made by persons taking part in the trial. Whilst resolutely condemning the criminal acts and offences, those taking the floor were more lenient towards the accused, especially towards good workers.

A complaint lodged with the chairman of a Polish Workers' Court should be heard within seven days. The sessions are in principle public; exceptions have, however, been reported.

The court renders its judgment immediately after the deliberation of the judges; unanimity is not required and the majority prevails.

Social courts, whose informal and *ad hoc* operations are inexpensive, may relieve some of the costs of the ordinary administration of justice by taking over a substantial number of cases which would otherwise be tried by State courts. Moreover, justified complaints have repeatedly been made of the congestion of the legal calendar with trifling actions arising from insults among neighbours and other minor offences against the peace. In this connection it is interesting to note that a Law of December 2, 1960, introduced new measures with regard to some torts. Complaints of slander and assault and battery may now be dealt with by the organization of which both the complainant and the defendant are members.

Polish writers stress less the element of economy and expediency than the educational purpose of the Workers' Courts allegedly achieved through both the moral sanctions inflicted on the accused and the impact of the proceedings on public opinion. An eminent Polish jurist, Eugeniusz Modliński, wrote in *Państwo i Prawo* in January 1962:

The workers' social courts are an expression of a search for new forms of acting upon the citizen's individual attitude concerning principles of community life based on the constitution of the People's State. They are to supplement with social means the activities of the existing organs for the prosecution of crime by mobilizing important opinion of the factory community and reflecting the workers' attitude towards infringements of the principles of community life (including offences against social property) and towards their perpetrators.

A group of Polish scientists from the Central Institute for the Protection of Labour investigated reactions to the introduction of the Workers' Courts. In January 1962, the preliminary results have been evaluated in an article by Adam Podgorecki. The author pointed out various factors that limited the conclusiveness of the inquiry, e.g., its short duration (October 1960 - March 1961), restricted territory (Lower Silesia), lack of conclusive experience (the first Workers' Courts had just started operating when the inquiry began) and shortage of available funds.

The preliminary investigation revealed, among others, the following reactions:

(1) Workers feel more ashamed and repentant when judged by their fellow-workers than when tried by an ordinary court; however, 25% of the accused stated after the trial that workers consider the Workers' Courts inconsistent with their interests.

(2) Some doubts persisted on the parallel functioning of Workers' Courts and State Courts.

(3) Workers are reluctant to sit on the bench. Among 122 persons asked if they would like to be elected judge of a Workers' Court, 96 answered no, 20 yes, 6 did not know.

(4) There is certain scepticism as to the permanence of the institution.

(5) Workers disapprove of ordinary court proceedings against employees appropriating State property for their personal use, especially when such goods are in short supply on the open market. The new Workers' Courts are supposed to change such attitudes and to mobilize public opinion against the accused.

The complex problems connected with social courts invites the attention of jurists and sociologists. Matters of labour discipline and minor offences against the Penal Code may be handled more expeditiously in an informal proceeding which has the advantage of acting swiftly and relieving the overburdened ordinary courts. It might also be true that a condemnation by public opinion—especially by colleagues at the place of work—can be more painful for the minor offender and constitute a better deterrent than a

light fine imposed belatedly by a State court. Yet one cannot disregard the negative moral effect of such proceedings on the usually closely knit community of fellow-workers: the spirit of friendship and mutual confidence, a main prerequisite of effective teamwork, may yield to suspicion and bitter resentment.

Apart from the argument that the results sought by the establishment of Workers' Courts could to a large extent be achieved by an acceleration of the regular administration of justice and adequate publicity of trials affecting specific sections of the community, the following dangers to the Rule of Law seem to weigh heavily in the balance:

- (i) miscarriage of justice due to lack of experience of lay judges;
- (ii) impossibility of correcting erroneous judgments through appellate procedure;
- (iii) lack of guidance and coordination resulting in disproportionate decisions rendered by various Workers' Courts in similar cases;
- (iv) external pressures of political nature;
- (v) impact of the close relationship between the accused and his judges.

The idea to arouse the interest of the community in the administration of justice through securing its active participation in the trial and ensuring its positive acceptance of the judgment is certainly not new. The jury system, open hearings, the publicity of the proceedings and of its outcome have long been conventional means of achieving that desirable objective. However, even if shorn of its ideological trappings in the framework of Marxist theory—as the Polish experiment seems to be—the practice of social courts in the countries of the Soviet bloc emerges as an interesting though controversial contribution to the perennial search for truly popular justice. It is therefore encouraging that the number of jurists demanding a tight legal control over the activities of social courts is steadily increasing. A thoughtful Polish comment by Górski, quoted above, may be cited here in conclusion:

In order that the sense of Workers' Courts does not get warped, they must develop on the basis of the authentic opinion of the workers. And the Workers' Courts, if they are to develop, must be appropriately protected and operate on the basis of adequate instructions. For Workers' Courts to be able to develop, they must be based on a legal foundation.

## A POLITICAL TRIAL IN PORTUGAL

*The readers of the Commission's publications know of the Commission's pre-occupation with the situation in Portugal. Comments have been offered on Portuguese elections, arrests, and political trials. Because of its underlying and deep interest in strengthening the Rule of Law in Portugal, the Commission sent in mid-1962 a prominent German lawyer, Dr. Hans Rau, as its Observer to a political trial in Lisbon. The article below is based in part on Dr. Rau's report.*

In No. 13 of this *Bulletin* there was a report on the arrests made by the Portuguese Government of leading persons of opposition groups before the parliamentary elections of November 12, 1961. The leaders of the opposition had elaborated a very full "Programme for the Democratization of the Republic", circulation of which was subsequently prohibited because the government saw in it an attack upon "moral unity of the nation". Among those arrested was Dr. Arlindo Vicente, a Lisbon lawyer. He was sent on September 20, 1961, to the Aljuba prison of the PIDE (the political police) in Lisbon first being accommodated in the so-called *curro* (cattle pen, in which one cannot stand upright). Then, on the instructions of the Court, he was transferred to the somewhat better PIDE prison of Caxias outside Lisbon. He remained in custody until judgment was passed on July 13, 1962, almost 10 months later. This custody was provisional and protective (*medida de seguranca provisoria de internamento*) in accordance with Section 7 of Decree Law No. 40550 of March 12, 1956. This constitutionally highly questionable provision merits quotation, all the more as the competent court concerned itself with it. It runs as follows:

The security measure of detention in a suitable place for an indefinite period of between 6 months and 3 years, to be extended by 3 further years for as long as security is still endangered, shall be imposed upon:

- (1) Whomsoever forms associations, movements or groups of a Communist character, whether these practise subversive activities, intend committing punishable offences against the security of the State or use terrorism as a method of operation, as well as anyone belonging to or collaborating with such associations, movements or groups, or following their directives with or without previous agreement.
- (2) Whomsoever wittingly renders these subversive activities possible by accommodating meetings, giving financial aid or allowing propaganda.

The main hearings against Vicente were held on July 12 and 13, 1962, before the *Tribunal Plenario*. This is one of the 15 criminal courts of Lisbon and is competent to hear cases involving political crimes with the exception of rebellion. The hearing was conducted by the President of the Court, Dr. Joao Caldeira.

According to the indictment Vicente had cated against the internal security of the State under Section 173, Paragraph 1, of the Portuguese Penal Code. This crime is punishable by 2 to 8 years penal servitude. The Public Prosecutor further maintained that the defendant was dangerous under the terms of the above quoted provision of Decree Law No. 40550 and proposed that his provisional custody should be made final.

The Public Prosecutor submitted that he saw a violation or threat against the internal security of the State in the following activities of the defendant:

The accused is a member of the secret organization existing under the name *Junta Patriotica*, which was formed at the beginning of the year 1962 and which affords assistance to the so-called Portuguese Communist Party or is close to it, subordinate to it and directed by it in spite of a certain autonomy; also, by the application of unconstitutional methods, it directly aims at altering the Constitution, as well as changing or destroying the present form of government.

As a member of this organization he maintained relations or contacts with the then detained members of the so-called "Party", to whom he secretly sent pamphlets and directions.

He directed the political activities of these detainees, received their reports on life in prison and their requests; and with the guidance of the said "Party", produced reports, letters and petitions or had them reproduced, with the intention of circulating statements which were false or prejudicial to the government, and of demanding the release of the above-mentioned political detainees.

The accused was an important member of the said Junta and a collaborator in its publication, the *Tribuna Liere*. A search through the accused's office revealed that the accused had in his possession 238 copies of a single issue of this periodical; he intended to distribute these issues, and had distributed approximately 15 already, for he gave 10 of them to Alves Simões for Pova de Santa Iria.

The Portuguese Communist Party directly aims at altering the Constitution of the State and the overthrowing of the present form of government by the use of force and unconstitutional methods.

Thus the indictment was largely taken up with the incriminating activities of the defendant in regard to his connection with Communist detainees and his efforts to have them released.

The defendant, who admitted a number of the acts with which he was charged, denied as his main argument that these could be

described as Communist political activities. He was supported by 15 witnesses, of whom 12 were summoned by defence counsel. They were, without exception, persons of good political standing, who were often asked whether they considered Dr. Vicente a Communist. They always answered in the negative. The most prominent witness for the defence was the university professor Dr. Palma Carlos, who identified himself with Vicente's actions. When the President of the Court said: "Not ideas, but subversive acts against the Portuguese State are on trial here", and went on to quote from an account, written in French by the defendant, of all those who had taken steps to oppose the dictatorship, the witness laconically replied: "So what?" and himself asked the President what the defendant's guilt really was. After Dr. Carlos had given his evidence, he went up to the defendant and shook him by the hand, a gesture which caused a stir in the courtroom.

It is of note that on conclusion of the evidence, the Public Prosecutor declined to address the court. Defence counsel pleaded for an acquittal. The Court considered the charges made in the indictment proven, but denied the dangerous character of the defendant, thereby rejecting the prosecution's request to make the provisional custody final. The Court not only approved mitigating circumstances for the defendant, but further insisted that these should be particularly strongly emphasized. According to Sections 56 and 94 of the Portuguese Penal Code the judges may "exceptionally and in view of the particular emphasis on mitigating circumstances" reduce the punishment of penal servitude provided by the law (in this case 2 to 8 years) to one year, or replace it by imprisonment of not less than a year. In application of this special provision the court sentenced Dr. Vicente to a suspended term of 20 months imprisonment and suspended his political rights for a period of five years. This suspended sentence was accompanied by a five year period of probation. Consequently the Court ordered the immediate release of the prisoner.

Dr. Hans Rau in his report stated that the proceedings were conducted by the President of the Court, Dr. Caldeira, with exemplary objectivity and with all due respect for the rights of the defence. The hearings were open to the public. The sentence proved far more lenient than had been expected and feared. Within the restricted scope afforded them by legislation of questionable justice, the judges of the *Tribunal Plenário* showed commendable impartiality.

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