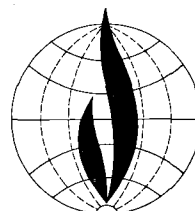


For the Rule of Law

Special AFRICA number

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

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No. 7

December 1971

Editor: Niall MacDermot

Appeal

The publication of the REVIEW No. 7 has been made possible by the generous help we have received from a number of governments to supplement our income from national sections, from foundations and from individual supporters.

We wish to acknowledge with gratitude the contributions we have received from the Governments of Austria, Canada, Cyprus, Denmark, France, The German Federal Republic, Guyana, Jamaica, Netherlands, Switzerland and the United Kingdom, as well as from the Dutch Peace Foundation.

We must, however, warn our readers that the future of the REVIEW is dependent upon increased support from individual lawyers throughout the world. If you are not already *a Contributor to the work of the International Commission of Jurists* we urgently appeal to you to become one by contributing *the sum of 100 Swiss Francs or more per year*.

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The International Commission
of Jurists
2, quai du Cheval Blanc
1211 Geneva 24
Switzerland

Editorial

The decision to devote this number of the REVIEW predominantly to events concerning Africa was prompted by two important Conferences held this year. The conclusions of both Conferences are reproduced in full in this issue.

The first, on 'African Legal Process and the Individual', was convened in April in Addis Ababa by the UN Economic Commission for Africa. Held just ten years after the African Conference of the International Commission of Jurists in Lagos, it is believed to be the first African conference to be convened by Africans dealing with human rights. Attended by representatives of over 20 African governments, as well as by a number of distinguished African jurists invited in their individual capacity, the conclusions of the Conference are far reaching. They invite the Organisation of African Unity to consider establishing an African Commission on Human Rights, an African Convention on Human Rights, an Advisory body to which recourse may be had for interpretation of the Convention, and also an Institute of Comparative Law publishing an African Journal of Comparative Law and holding regular meetings for study and research into African Law. We believe that these conclusions constitute a document of importance for lawyers throughout Africa concerned with the advancement of human rights. The Conference Conclusions also re-affirm many of the conclusions reached at the International Commission of Jurists' Conferences at Lagos (1961), Rio de Janeiro (1962), Bangkok (1965) and Dakar (1967).

The second was the International Conference in Colorado in September on 'Justice and the Individual: The Rule of Law under current pressures', convened by the ICJ as guests of the Aspen Institute for Humanistic Studies. The conference preceded a meeting of the Commission and the participants comprised members of the ICJ and other distinguished jurists coming from 25 countries in all continents of the world. One of the principal themes discussed was racial discrimination, with particular reference to South Africa. The Conference decisively rejected the doctrine that the United Nations is debarred by the domestic jurisdiction provision of Article 2 (7) of the Charter from considering systematic violations of human rights, and went on to hold that flagrant and systematic racial discrimination as practiced in South Africa inevitably constitutes a threat to peace and should be considered as such by the Security Council with a view to international action, as they did in the case of the illegal declaration of independence by Rhodesia.

Among the special articles dealing with Africa are an account of recent racist legislation and trials in South Africa, bringing up

to date previous publications of the ICJ on this subject; an account of an important development in the structure of the legal profession in Zambia; a description of the work of the Law Development Centre in Uganda, an imaginative institution designed to meet the needs of a developing country; and an article on preventive detention which compares recent developments in this field in Uganda and in West Bengal. In the section on Human Rights in the World there is an account of the deplorable state of the administration of justice in Guinea and a description of the new Senegalese Committee on Human Rights which we believe to be the first such body to be officially established in Africa. We also publish in this issue a summary of the historic opinion of the International Court of Justice on the presence of South Africa in Namibia.

The racist repression described in Mr. Michael Davis' article has been carried to a further stage of intensity since the article was written. A fresh wave of arbitrary arrests and detentions without trial resulted in yet another 'suicide' victim, Ahmed Timol, who fell from the tenth floor of a security police interrogation building. Further evidence of torture and menaces to detainees and internees was given at the Pietermaritzburg trial, and the insidious nature of the Terrorism Act was further exemplified in the trial of the Dean of Johannesburg, resulting in the savage minimum sentence of 5 years. These events led to an unprecedented degree of protest within South Africa not only from black Africans but from bodies such as the Civil Rights League, the Methodist and Anglican Churches, the Black Sash and the United and Progressive Parties. The International Commission of Jurists strongly supports these protests and calls upon the government of South Africa:

- (1) to permit an impartial international investigation into the death of Ahmed Timol and the allegations of torture of political prisoners and detainees.
- (2) to cease the arrest and detention of subjects without trial, a practice which experience in countries all over the world has shown almost invariably leads to police excesses and brutality.
- (3) to repeal the Terrorism Act, Suppression of Communism Act, BOSS Act, and other instruments of racist oppression.

Readers may be surprised that there is no article or comment in this issue upon the events in East Pakistan which have had such tragic consequences. The reason for the omission is that the ICJ is seeking to set up a Commission of Enquiry into these events and hopes later to be in a position to publish a special report on them. It was thought better that we should not in the meantime publish any comments which might be thought to prejudice the impartiality of the enquiry. This has not, however, inhibited the Commission from protesting publicly against the secret trial before a military

tribunal of the Awami League leader Sheikh Mujibur Rahman, or from joining with other non-governmental organisations in August in calling upon the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities to set up an enquiry into the violations of human rights in East Pakistan.

November, 1971.

T. S. Fernando

The President of the International Commission of Jurists, T. S. Fernando, has recently been appointed President of the Court of Appeal of Ceylon. This is the highest post in the judiciary, as the new court is the final appellate court.

The recognition of the qualities of our President will be warmly welcomed by all Members and friends of the ICJ, and we offer him our sincere congratulations and good wishes in his new post.

Justice in Guinea

Immediately after the proclamation of the independence of Guinea in October 1958, a decree signed by the President, Sekou Touré, abolished the profession of lawyer. In the opinion of the Guinean Head of State, that profession was an expression of a 'legalistic formalism which is not only useless but incompatible with the social realities of a young African nation'.

This decision, which passed unnoticed at the time, was nevertheless to have tragic consequences. As early as 1961, a High Court of Justice was created (again by decree) to be responsible for judging political offences. The members of this tribunal, against whose judgements there is no appeal, were all politicians chosen from among the immediate associates of the President of the Republic. In fact, it was brought into being purely to serve the cause, and its immediate task was to judge the leaders of the Guinean teachers' trade union, accused in November 1961 of 'undermining the internal and external security of the State'; they had, two days earlier, submitted to the Head of State a memorandum asking in rather moderate terms for salary increases for the members of their profession. Having been invited by an announcement over the radio to attend a 'working session' in the National Assembly building, they found themselves to their astonishment in the presence of the 'judges'. The President of the National Assembly, assisted by two ministers, informed the trade union leaders that they were under arrest and immediately pronounced sentence: two were condemned to 15 years' imprisonment and three others to 10 years. The whole procedure lasted only a few minutes, with no discussion and above all no question of the accused having any right to defend themselves. The public was informed of the verdict by a radio announcement, at the same time as the families of the condemned men. The members of the trade union, joined by Guinean students and school children, tried to stage a demonstration against the judgement, but the attempt was ruthlessly suppressed by the police and the army. Several people were killed and a large number of teachers and students were arrested; some of them spent two years in prison. As for the leaders 'judged' in the National Assembly, they were only set free in October 1967, and during their six years in prison

their families were never allowed to visit them or even communicate with them. Indeed, throughout the period they were held in the strictest solitary confinement, under deplorable conditions of hygiene. A number of prominent foreign personalities, as well as humanitarian organisations, approached President Sekou Touré with a view to obtaining the release of the prisoners: Amnesty International chose the trade union leader Keita Koumandian as their 'prisoner of the year' for 1964, while in France a number of left-wing personalities well known for their sympathy with the Guinean regime submitted an urgent appeal to the Guinean ambassador in Paris¹. When, six years after their condemnation, the prisoners were at last released, most of them were severely marked, both physically and mentally, by the experience. Some of them are still under medical care.

On 18 October 1965, nine days after an opposition political party had legally registered its constitution, President Sekou Touré's government announced the discovery of an 'imperialist plot'. The founder of the new party, the Guinean National Union Party (PUNG), a trader well known in Conakry under the nickname of 'Little Touré', was immediately arrested, together with his closest relatives and known friends, about fifty persons in all. In the same wave of arrests were included two ministers, ambassadors and senior officers of the Guinean army. Without anyone knowing where, when or by whom these persons were judged, it was later announced over the radio that ten of them had been condemned to death and the others to life imprisonment. Those condemned to death were executed without delay; the others, including those against whom no individual accusation had been made, were held in solitary confinement until 2 October 1970, the twelfth anniversary of Guinean independence; in other words, for 5 years.

In March 1969, a 'military plot' was discovered. At the same time as the chief culprits, Colonel Kaman Diaby, Deputy Chief-of-Staff of the army, and Keita Fodeba, Secretary of State for Rural Economy, two ministers and a large number of young officers were arrested. They were interrogated, at night, by a 'Commission charged with the investigation of the plot' consisting of nine members, mostly from the family of the Head of State, presided over by the Minister of National Defence, General Diané Lansana. On 11 May the National Revolutionary Council, an organ of Sekou Touré's ruling Democratic Party of Guinea, on which a 'law' had that same day conferred the title of 'Revolutionary Tribunal', decided to judge the offenders. They were accused of 'undermining the external security of the State', 'attempting to assassinate the President of the Republic' and 'inciting to civil war'. They were heard indirectly by means of tape recordings, without being seen by their judges, which of course meant that they had no possibility of defending themselves. They all admitted their

¹ Among others, Jean-Paul Sartre and the lawyer P. Stibbe.

'crimes' and the verdict was announced on May 12th: 13 persons were condemned to death and about thirty others received sentences of from 20 years to life imprisonment, accompanied in all cases by the confiscation of property. Those condemned to death were executed during the night of 25 to 26 May¹.

After an attempted landing on 22 November 1970 directed against Conakry and organised from outside the territory by Guinean opponents of the present regime, several hundred persons were arrested and accused of complicity with the 'invaders'. The National Assembly, specially convened and given the title of 'Supreme Revolutionary Tribunal', gave judgement after simply listening to tape recorded 'confessions' by the accused. A few days earlier President Sekou Touré had declared that the duty of all active members of the Party was to 'kill, slaughter, and give an account afterwards'. Consequently the members of the National Assembly, 'faithful to the Revolution', pronounced on 23 January 1971, amid demonstrations of mass hysteria, 92 death sentences and 67 condemnations to life imprisonment with hard labour. Already on the morning of the 25th four men, three former ministers and a police superintendent, were hanged on the Tombo Bridge in Conakry. During the following days others were hanged in different towns in the interior of the country. School children were invited to go and spit on and throw stones at the bodies, sometimes in the presence of the relatives of the victims who were forcibly taken to the place of execution. It has even been stated by witnesses that in certain places petrol was poured on the condemned men and they were burned alive. To celebrate the event, commentators on Radio Guinea did not hesitate to use the words 'carnival' and 'festival'. President Sekou Touré had announced in advance that he would not exercise the right of pardon conferred on him by the Constitution and had composed a poem entitled 'Farewell to the traitors', the chorus of which was broadcast at regular intervals by the Guinean radio. Under these circumstances and given the character, number and personality of the victims, one is not surprised at the immense wave of protest provoked by the executions. Pope Paul VI spoke of 'horror' and 'profound anxiety caused by the abnormal procedures followed', while his representative Professor Federico Alessandrini openly expressed his doubts as to the 'legality of the trial'. The severity with which the Holy See condemned the verdicts pronounced on 23 January cannot be explained solely by the fact that the Archbishop of Conakry Mgr. Tchidimbo, well known for his nationalism and his advanced left-wing views, was among those condemned to death. The exaggerated nature of the accusations made by the Conakry authorities, the fact that the accused were given no opportunity to defend themselves, the absence of the most elementary

¹ See in *Jeune Afrique* No. 541, 18 May 1971, the account given by one man who escaped.

guarantees that justice would be done, the incongruous nature of the list of those condemned which suggested a settlement of accounts rather than a sentence pronounced by a court of law, all these factors contributed to provoke an international wave of protest, including that expressed by the International Commission of Jurists.

The condemnations included men of every political, philosophical and religious conviction. We find, for instance, long-standing opponents of President Sekou Touré like the liberal minister Barry Ibrahima, known as Barry III; others who had always been faithful to him, like the former Minister of the Interior Magassouba Mariba, well known for his doctrinal intransigency and his admiration for Mao Tse Tung; or important civil servants who had remained more or less aloof from the political scene like the former governor of the Central Bank, Baldé Ousmane. These three men were hanged together in Conakry for 'collaboration with the enemy'. About thirty persons who had earlier been sentenced to various terms of imprisonment (those involved in the 1969 plot) were now condemned to death because, according to the verdict, 'new revelations had shown that their guilt was even greater than had been supposed'. Others, who had been condemned to death some years earlier, were again sentenced to the same penalty although they had in fact already been executed. This was true in the case of the former minister Fodeba Keita, accused in 1971 of acts committed in 1966 and even in 1961, whereas in fact he had been arrested, judged, condemned and executed in 1969 without the popular tribunal having heard even the usual tape-recording of his voice, since he had maintained to the end his absolute refusal to speak. The Guinean Head of State was to reveal that, among other crimes, Fodeba Keita had in 1965 caused the premeditated death of 300 persons shut up in a cell in the Alpha Yaya Camp¹.

General Keita Noumandian, former Chief-of-Staff and chief military adviser to President Sekou Touré, one of the principal persons accused in the present trial of the so-called 'fifth column', has revealed in his testimony some of the things he witnessed during his thirteen years at the head of the Guinean army. This former senior officer said, in a statement broadcast by the Voice of the Revolution, 'I had been through the war in Indo-China, but I had never seen such cruelty'. It can certainly be said that the 'fifth column' trial which opened on 24 July this year through the broadcasts of Radio Guinea is without precedent in the annals of judicial procedures. About 120 persons, including 15 former ministers, more than a score of senior officers, highly placed civil servants, traders, ordinary workers, labourers and peasants have been heard. Men and women of all ages and all convictions confess to crimes ranging from 'economic sabotage' to 'attempted assassination of the Head of State' and 'undermining the internal and external security of the State'. Most of

¹ See 'Togo Presse' No. 2753, 12 August 1971.

them confess to having received large sums of money from foreign powers (France, Portugal, the Federal Republic of Germany, the United States of America, etc. . .) to work for the overthrow of the existing regime. They had all taken part in judgements pronounced over the last few years, especially at the time of the January 1971 trials, when they vied with one another in the severity of their condemnation of the men then on trial. Some of them had participated directly in the night interrogations carried out in the detention camps, which is an indication of the complete confidence President Sekou Touré had in them at the time. The former minister Bama Marcel Mathos, arrested in July on his return from Pekin where he had particularly distinguished himself by the violence of his attacks on 'the imperialist powers' and 'the fifth column agents', now 'confesses' that he was a party to this plot. The people are to judge the accused but, as usual, they will have no possibility of seeing them. And they have no means of knowing under what conditions the statements broadcast by the radio have been made. President Sekou Touré declared at the beginning of the trial that 'there was no doubt whatever that the verdict would be a just one'. A few days earlier, the Guinean leader had said before the congress of the Revolutionary Democratic African Youth movement (the youth section of his party): 'Give me a thousand reactionaries and I will kill them with a clear conscience'.

The people as 'judges' are certainly obliged to attend the mass meetings organised in villages and quarters to listen to the radio broadcasts; and it often happens that individuals are arrested in the middle of these meetings on the strength of an accusation made in the course of one of the confessions or simply by some obscure opponent seeking promotion . . . the fate of an 'enemy of the people' is sealed in advance. The moment chosen to announce his fate is merely a matter of political expediency. It would even seem that most of these prisoners are considered as hostages, for President Sekou Touré has repeatedly announced that 'in case of any further attack directed against Guinea, the fifth column agents at present held in prison will immediately be liquidated'. In other words, the lives of these prisoners are at the mercy of the slightest threat to the power of the Guinean Head of State.

The President reviles his real or imaginary adversaries at one moment as 'reactionaries' the next as 'communists', and anyone giving trouble is ruthlessly liquidated with no regard for the 'legalistic formalism' considered 'incompatible' with the spirit of the revolution or for the reactions of the highest spiritual authorities of our time. By this total disregard for the universal concepts of justice, by refusing to observe in his country the practices and laws accepted throughout the community of civilised nations, President Sekou Touré risks incurring increasing hostility in world opinion. Perhaps he is encouraged to maintain this attitude by the silence — for which there is less and less

justification — observed by the international organisations of which Guinea is nevertheless a member. The fact remains that, thirteen years after that country's accession to independence, the judicial mockery of which we have described some of the more outstanding episodes is repeated at least once every two years, causing many deaths and terrible suffering among the population. And no one can foretell when or how this tragedy, with its disastrous economic and human consequences, will end.

Greece

Apart from the continuing arbitrary arrests and detentions without trial, two important developments have taken place in Greece since the promulgation of the 1969 Constitution by the military régime. They are the constantly increasing power of the Armed Forces and the provisions relating to the « Constitutional Court ».

The armed forces are a fourth branch of the government. The provisions of article 131 of the 1968 Constitution have made the armed forces a self-governing body beyond the reach of the civilian government. The basic structure of the armed forces is set out in articles 129 and 130. They emphasise the « mission » of the armed forces, « to protect the existing political and social system against internal enemies ». This power was further strengthened by the decree of 14 December 1968 regulating the structure and powers of the Supreme Command of the Armed Forces. All civil servants in Greece owe allegiance to the people, the armed forces owe allegiance to the nation. Thus the officers claim for themselves the privilege of deciding all issues of defence and security. They are politically and administratively independent and are placed above the sovereignty of the people. By a decision dated 9 January, 1969, all powers relating to the command of the armed forces were transferred from the Minister of Defence to the Chief of the Armed Forces. These powers included the authority of the Minister of Defence to allocate financial resources. Financial control of the armed forces is therefore completely withdrawn from Parliament.

The effect of the independent powers of the armed forces is their ever increasing encroachment on all walks of public life. The military occupy positions of responsibility in all civilian sectors: they decide questions relating to the Church and even on the casting of actors in the National Theatre and controversies relating to football teams. The army bureaucracy is raised to the top echelon of the State.

Another disquieting feature of the 1968 Constitution is the creation of the « Constitutional Court ». This court assumes control

over all political activities. Under article 98 its members are appointed for life by the leadership of the military régime. « The Constitutional Court decides on the meaning and the extent of competencies of the Chief of State, the Speaker of the Parliament, and of the Government—and decides appeals against legislative or administrative acts. The decisions of the Constitutional Court are irrevocable ».¹

All political activities are controlled by the Constitutional Court and « The charters of every party must be approved by the Court. Political parties whose aims or activities are manifestly or covertly opposed to the fundamental principles of the government shall be outlawed or dissolved by the decision of the Constitutional Court. The deputies of the party being dissolved shall be declared deposed of their office, and the seats held by them in Parliament shall remain vacant until the termination of the Parliamentary period ».²

The effect of this legislation is that Parliament has become subordinate to a court set up by leaders of the military régime.

The International Commission of Jurists is also deeply concerned about the continuing cases of arbitrary arrests and prolonged detentions without trial in Greece. Among the most notorious of these is the detention of Judge Christos Sartzetakis and other members of the legal profession. The case of Judge Sartzetakis has received wide public attention because of his independence and personal courage. His brilliant handling of the Lambrakis case, at the conclusion of which he committed several senior police and gendarmarie officers to the Criminal Court for trial, was portrayed in the French film 'Z'. In May 1968, the military régime 'suspended' for three days the provision of the Constitution guaranteeing the independence of the judiciary, and then dismissed Sartzetakis and a number of other judges for alleged acts « incompatible with the status of the Judiciary » and « political partiality » in the exercise of their functions. An appeal was lodged before the Council of State in July 1968, which led to the crisis between the Government and the highest administrative Tribunal. By annulling the judges' dismissal, the Council of State entered into an open conflict with the military régime who reacted by dismissing the President of the Council and forcing the resignation of its most distinguished members. Judge Sartzetakis was arrested on Christmas Eve, 1970. He was held by the military police, for nearly a year—practically incommunicado—with no date set for his trial. Following many powerful representations by legal professions from all over Europe and the United States and by many organisations including the International Commission of Jurists Judge Sartzetakis was at last released on 19 November 1971.

¹ Article 108 of the 1968 Constitution.

² Article 58 of the 1968 Constitution.

Northern Ireland

Discrimination in Northern Ireland, particularly in local government elections and administration, was discussed in this REVIEW in 1969.¹ One of the main complaints against the Ulster Government was the continued existence of the Civil Authorities (Special Powers) Act 1922, which gave the Northern Ireland minister of Home Affairs powers to make virtually any regulations he wanted. Initially, the life of the Act was for one year, but it was renewed annually until 1933 when it was made indefinite. New regulations were made creating new criminal offences and the burden of proving that the act was done with lawful authority or excuse was placed on the person alleged to be guilty of the offence.²

In 1968 a Commission of Enquiry was set up under the chairmanship of Lord Cameron to study the causes of the disturbances. Among the causes identified by the Commission were:-

1. A rising sense of continuing injustice and grievance among large sections of the Catholic population in Northern Ireland, in particular in Londonderry and Dungannon, in respect of:-

- (i) inadequacy of housing provision by certain local authorities;
- (ii) unfair methods of allocation of houses built and let by such authorities, in particular, refusals and omissions to adopt a 'points' system in determining priorities and making allocations;
- (iii) misuse in certain cases of discretionary powers of allocation of houses in order to perpetuate Unionist control of the local authority.

2. Discrimination in some Unionist-controlled authorities in the making of local government appointments at all levels but especially in senior posts to the prejudice of non-Unionists and especially Catholic members of the community.

3. Deliberate manipulation of local government electoral boundaries in some cases and refusal in others to apply for their necessary extension, in order to deny to Catholics influence in local government proportionate to their numbers.

4. A growing and powerful sense of resentment and frustration among the Catholic population at failure to achieve either acceptance on the part of the Government of any need to investigate these complaints or to provide and enforce a remedy for them.

¹ Review No. 2, June, 1969.

² Section 2(6), Civil Authorities (Special Powers) Act 1922.

5. Resentment, particularly among Catholics, against the Ulster Special Constabulary (the 'B Specials') as being a partisan and paramilitary force recruited exclusively from Protestants.

6. Widespread resentment among Catholics at the continuation in force of regulations made under the Special Powers Act, and of the continued existence of the Act itself.

7. Fears and apprehensions among Protestants of a threat to Unionist domination and control by an increase of Catholic population and powers. These were inflamed in particular by the activities of the Ulster Constitution Defence Committee and the Ulster Protestant Volunteers who provoked a strongly hostile reaction to civil rights claims, a reaction which was readily translated into physical violence against civil rights demonstrators.¹

A number of measures have been introduced by the Government of Northern Ireland to implement the recommendations of the Cameron Report, but, as has so often happened before, these have either 'come too little or too late' to prevent the recurrence of violence in the province. Reforms of the police were not made until 1970. An electoral law Act came into effect in November 1969 instituting universal adult suffrage for local councils on the basis of one man one vote, but the first full local government elections under the new system are not expected until late 1972. Only in June 1971 did the Prime Minister of Northern Ireland announce that those tendering for any Northern Ireland Government contract advertised after that date will be required to complete an undertaking not to practice any form of religious discrimination in the performance of the contract. Schemes are now being prepared to remove discrimination in the allocation of housing over a period of over two years.

A new Committee system for the Northern Ireland Parliament has also been proposed in June 1971, but the provisions are vague and the Social Democrats and Labour Party, the Nationalist Party and the Republican Labour Party have since withdrawn from Parliament.

Meanwhile, the Civil Authorities (Special Powers) Act has continued in existence and on 9 August, 1971, the Prime Minister of Northern Ireland invoked the powers of detention and internment vested in him as Minister of Home Affairs under that Act.

The ICJ appreciates that the increasing violence may have made it necessary for strong measures to be taken, but the internments served only to provoke further violence, especially as the powers of internment were used exclusively against Catholics, notwithstanding that some Protestants have also advocated violence. It is also to be regretted that the composition of the Committee of Enquiry into alleged brutalities

¹ See Report of the Cameron Commission of Enquiry into Disturbances in the Province, published September 12, 1969, by the Government of Northern Ireland.

against the internees is not such as to inspire confidence in the minority community, and that the complaining internees are not allowed legal representation before the Committee.¹

Paraguay

Two experts, a jurist and an ecclesiastic representing respectively the International Association of Democratic Lawyers and the International Secretariat of Catholic Jurists, carried out a fact-finding mission in Paraguay from the 22nd to the 30th May 1971.² After meeting and talking with ecclesiastics, jurists, trade unionists and the families of prisoners, the two experts reported that martial law which was declared in 1940 has virtually been in force ever since, with the exception of very occasional interruptions during electoral campaigns.

Article 59 of the Paraguayan Constitution³ limiting detention without trial to a maximum period of 48 hours is ignored and applications for habeas corpus are systematically refused by the Supreme Court, which interprets article 79 of the Constitution as introducing an exception to the 48-hour limit on detention without trial. This article provides that 'any person liable to participate in any of the acts (which led to the proclamation of martial law) may be detained'. Consequently, there are a great number of prisoners being held in police stations without ever being brought before a court.

An analysis of a list of political prisoners being held without trial which was submitted to the two international experts on 18 May, 1971, shows that 81 persons are being held in 14 detention centres under the authority of the police. Three of these have been detained 'pending trial' at the Asuncion No. 3 police station since 1958. One, Alcorta Alfredo, was arrested on 15 November, 1958, under the 'Defence of Democracy' Act, article 3 of which makes it a punishable offence to profess communist ideas and provides for a sentence of from six months to five years' imprisonment. Alcorta Alfredo was tried 13 months after his arrest for this political offence and sentenced to one year's imprisonment which meant that he should have been released immediately. In fact, he was taken back to No. 3 police station and is still there 13 years later.

¹ Since the above article was written, the Northern Ireland Government have published for discussion further proposals for reforming the legislature and have appointed the first Catholic Minister at Stormont.

² See the Report published by the I.A.D.L. in Brussels.

³ Constitution of 25 August 1967.

Senegal: A Permanent Commission on Human Rights

In 1968, Senegal created a National Commission to plan their programme for the United Nations' International Year for Human Rights. It was probably the impetus created by this Commission which led the Senegalese authorities to take a further step forward in this direction, and a step of considerable importance. This was the creation, by a government decree dated 22 April 1970, of a permanent National Commission on Human Rights whose primary duties are:

- a) to study all questions of a general nature relating to the protection of human rights;
- b) to prepare a programme of events or measures to be taken in the field of human rights, either at the request of the President of the Republic or the government or as part of an international campaign;
- c) to supervise and collaborate in the implementation of that programme;
- d) to build up an international collection of documents on this subject and, with this in view, to establish contacts with representatives of the United Nations and with Commissions or Associations created in Senegal or in other countries for humanitarian ends.

In order to awaken in the hearts and minds of the people of Senegal a more consistent and less intermittent concern for the problems relating to human rights and fundamental freedoms, the Commission has launched a systematic campaign for the education of the public in this field. Regular radio programmes on these subjects are being broadcast in Ouolof, the language of the biggest ethnic group in the country, and are followed with great interest. Competitions are organised and prizes offered for the best plays dealing with the subject of human rights. And last but not least, the Commission has decided to publish a handbook on human rights for the use of schools.

The preliminary studies for this handbook are already well under way and will be examined by the Commission at the end of this year. All this constitutes, as can be seen, a very considerable working programme, and it is to be hoped that the Commission will be able to carry it through. The mere fact of having established such a programme deserves praise and encouragement. Too many countries, throughout the world, were satisfied with having made eloquent speeches in favour of human rights on the occasion of the International Year and then, once the momentary enthusiasm had waned, were content to forget about these problems. The very fact of the creation

of the Senegalese Commission is in itself a proof that the interest in human rights is still actively alive in that country.

Some people may criticise the fact that the Commission is a state institution. This point of view is understandable but, in actual fact, what could such a body achieve without the initial support of the authorities? It is also worth while emphasizing that, while Senegal has a strongly presidential regime, it also has a judicial system which enjoys a very real and far-reaching independence and there is no reason *a priori* to assume that the same will not be true in the case of the Commission. It may also be added that the members of the Commission include representatives of private organisations, in particular trade unions, youth and women's organisations. Senegalese jurists have always shown themselves deeply concerned with the preservation of the Rule of Law, a concern which is reflected in the activities and publications of the Senegalese Association for Judicial Study and Research under the chairmanship of their first President Kéba M'Baye, as in the participation of President Youssoupha N'Diaye in the recent ICJ conference in Aspen.

This Senegalese experiment of creating an official and permanent body concerned exclusively with Human Rights seems to be the only one of its kind in Africa. The International Commission of Jurists welcomes it with interest and sympathy and wishes it well.

Spain

On 5 December 1970, two days after the opening of the Burgos trial, a state of emergency was decreed for three months in the Province of Guipuzcoa. This was the fourth time a state of emergency had been declared in this Basque province since the end of the civil war.

This meant that the police had the right to search premises without a warrant, to arrest Basque nationalists at night, and to suspend the right to hold meetings, the right to choose freely one's place of residence and the right not to be held by the police for more than 72 hours without being brought before a magistrate, which is the normal legal procedure in Spain.

This matter was taken further on 15 December 1970 when an extraordinary Council of Ministers convened by General Franco suspended article 18 of the 'Fuero de los Españoles' (the Constitutional Charter) for a period of six months. This article stipulates that no Spanish citizen may be held prisoner except in accordance with the law of the land, which provides that any person arrested must, within

seventy-two hours, either be set free or be handed over to the judicial authorities.

The suppression of the article meant that the whole population throughout the country was at the mercy of the police, which was now free to arrest and hold suspects indefinitely without bringing them before a magistrate.

At the end of the six months' period article 18 of the 'Fuero de los Españoles' came back into force, but just before its reintroduction, there came into force Act No. 16/1970 which had been voted by the 'Cortes' on 4 August 1970. This Act, known as 'the law concerning threats to society and social rehabilitation'¹ is much more severe than the 1933 Act concerning 'vagrants and beggars' which it is intended to replace.

After a preamble of two and a half pages presenting the considerations on which the law is based, with references to modern criminological theory and the need to defend society in a changing world, Chapter 1 defines the fifteen cases to which the new law will henceforth be applied. These mainly concern vagrants, homosexuals, prostitutes, beggars, drunkards and drug addicts. What is more disturbing from the point of view of respect for human rights is the fact that the law can also be applied, according to article 2, paragraph 9, to:

"Anyone who, with an obvious disregard for the rules of social propriety or decent behaviour or for the respect due to persons and places, behaves in an insolent, rough or cynical way, causing prejudice to the community or harm to animals, plants or inanimate objects."

The vagueness of this text gives full latitude to the authorities to treat their opponents as persons 'behaving in an insolent way'. The possibility of the law being used in this way is further emphasized by the 10th paragraph of the same article, which refers to:

"Those who form bands and groups and show an obvious predisposition to delinquency."

Furthermore, article 4 of this law provides for a sentence of from 4 months to 3 years for anyone who has already been sentenced three or more times and who can be considered as showing 'a predisposition to delinquency'. These sentences will be served in a penitentiary institution or a labour camp, and the offender may also (article 5, paragraph 9) be assigned to forced residence for a period not exceeding five years and forbidden to visit certain public places. The question arises whether this measure will be used to put out of the way anyone who shows hostility towards the government and who they consider behaves in an insolent, rough or cynical manner.

¹ Published in Colección legislativa de España. Disposiciones generales. Tome 327, 1-15 Agosto, 1970, Ministerio de Justicia y Boletín oficial del Estado, page 854.

Taiwan and the Philippines

The continued failure of the Chiang-Kai-Shek Government in Taiwan to release the Yuyitung Brothers is deplorable. These two journalists were the editor and publisher of the Chinese Commercial News in the Philippines. They were born of Chinese parents in Manila where they were raised and educated. The newspaper was founded by their father who was executed for resistance to the Japanese occupation in World War II.

The brothers had been in trouble from time to time with the Philippine authorities who accused them of being sympathetic to communism and publishing articles derogatory to the Philippine Government.

On May 4, 1970, they were arrested in Manila pursuant to a deportation order and placed forcibly on an aeroplane bound for Taiwan, a country with which they had no previous connection. They were there tried before a military court for spreading communist propaganda and sentenced to two and three years of 'reformatory education'.

The action of the Philippine Government in using deportation procedure to effect an extradition without any of the safeguards normally available in extradition cases appears to have been improper, and the claim by the military court in Taiwan to have jurisdiction to try the Yuyitung brothers illustrates forcibly the unreality of the claim of the Chiang-Kai-Shek regime to be the government of China.

Following numerous international protests, the ludicrous situation has now been reached where the Taiwan Government has indicated that it will consider releasing the brothers if President Marcos asks for their return to the Philippines, and President Marcos says he will allow them to return and resume their careers under certain conditions, but will not himself take any initiative in the matter.

Condemned without hope in California

Since 1893 the penal system of California has included one very unusual feature. Originally introduced as a measure of clemency towards prisoners, calculated to facilitate their return to a productive life, a special legal provision conferred on the prison administration the power to determine the period of detention of a prisoner, according to his behaviour in the prison establishment.

This method of determining the period of imprisonment is known as the system of 'indeterminate sentences'.

The State of California has repeatedly introduced new legislation aimed at improving this system, including certain modifications which came into force in 1917 and 1931. At that time there existed two commissions, one responsible for the surveillance of prisoners released on parole, the other for determining the period of detention in prison; but there was constant friction between the two, and the object of the Bill passed in 1931 was to define more clearly the respective functions of the two bodies. But it was the reforms introduced in 1944 which most specifically defined the powers conferred on the Adult Authority, or 'Parole Board'.

According to the terms of Chapter III, article 5075, of the Penal Code, the members of the Adult Authority, whose powers with regard to the liberty of prisoners are virtually unlimited, should 'have a broad background in and ability for appraisal of law offenders and the circumstances of the offence for which they were convicted. *Insofar as practicable* members shall be selected who have a varied and sympathetic interest in correctional work including persons widely experienced in the fields of correction, sociology, law, law enforcement, and education'.

The Attorney General of California, Evelle Younger, declared recently that 'the Californian system of Corrections is one of the most admired in the world'. What can certainly be said is that it keeps the highest number of persons in prison: 27,672, as compared with only 17,399 for New York. The reason for this is undoubtedly the system of indeterminate sentences. Originally, this system enabled a judge to impose indeterminate sentences which could be modified within fixed minimum and maximum limits and so used to give earlier release to certain individuals on the grounds of good conduct. This meant, in theory at least, that it transferred the power to determine sentences from the judge to the professional prison staff, who were in a position to observe the behaviour of the prisoner and make a judgement on his fitness for release on parole not on the basis of his crime but on that of the circumstances under which he committed it and his subsequent behaviour in prison. In principle it facilitated the rehabilitation of the prisoner and his release sooner than would have been possible under a fixed sentence.

If a reasonable maximum sentence were passed, this system could have much to commend it. But when the Court imposes a sentence of 'from one year to life', as was done in the case of George Jackson, the sentence can assume an altogether different character.

In practice, prison administrators have used the indeterminate sentence as a formidable disciplinary weapon against which there is virtually no defence: 'From the vindictive prison guard who sets out to build a record against some individual to the parole board,¹

¹ The name usually given to the 'Adult Authority'.

the indeterminate sentence grants Corrections the power to play God with the lives of inmates¹. In actual fact, the length of the sentence served by an individual depends entirely on the Adult Authority, a nine-member board consisting of the Director of the Department of Corrections and eight others appointed by the Governor of California.

The Penal Code stipulates that, as far as possible, these persons should have knowledge and experience of criminological problems; the present board is made up primarily of former policemen, prosecutors, FBI and Corrections personnel².

It may be added that the Adult Authority pronounces 30,000 to 40,000 decisions per year, each based on a hearing lasting about 10 minutes. Neither the press nor lawyers are allowed to attend these hearings.

It follows that the system operates in a subjective rather than a scientific way, giving discretionary powers to the members of the Authority.

More often than not the prisoners condemned with little hope of release, particularly negroes and 'chicanos'³, the 'non-whites' who constitute 45 per cent of the prison population of California, adopt a political attitude. They soon see themselves as political prisoners⁴. The death of George Jackson has provoked world-wide concern with this problem and it is clear that reforms are urgently needed. In the prisons of California as elsewhere prisoners should know what sentence they are to serve and when they can hope to return to normal life, having settled their debt towards society.

Freedom of movement in the USSR

Compared with the ruthlessly repressive measures which prevailed under Stalin, the judgements delivered by Soviet courts over the last ten years seem relatively moderate. The death sentence for economic crimes, reintroduced in 1961⁵, was again abandoned a few years later.

Prison sentences for criticising certain aspects of government policy included, for instance, seven years in a forced labour camp for

¹ Jessica Mitford 'Kind and usual Punishment in California', *The Atlantic Monthly*, May 1971.

² See 'California's prison system', article by Walter Karabian in *The Black Law Journal*, Los Angeles.

³ Name generally given to the rather dark-skinned Spanish-speaking Californians who are more numerous than the negroes in the State.

⁴ See 'If they come in the Morning', by Angela Davis, published by Orbach and Chambers on 13 October 1971.

⁵ *I.C.J. Review*, Vol. V, No 1, 1964.

the writer Siniavski in 1966¹ and eight years for M. Makarenko, the director of a literary and artistic club in Akademgorodok², in October 1970. In the same month the mathematician Pimenov and a worker in a marionette theatre, Boris Vail, were condemned to five years' exile by the Court in Kalouga, south-west of Moscow, for anti-Soviet activities. In November 1970 the Sverdlovsk Court sentenced the historian Andre Amalrik and the engineer Lev Oubojko to 3 years in prison for inventing and spreading anti-soviet lies.

The death sentence pronounced against two of the accused in a trial held in Leningrad in December 1970, arising out of an attempt to hijack an aeroplane, shocked world opinion by its exceptional severity. Eleven Soviet Jews were condemned for having plotted to force a Soviet plane to change its course and land in Sweden so that they could go from there to Israel. The imposition of the death sentence for a plot which had not begun to be carried out caused a profound shock, and there were public demonstrations of protest throughout the world. On appeal, at the request of the public prosecutor the Supreme Court of the Socialist Soviet Federation of Russia commuted the death sentences to 15 years' imprisonment, the other prisoners in the case being condemned to periods of from 12 to 8 years. One of the persons accused of being involved in this plot was an officer in the Soviet army; he was therefore judged, on 7 January 1971, by the Leningrad court martial and condemned to 10 years' imprisonment. These last two sentences were probably influenced by the international wave of protest provoked by the earlier judgements.

In May 1971, still in Leningrad, 9 Jews were condemned to terms of from one to ten years' imprisonment for having participated indirectly in this same plot and for having failed to inform the competent authorities of the reprehensible acts committed by the others accused in the case. Although an appeal was made against this judgement, it was rejected by the Supreme Court and the sentences confirmed. In this case, the severity of the judgement seems to have provoked little reaction in world opinion.

In June, 1971, nine other Jews were sentenced by the Supreme Court of Moldavia, sitting in Kishinev, for the attempted hijacking of a plane, the illegal use of a photocopying machine and the distribution of zionist propaganda.

The explanation for the severity of these judgements may lie in the violent and immediate reaction of the Soviet authorities to two hijackings which were successfully carried out near the Turkish frontier in the autumn of 1970 and which went unpunished. In one of these hijackings, in October 1970, a Lithuanian had killed a Soviet air hostess before landing in Turkey. The culprits were judged

¹ I.C.J. Bulletin No 26, June 1966.

² Le Monde, 19 December 1970.

in Turkey and the Supreme Court of Appeal in Ankara, while stating that the crime was not of a political nature, refused to comply with the repeated demands for extradition presented by the USSR.

At the same time, one cannot help feeling that a certain anti-semitism, or at least anti-zionism contributed to the severity of the sentences imposed in these trials. Further names must be added to the list of Jews condemned by Soviet courts in 1971. As an example, in May of this year, the Supreme Court of the Socialist Soviet Republic of Latvia sentenced four Jews to periods of from one to three years' imprisonment for circulating defamatory documents. The Supreme Court of the SSFR rejected the appeal of another Soviet Jew, Valerie Kukui, and confirmed the sentence of three years' imprisonment inflicted on him for the circulation of anti-soviet articles.

In August 1971 Dimitri Mikheyev, a physicist who had tried to get out of Russia by using the passport of a Swiss student travelling in that country was sentenced to eight years' imprisonment by a Moscow court. His Swiss accomplice was condemned to three years in prison.

These last trials should be considered in relation to the right to freedom of movement. The Universal Declaration of Human Rights states that "everyone has the right to leave any country, including his own" (Art. 13, para. 2). A considerable number of Soviet Jews have asked the authorities of the USSR for authorisation to leave that country and emigrate to Israel; over a long period authorisation has generally been refused and penal action has been taken against any manifestation of dissatisfaction at the situation so created. The severe reactions of the Soviet authorities to the hijacking or attempted hijacking of planes are understandable, but they cannot be considered as justified. A less rigid policy with regard to the right of Soviet citizens to freedom of movement would make penal action unnecessary.

INFRINGEMENTS OF THE RULE OF LAW IN SOUTH AFRICA

by

MICHAEL I. DAVIS
(Barrister-at-Law)

Editorial Note

The International Commission of Jurists welcomes the call to the legal profession in South Africa made on September 7, 1971, by Mr. T. Vorster, President of the South African Association of Law Societies. He proposed a campaign to end the continual erosion by the Government of the basic principles of Criminal Law, and appealed to the profession to eradicate 'the evil whereby authorities were trying to break down, or disregard, the principle that the State had to prove beyond reasonable doubt the guilt of the accused'. He also complained that the Association felt it was 'banging its head against a bureaucratic wall' when making representations to the State.

We share the hope of Professor Barend van Niekirk of the University of Natal that Mr. Vorster's appeal will herald a new approach on the part of the legal profession concerning matters previously labelled 'contentious'. 'I have no doubt', said the professor, 'that the present situation as regards the erosion of liberty and of the rule of law would never have come about if the lawyers of this country had been more vigilant and more outspoken in the defence of the values on which our law is supposed to be based. If no leadership emanates from them, from whom can it emanate?'. It is to be hoped that Mr. Vorster's call to the profession will be taken up and answered not once but repeatedly whenever the opportunity occurs, so that no one may be led to think that the erosion of the rule of law in South Africa has the approval of lawyers.

In August 1968 the I.C.J. published a study entitled 'The Erosion of the Rule of Law in South Africa'. This was followed by a report on subsequent developments in the September 1969 I.C.J. Review. The current article summarises legislation and litigation involving subsequent infringements of human rights and legal safeguards.

The B.O.S.S. Law

The establishment of a Bureau of State Security, generally termed B.O.S.S., by the Public Service Amendment Act, No. 86 of 1969 consolidated the activities of the Security Branch of the Police Force and the Military Intelligence. It was accompanied by amendments to the Official Secrets Act which made it an offence subject to penalties of up to 7 years imprisonment to publish, or communicate any police or security matter. 'Security matter' was defined to include any matter relating to the Bureau of State Security. The result of these provisions is to shroud in secrecy the activities of the Security Police.

A striking instance of the use of the Official Secrets Act to muzzle the established Press and prosecute even so highly placed an opponent as a Member of Parliament, occurred in February, 1970. Mr. J. Marais, a former Nationalist government M.P. and, at the time, deputy-leader of the ultra-rightist Herstigte National Party, disclosed to English-language Sunday newspapers the existence of a special section of the Security Police, whose duties included surveillance of right-wing opponents of the regime. Hours before the article was due to be published high-ranking police officials ordered that it be withdrawn, under penalty of prosecution under the Official Secrets Act. The presses were stopped and the report removed, newspapers appearing later that day with a new front page. Mr. Marais was prosecuted under the Official Secrets Act and convicted, after a trial held in camera. An appeal succeeded, on the grounds that the information could not have prejudiced the security of the State, since it had already been published in Parliamentary speeches and also, ironically, in a book by a police under-cover agent.¹

The provisions of Section 29 of the General Law Amendment Act of 1969² were even more far-reaching in permitting an official veil to be drawn over the activities of the Security police and their associates. Under this section any Minister is given unrestricted power to prohibit evidence being given in legal proceedings merely by issuance of a certificate stating that such evidence would be prejudicial to the interests of the State or to public security. Under the authority of this section a Minister is, for example, empowered to prevent a defendant testifying in his own behalf on any matter, and the Court is powerless to intervene.

Such fundamental interference with the ordinary rules of procedure regarding the right to furnish testimony and to comment on the actions of the police, moved some judges to express rare criticism of the legislation. Strong criticism was also levelled by various Bar organisations.

¹ Sunday Tribune (Durban) December 20, 1970.

² Text set out in I. C. J. Review, No. 3, (September 1969) at page 29.

In the wake of these and other critical statements, the Prime-Minister announced in September 1969, the appointment of a Commission of Inquiry into matters relating to the Security of the State. The Commission was held in secret, and publication of any information concerning the proceedings was made a criminal offence.¹

The Prime-Minister in September 1970 stated in Parliament that the Commissioner had completed his report. One year later its contents remain undisclosed, and there has been no indication of any intention to modify the legislation involved.

Population Registration and Racial Classification

The Population Registration Act, 1950, is one of the cornerstones of the regime's policy of racial division; every individual's rights are determined by his status in the racial hierarchy. This Act, already amended 18 times, was further amended by legislation enacted in 1969 and 1970. These recent amendments, made retroactive to 1950, restored certain racial classification procedures which had been ruled invalid by the Courts, and prohibited any challenge against official racial classification by those adversely affected. New and more comprehensive identity documents for all sections of the population are provided for under the 1970 amending Act.

Legal Practitioners

A number of lawyers have been struck off the rolls under the provisions of Section 5 of the Suppression of Communism Act. In *Arenstein v. Minister of Justice* (1970 S.A. 273 T.) the Transvaal Court affirmed, in an appeal, that once it had been proved that the practitioner concerned fell under the disqualification provisions of the Act, the Court was deprived of its usual discretion in the matter and was obliged to order disbarment.

As reported previously² Joel Carlson, the attorney for the defence in most of the recent trials involving political prosecutions had his passport seized by the South African Government in 1969. Despite widespread international protest, Mr. Carlson, who continued his active defence of political cases, was subjected to increasing pressure and harassment, including bomb attacks on himself and his family. In April 1971 circumstances finally forced him to leave South Africa, and the Government has indicated that he will not be allowed to return.

Contempt of Court charge against Dr. Barend van Niekerk

Late in 1969 Dr. Barend van Niekerk, a Senior Lecturer in Law at the University of the Witwatersrand published a Study³ on capital

¹ South African Government Gazette, No. 2520 dated September 17, 1969.

² I. C. J. REVIEW No. 3, p. 23.

³ South African Law Journal, November 1969; February 1970.

punishment in South Africa based on 158 answers to a questionnaire which he had submitted to all South African Judges and Barristers. Most of those replying believed that for identical crimes non-whites were far more likely to receive a death penalty than were whites. This racial differentiation was seen as being conscious and deliberate. Dr. van Niekerk thus called for an exhaustive enquiry into the operation of capital punishment in South Africa.

The Police visited the Law School, questioning both Dr. van Niekerk and Professor Alison Kahn, the Dean of Law and editor of the law journal in which the articles had appeared. Contempt of court charges were pressed against Dr. van Niekerk. In his opening address, senior counsel for the defence said that the case was unique in English speaking jurisprudence. His researches had revealed no other case in which an academic lawyer was prosecuted for contempt arising out of a professional contribution to a law journal. Extensive evidence led by the defence included testimony by state officials on the disparate numbers of whites and non-whites sentenced to death. After hearing the prosecutor's closing address, Mr. Justice Claassen informed defence counsel that there was no need for them to address argument, and he acquitted Dr. van Niekerk.

He then went on to state, however, that the prosecution had been justified, and made several critical observations indicating that portions of the study could possibly have constituted contempt of court.

The action taken against Dr. van Niekerk had shocked the legal community in South Africa. The Judge's observations evoked further strong criticism, in particular from the Council of the Society of University Teachers of Law,¹ which contended that the effect of these remarks would be to leave academics, legal authors and researchers with a disquieting sense of insecurity. Various newspapers also commented on the likelihood that the Press would be inhibited from commenting on differentiation in the administration of justice between the races, for fear of similar prosecution.

Detentions

Wide ranging resort to the detention powers afforded under Section 6 of the Terrorism Act, involving indefinite incarceration, incommunicado, without access to any court, lawyer, friend or family, continues to be integral to the maintenance of the security of the state. The actual number of persons detained is unknown, because in most cases the authorities have refused to release the names of those taken into custody under the detention provisions.

There have been repeated accounts of torture by electric shock and other vicious forms of maltreatment, and certain of these accounts

¹ Sunday Times (Johannesburg), September 27, 1970.

have been the subject of testimony and legal proceedings. Where such torture and assaults have been raised in contentious litigation the regime has avoided having the issue determined by the court.

Thus in the extended civil proceeding involving allegations of assault upon a 68-year old detainee, Mr. Gabriel Mbindi,¹ the State Attorney eventually made a substantial payment in settlement of the case, rather than submit to a judicial determination on the accusations of a 'systematic course of torture' by security police interrogators.

A dramatic plea for the court's protection by a detainee, Mr. Dasingee Francis, called to testify as a state witness, occurred during the trial of 12 persons under the Terrorism Act in Pietermaritzburg in February 1969. Mr. Francis said that he had been held in solitary confinement for 421 days and had been brutally and sadistically beaten, kicked and subjected to electric shock torture by the security police while in detention. The court refused to inquire into his complaints.² Mr. Francis was finally released, and returned to Zambia without being charged with any offence.

The South African government under pressure has admitted that there have been fourteen deaths of people being held in detention. The actual number of detainees who have died is unknown. The Minister of Justice once stated in Parliament that 'an unknown man died on an unknown date of cause unknown'.

Deaths in detention

The death in detention of Imam Abdullah Haron, a prominent Moslem religious leader in Cape Town, revealed evidence of police brutality during interrogation. He died on September 27, 1969.³ Testimony by the government pathologist at the inquest showed that the body had 28 widespread bruises, a haematoma on the back and a fractured rib, injuries similar to those found on assault victims. The police explanation was that the Imam had accidentally fallen down some prison steps. The magistrate found the cause of death to be cardiac arrest partly caused by the accidental fall, but recorded his inability to determine the cause of the remaining injuries. A suit for wrongful death by the widow, who claimed twenty-two thousand

¹ 'Erosion of the Rule of Law in South Africa', p. 46; Rand Daily Mail, November 1st. 1968.

² The Natal Witness, February 27, 1969.

³ Hansard (Assembly Debates) 1970, Volume 9, Columns 4529 et seq. Mrs. Taylor, a Member of Parliament, in calling for an inquiry into the full circumstances of the Imam's death, also alleged that the officer responsible for the assault which led to the death of the Imam was a sergeant of the security police who did not testify at the inquest. The same man had been named some years earlier by former detainee plaintiffs Alan Brooks and Stephanie Kemp as having severely assaulted them during interrogation. These claims were settled by government payments.

rand as damages was recently terminated on payment by the Government of 5,000 rand in settlement.

The following are recorded deaths¹ in detention, in addition to the Imam Haron and the 'unknown man':

Jacob Monnagotla: died 'of natural causes' after detention for six months, on September 10, 1969, the night before his trial.

Michael Shivute: is stated to have died by suicide on June 16, 1969, the night of his detention under the Terrorism Act.

Caleb Mayekiso: is said to have died of natural causes, on June 1, 1969 after two weeks detention.

James Lenkoe: was found hanging by a belt from the window of his prison cell on March 10, 1969, five days after his detention. Traces of copper were found in a wound on his toe. Dr. Moritz of Cleveland, a world authority on thermo-electrical injuries, found evidence of electric torture but the magistrate found that the cause of death was suicide by hanging.

Solomon Modipane: died of 'natural causes' on February 25, 1969, three days after arrest. The police stated he slipped on a piece of soap, 'causing certain injuries'.

Nicodemus Kgoathe: arrested on November 7, 1968, he is reported to have died of bronchial pneumonia on February 2, 1969. A doctor testified to having found assault injuries. The police said he had fallen in a shower.

J. B. Tubakwe: died on September 11, 1969, the day after his detention. The verdict was suicide by hanging.

Ah Yan: is stated to have hanged himself on January 5, 1967. He was detained late in 1966, the exact date being uncertain.

Leong Yun Pin: is stated to have died of suicide by hanging on November 19, 1966, three days after his detention.

James Hamakwayo: his death is also attributed to suicide by hanging, some time after his arrest on August 26, 1966. The date of his death is not known.

Suliman Salojee: died in a fall from the seventh floor of the security police headquarters on September 9, 1964, during interrogation. The inquest verdict attributed death to suicide or attempted escape.

Looksmart Solwandle Ngudle: is stated to have died by suicide on September 5, 1963. His is the first recorded death in detention.

The Trial of the 22 and the 19

During May of 1969 a large number of people, including Mrs. Winnie Mandela, wife of imprisoned African National Congress leader Nelson Mandela, and two prominent black journalists,

¹ Rand Daily Mail, March 14, 1970.

² Since going to press, the death by suicide of Ahmed Timol on 26 October 1971 has also been reported.

Mr. Peter Magubane and Miss Joyce Sikakane were detained by the security police, under the Terrorism Act. Eventually, on October 28, 1969, twenty-two persons, including the three mentioned were brought to court and charged with contraventions of the Suppression of Communism Act—not the Terrorism Act under which they had all been detained. The lengthy indictment contained allegations that the defendants had carried on the activities of the banned African National Congress, and had in various ways endeavoured to promote unlawful political change in South Africa.

At the commencement of the trial in the Pretoria Supreme Court, the defence requested copies of statements made by the defendants to the police during their detention. The prosecutor refused, arguing that an amendment to the criminal code had removed statements made while under such detention from the operation of the provision requiring production, and the judge, in a considered decision, upheld this contention.

Several of the witnesses called by the prosecution were persons still being held in detention. One such detainee, Miss Shanti Naidoo, refused to testify against the defendants, and described to the judge her experiences under interrogation which had finally forced her to make a statement. She had undergone continuous interrogation for five days and nights, during which time she was not allowed to sit down or to sleep. She said that she had lapsed into a dreamlike trance, having lost the capacity to distinguish reality. She was sentenced to serve two months imprisonment for her refusal to testify.

Another state witness and detainee, Philip Golding, an English economist working in South Africa, testified that he too had been assaulted while being interrogated. His demeanour indicated that he was testifying under great strain.

In mid-December the Court recessed to February 16, 1970. On that date the Attorney-General for the Transvaal informed the judge that all the charges against the 22 defendants were withdrawn, with an explanation that as they had already pleaded they were entitled to a verdict of not guilty. The judge then left the bench and the security police rearrested them all under the Terrorism Act.

Wide-spread protests accompanied the continued detention of the 22. 357 Johannesburg University students who peacefully marched in protest, were arrested. The Johannesburg Bar issued a statement strongly condemning the Terrorism Act. It characterised the Statute as a very serious inroad upon the rule of law, subversive to the proper administration of justice. It described as particularly objectionable the provisions which enabled persons to be detained indefinitely, in solitary confinement, without right to receive legal advice or to apply to court to determine the legality of their detention; also the wide definition of 'terrorism' whereby ordinary citizens going about their lawful pursuits could become terrorists. It also criticised severely

the provisions placing on accused persons the burden of proving certain facts beyond reasonable doubt in order to escape conviction and heavy penalties.¹

Finally, in August, 1970, 19 of the 22 persons who had been redetained were again charged, this time under the Terrorism Act which carries capital penalties, together with a Mr. Benjamin Ramotse who had been held in detention secretly since July 16, 1968. He had been in solitary confinement for almost two years; no one apart from the authorities knew that he was being so held.

At the commencement of the trial the defence applied to have the new charges under the Terrorism Act dismissed against the nineteen, on the grounds that they were being called upon to answer substantially the same charges as those previously preferred. Despite the prosecution's arguments the judge upheld the defence contention and ruled that the case against the nineteen should be dismissed. Four days after their acquittal the Minister signed banning orders restricting all nineteen under the Suppression of Communism Act for lengthy periods. This punitive action cannot be challenged in legal proceedings since the courts have no power to set aside or modify such orders.

Mr. Ramotse's trial was severed and he was subsequently convicted and sentenced to fifteen years imprisonment.

The Cases of Mr. R. Sobukwe and Miss Shanti Naidoo:

Mr. Robert Sobukwe, leader of the Pan Africanist Congress, was sentenced to three years imprisonment in 1960 following the protest campaign which led to the police shooting of peaceful demonstrators at Sharpeville and the banning of both the Pan Africanist Congress and the African National Congress. Shortly before his sentence expired an Amendment to the Suppression of Communism Act was passed enabling the authorities to hold persons convicted of certain political offences in custody after they had completed their sentence. Mr. Sobukwe was the only person against whom this provision was enforced, and he was detained on Robben Island a further six years after his original sentence was served.

In May 1969 he was released from prison, but restricted, in terms of a banning order, to the Kimberley District of the Cape Province. Shortly after his release he was offered a position at Wisconsin

¹ Statement of May 27, 1970—cited Congressional Record E 694, June 17, 1970. Far from heeding the Bar's call for repeal of the detention provision the government has passed a new detention section, similar in scope, in a law ostensibly designed to deal with drug offenders. The resort to flagrant violations of the Rule of Law in dealing with a fundamental social problem is indicative of the extent to which authoritarian rule has taken hold. (See Section 13 of Act 41 of 1971: *Abuse of Dependence Producing Substances and Rehabilitation Centres Act*).

University and applied for an exit permit so as to be able to leave South Africa. The exit permit was eventually granted, but Mr. Sobukwe could not use it because the Minister of Justice, who issued the banning orders, refused to lift these, thus precluding Mr. Sobukwe from legally leaving the Kimberley District to reach an airport or port.

Miss Shanti Naidoo, whose refusal to testify in the trial of the nineteen is referred to above, was released from prison, having served her sentence, and a further period of detention, in June 1970. She was also placed under banning orders, which, among other effects confined her to the District of Johannesburg. She decided to leave South Africa, applied for and was granted an exit permit. Again the Minister of Justice refused to lift her banning order, thus preventing her from leaving the Johannesburg District.

Applications on behalf of Mr. Sobukwe and Miss Naidoo were made to the Transvaal Supreme Court, to compel the Government to allow these departures, but the applications were denied in mid-1971. The Court held that a banning order was in the same category as a prison sentence and thus overrode any permission conferred by an exit permit.

Recent Detentions and Charges under the Terrorism Act

On January 20, 1970, the very Rev. Gonville French-Beytagh, Dean of the Cathedral of St. Mary in Johannesburg, was detained under the Terrorism Act, and was held incommunicado for 8 days, while being subjected to very intensive questioning. He was then charged under the Suppression of Communism Act, and released on bail. Shortly thereafter widespread raids on Student and Church organisations were conducted by the Security Police.

On June 30, 1971 the Suppression of Communism charges were withdrawn against the Dean. Immediately, however, he was presented with a new, 36 page indictment under the Terrorism Act. Charges inter alia include distributing funds to persons and organisations in South Africa on behalf of the banned Defence and Aid Fund, and supporting overthrow of the Government by violence. Among the numerous co-conspirators named is the American Mission Board. After a lengthy trial, the Dean was found guilty on three counts and sentenced to five years' imprisonment.

From January 1971 onwards, there were widespread arrests throughout South Africa of members of the Unity Movement of South Africa by the Security Police. Among those detained were several attorneys including Mr. J. B. Vusani of Johannesburg, Mr. A. K. Hassim of Pietermaritzburg, and Mr. J. L. Mkentane of the Transkei. On June 16, 1971, 14 of those detained were brought to Court in Pietermaritzburg and charged under the Terrorism Act.

The indictment includes allegations that the accused conspired to overthrow the Government of S.A. by violence and that they attempted to organise military training for men from South Africa to achieve that purpose. All 14 were remanded to August 2, 1971 for summary trial before the Natal Supreme Court.

On July 27, after the prosecution had refused to supply the defendants with statements they had made during their detention, the Court ordered that the defendants be supplied with copies of the statements. The Attorney-General's objection that the Terrorism Act denied this right was overruled, the judge dissenting from the contrary ruling in the case of the 22 previously referred to above.

On August 13, 1971 an urgent application was brought by Mrs. N. Pillay, one of the attorneys acting for the defendants, requesting an order enjoining the police from interrogating her husband, Mr. P. A. Pillay, in any unlawful manner including unlawful duress or torture, to force him to adhere to previous statements, or to make further statements. Mr. Pillay, a law clerk articulated to his wife, had been detained previously and after release was warned he would be a state witness. Subsequently he had been redetained after the police indicated they were not satisfied he would adhere to his previous statement. Mrs. Pillay averred her husband had said this statement contained what the police told him to say.

As evidence of the overwhelming probability that her husband was in danger of torture and maltreatment by the police, Mrs. Pillay attached to her application affidavits by 12 of the defendants. These contained detailed accounts of brutal assaults, electric shock torture, and threats to the deponents. The affidavits included descriptions of detainees being left overnight handcuffed to trees, being made to sit on imaginary chairs and stand for prolonged periods on bricks. Also disclosed was the attempt by a detainee, Jackson Somhlaza, to commit suicide by cutting his own throat, to end assaults, as well as the prolonged beating of Mthayeni Cushela, who subsequently died in a hospital to which he had been taken by the Security Police.

At the hearing the judge suggested an undertaking be obtained from the head of the Security Police that Mr. Pillay would not be removed from the police cells in Pietermaritzburg, and would not be maltreated, and when this undertaking was given by the respondent's counsel the judge confirmed it as an order of the Court.

On August 16, 1971 the trial opened against thirteen of the original fourteen defendants. As the trial has proceeded there has been evidence of maltreatment and prolonged solitary detention which has emerged in the testimony of state witnesses. At the time of writing the Pietermaritzburg trial is still continuing.

Both these trials have been attended by U.S. lawyers acting as observers for the ICJ, namely Rev. Edgar Lockwood, (who also represented the Episcopal Church and Amnesty International)

and Professor Kent, Dean of the Faculty of Law at Lusaka, Zambia (also representing Amnesty International).

Namibia (South West Africa)

The appeal of the defendants who were convicted in the first Terrorism trial in 1968 resulted in the convictions being affirmed. Defence arguments based on the General Assembly Resolution (2145) terminating the Mandate, and the terms of the Mandate itself, were rejected. Five of the life sentences imposed were reduced to twenty years imprisonment, but in all other cases the sentences were upheld.

A second trial of Namibians, involving 8 Defendants was held in Windhoek in mid-1969. On August 20, 1969, 6 of the Defendants were found guilty and sentenced to imprisonment ranging from life to 18 years. An appeal resulted in four of the life sentences being reduced to twenty years imprisonment.

In addition to the continuing uncertainty as to the number of Namibians secretly held in detention, (said, in 1968, by the I.C.J. Observer, Prof. Richard A. Falk, to reportedly number 250)¹ the South West African Peoples' Organisation (S.W.A.P.O.) contends that secret trials of Namibians have taken place. In March 1970 S.W.A.P.O. issued a statement that it had received a copy of an indictment against ten of its members who had been tried and sentenced in Pretoria.² There has been no reference at all to this trial in the South African Press. Efforts by a British Member of Parliament, who had a copy of this indictment, to obtain information from the British Government met with no success.³ The fate of these ten Namibians is unknown.

Current trends in South Africa thus indicate further entrenchment of authoritarian methods, the continuing violation of legal safeguards and extended denial of basic rights to those challenging the regime. Vigilance in regard to infringements of the rule of law is essential not only to keep the regime under international legal scrutiny, but also to evaluate the consequences of its illegal actions in Namibia in the light of the landmark opinion of the World Court, handed down on June 21, 1971.

¹ Erosion of the Rule of Law, p. 53.

² UN General Assembly: Committee of 24, Record of Meeting held March 19, 1970.

³ Anti-Apartheid News (London)—April 1970.

UGANDA'S LAW DEVELOPMENT CENTRE

by

R. M. COOPER, *B.A. Haverford, M.A. Oxon, J.D. Harvard*

The principal institutions of a modern legal system are a legislature, administrative and enforcing agencies, courts, an independent bar serving the public and one or more law schools. Every nation that seeks to have a modern legal system must have such institutions. In addition, a fully developed legal system has many supplementary institutions e.g. publishers of law reports and other legal materials, law reform committees, training centres for new members of the judiciary, practical institutes for members of the bar, centres for empirical research on legal problems, offices providing all levels of public officials with reliable interpretations of recent legal developments. Developing countries generally lack the resources necessary to support such a proliferation of specialised supplemental organisations. Yet their functions must be performed in some way if the substantive law is to achieve its purposes and if the administration of justice is to be efficient. Uganda has sought to resolve this dilemma by creating a new type of legal institution—a law development centre—which is responsible for carrying out most of these functions in a manner suitable to Uganda's needs and resources.

The Centre was established in July, 1968 within the Attorney General's Chambers. Later it moved to separate premises containing offices, classrooms, a library, dormitory accommodation for about 50 students with necessary supporting facilities, and faculty housing. In July, 1970 the Law Development Centre Act (No. 21 of 1970) established the Centre as a formally independent corporation, to be funded by government grants, donations, and any earnings arising from the Centre's activities.

Under the Act the day to day administration of the Centre is the responsibility of the Director, who since the creation of the Centre has been a Judge seconded from the High Court. The Centre is governed by a Management Committee consisting of the Solicitor General, the Dean of the local law faculty, the Director of the Centre, the Permanent Secretary of the Ministry of Education, and two to four other members experienced in the practice or administration of the

law and appointed by the Attorney-General. The Committee presently consists of the *ex officio* members together with three practicing advocates (including a former Attorney-General of Uganda) and a Judge of the High Court. Thus, the Centre is almost entirely a creation of the legal community. In the future it might be wise to broaden the governing board's membership to include potential non-legal beneficiaries of the Centre's services, such as representatives of the development-oriented ministries.

The professional staff of the Centre consists of the Director, an Assistant-Director, two senior lecturers and a lecturer, all of whom are lawyers. From time to time the staff receives part-time assistance from members of the local law faculty. It is expected that the full-time staff will increase substantially in the near future, and that the Centre will eventually become a multi-disciplinary institution.

The Centre's activities thus far may be grouped under five headings: law reform, publication, teaching, empirical research, and conferences. All the members of the staff participate in most of these areas.

The Director of the Centre is also Chairman of the Law Reform Commission, and consequently much of the work of the Commission has been carried out at the Centre. Some reform proposals have been the result of requests from the Attorney General's Chambers; others have originated within the Centre. It is expected that in future more law reform work will be undertaken at the suggestion of other ministries. Reform measures have been concentrated mainly in the fields of administration of justice and criminal procedure. A new Magistrates' Courts Act was drafted at the Centre, as were several bills carrying out a thorough revision of the criminal procedure code. The Centre has also drafted legislation relating to advocates, inquests, justices of the peace, charities, graduated tax, corruption and the law of murder and manslaughter. Now that the major ground-work has been done in these fields, it is expected that the Centre's law reform efforts will be directed to other areas.

Many of the Centre's publications (almost all mimeographed) grow out of its activities in law reform. Explanatory notes are prepared for most statutes drafted at the Centre, and upon enactment these notes (with any necessary changes) are distributed to the judiciary, the magistracy, law enforcement officials, and other interested persons. The Centre also publishes other materials of interest to the local legal community e.g. a commentary on the Uganda Bills of Exchange Act prepared by a High Court Judge, a handbook on quantum of damages including digests of 250 local cases, a booklet on a recent Road Traffic and Safety Act, which explained the special powers and duties of police under the Act and a legal doctrine important to the administration of the Act, and provided specimen charges for offences created by the Act and a table of penalties for easy reference. The Centre is presently editing a handbook for lay

magistrates, which will contain chapters on jurisdiction, criminal and civil procedure, evidence, criminal law and other topics of importance to the efficient working of their courts.

The Centre also publishes a Monthly Bulletin containing digests of important cases decided the previous month by the High Court, comments on legal issues, and appendices containing materials of professional interest. It is indexed biannually and is the only legal periodical received by the lay magistracy. It is also distributed throughout the profession and to police and other enforcement officials. The case digests are the most important part of the Bulletin. They regularly appear very shortly after the announcement of decisions and they are a necessary supplement to the cases reported in printed form in the East Africa Law Reports. Whereas the latter published 39 cases from Uganda during 1970, the Bulletin published digests of 276 cases. They are selected for the Bulletin not merely for new points of law decided, but also for purposes of guiding magistrates in areas where errors are frequent. The section of comments serves several purposes. Some of the comments are proposals for law reform; some explain and comment on recent decisions and legislation; others discuss legal doctrines and rules which appear to be causing difficulty in the lower courts; and still others discuss questions of customary law important in the magistrates' courts but rarely litigated in the High Court. Appendices have included summaries of statutes relating to magistrates' jurisdiction, specimen charges for commonly tried offences, and an index of sentences imposed or approved over a five year period by the High Court for particular penal code offences.

The Centre's publications thus serve the vital function of communicating legal developments in the capital to magistrates, other public officials, and practitioners throughout the country. Such communication can only be carried out locally and by a non-profit-making institution because speed is essential, the materials to be communicated must be selected with a thorough understanding of the needs of the recipients, and the market is very small.

The bulk of the Centre's teaching is done on its own premises. It conducts an annual course for magistrates lasting six to nine months. Shorter courses are run for army officers, police prosecutors, labour officials and others.

Staff lecturers from the Centre have given lectures on law at various training institutions in the country, and in one instance lectured to groups of magistrates throughout the country on a new statute about to be brought into force. In addition a major function which the Centre will undertake next year is the provision of a year's pre-enrolment course for recent graduates of the University law faculty. The Government has decided that in the circumstances of Uganda law graduates can better learn the practical aspects of public and private

practice in a course at the Centre than in apprenticeship programmes run by members of the bar.

The Centre has sponsored empirical research on the administration of justice in Uganda. Under its auspices a university professor did a comprehensive study of the operation of the magistrates' courts and made recommendations for reform. Another study has been done of the caseload of the High Court. A third study, of the causes of delay in the pre-trial processing of criminal cases, is presently in its final stages. It is hoped that the research capacity of the Centre will be expanded in the near future with the establishment of a permanent office of applied legal research. The office would provide voluntary coordination for those engaged in empirical research on topics related to law, a locus for the exchange of ideas, a base for visiting scholars and researchers, a repository of research papers, and administration of research grants. The Centre could also make available to outside researchers the benefit of its knowledge of what types of research would be useful for the making of government policies.

The Centre has been host to several large public conferences. Two conducted in co-operation with the Uganda National Association of Mental Health have dealt, respectively, with suicide and the law and alcoholism and the law. The Centre has also participated in and hosted a conference on Law in a Developing Country, which included participants from other African countries. These conferences serve as forums for multi-disciplinary discussion and as means for bringing legal problems to public attention.

The combining of these diverse functions in the Centre has two principal advantages. It maximizes the use of scarce professional resources and it enables each member of the staff to carry out particular projects with the benefit of deeper understanding of the entire legal system than he would be likely to acquire as a specialist. Thus, the expertise gained from drafting law reform proposals is immediately available to provide 'after-care' services for the statute once enacted: explanatory notes, specimen charges and similar materials, courses of instruction, lectures up-country and so on. Similarly, the experience gained from teaching lay magistrates and other officials may suggest problems for research or areas requiring reform. The monthly publication provides a means for those involved in developing the law to bring recent developments to the attention of those concerned.

Since, unlike the Attorney-General's Chambers, the Centre is not responsible for day to day legal advice to the Government, it can provide independent commentary on trends in legislation and the development of the legal system. Ideally, with sufficient staff the Centre could become a source of expertise on legal aspects of problems of economic development, and could make advisory services available for long-range planning by Ministries responsible for economic development.

Finally, it should be recognized that the Centre is basically a practical rather than an academic institution. It is oriented toward the policies of the Government and the practical needs of the legal community rather than to academic scholarship or teaching. Its role is thus quite different from that of the law faculty. Some efficiencies of scale might be realised by attaching the Centre to the law faculty, but on balance such a consolidation seems undesirable on two grounds. First, the Centre would become subject to the governance (and politics) of the university, which may not fully appreciate its relation to the legal community. Second, Governments in developing countries have generally been distrustful of universities, and thus the Centre's usefulness to the Government might be impaired by incorporation within the university. However, in any country contemplating the establishment of a centre the personalities involved may determine the organisational structure.

THE FORMATION OF THE LAW ASSOCIATION OF ZAMBIA

by

Leo S. BARON, Justice of Appeal, Zambia

'The lawyer in a developing society must be something more than a practising professional man; he must be more even than the champion of the fundamental rights and freedoms of the individual. He must be, in the fullest sense, a part of the society in which he lives and he must understand that society if he is to be able to participate in its development and the advancement of the economic and social well-being of its members. The lawyer must go out beyond the narrow limits of the law because..., while law is the instrument through which society is preserved, in its shape and character it is the reflection of society.'

On the 24th April 1970 President Kenneth D. Kaunda was the guest of honour at the annual dinner of the Law Society of Zambia. The subject of his address, from which the foregoing passage is taken, was: the function of the lawyer in the Zambia of today. His challenge—to the legal profession in general but perhaps to his audience in particular—was, to its great credit, taken up by the Law

Society, which asked the Attorney-General to convene a seminar to discuss how the profession could make a more effective contribution to the development of the nation; the society—which, notwithstanding that the profession is fused, has taken very much the form of the Law Society in England—was conscious that its activities were for practical purposes confined to areas which were the particular concern of private practitioners.

This seminar, held on the 25th July 1970, was very well attended by lawyers from every branch of the profession. In his opening address the Attorney-General, the Hon. Mr. Fitzpatrick Chuula, questioned whether in a country with so few lawyers the profession can support an association which takes the traditional form of a practitioners' union; he suggested that the type of body which would enable the lawyer to fulfil his true function must embrace every kind of lawyer in the country and go far beyond the structure of the existing Law Society. But he stressed that the functions of that society would not disappear or even be submerged; the basic purpose was to provide a meeting place for all lawyers, be they judges, private practitioners, Government lawyers, commercial lawyers or law teachers.

It would, of course, have been possible to meet all the desired objectives by a broadening of the charter and structure of the existing Law Society. But to adopt this course would be to ignore the historical and emotional realities of Zambia. Rightly or wrongly, the present Law Society is associated with the colonial era, and very few black Zambians are members. As Professor R. B. Kent, Dean of the School of Law at the University of Zambia, put it in his address at the society's annual dinner in April 1971:

'...I believe that symbols are important, and that there may well be something in a name. If to a most significant portion of the profession a particular organizational label evokes unpleasant memories of a by-gone day, then it is change and not continuity which is called for.'

The mood of the overwhelming majority was for change; a steering committee was elected with a mandate to consider the objects and structure of a new association and to report back.

The report of the steering committee was presented to another well-attended seminar in March 1971. The debate was lively and far-ranging. It was resolved to form a new association to be called the Law Association of Zambia, which would be established as a statutory body corporate (as was the Law Society). An interim executive committee was elected with a mandate to approach Government to enact the necessary legislation and generally to act for the association in the meantime.

The main debate, of course, centred on the objects, which emerged in the following form:

The purposes for which the association is formed are —

To further the development of law as an instrument of social order and social justice and as an essential element in the growth of society;

To provide a vehicle through which all lawyers, whatever their particular field of activity, can participate together fully and effectively in the development of society and its institutions;

To encourage the lawyer as an individual to join actively in the life of the people, to identify with them, and to utilise his unique skills and training in their service.

In pursuance of the foregoing broad objectives the association will concern itself with, inter alia, the following areas of activity —

(1) *Lawyers:*

- (a) Education at all stages and at all levels, with particular emphasis on the broadening of such education.
- (b) The qualifications of practitioners, both private and public.
- (c) The standards of conduct of all members of the legal profession.
- (d) Legal aid, and other means of securing representation for persons of insufficient means and any others who for any reason are unable to secure representation.
- (e) Contact and co-operation between the association and the representative bodies of other professions and institutions.

(2) *Law:*

(a) Development of the law:

- (i) the examination of the effect on Zambian society of the transition from colonial rule to independent government, with particular reference to the applicability and suitability of the existing received law;
- (ii) research into the character and content of customary law and the place it occupies in modern Zambian society;
- (iii) the examination of the influence of modern industrial, commercial and technological development, and the twentieth century world generally, on Zambian society and social institutions;
- (iv) general research.

(b) Reform of the law:

- (i) reform in the sense of improvement by amendment of, and the removal of particular imperfections in, existing law;
- (ii) reform in the sense of re-formulation, codification or restatement of particular branches of law.

(c) Legislation:

- (i) participation in draft legislation in its formative stage and prior to its introduction into Parliament;

- (ii) the strengthening of the machinery for the examination of the legal quality of Bills.

(d) The Rule of Law.

(3) *Judicial and Administrative Machinery:*

- (a) The selection, training and assessment of judicial and administrative officers.
- (b) The improvement and reform of judicial and administrative machinery, including tribunals and their procedure.

One of the major points emerging from the debate was that the reference to the areas of activity with which the association will concern itself does not mean that the association itself will necessarily undertake those activities. In certain cases it clearly will; the meeting adopted the steering committee's recommendation that various standing committees be established, and it is envisaged that, for instance, the standing committee on legislation, which will have power to co-opt members and form sub-committees will be a direct activity of the association. On the other hand, the standing committee on law reform and development cannot hope, in the present state of the profession in Zambia in terms of size, to do more than investigate the feasibility of establishing a law reform and development commission and urge government to recognize the tremendous importance of such a commission and to support it morally and materially.

The new association is off to a good start. Its character can be illustrated by the composition of the interim executive committee; half of its fourteen members, including the president and the secretary, are practitioners, the others being academics, government and local government lawyers, and students. The judiciary, while not being represented on the parent management committee, will certainly participate actively in standing committees such as that dealing with law reform and development, legislation and education.

Clearly the association has broader horizons and a broader base than the Law Society. This is a trend of tremendous importance and tremendous promise; it is a trend entirely in tune with another passage in Dr. Kaunda's address:

' We live in a changing world, and one in which the pace of change is becoming ever greater. Neither the character nor the needs of any given society can remain static, and if the law is to fulfil its proper function it must keep pace with the changes. This is not to say that the law must be a straw in the wind; if law is to be an effective instrument of social order it must be a stabilising influence, but it must be flexible and it must be progressive, else it will hinder society in its progress and development instead of advancing it.'

REVIEW PROCEDURES FOR INTERNMENT

by

Peter EVANS, Barrister-at-Law

‘Arbitrary imprisonment is an offence against human dignity, is criminal and poisons civilization...’ states the second Vatican Council in para 27 of its report ‘The Pastoral Constitution of the Church in the modern world’, an admirable statement in its directness and unequivocality.

Internment, detention, administrative imprisonment, call it what you will, on suspicion without trial or legal protection is arbitrary imprisonment, is an immoral procedure and can only rarely be justified and when so justified only in the context that there are extensive safeguards against indiscriminate and unreasonable use of such powers. Yet such powers are widespread in the contemporary world and their use would seem to be increasing. It is paradoxical that democratically appointed legislatures seem all too often to find no difficulty in arming their executives with powers which are a fundamental breach of the Rule of Law.

The use to which such powers have been put in some of the newer democracies have often bordered on the scandalous, mere opposition to the existing government being often a ground for locking up whole parliamentary oppositions as ‘subversive persons’. On the other hand it must be admitted that the boundary between legitimate opposition and conspiracy to displace such a government by coup d’état has been all too often blurred, giving apparent justification for what is basically objectionable.

The power for the executive to use such powers has in general in the older democracies been restricted to war-time, e.g. the famous English Defence Regulation 18b, or to situations of widespread violence, as in Northern Ireland, but in some of the newer states they derive from the constitution itself.

Art 22 of the Constitution of India permits legislation governing internments (called Preventive Detention) to both state and central governments, the new and unlawful constitution of Rhodesia does likewise, while in South Africa such powers are part of the normal police powers in day to day use.

In Common Law countries slight, but not very effective, checks on the arbitrary and unreasonable use of the powers of internment are in general a feature of the legislation conferring such powers, such as the setting up of appeal boards to advise the minister ordering internment, and provisions for hearing internees' objections to their incarceration, and for periodic reviews of each and every case. If judiciaries have played an undistinguished role in safeguarding the basic right to freedom of an interned person (save and except the former Burmese High Court), and have confined themselves to peripheral issues such as the use of the correct procedure in effecting arrest, the proper service of the notice of the 'grounds' for internment, and the apparent sufficiency and reasonableness of such grounds (or otherwise), it is because they have followed the English decision in *Liversidge v Anderson*¹ which laid down that though on an application for an order of *habeas corpus* the court could and would consider the sufficiency of the 'grounds' on which the minister acted, it could not examine in any way the 'facts' on which such grounds were formulated. Thus Mr. Justice Smith in the High Court of Ghana ruled within the framework of *Liversidge v Anderson*, 'The Preventive Detention Order sets out that the Governor-General is satisfied that it is necessary to make the Detention Order in question. It is signed by the Minister of Defence... The question of the necessity of making the order at all is not for the Court to consider. It also appears well established that where a statute requires only that a minister shall be satisfied that certain action is necessary the effect is 'virtually to exclude all judicial review'...' (quoting Sir Carlton Kemp Allen in 'Laws and Orders'.)

But the Burmese High Court did not think so. Thus '... we must examine the materials to see if they are such as could have justified the Commissioner of Police... But a distinction must be drawn... between reasonable satisfaction and apprehension born of vague anticipation'². In other words the Court decided it must look at the alleged facts to determine the reasonableness of the 'grounds'.

It is difficult to reconcile the *Liversidge v Anderson* lines of cases with developments in England in the law of Crown Privilege.

Until fairly recently, when a minister of the Crown certified that the disclosure of a fact, a minute, a letter or some other evidential matter was in his belief contrary to the public interest, the Court accepted the certificate without examining the evidence in question. No more: now the court itself looks at the evidence and decides whether the minister's view is reasonable (*Conway v Rimmer* 1 AER 1968). If in a mere civil action a court will examine 'the facts' to determine the reasonableness of the grounds it would be clearly inconsistent not to do so where the very liberty of the citizen is con-

¹ 1942 A. C. 206

² *Tinsa Maw Naing v the Commissioner of Police*, 1950 BLR (SC) 17 at 35.

cerned. The *Liversidge v Anderson* decision and the whole line of cases following from it (of which the Indian reports are full) would seem now to be bad law—as Lord Atkin, the only English judge among a wealth of distinguished legal talent which considered the case, said it was.

It is of great interest to observe therefore that the Detention (Prescription of time limit) (Amendment) Decree recently promulgated by the military government of Uganda (Decree 7 of 1971) appears to accept this view. The committee set up to review all internments and advise the minister thereon is expressly given power to ‘examine all allegations of facts upon which the detention order was based and shall be informed of all sources of information so that it may effectively perform its duties’.

In the following sub-section the person representing the government may require the committee to keep secret any facts of the identity of informants which in his opinion should not be disclosed. This ties in with the section of the decree which gives an internee a right to professional representation before the committee. Thus though ‘facts’ and the identity of deponents to such facts may be withheld from the internee and his legal representative, they cannot be withheld from the advisory committee.

In a branch of modern legislation which any lawyer must regard with extreme distaste, this african decree produced by a military and dictatorial government is more liberal and contains more safeguards against abuse than comparable decrees or statutes agreed to by many parliamentary legislatures.

A nearly contemporary legislative provision in West Bengal compares very unfavourably with the Uganda decree.

The ‘West Bengal (Prevention of Violent Activities Act) 1970’ is in many ways more precise in defining acts alleged to be subversive but the internee has no right to legal representation before the Advisory Board and the report of the latter need not be disclosed to him.

The distinction between an examination of the ‘facts’ and the ‘grounds’ justifying a detention is unclear in the Bengal statute, section II (i) of which provides that the Advisory Board shall ‘after considering the materials placed before it (the “ground”) and after calling for such information as it may deem necessary from the state government... submit its report etc.’. It is to be feared that in the *Liversidge v Anderson* tradition in the Indian legal world this will generally be narrowly construed and that the Board will content itself with an examination of the ‘grounds’ rather than ‘facts’ alleged to support them. And the internee has no right to a lawyer to draw attention to inconsistencies or discrepancies in such grounds.

The military dictatorship of Uganda would seem to have done better in its reaction to civil disturbance and the right to civil liberty than the democratically elected government of West Bengal.

It only remains to be said that all such legislation is objectionable and when looked at long after the events which have given rise to it, appears to the historian to have been of doubtful benefit — when not actually mischievous — in the solution of the civil disturbances which have at the time been said to justify it.

LAW AND SOCIALISM IN CHILE

by

Mr. José Antonio VIERA-GALLO,
Under-Secretary in the Chilean Ministry of Justice *

The subject on which I have been asked to speak is a difficult one and, rather than presenting an abstract dissertation on Law and Socialism, I have thought it preferable to concentrate my attention on the concrete experiment which is being carried out in Chile today.

The conception adopted by the Chilean government of a socialist liberation is deeply rooted in the historic tradition of our people, the tradition of the striving of that people towards democracy, justice and the respect of the judicial system which we have inherited and which we freely accept. Our liberation from subjection and domination has grown out of and will develop in accordance with our own past experience and our historical traditions.

As Mr. Felipe Herrera has already said, the law is not a flower which blossoms in the desert by some phenomenon of spontaneous generation. The laws which obtain always correspond to a certain conception of society; they are the expression of the groups which hold that conception and the interests which have given it form.

What happened when the People's Government came into power ? It found itself faced with a legal system characterized by two types of contradictions which explain the originality of the particular road to socialism which Chile has chosen to follow.

* Summary of a speech made at the inaugural session of a Conference on the Teaching of Law and Development.

The first contradiction is between the legal system itself and the reality of which it should be the reflection, between the principles expressed in the legal texts and the actual facts of the daily life of the people, which are in constant contradiction with those principles. The result is that the laws do not lead, in the actual life of the country, to the rule of justice.

The laws and the Constitution speak of freedom and equality and proclaim that there are no privileged classes in Chile. But the truth is quite different. This contradiction comes from the fact that the present legal system is the expression of a historic plan for capitalist domination which proved incapable of creating a sound system and which has provoked an ever-increasing antagonism based on the realities of the social situation.

And so, out of the constant struggle of the people, out of the daily suffering of the workers in town and country and the uncertainty and bitter anxiety of life in the 'shanty-towns', there evolves a class consciousness determined to have done with the present legal system based on interests which are contrary to those of the people and which are responsible for the suffering and misery of the masses. Moreover, out of this political consciousness is gradually growing a legal consciousness, still often embryonic, scarcely formulated, but full of profound wisdom and basically opposed to the present legal rules.

The people no longer have any faith in the laws by which they are governed, and this is one of the first signs of a revolutionary situation. Revolutions come about when a people ceases to believe in the laws which are in force and evolves as it were the first germs of a new set of laws, not yet clearly formulated or even explicitly recognized but gradually taking form in the very life of the people. Indeed, revolution is precisely the effort on the part of a people to take over control of the state in order to create new conditions of life and, by so doing, to introduce new laws for the organisation of society, to establish new legal systems.

A second type of contradiction may be found in our legal system, doubtless less important than the first, but one which helps us to understand the special nature of the socialist pattern which Chile has adopted. This time, the contradictions exist within the legal system itself, and are the fruit of a constant struggle on the part of our people by means of which they have managed, at different moments in our history, to impose the introduction of a series of legal provisions clearly aimed at the improvement of the conditions of the masses. These include, for instance, the labour legislation, the agrarian reform laws, the electoral laws and the regulations concerning the intervention of the State in economic affairs which have made it possible to bring the big monopolistic enterprises under state ownership.

It is these contradictions which made it possible for a revolutionary government to come into power by legal means and to exercise that power strictly in accordance with the law. They have also made it possible to create within the Chilean economy a sector of state ownership. Thanks to them, our historical evolution can be changed within the existing legal framework and with an absolute respect for the laws; indeed, we can say that it is thanks to our laws that we can carry through our revolution. However incredible it may sound, it is possible to change the content and the orientation of our legal system without infringing the rules laid down by that system as it exists today. We maintain that our present laws make it possible for us to transform the existing situation and, therefore, to transform the laws themselves, while respecting the general principles of the law, such as the non-retroactivity of penal laws, the remedy of amparo, the hierarchy of legal norms, and so forth.

The Government will break no laws. Any of our opponents who do will be punished by the implacable force of the laws which they themselves dictated. It is no exaggeration to say that the law has turned against its creators.

The immediate tasks of the government in the legal field are the following: the introduction of regulations concerning the national economy which will facilitate the creation and the continuance of popular unity; the effective participation of the population; the preparation of new penal legislation and, finally, a process of adaptation and of modernisation and the enforcement of higher standards in the administration of justice.

We need new economic legislation in order to make possible state ownership of the big monopolistic enterprises and other strategic sectors, and also to ensure the satisfactory functioning of those sectors by means of regulations concerning the internal organisation of the enterprises involved, changes in the contracts governing the relations between those enterprises, and the introduction of systematic planning. We also need to establish legal definitions and limits for the sectors subject to state, private and mixed ownership, so that the managements of these different enterprises may have a clear understanding of their rights and their limitations and can work within a framework of clearly defined laws affording them adequate guarantees.

The introduction of popular participation in public administration and in state and private enterprise also requires the establishment of new legal provisions governing that participation.

With regard to penal legislation, we shall have to modify and redefine the legal concept of property which is to be protected by the law, and also the nature and form of that protection. We want to change the whole conception of legal penalties and give them a new educational orientation. The emphasis will be placed on the elimination of the

social causes of delinquency rather on the punishment of individual offences against the law. Moreover, the new penal legislation must offer adequate guarantees for the defence of the society we are in the process of creating.

As for the administration of justice, we shall organise it in such a way as to ensure that the rights of every citizen are adequately protected by the public authorities and that the people can play an increasingly important part in the administration of justice.

These urgent tasks relating to our judicial system constitute a formidable challenge to lawyers, jurists and, above all, professors and intellectuals. We appeal to the Faculties of Law to lend their critical collaboration to the execution of the task to which the people of Chile have committed themselves.

Finally, I would stress that in our approach to this task we are inspired by one single idea: that the law and all its processes, which may seem far removed from the realities of everyday life, have only one purpose: the service of man and of the people of Chile. The challenge we have accepted and the task we have undertaken is to translate this ideal into a reality.

Judicial Application of the Rule of Law

Legal consequences for States of continued presence of South Africa in Namibia (South West Africa)

On June 21, 1971, the International Court of Justice delivered the following opinion in answer to the question put by the Security Council of the United Nations, 'what are the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)':

by 13 votes to 2:—

1) that, the continued presence of South Africa in Namibia being illegal, South Africa is under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory;

by 11 votes to 4:

2) that States Members of the United Nations are under obligation to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration;

3) that it is incumbent upon States which are not Members of the United Nations to give assistance, within the scope of subparagraph (2) above, in the action which has been taken by the United Nations with regard to Namibia.

Objections against the Court's dealing with the question (paras. 19-41 of the advisory opinion)

The Government of South Africa contended that the Court was not competent to deliver the opinion, because Security Council resolution 284 (1970) was invalid for the following reasons: (a) Two permanent members of the council abstained during the voting (Charter of the United Nations, art. 27, para 3); (b) as the question related to a dispute between South Africa and other members of the United Nations, South Africa should have been invited to participate in the discussion (Charter, art. 32) and the provision requiring Members of the Security Council which are parties to a dispute to abstain from voting should have been observed (Charter, art. 27, para 3).

The Court points out that (a) for a long period the voluntary abstention of a permanent member has consistently been interpreted as not constituting a bar to the adoption of resolutions by the Security Council; (b) the question of Namibia was placed on the agenda of the Council as a situation and the South African Government failed to draw the Council's attention to the necessity in its eyes of treating it as a dispute. In the alternative the Government of South

Africa maintained that even if the Court had competence it should nevertheless, as a matter of judicial propriety, refuse to give the opinion requested on account of political pressure to which, it was contended, the Court had been or might be subjected. On 8 February 1971, at the opening of the public sittings, the President of the Court declared that it would not be proper for the Court to entertain those observations, bearing as they did on the very nature of the Court as the principal judicial organ of the United Nations, an organ which, in that capacity, acts only on the basis of law independently of all outside influences or interventions whatsoever.

The Government of South Africa also advanced another reason for not giving the advisory opinion requested: that the question was in reality contentious, because it related to an existing dispute between South Africa and other States. The Court considers that it was asked to deal with a request put forward by a United Nations organ with a view to seeking legal advice on the consequences of its own decisions. The fact that, in order to give its answer, the Court might have to pronounce on legal questions upon which divergent views exist between South Africa and the United Nations does not convert the case into a dispute between States.

History of the mandate (paras. 42-86)

The mandates system established by article 22 of the Covenant of the League of Nations was based upon two principles of paramount importance: the principle of non-annexation and the principle that the well-being and development of the peoples concerned formed a sacred trust of civilisation. Taking the developments of the past half-century into account, there can be little doubt that the ultimate objective of the sacred trust was self-determination and independence. The mandatory was to observe a number of obligations, and the Council of the League was to see that they were fulfilled. The rights of the mandatory as such had their foundation in those obligations. When the League of Nations was dissolved, the *raison d'être* and original object of these obligations remained, since their fulfilment did not depend on the existence of the League.

The last resolution of the League Assembly and article 80, paragraph 1, of the United Nations Charter maintained the obligations of mandatories. The International Court of Justice has consistently recognized that the mandate survived the demise of the League, and South Africa also admitted as much for a number of years. Thus the supervisory element, which is an essential part of the mandate, was bound to survive. The United Nations suggested a system of supervision which would not exceed that which applied under the mandates system, but this proposal was rejected by South Africa.

Resolutions by the General Assembly and the Security Council (paras. 87-116)

Eventually, in 1966, the General Assembly of the United Nations adopted resolution 2145 (XXI), whereby it decided that the mandate was terminated and that South Africa had no other right to administer the territory. Subsequently the Security Council adopted various resolutions including resolution 276 (1970) declaring the continued presence of South Africa in Namibia illegal. Objections challenging the validity of these resolutions having been raised, the Court points out that it does not possess powers of judicial review or appeal in relation to the United Nations organs in question, nor does the validity of their resolutions form the subject of the request for advisory opinion. The Court nevertheless, in the exercise of its judicial function, and since these objections have been advanced, considers them in the course of its reasoning before determining the legal consequences arising from those resolutions.

It first recalls that the entry into force of the United Nations Charter established a relationship between all Members of the United Nations on the one side, and each mandatory power on the other, and that one of the fundamental principles governing that relationship is that the party which disowns or does not

fulfil its obligations cannot be recognized as retaining the rights which it claims to derive from the relationship. Resolution 2145 (XXI) determined that there had been a material breach of the mandate, which South Africa had in fact disavowed.

It has been contended (a) that the Covenant of the League of Nations did not confer on the Council of the League power to terminate a mandate for misconduct of the mandatory and that the United Nations could not derive from the League greater powers than the latter itself had; (b) that, even if the Council of the League had possessed the power of revocation of the mandate, it could not have been exercised unilaterally but only in co-operation with the mandatory; (c) that resolution 2145 (XXI) made pronouncements which the General Assembly, not being a judicial organ, was not competent to make; (d) that a detailed factual investigation was called for; (e) that one part of resolution 2145 (XXI) decided in effect a transfer of territory.

The Court observes (a) that, according to a general principle of international law (incorporated in the Vienna Convention on the Law of Treaties), the right to terminate a treaty on account of breach must be presumed to exist in respect of all treaties even if unexpressed; (b) that the consent of the wrongdoer to such a form of termination cannot be required; (c) that the United Nations, as a successor to the League, acting through its competent organ must be seen above all as the supervisory institution competent to pronounce on the conduct of the mandatory; (d) that the failure of South Africa to comply with the obligation to submit to supervision cannot be disputed; (e) that the General Assembly was not making a finding on facts, but formulating a legal situation. It would not be correct to assume that, because it is in principle vested with recommendatory powers it is debarred from adopting, in special cases within the framework of its competence, resolutions which make determinations or have operative design.

The General Assembly, however, lacked the necessary powers to ensure the withdrawal of South Africa from the territory and therefore, acting in accordance with article 11, paragraph 2 of the Charter, enlisted the co-operation of the Security Council. The Council for its part, when it adopted the resolutions concerned, was acting in the exercise of what it deemed to be its primary responsibility for the maintenance of peace and security. Article 24 of the Charter vests in the Security Council the necessary authority. Its decisions were taken in conformity with the purposes and principles of the Charter, under article 25 of which it is for Member States to comply with those decisions, even those Members of the Security Council which voted against them and those Members of the United Nations who are not Members of the Council.

Legal consequences for States of the continued presence of South Africa in Namibia (paras. 117-127 and 133).

The Court stresses that a binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence. South Africa, being responsible for having created and maintained that situation, has the obligation to put an end to it and withdraw its administration from the territory. By occupying the territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It also remains accountable for any violations of the rights of the people of Namibia, or of its obligation under international law towards other States in respect of the exercise of its powers in relation to the territory.

The Member States of the United Nations are under obligation to recognize the illegality and invalidity of South Africa's continued presence in Namibia and to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia. The precise determination of the acts permitted—what measures should be applied—is a matter which lies within the competence of the appropriate political organs of the United Nations acting within their authority under the Charter. Thus it is for the Security Council to determine any further measures consequent upon the decisions already taken

by it. The Court, in consequence, confines itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with resolution 276 (1970) because they might imply recognizing South Africa's presence in Namibia as legal:

(a) Member States are under obligation (subject to (d) below) to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, Member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation with respect to multilateral treaties. The same rule cannot be applied to certain general conventions such as those with humanitarian character, the non-performance of which may adversely affect the people of Namibia. It will be for the competent international organs to take specific measures in this respect.

(b) Member States are under obligation to abstain from sending diplomatic or special missions to South Africa including in their jurisdiction the territory of Namibia, to abstain from sending consular agents to Namibia, and to withdraw any such agents already there, and to make it clear to South Africa that the maintenance of diplomatic or consular relations does not imply any recognition of its authority with regard to Namibia.

(c) Member States are under obligation to abstain from entering into economic and other forms of relations with South Africa on behalf of or concerning Namibia which may entrench its authority over the territory.

(d) However, non-recognition should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, the illegality or invalidity of acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the mandate cannot be extended to such acts as the registration of births, deaths and marriages. As to States not Members of the United Nations, although they are not bound by articles 24 and 25 of the Charter, they have been called upon by resolution 276 (1970) to give assistance in the action which has been taken by the United Nations with regard to Namibia. In the view of the Court, the termination of the mandate and the declaration of the illegality of South Africa's presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of the situation which is maintained in violation of international law. In particular, no State which enters into relations with South Africa concerning Namibia may expect the United Nations or its Members to recognize the validity or effects of any such relationship. The mandate having been terminated by a decision of the international organization in which the supervisory authority was vested, it is for non-member states to act accordingly. All States should bear in mind that the entity injured by the illegal presence of South Africa in Namibia is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted.

Accordingly, the Court has given the replies reproduced above.

The Court was composed as follows: President, Sir Muhammad Zafrulla Khan; Vice-President Ammoun; judges: Sir Gerald Fitzmaurice, Padilla Nervo, Forster, Gros, Bengzon, Petren, Lachs, Onyeama, Dollard, Ignacio-Pinto, de Castro, Morozov and Jimenez de Arechaga.

Freedom of Association

Unconstitutional nature of a law whose effect would be to restrict freedom of association

The French Government submitted to Parliament a Bill which would have changed the 1901 Law on freedom of association by making the right of association subject to previous approval. Under Article 3 of the Bill the prefect would have been able to bring proceedings before the courts to prevent an association from acquiring legal status. The Bill was adopted, first by the National Assembly and then, in spite of strong opposition, by the Senate.

The President of the Senate, Mr. Alain Poher, asked the Constitutional Council for a ruling whether the new Bill was consistent with the Constitution. For the first time since its creation in 1958, the Council gave an adverse ruling, finding that Article 3 of the Bill was unconstitutional. This finding was based on the Preamble to the 1958 Constitution, which refers to 'human rights and the principles of national sovereignty as defined in the 1789 Declaration as amended by the Preamble to the 1946 Constitution'.

This decision resolves a dispute lasting 13 years in legal circles concerning the force in law of the Preamble.

The Constitutional Council gave the following grounds for its decision: 'Whereas among the fundamental principles recognized by the laws of the Republic and solemnly reaffirmed by the Preamble to the Constitution must be included that of freedom of association, and whereas this principle constitutes the legal basis for the general provisions of the law of 1 July 1901 concerning the constitution of associations and by virtue of this principle there is absolute liberty to constitute such associations... and therefore... the validity of such a constitution may not be made subject to previous authorisation by any legal authority... Whereas the object of Article 3 of the Bill which has been submitted to the Constitutional Council is to introduce procedures by which the acquisition of legal status by an association may be made subject to a previous decision by a judicial authority as to its legality,

The Council rules that:

the provisions of Article 3 of the Bill submitted for the consideration of the Constitutional Council are contrary to the Constitution....'

The decision of the Constitutional Council was widely welcomed by public opinion, which saw the proposed Bill as an intolerable infringement of the rights of the citizen.

CONSTITUTIONAL COUNCIL OF FRANCE

Request for ruling submitted by Mr. Alain POHER, President of the Senate.

Ruling announced on 17 July 1971 by Mr. Gaston Palewski (President) and the members of the Constitutional Council: Messrs. Jean Sainteny, François Luchaire, Paul Coste-Floret, François Goguel, Pierre Chatenet, Henri Monnet, Henry Rey, Georges Dubois.

Due process of law clause

The Appellant, a lieutenant in the Trinidad and Tobago Regiment was charged on 2 June 1970 with mutiny with violence contrary to Section 33 (1) of the Defence Act 1962. He appeared on 27 October 1970 before a court-martial consisting of five officers of the Commonwealth military forces and a Judge from Ghana who was not an officer of the military forces, the convening officer of the court-martial being of the opinion that the necessary number of qualified military officers was not available. Section 2A of the Defence Act, 1962, as amended by Section 2 of the Defence (Amendment) Act, 1970, which came into force on 19 October 1970 provides that:

‘Notwithstanding any rule of law to the contrary, if any court-martial is required to be convened in any circumstance in which, in the opinion of the convening officer, the necessary number of military officers having the requisite qualifications is not available to form the court and cannot be made available with due regard to the public service and the interests of justice, the convening officer may appoint any person as defined in subsection (4), as president in lieu of a military officer or as any other member of the court in lieu of or in addition to a military officer or military officers’.

The appellant objected to the jurisdiction of the court-martial on the grounds that the Defence (Amendment) Act 1970 was ultra vires the Constitution of Trinidad and Tobago and that the court-martial was illegal and unconstitutional. The motion was dismissed by the Judge of first instance and the appellant lodged an appeal.

Chapter 1 of the Constitution of Trinidad and Tobago which is concerned with ‘the recognition and protection of human rights and fundamental freedoms’ was in substance modelled on the Canadian Bill of Rights, 1960.

Section 1 (1) of the Constitution reads as follows: —

‘It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex the following human rights and fundamental freedoms, namely, (a) the right of the individual to life, liberty, security of the person and the right not to be deprived thereof except by due process of law’.

The Court of Appeal had to decide whether the Defence (Amendment) Act 1970 abrogated the Appellant’s right to life and liberty and his right not to be deprived thereof except by due process of the law.

After a learned and detailed survey of the history and definition of the ‘Due Process Clause’, the Court held that the procedural changes brought about by the Defence (Amendment) Act, 1970, were lawful under the Constitution and that the prescription of due process was adequately fulfilled. The appeal was dismissed.

TRINIDAD AND TOBAGO COURT OF APPEAL
(Justices of Appeal; Phillips, Fraser and De La Bastide)
In re APPLICATION of LT. REX LASSALLE
Decided 12 May 1971
Civil Appeal No. 2/71; Action No. 2339/70

Basic Texts

Resolutions adopted by the Conference of African Jurists on "African legal process and the individual" convened at Addis Ababa, April 1971, by The UN Economic Commission for Africa

Resolution 1: The process of arrest and detention

Affirms the resolutions of the Lagos Conference (i.e. the African Conference on the Rule of Law, convened by the International Commission of Jurists at Lagos, in 1961) in this regard

Deplores and condemns any legislation which permits detention without trial,

Emphasizes the importance of respecting the provisions regarding the conditions of arrest and detention contained in various criminal codes,

Urges that respect for these provisions be extended as far as possible to all kinds of arrest and detention, and that all places of detention shall be subject to frequent and regular judicial inspection, and that in the recruitment and employment of law enforcement officers attention be paid to their suitability, qualifications, training and that their remuneration be improved,

Recommends to this end, the establishment of an Institute of Comparative Law, under the auspices of the Organisation of African Unity, with the cooperation of the United Nations and its competent specialized agencies and of all inter-governmental and non-governmental organisations concerned with the problem, charged with:

- (1) The scientific study and development of law in Africa; and
- (2) the holding at regular intervals (once or twice a year in various African countries in turn) of study and research sessions on African law lasting two or three weeks at a time; and
- (3) the promotion of research into problems of African law and the publication of an African Journal of Comparative Law to be used for the widespread dissemination of the results of research, and of information regarding legal developments.

Resolution 2: The Judicial Process: Access to courts, trial review, judicial remedies and the Ombudsman

Reaffirms the resolutions of the United Nations Seminar held at Mexico (1961) stressing that *amparo*, *habeas corpus*, *mandado de seguranca* and other means of defending human rights are enduring and essential juridical institutions for the survival of any civilized community,

Recognizes and recommends that a many-sided approach must be undertaken to overcome the economic, social and human factors which create a gap between the principle that the courts should be readily accessible to all and the actualities of present-day judicial facilities in Africa,

Declares that among the measures that should be undertaken are:

(1) An extensive simplification of the rules of procedure especially in relation to the institution or commencement of legal proceedings by any person in particular, illiterate or needy persons;

(2) A sustained programme of civic education designed to communicate a better knowledge of legal rights and duties and thus promote the awareness of remedies which would enable the ordinary man to defend his rights and in which judges, magistrates, lawyers and law students have a leading role to play;

(3) A determined effort to minimize the cost of judicial proceedings and to bring justice and the individual closer together by increasing the number of courts and extending the use of circuit courts;

(4) A thoughtful Africanization of law and procedure so as to increase their understanding;

(5) The establishment of adequate machinery for the provision of legal aid to persons who otherwise could not afford to prosecute or defend their rights in court;

(6) A scrupulous respect for the basic elements of fair hearing including the enforcement of such safeguards as the protection of witnesses, litigants and counsel; the presumption of innocence; the protection afforded by the principle *ne bis in idem* and against self-incrimination; the holding of trials in public and the curtailment of delays in disposing of cases;

(7) (a) The settlement of all judicial business in the ordinary courts of the land and the abolition of all exceptional tribunals;

(b) The development of an adequate system for the settlement of administrative problems and of administrative courts with a channel of appeals to the highest courts in the land;

(c) Where appropriate the creation of the office of Ombudsman; and

(d) The introduction of some code of non-contentious administrative procedure and appropriate machinery for its enforcement.

Resolution 3: The Judicial Process: Independence of the judiciary, the executive and the judiciary, and international judicial processes

After considering the important questions regarding the independence of the judiciary, the relations between the judiciary and the executive, and possible international judicial processes,

Affirms the resolutions in this regard of the following Conferences: the Lagos Conference of January 1961, the Rio de Janeiro Conference of 1962, the Bangkok Conference of 1965, and the Dakar Conference of 1967, all held under the auspices of the International Commission of Jurists;

Endorses the recommendations of the United Nations Seminar on the establishment of regional commissions on human rights with special reference to Africa, held in Cairo 1969; and

Recommends as follows:

(1) That the independence of the judiciary be guaranteed in order to ensure the impartiality of justice;

(2) That attention be paid to the social and economic factors that promote stability and that jurists should acknowledge the fact that they have a vested interest and a professional or technical commitment to the task of nation-building and that problems of political morality and the prevalence of the spirit of justice within their state are the business of lawyers;

(3) That steps be taken to agree at an early date upon a comprehensive code of judicial ethics, which also takes account of relations between the judiciary and the police; and

(4) That in exercise of political power all authority be subordinated to law and that the protection of human rights should be the primary concern of all the principal organs of the State;

(5) With a view to promoting the better protection of human rights, the Conference recommended further:

- (i) that an African Commission on Human Rights be established and charged with the responsibility of collecting and circulating information relating to legislation and decisions concerning human rights in annual reports devoted to the question of civil rights in Africa;
- (ii) that an African Convention on Human Rights be concluded;
- (iii) that every effort be made to harmonize legislation in the different African countries in this regard;

- (iv) that an Advisory body be established to which recourse may be had for the interpretation of the terms of the African Convention on Human Rights; and
- (v) that the various African States be urged to take speedy measures to accede to or ratify the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the OAU Convention governing specific aspects of refugee problems in Africa.

(6) The Conference welcomes the recommendations of the aforesaid United Nations Seminar held in Cairo in 1969 entrusting the Organisation of African Unity with the establishment of a Commission for Human Rights for Africa and invites the Organisation of African Unity to hasten the implementation of the said recommendations taking account of existing international instruments that have been drafted by the United Nations in this connexion.

Resolution 4: Provision of legal services to individuals: on the question of legal aid, the Conference

Emphasizes that it is essential to the fair and impartial administration of justice that rich and poor alike should have equal access to the courts and to the assistance of trained legal personnel and that this consideration imposes an obligation on governments and on the legal profession to devise adequate machinery for ensuring that the ideal of equal justice before the law becomes a living reality that supports the development of a spirit of justice in the society.

Final Document of the Aspen Conference

on

“Justice and the individual: The Rule of Law under current pressures”

This International Conference of lawyers from 25 countries, convened by the International Commission of Jurists from 8 to 12 September, 1971, as guests of the Aspen Institute for Humanistic Studies, Aspen, Colorado, in the United States of America,

Having taken note of

- (a) pressures to which the Rule of Law is subjected in many countries of the world, and in particular
the increasing tendency of many governments, aided by modern technology, to undermine basic rights of the individual; and the tendency of authorities, especially in countries where there is an urgent need for the economic advancement of their peoples, to assert that such advancement requires and justifies arbitrary rule and the denial of civil and political rights;
- (b) flagrant denial by many governments of human rights now protected by international customary and treaty law;
- (c) widespread disregard in armed conflict, including internal strife, of the minimum standards of civilised conduct required by international humanitarian laws;
- (d) infectious violence which, as the Universal Declaration of Human Rights recognises, is often the last resort of those who are too long denied their human rights under the Rule of Law;

And having, without prejudice to its continuing concern about racial discrimination and colonial oppression in other areas, specially considered

- (e) the racially repressive minority regime, maintained by unjust laws, which in violation of human rights persists in South Africa;

Now resolves that

(1) denial of civil and political rights affords no short-cut to the attainment of economic, social and cultural rights for every individual; all these rights are interdependent and advances must be made on both fronts to meet the obligations of the International Bill of Human Rights (comprising the Universal Declaration, the two Covenants and the Optional Protocol) and of other international and regional instruments for the protection of human rights; this balanced progress

will not be made unless the economic policies of the developed countries and of international economic institutions are such as to further economic and social reform in the developing countries;

(2) all lawyers, whether judges, advocates, government lawyers, teachers of law or participants in the law-making processes have a special responsibility, which they have not as yet sufficiently discharged:

- (a) to help to develop and utilise institutions, procedures and expertise to bring economic, social and cultural advance to their fellow countrymen within the framework of the Rule of Law;
- (b) to stimulate a greater awareness of the international obligations in respect of human rights, to which under treaty and customary law their countries are subject;
- (c) to encourage the application of that law in national tribunals and to make fuller and bolder use of international remedies for violations of those rights in their own and other countries;

(3) a permanent independent Commission of Enquiry should be set up within the framework of the United Nations to receive and investigate complaints of violations of international humanitarian laws occurring in armed conflicts, as proposed by the Special Committee of Non-Governmental Organisations on Human Rights at Geneva on February 18, 1971;

Further welcomes as a step in the better protection of human rights

(4) the new procedures for handling communications addressed to the United Nations relating to gross violations of human rights and fundamental freedoms, contained in Resolution I (XXIV) of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of August 14, 1971;

And draws attention to

(5) the importance of securing in the organs of the United Nations concerned with human rights, a discussion of all issues in an atmosphere free from any consideration other than a concern to protect and further individual and group rights, and, in particular, of ensuring that the experts charged with supervising the application of the Convention on the Elimination of All Forms of Racial Discrimination should be persons of independent status, known for their impartiality;

And in the absence of effective machinery or governmental action on the international level, calls upon the International Commission of Jurists

(6) to consider setting up in different parts of the world appropriate agencies to investigate violations of human rights and, as a matter of immediate and special urgency, to institute an enquiry into alleged violations of human rights, the humanitarian laws and the Rule of Law in East Pakistan;

And finally resolves, in reference to racial discrimination that

- (7) (a) systematic racial discrimination, like other violations of human rights, is a matter of international concern not excluded by the domestic jurisdiction provision in Article 2 (7) of the Charter. Every offending state is therefore subject to appropriate U.N. action;
- (b) moreover, racial discrimination, as practised in its most flagrant and systematic form in South Africa, inevitably leads to violence and is a threat to the peace justifying action under Chapter VII of the Charter, as decided in the case of Rhodesia;

- (c) foreign trade and financial interests operating in South Africa should at least, in accordance with the principles of the Convention on the Elimination of All Forms of Racial Discrimination, be prohibited by their governments from themselves aiding and abetting racial discrimination in the conduct of their business;
 - (d) victims of racial discrimination, like all individuals, must be afforded the right to leave and return to their country. The right of asylum and other rights relating to refugees must be strengthened so that victims of racial discrimination who seek refuge in other countries should, as a matter of right, be received and protected. When needed, international aid must be provided to make this possible and, as a minimum requirement of humanity, to give them adequate opportunities of livelihood in their country of asylum or elsewhere.
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COMMISSION

Three new Members have been elected:

Mr. Edgar FAURE (France). He is a Doctor of Law, Advocate of the Paris Court of Appeal, and a 'Professeur agrégé' of law. He is a Deputy of the French Parliament and has formerly been Prime Minister of France, Minister of Justice, Minister of Finance and Minister of Education, and also a Senator. He was a distinguished member of the French resistance movement and was assistant to the French delegate at the Nuremberg War Criminals Trial.

Mr. Godfrey L. BINAISA Q.C. (Uganda). Born in 1920 he was educated at Makerere College, Kampala and at Kings College, London, where he was awarded an LL.B. He was called to the bar at Lincoln's Inn in 1956 and practised as a barrister in Kampala until he was appointed the first Attorney-General of Uganda in 1962. He resigned this office at the time when President Obote introduced preventive detention. He was President of Uganda Law Society in 1968, is a member of the O.A.U. Commission for Mediation, Conciliation and Arbitration; a member of the Uganda Judicial Service Commission; a member of Makerere University Council; and Chairman of Uganda Law Development Centre.

Mr. Joel CARLSON (lately of South Africa). Born in South Africa in 1930, he worked after leaving school as a clerk at the Bantu Commission's Court in Fordsburg. He left to attend the University. After qualifying, he practised as a lawyer in Johannesburg from 1954. He soon became well-known for his courageous defence of Africans prosecuted under the pass laws and other discriminatory legislation in South Africa. He was Representative of the International Commission of Jurists in South Africa until 1971 when he was forced by intolerable pressures on himself, his staff and his family to leave the country. He has written and spoken widely on South African discriminatory legislation, and is now working at the Center for International Studies in the New York University.

The Commission held a plenary meeting at Aspen, Colorado, in September 1971, which was preceded by a Conference whose resolutions are referred to elsewhere in this REVIEW. The Commission Meeting was attended by 22 of the Members of the Commission, the Secretary-General and some of the members of the Secretariat. There was a fruitful discussion on the organisation and on a closer collaboration between the Members and the Executive. The Secretary-General made a report on the activities of the Commission since the last Commission Meeting in 1966 and a discussion followed on the REVIEW and other publications, National Sections, Conferences and Seminars, Interventions and Observers, U.N. Activities and Enquiries and questions arising out of general policy.

SECRETARIAT

The Secretary-General attended the Conference of African Jurists at Addis Ababa in April 1971, and submitted important documentation to the Conference which were incorporated in the Resolutions published in this REVIEW. He then visited Kenya, Tanzania, Zambia, Uganda, Nigeria and Ghana, where he addressed meetings of the National Sections and had conversations with Attorney-Generals and other Ministers.

The Secretary General also attended a Seminar of the European Commission of Human Rights at Attersee. Eight European sections of the I.C.J. were represented and plans were made for future European conferences.

NATIONAL SECTIONS

AUSTRALIA: In May 1971, the Australian National Section published the fourth number of their review 'Justice', with articles on the Rule of Law in New Guinea, the aboriginal legal service, Freedom and Order in Australia, the Senate and Commonwealth Delegated Legislation, and Magna Carta.

AUSTRIA: The Austrian Section of the I.C.J., together with the German and Italian National Sections, organised a Seminar in May 1971, at Weissenbad on Attersee. The Seminar was addressed by distinguished professors of law of various nationalities on the reforms of administrative penal law.

CEYLON: The Ceylon Section sent a memorandum to the Constituent Assembly of Ceylon with important draft provisions to be incorporated in the proposed new Constitution. They deal in particular with the independence of the judiciary, the incorporation of fundamental rights and the justiciability of these rights.

CHILE: The President of the National Section, Professor Osvaldo Illanes Benitez, wrote an article at the time of the investiture of President Allende which was widely acclaimed. In this article he requested and obtained clarification and precise assurances as to promises which had been made to maintain fundamental freedoms and human rights, as well as the independence of the Judiciary in which lies the surest protection of these rights.

DOMINICAN REPUBLIC: The Association of Santiago lawyers (Abogados de Santiago) has become an Associate Member of the Commission under the presidency of Dr. Salvador Jorge Blanco.

EQUADOR: The National Section of Quito have informed us that they are carrying out a study on the 'Nationalisation of the Agricultural Reform' and that they are particularly interested in the problems of rural countries.

FRANCE: 'Libre Justice' made a special study on the position of mentally abnormal delinquents which disclosed that the present law did

not afford them adequate protection. The French section therefore recommended 'that stricter control should be exercised by the administration, the judiciary and the medical profession over admissions of mental patients to public institutions and that legislation should be introduced to control admission of mental cases to private institutions which are not subject to any law at all'.

GHANA: 'Freedom and Justice' the Ghana Section of the ICJ has been reconstituted with a new constitution. In order to achieve countrywide representation, the section propose to convene a national meeting before the end of the year.

INDIA: The *Mysore* State Commission of Jurists met to consider the situation in East Pakistan and unanimously passed the following resolution:

"The Mysore State Commission of Jurists records with grave concern the recent developments in Pakistan, namely, the failure of the military regime to restore the democratic rights of the people, through their duly elected representatives, to ensure their human rights, and the large scale military action against its citizens in East Pakistan contrary to the Rule of Law, and expresses its sense of horror at the brutal suppression of the citizens of its Eastern Wing by subjecting them to inhuman and barbarous treatment and condemns the genocide committed by the military regime of Pakistan against millions of its citizens in East Pakistan."

The Law Reform Group of *Bombay* made a study of the judgment of the Supreme Court of India in the Banks Nationalisation case. The Group is considering the proposed Amendments to the Companies Act regarding the proposals to diffuse the ownership of the Press, and also proposed to discuss the Bill sponsored by Mr. Gadgil, a member of the Group who has recently been elected to Parliament, on extending privilege under the Evidence Act on confidential communications to journalists.

IRAN: The Association of Iranian Jurists had several discussions on general problems of law. For the celebration of 2500 years of the Iranian Empire, members of the Association published articles in the leading press on the legal system of Iran during 25 centuries. At a Council meeting in June 1971, twelve leading members of the legal profession were elected to the Board of the Association and Dr. Parviz Kazémi was re-elected Secretary-General.

ITALY: The National Section has organised a study on the regulations of collective disputes and on the right to strike within the social European context. Trade unions and a number of personalities interested in labour law attended. At the end of the discussions the meeting addressed a petition to the presidents of the two Houses of Parliament in which they proposed a number of legislative reforms.

JAPAN: The 'Association of Jurists for the Rule of Law', the Japanese National Section, have published their 4th volume on *The Law and Human Rights* which includes translations from the I.C.J. Reviews and articles on 'Legal Problems on the Destruction of Environment' and 'Water and Air Pollution and the Public Health'.

MAURITIUS: The ICJ welcomes the new national section in Mauritius which was established under the name of ' Truth and Justice ' in June 1971.

NORWAY: The ' Norwegian Association of Jurists for Human Rights and Peace ', the Norwegian Section of the ICJ, prepared a draft convention on environmental co-operation among nations. It also took part in the arrangement of the Nansen-Symposium in Bergen, July 28 to August 1, to commemorate the 50th anniversary of Dr. Frithjof Nansen's appointment as the first League of Nations High Commissioner for Refugees, and the 20th anniversary of the Office of the U.N. High Commission for Refugees. 78 outstanding jurists and other scientists from many parts of the world took part in the Symposium. A South Sudan Committee has been created headed by Judge Østensen, a member of the Section, with the object of acting as a mediator, helping the population of South Sudan to formulate their demands on a constitution, ensuring them some kind of self-determination within the framework of a federation.

UNITED KINGDOM: ' Justice ' published three reports in 1971: ' Administration under Law ', ' Litigants in Person ' and ' Unrepresented Defendants in Magistrates Courts '. A joint meeting with ' Libre Justice ', the French Section of the ICJ, took place in Paris in July 1971 on the subjects of ' Tax Evasion ' and ' Perjury '. In September, a party of ' Justice ' members visited Jersey at the joint invitation of its group members in Jersey and the Jersey Law Society to discuss the administration of justice in Jersey and the effects of Great Britain's entry into the Common Market.

MEMBERS OF THE COMMISSION

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