

FOR THE RULE  
OF LAW

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

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# THE RULE OF LAW AND HUMAN RIGHTS

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## GENEVA CONFERENCE ON HUMAN RIGHTS

In response to the call of the United Nations to international non-governmental organisations, an NGO *Ad Hoc* Committee was constituted in Geneva for the International Year for Human Rights. The task of this Committee and of a similar Committee at the United Nations headquarters in New York has been to co-ordinate the activities of NGOs and to cooperate with the United Nations in relation to Human Rights Year.

In order to enable NGOs to formulate a common view which could be submitted to the International Governmental Conference convened by the United Nations to be held at Teheran from the 22nd April to the 13th May, 1968, the Geneva Committee convened a three-day Conference of representatives of NGOs which was held at the Palais des Nations at Geneva on the 29th to the 31st January 1968.

The Conference was attended by 146 participants representing 76 NGOs, 9 delegates from 6 National Human Rights Year Committees and 22 observers, representing 17 UN agencies, governmental and other organisations.

The Conference divided into four committees: I — Civil and Political Rights; II — Social and Economic Rights; III — Cultural Rights; and IV — Implementation Machinery. Substantial Working Papers for each of these four topics had been prepared in advance. The Reports adopted by each of the four Committees are to be used as internal documents for the guidance of NGOs. In addition the Conference adopted unanimously General Conclusions, which are to be transmitted to governments and presented to the Governmental Conference at Teheran.

Mr Seán MacBride, who is the Chairman of the Geneva Ad Hoc Committee, presided. The Vice-Presidents were: Mr. G. Boglietti (World Federation of Trade Unions), and Mr. T. Szmitkowski (Pax Romana); Mr. L. H. Horace Perera (World Federation of United Nations Associations) and Dr. G. Riegner (World Jewish Congress) acted as General Rapporteurs, while

Mr. J. Duncan Wood (Friends World Committee for Consultation) acted as Special Rapporteur on Ratification of Human Rights Conventions.

The Secretary-General of the United Nations sent a special message to the Conference which was read by Mr. Curtis Campaigne, Special Assistant at the Division of Human Rights at the United Nations.

In addition to the representatives of 76 NGOs, the Conference was attended by observers from the Swiss Federal Government, the United Nations, UNESCO, ILO, FAO, the Office of the High Commissioner for Refugees, UNITAR, the Council of Europe, the Pontifical Commission on Justice and Peace (Vatican City) and a number of observers from National Human Rights Year Committees and other organisations. Mrs. J. W. Sheppard, President of the Conference of NGOs (ECOSOC), represented the New York Bureau.

The Conference, representing all the leading NGOs, included leading representatives of the Churches, trade unions, professional, cultural, social, economic, veterans, women's and youth organisations. The Conference was representative of the different political ideologies. The discussion was of a high level. The most significant feature of the Conference was the cooperative, constructive and informed attitude of all the participants.

The fact that such a large Conference of representatives of such varied ideological views reached unanimous agreement on the General Conclusions adopted is an important contribution to the cause of human rights throughout the world. The General Conclusions, which are far-reaching, deserve the attention of everyone interested in promoting human rights irrespective of religious or political affiliation.

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A further Conference convened by the Conference of NGOs (ECOSOC) in cooperation with the Geneva and New York Ad Hoc Committees for the International Year for Human Rights and with the Conference of NGOs (UNESCO) will be held at UNESCO in Paris on the 15th to the 19th September, 1968. The key speakers will include the Secretary-General of the United Nations, U Thant, the Director General of UNESCO, M. René Maheu, and President Kenneth Kaunda of Zambia.

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## CONCLUSIONS

1. A Conference of non-governmental organizations, convened by the Geneva International Committee of Non-Governmental Organizations for the International Year for Human Rights, was held in Geneva from January 29-31, 1968. The Conference provided the occasion for a broad exchange of views concerning the promotion and protection of human rights throughout the world and the role that non-governmental organizations are called upon to play.

The conclusions which follow do not necessarily reflect in their entirety — at least at this stage — the positions officially adopted by the seventy-six organizations taking part in the Conference; but they do represent the general consensus of opinion and were unanimously adopted.

2. The Conference affirms its unqualified support for the United Nations, which it considers the principal and the most effective instrument for promoting human rights throughout the world. The work of the United Nations over the last twenty years has resulted in considerable achievements: such as the Universal Declaration of Human Rights (whose principles have influenced international law and many national legislations), the declarations and recommendations on specific rights and the numerous international conventions and covenants drawn up by the United Nations and its specialized agencies.

3. There is, nevertheless, a strong feeling of disappointment at the slowness and in many respects the inadequacy of the United Nations' progress in regard to human rights, which is seen in the gulf between the texts adopted and their effective application. However, criticism should not be levelled at the United Nations so much as at the member states themselves, which have often shown a lack of enthusiasm in the promotion and protection of human rights. Many conventions remain inoperative, sometimes for years on end, because they have not been ratified — often by the very states which adopted them in the General Assembly. Whether this attitude is due to inertia, delay or opposition the resulting position is most discouraging.

The Conference appeals to Governments to ratify all the conventions relating to human rights, in particular the International

Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and to ensure their immediate application. In this connection, emphasis should be given to the provisions for implementation machinery, especially the Protocol to the Covenant on Civil and Political Rights. It requests all non-governmental organizations to mobilize public opinion to this end.

4. No-one who holds human life in dignity and respect can fail to be alarmed by the intensified violence and brutality of our times. Massacres, tortures, arbitrary imprisonments, summary executions have become such common currency that the natural reaction of horror tends to be dulled, and these degradations of human values are thus allowed to spread. This is a serious problem, demanding an untiring effort from everyone, and primarily from those who have responsibilities in the political, scientific, spiritual and educational fields. Human Rights Year must be used by non-governmental organizations as the occasion for mobilizing public opinion against this increasing violence, which, in an era that is awakening to the dignity of man, cannot be accepted in silence.

5. Since peace is the underlying condition in which human rights may be fully respected, war is their negation. It is the purpose of the United Nations to prevent conflicts and to institute an effective system for the peaceful settlement of international disputes. While this aim remains unrealized, it is essential nevertheless that humanitarian principles prevail in every armed conflict. The Geneva Conventions of 1949, adopted under the aegis of the Red Cross, lay down the minimum rules of humanitarian conduct to be observed by belligerents; at present they are the only instrument available to protect human rights in time of war. Compliance with these rules by all involved in a conflict, whether international or internal, is imperative. Governments and the United Nations, together, must ensure that the Conventions are known to all and respected in all circumstances.

The Conference notes with regret that the rules relating to the use of weapons date from the Hague Conventions of 1907, when practically none of the modern weapons for mass destruction, in particular atomic weapons, existed. A new codification in this field is therefore especially necessary for the protection of civilian populations.

6. The Conference notes that the implementation provisions adopted by the United Nations are fragmentary and piecemeal in nature, resulting in lack of coordination, and that they all too often respond to the expediency of the moment.

While appreciating that a pragmatic approach is often valuable, and that the nature of economic and social rights may require implementation procedures differing from those for civil and political rights, the Conference considers that there is a need for machinery providing global coordination and control of the implementation of human rights. The institution of a United Nations High Commissioner for Human Rights could, for example, fill part of this need.

7. The Conference considers that if implementation machinery is to be effective, it must operate, independently and impartially, at the national, regional and world levels, and be able to enter automatically into action at any time, without it being a necessary pre-requisite that a government should intervene to set the machinery in motion. The right of individual petition against infringements of human rights must be granted to all.

8. The Conference underlines the need to make fullest possible use of existing institutions, among which regional institutions are of particular importance. Nonetheless, their machinery could be improved ; and the possibility should be envisaged of creating similar regional systems in other areas of the world. The standards applicable by such institutions should conform with those laid down by the United Nations.

9. The Conference believes that the creation of one or more international jurisdictions to adjudicate upon violations of human rights and crimes against peace and humanity is highly desirable.

10. The Conference notes that there are difficulties in implementing economic and social rights, largely arising from the different degrees of development in the various countries of the world. It hopes that these differences will be rapidly overcome, in view of the solidarity of all mankind and the compelling moral obligation upon the privileged nations and peoples to contribute to the development of the less privileged.

It stresses the necessity for each government to implement a programme of priorities for the promotion and progressive

protection of the fundamental economic and social rights recognized in the United Nations Covenant.

The Conference affirms that no real progress can be made while discrimination, in all its forms, exists: in particular, inequality of opportunity and conditions of life by reason of a person's race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including that of refugee, stateless person or migrant worker. The family, which is the natural and fundamental group unit of society, must be accorded special protection so that its potentialities may be fully realised. The problems of children and adolescents and their protection should receive special attention.

Non-governmental organizations are invited to cooperate with governments and local authorities in the planning, instituting and implementing of programmes for the effective protection of economic and social rights.

11. The Conference asks states to pay special attention to the promotion of the rights of women, and to the elimination of religious intolerance and of discrimination in all its forms and in all fields. Accordingly, it particularly welcomes the Convention on the Elimination of all forms of Racial Discrimination and the Declaration on the Elimination of Discrimination against Women.

The full and free exercise of the rights to peaceful assembly and association, freedom of opinion and expression, freedom of movement and security of the person is of the utmost importance, for on these rights the exercise of many other fundamental rights depends.

12. Although the right to education has been given definition and content, universal cultural rights are still relatively new and ill-defined on the international scene. At the same time, changes have recently come about in many fields, especially the technical and scientific, raising new problems to be studied in depth. During the last twenty years, attention has generally been concentrated upon the rights of the individual, while little thought has been given to the rights within a society of minorities and other groups as such. All these problems provide non-governmental organizations with a special opportunity to help give these rights meaning and to contribute to cultural progress by examining these questions in detail.



The Conference considers that the greatest possible access to culture and the freest possible flow of scientific, cultural and artistic creation are essential if there is to be the widest range of cultural choice. It is equally essential that the individual should be guaranteed access to whatever level of education he may aspire to and achieve.

The Conference further considers that ethnic, linguistic or religious groups and minorities should not be forced to abandon their cultural identity in order to be accepted by dominating or majority groups. Indeed, every culture, and not only that of a people or nation, has a dignity and value to be respected and preserved.

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This is the meaning that the non-governmental organizations meeting in Geneva derive from the International Year for Human Rights. This is the path which the Conference has taken and which it sincerely hopes the peoples and governments of the world will follow.

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## **BANGALORE CONFERENCE ON FREEDOM OF MOVEMENT**

The first international Conference of Jurists to discuss the important right to Freedom of Movement took place in Bangalore (India) from January 10-14, 1968. It was held under the auspices of the Mysore State Commission of Jurists in collaboration with the Indian Commission of Jurists and the International Commission of Jurists. In addition to the Right to Freedom of Movement as defined by Article 13 of the Universal Declaration of Human Rights, the Conference discussed a proposal for the establishment of a Council of Asia and the Pacific. Designed as a contribution to the International Year for Human Rights, this Conference was the first international event to be held within the framework of the Year.

The Conference brought together some 100 jurists from 18 countries of Asia and the Pacific Region as well as observers from leading international organisations both governmental and non-governmental, and from countries outside the Region. The work of the Conference was conducted in three committees, dealing respectively with 'the Right to Freedom of Movement within a country', 'the Right to Freedom of Movement outside one's Country' and 'the Proposal for a Council of Asia and the Pacific'.

The Conference was opened by Shri G. S. Pathak, Governor of the State of Mysore, and the plenary session elected the following officers :

Chairman of the Conference: M. C. Setalvad (India)

Secretary : E. S. Venkataramiah (India)

Press Officer : C. R. Somasekheran (India)

### *Committee I*

Chairman : H. Jayawardene, Q. C. (Ceylon)  
Vice-Chairman : Parviz Kazemi (Iran)  
Rapporteur : A. N. Jayaram (India)  
Secretary : L. G. Weeramantry (International Commission of Jurists)

### *Committee II*

Chairman : John F. Kearney, Q. C. (Australia)  
Vice-Chairman : Jean Morice (Cambodia)  
Rapporteur : Chandra Kantaraj Urs (India)  
Secretary : Hilary Cartwright (International Commission of Jurists)

### *Committee III*

Chairman : V. Krishnamurthi (India)  
Vice-Chairman : Ruperto G. Martin (Philippines)  
Rapporteur : D. S. Wijewardene (Ceylon)  
Special Adviser : Purshottam Trikamdas (India)  
Secretary : C. Selvarajah (Ceylon)

The reports of the three Committees were, after discussion in plenary session, adopted unanimously by the Conference, which was closed by its Chairman, Mr. M. C. Setalvad. The Conclusions and Resolution of the Conference are set forth below.

# THE RIGHT TO FREEDOM OF MOVEMENT

## INTRODUCTION

1. The United Nations has designated 1968 as International Year for Human Rights. This Conference of Jurists, called by the Mysore State Commission of Jurists, in co-operation with the Indian Commission of Jurists and the International Commission of Jurists, offers its contribution to that year in the detailed study which it has made, and in the Conclusions which it has reached concerning the Right to Freedom of Movement, recognised in Article 13 of the Universal Declaration of Human Rights (1948) in the following terms :

(1) Everyone has the right to Freedom of Movement and residence within the borders of each State,

(2) Everyone has the right to leave any country, including his own, and to return to his country ;

and also recognised in Article 12 of the International Covenant on Civil and Political Rights (1966).

2. Freedom of movement of the individual within a country, in leaving his own country, in travelling to other countries and in entering his own country is a vital human liberty, whether such movement is for the purpose of recreation, education, trade, or employment or to escape from an environment in which his other liberties are suppressed or threatened. Moreover, in an inter-dependent world requiring for its future peace and progress an ever growing measure of international understanding, it is desirable to facilitate individual contacts between peoples and to remove all unjustifiable restraint on their movement which may hamper such contacts.

3. To the extent that freedom of movement is formulated as a legal right, it has to be recognised that this right may be subject to certain limitations. But it is important to assert that there is in the first place a right to freedom of movement ; it is for those who would challenge it to show that in a particular instance the right can be justifiably withdrawn or restricted.

## **CHAPTER I**

### **FREEDOM OF MOVEMENT WITHIN A COUNTRY**

4. The right to freedom of movement and residence within the borders of a State must be made available to every person lawfully upon the territory of a State irrespective of his citizenship, race, colour, religion or political affiliation. Incorporation of the right in substantive law as well as procedural safeguards for its enjoyment must be ensured.

5. Considering the need to maintain a balance between the freedom of the individual and the general welfare of the community, reasonable restrictions may be imposed by or under the authority of law on the enjoyment of the right. Such restrictions may, however, be imposed *only* if the following conditions are satisfied :

- (a) The provisions relating to the imposition of restrictions, appeals from such restrictions and their review by the courts and independent administrative bodies contained in Chapter III of these Conclusions are observed.
- (b) The law permitting the imposition of the restrictions fixes the maximum limit of the period of restriction and requires the making of periodical public reports to the appropriate constitutional authority giving adequate particulars of all executive action in pursuance of such law.

## **CHAPTER II**

### **FREEDOM OF MOVEMENT OUTSIDE ONE'S COUNTRY**

#### **Scope and Content of the Right**

6. Freedom of movement outside one's country may involve three elements :

- (a) departure from one's country ;
- (b) entry into, travel within and exit from a foreign country ;
- (c) return to one's country.

Somewhat different considerations apply to each of these elements. Nevertheless, if freedom of movement is to be enjoyed to the full, they should each receive the widest possible protection.

### **Right to Leave a Country**

7. Every State should recognise that its citizens have a right to leave their country, and to proceed to the countries of their choice. This right should be protected by legislation. Any restrictions should be imposed only in accordance with the rules set out in Chapter III hereof, both as to the imposition of restrictions and as to the appeals from such restrictions and their review by administrative bodies and the Courts.

### **Right to Enter a Country**

8. (a) The right of a citizen to enter his own country should be recognised without limitation. The re-entry of long-term residents, including stateless persons, may be refused only in the most exceptional circumstances.
  - (b) Deprivation of citizenship should not be used for the purpose of circumventing this right.
  - (c) Where citizenship of a person extends to both metropolitan and non-metropolitan territories, it is recognised that this right may be limited to entry into the territory to which he belongs.
9. (a) As the first step towards removing all barriers to freedom of movement, foreigners should be accorded a right, subject to clearly defined grounds on which it could be refused in specific cases, to visit a State for a limited period as tourists, for business or professional purposes or for study.
  - (b) Recognition should be given to the right of refugees, stateless persons and persons seeking political asylum to seek to enter a country in accordance with the terms of Article 14 of the Universal Declaration of Human Rights and of the United Nations Declaration on Territorial Asylum of November 30, 1967. Where a State finds difficulty in granting or continuing to grant asylum, it should grant to the person concerned an opportunity, either by

way of provisional asylum or otherwise, of going to another State of his choice.

- (c) An effective procedure for appeal from, and the administrative review of, refusal of entry, should be provided.
- (d) States should be encouraged to adopt treaties, such as those existing between the members of the European Economic Community, between the Nordic countries and between certain States of Latin-America, under which citizens of each of the States parties to the treaty are accorded full freedom of movement throughout the territories of all those States.

### **Inclusion of Family**

10. No restriction on exit from one's country, or on entry into a foreign country, should be inconsistent with the right to protection of family life accorded by Article 12 of the Universal Declaration of Human Rights and Article 17 of the Covenant on Civil and Political Rights.

### **Limitation on Right to Leave**

11. The right of a person to leave a foreign country should be guaranteed subject to three limitations only. He may be refused permission to leave (a) for such period as is necessary for reasons of public health; (b) if there are reasonable grounds for suspecting that he has committed a criminal offence within the jurisdiction of the foreign country concerned, until he has been tried and acquitted or found guilty and served any sentence of imprisonment or paid any fine imposed on him; the investigation and trial should take place within a reasonable time; (c) until he has paid or made provision for the payment of any taxes payable by him.

### **Passports and Visas**

- 12. (a) Since a passport is in practice necessary to proceed to other countries, the right of the individual to a passport should be recognised. The procedure for obtaining a passport should be simple, speedy and inexpensive. The ground on which a passport may be refused, issued

subject to limitations, cancelled or withdrawn should conform to the principles laid down in paragraph 7 of these Conclusions in relation to the right to leave one's country.

- (b) The principles relating to appeal and review contained in Chapter III apply equally to the refusal, the issue subject to limitations, the cancellation and the withdrawal of passports.
- (c) The need to have a passport renewed when abroad should not be used by a Government as a means of bringing pressure to bear on its citizens in foreign countries to compel their return.

### **Refugees and Stateless Persons**

13. Refugees, stateless persons, and those unable to obtain a passport from the country of which they are citizens should have a right to a travel document acceptable to states in lieu of a passport. Such a document is at present obtainable by those who fall within the provisions of the Convention relating to the Status of Refugees, 1951, the Protocol relating to the Status of Refugees, 1966, and the Convention relating to the Status of Stateless Persons, 1954. In so far as these instruments do not make comprehensive provision for the granting of universally acceptable travel documents to such persons, they should be completed by further international agreements, the full and effective application of which should be subject to the supervision of the United Nations.

### **Free Movement Treaties**

14. States should be encouraged to adopt treaties, such as those existing between the members of the European Economic Community, between the Nordic countries, and between certain States of Latin-America, under which citizens of the States parties thereto may travel freely between the territories of those States without a passport.

### **Elimination and Simplification of Formalities**

- 15. (a) States should be encouraged to examine their visa requirements with a view to their eventual abolition



in so far as they are not strictly necessary. The abolition of these requirements should extend to refugees, stateless persons and any other persons travelling on a travel document other than a passport.

- (b) In so far as visas are retained, the procedure for obtaining them should be simple, speedy and inexpensive, and the refusal of a visa should be subject to appeal and review.
- (c) Once a visa has been granted refusal of entry should, in view of the hardship which may be involved, be limited to those cases in which it is strictly necessary in view of facts or circumstances which have arisen or been discovered since the issue of the visa.

### **Frontier Formalities**

16. The procedure and formalities applied at frontiers for entry to and departure from countries should be simplified.

### **Security of Movement and Residence Abroad**

17. It is vital that the freedom of movement of those travelling outside their country should be secure and should not be unlawfully interfered with either by their own State or by the State in which they are present.

18. This principle applies both to those who are abroad with the consent of their country and to those who have received political asylum. Such persons must be able to live and travel free from the danger of being returned against their will to the State from which they have sought asylum.

### **Abductions from Territory or Aircraft**

19. The abduction of persons from the territory of a foreign State by the agents of any State, and the removal of passengers from on board foreign ships or aircraft which have made unscheduled stops, whether by the authorities of the State on whose territory the stop has been made or by any other persons, seriously contravene the individual's right to freedom of movement.

20. The individual whose freedom of movement has been infringed by his unlawful abduction from foreign territory or

removal from a ship or aircraft should enjoy the right to have recourse to the Courts of the State which abducted him to secure his release and return to the State from which he was abducted, and to obtain compensation for any loss or damage sustained as a result of his unlawful abduction. Where he does not have such recourse, he should be able to have recourse to an international tribunal for the protection of his rights. These principles apply whether the abduction was effected by agents of the State to which the person concerned was abducted or by private individuals.

### **CHAPTER III**

#### **RULES APPLICABLE TO RESTRICTIONS ON FREEDOM OF MOVEMENT**

##### **General**

21. Save in so far as is otherwise provided in these Conclusions the Rules set out in this Chapter shall apply to all restrictions on the right to freedom of movement dealt with in the preceding Chapters.

22. The right of a citizen to re-enter his own country is absolute and not subject to any limitation.

##### **Limitations on Rights**

23. In respect of other aspects of the right to freedom of movement, only such limitations as are consonant with the Rule of Law and as are reasonably necessary in a democratic society may be imposed.

Furthermore, Article 12 (3) of the International Covenant on Civil and Political Rights recognises that the right of freedom of movement

shall not be subject to any restrictions except those which are provided for by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights and duties recognized in the present Covenant.

It should, however, be recognised that these heads of restriction may by the very generality of their expression encourage limitations on freedom of movement. Therefore, to the extent that any of them is adopted by a legislature, their scope should be strictly construed so that any question of doubt is resolved in favour of freedom of movement.

24. Such restrictions as are imposed must be reasonable in their operation and application, and should not be arbitrary, excessive or greater in respect of time or area of application than is required in the interest of the general public and necessary in the particular situation nor constitute an abuse of authority.

25. The exercise of the right to freedom of movement being a vital human right, any limitation on this right should be imposed only by or under the authority of law enacted by the legislature and such measure should set out the precise grounds on which it is sought to justify the limitation.

### **War or Emergency Situations**

26. In so far as it may become necessary to impose special restrictions on the right to freedom of movement owing to an emergency situation such special restrictions should only be permitted in time of war or other public emergency threatening the life of the nation and should be limited to the extent strictly required by the exigencies of the situation. In such situations the safeguards for the protection of fundamental rights during such period recommended by previous congresses and conferences of the International Commission of Jurists and by the United Nations Seminar on Civil and Political Rights \* (Jamaica 1967) should be respected.

27. No restriction should be imposed which is inconsistent with the right to protection of family life accorded by Article 12 of the Universal Declaration of Human Rights and by Article 17 of the Covenant on Civil and Political Rights.

### **Family**

28. Any limitation of freedom of movement or refusal to grant a travel permit or passport in a particular case should be

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\* The conclusions of this Seminar will be published in *Journal of the International Commission of Jurists*, Volume IX, No. 1.

communicated to the individual concerned without unreasonable delay and should state in writing the reasons for such limitation or refusal.

29. The validity of any restriction imposed on a person's right to freedom of movement should in all cases be subject to ultimate review by the Courts to ensure that such restriction complies with the criteria adopted in these conclusions.

30. An effective procedure for the independent administrative review of and appeal from administrative decisions restricting the right to Freedom of Movement with ultimate recourse to the courts should be provided.

31. In all cases the onus of justifying any restriction on a person's right to freedom of movement should rest on the authority seeking to impose such restriction.

32. The several safeguards relating to administrative orders (notice to interested parties, right to be heard and represented, judicial review, etc.) recommended by previous congresses and conferences of the International Commission of Jurists and by the United Nations Seminar on Civil and Political Rights\* (Jamaica 1967) should be complied with.

## *CHAPTER IV*

### **INTERNATIONAL PROMOTION OF THE RIGHT TO FREEDOM OF MOVEMENT**

33. Jurists the world over and all persons and bodies interested in the promotion and protection of Human Rights should build up public opinion which will impel States to recognise the importance of this freedom and to act conformably to the letter and spirit of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

34. It is recommended that the United Nations should promote the preparation and adoption of an International Convention relating to freedom of movement. While such an International

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\* See preceding note.

Convention should be as comprehensive as possible and should ensure the maximum degree of freedom of movement, making provision in particular for all the matters set forth in these conclusions, it could by means of optional clauses allow for reservations on the part of States which are unable or unwilling to grant full freedom of movement in existing circumstances.

35. Having regard to the increasing frequency of the abduction or kidnapping of passengers in the course of travel it would be desirable to consider the adoption of an international convention for the protection of passengers in transit by ship or aircraft.

36. The Conference requests the International Commission of Jurists to transmit these Conclusions to the United Nations International Conference on Human Rights to be held in Teheran on April 22 - May 13, 1968.

### **PROPOSAL FOR A COUNCIL OF ASIA AND THE PACIFIC \***

The Conference of Jurists from sixteen nations, assembled at Bangalore in January 1968, at the invitation of the Mysore State Commission of Jurists, the Indian Commission of Jurists and the International Commission of Jurists, having considered and noted the Resolution adopted by the Conference of Jurists from the Asian and Pacific Region assembled at Colombo in January 1966

#### ***BELIEVES***

1. That on the Asian Continent and in the Pacific Region there are many countries which have achieved their independence in recent years ; and these and other countries in the Region have numerous problems of common interest and urgency relating to human rights and fundamental freedoms and social, economic and cultural matters in their bearing on the Rule of Law ; and
2. That the sharing of experience by those countries would be of great value to them all ;

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\* Special Resolution Adopted by the Bangalore Conference.

And therefore *RECOMMENDS*

- A. That consideration be given to the establishment, by the Governments and Parliaments of such Region, of an organisation analogous to the Council of Europe for the purpose of realising their common aspirations and fulfilling the Rule of Law, by discussion of questions of common concern, and by agreement and common action upon economic, social and cultural matters for the furtherance of the Rule of Law and the fuller realisation of human rights and fundamental freedoms ;
  - B. That such Organisation be representative of the Governments and Parliaments of such Region ;
  - C. That participation in such Organisation be upon such a basis that it shall not affect the collaboration of its Members in the work of the United Nations Organisation or of any other organisation or association to which they are parties ;
  - D. That the matters which should be within the scope of such Organisation should not include matters relating to national defence ;
  - E. That membership of such Organisation should be open to all States in such Region which adhere to the Rule of Law and the maintenance of human rights and fundamental freedoms ;
  - F. That a copy of these Recommendations be forwarded by the International Commission of Jurists to the Governments of all States in such Region ;
  - G. And that the National Sections of the International Commission of Jurists take appropriate steps to further the establishment of such Organisation.
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## APARTHEID IN RHODESIA ?

Since the illegal unilateral declaration of independence (UDI) in November 1965, the régime of Mr. Ian Smith has shown an unmistakable tendency to move away from the principles of non-discrimination and a multi-racial society, and it is the purpose of this article to examine the steps that have been taken in this direction.

It is first necessary to emphasize that in most important respects Rhodesian society already lived largely segregated and in separate communities prior to UDI. The Land Apportionment Act in 1941 divided the territory into 'European', 'African' and unreserved areas — the latter forming only between five and six per cent of the territory. All towns and cities are in the European area, and Africans who work there (except domestic servants who live on their employer's premises in a hut in the garden) have by law to live in separate African townships. People of other races have so far been treated as European for residence purposes.

Education is the second major field in which there is almost complete segregation. Two separate educational systems are in existence: one for non-Africans (with separate schools for Indians and children of mixed origin) and one for Africans; it is only in a few mainly European private schools that pupils of the various races mix.

The opportunities for inter-racial social contact and understanding, both among adults and among children, are thus very limited. It appears to be the régime's intention to restrict them even further, as the measures described below indicate, and indeed as Mr. Smith has himself stated before his own Parliament on 2 August 1967. Adopting the term 'separate development' — an alternative phrase for *apartheid* — he said that Rhodesia's policy was to ensure that the separate communities had the opportunity of advancing while maintaining their own customs and ways of living.

Certain limitations on the régime's power to introduce racially discriminatory measures are contained in the 1965 'Indepen-

dence Constitution', adopted after UDI. These limitations are carried over from the 1961 Constitution.

In the first place, the Declaration of Rights contains the following provisions :

76 (1) No written law shall contain any discriminatory provision.

(2) For the purposes of this section a provision shall be regarded as discriminatory if by or as an inevitable consequence of that provision persons of a particular description by race, tribe, colour, or creed are prejudiced.

(a) by being subjected to a condition, restriction or disability to which persons of another such description are not made subject ; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description, and where the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, colour or creed of the persons concerned.

A similar provision relating to discriminatory action by a public authority or a public officer is contained in article 77.

Article 76 only applies to legislation enacted after the adoption of the 'Constitution', and its effect is even then limited. All bills which have been passed by Parliament must be examined by the Constitutional Council which is required to report on whether the bill, if enacted, would be inconsistent with the constitutional Declaration of Rights. However, a report that a bill is so inconsistent does not prevent its enactment altogether. If it is passed by Parliament a second time — with a two-thirds majority if it is voted on again at once, or with a simple majority if it is voted on again after at least six months — it becomes law notwithstanding that it is inconsistent with the Declaration of Rights.

Thus, if the régime is determined to enact legislation that infringes the provision of the Declaration prohibiting discrimination, the Constitutional Council can at best delay such legislation for a period of six months.

## **1. The Property Owners (Residential Protection) Bill**

The purpose of this proposed law is to remove from European residential areas the Indians and persons of mixed blood



who at present have the right to live there. The creation of exclusive racial areas will not be compulsory, but will depend on the initiative of the property-owners in any particular area. If more than fifty per cent of them petition for the declaration of a racially-exclusive area, the régime is, under the terms of the proposed law, empowered to evict persons who do not belong to the race that predominates in the area and to purchase their property by compulsory procedure. While this Bill is theoretically applicable also to predominantly non-European areas, it is in practice clearly designed to enable Europeans to compel the removal of the Indians and other non-Europeans who now live in the European residential suburbs.

This proposed legislation was expected to come before Parliament in the new year.

## **2. Municipal Amendment Act**

Under the Municipal Act, local authorities already have power to provide separate eating houses for Africans, which may not be used by non-Africans, and to enforce segregation in public transport. The Amendment Act, passed in the autumn of 1967, gives them power to segregate recreational facilities such as parks, swimming-pools and sports fields, as well as such amenities as public lavatories and park benches.

The Act was passed in spite of an adverse report from the Constitutional Council, which found that it was inconsistent with the Declaration of Rights in the Constitution. In December 1967, the Salisbury City Council decided in principle to implement the provisions of the Act within the city of Salisbury. Such implementation will presumably not only prevent people of different races from using the same amenities, but is likely to restrict or bring to an end inter-racial sporting competitions and racially mixed teams.

## **3. Developments in the Educational Field**

It has already been stated that some private schools admit pupils of all races. The number of African pupils attending such schools has always been small, owing to the fees involved. Nevertheless, in August 1965 the régime, whose permission is necessary for the attendance of Africans (since a technical infringement of the Land Apportionment Act is thereby

committed), announced that no further African pupils would be allowed to attend such private schools.

The strict enforcement of the Land Apportionment Act has also led to the compulsory closing-down of a school for the African children of domestic servants resident on their employer's premises in a European suburb of Salisbury, on the ground that land in such an area could not be used for the purpose of an African school. The distance from the nearest African township and school means that the children are thus deprived of education, for there are no transport facilities, and education for Africans is not compulsory as it is for Europeans. Other similar schools are also threatened.

#### **4. Restrictions on Inter-Racial School Sports**

As already stated, schools are completely segregated on racial lines except for a few private schools. It has nonetheless been the practice for school sports teams to play matches against schools of a different race. In June 1967 the régime forbade schools to take part in such inter-racial competitions without the consent of their parent-teacher association. However, most parent-teacher associations have agreed to their continuation. In November 1967, the régime returned to the attack with the issue of fresh proposals that, *inter alia*, separate changing rooms, showers and lavatories should be available at white schools for visiting non-white teams, and that when integrated private schools play matches at Government white schools, they should send all-white teams. News of these latest proposals was censored from the Rhodesia press on 17 November 1967, under the Censorship Regulations that have been in force since U.D.I.

#### **Conclusion**

The régime claims to have the support of the vast majority of the population of Rhodesia, including the Africans. It bases this claim on the support it receives from the chiefs. It is however perhaps significant that under the Emergency (African Affairs) Regulations, 1966, the régime has power to suspend any chief from office, and to order him and his family to move away from his tribe to an area specified by the Minister of Internal Affairs. This power may be exercised if, in the

opinion of the Minister, it is necessary or desirable for the public safety, the maintenance of public order or the preservation of the peace, or 'for making adequate provision for terminating or otherwise dealing with the state of emergency' that has been in force since UDI. This last condition places chiefs entirely at the mercy of the régime, since it could presumably be interpreted so as to obtain the removal of a recalcitrant chief who has expressed — even mild — disagreement with the régime's policy.

It is also significant that it has been considered necessary to maintain a state of emergency in force ever since UDI, throughout a country which is said to be wholeheartedly behind the régime. It is not the purpose of this article to examine the emergency powers in detail; but it should be pointed out that the steps in the direction of *apartheid* have been taken at a time when the authorities have, under the Emergency (Maintenance of Law and Order) Regulations 1966, *inter alia* detained or restricted hundreds of political opponents, maintained a strict censorship on the press, taken power to restrict and prohibit meetings, to control and restrict freedom of movement, to control and regulate publications, to arrest persons and to conduct searches without a warrant, and have created numerous offences, such as that of publishing statements 'likely to cause alarm or despondency' or publishing information about 'any measures taken for or in connexion with the state of emergency in Rhodesia'.

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## St. KITTS-NEVIS-ANGUILLA

Early last year, several islands in the West Indies, formerly part of the Eastern Caribbean Federation, obtained their independence from Great Britain. They were given the new status of 'Associated State' within the Commonwealth. These States have complete internal independence, but Britain is still responsible for their defence and foreign affairs. The 'Association' with Britain may be unilaterally terminated at any time by Britain, or by an Associated State subject to certain procedural requirements.\*

### St. Kitts-Nevis-Anguilla

The 'Leeward' islands of St Kitts (St. Christopher), Nevis and Anguilla became one such Associated State on February 27, 1967. St. Kitts has an area of 68 square miles and an estimated population of 36,500; Nevis and Anguilla are smaller and have respectively one third and one sixth of St. Kitts' population. The Chief Minister is Mr. Robert Bradshaw. At the last election in July 1966 his party (Labour), which had been virtually unopposed for fourteen years, was opposed by a newly formed party, the People's Action Movement (PAM). This party won 39% of the votes (to Labour's 44%) and its popularity has probably been increasing. No votes were cast in favour of Labour in Nevis or Anguilla.

### State of Emergency

On May 30, 1967 the island of Anguilla, claiming that she had been neglected by the Government in St. Kitts, purported to secede from the Associated State; this decision was sub-

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\* There must normally be a 90 day interval between the introduction of legislation to terminate the Association and its consideration. Before the legislation receives the assent, it must be approved by a 2/3 majority of those voting in a referendum. Such termination is irrevocable.

sequently approved by seventy per cent of the island's total electorate. After the 'secession', which amounted in law to an act of rebellion, the Government had a state of emergency declared in all three islands. The legal basis for this was a Leeward Islands (emergency powers) Order in Council of 1959.

On June 10, 1967, there were shooting incidents on St. Kitts at the Police Station, the Electric Power Plant and the Defence Force Headquarters. As a result, about twenty-two people, including the leaders of the Opposition and of the two non-government trade unions, were detained under the Emergency Regulations. The Government justified this action on the ground that the incidents were the first step in an attempt to overthrow it by force. There were on the other hand strong rumours, which were firmly denied by Mr. Bradshaw, that the incidents had been provoked by the police in order to provide an excuse to take action against the Opposition. The International Commission of Jurists is not directly concerned with the truth of these rumours, nor is it in a position to assess their reliability; for the purpose of this article, it accepts that the Government genuinely believed that it was faced with an attempt to overthrow it by force.

After the detainees had been unsuccessful in obtaining bail, they applied for *habeas corpus*. This was granted in three cases, but the applicants were subsequently re-arrested. Apart from one, the rest of the applications — after many adjournments — were finally refused by the Resident Judge. However, on August 10, the Appeal Court of the West Indies Associated States ruled that the Order in Council under which the Emergency Regulations had been issued was, in the absence of certain amendments, incompatible with the new Constitution; the detentions were therefore illegal.

The President of PAM, Dr. William Herbert, was immediately released on bail, and several other detainees unconditionally. Before releasing five other detainees on bail, a few days later, the magistrate referred to broadcasts on the (Government controlled) radio and to threats against his life attempting to prevent him from releasing the Defendants. A few hours later, the five detainees and Dr. Herbert were re-arrested under an Emergency Powers Act, which the House of Assembly had enacted over the week-end; they were charged with offences arising from the shooting incidents and with conspiracy.

## Interference with the Judicial Process

The first trial opened on October 16. The Resident Puisne Judge had been replaced at his own request 'for certain reasons' that he did not disclose. The Chief Justice of the Associated States declared later that the judge, having heard the *habeas corpus* applications made by the same Defendants, had felt that a judge with a fresh mind should preside at the trials. The ranking senior Puisne Judge of the Leeward Islands was then appointed. At the first trial, the court found that the Accused's confession had been extracted at gun-point and acquitted him. At the second trial, ten days later, where police officers admitted having previously made untrue statements, five more persons were acquitted and subsequently re-arrested on different charges.

Immediately after the acquittal in the first trial, a demonstration was organized, allegedly by Government officials, outside the judge's hotel, protesting that he was biased. Later, a document was handed to the Chief Justice by the Government entitled 'Complaints against the Judge'.

Between the two trials, the judge was threatened over the telephone and by letter; during the second trial he and two jurors were threatened by letter. The judge considered that, in order to avoid outside pressure, the jurors should be kept together during the trial; but the government refused to pay the cost that this would have entailed.

After the second trial, the Government requested the immediate withdrawal of the trial judge; the complaints that it put forward were 'of the kind frequently made by dissatisfied parties in civil and criminal appeals'.\* The Chief Justice refused this request, but the judge asked to be relieved of his duty and was replaced.

The day after the second trial, a Resolution was passed at a specially-summoned meeting of the House of Assembly expressing lack of confidence in the administration of justice. During the debate, which was broadcast over the St. Kitts' radio station, statements relating to the subject matter of the pending conspiracy charges were read out, which the Chief Justice later qualified as a contempt of court.

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\* Quoted from the statement in open court of the Chief Justice of the Associated States' Supreme Court, November 1967.

Before and during the trials, use was made of the radio and government newspapers to criticize the action of the courts and to pronounce upon the Defendants' guilt. Defence counsel, who had come from all over the West Indies, stated that they had not been allowed to visit their clients in custody. One of them was deported (no reason being given), the visitor's permit of another was continually being revoked, one was shot at, two intimidated and one declared *persona non grata*.

In the remaining three trials for conspiracy and connected offences, the Accused, who included Dr. Herbert, were immediately acquitted after the Prosecution had offered no evidence against them.

The day before the final acquittal, the Government announced that it proposed to set up a Commission of Inquiry to investigate certain facts (which formed the subject matter of the trials) and to make recommendations thereon. A few days later, an order under the Emergency Regulations was served on ex-detainees and on many of those who had been acquitted of conspiracy prohibiting them from travelling outside St. Kitts, since 'they were suspected of having been concerned in acts prejudicial to Public Order in the State'.

At about the same time, on the motion of Mr. Bradshaw the state of emergency, which applies to all three islands, was extended for a further six months. If the facts at the time of Anguilla's 'secession' were as the Government states, the original application of the state of emergency to the other two islands was probably legitimate. However, the extension in November, when St. Kitts and Nevis had long been free from any kind of disturbance, appears to be completely unjustifiable.

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The Opposition claim that the Government in St. Kitts has shown itself incapable of solving the islands' serious economic problems and that it has lost the support of the bulk of the population. Such claims are often made by an opposition, and are for the economist and political scientist to decide. The task of the International Commission of Jurists is to emphasize the principle that no government, however successful, is entitled to ignore the elementary rules of democracy.

The indictment against the St. Kitts Government is a long one: it has repeatedly shown contempt for the courts, has

refused to accept their decision and has flagrantly attempted — by threats and the misuse of the mass media — to use the courts as an instrument of its policy. When the courts proved to be instruments of the Rule of Law, it resorted to government by emergency regulation and trial by 'Commission of Inquiry'.

The smallness of St. Kitts affords no justification for minimizing the gravity of the situation there. From the view-point of the Rule of Law size is irrelevant. Moreover, many West Indians, who have been anxiously following recent events, feel that democracy in the Caribbean is on trial there, and that an unfavourable outcome would have effects outside St. Kitts-Nevis-Anguilla.

If such a disaster is to be avoided, the Government's misconception of the role of the Law Courts must be corrected, if possible by the Government itself. It is to be hoped that West Indian and other friendly Governments will bring their influence to bear, so that the Rule of Law may be upheld.

The courage and independence thus far shown by the members of the Judiciary and of the Bar in St. Kitts and other West Indian states is warmly to be commended. The independence of the Judiciary is invariably one of the first victims of a totalitarian regime; the actions of the Government of St. Kitts-Nevis-Anguilla may not have been intended as a deliberate attack upon the Rule of Law, but the methods used cannot fail to arouse anxiety.

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## THE SWISS CONSTITUTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Of the eighteen Members of the Council of Europe there are only two countries that have not yet ratified the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, France<sup>1</sup> and Switzerland. The present legal position in Switzerland makes it impossible for her to ratify the Convention without a number of very important reservations; it is, indeed, generally considered that ratification would entail the — at least partial — revision of the Federal Constitution of the Swiss Confederation.

### I. Ratification by Switzerland of the European Convention on Human Rights.

During the debates in the Swiss National Council on 22 June 1966, Mr. Eggenberger proposed<sup>2</sup> that the Federal Council should submit a report to the Legislative Council specifying the legal amendments that would have to be made if Switzerland was to accede to the European Convention. When introducing his motion, Mr. Eggenberger said :

It must be admitted that our law as it stands today has certain imperfections which prevent us from acceding to this Convention without reservations.

I shall mention first political anti-feminism, in other words, the refusal to grant women the right to take part in political life on an equal footing with men. Another example is anti-clericalism, which is written into our Constitution and is a survival from the

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<sup>1</sup> Apparently, only minor legal difficulties, which could perhaps be resolved by means of reservations, stand in the way of France's ratification of the European Convention on Human Rights, and it should be possible for her to take the political decision to ratify in a short space of time, probably during 1968, International Year for Human Rights.

<sup>2</sup> Federal Assembly Official Record, 1966, pp. 406-410.

period of civil war and *Kulturkampf* which Switzerland went through during the last century: *the prohibition against the Jesuits and monasteries and the refusal to allow clergymen of any creed to sit in the National Council*. There is also, I think, a touch of anti-semitism in the *law prohibiting ritual slaughter*, which infringes the freedom of worship of the Jews. Furthermore, the legal protection given to persons under *administrative detention* is not always adequate, and thus hardly compatible with the European Convention.

The International Commission of Jurists considered the first of these problems in 1961.<sup>3</sup> Article 74 of the Federal Constitution of the Swiss Confederation grants 'every Swiss who has reached the age of twenty' the right to take part in elections; this is interpreted so as to exclude women from the electoral register in federal elections. A draft amendment to the Constitution allowing women to vote at the federal level was rejected in a referendum of 1 February 1959. However, the cause of women's suffrage is gaining ground at the cantonal level; the Cantons of Basle (City), Geneva, Neuchâtel and Vaud have amended their constitutions to allow women to vote within their canton. Women are able to vote on certain matters in the Cantons of Berne and Glaris; and the question of women's suffrage will shortly be the subject of a referendum in the Cantons of Soleure and Valais.<sup>3a</sup> Of course, the votes in such referenda are only cast by men; the most conservative results occur in the villages and smallest cantons, which are still governed by *Lands-gemeinden*, a kind of direct democracy, such as was practised in classical Athens, with its essentially masculine tradition.

Article 51 of the Swiss Federal Constitution provides:

The Order of Jesuits and societies affiliated to it may not be admitted in any part of Switzerland and all activities in church or school are forbidden to their members.

This prohibition may be extended, by federal decree, to other religious orders whose activity is dangerous to the State or disturbs the peace between the various religious bodies.

Articles 50 and 52 also deal with religious matters in a restrictive way, particularly the latter, which prohibits 'the founding of new religious orders and the re-establishment of those

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<sup>3</sup> See *Bulletin* No. 12, December 1961, p. 51: *The Electoral Enfranchisement of the Women of Switzerland*.

<sup>3a</sup> Women's suffrage has, since the writing of this article, been rejected in the Canton of Soleure (February 18, 1968).

that have been dissolved'. Despite the historical reasons for these articles, it is nonetheless surprising to find them in a constitution adopted

'In the name of Almighty God !'

and they are in clear violation of religious liberty — at least for the Catholics, who are in a majority in some Cantons — even though article 49 of the Constitution declares freedom of conscience and religion to be inviolable. Again Article 75 of the Constitution seems to ignore Article 49 at the political level, since it provides that only lay citizens are eligible for membership of the National Council.

Article 25A of the Constitution, which was passed by referendum on 20 August 1893, provides :

The bleeding of slaughter animals which have not been previously stunned is expressly forbidden ; this provision applies to all methods of slaughter and to all kinds of livestock.

This provision clearly makes the ritual slaughter required for Kosher meat illegal and infringes the freedom of worship of the Jews.

When Mr. Eggenberger spoke of administrative detention, he did not have any particular article of the Constitution in mind ; he was pointing to the absence of any provision on such an extremely important matter which is left to the discretion of the cantons. Most of these provide for administrative detention in fairly wide terms, without giving legal safeguards to the detainee, who is thus vulnerable to arbitrary treatment by the police.

There are many ways in which the Federal Constitution could be revised : some of its articles may be amended and others withdrawn ; new provisions may be included — in this case it is essential that such provisions set out at least some general principles. Merely to revise the Federal Constitution is insufficient ; for that will not resolve the problems which are within the competence of the cantons, and for which no guiding principles were laid down by the framers of the Federal Constitution.

## II. Revision of the Federal Constitution

If the legal protection which Switzerland accords to her citizens is to satisfy the provisions of the European Convention,

she must ensure that rights and freedoms are enjoyed 'without distinction on any grounds including sex...' (*Article 14* of the Convention); she must therefore study the question of women's suffrage (*Article 74* of the Federal Constitution). At the same time she must guarantee 'the freedom to manifest... religion or belief, in public or private, in worship, teaching, practice and observance' (*Article 9* of the Convention); this means that she must reconsider the articles in derogation from this freedom (*Articles 50 to 52 and 75*) and the question of ritual slaughter (*Article 25A*).

However, amendment of these articles would not of itself satisfy the requirements of the European Convention; certain questions which have been left perhaps a little too freely to the discretion of the cantons could be dealt with by the Federal Constitution itself.

The question of administrative detention raised by Mr. Eggenberger should also be examined in the light of *Article 5* of the European Convention, which provides:

Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

The rules of criminal procedure in certain cantons which cling to the principle of 'the secrecy of investigation' will also need to be amended. Under these, the investigating judge has a discretion to prevent, for as long as he deems necessary, any

access to an accused by his counsel. This infringes the rights of the defence provided for under Article 6 (3) (c) of the European Convention.

In addition, the provisions which authorize a number of departments to listen into private telephone conversations should be amended ; Article 8 of the European Convention provides :

‘Everyone has the right to respect for his private and family life...’

This right could be realized if perhaps the secrecy of telephone conversations were given the same protection as that of letters and telegrams in Article 36 of the Federal Constitution.<sup>4</sup>

Again, the important question of the recruitment of judges, which is left to the cantons to decide, should be studied in the light of Article 6 of the Convention : ‘... Everyone is entitled to a fair... hearing... by an independent and impartial tribunal.’ This right is not always guaranteed by the method of electing judges adopted in most of the cantons. The principle of an elected Bench, accepted in ancient times, has since been condemned by intellectuals, who feel that its application may compromise the judges’ independence and impartiality. Many countries have now abandoned it, and, in those that have not, it meets with opposition.

The important task of revision might well be complete, if the Constitution included certain rights that are not legally binding under the European Convention, but are in fact protected by countries which give full recognition to human rights. An example is the right of conscientious objection : Article 4 (3) (b) of the Convention refers to the fact that this right is recognized in some countries. Article 18 of the Constitution provides : ‘Every male Swiss is liable to perform military service,’ and Article 49, para. 5 : ‘No-one may secure exemption, on the ground of religious opinion, from the fulfilment of any civic obligation.’ An amendment is clearly necessary if Switzerland is to recognize the conscientious objector.

None of the criticisms in this article is original. All the matters that have been dealt with here have, from time to

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<sup>4</sup> See *Bulletin of the International Commission of Jurists*, No. 31 : *Nordic Conference on the Right to Privacy*.

time, been the subject of comment in the press, of debates in the country's political and legislative bodies and some even of referenda. All of them are now under study and can be considered as on the way to solution.

It has been suggested that rather than to amend certain articles of the Constitution, which dates from 29 May 1874 and has already been amended in several places, it would be better to make a complete revision of it. This idea, however, has, up to now, not been generally accepted and was even rejected in a referendum of 8 September 1935. Today, the idea is gaining ground: the Federal Council has accepted it and has appointed a nine-member committee under the Chairmanship of Mr. F. T. Wahlen, a former Federal Councillor, to undertake the preliminary studies. However, it seems unlikely that this Committee will be able to complete its work before 1974 (the centenary of the present Constitution). If the principle of complete revision were eventually to be accepted, the committee would be enlarged and its findings would be submitted to the decision of the Swiss people.

However, the Swiss people in its enthusiasm for innovations should not necessarily vote in favour of every proposal that is put before it. One proposal, which will shortly be the subject of a referendum, is to insert a provision limiting the number of foreigners in Switzerland to ten per cent of the population; (the present proportion is almost fifteen per cent.) It would be regrettable if this feeling of xenophobia were enshrined in the Constitution of Switzerland, long regarded as a country that offers welcome and asylum. The Federal Council and the Committee of the National Council have in fact given an unfavourable opinion on the subject of this proposal.

On the other hand, encouragement should be given to the transitional provision proposed by the Government, which would allow five thousand electors to demand a plebiscite in the seven districts of French-speaking Jura, where there have been some demonstrations in favour of autonomy for these regions.

At all events, it is difficult to determine the date when Switzerland will have effected the complete revision or series of amendments of the Constitution necessary if she is to ratify the European Convention without reservations. The machinery of direct democracy in this country moves slowly, and it will be a long time before the campaign for recognition of some

of the rights already mentioned — particularly political rights for women — will be 'accepted by the majority of the Swiss citizens taking part in the vote and by the majority of the states' (*Article 123 of the Constitution*).

For this reason some have questioned the desirability, from a political and psychological point of view, of making ratification of the Convention necessarily depend upon the revision of the Constitution;<sup>5</sup> they would prefer to see an immediate ratification subject to reservations, as authorized by Article 64 of the Convention, which provides:

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned.

Those who hold this opinion point to the many countries that have taken advantage of this right, in particular to Norway, which made a reservation concerning the prohibition against the Jesuits — though the relevant article in her Constitution has now been repealed. One of the supporters of this view is Mr. Willy Spühler, the President of the Confederation. In a speech of 1 January 1968 at Zurich, he said: 'I see in Switzerland's accession — even with reservations — not the renunciation, but the demonstration of an intention to eliminate the reasons for the reservations.'

Others are strongly opposed to immediate ratification in view of the extensive reservations that would have to be made.<sup>6</sup> They feel that there can be no comparison between, for example, Austria's reservation concerning the House of Habsburg and the reservation that Switzerland would have to make concerning universal suffrage, since 'one half of the people have no say in the laws to which they are subject'. They are afraid that if such reservations are formulated at the time of ratification, this would slow down the movement towards adapting the Swiss Constitution 'to the principles on which a Modern State

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<sup>5</sup> See, for instance, Mr. Bretscher's speech during the debate in the Swiss National Council, 22 June 1966, *op. cit.*

<sup>6</sup> See the speeches of Mr. Tenchio and Mr. Schmitt in the same debate.

is founded', and would salve the consciences of those who are opposed to constitutional reform.

Both these points of view are valid. If, as could well happen, it is decided to make a complete revision of the Constitution, an immediate ratification with reservations would perhaps be preferable, on account of the long delay that such revision would entail. In fact, Mr. Bretscher, in his speech in the National Council, expressed the hope that in 1968, International Year for Human Rights, Switzerland would join the ranks of those countries which had ratified the European Convention.

In any event, the Federal Constitution of Switzerland is being brought into line with the European Convention on Human Rights. The Swiss are fully aware that this is necessary and are determined to preserve their reputation and to ensure that an affirmative answer is given to the question: 'Do the Swiss deserve to be Swiss?'<sup>7</sup>

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<sup>7</sup> From *The Swiss*, by Robert Dargeant.



## RIGHTS OF THE DEFENCE IN YUGOSLAVIA

### *Editor's Note*

The Constitution which Yugoslavia adopted in 1963 has been of particular interest to constitutional lawyers and political scientists in all parts of the world and of all the various ideologies. The International Commission of Jurists in its *Bulletins* Nos. 17 and 20 pointed out that this new Constitution was an encouraging point of departure promising greater safeguards for the individual's freedoms.

Article 32 of the Constitution states that human rights and freedoms are an inalienable element of socialist society, without which human dignity cannot be realized. Articles 47 to 50 set out the general principles of criminal law and procedure. The Yugoslav parliament has passed a series of laws to put the provisions of the constitution into effect. One of these, which entered into force on 1st January 1968—the beginning of Human Rights Year, is worthy of special attention. This new law of criminal procedure brings the laws concerning the rights of the defence up to date; it incorporates generally accepted principles and seems to mark a new stage in Yugoslavia's legal development in the field of human rights. The commentary which follows was provided by a Yugoslav reader of ICJ publications, Mr. Josef Hekman, a lawyer from Rijeka.

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On 1st January 1968, the amendments and additions to the Yugoslav law of criminal procedure entered into force.

This law, whose exact title is *Code of Criminal Procedure*, is promulgated in the *Official Gazette* (Sluzbeni list SFRY) No. 50 of 13th December 1967, where the final text of the law with a new system of numbering is to be found. The actual

amended articles were published in the Official Gazette No. 23/67 of 24th May 1967; they were ratified in Parliament by a vote of 11th May 1967.

The rights of the defence under this new code are appreciably greater than those provided for previously in several respects. In the first place, the accused is entitled to ask for his lawyer to be present during the whole of his examination and that of the witnesses, as well as at the investigation in the places considered relevant. Defence counsel may examine the documents of the investigating court and any other evidence at any time; whereas, in previous legislation, as far as examination of the documents was concerned, at the discretion of the investigating court this right could be taken away. Under Article 72/II of the previous code, counsel could be refused permission to see the documents, either as a whole or in part, and the court records if in the circumstances this was necessary. The sole judge of whether such necessity existed was the investigating court itself. Moreover, defence counsel was never allowed to be present at the Court investigation (Article 150); this situation has, as has been said, been completely changed.

A further amendment allows defence counsel to demand to be present even during appellate proceedings and at the deliberation of the judges, which had not previously been the case. The right of the defence in the appeal court has thus been enlarged, and defence counsel is now on the same footing as the Attorney-General.

Under the old legislation, in particular Chapter VI of the Law of Criminal Procedure, the accused was entitled to be assisted by counsel during the whole of his case; and at the very beginning of the investigation, the Judge was under an obligation to inform the accused of his rights. The new law not only defines the rights of the defence, but also enlarges them in the context of the investigation and the trial, which is of particular importance.

Already under the old law, defence counsel had to be a lawyer. In the case of certain offences, specified by the criminal code, the presence of a defence lawyer was compulsory. If the accused refused to appoint counsel, the court chose one for him.

The rights of the defence are now completely safeguarded. The new laws provide one of the most up-to-date systems for

the protection of the accused, and are at the same time an important development in the field of human rights.

Under the new Article 66/2, the accused must not only be told that he has a right to choose a lawyer, but his lawyer must be present during his examination. Article 156 lays down that both the prosecution and the defence are free to be present not only during the examination of the accused but also at the investigation in the relevant places and at the hearing of all the witnesses. They need not merely be present as observers, but can take an active part, such as by putting questions or making submissions.

Detention before trial may be ordered only in the circumstances laid down by law; the period of detention and of the court investigation must be restricted to as short a time as possible. The reasons for refusing bail (Articles 175 & 176) are the same as in other modern systems: the seriousness of the offence and the corresponding punishment, collusion, interference with the investigation and the possibility that the accused will escape or commit another crime.

The detention order must be made in writing by an investigating judge. The police can only detain a suspect in exceptional cases falling within the provision of Article 176 (quoted above). In this case the person arrested must immediately be brought before the nearest investigating court. The investigating judge must immediately inform the suspect of his right to appoint Counsel within 24 hours the investigating judge will examine him without delay and, if he refuses to take counsel, a lawyer from the court will defend him within the next 24 hours. This is particularly important when the accused is in financial difficulties, for he will thus receive the same treatment as an accused who is able to pay for his counsel.

These rules have one exception: under Article 212, paragraph 8, the accused can be examined in the absence of a defence lawyer, but only if he formally states that he does not wish his counsel to be present, or if his counsel having been informed of the situation, does not come. The rights of the defence during the court investigation are the same.

The rights of the defence during the trial at first instance are the same as they were before the entry into force for the new law. They are similar to those provided for in other European systems: the right to adduce evidence, to put questions,

to make submissions and objections to the record, to make final submissions and to reply.

Under Article 341, at the hearing on appeal also, defence counsel may be present if he has so demanded in writing, or if the court considers that his presence is useful to the proper appreciation of the case. Since 1st January 1968, when the new law entered into force, all the documents of the investigating court have been modified so as to conform with it.

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## ICJ NEWS

### SECRETARIAT

At the invitation of the Norwegian Students Association, the Secretary-General of the ICJ, Mr. Seán MacBride, went to Oslo on 10th December 1967; this is not only Human Rights Day but also the anniversary of Dr. Nobel, on which the Nobel Peace Prizes are distributed. Since no prize was awarded for 1967, the 10th December ceremony was entirely devoted to the celebration of Human Rights Day. As guest of honour Mr. MacBride made the principal speech.

Afterwards, Mr. MacBride went to New York to give a lecture at the Hammar skjöld Forum on 'International Protection of Human Rights'. At the same time, he had talks with leading personalities in the United Nations Organisation and with most of the African delegates on the South West Africa question and on what stronger action could be taken in relation to it at the international level.

The ICJ sent Mr. Richard A. Falk, Professor of International Law at the University of Princeton (USA), to Pretoria as an observer of the closing stages of the trial there, in which 33 South West Africans were convicted of offences under the South African Terrorism Act and the Suppression of Communism Act.

The ICJ protested against the introduction of a compulsory death sentence in Rhodesia for those found in possession of 'weapons of war'. Such persons are presumed to be 'terrorists' unless they can prove beyond reasonable doubt that they are not. In the view of the ICJ, the basic humanitarian principles of the Geneva Conventions for the treatment of prisoners of war should be extended to African 'freedom fighters' captured in combat.

The Commission expressed its concern over recent political trials in Greece, where the rights allowed to the defence have been well below the requirements of the Rule of Law. In its Press Release, it drew jurists' attention to the difficulties encountered by a number of Greek defence counsel in carrying out their task, and to the prejudice which might result for the Accused, if, in consequence, they were denied an adequate defence.

In a further Press Release, the Commission reflected the general uneasiness caused by the trial of the young intellectuals in Moscow and by the veil of secrecy surrounding the proceedings. It hoped that the Soviet authorities would make available the full record and transcript of the trial, and thus undo some of the harm that this trial and its surrounding circumstances had done to the image of Soviet justice.

Dr. Marino Porzio, a member of the legal staff of the Secretariat, was arrested by the Portuguese authorities, 24 hours after his arrival in Lisbon, and expelled from Portugal. The object of his visit had been to meet lawyers in Portugal interested in organizing a programme for the celebration of International Human Rights Year. The Commission rejected as unfounded the Portuguese allegation that Dr. Porzio had 'interfered in the domestic affairs' of Portugal. It protested against this arbitrary and unacceptable action, which was clearly indicative of the existence of a police state in Portugal.

The ICJ has been put on the International Labour Organisation's special list of NGOs. This means that its status in relation to the ILO is similar to the consultative status that it has with other governmental organizations. The Commission has, in the last few years, had close relations with the ILO.

## NATIONAL SECTIONS

### New National Sections

The Executive Committee of the ICJ, at its meeting in Geneva, last November, approved the Statutes of the new National Section of the Dominican Republic and of the local Section of Rosario (Argentina). It also approved the affiliation to the ICJ, as Associate Member, of the Senegalese Association for Legal Study and Research.

### Celebration of Human Rights Year

National Committees, in which the National Sections of the ICJ are taking an active part, have been set up in: Argentina, Australia, Austria, Canada, Ceylon, Chile, Congo (Democratic Republic), Costa-Rica, Cyprus, Denmark, Ecuador, Germany (Federal Republic), India, Iran, Ireland, Italy, Jamaica, Japan, Nepal, Netherlands, New Zealand, Norway, Pakistan, Sweden, Trinidad and Tobago, Turkey, United Kingdom and USA. Others are now being formed in: Belgium, Finland, France, Ghana, Iceland, Israel, Luxemburg, Nepal, Nigeria, Peru, Sierra-Leone and Zambia.

The International Commission of Jurists is a non-governmental organization which has Consultative Status with the United Nations, UNESCO and the Council of Europe. The Commission seeks to foster understanding of and respect for the Rule of Law. The Members of the Commission are:

JOSEPH T. THORSON	Former President of the Exchequer Court of Canada
VIVIAN BOSE (Honorary Presidents)	Former Judge of the Supreme Court of India
T. S. FERNANDO (President)	Judge of the Supreme Court of Ceylon; former Attorney-General and former Solicitor-General of Ceylon
A. J. M. VAN DAL	Attorney-at-law of the Supreme Court of the Netherlands
OSVALDO ILLANES BENITEZ (Vice-Presidents)	Chief Justice of the Supreme Court of Chile
Sir ADETOKUNBO A. ADEMOLA	Chief Justice of Nigeria
ARTURO A. ALAFRIZ	Attorney-at-law; Professor of Law; former Solicitor-General of the Philippines
GIUSEPPE BETTIOL	Member of the Italian Parliament; Professor of Law at the University of Padua
DUDLEY B. BONSALE	United States District Judge of the Southern District of New York; past President of the Association of the Bar of the City of New York
PHILIPPE N. BOULOS	Deputy Prime Minister, Government of Lebanon; former Governor of Beirut; former Minister of Justice
U CHAN HTOON	Former Judge of the Supreme Court of the Union of Burma
ELI WHITNEY DEBEVOISE	Attorney-at-law, New York; former General Counsel, Office of the USA High Commissioner for Germany
MANUEL G. ESCOBEDO	Professor of Law, University of Mexico; Attorney-at-Law; former President of the Barra Mexicana
PER T. FEDERSPIEL	Attorney-at-Law, Copenhagen; Member of the Danish Parliament; former President of the Consultative Assembly of the Council of Europe
ISAAC FORSTER	Judge of the International Court of Justice, the Hague; former Chief Justice of the Supreme Court of the Republic of Senegal
FERNANDO FOURNIER	Attorney-at-Law; President of the Inter-American Bar Association; Professor of Law; former Ambassador to the United States and to the Organization of American States
HANS-HEINRICH JESCHECK	Professor of Law; Director of the Institute of Comparative and International Penal Law of the University of Freiburg
RENÉ MAYER	Former Minister of Justice; former Prime Minister of France
Sir LESLIE MUNRO	Former Secretary-General of the International Commission of Jurists; former President of the General Assembly of the United Nations; former Ambassador of New Zealand to the United Nations and United States
JOSÉ T. NABUCO	Member of the Bar of Rio de Janeiro, Brazil
LUIS NEGRON-FERNANDEZ	Chief Justice of the Supreme Court of Puerto Rico
PAUL MAURICE ORBAN	Professor of Law at the University of Ghent, Belgium; former Minister; former Senator
STEFAN OSUSKY	Former Minister of Czechoslovakia to Great Britain and France; former Member of the Czechoslovak Government
MOHAMED A. ABU RANNAT	Former Chief Justice of the Sudan
EDWARD ST. JOHN	Q.C., M.P., Barrister-at-law, Sydney, Australia
THE RT. HON. LORD SHAWCROSS	Former Attorney-General of England
SEBASTIAN SOLER	Attorney-at-law; Professor of Law; former Attorney-General of Argentina
PURSHOTTAM TRIKAMDAS	Senior Advocate of the Supreme Court of India; sometime Secretary to Mahatma Gandhi
H. B. TYABJI	Barrister-at-Law, Karachi, Pakistan; former Judge of the Chief Court of the Sind
TERJE WOLD	Chief Justice of the Supreme Court of Norway

Secretary-General: SEAN MACBRIDE S.C.  
Former Minister of Foreign Affairs of Ireland

Executive Secretary: VLADIMIR M. KABES  
LL.D., M.C.L.

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The International Commission of Jurists has devoted a special issue of the *Journal* to International Year for Human Rights, 1968. Its contributors are eminent lawyers from many parts of the world. The first part of this issue (Vol. VIII, No. 2), which contains in addition an article on the French *Conseil d'Etat* and the Digest of Cases, is now available.

The second part (Vol. IX, No. 1) will be appearing in June 1968. In addition to the Human Rights articles, this volume will publish the Jamaica Conclusions on Civil and Political Rights, an article on the Judicature of New Zealand and the Digest of Cases.

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