

FOR THE RULE  
OF LAW

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

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ASPECTS OF THE RULE OF LAW

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**PRESIDENT JOHN F. KENNEDY**

The following cable was sent by Mr. Sean MacBride, Secretary-General of the International Commission of Jurists, to President Lyndon Johnson on Friday, November 22, 1963:

On behalf of International Commission of Jurists and myself personally please accept deepest sympathy stop We grieve with the people of the United States on the loss inflicted upon them and the whole of humanity by this dastardly act

Sean MacBride

*Secretary-General*

International Commission of Jurists

Mr. MacBride knew President Kennedy personally for very many years.

## HUMAN RIGHTS DAY

On December 10, 1948, the General Assembly of the United Nations approved and proclaimed the Universal Declaration of Human Rights. There was no vote cast in opposition, although the countries of what has come to be called the Soviet bloc abstained on the ground that the Declaration was inadequate in its comprehension of human rights. Although there have been many new accessions to United Nations membership since 1948, it is generally considered that, by the very fact of becoming a member of the United Nations and thereby subscribing to the obligations laid down in the Charter, the new member States undertake to observe and promote respect for human rights as laid down in the Universal Declaration. As the tangible norm that civilized nations strive to realize within their own territories and with other States, the Universal Declaration stands proclaimed. It may also be said that the General Assembly by its unanimous decision of December 7, 1962, to celebrate the fifteenth anniversary of the Universal Declaration on December 10, 1963, has now unanimously confirmed the 1948 Declaration.

But it would be idle to pretend that in itself the Declaration has the force of positive law; the guarded language of its Preamble and the explicit reservations that were made on this point by the delegates of several countries point all too clearly to the unhappy divorce between paper declarations and reality in the field of human rights, on the municipal as well as the international law level. The patient but as yet abortive attempts to draw up a Covenant point even more clearly the melancholy state of affairs attributed by cynics to lack of sincerity—the divergence between word and deed. All this is well-known, and the jibes of the cynic are equally well-known. But in the absence of a supra-national authority, which the United Nations has not become, the success of inter-governmental organizations depends on the goodwill and good faith of member Governments. It must also be remembered that those who believe, often passionately, in a supra-national jurisdiction in matters of human rights tend to disbelieve in the good faith of those who do not, which is not always the case. This being said, it must also be said that the persistent efforts that have been and are being made towards an international

jurisdiction deserve whole-hearted recognition, and even more so the less direct methods of detailed discussion and proposals on specific topics in the vast field of human rights.

The exchanges that have taken place under United Nations auspices of many concrete problems and their various solutions have not been decisive of any world problems—and this was not their immediate objective—but they do allow for the essential first step towards real understanding and awareness of the state of human rights in different parts of the world and enable those who will to profit from the wisdom or folly of the experience of others. Through the publications of the United Nations there is much to learn of progress in individual countries and much encouragement at the level of national law. No-one would pretend that all is well with the enjoyment of human rights anywhere as long as freedom is denied, whether by dictatorships of the Left or the Right, by self-seeking personal rule, or in those small but stubborn areas in some democratic countries where authoritarianism intrudes. No-one should pretend, as long as ignorance and poverty are rife and life itself is menaced by the inadequacy of resources to put down conquerable diseases, that human rights are respected as they should and could be.

On Human Rights Day, December 10, on the fifteenth anniversary of the Universal Declaration of Human Rights by the General Assembly of the United Nations, it is fitting, not merely to affirm devotion to the promotion of human rights, but to pay tribute to the earnest efforts and the achievements in this field of the United Nations and its specialized agencies. There is much to be done; indeed, the magnitude of the gap between what nations subscribe to and what they do is awesome, and therefore the resolve to fresh and constant endeavour is more vital than giving due credit for what has been done. With the majority of world opinion accepting that human rights pass all international boundaries—and particularly are not to be regarded as essentially an internal matter for the purposes of the Charter of the United Nations—it is crucial to the promotion of human rights that moral support and encouragement be forthcoming from international organizations, governmental and non-governmental. Not all tyrants are impervious to strong and general censure at the bar of world opinion and it is not easy for those who try to be to rest forever defiant of what most of the world thinks.

But there is a less spectacular danger that comes in countries generally regarded as free and democratic. The difference between general and generalized satisfaction is too often blurred, and

blurred to the point that it leads to complacency. Many voices are raised loud and clear at the international level which speak in whispers or not at all at home. The perspicacity and sensitivity on the human rights of other nationals too frequently is absent on the human rights of one's own people. Human rights are a vital matter of internal concern, and primarily a matter of internal concern, but they are not and must never be allowed to be a matter of exclusively internal concern. The mote in one's own eye must not stand in the way of concern for the beam in the eye of one's neighbour, but it should itself nevertheless be removed. And it is not necessarily removed for good and all by incorporating human rights in Constitutions, welcome as this may be.

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## **THE BURMESE SITUATION DETERIORATES**

In an article entitled "Military Rule in Burma", which appeared in *Bulletin* No. 15 of the International Commission of Jurists, published in April 1963, a survey was made of the Burmese situation following upon the military coup d'état of March 2, 1962. Professing to follow what it described as "the Burmese Way to Socialism", the Military Government began to adopt measures which at the time of publication of the article had already begun to cause disquiet in legal circles concerned with the Rule of Law. The International Commission of Jurists has since been keeping a close watch on the Burmese scene. It was hoped that, once the excesses that sprang from revolutionary fervour were spent, an attempt would be made to build up democratic institutions. Subsequent events, however, seem to indicate that those now at the helm of affairs in Burma are steadily veering further away from the Rule of Law.

### **Further Arrests**

Reference has been made in the earlier article to the arrest of the President, the Prime Minister, the Chief Justice, Cabinet members and other important persons in March 1962. Now new waves of arrests have shocked the world.

On August 9, 1963, eleven persons, including prominent political figures, a leading journalist and a prominent religious leader,

were taken into custody by the Revolutionary Government. Among these persons was U Chan Htoon, a former Judge of the Supreme Court of Burma and a member of the International Commission of Jurists. Three of the politicians arrested were members of the Executive Committee of the AFPFL (Anti-Fascist People's Freedom League). The leading journalist arrested was U Law Yone, Chief Editor of *The Nation*. An official statement released on the same day as the arrests said:

The Revolutionary Council, in the interests of the country and people, has been endeavouring to bring about internal peace for which overtures have been made. While prospects for peace have been materialising brightly and while the Government's efforts in this direction have been continuing, the following persons have been trying to wreck the Government's peace efforts. Consequently they have been placed in protective custody.

There were more arrests to follow. On September 7, a sergeant-major, described as "a counter-revolutionary agent", was arrested. On October 4, six more members of the Executive Committee of AFPFL were arrested, reducing thereby the original strength of the Executive Committee from nineteen to ten. Twelve influential AFPFL district leaders were also taken into custody on the same day. Soon after, two Shan leaders, two Karen State leaders, among others, were taken into custody. Arrests in the districts were numerous. In the Meiktila district alone there were twenty-seven arrests between October 8 and 10.

The "protective custody" measures of the Revolutionary Government caused widespread alarm. On October 8, U Tun Win, a member of the Executive Committee of the AFPFL, appealed to all AFPFL leaders not to be stampeded into irresponsible acts because of the arrests. "All of us are sorry," he declared, "that the Revolutionary Government should have made these arrests through misunderstanding. But this should not make us lose our equanimity."

The Revolutionary Government claimed that these were temporary measures which were necessary because the old guard politicians were obstructing parleys with the Communists and minority insurgent groups. This claim must be judged in the light of the fact that, although three former Ministers of the Pyidaungsu Government were released on August 9, ex-Premier U Nu and most of these persons arrested in March 1962 still remain under arrest.

Subsequent to these arrests the peace talks with Communist and other Leftist leaders, on which the Revolutionary Government had



pinned so much hope for a lasting peace, collapsed, whereupon the Government during the week-end of November 15-17, 1963, suddenly struck at the houses and headquarters of Communists and Leftists throughout the country and arrested most of their leaders. The arrests made on these three days also included members of the AFPFL and Pyadaungsu Party, as well as writers, journalists and trade unionists. The number of persons placed under "protective custody" in consequence of this new wave of arrests is estimated at well over four hundred. Meanwhile, peace talks with certain right-wing rebel groups such as the Karens, Shans and Kachins continue, but what the fate of leaders of these groups would be should these talks also fail remains a conjecture.

Most political observers interpret these arrests as demonstrating a determined effort to eliminate all political opposition and to establish a one-Party state under military rule, the one Party being the Burma Socialist Programme Party formed and nurtured by the Government itself. (See article on "Military Rule in Burma", *Bulletin* No. 15, on the creation of the Burma Socialist Programme Party.) This interpretation is strengthened by the fact that the Revolutionary Council issued an official communiqué to the effect that this new Government-sponsored party would be financed out of public coffers.

### **Recent Nationalizations**

In regard to the nationalization policy of the Revolutionary Government, the Commission made the following observation in the earlier article: "Privately owned enterprises are being taken over at an increasing tempo, and it appears obvious that private enterprises of any size or importance will shortly cease to exist as such in the Burmese economy." Subsequent nationalization measures have established the correctness of this observation. In September 1963 all firms controlled by the BEDC (Burma Economic Development Commission, previously autonomous though State-owned) which had hitherto functioned as private limited companies were completely nationalized, and arrangements were made to transfer them to various Government departments, boards and corporations. Even relatively small individually-owned businesses such as rice-mills and drug stores were nationalized overnight, the reason sometimes being given that the owner was in arrears of income tax. At the time of writing, the latest nationalization measure was the take-over of all the seven private cigarette companies of Burma. The Revolutionary Government

took over these cigarette companies under the provisions of the newly promulgated Enterprises Nationalisation Law, 1963, in regard to which certain observations are made below.

It is not proposed to comment in this article on whether extensive nationalization is in the interests of Burma's economy; nor is it suggested that a democratically elected government has not the right to nationalize by fair procedures such enterprises as it deems essential to nationalize in the interests of the people it represents. In regard to Burma, however, the Revolutionary Government is in the first place set up by force and therefore not representative of the people. Secondly, its decrees relating to nationalization both in their substantive and in their procedural aspects are neither just nor reasonable by Rule of Law standards.

The Enterprises Nationalisation Law, 1963, was promulgated by General Ne Win, the Chairman of the Revolutionary Council, on October 19, 1963, but with retrospective effect from August 16, 1963. The object of this Law was apparently to facilitate and to accelerate the pace of nationalization. It authorized the Revolutionary Government to take over by issue of a proclamation any company, organization or enterprise engaged in industry or any other business, whether legally incorporated or not, and whether owned by a group or an individual. It provided for the appointment concurrently with the take-over of two Committees—an Administrative Committee to look after the affairs and control the assets and properties of the enterprise concerned, and a Compensation Committee to determine the compensation to be paid to the proprietors of the nationalized enterprise. In regard to the decisions of the Compensation Committee, it was provided that they could not be challenged in any court of law, and that the Government had power to alter or modify them. The Government was also empowered to make such rules by notification as were necessary to secure successful enforcement of the Law. Any person who violates the provisions of the Law or the rules or directives issued thereunder, or obstructs or interferes in any way with officials performing their duties under the Law or the rules is liable to punishment with imprisonment which can extend to five years or a fine or both.

The International Commission of Jurists has often had occasion to point out that retroactive legislation is obnoxious to the Rule of Law for reasons which it is hardly necessary to re-state here. (See, for instance, the article on "The Ceylon Coup d'Etat Trial", appearing in *Bulletin* No. 15.) Sudden decisions to nationalize made, as in Burma, without adequate notice to those persons or

bodies likely to be affected and without giving such persons or bodies an opportunity of being heard cannot be justified whatever may be the merits of the ultimate objective. But they are still less justifiable when decisions as to the quantum of compensation payable can be altered or modified by the Government at will. The new Nationalization Law denies the affected party the right to have a decision of the Compensation Committee reviewed by a court of law and gives him at most a precarious right to the compensation ordered.

It remains to be seen what role the legal profession in Burma can and will play in the new setting. The Rangoon Bar Association has very recently appointed a 13-member Committee to examine this question. It is hoped that the appointment of this Committee is not a step calculated to undermine the independence and prestige of the legal profession, but is the outcome of a genuine desire to explore how best the lawyers of Burma, mindful of the high ideals of their profession, can be of service to their fellow men notwithstanding the difficult conditions under which they have to work. It will do well for the members of the Committee to bear in mind in the course of their deliberations Clause XII of the *Conclusions* of Committee III of the International Congress of Jurists held in Rio de Janeiro in December 1962, which runs as follows:

At all times the lawyer should strive to be a visible example of the ideals of his profession—integrity, competence, courage and dedication to the service of his fellow men.

The International Commission of Jurists awaits with interest the outcome of these deliberations.

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## THE REHABILITATION OF STALIN'S VICTIMS IN CZECHOSLOVAKIA

The famous disclosures of Mr. Krushchev at the 20th and 22nd Congresses of the Communist Party of the Soviet Union continue to cause agonizing reappraisal of the trials that took place in the Soviet Union and its Eastern European associates. This process was first carried out on the grand scale in the Soviet Union itself and similar rehabilitations of the victims of Stalin's

terror have taken place in Bulgaria and Hungary. Now Czechoslovakia has followed suit. It is no coincidence that Czechoslovakia has taken a particularly long time to carry out the revision of the Stalinist trials of the past, and the reappraisal in that country has been particularly agonizing. From a doctrinal point of view the whole concept of Socialist Legality is at stake and from a purely political point of view the personal involvement of those who played a leading role at the time makes their present political position extremely delicate.

It is, of course, not easy to separate Socialist Legality from political doctrine or even practice. The Communist State operates on the basis that all organs of State power strive for the implementation of Marxist-Leninist principles, and the Judiciary, far from standing between Executive power and the individual by firm and impartial interpretation of the law, are required to advance and strengthen the power of the proletariat as the agent of social progress. The dominant organ in the constitutions of Communist countries emerges in fact as the Communist Party. And the Judiciary is only one of the branches of State power as directed by the Party. The convictions and sentences under the Stalinist regime simply reflect the will at the time of those emerging uppermost in the power struggle in Czechoslovakia, which in turn reflected the Stalinist line of the Soviet Union. The rehabilitation of Stalin's victims by the Supreme Court of Czechoslovakia carries through at the judicial level the process of de-Stalinization which proceeds apace at the political level. For an understanding of the current concept of Socialist Legality, which is clearly undergoing modification, it is essential to grasp the fact that the implementation of laws in the context of social change as expressed in Party policy still remains a basic tenet of Communist legal philosophy, and that the present direction of judicial decisions follows the line of Party policy just as surely as it did in the Stalinist era.

On August 22, 1963, *Rude Pravo*, the official newspaper of the Communist Party of Czechoslovakia, gave the following account:

Within the scope of efforts aimed at the complete liquidation of the consequences of the cult of personality in the life of the Czechoslovak Communist Party and the entire community, the Central Committee of the Czechoslovak Communist Party decided in 1962 to carry out a revision of the political trials of 1949/1954, re-examine the results of the investigations made in the past years and submit the results to the XIIth Party Congress for discussion.

A commission of the Party Central Committee was set up for this purpose, which together with the Procurator-General's Office and the Ministry

of the Interior has examined and checked all the accessible materials, carried out a number of interviews and talks to clarify all the facts and circumstances relating to that period.

This extensive and important work could not be completed by the time the XIIth Party Congress met. The Congress approved the course taken by the Party Central Committee and asked the new Central Committee to deal with and conclude within four months all the remaining cases of political trials from the period of the cult of personality.

On April 3 and 4, 1963, the Party Central Committee discussed and approved a report on the violation of Party principles and Socialist Legality during the period of the cult of personality and recommended the Procurator-General's Office and the Supreme Court to review the political trials of 1949/1954 and draw the necessary conclusions.

The Procurator-General's Office and the Supreme Court were strictly directed in their work by the valid criminal law and criminal procedure law, and all the facts of the original proceedings, held in a specially tense international situation, have been clarified on the basis of objectively collected evidence and dealt with in public hearings.

On the basis of the Procurator-General's Office proposals, the Supreme Court dealt within the prescribed time-limits with the individual criminal cases and arrived at the following conclusions.

The role of the Party in relation to the judicial rehabilitation is here clearly shown. *Rude Pravo* then gave a detailed list of the Court's findings of which the most noteworthy was the legal rehabilitation of Rudolf Slansky, who was convicted and executed for espionage and high treason with overtones of zionism, etc. The Slansky trial resulted in the execution of eleven men, eight of whom were Jews, on December 3, 1952. Slansky was the Secretary-General of the Czechoslovak Communist Party, and as such one of the most powerful men in Czechoslovakia. His rehabilitation means logically that his accusers were wrong, which in turn means that they were guilty of Stalinist crimes. It is this aspect of the Slansky case that has caused so much political anxiety for those who rose to power over his dead body. Quite apart from the question of fabricated evidence, one of the by-products of Socialist Legality is that the sheep of today may be the goats of tomorrow; a shift in party trends, such as Mr. Krushchev produced with his denunciation of Stalinist crimes, has actually brought this about.

Already in Czechoslovakia several of those deeply involved in the liquidation of Slansky and his associates had themselves fallen from grace. Thus, the Minister of National Defence, Alexei Cepicka, and the Minister of National Security, Ladislav Kopriva, had been expelled from the Party. Mr. Siroky, the Prime Minister, has been replaced, but the reason given is a compound of inefficiency, failure to follow Party directives and ill

health. Security Chiefs have been sentenced to imprisonment for fabricating evidence against Slansky and his associates: Colonel Karel Kostal was sentenced to seven years imprisonment and Colonel Antonin Prchal to six years. Both were sentenced to loss of civil rights. Two security officials were also sentenced for illegalities in the course of their investigations. In March 1963 the President of the Supreme Court was replaced at his own request in order that he might devote himself to legal research. He had been chief prosecutor at the Slansky trial. The one person deeply involved in the case who has so far not fallen victim to the consequences of Slansky's rehabilitation is President Novotny himself. In the very different past, President Novotny was proud to boast of his part in cleansing the Party of Slansky's anti-Leninist methods. In view of the important part claimed by President Novotny, and with good reason, the political alignment in Czechoslovakia still remains strikingly at variance with the dictates of Socialist Legality as understood at present.

The careful revision of the verdicts in the Stalinist trials deals only with the guilt of the accused of the offences charged. The Central Committee of the Czechoslovak Communist Party was, however, concerned also with the question whether their behaviour as Party members had been correct in the light of latter-day revisions. As *Rude Pravo* put it in its edition of August 22, 1963:

The Party investigation revealed that many of the previously unjustly condemned persons had also been unjustly expelled from the Party. For that reason, the plenary session of the Party Central Committee decided to restore their Party membership. On the other hand, it has been proved that some of them committed gross breaches of the organizational rules and principles of Party work. For that reason it was decided to confirm the expulsion from the Party in the case of Rudolf Slansky, Otto Sling, Karel Svab, Bedrich Reicin, Otto Fischl and Jarmila Taussigova. In some other cases Party conclusions have been drawn corresponding to the extent of their Party responsibility.

The edition of August 9, 1963, was more explicit in indicating what had gone wrong. After pointing out that "some parts of the security organs were placed above the Party", the article went on

If we ask, as we now do, how Socialist Legality could have been so extensively violated as it in fact was between 1949 and 1954, we must once again take into consideration the *entire* system of personality cult. Firstly, this system did not spring into being all of a sudden. And secondly, there existed in its gradual evolution certain junctures which are worth pondering. . . . One of these junctures was represented by the violation of the principle of collective discussion of all serious problems by responsible

Party organs. It seems that here we meet a kind of vicious circle in which the causes and the consequences gradually exchange places and imbue one another. The violation of the collective principle was one of the cardinal causes of the cult, just as it was its consequence...

A certain historical irony can be seen in that a considerable share in the violation of Leninist principles, in introducing administratively bureaucratic methods and in bossing people around, went first of all to certain individuals, such as Rudolf Slansky, who later were wrongly condemned. They were the typical protagonists of the cult and they were disseminating it actively in our Party, until in the end they themselves fell victim to its consequences. That is why they have been rehabilitated by the Court, because the indictment of high treason, espionage and counter-revolutionary intentions was fabricated by some security officials, but some of them have rightly not been rehabilitated in the Party sphere.

It would now appear that Slansky and those tried with him were wrongly convicted of Titoism, but retrospectively they are now condemned by the Party for Stalinism. This is the meaning of the partial rehabilitation; obviously they cannot now be judicially tried for Stalinist crimes. The political reappraisal has gone so far as to condemn no less a figure than the late President Gottwald, who is blamed for "permitting the violation of Leninist principles in the Party leadership, which was the reason why offences against the statutes and principles of the Party, which ought to have been dealt with inside the Party, were wrongly handed over to security organs, and why Socialist Legality was grossly violated in connection with the political trials". Stalinism sought the enemy within the Party and did so by means of trials apparently designed to terrorize.

Now that terrorism through the Security Police stands condemned and what is called "the cult of personality" has given way to what is now described as "collective leadership", the workings of Socialist Legality will show different characteristics in some respects. The political re-orientation towards "collective leadership" now is the prime mover in State power, including judicial decisions, which means that for purposes of the administration of justice the infallibility of those who wield power through the Security Police gives way to those who wield power through whatever the current processes may be. The "guarantee" of justice is still the Party line, now shaped along different lines from those of Stalin. As *Rude Pravo* puts it in the article of August 22, 1963,

strict observance and development of the Leninist norms in the life of the Party and the entire Socialist community of this country headed by the Czechoslovak Communist Party gives a firm guarantee that similar painful things will never happen again. Under the leadership of our Com-

munist Party, Socialist Democracy is being constantly expanded together with a further development of the rights and freedoms of the Socialist man constructing the Communism of tomorrow.

Modern Communist doctrine and practice may well provide for relaxation of restrictions on the rights and liberties of the citizen, but it can scarcely be said, as long as the Party line in a one-party State dominates the administration of justice, that these relaxations are based on anything stronger than current political trends. The Commission firmly believes that true legality can only be attained through the impartial administration of justice by judges who owe no allegiance to the Executive or to the Legislative branches of government.

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## **THE DOMINICAN REPUBLIC AND LATIN AMERICA**

Events in the Dominican Republic in the past twelve months cannot be treated in isolation from events in the rest of Latin America; their impact and significance have already been felt far beyond its boundaries. The overthrow by the military forces on September 25, 1963, of the first freely-elected Government the Dominican Republic has known since 1924 is not an incident that can be shrugged off as an example of Latin American political immaturity nor can it be used as support by those who preach that it is hopeless for democratic institutions to survive on that continent. It is, rather, a bitter lesson to be learned by all whose sincere desire is the fullest realization of the dignity of man, the achievement of which in the end rests today with those who have the courage to stand for their principles and be counted at a time when it is fashionable or advantageous to be indifferent.

The elections in the Dominican Republic in December 1962, which saw President Bosch win an overwhelming majority of freely cast votes, were an inspiration to the masses of people in Latin America. The conduct of the elections, the mass participation, the freedom to put different views, were a compliment to the durability of basic wisdom and deep conviction among the Dominican people, who, after thirty years of a brutal dictatorship, rejected the violent and oppressive impact on their spirit of the



crudities of totalitarian rule. This free election combined with the free choice of the Argentinian people in their elections of July 1963 to give fresh courage to the forces of liberal democracy in Latin America, but democracy has been tragically short-lived in the Dominican Republic.

In spite of the manifold difficulties faced by the new regime and the problems encountered in realizing the somewhat visionary election programme proposed by President Bosch, the first months of the new Government gave promise to a people, who knew only privation, of a greater respect for the rights of the individual and parallel with it a substantial improvement in the standard of living.

But the democratic "revolutionary evolution" was not to be. On September 25, 1963, the military forces conducted a coup d'état and on the following day set up a Government of the opposition parties which had refused earlier to join President Bosch's Government. The main reason given by the military for the overthrow of President Bosch is flimsy and crude: "the military had to intervene to put order into chaos and combat Communism". President Bosch had been accused, among other things, of being "soft" on Communists, of being vain, of being a bad administrator, of not possessing the flexibility of a good politician, of being unable to delegate authority, of being contemptuous of the urban élite, of being stubborn. More telling—and perhaps more to the point—was the accusation that he was planning to confiscate from the military, and others, their ill-gotten gains under Trujillo. Still another allegation heard was that President Bosch had alienated the military by refusing to agree to certain contracts for military equipment which apparently was not needed for the defence of the Dominican Republic but which would have reaped sizable commissions for certain military officers.

Many, perhaps all, charges levelled are true in one measure or another but the failures of President Bosch cannot rest on his shoulders alone. Some of these accusations are to his credit. Communism, quite contrary to the woolly approach of some so-called liberals, remains a threat from Cuba and elsewhere and has the same ultimate result, though for different reasons, as Trujillo's regime—the negation of human liberty. Bosch's statements on the nature of the Castro revolution—"The revolution failed in Cuba because it was sidetracked to Communism"—and the attacks on him that emerged just before the coup from the Mexican voice of Soviet Communism, *Politica*, indicate that he knew the threat posed by Communism but knew also that the

greatest breeding-ground for Communism was the misery and poverty of the people who had been exploited under the Trujillo regime. But certainly the "chaos" suffered by the Dominican Republic after the downfall of the Trujillo regime was due in part to the lack of institutions to counterbalance the oversized military forces, to a lack of foresight and courage on the part of the upper and middle classes, who did not dare to make decisions let alone express opinions, to the graft and corruption which became part of the traditions established by Trujillo, to the inability of those surrounding Bosch to work with a popular movement towards real reforms. Added to this were: a lack of skilled personnel, a movement from the Right which calculated on the creation of anarchy by the Communists which would "compel" a seizure of power by the armed forces, the mere tolerance of Bosch by the Left because it felt he was bound to lose and that the masses would go into the streets and provoke the military into desperate action, thus consolidating the Left under the aegis of the extremists. The liberal elements of society, the technicians, the business men, and the large landowners who failed to rally behind Bosch and his Government have all an equal responsibility for the crushing of democracy in the Dominican Republic.

The role of these groups was not always passive; it was not only their lack of support for the reforms of the Bosch Government, but also their direct connivance that destroyed democracy in the Dominican Republic, and in the end their part in the coup was perhaps greater than that of the military.

The opposition to President Bosch was well known. The military originally tried to prevent the elections from taking place but gave in because it was expected that he would lose. Threats to the new Government were in evidence in March and July 1963, when Señor Bosch confronted the leaders of a plot at San Isidro air base but, although he won his battles, he lost the war. He summarized the position in a broadcast commenting on the struggle with the military and perhaps laid the blame directly where it belonged:

The military people do not conspire, unless civilian politicians urge them to do so. A conspiracy has been under way, but the military personnel are not responsible for it. Those who want power at any cost in this country wanted to use military officers as a stepping stone to seize it.

He expanded on these thoughts in an article (*New Leader*, October 14, 1963) which, although addressed to a North American audience, has equal validity for Latin America, and for any other part of the world where democracy is understood and prized:

It is difficult for a citizen of the United States to understand the mentality of the oligarchical sectors of Latin America. Their solidarity and lust for power in order to hold on to privileges that are unknown today in most civilized countries of the world is beyond the comprehension of the average person in the U.S. Yet for these oligarchical groups even honest administration is an unforgivable sin, since they have always been accustomed to receiving illegal advantages through friends and relatives entrenched in government positions. Government for them is the vehicle through which privileges are distributed; but these privileges should be exclusively theirs.

The existence of these oligarchies would not represent a mortal danger for democracy in Latin America if they did not have at their disposal armed forces supplied by irresponsible military chieftains who have no political education and who, for that very reason, are incapable of realizing where they are leading their own people's destiny. In the majority of Latin American countries, the military chiefs represent the proverbial gun in the hands of a child.

The warning is not for the Dominican Republic alone, nor only for Latin America, with its ready examples of Honduras, Guatemala, Peru, Ecuador and Paraguay, among others; the threat to human liberties by this combination of forces is known only too well also in other parts of the world (e.g., Burma and Indonesia, where the military *is* business), and the *Bulletin* will devote increasing attention to this running sore.

Of equal significance is the role played by the lawyer in the Dominican Republic. His record during the Trujillo regime is not one of which he boasts; he was one of the first after the overthrow of Trujillo to press for not prosecuting those who had tortured and profited from the blessings of Trujillo. The hands of the lawyer and jurist were equally soiled and the masses held the *avogado* in disrepute. The Bar in the Dominican Republic was basically opposed to the election of Bosch and assumed, after Bosch's victory, a negative role. There was purely destructive criticism of the reforms proposed; and the Bar became an obstacle to the economic and social changes so critically necessary in the Dominican Republic if democracy was to succeed. When the coup occurred, the voice of the Bar as an organized group was not raised in protest. There were isolated voices among the lawyers, and some individuals protested vigorously: some were Communists; some were liberals with the courage of their convictions. It is not with pride that the lawyer in the Dominican Republic can point to his record in the last thirty-five years. It is with especial shame that he should look to his record over the last year.

The lawyer in the Dominican Republic is a case study of the lawyer today in many other parts of the world. He has come to be regarded as a purely negative being. His task, by the very nature

of his calling, casts him in the role of preserving rather than revolutionizing. But he cannot stand by as a spectator; he must join in the flow of history if he is to fulfil his proper functions in society. He must not become an obstacle to reforms, lest he truly deserve the label given to him by Lenin: "The lawyer is the scum of history."

The junta in power *at the moment* in the Dominican Republic has promised a constitutional convention towards the end of 1964 and other developments which would eventually lead to elections in June or July 1965. It is hoped that the following statement by President Bosch in March 1963 will be taken to heart, not only by those in power, but also by the lawyers in whose hands rests the defence, preservation and strengthening of human rights:

We prefer to be destroyed for maintaining the law, justice, and right, than staying in power by abusing or distorting justice and law, and misusing the law.

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## THE SITUATION IN HAITI

For some time before the tense relations which developed several months ago between the Dominican Republic and the Republic of Haiti focussed attention on Haiti, the International Commission of Jurists had been following with concern the policies of the Haitian Government. From the evidence and first hand documentation collected, it emerged that President François Duvalier was imposing real tyranny. But before reaching a conclusion on this regime, the Commission wished to check the documentation by making a direct investigation in the country itself and the President of the Commission, Mr. Vivian Bose, several times attempted to obtain permission from the Government of Haiti to send a group of observers. President Duvalier did not see fit to reply to any of the three communications sent to him for this purpose and the Commission therefore considers itself free to make public such information as has come to its notice.

### The Rise to Power of Dr. Duvalier

After the troubled period following the end of the Presidency of Paul Magloire in December 1956, Dr. François Duvalier came to power with the help of the army in October 1957. The Constitu-

tion of November 25, 1950, which was still in force, provided for a division of power between a President elected by universe suffrage for six years and a Legislature consisting of two Houses—the National Assembly and the Senate. In December 1957, the two Houses passed a new Constitution on the initiative of President Duvalier and this Constitution retained the Presidency and the two Legislative Assemblies. This Constitution itself provided for a uni-cameral Legislature by April 1963, but at the same time it provided that Deputies and Senators who had been elected in September 1957 would remain in office until April 30, 1963. However on April 7, 1961, President Duvalier on his own authority made a Decree terminating the term of office of Deputies and Senators and providing for elections then and there for the new Legislative Assembly.

Elections for this House took place at the end of April, but before that date President Duvalier had more or less eliminated opposition parties, and the Government party, the Democratic Party, was the only one offering candidates for the 58 seats. Thus the elections to the Legislative Assembly were a mere formality but Dr. Duvalier managed to use this as a tacit re-election of himself by the electors. Above the name of the candidate on the voting paper he had printed his own name; when the votes had been counted the Government announced that the fact that the President's name appeared on each and every voting paper was to be interpreted as an expression of the wish of the electors to re-elect him for a further period of six years, this period to run from May 1963, when his first term of office was due to expire. As that date approached many foreign observers wondered whether so brazen a violation of the Constitution would arouse an upsurge of resentment bringing the downfall of the regime. But President Duvalier had of course been able during the previous six years to stifle the slightest sign of opposition and he was able calmly to announce that he accepted the decision of the electors that he stayed in office for a further six years.

The Constitution of 1957 is, like that of 1950, modelled on genuine democracy and contains a declaration of individual rights, guarantees respect for civil liberties and sets up a judicious balance of powers; but a state of emergency has been continuously in force since 1958, suspending the constitutional guarantees, and the President has obtained from successive Legislatures an almost total delegation of legislative power. The fact of the matter is that the Government deliberately ignores individual freedoms, has reduced the courts to a state of absolute submission and has given the police almost unlimited power.

## Individual Rights

As far as individual freedoms are concerned, the fate of the most basic of all rights is dealt with later in connection with the police; these are the right of every individual to his life, his personal safety and his freedom.

Under Article 13 of the Universal Declaration of Human Rights freedom of movement means that "every person has the right to leave any country, including his own, and to return to his country" but a Haitian national may not leave Haiti without an exit visa and once abroad may not return without an entry visa. This position is all the more paradoxical in that nationals of many foreign countries are free to enter and leave Haiti without visas. The system is enforced with such severity that it is almost impossible for a Haitian to visit foreign countries. Freedom of conscience and of religion is officially permitted and President Duvalier puts on a show of extreme deference to the Roman Catholic Church, to which almost all the population belongs. But with no compunction he ordered the deportation in the most humiliating way of first Mgr. François Poirier, Archbishop of Port-au-Prince, and Mgr. Robert, both Frenchmen, and then Mgr. Rémy Augustin, the first Haitian bishop, and several other Catholic priests. The Catholic newspaper *La Phalange*, which was the largest daily newspaper in the country, was seized in January 1961 and the English priest who edited it was deported. These steps led the Holy See to excommunicate the President, who nevertheless continues to appear at important religious ceremonies.

Freedom of the press is almost non-existent. Without recourse to legal procedures, the Government uses force to stop publication of periodicals. The offices of the *Patriota*, *Indépendance*, *Haiti Miroir* and *Mopisme intégral* were sacked by the police and several of their staff were subjected to violence and arrested. The editor of a woman's weekly, *Escale*, Mme Hakim-Rimpel, was taken from her home in the night by the police, then tortured and left for dead on the outskirts of the city.

Trade union freedom disappeared when President Duvalier came to power. The National Union of Haitian workers, which was the largest association of trade unions, was disbanded and its files were confiscated. Of the two main trade union leaders one, Dacius Benoit, was arrested, tortured and put to death; the other, Lyderic Bonaventure, miraculously escaped an attempt on his life and now lives in exile in New York.

The political rights written into the Constitution are practically meaningless, with the opposition completely eliminated, with the right to vote only for Government candidates and with the elected Assembly stripped of its powers, which are now exercised by the President.

### Judiciary

The judicial system in Haiti affords no possibility of limiting in the slightest the absolute power of the Government. There is a *Cour de cassation*, four *cours d'appel*, eleven courts of first instance and several dozen inferior courts. The sole qualification required to be a judge is a law degree; this is of poor standing. There are no entrance examinations or competitions, and judges are appointed by the President at his discretion. Promotion in the judicial hierarchy also depends on the President's discretion, with professional bodies playing no part at all. In the last few years, the Government has introduced the practice of having a judge sign an undated letter of resignation on his appointment, this giving greater power over the Judiciary. When he came to power, President Duvalier carried out a massive purge of the Judiciary. Distinguished judges such as Théodore Nicoleau and Emile Saint-Clair, Counsellors at the *Cour de cassation*, were dismissed for showing too much independence. The *Cour de cassation* is at present composed so as not to stand in the way of the Government. Its President has publicly and officially stated that the "re-election" of Dr. Duvalier in April 1961 was entirely in accordance with the Constitution. The same year the *Cour de cassation* set aside at the Government's instance the election of the *bâtonnier* of the *Ordre des Avocats* of Port-au-Prince, a man respected by his colleagues for his integrity and firmness. What happened to lawyers who refused to accept quietly the arbitrary powers of the Government is described later.

### The Police

The key-stone of the Haitian political system is the police. Dr. Duvalier came to power through the support of the army. Having learned this lesson, he then proceeded to disband the army systematically, for the army might threaten the authority which he intended to exercise alone. He reduced the army, dismissed successive commanders-in-chief, closed the military academy and dismissed a large number of officers of all ranks. For the most

part, money and supplies are allocated not to the army but to the police.

The most feared section of the police is a kind of secret political police who wear no uniform; this consists of a force of several thousand men who figure in the national budget in purely fictitious posts and who are directly responsible to the President through ties of mutual and absolute complicity and dependence. Members of this force are the famous *tontons macoutes*, largely recruited from the criminal element in the cities. It is estimated by Haitians that this force costs about 15 million dollars per year, that is, almost half of the national budget, and it is also estimated that the American equipment devoted to this police force is in the order of one million dollars worth, but it is not possible to verify these figures, which seem to be exaggerated.

Police methods are simple; there is no need for warrants. The *tontons macoutes* have *carte blanche* to arrest, imprison, interrogate, torture and put to death any citizen without even an order in writing. They act not only on the orders of the Government but also on their own initiative, which means that they wield discretionary power over the lives and liberties of their fellow citizens. Those who are unfortunate enough to be picked out as opponents of the regime or are merely under suspicion disappear without trace. It is obviously impossible to give exact figures of such cases but it is estimated that the figure runs into several hundred. Several important political figures have thus been put to death in summary fashion. By way of example, there is the case of M. Clement Jumelle who ran for the Presidency in 1957 against Dr. Duvalier. He was obliged to seek diplomatic sanctuary in the Cuban Embassy to escape from the police. His health was so poor that he died shortly afterwards in the Embassy. On the day of the funeral the police broke up the funeral procession, seized the body and buried it secretly. Two of his brothers, M. Ducas and M. Charles Jumelle were themselves machine-gunned and killed by the militia on August 30, 1958. The former had been Minister of the Interior and of Justice and was a well-known lawyer. The fourth brother, Gaston Jumelle, and his four sisters were arrested and spent several months in prison. In October 1959 six Senators were dismissed. Five of them were successful in taking refuge in the Mexican Embassy and then in leaving the country. The sixth, M. Yvon Emmanuel Moreau, was arrested and simply disappeared.

The Bar of Port-au-Prince was very severely hit. Among the victims of the militia and the *tontons macoutes* were M. Emile Cauvin, former *bâtonnier* and considered to be the leading lawyer



in Port-au-Prince, arrested at his home in 1961 and never seen again; M. Emile Noël, killed by the police; M. Joseph Pierre Victor, who disappeared the day after he had appeared in court for the Bank of Colombia against a member of the militia. To these, one can add as either having been killed or having disappeared after their arrest, Dr. Georges Rigaud, Dr. Watson Telson, ex-Senator Frank Legendre, Messrs. Antoine Templier, Yvon Martin, Louis Charles, Anthony Roland, Antoine Marcel, Télémaque Guerrier, Augustin Clitandre, Francisque Joseph, Luc André, and many others. Then again, there is the poet Jacques Stephen Alexis, arrested in April 1961, of whom there is no news since then and Eric Brière, seventeen years old, who died under torture by the *tontons macoutes* inside the President's palace. At the beginning of 1961 some twenty young people were arrested for having daubed on walls inscriptions which were considered subversive. Two or three weeks after their arrest it was learned that eight of them had been put to death in prison and there is no news of the others.

Reference should also be made to the cases of those who were arrested without cause, imprisoned, ill-treated or tortured and who were released only after several months in custody. Many of them were simply paying for having accidentally bumped into a militia man in a crowd, or for having overtaken the car of an officer of police. Many lawyers have also spent several weeks or months in prison for being too independent. Some of them are marked for life by torture. The terrible conditions in which "suspects" are kept should also be mentioned: the police have their own prisons, which are free from outside control. Lastly, there are those who have been deported and those who had to flee for their safety. There is, for example, Senator Jean David, who in June 1959 asked indiscreet questions in the Senate on the handling of public funds. He was at once arrested, taken to the airport by a guard of twenty armed militia men and placed aboard the first aircraft leaving without even being able to see his family. In September 1959 Senators Jean Bélizaire, Luc Stéphen, Jules Larrieux and Thomas Desulme were dismissed. Sensing danger, they asked for asylum in the Mexican Embassy, where they stayed for four months before being allowed to leave the country. Distinguished lawyers who also fled the country include M. Emile Saint Lot, former Dean of the Law Faculty, M. Luc Fouché, M. Alphonse Esmangert and M. Joseph Dejeans, former Ambassador in London.

## Extortion

Since 1954, Haiti has received 53 million dollars in financial aid from the United States, and from the United Nations 15 million dollars in gifts and loans. Despite this aid, considerable in relation to an annual budget in the order of 28 million dollars, there is a deficit economy and the standard of living continues to fall. The gross national income per year is 75 dollars per person, one of the lowest in the world. President Duvalier has, however, managed to build up a sizable private fortune and here again he has used his faithful police for this purpose. He created an organization called "Movement for National Reconstruction" as chief of which he appointed Luckner Cambronne, of the *tontons macoutes*. This M.N.R. is supposed to administer a special fund made up of voluntary contributions for financing public works. A major undertaking was the building of a model estate outside Port au Prince for the housing of the working class. The estate has already been given a name, inevitably, Duvalierville; but building was barely begun and for nearly two years no further work has been done. The main object is clearly to fill the coffers of the M.N.R. and Luckner Cambronne and his men are completely free to use their own methods for obtaining voluntary contributions. They demand taxes as they see fit from business men and store-owners, who are regularly visited by armed police acting as collectors of this extraordinary tax. The Consul of one European country had his consular status withdrawn when he refused to make a contribution of 5,000 dollars. A group of Italian business men were recently summoned to police headquarters, where they were asked to pay 10,000 dollars. The M.N.R. has set up turnpike posts on certain roads and even levies taxes on voodoo rites. It need scarcely be said that the Government is most reticent on the subject of where this money goes. No-one has yet seen these "public works" for which it is supposed to pay.

In the world today there are many authoritarian regimes. Many of them have at least the merit of being based on an ideology, but the tyranny that oppresses Haiti has not even this saving grace. A few men have come to power by force and stayed in power through terror. They seem to have only one aim, to bleed for their own gain one of the most wretched countries in the world.

The foregoing is a shortened version of the Press Statement issued by the Commission on August 15, 1963. In that statement further information was requested on the situation in Haiti, and it was stressed that the Commission had not been permitted to

verify the facts by an on the spot inquiry. Since August 15, through the co-operation of a number of people anxious to arrive at the truth, a number of errors of detail in the Press Statement came to light. Where these matters are dealt with in this article corrections have been made. The most important were that it was not made clear in the original statement that President Duvalier flouted the Constitution in 1961, not by his setting up of a unicameral Legislature, which was already provided for, but by prematurely terminating the term of office of the Deputies and Senators; the figures given for the cost of the *tontons macoutes* and their equipment must be viewed with considerable reserve, since their armament does not evidence one million dollars worth of American arms; and it is clear that Clement Jumelle died of natural causes and not through the ministrations of the *tontons macoutes*.

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## A GAIN AND A LOSS IN NIGERIA

On October 1, 1960, Nigeria became an independent country within the British Commonwealth and in the same year the Constitution of the newly independent State was enacted. This Constitution contained a number of provisions of considerable interest, some of which were dealt with by Dr. T. O. Elias in the *Journal of the International Commission of Jurists* Vol. II, No. 2 (1960), pp. 30-46, in an article entitled "The New Constitution of Nigeria and the Protection of Human Rights and Fundamental Freedoms". Dr. Elias is now Attorney-General and Minister of Justice of the Federation of Nigeria, which became a Republic, still within the British Commonwealth, on October 1, 1963. Nigeria is in many respects the litmus-paper of the Rule of Law in Africa for it is in this country that the most determined efforts have been made to retain democratic institutions without recourse to the all too familiar mechanism of the one-party State and preventive detention. The Commission recalls with pleasure and gratitude that Nigeria was the host country for the Commission's African Conference on the Rule of Law in January 1961, and that Dr. Elias acted as General Rapporteur.

## A Gain

With the establishment of a Republic in Nigeria, the new Constitution of the Federal Republic came into effect and designated as the Republic's first President Dr. Nnamdi Azikiwe, the former Governor-General. The new Constitution, like the former, contains a chapter dealing with fundamental rights. This chapter in the old Constitution was one to which Nigeria could point with justified pride, and it is with profound satisfaction that the Commission notes that the Preventive Detention Bill and the proposed amendment to the Constitution which would have given Parliament power to enact the Bill have, for the time being at least, been shelved. After a two-day Conference of the Prime Ministers of the Nigerian Regions and party leaders, it was announced in Lagos on July 26, 1963, that the Conference had deferred consideration of the proposed preventive detention powers but it was added:

There was unanimity that the security of the country must be guaranteed by all appropriate measures for the maintenance of law and order and good government with due regard for the observance of the fundamental rights entrenched in our Constitution.

Strong opposition had in fact been voiced against the proposed powers and, moreover, was voiced through a free press, some sections of which normally support the Government. *The West African Pilot*, which does not, was of the opinion that if there were new offences not covered by existing legislation amendment of the criminal code was the proper solution. The *Pilot* went on to point out that preventive detention and a one-party system of government were inseparable bedfellows. This is generally the case, especially in Africa, but it should be noted that India has powers of preventive detention, whilst political parties may exist freely.

Whether the objection to preventive detention in Nigeria sprang from firm adherence to the Rule of Law as a concept to be cherished or whether it was born of the deep-seated anxiety that no one Region should gain power over the whole country is not easy to say. The diversity of Nigeria's peoples, ethnically, linguistically, culturally and in matters of religion, was a substantial factor in the original decision to provide for a Federation, and it is important to note that although the Northern Region is numerically stronger than the each of the other Regions, and might therefore attain ascendancy in a Legislature based on the size of the peoples of constituent Regions, each Region is equally repre-

sented in the Senate (the Upper House), and in this way no one Region can obtain ascendancy over the other as long as the Senate's concurrence is required, as it is for Constitutional amendment. To remove the safeguards of the entrenched fundamental rights from their present position, where a Constitutional amendment would be necessary, to the general competence of the Legislature would drastically weaken the protection of fundamental rights in this case, since the Senate could not veto for longer than six months a measure approved and re-approved by the House of Representatives.

The shelving of this proposal is all the more to be commended in that Nigeria has recently carried out trials for serious political offences, in which two prominent Nigerian opposition leaders, Chief Awolowo and Chief Enahoro, were sentenced to terms of imprisonment of ten and fifteen years respectively. Whether or not emergency powers may be exercised, a vital matter for a political opposition, depends on the wishes of Parliament and not on the discretion of the Executive. The provisions of the Nigerian Constitution of 1960, s. 65, are worthy of citation in full:

(1) Parliament may at any time make such laws for Nigeria or any part thereof with respect to matters not included in the Legislative Lists as may appear to Parliament to be necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency.

(2) Any provisions of law enacted in pursuance of this section shall have effect only during a period of emergency.

(3) In this section "period of emergency" means any period during which

(a) the Federation is at war;

(b) there is in force a resolution passed by each House of Parliament declaring that a state of public emergency exists; or

(c) there is in force a resolution of each House of Parliament supported by the votes of not less than two-thirds of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion.

(4) A resolution passed by a House of Parliament for the purposes of this section shall remain in force for twelve months or such shorter period as may be specified therein:

Provided that any such resolution may be revoked at any time or may be extended from time to time for a further period not exceeding twelve months by resolution passed in like manner.

Power to provide for preventive detention is not within the powers of the Legislature, as being a fundamental right subject

only to Constitutional amendment or the powers in s. 65. For the time being at least these safeguards are to be retained. It is considered that the Constitution strikes a proper balance in this respect between the security of the State and the freedom of the individual, and the Commission welcomes the decision not to take away these safeguards.

### A Loss

Another salutary feature of the 1960 Constitution was the independence of the Judiciary. In a Federal State with entrenched provisions in its Constitution a great responsibility rests on the Judiciary. As Dr. Odumosu observes in his book, *The Nigerian Constitution: History and Development* (1963) at p. 251:

The Judiciary is the "watch-dog" of the Constitution and the constitutionality of any law passed by any legislature can be tested before the court. Without an independent judiciary and the provision of legal remedies fundamental rights in Nigeria would have been a sham ...

The 1960 Constitution contained excellent provisions to safeguard the independence of the Judiciary. Apart from the Chief Justice of the Federation (and we are proud to point out that he is a Member of the International Commission of Jurists), all Federal Justices were appointed by the Governor-General on the recommendation of the Judicial Service Commission of the Federation, which consisted of the Chief Justice of the Federation, who was Chairman, the Chief Justice of each territory, the Chairman of the Public Service Commission of the Federation and one other member appointed by the Governor-General on the advice of the Prime Minister, such member having been a judge of a Superior Court of civil and criminal jurisdiction in the Commonwealth. There were strict limitations in both substance and procedure on the removal of the Federal Judiciary. The Judicial Service Commission seemed to be an excellent formal safeguard against political influence on appointments to the Judiciary. Where experience shows that in the absence of such formal provisions the practice is nevertheless scrupulously observed of disregarding political considerations, it is not necessary to enact as law such a practice, but it is difficult to understand why, when such a provision has been enacted, it should be considered desirable to drop it from the new Constitution. Appointments to the Federal Judiciary are now to be made by the President on the advice of the Prime Minister, thereby opening up the way to political appointments. It is not suggested that the present

Prime Minister of Nigeria envisages political appointments to the Bench, but Constitutional provisions are to guard against what might happen rather than what is happening. It seems a retrograde step to remove the question of judicial appointments into what is unquestionably the political domain, however correctly political power may be exercised in this respect. The provisions relating to the removal of judges still afford a satisfactory measure of independence from political interference by the requisite of a two-thirds majority of all members of each House of Parliament for the removal of a judge.

Nigerian judicial institutions have recently been subjected to severe stresses by the treasonable felony charges against Chief Awolowo and Chief Enahoro. Trials on charges arising from political activities, even when allegedly subversive, are bound to cause political controversy, but few have doubted the integrity and impartiality of the Nigerian judges presiding at these trials, whatever the political background may be. Appeals have been lodged in both cases, and there is no doubt that the application of the law by the Nigerian Judiciary has been and will be scrupulously fair, whether or not the appeals are successful.

The Nigerian Judiciary and the machinery of the law in Nigeria have stood the test in a way that is rare in contemporary Africa, in that the authors of alleged political subversion were before ordinary courts charged with ordinary crimes before they could be deprived of their liberty. It is heartening to see that preventive detention has not yet wormed its way into Nigeria, but at the same time one would have wished to see the retention of the admirable machinery for judicial appointments.

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## PRESS CURBS IN PAKISTAN

Under martial law the press of Pakistan was subject to certain sanctions. But even after martial law was ended other less ostensible but equally effective weapons were used to curb the press, the most powerful of these being the withdrawal of official advertising, which could be a grave blow to newspapers in a country where circulations are small.

Not satisfied with indirect forms of control, the Government decided upon legislation to control journalism which would have

the result of compelling newspapers to toe the Government line under pain of losing publishing rights or of punishment for publishing views unfavourable to the Government.

### **The Press and Publications (Amendment) Ordinances**

On September 2, 1963, the Provincial Governments of West and East Pakistan simultaneously announced amendments to the Press and Publications Ordinance 1960, which amendments, the Governments declared, were directed towards making the press conform to "recognized principles of journalism and patriotism". The Ordinance contained certain major amendments to the Ordinance of 1960.

The amending Ordinance prohibited the printing or publishing of proceedings of the National and Provincial Assemblies unless the publication was officially authorized by the Speaker of the Assembly concerned or by an officer appointed in this behalf by the Speaker. In like manner the Ordinance prohibited the printing and publishing of (a) proceedings of the High Court without an authorization from the Chief Justice and (b) proceedings of a court of law or other judicial or quasi-judicial body or tribunal without an authorization from the presiding officer concerned or a person appointed in this behalf by such officer.

The authorizing authority in each case was further empowered to make an order directing any printer, publisher or editor to print or publish verbatim the entire authorized version of any proceedings. A similar obligation to print and publish in full was imposed in the case of all official press notes and handouts issued by the Central Government or any Provincial Government.

Every editor, printer, publisher or other person contravening the new provisions was to be liable to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand rupees<sup>1</sup> or to both. Any publishing house or newspaper contravening the provisions could be warned or ordered to suspend or stop publication.

The amending legislation also empowered the Government, whenever in its opinion it was necessary to do so, to appoint a Commission for the purpose of inquiring into the financial and administrative affairs of a particular newspaper or of newspapers generally. The primary object of this provision would appear to be to discover the sources from which newspapers receive financial

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<sup>1</sup> One rupee equals £0/1/6 or U.S. \$0.21.



support and to ascertain the extent to which such sources of support are pro- or anti-Government, local or foreign. The Chairman of the Commission could make an order issuing an ad interim injunction (as the interim injunction is called in Pakistan) appointing a person or persons to take possession of a printing press or a newspaper in respect of which an enquiry was being held. Orders issuing an ad interim injunction were not to be subject to any kind of appeal. Appeals against other orders of the Government made under this amending legislation could be brought before a Tribunal consisting of three persons and the Chairman was to be a retired Supreme or High Court Judge. Of the remaining two one would be a Government servant and the other a representative of working journalists or editors, but nominated by the Government. A decision of this Tribunal could not be called in question in any court.

There was sharp opposition to the new press curbs from the moment of their promulgation. The Karachi Journalists' Union lost no time in passing a resolution calling upon the Government to withdraw the laws. On September 9, the day on which journalists observed a nation-wide protest strike, the East Pakistan Union of Journalists issued a stirring appeal demanding the repeal of the "repressive and retrograde laws". The appeal made, *inter alia*, the following comment: "There can be no democracy without a free press. There can be no free people without democracy. The cause of a free press is the cause of democracy... This has taken away from us our fundamental rights, the rights to information and education".

The press curbs were opposed not only by journalists but by other important and influential sections of the community. Politicians, trade unionists, lawyers and students alike joined in condemning them. The Dacca Bar Association described the curbs as "a fatal attack on democracy calculated to deprive the citizens of their inviolable and inalienable right of free expression of their thought and belief". Consequent on these protests the Governors of West and East Pakistan, acting on the President's recommendation, suspended the operation of the new restrictions for one month to give Pakistani journalists time to make "constructive suggestions".

On September 21 a joint meeting of the Council of Pakistan Newspaper Editors (CPNE), the All-Pakistan Newspapers Society (APNS) and the Pakistan Federal Union of Journalists (PFUJ) was held in Karachi and a twelve-member Committee representing all three bodies was appointed. It was resolved that the Committee

explore forthwith all possible means of getting the Ordinance repealed. The Committee had a series of meetings with Ministers and officials of the Central and Provincial Governments and finally met the President himself. In the light of the discussions the President recommended to the Provincial Governments certain changes in the Ordinance.

The press-Government talks resulted in a simultaneous announcement by the Provincial Governments on October 9 that the Press and Publications (Amendment) Ordinance of September had been replaced in each Province by a new one.

The October amendments considerably eased the press curbs imposed by the September legislation, but nevertheless the relaxations were inadequate when viewed from the standpoint of fundamental human rights. The President of the Lahore Civil Liberties Union described the relaxation of the restrictions as inadequate and falling short of the people's expectations.

The October legislation did away with the provisions relating to authorization of reports. It was no longer obligatory to publish in their entirety Government handouts or press notes issued by the Government, but no account of Assembly or judicial proceedings could contain any matter in respect of which the Speaker or the presiding officer as the case may be gave a direction forbidding publication. The right to appoint Commissions with wide powers of inquiry was restricted, but the Government could still appoint a Commission to inquire into whether funds for newspapers were being raised through extortion, blackmail or any deceitful means.

Perhaps the most noteworthy feature of the October legislation is a section which provides that no penal order against a printing press or a newspaper shall be made except after giving the person concerned an opportunity of being heard by the officer or authority making the order. This provision applies also to orders requiring security to be furnished or directing the forfeiture of a press.

The October modifications provided for an appeal against the interim injunctions earlier referred to which could be lodged with the Tribunal of Appeal. As regards the Tribunal itself, the modifications provided that the journalists' representative on the Tribunal be nominated by the Chairman of the Tribunal from amongst a panel selected by organizations of journalists and editors and not nominated by the Government. But the right of an aggrieved party to have recourse to the ordinary courts of the land remained suspended.

This article sets out only the key provisions of the September and October legislation, which are sufficient to enable one to

appreciate the nature and effect of the original restrictions and their subsequent modification. The boldness and vigour of the opposition to the original restrictions must be commended, and it is indeed gratifying to note that the democratic means adopted to oppose the restrictive provisions of the September legislation met with some success.

Whilst certain press curbs are justifiable in the public interest, for example on obscene or defamatory matter, or on communications affecting public security, freedom to report parliamentary and court proceedings is a vital part of the democratic process. The October modifications remain only modifications and are not a removal of all the objectionable press restrictions.

### Subsequent Measures

Recent Government attitudes and actions vis-à-vis the press serve to indicate that notwithstanding the October modifications, the sword of Damocles still hangs over the press in Pakistan; for instance, the Government's determination to implement its decision to cancel the licences of foreign news agencies operating in Pakistan and the banning of the publication of the daily *Kohistan* for a period of two months, coupled with the arrest of three of its editors. The official order banning the publication of this newspaper for a period states that certain items of news relating to student agitation appearing in *Kohistan* on November 6, 1963, were "factually incorrect and alarming". The press note issued by the Government of West Pakistan relating to the ban states that the *Kohistan* version of the agitation "is a malicious attempt to incite the students and to raise doubts about the veracity of the press note issued by the Government". The reason for the ban given here suggests that the decision to cancel the licences of foreign news agencies was actuated *inter alia* by a desire to eliminate as far as possible the publication of news items in conflict with Government press notes and handouts.

Whatever the facts may be, one can find no justification for the banning of newspapers in this summary fashion. Indeed, there can be no restoration of the Rule of Law in the field of freedom of expression unless and until all objectionable restrictions and governmental controls are completely removed.

## THE HUNGARIAN MINORITY PROBLEM IN RUMANIA

From the eleventh century until 1918, Transylvania, a region of some 23,300 square miles, or some 40,700 if the larger area including Maramures, Crisana and the Banat is included, came in one way or another under Hungarian rule. In 1918, it was ceded to Rumania as a region then consisting of some five and a quarter million, of whom half a million were German, one and a half million Magyar and the remainder Rumanian. There is a bitter and bloody history of national tensions. The region now comprises one of the most important national and linguistic minorities in Eastern Europe and provides an absorbing case study on the treatment of minorities in a Communist People's Republic. The total Hungarian population of Rumania, according to the 1956 census, was approximately 9.1%.

The detection of discrimination in most countries is a difficult process which does not appear from the *ipsissima verba* of legislation and it is difficult to pin down administrative practice as discriminatory unless the group discriminated against is expressly designated. It is usually a simpler process to examine legislation and practice to see what is missing from the point of view of the rights of a group in question. In a Communist State the denial of freedom to any particular group must be examined in the context of the entire social and political outlook of the State, since many rights and freedoms as understood in liberal democracies are denied to the whole population. If it be that a particular group resists the process of socialization more vigorously than another, it is not easy to see the line between discrimination against that group and the employment of greater force to deal with greater resistance. These facets of a Communist State have been much in evidence in the past and it is against this background that the minority question in Transylvania has to be considered. The experience of the Chinese People's Republic, with the peculiar blend of Communism and chauvinism on the part of the ethnic majority, viz, the Great Hans, towards the Tibetans was, for example, admitted by the Chinese themselves. Again, discrimination exists in the Communist ideology itself, but is part of the general doctrine that social progress is to be achieved through the strengthening of the proletariat, which requires for its accom-

plishment the strengthening of class-consciousness among the people. This has nothing to do with discrimination against a national, ethnic, religious or linguistic group.

A further obstacle to a fully documented study of minority problems in Transylvania is the absence of sufficient reliable data. In a Communist society the public ventilation of grievances at the political level is severely restricted and silence extends also to minorities with a grievance.

### **The Peace Treaty and the Constitution of 1952**

The Peace Treaty concluded between the Allied Powers and Rumania in 1947, stipulates in Part II (Political Clauses), Section 1, Art. 3 that

(1) Rumania shall take the steps necessary to secure to all persons under Rumanian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.

(2) Rumania further undertakes that the laws in force in Rumania shall not, either in their content or in their application, discriminate or entail any discrimination between persons of Rumanian nationality on the ground of their race, sex, language or religion, whether in reference to their persons, property, business, professional or financial interests, status, political or civil rights or any other matter.

Thus, the wording of the Peace Treaty clearly excludes discrimination against minorities and it is of little consequence whether the Hungarians in Transylvania are to be regarded as an ethnic, i.e., racial group, since their language alone is sufficient to bring them within this protection.

Particularly striking, both with reference to the Peace Treaty and in comparison with the Constitutions of most other People's Democracies, are the provisions of Article 82 of the Rumanian Constitution of 1952. This Article provides that all the national groups in the territory of the Rumanian People's Republic are entitled to use their respective languages and to have at all levels establishments of public education in which instruction is given in their mother tongue and further provides that the spoken and written language used by administrative and judicial authorities in districts where a national group other than Rumanian is in the majority should be the language of this national group; civil servants in such areas should be appointed from among members of this majority group, or if from other groups, it is

necessary that they speak the language of the majority. Article 84 follows the lines of the Soviet Constitution in recognizing not only the separation of Church and State but also the exclusion of the Church from education. No religious community may have its own educational establishments, but theological schools may train people to carry out their part in religious services. In two other Articles the Constitution deals with the rights of national minorities. In Article 17, which lists the duties of the Rumanian State, there is a duty owed by the State to protect national minorities and especially their culture, which ought to be socialistic in its content and national in its form. Article 81 goes into the realm of enforceable legal sanctions protecting minorities and within the general framework of provisions concerning equality before the law it is provided that any kind of chauvinistic persecution of non-Rumanian national minorities or any kind of propaganda calculated to bring about such persecution is a criminal offence.

It should be noted that only the cultural rights of minorities are mentioned and Article 17 designates the Rumanian State as unitary, independent and sovereign, thus excluding any form of federation, such as, e.g., the Soviet Union or the United States. In this respect, restricting minority rights to cultural matters and protection from persecution shows little advance from the position of national minorities in the former Kingdom of Rumania between the two World Wars. How far the cultural rights of the large Hungarian minority in Transylvania are respected will now be considered.

### **Administrative Measures**

Foremost among these is the redemarcation of regions and cities, thereby fragmenting the Hungarian population in such a way as either to reduce their majority or to convert it into a minority. The Hungarian Autonomous Province was created in 1952 by Articles 19 and 20 of the Constitution of that year. The total population of this Province was, according to the 1956 census, composed of 77.3% Hungarians, 20.1% Rumanians, 0.4% Germans, 0.4% Jews and 1.5% Gypsies. In December 1960 a governmental decree modified the boundaries of the Hungarian Autonomous Province. Its whole southern part, which was predominantly Hungarian, was attached to Stalin Province, which has now of course been renamed and is known as Brasova. In place of this, several districts with an overwhelming Rumanian

majority were joined to it from the southwest. This boundary adjustment reduced the Hungarian population by approximately 82,000 and increased the Rumanian population by approximately 131,000 out of a total population of just over half a million. The official reasons were to facilitate communications and administration, but the new name given to the freshly demarcated province echoes the real fact of the situation, viz., the substantial dilution of its Hungarian character. The Province was no longer called the Hungarian Autonomous Province but the Mures-Hungarian Autonomous Province, after the River Mures.

The process of dilution was carried still further, though by less obvious methods, by the drive towards industrialization. The region adjacent to Hungary already had the highest rate of industrialization in the country but the programme aimed at an overall stepping up, for the border regions of Transylvania as well as for the rest of the country. In a Socialist economy not only does industrialization mean the growth of the urban proletariat, but it also means the creation of a large industrial bureaucracy. In the process of stepping up the industrialization of industrial Transylvania, large numbers of civil servants, administrative staff, industrial bureaucrats and workers of Rumanian nationality swelled the Rumanian population in the regions neighbouring Hungary. In this case it is difficult to speak of a failure to respect the rights of the Hungarian minority. Industrialization with its consequent internal migration is a common enough feature of many societies. Where, however, there is an influx of a minority group and an exodus of a majority group the consequences for the culture of the majority group are important enough if the matter stops there. Many young Hungarians are obliged to leave Transylvania in search of work in the territories to the south and south-east of Transylvania, which are known as Old Rumania. And, it should be observed, the matter does not remain there, as will be shown later in this article.

There is another technique which frequently conceals *de facto* discrimination beneath a façade of general applicability. Whether or not the famous Law No. 261 of April 4, 1945, and Decree No. 12 of August 13, 1945, did in fact discriminate against Hungarians, its provisions certainly weighed very heavily on Hungarians who had Rumanian citizenship. This Law provided that all persons who served in military or para-military organizations of a state having been at war with Rumania lost their Rumanian citizenship. Decree No. 12 fixed the operative date for such service as after August 22, 1944. For practical purposes

this meant that the Hungarian minority would lose their Rumanian citizenship. The circumstances were that Rumania joined the Allies against the Axis Powers in 1944, whilst Hungary was under German occupation and on the Axis side until the end of the war in May 1945. The northern and predominantly Hungarian part of Transylvania was given back to Hungary in 1940 by the Germans and Italians and under the Hungarian regime of Horthy all adult males were obliged to enlist for military service and youths were required to join young people's para-military organizations. Through these circumstances few Hungarians escaped the threat of losing their nationality. It was provided that joining the Communist Party would save them from losing it.

### **Discrimination in the Cultural Field**

The steps taken by the Rumanian authorities to weaken Hungarian culture are again in some cases mixed with what might be merely part of general Communist policy. Thus, for example, both Catholic and Protestant churches were deprived of their schools; this in itself was merely part of the normal materialistic and secular policy of a Communist State and as such, although it struck a particularly severe blow at Hungarian culture, it was not discriminatory. But there was also a widescale destruction of centuries-old Hungarian private or public archives and libraries, and the devastation of old Hungarian castles to provide stone material for new buildings. Vital links with the past were thereby wiped out.

Until 1958, a large-scale educational system, from the primary to the university level, flourished in Hungarian. Since then, however, the situation has changed rapidly. The number of Hungarian primary schools is steadily dwindling and a decree now in force authorises only the eldest of a family's children to study in a Hungarian-language school. At the level of higher education the Rumanian authorities introduced a system of "parallel sections". This meant that in such an institution a parallel Rumanian curriculum with Chairs held by Rumanians was introduced. When this cuckoo in the nest was big enough it took over the whole nest and the Hungarian section disappeared. Another method which helped in cutting down instruction in the Hungarian language was for the student body and the teaching staff of the institutions concerned to announce that for practical considerations and in accordance with their desire to perfect themselves in "the beloved Rumanian mother-tongue" they had decided to combine



with a Rumanian-language institution, or in the case of a bi-lingual institution to go over entirely to Rumanian. This process was carried so far that even student hostels felt its impact. Those for Hungarians became for mixed nationalities and Hungarian students asked to share a room with a Rumanian in order to perfect their knowledge of Rumanian. At the present time the Medical School in the capital of the Mures-Hungarian Autonomous Province is undergoing "parallelization". For Hungarian academic establishments there is now a limited admissions quota. In 1958, the Hungarian University in Cluj, Bolyai University, fused with the Rumanian University of Babes. The fusion was marked by the suicide of three of the professors at Bolyai University.

Odd facets of this process could in isolation be laudable. For example, it is an excellent language training to share a room with someone speaking a different language, but the whole pattern of cutting down Hungarian-language instruction in an area which is or was so Hungarian that it was part of Hungary for almost 900 years cannot be reconciled with respect for the constitutional rights of the Hungarian minority and is by no means explicable as part of the normal process of shaping a Communist society. For centuries Hungarian culture and tradition have taken deep root and survived the vicissitudes of fortune, both kindly and outrageous. It is difficult to conceive that a people so deeply rooted in its culture would itself clamour for the destruction of that culture by absorption into the Rumanian mainstream.

A further instrument for the dilution of the Hungarian majority in Transylvania is the resettlement of Rumanian refugees coming from Bessarabia. Their reintegration into Rumanian economic and social life has taken place mainly in Transylvania, where they constitute a large part of the labour force in the industrial development from the western belt neighbouring Hungary to the heart of the Mures-Hungarian Autonomous Province, and they are settled mostly in cities where the proportion of the Hungarian population is still high, e.g., in Cluj, the capital of Transylvania.

The Rumanian National Statistical Office carried out a census in 1956 and it was emphasized that the civil servants carrying out the census were obliged to call attention in each case to the basic difference between nationality, i.e., ethnic origin, and mother-tongue. All persons registered had to state to which national ethnic group they belonged. The distinction between national group and mother-tongue and the obligation to state before officials one's national group drive a wedge between a people and its culture and this indeed is reflected in the figures given by

the census. For every thousand people of declared Hungarian origin there were one thousand and forty-two giving Hungarian as their mother-tongue. It is difficult to believe that Hungarian, difficult and almost unrelated to other languages, is the mother-tongue of any but Hungarians and yet 4.2% of the Hungarian minority group shrank from stating that they were Hungarian. The reasonable conclusion to be drawn from this is that in their eyes it was better not to declare oneself to be Hungarian. The more innocent explanation of gross inefficiency in the compilation of the census would seem to be negated by the deliberate distinction drawn by officialdom where no real distinction exists.

Too many individual items which could be capable of other explanations than discrimination if taken singly point unmistakably when viewed as a whole towards a pattern of conduct. In short, as far as the Hungarian people in Rumania are concerned, they appear in the give and take of living together to lose on both the swings and the roundabouts. When this happens to a minority group it is difficult to resist the conclusion that they are being subjected to discrimination.

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### **SOUTH AFRICA — THE UNITED NATIONS SPECIAL COMMITTEE ON APARTHEID AND A SABOTAGE TRIAL**

The relentless march of events in the Republic of South Africa is such that the *Bulletin* of the International Commission of Jurists has many times examined serious departures from the norms of the Rule of Law in that country. *Bulletin* No. 16 (July 1963) considered the General Law Amendment Act of May 2, 1963 (generally known as the No-Trial Act), and less than one year earlier, *Bulletin* No. 14 (October 1962), had examined the General Law Amendment Act of June 27, 1962 (generally known as the Sabotage Act). Readers of the *Bulletin* will no doubt be familiar with the recent developments in the United Nations, where the rest of the world has with virtual unanimity condemned in forthright terms the policy of apartheid practised in the Republic and the draconian laws that have been passed to implement the policy of apartheid itself and to stifle organized opposition to it.

## Memorandum by the International Commission of Jurists

The Commission submitted along with many other non-governmental organisations a memorandum to the Special Committee of the United Nations on the Policies of Apartheid of the Government of the Republic of South Africa. The following is a summary of the Commission's observations.

The Commission believes, as does the overwhelming majority of member States of the United Nations, that the policy and practice of apartheid is basically incompatible, not only with Article 1 of the Universal Declaration of Human Rights, but with the objects of the Charter of the United Nations. Even if apartheid followed the famous "separate but equal" doctrine formerly laid down by the Supreme Court of the United States and now declared to be unconstitutional, the separation of different groups on grounds of race, colour or creed is in itself an affront to human dignity. Despite the tenacity with which the Nationalist Government of the Republic of South Africa clings to racial theories and practice, the policy of apartheid does not appear to have even the saving grace of sincere conviction that it will be implemented consistently in accordance with its basic theory. A great deal of South African legislation has been implemented in a way which leaves no doubt that apartheid aims at the political, cultural and economic subjection of a supposedly inferior section of the community. In the Commission's Report, *South Africa and the Rule of Law*, these practices were analyzed in connection with, *inter alia*, movement and residence, work and trade unions, rights and freedoms and education.

Since 1960, when the Commission published this Report, these practices have shown a marked deterioration, and in particular attention should be drawn to the drastic job designation which can now be carried out whereby certain jobs are allocated exclusively to a particular group or groups of the community. The better jobs are being reserved to the white section of the community alone. Nevertheless, there are large numbers of African and coloured people still living ostensibly as migrants in the urban communities, which they regard not without justification as their home. These people, as long as there is a need for menial service in the urban communities, are allowed to stay, in flat contradiction of the basic principle of apartheid. The reason for this is the need for a labour force in the industrialized parts of the Republic and for domestic servants. However, as jobs performed by Africans and coloureds become designated as henceforth for

whites, these people are no longer permitted to reside among the white community unless they are able to find some other job available to their particular group. If they cannot, they are banished to a Bantustan area, which, however unfounded the supposition may be, is regarded in apartheid practice as their home. The use of a cheap labour force, as long as it conforms with economic dictates, appears to be the sole breach in the massif of apartheid and is explained by reasons little more worthy, if at all, than apartheid itself.

The African and coloured worker, it will be remembered, has none of the rights of organized labour that are familiar in free countries and which are in many respects available to the white worker in South Africa itself. A particularly pernicious piece of legislation in this respect is the Bantu Laws Amendment Act, 1963, about which strong protests were made to the International Labour Organisation whilst the Act was still a Bill. This Act abolishes all rights of residence for Africans, who may reside in urban areas only if their labour is certified essential, and it is this legislation which enables the Minister of Bantu Administration to prescribe classes of work in which Africans may no longer engage and to fix the maximum number of Africans who may work in particular classes of employment in particular areas. This legislation aims at tolerating such Africans as are essential on a basis of casual residence but implies banishment when economic conditions affecting the interests of the white community make it desirable, in the opinion of the South African authorities, to dispense with the service of Africans in particular spheres of work.

### **The Concept of Bantustan**

A Bantustan is essentially an area, of which there are several, set aside for African residence in an African community with self-government by Africans. Transkei is the first such state and is particularly important as a test of the good faith of the South African Government in its apartheid policies. Elections have been held in the Transkei for the Legislative Assembly which, in turn, elects the Executive. The Assembly consists of 45 elected members and 64 chiefs, including four paramount chiefs, whose appointment will be subject to the approval of the President of the Republic. The President also has power to increase the Cabinet from six to nine members and he may remove any or all of the members of the Cabinet on a petition from the Legislative Assembly. The composition of the Legislative Assembly, with a majority of members

subject to the President's approval, clearly directs executive control towards the President. Economically, Transkei is not itself viable and is obviously financially dependent on white areas of the Republic. Appointments to the Judiciary and the establishment of courts come within the authority of the Transkei Executive but are subject to the approval of the Minister of Bantu Administration. Any magistrates court may be established or dis-established by the Central Government. Claims that this is anything remotely approaching self-government are illusory.

### **Civil Liberties**

The much criticized Publications and Entertainments Act of 1963, gives wide powers of censorship according to vague criteria but does provide for an appeal to the Supreme Court of South Africa. By legislation culminating in the General Law Amendment Act, 1963, the Minister of Justice is empowered to forbid any individual who is listed as a Communist (and this can in practice include any critic of the Government) or as belonging to an illegal organization from attending any gathering, except as may be authorized. Any assembly may be prohibited for any amount of time if the prohibition be necessary in order to combat the achievement of any of the objects of Communism as understood in South African legislation. The wide powers to prohibit publications under the existing law were further strengthened by this Act, which may require as a condition to granting a certificate of registration for publication purposes the deposit of a sum not exceeding 20,000 Rand (£10,000 or \$28,000) and if a prohibition is imposed the Minister has power to order that the entire amount be forfeited to the State.

The Act of 1963 which provides for preventive detention was commented on in *Bulletin* No. 16. Exact and up to date figures for those held in custody by the police are not readily available. The latest figure given by the Minister of Justice exceeds 500, but many of these have been released and in some cases legal proceedings are taken.

### **Education**

The scheme of Bantu education was discussed in *South Africa and the Rule of Law*. Bantu education is now completely under the control of the Minister. By an Act of 1961 amending the Bantu Education Act of 1953 no school may be established in a Bantustan unless it conforms to requirements and has registered with the

appropriate Government agency. The Minister may dis-establish any such school at the end of whatever period he specifies, even though the school continues to conform to the requirements prescribed. He has complete discretion whether or not to allow a school for Bantus. It therefore follows that any school teaching a way of life acceptable to those who are not devotees of apartheid can have at best a precarious existence. A more recent complaint, raised many times by Africans in South Africa, has been that the curriculum in Bantu schools is markedly inferior to that in white schools and this is attributed to a deliberate policy on the part of the government to educate Africans only for menial positions.

### **General**

The effects of the apartheid policy and the repressive legislation passed to suppress political organization or expression hostile to the Government caused not only considerable humiliation and suffering but also acute economic hardship. Many cases have been reported in the press of banishment to remote areas where it is difficult to earn a living; there are many cases of detention and the separation of families through the husband working in urban areas where his wife is not allowed to visit him. Detention in custody, whether police detention for 90 days recurring or on remand awaiting trial, house arrest and banishment give rise to severe economic hardship and even where people are brought to trial the courts are so over-loaded with cases under the more recent legislation that the problem of supporting oneself, a wife and family becomes acute. The long drawn-out Treason Trial, which to the undying credit of the South African Judiciary ended in an acquittal, was a particularly grievous case of hardship on the defendants who were held in custody for so long.

### **A Sabotage Trial**

On Wednesday, October 23, 1963, the Commission made the following statement to the Press:

On Thursday, October 17, 1963, the International Commission of Jurists dispatched the following telegram to the Minister of Justice and the Minister of Foreign Affairs of the Republic of South Africa:

ON BEHALF OF THE INTERNATIONAL COMMISSION OF  
JURISTS I REQUEST PERMISSION FOR AN OBSERVER TO  
VISIT SOUTH AFRICA FOR THE PURPOSE OF OBSERV-  
ING THE SABOTAGE TRIAL BEGINNING OCTOBER 29.

THE NAME OF THE PROPOSED OBSERVER WOULD BE NOTIFIED AS SOON AS PERMISSION WAS RECEIVED.

VIVIAN BOSE  
PRESIDENT

The following reply was received from Mr. Eric Louw, Minister of Foreign Affairs, and it is understood that the Government of South Africa released it to the press:

YOUR REQUEST HAS BEEN SUBMITTED TO THE MINISTER OF JUSTICE WHO REPLIES AS FOLLOWS: "I AM SURPRISED THAT YOU NOW REQUEST PERMISSION FOR OBSERVER TO VISIT SOUTH AFRICA FOR PURPOSE OF OBSERVING TRIAL ON OCTOBER 29. IN THE PAST YOU SENT SO CALLED OBSERVERS ON A NUMBER OF OCCASIONS WITHOUT REQUESTING PERMISSION. THESE OBSERVERS DID NOT SHOW ELEMENTARY COURTESY OF PAYING THEIR RESPECTS TO SOUTH AFRICAN BAR COUNCIL AND TO OTHER AUTHORITIES. YOUR REQUEST IS TANTAMOUNT TO A SUGGESTION THAT THE TRIAL WILL NOT BE A FAIR ONE AND APPEARS TO BE MOTIVATED BY THE RECENT RESOLUTION OF THE UNITED NATIONS. OUR COURTS ARE AT ALL TIMES OPEN TO EVERYONE AND OUR SYSTEM OF JUSTICE AND OUR INDEPENDENT JUDICIARY COMPARABLE WITH BEST IN THE WORLD. CONSIDER YOUR REQUEST AS AN AFFRONT TO OUR SYSTEM OF JUSTICE OUR BENCH AND BAR. I AM NOT INTERESTED IN THE NAME OF YOUR OBSERVER NOR WILL I AFFORD HIM OFFICIAL RECOGNITION OR SPECIAL FACILITIES SHOULD YOU DECIDE TO SEND ONE".

LOUW, MINISTER OF FOREIGN AFFAIRS

The press statement went on to say that the Commission would like to make the following observations.

The request for permission to send an Observer to this trial in South Africa was made for the purpose of ensuring that he would be allowed to enter the country.

No special facilities were requested and certainly no affront to the South African Judiciary can be reasonably inferred from our request. Indeed, the Commission and Observers appointed by the Commission have repeatedly paid tribute to the high standards of the South African Judiciary and Bar. However, the trial in question concerns charges brought under the Sabotage Act, which,

as was stated by the Commission on June 21, 1963, is regarded as a serious departure from the norms of the Rule of Law.

The Commission, having expressed its considered and definite views as to the objectionable nature of this piece of legislation, is anxious to observe the manner in which it is now about to be implemented.

This trial is obviously one of exceptional interest to all lawyers and to all who are interested in safeguarding human rights. For these reasons the Commission decided to send a legal Observer to the trial. The sending of lawyers, who can give a first hand objective report, to observe proceedings of this nature is an important part of the Commission's work. The right to send legal Observers to trials involves an important principle which the Commission has always asserted and will continue to assert. The sending of legal Observers does not involve a prejudgment of the issues involved.

Out of courtesy to the Government concerned and in order to ensure that no visa difficulties would arise, the President of the Commission notified the South African Government of the Commission's decision to send an Observer. The Commission sees no basis for the violent reaction of the South African Minister of Justice.

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When the trial opened, the defence objected that the indictment did not give sufficient particulars of the charges which the accused had to meet. (One of the original eleven is now no longer charged and was to have given evidence for the prosecution, but he fled the country.) To this the prosecution replied that they knew, which drew from the judge the historic reply that this they could know only if they were guilty. The indictment was quashed against the ten remaining accused.

The Commission was glad to see that once more the South African Judiciary has refused to yield in its strictly correct application of the law. The accused were not set free and were taken off into custody, apparently, since no judicial order for their remand appeared to have been made, under the police power to detain without trial for 90 days. It has, however, been subsequently ascertained that they were detained under judicial procedure. Subsequently an application for bail by two of the accused was refused, and the prosecution set about their task of preparing an indictment which will conform with the law. Once more, we pay tribute to the high-minded integrity of the South African bench, and hope that something of this legal ethic will restrain future



prosecutors from the disgraceful contention so firmly rejected by Mr. Justice de Wet when he quashed the indictment.

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## **THE PRINCIPLES OF CONSTITUTIONALITY AND LEGALITY IN THE NEW YUGOSLAV CONSTITUTION**

### **Principles and Terminology of the Yugoslav Constitution of April 7, 1963**

On April 7, 1963, the Yugoslav Federal Assembly adopted and promulgated the new Constitution of the **FEDERAL SOCIALIST REPUBLIC OF YUGOSLAVIA**. The Constitution came into effect from the date of its promulgation, and supersedes the Constitution of January 31, 1946, and the Constitutional Law on the Basic Social and Political Structure of the Federal People's Republic of Yugoslavia and on the Federal Organs of Political Power, of January 13, 1953.

Previously, the Federal Assembly had appointed on December 2, 1961, a Commission on Constitutional Questions (Constitutional Commission), which drew up a preliminary draft after making extensive studies of comparative law and considering the party platforms of the Communist, Socialist and Social-Democratic Parties. The main lines of the preliminary draft were approved at a joint sitting of the Federal Assembly and the Federal Council of the Socialist Alliance on December 20 and 21, 1962. The Constitutional Commission was instructed to prepare the final draft, and in so doing to examine any proposals and suggestions emanating from the public discussion. It should be explained that, immediately following the approval of the main lines by the Federal Assembly and the Socialist Alliance, a public discussion was organized, as had been the case in the Soviet Union prior to the adoption of the Stalin Constitution of 1936. This discussion took place in over 70,000 meetings of social organizations, and according to the Yugoslav *Review of Political Affairs* six million citizens attended these meetings, in which 300,000 took an active part, which presumably means that they spoke at the meetings. The overwhelming majority of the citizens were said to have given their full support to the main features of the Constitution as expressed in the preliminary draft.

From the point of view of the Rule of Law, Chapters VII and XIII of the new Constitution are of particular interest. Chapter VII deals with "Constitutionality and Legality". Chapter XIII makes provision for the establishment of a Yugoslav Constitutional Court and defines the powers and competence of the Court. Both of these Chapters will be discussed below. In order to understand them, however, it is necessary by way of introduction to say something about the special character of Yugoslav governmental and social organization as enshrined in the Constitution, and about Yugoslav constitutional terminology. This is all the more worthy of attention, in that the Constitutional Commission itself, in its *Explanatory Memorandum on the 1962 Draft*, admitted that in the framing of the text of the Constitution it had encountered considerable terminological difficulties and had not been able to overcome them entirely.

The most striking feature in the evolution of Constitutional Law in Yugoslavia since the 1948 breach between Moscow and Belgrade in Stalin's time is the decentralization in public authority and in the organization of the economy. Communist political theory regards such decentralization as a phase in the process of the withering away of the State. The State withers away to the extent that direct self-administration by voluntary associations of workers is substituted for administration by the coercive machinery of the State. The State is then superseded by an institution which the Yugoslavs describe as the *Social Community*.

In the Yugoslav Federal State the Federated States (Republics), the Districts and the Communes enjoy legislative and administrative autonomy which is circumscribed either negatively or positively. In Yugoslav terminology the Federation, the Republics, the Districts and the Communes are all "socio-political communities" and are further defined as "territorial communities which comprise socio-economic as well as socio-political elements". These socio-political communities should not be confused with the "socio-political organizations", which include the trade unions, the Socialist Alliance of the Working People and the League of Communists of Yugoslavia. A distinction should also be made between socio-political organizations and social organizations, the latter meaning voluntary associations of citizens, which normally come under the law of associations. A particularly important social institution is the "working organization"; according to the *Explanatory Memorandum on the 1962 Draft*, "working organization" is a "generic expression for all forms of organization based on labour and self-management". This expression embraces busi-

ness enterprises managed by the workers, together with co-operatives, cultural, educational, health, social and welfare institutions and other public services.

### **Constitutionality and Legality**

According to Article 145 of the new Constitution, the basic principles of constitutionality and legality guarantee "the achievement of the socio-economic and socio-political relations prescribed by the Constitution and by law, the unity of the law, and the protection of the right to self-government and the other rights of socio-political communities and organizations". The emphasis, as Srzentić explains in the *Review of Political Affairs* of October 20, 1962, is on preserving the unity of the law and on protecting the rights of territorial and other autonomous bodies against encroachment by Federal authorities.

The guardians of constitutionality and legality are the Constitutional Courts, viz, the Federal Constitutional Court (the Constitutional Court of Yugoslavia) and the Constitutional Courts of the six Republics. It is their specific task to see that the hierarchy of legal provisions is respected: that the Constitution takes precedence over a statute, that a statute ranks higher than statutory orders of the Republics, that the law of the Federation and of the Republics prevails over the by-laws of Districts and Communes, and so on. Detailed provisions govern the respective ranks of these various enactments in the legal hierarchy. This point is all the more noteworthy in view of the fact that until recently Communist States paid not the slightest attention to such gradations in the scale of legislative provisions. In the Communist State—the dictatorship of the proletariat—the Communist Party ranks above the State. The monolithic political will of the rigidly centralized Party thus determines the content of legislation. Accordingly it is "a comparatively immaterial question of form whether this monolithic political will is given expression in constitutional statutes, ordinary laws or mere orders" (Prof. Meder: *Osteuropa-Recht* 1956, p. 157). It has frequently happened, for instance, that the Praesidium of the Supreme Soviet has altered provisions of the Constitution by *ukase* (decree), although Article 146 of the Soviet Constitution prescribes a special procedure for constitutional amendments (identical resolutions by both chambers of the Supreme Soviet, adopted by a two-thirds majority). It has also happened that constitutional and statutory provisions have even been set aside by joint orders of the Central Committee of the Communist Party and of the Council of Ministers.

Article 147 of the new Yugoslav Constitution begins by laying down the primacy of the Federal Constitution over all other legislative instruments (statutes, statutory orders and other regulations having general effect). All statutes, statutory orders and regulations having general effect made by a Republic must conform to the Constitution of the Republic in question.

According to Article 148 "the Constitution of a Republic may not be at variance with the Constitution of Yugoslavia". Statutes passed by a Republic may not violate or derogate from Federal statutes, and all legislative instruments of lesser degree must conform with statutes. The by-laws of a socio-political community (District or Commune) and the by-laws and other binding rules of a working organization or other autonomous corporation must conform with the Constitution and with statutes.

What the Federal Constitutional Court is empowered to do in order to resolve conflicts between legislative provisions at different points of the legislative hierarchy varies according to the rank of the conflicting enactments. If a provision of a State Constitution infringes the Federal Constitution, the Federal Constitutional Court submits an advisory opinion to the Federal Assembly (Article 244), and it is for the latter to decide what necessary steps to take. According to Vratuša this rule was adopted having regard to "the sovereignty and independence of the Republics in the Yugoslav Federal system" (*Review of Political Affairs*, December 5, 1962, p. 22). The Federal Constitutional Court may adjudge a Federal statute to be unconstitutional; the Federal Assembly thereupon must, within six months from the handing down of the judgment, amend the statute in accordance with the judgment. Should it fail to do so, the unconstitutional statute or those provisions which are unconstitutional cease to be valid on the expiry of this six-month period (Article 245). The same rule applies, *mutatis mutandis*, where the Federal Constitutional Court finds that a statute passed by one of the Republics is at variance with the Federal Constitution. It is then incumbent on the Parliament of the Republic to remedy the matter within six months. A statute passed by a Republic which obviously violates the "rights of the Federation" may be set aside forthwith by the Federal Constitutional Court (Article 246). In the same manner the Federal Constitutional Court is competent to set aside on its own authority any statutory orders, by-laws, generally applicable regulations or specific provisions of the same which contravene the Federal Constitution or a Federal statute.

The Federal Executive Council (Government) and the Executive Councils of the Republics are empowered to take interim measures for the protection of constitutionality and legality. Thus, the Federal Executive Council has the right to stay the enforcement of regulations or other general orders of the Government of a Republic pending the decision of the Federal Constitutional Court when such regulations or orders are at variance with the Federal Constitution or with Federal law. The same power is vested in the Governments of the Republics with regard to unconstitutional or illegal regulations or other general orders of a Communal or District authority. For its part, pending the decision of the Constitutional Court of a Republic, a Communal Assembly may suspend generally applicable decisions of autonomous organizations on the ground that they are contrary to the Constitution or a statute.

Chapter VII of the Constitution contains further provisions which are valuable from the standpoint of the Rule of Law. Under Article 152 all laws, regulations and orders take effect only when they have been published, in most cases not before the eighth day after publication. In Communist countries it is by no means axiomatic that the promulgation or publication of an enactment is a condition of its validity. It was recently reported by Professor Berman that the Supreme Soviet of the U.S.S.R. in the period 1937 to 1958 had passed more than 7,000 laws, of which only a few hundred were published (*Harvard Law Review*, March 1963, p. 940). An Act passed in 1958 has to some extent remedied this situation.

Article 154 provides that regulations, generally applicable orders, by-laws and the like, may not be given retrospective effect in the absence of statutory authority. Retrospective penal provisions are unconstitutional unless they are more lenient than those in force at the time when the crime or offence was committed.

Article 155 enshrines the principle of administration according to law.

Article 156 contains a kind of "due process" clause addressed to State organs and organizations exercising public powers; they may decide on matters affecting the rights and duties of citizens or apply measures of coercion or restriction to citizens only in accordance with the procedure prescribed by law. In such administrative proceedings everyone must be afforded a proper hearing; in addition he must be given an opportunity to appeal or complain against the decision.

Article 158 guarantees the right to file an appeal to the competent higher authority against all judicial decisions, administrative

acts and rulings or orders of organizations exercising governmental functions. Only exceptionally may this right of appeal or complaint be withheld, and then only in specifically limited cases and only in so far as the protection of rights and legality has been provided for in some other manner.

### **The Jurisdiction of the Constitutional Court**

Chapter XIII of the Constitution establishes a Federal Constitutional Court (the Constitutional Court of Yugoslavia) and lays down the organization and jurisdiction of the Court. Provisions on the organization and jurisdiction of the Constitutional Courts of the six Republics are contained in the Constitutions of each Republic.

The functions which the Federal Constitutional Court exercises to preserve constitutionality and legality are described above. In addition, the Federal Constitutional Court is required to decide any conflict of competence between the Federation and a Republic and, unless otherwise provided, between a Republic and a socio-political community (i.e., District or Commune), border disputes between Republics, conflicts of jurisdiction between the Federal courts and other Federal authorities, as well as conflicts of jurisdiction between the courts and other authorities of a Republic [Article 241, paragraph 1, (4) and (5)].

The Federal Constitutional Court may also pronounce "on the protection of the right of self-management and the other basic rights and freedoms guaranteed by the Constitution, where such rights and freedoms have been violated by a decision or order of a Federal authority . . ." (Article 241, last paragraph).

According to Article 249 the following may raise a question of constitutionality or legality in the Federal Constitutional Court:

- (a) the Federal Assembly and the Parliaments of the Republics;
- (b) the Federal Executive Council and the Executive Councils of the Republics, except where the constitutionality of a statute adopted by their Parliaments is in issue;
- (c) the Supreme Court of Yugoslavia and the other highest courts of the Federation, and also the Supreme Courts of the Republics, if an issue of constitutionality or legality is invoked in proceedings pending before those courts;
- (d) the Federal Public Prosecutor, if an issue of constitutionality or legality arises in the exercise of his functions;

- (e) the Constitutional Courts of the Republics;
- (f) District and Communal Assemblies, working organizations or other autonomous corporations, if their constitutional rights are violated.

Federal legislation is to specify the conditions on which citizens are to have access to the Federal Constitutional Court. The Constitution as such gives the citizen no right to bring a complaint before the Federal Constitutional Court that his constitutional rights have been infringed.

### **The Position of the Individual**

From the viewpoint of the Rule of Law the institutions and principles analyzed above are of considerable value. Their effect as regards the individual, the ordinary Yugoslav citizen, is, however, materially different from that of corresponding institutions and principles in liberal democracies. This is due to the fact that the framers of the Yugoslav Constitution are attuned to a different conception of man from that of their opposite numbers in the Western world. The *Explanatory Memorandum on the 1962 Draft* contains the following revealing passage: "Man, not being born free, cannot make himself free by his own efforts. He achieves and realizes his personality only in society, and it is by society that the limits of his personality are determined in freedom."

The Yugoslav Constitution is not patterned on the notion of free and individual personality. It is based, as Crvenkovski writes, "on man as embodied in socialist conditions of production and in social self-management" (*Review of Political Affairs*, April 20, 1963, p. 19). The Constitution protects the socio-economic status of the working man or woman. It is for this reason that the right to participate in social self-management ranks as the foremost right of the Yugoslav citizen. At the same time he may not exercise this right according to his individual discretion, but must let himself be led by the social consciousness of a socialist, the shaping of which is the business of the Communist Party. It is the Party's responsibility to educate the Yugoslav citizen to exercise his rights in conformity with the spirit of the Constitution. The role of the Communist Party is defined in the following terms in the Preamble to the Constitution:

The League of Communists of Yugoslavia, initiator and organizer of the People's Liberation War and Socialist Revolution has, owing to the necessity of historical development, become the leading organized force of the working class and working people in the development of socialism

and in the attainment of solidarity among the working people and of the brotherhood and unity of the people.

Under the conditions of socialist democracy and social self-government, the League of Communists, through its ideological and political guidance, takes the leading role in the political activity necessary to protect and to promote the achievements of the Socialist Revolution and socialist social relations, and especially to strengthen the socialist social and democratic consciousness of the people.

The new Yugoslav Constitution also guarantees the traditional human rights such as freedom of the Press, freedom of association, freedom of assembly and freedom of speech (Article 40), privacy of correspondence (Article 53), the integrity of the person (Article 47), freedom of movement and residence (Article 51), and the inviolability of the home (Article 52). However, the content of these rights is watered down by reservations of vital importance. For instance, Article 40 states that freedom of the Press, freedom of association, freedom of speech and freedom of assembly "shall not be used by anyone to overthrow the foundations of the socialist democratic order determined by the Constitution, to endanger peace, international co-operation on terms of equality, or the independence of the country ...". Apart from these restrictions *ex jure constitutionis*, a further consideration is that political orthodoxy is a condition for the exercise of these rights. Vratusa doubtless recognizes this fact when he writes: "But it would be unrealistic and insincere to conceal the fact that in the prevailing conditions the social community must determine the limit to which it can tolerate activities which are not in harmony with socialist aims" (*Review of Political Affairs*, April 5, 1963, p. 18).

Under the conditions described above, neither the provisions on constitutionality and legality nor the extensive jurisdiction of the Constitutional Court are capable of contributing much to the development of free, individual personality. On the other hand, they should be of considerable value in protecting the rights of autonomous corporations and thereby helping to strengthen the process of decentralization as a result of which the position of the individual in Yugoslavia has undoubtedly been improved.



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