

**FOR THE RULE
OF LAW**

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CONTENTS

ASPECTS OF THE RULE OF LAW

Berlin	1	Mali	20
Burundi	5	Morocco	28
East Germany	15	South Africa	37
United States	39		

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BERLIN : HELPING REFUGEES TO ESCAPE — AN OFFENCE AGAINST PEACE ?

It is estimated that 3.7 to 4 million inhabitants of East Germany escaped to the West during the period between 1946 and August 13, 1961—the day on which the building of the ill-famed wall across Berlin began on the orders of the Council of Ministers of the German Democratic Republic (GDR). This refugee movement from East to West was a phenomenon without parallel in recent history; it was, in its way, a unique marching plebiscite against the domination of the East German Communist regime. As early as 1954, this regime began making efforts to put a stop to fleeing the Republic by introducing criminal offences. According to the relevant clause of the repeatedly amended and increasingly drastic Passport Act of September 15, 1954, prison sentences of up to three years await any person leaving, or arriving in, the territory of the GDR without the requisite permit or failing to observe the instructions regarding destination, routes and duration of travel, or any person fraudulently obtaining a travel permit in favour of himself or another person. An even harsher punishment of up to 15 years penal servitude with possible confiscation of property awaits anyone who is found guilty of the offence of “false proselytism” (undertaking to suborn a person into leaving the GDR on behalf of agents of organizations, espionage agencies or the like, or with a view to service in organizations of mercenaries as provided for in Section 21 of the amending Act of December 11, 1957). As these penal provisions did not stop persons fleeing the Republic in the measure expected, the Communist regime of the GDR proceeded to the building of the Berlin Wall. In spite of this, and although the guards at the Wall fire on those fleeing from the GDR and East Berlin to West Berlin, cases of escape from East Germany still occur. The latest method of intimidation developed by Soviet-German courts consists in treating acts helping refugees to escape no longer as instigating or aiding and abetting infringements of the Passport Acts, but as offences against the peace.

One victim of this legal development, which is incompatible with any principle of legality—Socialist or non-Socialist—is

Harry Seidel, who was sentenced by the Supreme Court to penal servitude for life on December 29, 1962. According to the judgment of the Court as reported in *Neue Justiz* (an official government journal published in East Berlin) the court was satisfied that Seidel was guilty in the following way.

Immediately after the order had been given to build the Berlin Wall, Seidel left East Berlin illegally. A few weeks later, in the words of the judgment,

the accused destroyed several frontier installations in the Kieholzstrasse, Treptow, Berlin. He penetrated into the East German capital and caused his wife to follow him to West Berlin with their child. By similar means he attempted to transfer his mother to West Berlin. This attempt was foiled by the vigilance of the frontier guards. By the end of November 1961, the accused, sometimes alone, sometimes together with one Horst Junker of West Berlin, had helped approximately 20 persons to reach West Berlin, after having in each case destroyed installations. He also undertook to induce a leading sportsman to desert the GDR... In January 1962, again, the accused led two women citizens of the GDR through the frontier installations in Treptow to West Berlin.

As the progress of the Wall and the reinforcement of other frontier installations made overland escape increasingly difficult, a group "for whose work the accused was chiefly responsible" began, in the words of the above-quoted judgment, early in March 1962, to dig

a tunnel about 20 yards long, which ended in the house with the address Heidelbergerstrasse 75 in Treptow, Berlin... During this operation the accused broke through the foundation wall of an East Berlin property and penetrated with Busse, an accomplice, into the basement. He broke down the basement door and reconnoitred the yard belonging to the house. In the weeks that followed the group brought more than 20 persons through the tunnel to West Berlin.

Before his arrest on November 14, 1962, Seidel took part in the building of six more tunnels, of which four were completed. Through these a further 20 persons reached West Berlin. Several of the persons assisting the accused in building tunnels are said to have belonged to groups which are in contact with the Berlin branch of the West German Federal Office for the Protection of the Constitution. Some of them are said to have been armed while building the tunnels. Seidel himself is said to have carried a pistol at the time of his arrest.

It is not our intention here to question the facts which the Supreme Court of the GDR considered proven. The acts with which Seidel was charged constitute various offences under East German Law. He did, "without due authorization", enter the

territory of the GDR and assist his wife, his 4-month-old child and 42 other persons to escape. His trespassing in the GDR is concomitant with the assistance he gave to refugees and may be met with a maximum penalty of three years imprisonment under Section 8 of the Passport Act as amended. Seidel further induced a leading sportsman to leave the GDR, which, in accordance with Section 21 (2) of the Criminal Law (Amendment) Act, 1957, is punishable with at least six months imprisonment but only insofar as the inducement is exercised "by use of threats, deceptions, promises, or similar methods of influencing freedom of choice". Insofar as Seidel broke through foundation walls and broke doors in building tunnels, he became guilty of damage to property, which is punishable with a fine or with a prison sentence of up to two years under Section 303 of the Penal Code. However, the charge is only brought in answer to a claim and not, therefore—as is to be understood in Seidel's case—when the owner gives his consent. In any case Seidel was not charged with damage to property. Finally Seidel violated the Ordinance of September 29, 1955, concerning possession of weapons, in accordance with which, for example, "anyone found in possession of weapons without the authorization of the State" shall be sentenced to penal servitude.

The Supreme Court pronounced Seidel guilty of repeated offences against the Act for the Protection of Peace (see below), repeated acts of violence endangering the safety of the State, repeatedly inducing persons to flee the GDR, and unlawful possession of weapons.

Insofar as Seidel was found guilty of repeated offences endangering peace and repeated acts of violence endangering the safety of the State, the Supreme Court's pronouncement of guilt bears the clear mark of arbitrariness. The relevant provisions of the law make this shatteringly obvious.

The crime of "acts of violence endangering the safety of the State" is described as follows in Section 17 of the Criminal Law (Amendment) Act, 1957:

Anyone who attempts to frighten and terrorize the people through acts of violence or the threat of such acts in order to spread insecurity and shake the people's confidence in the power of the peasants and workers shall be sentenced to penal servitude or, in less serious cases, to imprisonment for not less than six months.

The actions described in the judgment in no way fulfil these conditions. Seidel neither attempted acts of violence nor frightened and terrorized the people through his actions; nor had he any

desire to do so. An essential element of the offence would be the offender's desire that as many people as possible should learn of the acts of terror, for only then could the people be frightened and terrorized. Seidel wished, on the contrary, that if possible no one except the refugees themselves should hear of his work, since the success of his plans depended on it.

Any jurist committed to the principle of legality is completely mystified by the sentencing of Seidel for crimes against peace. According to the East German Supreme Court's pronouncement of guilt, the charges against Seidel represent an offence against Section 2 (1) of the Act for the Protection of Peace of December 15, 1950. This provision runs as follows:

Anyone who propagates an act of aggression, in particular a war of aggression, or in any way advocates war, together with those soliciting, inducing or provoking German nationals to participate in warlike acts aimed at the oppression of a nation, shall be sentenced to imprisonment, and in serious cases to penal servitude.

Section 6 threatens particularly serious offenders with not less than five years penal servitude or penal servitude for life.

The provisions of the Act for the Protection of Peace, according to the statement made by Rudolf Herrnstadt in his capacity as Speaker of the SED (the Communist party in the GDR) in the course of parliamentary debates on the Bill, corresponded to the recommendations of the second World Peace Congress, which was summoned by the Communist dominated World Peace Council to Warsaw, where it met between November 16 and 22, 1950. The Congress called upon the States, in a resolution, to publish laws penalizing propaganda for war. With the exception of China, all Communist States were quick to follow this recommendation. Only three weeks later the Bill for the Protection of Peace was laid before the People's Chamber (Parliament) in the GDR. The Act was passed without delay and came into force on December 16, 1950. The purpose of the Act is to penalize various forms of propaganda and warmongering, as emerges clearly not only from the words of the Act, but also from the Preamble. The latter states:

The propaganda for war spread by the Anglo-American imperialists and their accomplices represents a serious threat to European peace and to the friendship of the German people with all peaceloving nations. Propaganda for war, in whatever forms it may be spread, is one of the most serious crimes against humanity.

The malefactors against whom the Act is directed were described as follows by the reporter of the Legal Committee of the

People's Chamber, Dr. Viktor Klemperer: "The people we are aiming at are the warmongers, the actual instigators of a new and terrible crime. We are aiming only at them".

Although the Preamble, the text of the Act and the parliamentary debates leave not the slightest doubt as to its purpose, the Supreme Court of the GDR managed to pass off the help Seidel gave to refugees as preparatory acts of war and aggression. Its argument was as follows:

The crimes committed by the accused represent the direct realization of the aggressive power policy of revengeful and militaristic circles in the Bonn Government and the West Berlin Senate, which threaten to plunge the world into the catastrophe of a third World War fought with atomic weapons and rockets.... The systematic state-organized undermining of the GDR's national frontiers by planned attacks, the systematic destruction of frontier installations and the abduction of citizens of the GDR are thus to be considered as preparation for war and aggression. According to the principles of justice laid down at the International Military Tribunal in Nuremberg the attacks on the GDR's national frontiers organized by the Bonn extremists, as carried out by the accused, Seidel, are an offence against peace. This offence, according to Article 6a of the statute of the International Military Tribunal, includes "planning, preparation, initiation or execution of a war of aggression".

Nothing could reveal the error of the Supreme Court judges of the GDR more clearly than the reference to the International Military Tribunal in Nuremberg. For the acts of helping refugees, with which Harry Seidel is charged, are put on a level with the acts judged as offences against peace perpetrated by Göring, Hess, Jodl, Keitel, Neurath, Raeder, Ribbentropp and Rosenberg; even Neurath escaped with a milder punishment than Harry Seidel. The judgment of the Supreme Court of the GDR against Harry Seidel is a miscarriage of justice which bears all the marks of a denial of justice, representing as it does—to use the definition coined by the great international man of law, Vattel—, "*une injustice évidente et palpable*".

A POLITICAL TRIAL IN BURUNDI

The Kingdom of Burundi acquired independence at the same time as the Republic of Rwanda, on July 1, 1962. These two sister States were admitted to the United Nations on September 18, 1962, at the opening meeting of the seventeenth session of the General Assembly. A few weeks later Burundi unfortunately

attracted the notice of the rest of the world by re-opening a trial which had been closed by a final judgment delivered while the country was still administered by Belgium as a Trust Territory of the United Nations. This ended with the execution, on January 15, 1963, of five prominent opponents of the government now in power. Before giving a brief account of this trial, it will be as well to recall a few general facts which will place the trial in its proper context.

I

Formerly the south-west part of German East Africa, Ruanda-Urundi was administered by Belgium from 1919 to 1962, first as a mandated territory and later as a trust territory. The largest part of the population belongs to the Bahutu ethnic group of the Bantu race. The Batutsi group of the Hamitic race constitutes the ruling class and until recently had successfully maintained its control over the country as a whole. Each half of the territory was under the authority of a traditional Batutsi chief called the *mwami* and recognized by the administering authority. The Belgian administration was successful in maintaining this general unity. But when the Belgian Government announced its intention, in November 1959, of granting independence to the trust territory, conflicts broke out resulting in serious disorders, mainly in Ruanda.

Elections took place in the country for the first time in July 1960 for the appointment of municipal councils. In Ruanda the Bahutu parties obtained an overwhelming majority. The *mwami* of Ruanda, Kigeri V, emigrated to Europe and in January 1961 the elected assemblies deposed him and proclaimed the republic. On the other hand, the *mwami* of Burundi, Mwambutsa IV, who had been in power since 1915, was confirmed in office. Elections for the appointment of legislative assemblies took place on September 18, 1961, under the supervision of a commission of the United Nations. In Ruanda the contest was between the two chief ethnic groups; the Democratic Republic Movement, or the Bahutu party, won 35 seats while the Batutsi party won 7.

In Burundi the situation was more complex. The opposition between the two racial groups was a good deal less pronounced owing to many family alliances, and the real conflict arose between the two factions of the Batutsi group—that of the *mwami* Mwambutsa IV and that of the other large Batutsi families grouped round Chief Barranyaka. The son of the latter, Joseph Biroli, had set up the Christian Democratic Party which, allied with parties

of lesser importance in a "United Front", was then in power. He opposed the Progressive National Union (UPRONA), set up in 1958 by Prince Louis Rwagasore, son of the *mwami*. To the general surprise, 58 seats of the Assembly were carried by the UPRONA as against 6 by the United Front in the elections of September 18, 1961, and on September 29, Prince Rwagasore was invested with the office of Prime Minister.

On the evening of October 13, Prince Louis Rwagasore was shot while on the terrace of the Tanganyika Restaurant in Usumbura, capital of Burundi. A few hours later the police arrested a commercial employee of Greek nationality by the name of Jean Kageorgis who was suspected of having fired the shot. Shortly after, the police arrested eight other persons, among them the head of the Christian Democratic Party, several leaders of that party and two Greek subjects.

Before coming to the preliminary investigation and the trial, it should be mentioned briefly that the Home Secretary, André Muhirwa, brother-in-law of Prince Rwagasore, succeeded the latter as Prime Minister. Also, on October 23, 1961, the General Assembly of the United Nations, which had closely followed the development of the trust territory towards independence, passed Resolution No. 1627 (XIV) expressing its indignation over the assassination of the Prime Minister and requesting the commission of three members which had supervised the elections of September 18, to return to Burundi in order to inquire into the circumstances of his death. On January 30, 1962, the commission published its report in which the United Front was implicated and the assassination of the Prince was interpreted as an incident of ancestral rivalry between the clan of the *mwami* Mwambutsa and that of Chief Barranyaka. Moreover, during January and February 1962, the attention of the Trusteeship Council was focused mainly on Ruanda owing to the growing racial conflicts and the large-scale emigration of the Batutsis. Internal strife was so marked that after many months of difficult negotiations with the two governments concerned the United Nations had to abandon hope of preserving the territory's unity, and two countries, instead of one, became independent on July 1, 1962, and formed the Republic of Rwanda and the Kingdom of Burundi.

II

In addition to the Greek subject, Jean Kageorgis, the suspects arrested by the police on the night of October 13-14, 1961, were

Joseph Biroli, son of Chief Barranyaka and founder and president of the Christian Democratic Party, Jean-Baptiste Ntindendereza, Home Secretary of the former government, Antoine Nahimana, Jean-Baptiste Ntakiyica, Henri Ntakiyica and Pascal Bigirindavyi all members of the Christian Democratic Party; and Michel Iatrou and Liverios Archaniotis, both businessmen of Greek nationality.

In accordance with the trusteeship agreements still in force at that time, it came within the jurisdiction of the courts established under the trusteeship to try the case: the Court of First Instance of Usumbura, composed of a single judge of Belgian nationality, with right of appeal to the Court of Appeal of Burundi, composed of three judges also of Belgian nationality. There was no right of appeal from this judgment as the local judicial system does not provide for any further appeal to the Supreme Court. The examining magistrate who conducted the preliminary investigation was also of Belgian nationality. The local government strongly protested against the case being handled exclusively by Belgian judicial authorities, pointing out that the Constitution of Burundi, approved by Legislative Decree of January 30, 1962, under the trusteeship, provides in Article 85 for the setting up of a jury in criminal cases. On January 23, 1962, the Legislative Assembly passed a law whereby the Court of First Instance and the Court of Appeal would be assisted by a jury composed of thirteen members. When the case came before the Court of First Instance, composed, as in the past, of a single presiding judge, the father and the widow of the victim who had instituted the civil action appealed under the Law of January 23, contesting the validity of the composition of the court. By a decision of March 8, 1962, the Court of First Instance rejected this appeal on the grounds that the trustee authority possessed sole competence for legislating on matters of criminal procedure and that the law of January 23, 1962, on the setting up of a jury must therefore remain legally inoperative so long as the trusteeship continued to exist. This decision was confirmed by the Court of Appeal by its decision of March 10, 1962. It may be mentioned in passing that the United Nations' Commission of Inquiry had acknowledged in its report that the prosecution and punishment fell solely within the province of the administering authority under the trusteeship.

The case came before the Court of First Instance again, this time to be debated and judged on its main issue. The public prosecutor's case was that the death of Prince Rwagasore was the result of a plot designed to overthrow the UPRONA government

and bring the United Front back to power. He said that the leaders of the Christian Democratic Party, and principally the two sons of Chief Barranyaka, Joseph Biroli and Jean-Baptiste Ntidendereza, had decided, as an initial measure, to do away with the strong man of the UPRONA. They had, to this end, secured the services of Jean Kageorgis, known as a crack shot. The two Greek businessmen had served as intermediaries. On the evening of October 13, Kageorgis, accompanied by Ntidendereza and Antoine Nahimana, who were well acquainted with the habits of the prince, took up a position in a thicket near the Tanganyika Restaurant and killed the prince with the first shot.

Kageorgis apparently never denied having been the principal author of the murder. As to the others, the accusation was based on confessions made during the preliminary examination. Detailed information about the circumstances in which these confessions were obtained is lacking but it is certain that during the hearing the accused retracted them completely. On April 2, 1962, the court sentenced Kageorgis, Ntidendereza and Nahimana to death and the others to long-term penal servitude, with the exception of the two accessories who were condemned to short-term imprisonment. The case was taken to the Court of Appeal which in its judgment of May 7, 1962, confirmed the death sentence passed against Kageorgis, reduced the sentences passed against Ntidendereza and Nahimana to twenty years penal servitude, condemned Michel Iatrou, Joseph Biroli, Jean-Baptiste Ntakiyica and Henri Ntakiyica to twenty, fifteen and ten years penal servitude, respectively, and confirmed the short-term sentences passed against Liverios Archaniotis and Pascal Bigirindavyi.

Appeals for mercy were made by the condemned men and were rejected. Jean Kageorgis was shot in the courtyard of the Usumbura prison at dawn on June 30, 1962, the day before Urundi acquired independence.

III

As soon as independence was acquired, the Government made no attempt to hide its intention of questioning the judgment of May 7, 1962, although the issue was *res judicata* and the matter closed. Kageorgis had already been executed in accordance with the judgment and Bigirindavyi released after having served his sentence. The means devised were simple. A higher court with retroactive competence was created and it was used to quash the judgment of the Court of Appeal and to try the case afresh before other judges.

This is what was done. A Law of September 26, 1962, established a Supreme Court "composed of a president and as many other judges as needed". In accordance with Section 5, this Court was to take cognizance of "requests for appeal against judgments and decisions delivered where there had been no right of appeal in civil, commercial and criminal cases". A royal Decree of October 10, 1962, established the procedure for appealing to the Supreme Court. This, incidentally, was illegal in that, under the Constitution, procedure in the courts fell within the province of the Legislature.

This Decree contained provisions which were surprising unless their only object was to facilitate the quashing of the judgment of May 7. Thus, according to Section 2, appeal may be made by the persons instituting civil action *even if they had withdrawn an action*. This was evidently to enable the *mwami* and the widow of the prince, who had withdrawn their civil actions during the first phase of the proceedings, to appeal. According to Section 3, the time limit for making an appeal to the Supreme Court is *twelve whole months* starting from the notification. This period appears abnormally long but five months had already elapsed since the judgment of the Court of Appeal was given. According to Section 18, the provisions of the decree are applicable "to actions *instituted prior to its enforcement*" (emphasis added). The author of the Decree might as well have added "and judged" since its purpose was to annul a decision of the Court of Appeal which was *res judicata*. It would be difficult to get a regulation more exactly made to measure for the particular problem it was designed to solve.

On October 20, 1962, the *mwami* Mwambutsa and Princess Marie-Rose Rwagasore, who were plaintiffs in the civil action, together with the public prosecutor, made an appeal to the Supreme Court against the judgment of May 7, 1962. The accused, aware of the danger which a quashing of the judgment and a re-opening of the trial would represent for them, instructed their lawyers to represent them before the Supreme Court. Several had entrusted their defence to two prominent lawyers from Brussels, Georges Aronstein and Léon Goffin. The Supreme Court set the hearing of the case for October 27, which made it practically impossible for these lawyers to be present, and at the hearing denied the application for a fortnight's adjournment made by Albert Liebaert, an Usumbura lawyer, on behalf of his colleagues. This denial violated not only the rights of the defence but also the provisions of Sections 14 and 16 of the royal Decree

of October 10, 1962, under which the written statements presented in support of an appeal must be communicated to the opposing party prior to the proceedings and an extension of time granted to the parties by the Court.

The Supreme Court gave its judgment the very same day as the hearing, October 27, 1962; it quashed the decisions of the Court of First Instance of March 8 and April 2, 1962, and the judgments of the Court of Appeal of March 10, and May 7, 1962, on the ground that no jury had been present when the two courts had given their decisions, contrary to Article 85 of the Constitution and the Law of January 23, 1962, which required a jury; and the case was referred back to the Court of First Instance to be heard and judged anew.

The Court of First Instance set the trial for November 8, 1962, which was just 13 days from the date of the Supreme Court's judgment. But out of regard for the two lawyers who had to come from Brussels, the court consented to postpone it until November 16. Meanwhile the International Commission of Jurists, which was closely following developments and was concerned about the unusual nature of this procedure, decided to send an observer to Usumbura to follow the proceedings. Guy Razafintsambaina, a lawyer from the Malagasy Republic, accepted this mission and attended the hearings. It stands out from his report, as well as from the statements made by Mr. Aronstein and Mr. Goffin on their return to Belgium, that the proceedings were carried out in a lamentable manner and that the most elementary rights of the defence were disregarded from beginning to end. The following points stand out from these sources.

1. The two lawyers from Brussels arrived in Usumbura on November 12. They immediately encountered the greatest difficulties in getting into touch with their clients and only through the intervention of the Prime Minister were they able once, and only once, to see the prisoners freely.

2. A more serious matter still, the Belgian Ambassador forwarded to the lawyers a two-page letter which he had just received from the Prime Minister addressing a "warning" to the two lawyers which, in reality, was a thinly disguised threat giving them to understand that their freedom and even their lives might be in peril. Mr. Aronstein and Mr. Goffin considered that under such circumstances they could not assume responsibility for the defence. At the opening of the first hearing, on November 16, Mr. Goffin read a statement in which he questioned the regularity

of the proceedings on legal grounds. Mr. Aronstein then made a brief statement explaining the reasons which led them to abandon the case. The court rejected the arguments in their statements and proceeded to appoint two lawyers. These lawyers had only forty-eight hours in which to become acquainted with the voluminous file of the case.

3. The Court of First Instance was composed of a presiding judge and two assistant judges, assisted by a jury of thirteen. None of the judges had any legal training, which was true also of the members of the Court of Appeal and of the Supreme Court. As regards the jury, it was, to begin with, organized in circumstances which, with respect to the Law of January 23, 1962, were completely irregular; secondly, and most important, the proceedings were carried on in French, of which most, if not all, of the members of the jury had no knowledge whatever. Mr. Razafintsambaina remarks in his report:

The members of the jury, thirteen in number, appear not to have taken their job seriously, except for the foreman who, obviously interested and conscious of his position, wanted to play the role of public prosecutor. . . . During the proceedings we observed some of the members dozing, others coming and going in the courtroom and still others who arrived late without the hearing being suspended—so many procedural defects that even the defence did not consider it worth while to call attention to them, for the fact is that in this trial one defect more or less could hardly matter.

4. Article 85 of the Constitution of Burundi establishes that legal proceedings are to be open to the public. In this particular case the hearings were not really made public, because a written authorization from the King's Public Prosecutor was required for admittance to the court-room.

5. The authorities responsible for holding the hearings did everything in their power to humiliate and discredit the accused. The trial was referred to officially as that of *the murderers* of Prince Rwagasore, thus tending at least to anticipate the decision of the Court. The accused, several of whom belonged to the highest local nobility, were brought to the hearings in the uniforms of common prisoners, which would tend to prejudice them in the eyes of the jury.

6. Logically, the proceedings instituted by the government should have been commenced *de novo* with special regard to a new examination of the charges brought against the accused. In this connection Mr. Razafintsambaina remarks:

What did [the authorities of Burundi] do, in addition to what had been done by the Belgians, to be in a position to say that the justice rendered

by them is beyond criticism? Nothing. They merely hastened to return to the file drawn up by the Belgian judicial authorities in its entirety, without adding or subtracting anything. The public prosecutor was content with employing, except for a few phrases, the entire indictment written and pronounced by the Belgian prosecutor. Hence this trial did not bring forward anything new which could justify modifying the sentence previously delivered by the Belgian authorities.

The judgment delivered on November 27 by the Court of First Instance was severe. Five of the accused persons were condemned to death: Jean-Baptiste Ntidendereza, Antoine Nahimana, Joseph Biroli, Michel Iatrou and Jean-Baptiste Ntakiyica. Henri Ntakiyica was condemned to penal servitude for life and the sentence of Liverios Archaniotis was increased from eighteen months to ten years penal servitude.

The accused appealed and the case came before the Court of Appeal on Saturday, January 5, 1963. Mr. Aronstein and Mr. Goffin who had done everything possible to obtain visas in time, were not successful in getting them until the day of the hearing, and they arrived in Usumbura after the proceedings had been closed. The British organization, *Amnesty*, sent Mr. Muir Hunter, a barrister from London, as an observer. Mr. Hunter reported that on Saturday noon the Court was prepared to adjourn the proceedings until Monday, January 7, but the Prime Minister came in person to the hearing and requested the judges to bring in a verdict the same day, doubtless to have this done before the two lawyers arrived from Brussels. Slightly before midnight on January 5, therefore, the Court of Appeal pronounced a decision whereby it confirmed the verdict of November 27, 1962.

As executions were known to be imminent, counsel for the defence redoubled their efforts to obtain at least a reprieve for the five men under sentence of death. Mr. Aronstein and Mr. Goffin attempted once again to come to Usumbura and ran the risk of leaving without a visa. On arriving at Usumbura on the morning of January 13, they were forbidden to leave the airport and were forced by the authorities to take the first plane to Elizabethville. Mr. Liebaert, one of the lawyers appointed by the Court, attempted to lodge an appeal with the Supreme Court against the decision of January 6, in which he pointed out twenty-three grounds for annulling the judgment. To his surprise, on January 14, he found himself opposed by a royal Decree of October 30, 1962, which had never been published, according to which a "new appeal to the Supreme Court for the same cause" is subject to the agreement of the Public Prosecutor.

On the same day, January 14, 1963, the five men under sentence of death were transferred to Kitega, some distance from Usumbura. It is known that very prominent figures appealed to the *mwami* for clemency and the Belgian Government sent Raymond Charles, *Procureur du Roi* from Brussels, to Usumbura to take final steps. These efforts were fruitless and on the morning of January 15 the five condemned men were hanged before a crowd of ten thousand.

IV

It is now necessary to consider the various legislative and judicial measures that made it possible to change five prison sentences to death penalties and examine the spirit that lay behind that *reformatio in pejus*.

It has already been pointed out that a Supreme Court was created for the needs of this particular case. But even then, the way the re-trial was conducted was irregular and occasioned grave prejudice to the accused.

The newly created Supreme Court ordered a trial. This should have commenced *de novo*, in which case the accused would have been entitled to the presumption of innocence and the prosecution would have been obliged to produce its evidence afresh. Instead of that the Court of First Instance proceeded on the assumption that the accused were guilty and so all that it had to do was to re-assess the sentences. The Court also accepted the confessions of the accused without further scrutiny though they had been withdrawn. One of the points that Mr. Razafintsambaina stresses in his report is that the confessions made during the police investigation in dubious circumstances and later retracted, were held against the accused instead of being examined afresh.

Even if the view be taken that there were not two trials but only a continuation of the original trial, the normal result of cassation is that the case has to be re-examined from the start by other judges.

It may be recalled in passing that if the new Law of September 26, 1962, opens a means of appeal against sentences that were hitherto final, then no one will be able to dispute the right of *any* condemned person to use this as a means of appeal against his conviction and sentence.

Neither the newly created Supreme Court, which sat in judgment over the decisions of the duly constituted courts under the

trusteeship and reversed their decisions, nor the Court of First Instance which reheard the trial, nor the Court of Appeal which heard the appeals after the trial, had a single lawyer on the Bench.

Finally it should be observed that this is the first time, so far as is known, that a country passing from the status of a trust territory to that of a sovereign State has considered itself authorized to re-open judicial proceedings closed prior to its independence. It is easy enough to imagine what would happen if all new States were to imitate the example of Burundi. It is a principle of law in all civilized countries that a change in internal or international political status has no effect on the validity of court decisions which have become *res judicata*. This rule is an essential condition for the stability and safety of social relations. If it meets a need on questions of civil law, it is all the more essential in the field of criminal law where it is simply a corollary of the principle laid down in the *Conclusions* of the International Congress of Jurists held at New Delhi in January, 1959, that "After a final conviction or acquittal no one should be tried again on the same facts, whether or not for the same offence."

REFORMS IN THE ADMINISTRATION OF JUSTICE IN THE GERMAN DEMOCRATIC REPUBLIC

As is well known, the Communist conception of the State rejects the principle of the separation of powers. The Communist State, the dictatorship of the proletariat, is characterized by a concentration of power which, among other things, is incompatible with the principle of judicial independence inherent in the Rule of Law. The Communist State doctrine requires that the judge, like anybody else, should be guided by partisan considerations. This means that his first duty is to implement decisions and measures taken by the Communist Party, to which, under the dictatorship of the proletariat, the State is subordinated. Judges and public prosecutors in the German Democratic Republic (GDR) are required to take their decisions "in a partisan spirit, as political men", because "the more partisan their attitude, the more conviction every indictment, every pleading and every judgment will carry in the eyes of the masses". (Quoted from

an article on "Ten Years of Democratic Justice in Germany" by Hilde Benjamin, Minister of Justice, and Ernst Melsheimer, Attorney-General, German Democratic Republic).

The principle of subordination of judges to the political authorities has been institutionalized in a particularly striking manner by the latest law reforms in the GDR. The basic law in this connection is the "Decree of the State Council respecting the basic functions and the procedure of the courts", which the People's Chamber (Parliament) passed on April 17, 1963, when it also passed four laws giving effect to the Decree's provisions, namely the Judicial Organization Act; the Act on Public Prosecutions; the Act amending the Criminal Law and Civil Procedure Law; and the Act amending the Labour Code.

In analyzing the position of the Supreme Court of the GDR within the State, as we shall now do, it is necessary first of all to recall the exact constitutional position and competence of the State Council. After the death of the Republic's first President, Wilhelm Pieck, the duties of the Presidency were transferred to the State Council by an Act of September 12, 1960. The Council not only took over the essentially representative functions of the Head of State, but is now empowered to give "generally binding interpretations of the law". It can also issue "decrees having legal force", general prescriptions "affecting the defence and safety of the nation", ratify "general prescriptions of the National Defence Council" (which it appoints), and so on. The State Council is in effect the most powerful of State organs. Its Chairman is the First Secretary of the SED, the Communist Party in the GDR. The State Council is mainly composed of the same individuals as are found in the Party's top organs. With its establishment, the Council of Ministers, which, under the Constitution, was to constitute "the Government of the Republic", that is the supreme executive organ, is relegated to second place.

Structure and Jurisdiction of the Supreme Court of the GDR

The Supreme Court is the highest judicial body. It guides the decisions of all courts (district and circuit courts, labour courts, military tribunals). During the parliamentary debate on the Bill to reform the administration of justice, Otto Gotsche, who from 1950 to 1960 was personal secretary to Ulbricht, i.e., head of his secretariat, commented in the following terms upon the definition of judicial functions given in Section 2 of the Judicial Organization Act:

It is provided that court decisions shall be based on the laws and resolutions of the People's Chamber, the decrees and resolutions of the State Council and other legal prescriptions, and shall serve the purposes of general State policy in the overall construction of Socialism including the development and establishment of Socialist relationships between citizens and society, the State and one another, defence of the Socialist political and economic order, and protection and implementation of the rights and legally sanctioned interests of the citizens.

In this way, the courts will help in promoting the planned development of productive forces, the establishment of Socialist production relationships, and hence the fulfilment of the objective laws of social progress (emphasis added)...

Considerable significance is thus attached to the obligation which the Bill places upon courts to keep constantly abreast of problems of social evolution, the tasks involved in the overall construction of Socialism, the shaping of uniformity in court decisions and the trends in the crime rate, and to base their decisions on lessons derived from such studies. This obligation is supplemented by the further requirement that the courts should take into account the knowledge and experience of responsible political and economic organs and research institutions of the State.

The manifold functions of the Supreme Court are distributed among its four organs, which are (a) the Plenum; (b) the Presidium; (c) the Colleges; and (d) the Divisions of the Court.

The *Plenum* is the highest organ of the Supreme Court. It is composed of the President, Vice-President, all the senior judges of the Supreme Court, the heads of the higher military tribunals and all the members of district courts (these are intermediate-level bodies; circuit courts represent the lower level). The Plenum guides the decisions of all courts and also the activities of the Presidium and colleges of the Supreme Court. In so doing, it gives directives and resolutions at the request of the President of the Supreme Court, the Chief Public Prosecutor or the Minister of Justice.

The *Presidium* is the collective body responsible for guiding the work of all courts between sessions of the Plenum. It is composed of the President, Vice-President, several senior judges and judges from the various Colleges, and the head of the Supreme Court inspectorate. This function, which involves among other things making recommendations concerning the penalty to be inflicted in specific cases, was exercised prior to the reform by the Ministry of Justice. The Presidium is empowered, *inter alia*, to guide the work of the Colleges and to reverse decisions of the Divisions of the Supreme Court, district court presidia, and the plena of higher military tribunals.

The reversing of the court decisions by cassation is an exceptional procedure whereby any final criminal or civil judgment or

any other final court decision may within a year's time after it becomes final be challenged by the Chief Public Prosecutor or the President of the Supreme Court on the grounds of "illegality" or "gross injustice". Parties to proceedings, e.g., private persons, may not appeal for reversal of a decision, since the cassation procedure is not designed to serve the interests of the parties, but only those of the community with the object of annulling incorrect judgments. This provides a means of indirect supervision over the lower courts. It is, however, open to anyone, for example an SED official who is displeased with an insufficiently partisan judgment, to ask the President of the Supreme Court or the Chief Public Prosecutor to institute cassation proceedings. In this connection, the following statement made during the parliamentary debates on the judicial reforms by Dr. Heinrich Toeplitz, President of the Supreme Court and a Deputy in the People's Chamber, is most enlightening:

I can report to the People's Chamber that the number of requests of this kind [for cassation proceedings] was substantially higher in 1962 than in 1961. This was due to the State Council's active concern with questions pertaining to the administration of justice, and publications dealing therewith. The number of cassation proceedings instituted by the President of the Supreme Court on the basis of such requests was three times greater in 1962 than in 1961. That shows that incorrect judgments are still being given, but also that the Supreme Court now makes it a practice to correct even minor defects in district and local circuit judgments through the cassation procedure.

The *Colleges* of the Supreme Court have competence in specified fields. There is a College for criminal law, one for military offences, and another for civil law questions embracing, family and labour matters. The Colleges ensure uniformity in the decisions of the Divisions of the Court placed under them, which pronounce the actual judgments. The presiding officers of the Colleges can submit draft proposals for cassation proceedings and make suggestions to that effect to the Presidium of the Supreme Court.

Relationship between the Supreme Court and the People's Chamber and State Council

The State Council Decree respecting the basic functions and procedure of the courts establishes a direct relationship between the Supreme Court, on the one hand, and the State Council and the People's Chamber on the other. The purpose of this provision, as explained by the President of the Supreme Court to the

People's Chamber, is to ensure that the Judiciary will contribute "more effectively" to "the main goal, namely the overall construction of Socialism". How exactly is this relationship achieved?

The members of the Supreme Court are appointed and dismissed by the People's Chamber on the nomination of the State Council.

The following persons participate regularly in the deliberation of the Supreme Court Plenum: two members of the State Council, the Chief Public Prosecutor, the Minister of Justice and a representative of the Bureau of the FDGB (the central trade union organization). Two State Councillors also take part, where desirable, in the sittings of the Supreme Court. They must, in the words of Mr. Gotsche during the debates in the People's Chamber, "supervise and control the implementation by the Supreme Court and the Chief Public Prosecutor of the laws and resolutions of the People's Chamber and of the decrees and resolutions of the State Council relating to the administration of justice".

The Supreme Court is responsible to the People's Chamber and, between its rare sessions, to the State Council. It is required by the new legislation, as Dr. Heinrich Toeplitz put it in the above-mentioned debates, "to keep the State Council informed of the work of the courts. This obligation extends to the entire evolution of judicial precedent and its social effectiveness, questions of principle put to the courts, and the evaluation of applications lodged with the Supreme Court by individual citizens (and usually consisting of requests for cassation of lower court judgments)".

The State Council, for its part, influences the activities of the Supreme Court through "suggestions and recommendations". In this way, again in the words of Dr. Toeplitz,

important issues of State policy are brought to the notice of the Supreme Court by the highest State organs and thus find their way into court decisions... The State Council can also recommend the Supreme Court to lay down directives and resolutions. Moreover, the Chief Public Prosecutor can provoke a debate on basic principles arising from judicial precedent by availing himself of the provisions of Section 25 of the Act on Public Prosecutions, which empower him to lodge objections with the State Council against resolutions of the Supreme Court aimed at guiding court judgments.

One could not ask for a more apt characterization of this reform of the administration of justice just described than that given by the *Neue Zürcher Zeitung* of April 8, 1963, in three terse sentences, viz.,

Since neither the People's Chamber nor the State Council can be regarded as bodies free to make independent resolutions without the assent of the top Party leadership, the meaning of the reorganization is clear. The Head of the Party, Ulbricht, who is Chairman of the State Council, will keep an even tighter rein on the Judiciary than before. The Party's dictatorship over the latter, which has long existed in practice, has now, with the new Judicial Organization Act of the German Democratic Republic, received legal sanction.

THE PEOPLE'S COURT IN THE REPUBLIC OF MALI

The former colonial territory of the French Sudan became in November 1958 the Sudanese Republic, and then, in August 1960, the Republic of Mali. Up to the present time the Republic of Mali has enjoyed stability of government. The team of politicians formed by Modibo Keita in the framework of the party known as *Union Soudanaise* (the territorial section of the *Rassemblement Démocratique Africain*, RDA), many years before the country became independent, has been in uninterrupted power since the inauguration of the first "Government Council" at the capital, Bamako, in 1956. The last time that a National Assembly (or Parliament) was elected, in March 1959, it was quite clear that the government team held the confidence of a very large majority in the country. President Keita's government had bravely engaged in a policy of austerity, with absolute priority being given to the problem of economic and social development, always a difficult one in a country with limited natural resources of a mainly agricultural nature. The aims of that policy are expressed in a five-year plan based on studies by a group of French experts, that was approved by the National Assembly in September 1961 and August 1962. The aims are ambitious and their achievement, on which the economic "launching" of the country depends, is itself contingent upon the degree of self-discipline and cooperation of which the population proves capable. This means that the policy of the government must inevitably meet with serious opposition. In fact, in 1962 there was considerable restlessness which called forth energetic action on the part of the government: 95 accused persons were brought before a court of special jurisdiction called the "People's Court". It is interesting to view, in this example, the means by which an authoritarian government crushed a movement which it considered subversive and it is also of interest to examine the question of how far such a government's means of self-defence should reasonably be allowed to extend.

I

On July 1, 1962, President Keita announced the Mali Government's decision to reform the currency. The Republic was leaving the West African Monetary Union in which the so-called "CFA" franc circulated and was proposing to introduce a "Mali franc"; a State bank was to be set up with an initial capital of one million CFA francs to issue the national currency and control the activity of all banks existing in the country. The idea was that as soon as the national currency was issued, the CFA franc would no longer be legal tender. However, the reform has made no difference to the fact that the Republic of Mali is still in the franc area.

It would seem that the monetary reform had detrimental consequences for certain shopkeepers whose discontent was cunningly exploited by the adversaries of the government. On July 21, 1962, a crowd of hundreds of demonstrators gathered in the market place of Bamako, formed a procession and paraded before the French Embassy shouting "Vive la France" and "Vive de Gaulle" and then proceeded towards the central police headquarters with cries hostile to the government and the party in power. They were dispersed after a violent encounter with the police during which many were wounded but no one was killed. Two hundred and fifty-two of the agitators were arrested. The militant members of the *Union Soudanaise*, the government party, immediately organized a counter-demonstration to assure President Keita of their loyalty and whole-hearted support of the monetary reform. The President then addressed an appeal to the nation, giving an assurance that he would take severe measures against those who trafficked in currency. By July 22, order was re-established and it was announced that severe penalties would be inflicted on any shopkeepers who kept their shops closed.

The *Union Soudanaise* appointed a national committee to investigate the origin of the disturbance and find out exactly who was responsible for it. Two important politicians, Fily Dabo Sissoko and Hamadoun Dicko, were soon arrested on suspicion of being the instigators of the trouble. Both had been Deputies in the French National Assembly when Mali was still a colonial territory under the name of Sudan; both had held ministerial portfolios in the French Cabinet in Paris; the first-named, a member of the French Socialist party, had been Secretary of State for Industry and Trade in 1948, and the second had been Under-Secretary of State for Public Education, and subsequently

for Industry and Trade, in 1956 and 1957. At the time of the National Assembly elections held at Bamako on March 8, 1959, Mr. Sissoko and Mr. Dicko were the leading members of the *Parti du Regroupement Africain* which was the opponent of the *Union Soudanaise*. The latter, moreover, had won by an overwhelming majority, since it had obtained all 80 seats in the Assembly. Subsequently, the two opposition chiefs went over to the government of Modibo Keita, who gave them posts in his administration. The above-mentioned investigation also led to the arrest of an important local trader, El Hadj Kassoum Touré, who, it was suspected, was in possession of large amounts of CFA francs and who, when his interests were damaged by the monetary reform, placed himself at the head of the rebellion among the traders.

Speaking at a public meeting at the beginning of August, President Keita expressly named Mr. Sissoko, Mr. Dicko and Mr. Touré as the leaders of a long-standing conspiracy involving certain foreign governments. He said their aim was to remove the present government from power and replace it by another government that would be "more docile to instructions received from outside the country"; their tactics would be to play on the discontent of traders, shopkeepers, itinerant pedlars, porters, etc., who represented quite a large part of the population and whose interests would be harmed by the government's social policy. They also tried to win over to their cause the veterans whose support is always sought in any political contest in French Africa. The term "veterans" designates retired military men who have been in the French Army for a long period though many of them have not seen active service; they receive a pension from the French State and their understanding of public matters is usually limited.

The President ended by saying that it would rest with the people of Mali to decide the fate of Sissoko, Dicko and Touré and all the other demonstrators who had not subsequently been set at liberty.

II

What court would be competent to hear this case?

The judicial organization of the Republic of Mali was dealt with in an Act No. 61-55 promulgated on May 15, 1961. According to Section I, justice is administered by a Supreme Court, an Appeals Court, an Assize Court, primary courts, justices of the peace with extended powers and Labour Courts. There is also a High Court of Justice, mentioned in Articles 46 and 47 of the Constitution, which is competent to judge members of the govern-

ment upon an accusation made by the National Assembly. At the very time when the events related here were taking place, on August 9, 1962, an Act—No. 62-70—was promulgated, enumerating all the judicial bodies in the Republic of Mali and classifying them under one of the headings listed above. Accordingly, the tribunal competent to judge Mr. Sissoko, Mr. Dicko and Mr. Touré and their accomplices, if they were to be accused of rebellion or attempts against the safety of the State, would be the Assize Court, whose organization is described in Sections 36 to 43 of the Act of May 15, 1961. But, as early as July 24, 1962 (only three days after the demonstrations), a meeting of the “enlarged” political bureau of the *Union Soudanaise* was held: besides the 19 members of the National Political Bureau there were present all the members of the government and the National Assembly, as well as the responsible heads of the “People’s Organizations” of Bamako. This body decided to hand over the persons responsible for the disturbance to a People’s Court composed of 39 members. Apart from the presiding judge, the Court was to include a delegate from each of the 30 local sections of the Party and two delegates from each of the following: women’s organizations, young people’s organizations, trade unions and veterans.

No “People’s Court” was mentioned in the list of judicial bodies set forth in the Act of May 15, 1961 and confirmed in the Act of August 9, 1962. Now, it is a generally recognized principle of constitutional law that the establishment of new courts rests with the legislative power, and this principle is explicitly stated in the Constitution of the Republic of Mali of September 22, 1960, Article 24 of which specifies that penal procedure and the establishment of courts fall within the purview of the legislative power. Moreover, Article 5 of the Constitution enumerates the institutions of the Republic of Mali as follows: the Government, Parliament, the Court of State, and the High Court of Justice. No mention is made of an “enlarged political bureau” and it is hard to see how this extra-legal body can have invested itself with legislative powers. It certainly could not do so merely on the ground that the 80 members of the National Assembly were also members of the “enlarged bureau”. Moreover, if that body’s decision were somehow to be given the force of law, the logical course would have been to publish it in the Official Gazette. No trace can be found in the Official Gazette of the Republic of Mali either of the Constitution of the “enlarged political bureau” or of the decision taken by it on July 24, 1962, or even of the exist-

ence of the People's Court. It is, therefore, fair to conclude that, under the Constitution of Mali, the People's Court was nothing but a *de facto* institution which had no legal standing.

III

The opening session of the People's Court was set for Monday, September 24. A few days before that date, namely on September 18, a ministerial reshuffle had taken place in which the portfolio of Justice was transferred to Madeira Keita, formerly Minister for Internal Affairs, widely known as the "strong man" of the government.

The hearing took up four full days, from Monday to Thursday, September 24 to 27. The Court did not sit in the Hall of Justice but in the meeting hall of the Veterans' Association. Of those arrested on July 21, ninety-two were brought before the Court besides the three main defendants, Messrs. Sissoko, Dicko and Touré. All the accused were charged with having "organized a conspiracy and having committed an attempt against the internal security of the State for the purpose of altering and destroying the Government of Mali". The Court, composed as already described, was presided over by Mamadou Diawara. A significant point: no lawyer or counsel of any kind assisted the accused.

The trial was public and consisted merely of interrogating the accused and hearing their statements. They, however, had full latitude to explain their conduct and were able to speak with the utmost freedom. Most of the accused tried to minimize the significance of the demonstrations that had taken place on July 21, and affirmed that they had only followed the crowd without any hostile intentions towards the government. Kassoum Touré admitted that he had taken part in organizing the shopkeepers' demonstration, but insisted that he had done so without political intent. Hamadoun Dicko denied all the charges. But Fily Dabo Sissoko pleaded guilty, saying: "I admit all the charges; I am seriously at fault." In particular, he admitted that he had encouraged the shopkeepers and veterans to organize a demonstration against the government, to parade in front of the French Embassy shouting slogans hostile to the Republic of Mali and to attempt to take the police headquarters by force. At the conclusion of his statement, he threw himself upon the mercy of the People's Judges.

After the four days of hearings, the People's Court met on Monday, October 1, 1962, to deliberate. On the same day it delivered judgment. No evidence is available on whether this

was done in due and proper form, mentioning by name each defendant and the various indictments and charges of which he was found guilty, or whether it was read at a public hearing. Its contents are known only from a "communiqué from the office of the President", published in *Essor*, the official organ of the *Union Soudanaise*, on October 2. This communiqué merely reports the judgment, without giving any grounds. The three principal defendants, Mr. Sissoko, Mr. Dicko and Mr. Touré, were sentenced to death; fourteen defendants were sentenced to twenty years hard labour, eight to fifteen years, seven to ten years, and twenty-seven to five years; one year's imprisonment was the penalty meted out to twenty-one of the accused; and the last fifteen were given the benefit of the doubt and acquitted.

In the same communiqué, the Office of the President congratulated the People's Court on

the highly proper conduct of the hearing... and particularly the wide latitude allowed the prisoners for their defence and in answering publicly to the charges against them, so that all the required guarantees of accuracy and objectivity were present.

The communiqué added:

The Office of the President of the Republic of Mali also notes that throughout the trial the *Union Soudanaise* (RDA) and the government of the Republic of Mali avoided involving the Embassy of the French Republic, the French Government or any foreign representation.

This valuable clarification was equivalent to disavowing the previous arguments of the party, according to which a conspiracy had been organized at the instigation, or at least with the support, of the French Government. It constituted a justification of the very firm note in which, from the outset, the French Embassy said that it had had nothing to do with the demonstrations.

One week after the judgment was passed, President Modibo Keita commuted the death sentences pronounced against Mr. Sissoko, Mr. Dicko and Mr. Touré to sentences of hard labour for life.

IV

The establishment of the People's Court and the hearings held by that body give a clear picture of the conception of justice which the Head of the Government of Mali has openly adopted. Early in December 1962, President Keita, speaking at the closing session of a seminar for Mali judges, said:

Judges of the Republic of Mali must not be led, in the name of the independence of the Judiciary and the separation of powers, to lose sight of the fact that they are first and foremost militant members of the *Union*

Soudanaise... For all militant members of the *Union Soudanaise*, the Judiciary, as a social institution of the State and a supreme body by its very nature, must necessarily be in the service of the regime which established it.

The government point of view is also reflected in the following extract from an editorial published on October 1, 1962, the day before the trial before the People's Court ended, in the official Party organ *Essor*. It is important to notice that this was done while the trial was still in progress and the matter *sub judice*.

Faced with this situation [created by the demonstration of July 21], the party and the government, sure of the people's support, had no choice but to take the steps of which we all know: *exceptional situations call for exceptional measures* (emphasis added).

The communiqué issued on the following day by the Office of the President said in connection with the verdict:

[The party and the government] urge all militant members to *consider themselves mobilized* for the purpose of discovering, denouncing and neutralizing all possible ramifications of the plot... [They] cannot disassociate the crime against the internal security of the State and the attempt to overthrow the government from the crime of *hampering the achievement of a planned Socialist economy for which the country has opted* (emphasis added).

It has already been mentioned that *Union Soudanaise* under the the country is committed, above all things, to the huge task of economic development. It appears from the communiqué quoted above that he who opposes the needs of development is regarded as having committed a crime against the State. Judging from what President Keita said above, it can only be concluded that the Government of Mali regards the judges of Mali as "first and foremost militant members" of the political party, the *Union Soudanaise*; the judges are not, in fact, independent. The words, cited above, in the editorial of *Essor* that "exceptional situations call for exceptional measures" leave us in great doubt as to whether those charged with demonstrating against the government could have expected, or did in fact receive, a fair trial.

The preamble to the Constitution of Mali of September 22, 1962, states:

The Republic of Mali solemnly reaffirms the rights and liberties of man and of the citizen consecrated by the Universal Declaration of Human Rights of December 10, 1948.

Now, the Universal Declaration of Human Rights is unequivocal. Under Article 10, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, and under Article 11, everyone charged with a penal offence has

the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Furthermore, Article 42 of the Mali Constitution provides that:

The Republic of Mali assures and guarantees the independence of the Judiciary as guardian of individual freedom and responsible for applying, in its proper sphere, the laws of the Republic.

The proceedings which took place before the People's Court violated Articles 10 and 11 of the Universal Declaration of Human Rights and Article 42 of the Mali Constitution for the following reasons:

- (1) the People's Court was nothing but a *de facto* body;
- (2) it was not an independent and impartial tribunal;
- (3) its establishment violated the constitutional provisions regarding the organization of the Judiciary;
- (4) it was called upon to judge, not *accused persons* but *guilty persons*; that is to say, by a reversal of the principle recognized in Article 11 of the Declaration, the persons accused were presumed to be guilty even before they appeared in court; this was obvious from the terms in which the Chief of the Executive had announced the trial;
- (5) it also appears that the defendants were not given every guarantee necessary for their defence since, contrary to all tradition, they were not assisted by any *professional counsel*.

The fact that the President commuted the three death sentences to ones of hard labour for life cannot detract from the illegality of the tribunal, of the procedure and of the sentences; nor can it justify the President in disregarding his own Constitution and detaining persons who had not been tried according to law and had not been sentenced by a properly and legally constituted court after a fair and proper trial.

What are we to conclude from all this? The Mali Government is entitled to take credit for the courage with which it has been dealing with the problems of economic and social development for the last four years. Furthermore the government is justified in defending itself against subversive activities; but it should do so only by lawful means. To equip a *de facto* authority with repressive powers is a needless and dangerous expedient; dangerous above all for the government itself, repugnant to the Rule of Law. The Constitution has provided for a rational distribution of public powers. The government, supported by the Parliament whose confidence it holds, has full latitude to lay down the economic and

social policy which the immense majority of the population expects of it. If the legal framework for this policy is clearly and judiciously planned—and it rests only with the government and Parliament that it should be so—then there will be no need for the courts to be “in the service of the regime”: it will suffice for them to be in the service of the law. The judges will not have to be “party militants”: it is enough that they be conscientious. No special courts will be required: those established by law will be adequate. In ensuring that the Rule of Law is respected in its institutions, the Republic of Mali will be able to safeguard its stability without in any way compromising the economic development of the country.

THE NEW CONSTITUTION OF MOROCCO

By an overwhelming majority the Moroccan people approved the draft Constitution submitted to them by King Hassan II in the referendum of December 7, 1962. Ahmed Reda Guedira, Minister of the Interior, emphasized the historic importance of the event which marked a decisive step forward in the rapid evolution of the Moroccan Government from theocratic absolutism to constitutional monarchy. Another landmark was the election of May 17, 1963, when for the first time in their history the Moroccan people were able to elect a parliamentary assembly. The very success of the opposition parties serves as eloquent testimony to the honesty and freedom of the vote. At this time, when the first written Constitution of the Kingdom of Morocco enters into effect, it seems important to recall its essential characteristics.

Origins of the Constitutional Reform

During the three centuries in which the Alaouite dynasty reigned over the Sherifian Empire, the Chief, designated by the College of *Oulémas* as the Commander of the Faithful (*Amir al Mouminine*) was both the secular and religious leader of the community. Upon his return from exile in November 1955, Sultan Mohammed V declared his intention of giving the country democratic institutions. As early as December 7, 1955, he replaced the traditional College of *Makhzen* by a Council of Ministers in which various political interests were represented.

On March 2, 1956, Morocco became independent, and on August 20, 1956, the government announced the forthcoming meeting of a Consultative Assembly. This Assembly was to hold two meetings each year at which time it would discuss the budget and question the Ministers but would have no other legislative power. In the months which followed the Sultan designated to the Assembly 76 members from the candidates presented by political parties, trade unions and various social and economic organizations. It should be noted that the *Istiqlal* and the *Union des Travailleurs Marocains* (UTM) both left-wing groups, had ten representatives each. The Consultative Assembly held its inaugural session in Rabat on November 12, 1956, the very day on which Morocco was admitted to the United Nations. Eight months later, in July, 1957, the Sultan made his first brusque change in the traditional procedure of succession to the throne by designating his eldest son, Moulay Hassan as heir. Until then the crown had not been hereditary; but the choice of a monarch after the death of the Sultan had been left entirely to the discretion of the *Oulémas*. On August 16, 1957, Mohammed V changed his title to that of King thus transforming the Sherifian Empire into the Kingdom of Morocco.

Next year, on May 8, 1958, the King published a programme of liberal reforms entitled the "Royal Charter", which made provisions for a separation of legislative powers between the throne and an elected Assembly, individual and collective responsibility of Ministers, the election of a National Assembly and a guarantee of individual liberties in the near future. This final point in the programme was the first to be implemented with the "Code of Public Rights", promulgated on November 25, 1958, which guaranteed freedom of speech, freedom of assembly and association, unless the monarchy was attacked or public order and national security endangered. A Decree concerning elections to local assemblies was passed on September 5, 1959; consequently on May 29, 1960, for the first time in its history, the Moroccan people were called upon to elect members of 798 rural and municipal councils. These elections were based on universal suffrage, women having equal voting rights with men. They took place in complete calm, with 75% of the registered voters exercising their right. Political parties were allowed full freedom in which to campaign and each of them obtained its fair share of the representation.

This was only the first step and the leftwing parties, namely the *Union Nationale des Forces Populaires* (UNFP) which was a splinter faction of the *Istiqlal*, and the UTM, a left-wing trade union

group, brought heavy pressure to bear on the King to call an early parliamentary election. The King counter-attacked by removing the Prime Minister Abdullah Ibrahim, who favoured the left-wing groups, and decided to take charge himself of the executive power through the intermediary of the Crown Prince. At the same time, however, he promised that a Constitution would be drawn up and enacted before the end of 1962. In fact, as of August, he appointed a commission to draft a Constitution. This commission composed of jurists, theologians and representatives of political parties began its work in November. It was boycotted by the UNFP, whose members refused to participate in its activity, and finally dissolved at the beginning of 1961 owing to the difficulties presented by the election as chairman of Allal al-Fassi, the leader of the *Istiqlal* party.

On February 26, 1961, King Mohammed V died suddenly in Rabat. The Council of Ministers gave full powers to the Crown Prince, who succeeded his father as Hassan II. Anxious to fulfil his father's promises, the young sovereign proclaimed on June 7, 1961, an Act known as the "Fundamental Law" which was to remain in force until the promulgation of a Constitution. Like the "Royal Charter" of May 8, 1958, the "Fundamental Law" is a declaration of principles and intentions. It proclaims that Morocco, whose language is Arabic and religion Islamic, is a country in the process of evolving towards a constitutional monarchy with democratic institutions. It affirms equality of rights and protection of the individual's freedom as well as the principle of the separation of executive, legislative and judicial powers. Drawing on the experience with the first constitutional commission, the King entrusted the drafting of a Constitution to a committee composed principally of foreign jurists. Mohammed V had promised his people a Constitution before the end of 1962; his son kept that promise and on November 18, 1962, he issued the draft of a Constitution whose basic structure he outlined in a speech carried by radio and television. It was this proposal which was presented to the people in a referendum on December 7, and adopted by an overwhelming majority of the voters. On December 7, 1962, in accordance with the will of the people as clearly affirmed by King Hassan II and the Moroccan people, the old Sherifian Empire became a constitutional monarchy with authentically democratic and representative institutions.

The Main Features of the Moroccan Constitution

After a purely descriptive analysis of the new institutions in the following paragraph, an attempt will be made to define the principal characteristics of this constitutional government. The Moroccan Constitution is drawn up clearly, concisely and succinctly. It contains 110 Articles under 12 Headings.

The first provisions define principles and fundamental rights. They declare that Morocco is "a constitutional, democratic and social monarchy" and that sovereignty belongs to the nation itself. Articles 2 and 3, obviously inspired by Articles 3 and 4 of the French Constitution of October 4, 1958, state that the nation shall exercise its sovereignty either "directly through referendum or indirectly through constitutional institutions" and that political parties contribute to the representation of citizens in the government. A very important provision made at the end of Article 3 is that "There shall be no single party government in Morocco." All citizens are equal before the law and no law can be passed with retroactive effect. Political rights are outlined in Articles 8 to 12 and economic and social rights in Articles 13 to 18. It is important to emphasize the provisions which accord equal political rights to men and women (Article 8) and declare that all citizens have equal rights to hold public office (Article 12) and possess equal rights to work and education (Article 13).

In the exercise of his constitutional powers the King is Head of State as well as Chief Executive, while retaining his traditional title as "Commander of the Faithful." (*Amir al Mouminine*). Article 20 confirms the change in tradition by which Mohammed V in 1957 made the Crown hereditary, passing to the oldest direct male descendant of the King. The King may appoint the Prime Minister and the Cabinet, remove them from office and preside over Cabinet meetings. He may draft laws and see that they are enforced. He is Head of the Armed Forces and appoints both civilian and military personnel to their posts.

Parliament is composed of two Chambers, the House of Representatives, whose members are elected for a term of four years by direct universal suffrage, and the Chamber of Councillors whose members are elected for a six-year term by local and regional assemblies as well as by certain professional, business and trade union groups. The two Chambers hold their sessions simultaneously, twice a year. The essential function of Parliament is to pass laws, the exact powers of legislating being defined in Article 48. Both the Prime Minister and the members of the two Chambers

may propose laws. In the case of a conflict between the two Chambers over a draft proposal, the final decision is by a two-thirds majority vote of the House of Representatives.

The Judiciary is, according to Article 82, "independent of the Legislature and the Executive." The Constitution is modelled here on that of France and foresees the institution of a Supreme Court to protect the judges in their careers and in the exercise of their functions. Article 85 declares that "judges of the Bench cannot be removed." It is interesting to note that within the Supreme Court a constitutional body will be formed to rule upon the constitutionality of certain laws and measures as well as to supervise the legality of electoral procedures.

Though temporary in nature, the provisions of Article 109 are extremely important as they act as a safeguard against indefinite postponement of the establishment of representative institutions. The provisions state that Parliament will be elected not later than six months after the Constitution enters into effect. As a matter of fact the House of Representatives was elected five months and ten days after the constitutional referendum. The electoral calendar drawn up by the King also made provisions for holding elections to municipal councils, chambers of commerce, artisans' councils, agricultural groups and unions, as well as to provincial assemblies during the period from June to September 1963. This will allow the election to the Chamber of Councillors to be held on October 4, 1963.

Principal Characteristics of the Constitutional Government

In an article in *Le Monde* of Paris which appeared just before the referendum, Ahmed Reda Guedira emphasized the liberal character of the new institutions. He was proud to be able to contrast the multi-party system, set forth in Article 3 of the Constitution, with the one party regimes which the overwhelming majority of developing countries "believe can show them the way to progress and the secret of development."

Instead of the authoritarian and police regimes which dominate so many of the new States, Morocco has its guarantee of fundamental freedoms enumerated in Articles 8 to 18. It will be noted, moreover, that this liberalism follows in the tradition of the most recent political developments of the country. Even before the constitution of elected assemblies, the various political parties and union organizations were able to function in complete freedom

as was proved by the irreproachable manner in which the municipal elections of May 1960, were conducted.

However, it is undeniable that the Moroccan constitutional system is based on a preponderance of power in the hands of the Executive. Many commentators have compared this system to that of the Fifth French Republic and it is obvious that many of the provisions of the Moroccan Constitution were inspired by those of the French Constitution of October 4, 1958. Professor Maurice Duverger classifies both systems under the heading "Orleanist parliamentarianism", a phrase which refers to the French Constitution of 1830 according to which the Cabinet must have the confidence of the Head of State as well as of Parliament. This dual responsibility of the government is set forth in Article 65 of the Moroccan Constitution where it is stated that "the government is responsible to the King and to the House of Representatives." In the House of Representatives the responsibility of the government may be challenged if the Prime Minister asks for a vote of confidence on a statement of general policy or on a specific law, or if at least one tenth of the members of the House present a motion of censure; the provisions on this matter of Article 80 and 81 of the Moroccan Constitution are based on those of Article 49 of the French Constitution. The responsibility of the Prime Minister to the King is set forth in Article 24 which states that the King "will appoint the Prime Minister and the Cabinet" and that "he may accept their resignations *either on his own initiative*, or as a result of an individual or group resignation". (Emphasis added). The "Orleanism" therefore of the Moroccan Constitution is even more pronounced than that of the French one, in which nothing explicitly authorizes the Head of State to terminate the functions of a Minister on his own authority.

This preponderance of the Executive, in the person of the Head of State, is seen even more clearly in the latter's relationship to Parliament.

(1) According to the provisions of Article 27, the King may dissolve the House of Representatives. The provisions of Articles 77 to 79 covering the circumstances under which the King can dissolve Parliament, and its consequences, are quite similar to those of Article 12 of the French Constitution.

(2) As has been seen earlier, Parliament, though possessing the right to legislate, has this power confined within strict limits.

(a) First of all, the power of legislating as defined in Article 48 is quite limited. It includes the protection of political, social and

economic rights, fundamental civil rights and criminal law, the organization of the Judiciary, fundamental guarantees granted to civil servants and military personnel. All other matters according to Article 49 lie with the Executive's power to make law by regulations.

(b) Furthermore the government may, in the intervals between parliamentary sessions, make laws by decree to be submitted later to Parliament for ratification (Article 58). Parliament can also authorize the government "for a limited period and for a specific objective" to take such measures by decree as would normally fall within the sphere of the law (Article 47).

(c) A law proposed and passed by Parliament may be sent back to both Chambers for revision by the King (Article 70). Moreover, any law whether proposed by Parliament or the government can be submitted to public referendum by the King (Article 72); when a bill, after having been rejected by Parliament, is approved by a vote of the people, the House of Representatives is automatically dissolved (Article 75).

(3) There has been much talk in France about the jurisdiction of the special courts under the provisions of Article 16 of the French Constitution: it was obviously taken as a model by the drafters of Article 35 of the Moroccan Constitution in the following terms:

When the territory of the nation is threatened or such events take place as may jeopardize the functioning of constitutional institutions the King may, after consultation with the leaders of both Chambers and addressing the nation, proclaim a State of Emergency by Royal Decree. By virtue of this situation, in spite of all other provisions to the contrary, he may take such measures as are necessary to protect national security and ensure a return to the normal exercise of constitutional institutions.

The State of Emergency may be ended by the same procedure that instituted it.

(4) According to Sections 2 and 3 of Article 31 the King "signs and ratifies treaties"; it is only when a treaty involves the finances of the State that a vote by Parliament is required before ratification. It is easy to see the importance of this provision which virtually places all of the country's foreign policy in the hands of the King.

Seen from these aspects the political government of Morocco may be defined as an authoritarian democracy. Nevertheless it is important to consider another aspect. As in all developing countries, the problems of social and economic development have primordial importance for Morocco. Therefore the Constitution provides for a High Council for National Planning and Develop-

ment (Articles 96 to 99), presided over by the King, whose composition will be fixed by law, to draw up plans and determine concomitant budgets. According to Article 53, once the investment budgets related to development plans have been voted upon by Parliament, at the time of its approval, the budget allotment continues automatically throughout the period required for the execution of the plan. It is important to note that although Article 15 proclaims the right to private property, "this may be limited in extent and exercise when the necessities of national economic development and social planning require it." It is important that these directives for economic development and planning be reflected in the Constitution. Seen from this point of view the Moroccan system may also be termed a social democracy.

Conclusion

In order to appreciate the constitutional reform accurately it is necessary to place it in its historical setting. For the past few centuries Morocco has lived under a system of absolute monarchy. Until 1960, there had never been elections; and until now no representative assembly has ever limited the power of the monarchy. The new system marks an important advance on the road to democracy. Even though the King retains certain important prerogatives it must not be forgotten that, although such matters as the holding of referendums or the dissolution of Parliament seem suspect to countries in which democracy is profoundly rooted, they appear quite different in a country like Morocco where it seems natural to call upon the electoral body to arbitrate a conflict between Executive and Parliament.

Furthermore, after the constitutional referendum and the first legislative elections enough data have been acquired to fill out and supplement an analysis of the Constitution itself.

In the referendum of December 7, 1962, all the political parties (with the exception of the Communist Party which has been banned for the past few years) were able to campaign in complete freedom. The UNFP and the UTM, the cores of left-wing opposition, felt it in their interest to recommend to their followers that they abstain from the election but all the other parties, including the *Istiqlal*, were in favour of it. Of an approximate total of 4,700,000 registered voters about 84% participated in the voting. The number of "Yes" ballots was 3,697,515, which represents 95% of the votes cast and 80% of the number of registered voters. Observers noted

that the election was carried out in a calm, orderly and dignified manner throughout the country.

In the elections of May 17, 1963, the government forces were grouped around the *Front de Défense des Institutions Constitutionnelles* (FDIC) under the leadership of Ahmed Reda Guedira. They faced opposition on the right from the old *Istiqlal* party, led by Allal al-Fassi, Mohammed Diouri and Mohammed Boucette, and on the left from the UNFP, aided by the UTM, led by Ben Barka and Mr. Bouabid. Foreign observers noted throughout the electoral campaign that the royal government made it a point of honour to allow complete freedom of expression to its opponents, of which the opposition press availed itself so freely as to accuse Mr. Guedira of using the powerful State apparatus to aid the FDIC. Perhaps due to the impression caused by the opposition propaganda, foreign opinion expected a landslide victory for the FDIC in the May 17 elections. However, the success of the government party was slight, giving it only 69 seats out of the 144 which comprise the House of Representatives, and falling four seats short of an absolute majority. The *Istiqlal*, far from suffering the set-back predicted by its opponents, obtained 42 seats. The UNFP obtained a large majority in Casablanca and Rabat, thus confirming its strength on the coast and in the cities, and 27 of its candidates were elected. The six remaining seats were won by independent candidates. A significant feature of the voting was that the leaders of the various parties suffered reverses. Six government Ministers were defeated, the leader of the *Mouvement Populaire* was beaten in his own stronghold by the *Istiqlal* candidate and the *Istiqlal* in its turn lost several of its own strongholds to the UNFP. It is evident, therefore, that the elections were in no way pre-arranged and the special correspondent of *Le Monde* commented that the voting had taken place "under conditions of freedom unprecedented in other African countries."

This analysis of the constitution gives a rough overall view of the new political structure in Morocco. This view must remain rather approximate for the moment as the value of such institutions will depend essentially upon the degree to which these State bodies use the powers conferred upon them in the laws. The evidence of the May 17, 1963, elections seems conclusive for it shows that although the King and his Ministers disposed of vast powers they were able to use them with restraint and scrupulously respected the rights of the opposition. Furthermore, the Moroccan people themselves demonstrated their political maturity. The new structures of government in the Kingdom of Morocco have

thus successfully met the challenge of a free confrontation of parties and may well create a framework in which truly social and democratic processes can take place.

SOUTH AFRICA : THE NO-TRIAL ACT

In June 1962, the South African Government passed the General Law Amendment Act, which became known as the "Sabotage" Act. In No. 14 of this *Bulletin*, the Act was criticized as infringing many of the basic requirements of the Rule of Law. Since the passing of the Sabotage Act there have been further acts of violence in South Africa and the emergence of a terrorist organization known as "Poqo". On April 22, 1963, a Bill, the General Law Amendment Bill, conferring upon the Executive extraordinary powers, was introduced into Parliament by the Minister of Justice, Mr. Vorster, who claimed that the measures demanded were necessary in the interests of State security. The Bill was rushed through Parliament and became law on May 2.

The new Act, dubbed by its critics the "No-Trial" Act, creates several new offences, two of which carry the death penalty. Under Section 5 of the Act any person, who has ever been resident in South Africa, advocating or encouraging from outside the Republic, "any political, industrial, social or economic change within the Republic" by forcible means and with the aid of "any foreign government or any foreign or international body or institution" is guilty of an offence for which the maximum punishment is death and the minimum is five years imprisonment. In similar terms, the same Section makes a person guilty of an offence and liable to the death penalty who has

undergone any training outside the Republic or obtained any information from a source outside the Republic which could be of use in furthering the achievement of any of the objects of communism or of any body or organization which has been declared to be an unlawful organization...

unless that person can prove he did not undergo the training or obtain the information for furthering the achievement of the objects of communism. The minimum sentence is five years imprisonment. These offences are incredibly wide, particularly when it is borne in mind that communism virtually means, under South African law, political opposition to the government.

Some of the Sections of the new Act on procedural matters bear a striking resemblance to the Sabotage Act, i.e., the normal forms of punishment for juveniles are, in political cases, specifically excluded, summary trials can be ordered by the Attorney-General "in the public interest" and the burden of proof is shifted to the accused in political type offences.

There are three new procedural changes to which readers' attention must be drawn:

(1) Section 17 of the Act provides that any commissioned police officer may arrest without a warrant any person whom he reasonably suspects of committing certain political offences or has information about such offences, and can detain such person for 90 days' "interrogation". During interrogation the suspect may be held *incommunicado*. He must be visited once a week by a magistrate. Otherwise no person can see him — not even spouse, children, parents or legal adviser—without police permission. Even the 90 days appears to be no safeguard as the suspect can be rearrested for a further 90 days bout of questioning "unless he has replied satisfactorily to all questions". Finally Section 17 (3) of the Act reads:

No court shall have jurisdiction to order the release from custody of any person so detained, but the said Minister may at any time direct that any such person be released from custody.

However, during the reading of the Bill in Parliament, the Minister agreed to an amendment with the result that the provisions of this Section will expire on June 30, 1964. But there is a rider that the President of the Republic can extend the provisions, at his own discretion, for further periods not exceeding 12 months at a time.

(2) A new provision contained in Section 4 of the Act permits the Minister of Justice "at his discretion" to order the continued detention in prison of a person who has just completed in full a term of imprisonment for a political offence. In the original Bill there was no time limit laid down for the further period of detention. In the parliamentary debates on the Bill the Minister agreed to an amendment with the result that this provision too will expire on June 30, 1964; thereafter the Minister can ask Parliament to extend by resolution the provision from time to time for further periods not exceeding 12 months at a time. In the result continued detention can be more or less continuous depending essentially on the Minister. This form of punishment ironically parallels the punishment practised in Communist countries during the Stalinist

period of sending prisoners to labour camps after they had served their sentence.

(3) Under Section 14 of the Act retroactive penal offences are created. As far as is known this is the first time that the Parliament of South Africa has legislated in this manner. The President is empowered to declare by Proclamation organizations unlawful as from April 8, 1960. This means that a person can be retroactively charged under the Suppression of Communism Act for offences relating to unlawful organizations even if they were not unlawful at the time. Furthermore the Act states that "no court shall have jurisdiction to pronounce upon the validity of any proclamation issued under this sub-section".

There are other points in the Act which can be criticized. For instance the postmaster can now detain and confiscate letters, parcels and telegrams if he reasonably suspects the mail to be concerned with any offence. Before the present Act this action could only be taken after a written request to the public prosecutor by the post office authorities.

In conclusion it is significant that there is a clear trend in South African legislation, noticeable in Sections 14 and 17 (3) of this Act, to oust the jurisdiction of the courts. The Executive is arrogating to itself duties which under the Rule of Law should be discharged by the Judiciary. At the same time there is evidence from the Act that in cases where political offences are concerned the Executive is pursuing a deliberate policy of depriving individuals of the normal basic safeguards.

Anyone who doubts that South Africa has become a police state should examine its laws. The question is then no longer in doubt.

THE NEGRO PROBLEM IN THE UNITED STATES

The following extract is from the 1961 Report of the United States Commission on Civil Rights.

...this Commission must report that Negro citizens in some places to-day live in fear of violence—accompanied by fearsome doubts regarding police integrity on race problems. It has seen this fear in the attitudes of Negroes it has interviewed; in their unwillingness to testify before the Commission—often in their unwillingness even to speak to Commission representatives. The same fear sometimes prevents the citizen from seeking redress from the Federal Government for violation of his rights. This fear is often without foundation—but it exists.

That intolerance against Negroes exists in many parts of the USA is substantiated by the above extract. This intolerance takes many forms: unjust local laws; intimidation and violence by Whites against Negroes; segregated schools, transport, shops and so on.

It is impossible in a short article to cover more than a fraction of the enormous problem surrounding the whole question of the Negro minority in the USA; we have tried therefore to concentrate on current developments and in particular on action being taken to liquidate those forms of injustice and inequality suffered by Negroes to-day.

In studying the Negro problem the reader must constantly bear in mind the considerable degree of autonomy enjoyed by the states of the Union, which autonomy provides those states with the opportunity to resist implementation of federal legislation and to obstruct the decisions of the federal courts.

A Historical Note

Negroes were brought to North America from Africa and the Caribbean. They mainly worked, as slaves, in the cotton plantations of the Southern states, subject to a body of laws known as the "slave codes". The Civil War of 1861-65, a conflict between the federal forces and the governments of the eleven states of the South, brought to a head the whole subject of slavery.

After the Civil War, Congress passed three important Amendments to the Constitution. The Thirteenth Amendment abolished slavery. The Fourteenth made all Negroes citizens of the United States and of the state in which they lived and provided them with the "equal protection of the laws". Finally in 1869 the Fifteenth Amendment laid down that the right to vote should not be denied or abridged "on account of race, color, or previous conditions of servitude". At about the same time a series of Civil Rights Bills were enacted by Congress, which gave the Negro—*inter alia*—the right to vote, protected him from violence, guaranteed him due process of law and equal protection of the laws. However the Southern states were determined to prevent the Negro from exercising these rights that he had gained as a result of the Civil War. After the period of Reconstruction, there were passed, throughout the South, laws known as "segregation" laws, which provided for the separation of Negroes and Whites in public places and transport. Negroes were also disfranchised, first by the adoption of Black Codes and then by artifices such as literary tests; they also

lost their place as legislators. Finally, Southern Whites used force and intimidation to carry through their policies of discrimination against Negroes. By the turn of the century it could truthfully be said that Negroes—despite the guarantees of the Constitution—had been relegated to the status of second class citizens. This situation lasted well into the twentieth century. However changes came. Slowly. Two World Wars, the New Deal, the advent of the United Nations Organization have all been factors contributing to the realization within the USA that Negroes are a permanent and important part of the structure of American society and must be treated on a basis of absolute equality.

In forming a majority of public opinion *against* segregation and discriminatory practices the influence of the Supreme Court has been profound, although it is well to remember that many of these practices occur in the social sphere and are often not justiciable.

The Courts and Integration

In the last century it was not the usual practice of the Supreme Court to enforce the Fourteenth Amendment and the Southern states were left to pursue their own policies in regard to the treatment of their Negro citizens without interference from the federal courts. The attitude of the Supreme Court at that time is well illustrated in its classic decision in 1896 in the case of *Plessy v. Ferguson*. The appellant, a coloured man, entered a railway coach reserved for Whites and was ordered by the conductor to sit in the coach reserved for coloureds. He refused and was arrested and charged under a Louisiana statute which laid down that railway companies provide equal but separate accommodation for Whites and the coloured races. The Supreme Court upheld the constitutionality of the statute. Since this case the views of the Supreme Court have radically changed. The Court came to realize that the separate but equal doctrine was basically unjust and in practice denied the Negro the equal protection of the laws. Thus in 1950 in the case of *Sweatt v. Painter* the Court concluded that the legal education offered in a separate law school for Negroes was inferior to that afforded by the University of Texas law school and hence that the equal protection clause required that a qualified applicant be admitted to the latter. In the leading case of *Brown v. Board of Education* in 1954, Negro children from various states sought the aid of the courts on account of their exclusion from the public schools of their states on grounds of race. The Supreme Court

held that in the field of public education the "separate but equal" doctrine had no place, and that separate educational facilities were inherently unequal. The Supreme Court in its implementing decision of May 31, 1955, directed Federal District Courts to require that the school authorities "make a prompt and reasonable start towards full compliance". Since the *Brown* case the Supreme Court has repeatedly handed down decisions which reflect the unequivocal views of the Court that discriminatory laws do not afford the "equal protection" demanded by the Fourteenth Amendment and are therefore unconstitutional. In a majority of the 17 segregated states gradual desegregation began following the *Brown* case. But in 8 of them, all in the deep South, there was delay, the words of the Supreme Court being interpreted to give the states unlimited licence to procrastinate. In 1960 in Texas, the Federal District Court held that the Houston School Board's plan for integration was "a subterfuge designed only to accomplish further evasion and delay", and ordered the Board to integrate at the rate of one grade a year. The diligence with which federal courts have been implementing the *Brown* decision is nowhere better illustrated than in the suits arising from the Meredith case in Mississippi in 1962, which is described below in some detail.

There have been several important Supreme Court decisions this year. On May 20, the Supreme Court reversed the convictions of lunch-counter sit-in demonstrators and declared it was unconstitutional for a state to require segregation and use its powers to enforce it. The effect of this case is that no Negro can be convicted of trespass for seeking service in a "white only" restaurant.

On May 27 the Supreme Court ordered the city of Memphis in Tennessee to begin desegregating its parks, libraries and museums immediately. Justice Goldberg wrote in his opinion that the *Brown* decision "never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools..."

In the state courts of the South there has been a general reluctance to interpret the law so as to give effect to the *Brown* decision and the spirit behind that decision. On the contrary, state courts in the South have almost always upheld state legislation providing for segregation.

Legislatures and Integration

The first piece of federal legislation seeking to protect the Civil Rights of Negroes since 1875 was passed by Congress in 1957.

The Act was controversial. The House of Representatives approved the Bill by 286 votes to 126; the Senate by 72 votes to 18. This Act set up the United States Commission on Civil Rights as a bipartisan agency, and, as amended, directed the Commission to:

Investigate formal allegations that citizens are being deprived of their right to vote and have that vote counted by reason of their color, race, religion, or national origin;

Study and collect information concerning legal developments which constitute a denial of equal protection of the laws under the Constitution; Appraise the laws and policies of the Federal Government with respect to equal protection of the laws under the Constitution...

In its six years of existence the above Commission has, not surprisingly, concentrated its work on the Civil Rights problems involving the nation's 18 million Negroes. In 1959 the Commission published a 668-page Report, as a result of which Congress passed in 1960 another Civil Rights Act strengthening the measures available to the Executive for dealing with matters such as discriminatory denials of the right to vote, obstruction of federal court orders and the bombing or desecration of schools and churches. State laws, but noticeably *not* in the deep South, were also passed aimed at preventing racial or religious discrimination.

In 1961 the Commission published its second statutory Report, this time in five volumes running to 1,392 pages. It examined denial of Civil Rights under the heads: voting, education, employment, housing and justice. The prevailing attitude towards the Negro in the deep South is shown in this example quoted by the Report of a Negro who went to register as a voter in Louisiana. The registrar returned the registration card to the Negro saying there was a mistake in it and that he could not therefore be registered to vote. The Negro examined his card again and could see no error. He asked what his mistake was, and was told "... you underlined ' Mr. ' when you should have circled it. "

Most of the recommendations made in the 1961 Report have received consideration by Congress or by agencies of the Executive.

In matters of promoting the Civil Rights of Negroes, Legislatures in many of the Southern states have adopted a bitterly hostile attitude. For instance in Louisiana in 1960 the Legislature passed 28 Bills intended to prevent the integration of the state's public school system including an Interposition Act which declared the Supreme Court's decision in the *Brown* case of 1954 ineffective in Louisiana and made it an offence for federal judges or other officials to enforce integration measures. However other states

outside the deep South, including Border states, have in the last four years passed important legislative measures aimed at preventing racial discrimination.

The Executive and Integration

The Federal Executive has been increasingly concerned since the *Brown* case to see that proper effect is being given to the orders of the courts in all integration matters. It was the Administration which first submitted to Congress in 1956 the Bills on Civil Rights which finally resulted in the Civil Rights Act 1957. In this Act considerably increased power was given to the Executive to fight against discrimination—for instance there was created within the Department of Justice a new Civil Rights Division headed by an Assistant Attorney-General. In Little Rock, Arkansas in 1957, Governor Faubus refused to allow Negro children to enter a White High School despite the integration programme introduced by the State Board of Education, which had been upheld by the federal courts, and even called out the local militia. To ensure enforcement of the orders of the federal courts, President Eisenhower responded by sending federal troops to Little Rock.

There is no doubt that the present Administration of President Kennedy, particularly the Department of Justice and the law enforcement officers, is actively fighting discrimination. As a new step, the Justice Department is itself now actively engaged in filing suits in the courts in voting rights actions. Early this year it had reportedly brought 23 suits in five Southern states. On February 28, 1963, the President called for new Civil Rights legislation to facilitate Negro voting registration, renew and expand the authority of the Civil Rights Commission and assist schools in desegregating. Again this year, on June 19, the President called upon Congress to enact further extensive Civil Rights legislation in a programme which included proposals to guarantee all citizens equal access to public facilities such as hotels and restaurants, and to eliminate racial discrimination in employment.

No occasion has better demonstrated the antagonism of the Southern people and states towards federal government integration policy than the Meredith case of 1962. It is worth recalling the facts of that case.

Mississippi Incident

James H. Meredith, a 29 year old Negro ex-serviceman, applied for admission to the all-white University of Mississippi at Oxford.

Admission was refused. Then on June 25, 1962, the Federal Court of Appeals for the 5th Circuit sitting at New Orleans, ordered the District Court to issue an order to the university to admit Meredith. The Court of Appeals denied the state a stay of execution pending a review by the Federal Supreme Court. Mr. Justice Hugo Black sitting as vacation judge of the Supreme Court on September 10, ordered the University of Mississippi to comply forthwith with the judgment and order of the Court of Appeals. Shortly after, on September 13, Governor Ross Barnett of Mississippi urged in a television broadcast open defiance of the court order, called upon Mississippians to use all legal means to forestall integration and invoked the doctrine of "interposition" (which is the supposed right of states to overrule federal laws, though federal courts have held interposition not to be valid). Meredith now showed that he plainly intended to enroll as a student at the university. Four times, on September 20, 25, 26 and 27 Meredith, supported by federal Justice Department marshals went to the university to try to enroll. Each time he was turned back—on several occasions by Governor Barnett himself, who had assumed the post of special registrar. State authorities following the advice of their Governor used every means of blocking Meredith's entry. A state court found Meredith guilty of a technical offence of falsifying his voter registration return and sentenced him to 9 months imprisonment. The Federal Court of Appeals immediately issued an injunction which forbade the state authorities to arrest or prosecute Meredith. The state Legislature, hastily convened, passed a law specially designed to prevent Meredith's entry to the university. The Court of Appeals promptly struck down the law. Tension in the State mounted. By September 27 a very large number of State police, patrolmen and sheriffs had converged on the university campus. The next day the Court of Appeals found Governor Barnett guilty, in his absence, of civil contempt and ordered him to purge himself of contempt by October 2, or face arrest and a \$10,000 a day fine. The federal government now decided to intervene to secure compliance with court orders. President Kennedy called out federal troops who began converging on Oxford on September 29. The following evening serious riots broke out on the university campus between demonstrators and federal marshals. Two men lost their lives and about seventy-four people were injured. However on the morning after the riots on October 1, Meredith was enrolled at the university and took his place in classes. After a series of postponements, the Court of Appeals on January 6, 1963, ordered Governor Barnett and Lieutenant-

Governor Johnson to show cause why they should not be held in *criminal* contempt; the proceedings, as yet unresolved, are still before the courts.

Meredith attended always by federal marshals was able with some difficulty to complete his first term. In February, after hesitation on account of the open hostility shown him by other students, he bravely enrolled for his second term. He has since been joined by a second Negro student.

Other Action to End Discrimination

A look has been taken at the action in train by the three branches of federal government to end Negro inequalities. But the efforts of private individuals, particularly Negroes themselves, and groups, such as the National Association for the Advancement of Coloured Peoples, have had a tremendous impact on helping to end discrimination. The Negro's present growing tendency to demonstrate, and to demonstrate effectively, as recent events in Birmingham, Alabama have shown, reflects his exasperation with the slow processes of the law in ending discrimination against him.

During 1958 a non-violent movement of protest launched by Negro students to end segregation in public places gathered impetus. This consisted of sitting down at lunch counters, department stores, restaurants, etc. reserved for Whites and refusing to go until served. Although huge numbers of Negroes were arrested for "sitting-in", the movement had considerable success. For instance in 1960 Woolworth's and three other chain stores announced that their lunch counters would be integrated in 112 Southern cities.

The results achieved by the "Freedom Riders" in effecting desegregation must not be forgotten. This movement, initiated in May 1961 by both Negro and white students, aimed at challenging racial segregation in inter-state bus travel, a practice already ruled unlawful by the Supreme Court. The first "rides" ended in violence in Anniston and Birmingham, Alabama, when the police failed to take steps to prevent white mobs attacking freedom riders. But the point had been made and the Inter-State Commerce Commission was asked by the President at the end of May 1961 to issue regulations strictly forbidding racial segregation in inter-state bus travel.

In May, 1963, in an effort to end local forms of discrimination a large portion of the Negro population of Birmingham, Alabama,

conducted a series of public demonstrations coupled with a boycott of stores owned by Whites. Violence and tragedy were narrowly averted. On May 10, Dr. Martin Luther King, the Negro leader, announced that agreement had been reached with representatives of the white community over desegregation at lunch-counters, lavatories, rest-rooms and drinking fountains within three months, the hiring and promotion of Negroes on a non-discriminatory basis, the release of all those arrested during the demonstrations and the creation of a bi-racial committee to plan further desegregation

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In conclusion, what is the balance sheet? Early this year the admission, without incident, of Harvey Gantt, a Negro architectural student, to Clemson College in South Carolina brought official desegregation to the last but one of the 50 states. On June 11, two Negroes, Miss Vivian Malone and James Hood registered at the University of Alabama despite the defiant opposition of Governor Wallace. At Tulane University, a private institution in Louisiana, 11 Negroes were quietly admitted last February. The number of schools desegregated in 1962 rose from 912 to 972, but there still remain no less than 5,257 segregated schools to be tackled in the Southern and Border states. Although the Supreme Court ruled against segregated education 9 years ago, only 7.8% of Negroes in the South are attending integrated schools.

Despite progress in voting matters there are still far too few Negroes registered to vote. Often Negroes do not vote because they are afraid of economic or physical reprisals. In the last Presidential election in Bienville County of Louisiana only 26 Negroes out of a Negro voting age population of 4,077 were registered to vote. In 1963 a federal judge ordered the names of 1,100 qualified Negro voters to be added to the lists in Montgomery County in Alabama. The judge found "shameful inequalities"; for instance six Negroes with master degrees had been rejected by the local registration authorities on account of race.

In other fields too there has been progress. Georgia now has a Negro state Senator, the first in 50 years. In Little Rock, Arkansas, earlier this year restaurants and hotels were peacefully desegregated. Last January, the Governor of North Carolina announced a programme aimed at equal employment opportunity for Negroes.

But much remains to be done. For example in the legal profession. In Mississippi there are only four Negro lawyers practising,

and the only white lawyer, who has handled civil rights cases, Mr. W. L. Higgs, has apparently been hounded out of the state by the local authorities on account of his work for Negroes inside and outside court. It has been reported that in all the Southern states there is only one white lawyer *regularly* handling civil rights cases for Negroes.

Negroes, as the unprecedented mass demonstrations in Birmingham have shown, are clearly determined, and rightly so, not to rest until they have obtained full equality of treatment throughout the United States. But there are now unmistakeable signs that their patience is wearing thin; until discrimination in all its forms is eradicated, the situation will remain potentially explosive.

In this article we have been concerned with the South to the exclusion of other parts of the USA. This has been intentional because in the South all the worst and most violent forms of discrimination are found. This does not mean that discrimination is confined to the South. It is not. For instance discrimination in fields of employment and housing can still be found in many parts of the country outside the South. At the same time it is well to remember that discriminatory attitudes to the Negro are repugnant to the great majority of the citizens of the United States.

The Meredith case and the recent events in Birmingham well show how the vexed Negro problem can arouse the deepest passions and resentment against the integration policy and actions of the federal government in the South. While legislation, executive orders, the decisions of the courts, and the work of individuals and groups all play a vital part in the struggle against inequality, what is required more than anything is a change of outlook toward the Negro amongst the majority in the South. Without the willing cooperation of the South, and the pressures of public opinion throughout the country, there can be no lasting solution to a situation which is still shameful to the good name of the United States.

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