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LEGAL ASPECTS OF CIVIL RIGHTS IN THE UNITED STATES AND THE CIVIL RIGHTS ACT OF 1964 (PART III)

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STAFF STUDY
THE CENTRAL AMERICAN DRAFT CONVENTION ON HUMAN RIGHTS AND THE CENTRAL AMERICAN COURT

DOCUMENT

THE CENTRAL AMERICAN DRAFT CONVENTION COMPARED

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LEGAL ASPECTS OF CIVIL RIGHTS IN THE UNITED STATES AND THE CIVIL RIGHTS ACT OF 1964

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LEGAL ASPECTS OF CIVIL RIGHTS IN THE UNITED STATES AND THE CIVIL RIGHTS ACT OF 1964

(PART III)

(a) Introduction

In Parts I and II of this article¹, the provisions of the Civil Rights Act of 1964 and the background history of Federal Civil Rights laws in the United States were briefly summarized. Part III will be devoted to a brief survey of the ruling decisional law concerning civil rights as developed in the Federal courts, primarily the United States Supreme Court, a digest of the proposed Voting Rights Act of 1965 and a brief comment on State legislation concerning civil rights.

Most of the case law herein noted was developed prior to 1964 and to some extent was codified in the 1964 Civil Rights Act. But some very significant decisions have been handed down since the passage of that Act on July 2, 1964. Many important civil rights cases are currently pending at various levels of the Federal court system. It can be anticipated that, in the near future, there will be many decisions rendered interpreting and applying the various sections of the Civil Rights Act of 1964.

The most significant civil rights decisions of the past year were those of the United States Supreme Court upholding the constitutionality of the "public accommodations" section of the Civil Rights Act of 1964. These decisions are discussed hereafter.

Another important recent development has been the introduction into Congress, at the instance of President Johnson, of the proposed Voting Rights Act of 1965. This legislation, which was triggered by the incidents which occurred in Selma, Alabama, where various devices were used to frustrate the registration of Negro voters, is intended to supplement and strengthen the voting right acts of 1870, 1871, 1957, 1960 and 1964, described in Part I of this article. This new bill was passed by the Senate on May 26, 1965 and, at this writing, its passage by the House appears imminent, and, accordingly, an analysis of its provisions is included herein.

¹ Journal of the International Commission of Jurists, Vol. V, No. 2 (Winter 1964) pp. 247-274.

As observed in the first co-author's earlier article on "Civil Liberties in the United States"² one cannot fully understand the complex civil rights situation in the United States without a knowledge of the problems of Federalism.

The United States has a dual form of government. In every state there are two governments – the state and the United States. Each State has all governmental powers save such as the people, by their Constitutions, have conferred upon the United States, denied to the States or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably implied from those granted.

In the area of civil rights, the Federal Government can act only within the limitations of the Federal Constitution and the powers which had been delegated to it. It does this primarily in its regulation of "interstate commerce" and in preventing "State actions" which would deny the citizens of the United States rights and liberties guaranteed under the Federal Constitution. The concepts of "interstate commerce" and "State action" have been rapidly expanding.

Such discriminations as have existed, and now exist, in the United States on account of race, colour, national origin, religion or sex are chargeable, primarily, to laws and actions of a few of the 50 States. The whole nation cannot be held responsible for acts of discrimination caused by some few individual States.

(b) Voting and Elections

Recently, the Supreme Court stated:

History has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.³

Southern states have used various devices, hereafter noted, to disenfranchise Negroes and, until fairly recently, these have been quite successful. But recent legal developments, the Civil Rights Acts of 1964, and the proposed Voting Rights Act of 1965, constitute a major breakthrough for Negro voting rights.

The first principle is that apportionment by State legislatures is a proper subject for review by Federal courts.⁴ In 1946, the

² Journal of the International Commission of Jurists, Vol. II, No. 1 (Spring-Summer 1959) pp. 79-144.

³ *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁴ *Baker v. Carr*, 369 U.S. 186 (1962); see *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Supreme Court held⁵ that apportionment – the division of a state into geographical units for voting purposes – and weighting of various areas within such geographical units, were “political questions” to be settled by each State legislature and were beyond the reach of the courts.

But in 1960, the Court reviewed a case involving racially based gerrymandering – drawing political boundary lines in a way which purposely disenfranchises Negroes or some other race or devalues their vote – and declared the practice unconstitutional since it deprived Negroes of their right to vote.⁶ In striking down the change of the municipal boundaries of Tuskegee, Alabama, from a square to a “strangely irregular” 28-sided figure, the Court therein stated:

[T]he inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights.*

(A discriminatory purpose must be proved, however, and where a gerrymander results in concentration of minority groups in a district but is not proved to be motivated by racial reasons, the gerrymander has been upheld.)⁷

Two years later, in *Baker v. Carr*,⁸ an apportionment case, not involving racial gerrymandering, was reviewed. The rule of law thus clearly established was that legislative apportionment and weighting must be measured against the guarantee in the Federal Constitution that each citizen is entitled to equal protection of the laws and the right to vote. Apportionment (all apportioning is done by the State legislatures) has since been held unconstitutional where it resulted in a substantial inequality among voters in a State. The districts for both houses of a bicameral State legislature⁹ and for Congress¹⁰ must be drawn to give a substantial equality of population among the various districts,¹¹ so that as nearly as practicable “every voter is equal to every other voter in his State”,¹² and there

⁵ *Colegrove v. Green*, 328 U.S. 549 (1946).

⁶ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

⁷ *Wright v. Rockefeller*, 376 U.S. 52 (1964).

⁸ 369 U.S. 186 (1962).

⁹ *Reynolds v. Sims*, 377 U.S. 533 (1964); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964).

¹⁰ *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

¹¹ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

¹² *Gray v. Sanders*, 372 U.S. 368 (1963).

* A footnote to history is that on September 15, 1964, with the boundaries restored to their original shape, two Negroes were elected to the Tuskegee City Council against white opponents seeking reelection. This was the first time since Reconstruction days in Alabama that Negroes have won elective office against white opponents.

is no "significant under-valuation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside".¹³ In *Gray v. Sanders*,¹⁴ which declared unconstitutional an unfair and discriminatory "county-unit" weighting system in Georgia, the rule of law was stated this way:

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth [direct election of United States Senators] and Nineteenth [woman suffrage] amendments can mean only one thing – one person, one vote.

By reason of these decisions urban population centres, which have been short-changed in apportionment by rural-dominated State legislatures, will receive more representation in State and national governments; and race cannot be the motivation for a political boundary line. These represent critical gains for Negroes, who are heavily represented in the cities.

The second breakthrough is that all citizens who seek to vote or who run for office must be treated equally, on their merits alone. Any State statute providing for a "white primary" is unconstitutional,¹⁵ as are other laws and practices leading to the same result, as statutes turning over nominations to political parties so that a party convention¹⁶ or a party State executive committee,¹⁷ could exclude Negroes by rule, or where the party sets itself up as a private club.¹⁸ The most recent of these circumventing schemes ruled unconstitutional was a device called the "Jaybird Democratic Association" which claimed to be a private organization restricted to white people, which operated as the county Democratic party in selecting the nominee prior to the primary.¹⁹ The "Grandfather Clause", which provided that no one could vote who was not a descendant of someone registered to vote at the end of the Civil War, thus obviously excluding Negroes, was held unconstitutional in 1915.²⁰ But a State statute requiring all applicants for voting to

¹³ *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964).

¹⁴ 372 U.S. 368, 381 (1963). The decision overruled *MacDougall v. Green*, 335 U.S. 281 (1948) which, following *Colegrove v. Green*, had upheld the Georgia system.

¹⁵ *Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932).

¹⁶ *Smith v. Allwright*, 321 U.S. 649 (1944).

¹⁷ *Chapman v. King*, 154 F. 2d 460 (5th Cir. 1946), cert. den., 327 U.S. 800 (1946).

¹⁸ *Rice v. Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. den., 333 U.S. 875 (1948).

¹⁹ *Terry v. Adams*, 345 U.S. 461 (1953).

²⁰ *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915); see *Lane v. Wilson*, 307 U.S. 268 (1939).

pass a literacy test is not unconstitutional on its face.²¹ However, inherently unfair literacy tests or discrimination by voting officials in administering them are unconstitutional,²² as is an artificially short registration period.^{22a}

The poll tax is a payment which a handful of States require before a person can register and can vote in an election. Since 1939, legislation seeking abolition of the poll tax for Federal elections has been introduced in every Congress. But not until 1962 was Federal anti-poll tax action taken, with the adoption of the Twenty-Fourth Amendment to the United States Constitution, which provides:

The right of citizens of the United States to vote in any primary or other election for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

In a case which arose prior to 1962, a Federal court held that while a poll tax for Federal, State and local elections was not unconstitutional on its face, racial discrimination by Mississippi officials in collecting a poll tax was unconstitutional;^{22b} this appears to be the present rule of law for State and local elections.

A 1965 Supreme Court case involves the construction and application of the Twenty-Fourth Amendment for the first time.²³ Knowing the Amendment would be adopted, Virginia eliminated the poll tax as an absolute prerequisite to voting in Federal elections, and provided that a voter could also qualify by filing, in each election year and at least six months before an election, a complicated certificate of residence. Poll taxes still had to be paid for State elections. The Supreme Court held this alternative requirement unconstitutional, since the Amendment provides that the right to vote cannot be "denied or abridged" through the poll tax, and "nullifies sophisticated as well as simple-minded modes" of impairing the right not to pay the tax, including "onerous procedural requirements which effectively handicap exercise of the franchise" by those refusing to pay.^{23a} The "cumbersome" certificate procedure "amounts to annual re-registration", which Virginia did not need to administer its election laws properly; the Twenty-Fourth Amend-

²¹ *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959).

²² *Davis v. Schnell*, 336 U.S. 933 (1949), affirming 81 F. Supp. 872 (S. D. Ala. 1949); *United States v. Mississippi*, 380 U.S. 128 (1965); *Louisiana v. United States*, 380 U.S. 145 (1965).

^{22a} *Lane v. Wilson*, 307 U.S. 268 (1939).

^{22b} *United States v. Dogan*, 314 F. 2d 767 (10th Cir. 1963).

²³ *Harman v. Forssenius*, 14 L. ed. 2d 50, Supreme Court, April 27, 1965.

^{23a} Citing *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

ment not only abolished the poll tax as a prerequisite to voting, but every "equivalent or milder substitute."

Equally important are two recent cases forbidding Mississippi from conditioning voter registration on the "ability to read and write any section of the Constitution of this State and give a reasonable interpretation thereof to the County registrar . . . [and] demonstrate . . . a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government . . . [and] be of good moral character"^{23b} and forbidding Louisiana from requiring a prospective voter to "be able to understand" and "give a reasonable interpretation" of any section of the State of Federal Constitution "when read to him by the registrar".^{23c} In an earlier case, the Supreme Court approved a holding striking down a similar Alabama requirement.^{23d} The Supreme Court found: that such "interpretation tests" were invoked by the States when such relatively straightforward devices as the "Grandfather Clause" or the "White Primary" were outlawed as means to disenfranchise the Negro, and were "little if any less successful" for this; that these tests "vested in the voting registrars a virtually uncontrolled discretion as to who should vote and who should not"; that the registrars had used them "to deprive otherwise qualified Negro citizens of their right to vote"; and that the hurdle posed to Negroes by the existence of the test deterred them from registering. The tests were unconstitutional under the Equal Protection guarantee of the Fourteenth Amendment and the Fifteenth Amendment's proscription of racial discrimination in voting:

This is not a test but a trap, sufficient to stop even the most brilliant man on his way to the voting booth. The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar.^{23e}

The Supreme Court also upheld a ruling that a new "citizenship" test devised by Louisiana to replace the "interpretation test", consisting of cards to be drawn at random with questions on them, would have to be applied to all registered as well as prospective voters, if at all, since making it only prospective would not cure the discrimination of the past, which saw an increase in white voters but a radical decline in Negro voters.

The United States Attorney General, acting under the 1957

^{23b} *United States v. Mississippi*, 380 U.S. 128 (1965).

^{23c} *Louisiana v. United States*, 380 U.S. 145 (1965).

^{23d} *Davis v. Schnell*, 336 U.S. 933 (1949) affirming 81 F. Supp. 872 (S. D. Ala. 1949).

^{23e} Black, J. for the Court in *Louisiana v. United States*, 380 U.S. 145 (1965).

Civil Rights Act, may bring an action in the name of the United States to enjoin voting officials who are discriminating.²⁴ Under the 1960 Civil Rights Act he may bring suit for the United States against a State in which such discrimination is law or is encouraged.²⁵

Most recently the Supreme Court held that Federal courts could rule on undecided questions of constitutionality of a State's voting laws and procedures without abstaining and waiting for the courts of that State to act first, because of the "importance and immediacy of the problem" and because, whatever interpretation the State courts gave the statute, the Constitutional question would still remain.^{25a} And the Federal courts should not allow dismissal of voting rights complaints, filed against states which obviously have disenfranchised Negroes, for bogus technicalities such as a state's recent jurisdictional quibbles and contention that the United States could not sue to enjoin one unconstitutional voting discrimination device because another unconstitutional law of that state kept the potential voters from meeting the Federal statutory demand that they be "otherwise qualified by law to vote".^{25b}

No State may require that the race of a candidate for office be stated in his nomination papers or on the ballot, because by this the State indicates that "race or color is an important – perhaps paramount – consideration in the citizen's choice" while actually it has "no relevance" to the candidate's qualifications.²⁶ Damages are recoverable by suit in a Federal court against members of a State election board allowing this, and State judicial remedies do not have to be exhausted first.²⁷ Further, all qualified voters have a constitutionally protected right to vote²⁸ and to have their votes counted.²⁹ Any denial of that right is recompensable in damages³⁰ or, perhaps more important in terms of the overall struggle for Negro voting, may be prosecuted by Federal officials in Federal Courts.

State statutes requiring separation of the names of whites and Negroes on registration, poll-tax, and residence-certificate lists, and

²⁴ *United States v. Raines*, 362 U.S. 17 (1960); *United States v. Thomas*, 362 U.S. 58 (1960); *United States v. Mississippi*, 380 U.S. 128 (1965).

²⁵ *United States v. Alabama*, 362 U.S. 602 (1960); *United States v. Mississippi*, 380 U.S. 128 (1965).

^{25a} *Harman v. Forssenius*, 14 L. ed. 2d 50, Supreme Court, April 27, 1965.

^{25b} *United States v. Mississippi* 380 U.S. 128 (1965).

²⁶ *Anderson v. Martin*, 375 U.S. 399 (1964).

²⁷ *McDonald v. Key*, 224 F. 2d 608 (10th Cir. 1955), cert. den., 350 U.S. 895 (1955).

²⁸ *Ex parte Yarbrough*, 110 U.S. 651 (1884).

²⁹ *United States v. Mosely*, 238 U.S. 383 (1915).

³⁰ *Myers v. Anderson*, 238 U.S. 368 (1915); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Chapman v. King*, 154 F. 2d 460 (5th Cir. 1946), cert. den., 327 U.S. 800 (1946).

on assessment lists, were recently held to violate the Equal Protection clause of the Fourteenth Amendment.³¹

The purpose of Titles I and VIII of the Civil Rights Act of 1964 is to "enforce the constitutional right to vote". The Act codifies many of the court decisions noted, and adds teeth to enforcement of voting rights.

(c) The "Separate but Equal" Doctrine Overruled (1954)

In 1954, in the "School Segregation Cases",³² the Supreme Court finally overruled the doctrine, established in 1896 in the *Plessy* case,³³ that constitutional due process, equal protection and equality of treatment are accorded when the races are provided with substantially equal facilities, even though such facilities are separate.

It held therein that "in the field of public education the doctrine of 'separate but equal' has no place", and that "separate education facilities are inherently unequal", and constitute, if effected by a State, a denial of the equal protection of the laws guaranteed to persons by the Fourteenth Amendment and, if effected by the Federal Government, a deprivation of a person's liberty in violation of the due process clause of the Fifth Amendment.

Since 1954, the Supreme Court and other Federal courts have handed down numerous decisions to the same effect, in cases involving public education, publicly owned or operated parks, recreational and cultural facilities, places of amusement and entertainment, and public transportation. Repeatedly in these cases, the Federal courts have rejected the "separate but equal" concept, have upheld the constitutional rights of persons discriminated against, and have ordered desegregation.³⁴

(d) Public Facilities and Public Accommodations

The term "public accommodations" has been variously defined in statutes and court decisions. Usually, however, "public accommodations" have been thought of as privately owned facilities, such as places for lodging, eating, drinking or entertainment which are "open to the public".

"Public facilities" are usually thought of as facilities which are

³¹ *Virginia State Board of Elections v. Hamm*, 379 U.S. 19 (1964), affirming 230 F. Supp. 156 (E. D. Va. 1964).

³² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

³³ *Plessy v. Ferguson*, 163 U.S. 537 (1896); See Part II this article in *Journal*, Vol. V, No. 2, at pp. 271-273.

³⁴ *Watson v. Memphis*, 373 U.S. 526 (1963) and cases there cited; *Goss v. Board of Education*, 373 U.S. 683, 687-688 (1963).

owned, operated or managed for the public by, or on behalf of, a government or governmental agency, such as parks, beaches, playgrounds and other recreational and amusement facilities, libraries and public schools and colleges.

The Civil Rights Act of 1964 contains provisions against discrimination in places of public accommodation (Title II) and public facilities (Title III) as so defined.

(d) (1) Public Facilities

Before passage of the Civil Rights Act of 1964, the Supreme Court had held repeatedly that a state or a state agency cannot require racial segregation of public facilities without violating the Equal Protection Clause of the Fourteenth Amendment.

Applying this rule, Federal courts have held in recent years that among the public facilities which may not be racially segregated – by excluding Negroes therefrom, by providing separate but equal facilities or sections of a facility for whites and for Negroes, or by providing a programme with separate days for whites and Negroes in the use of such facilities – are the following:

A basketball court in a public city park³⁵; public municipal golf courses³⁶; city owned or operated public parks, and golf courses and other recreational facilities located therein³⁷; public swimming pools, public beaches and bath houses³⁸; service in a restaurant operated by a private corporation on premises leased from a city at its municipal airport³⁹ or in a restaurant operated in a county courthouse or in a publicly owned parking building⁴⁰; seats in a courtroom as where one section was assigned to whites

³⁵ *Wright v. Georgia*, 373 U.S. 284 (1963).

³⁶ *Holmes v. City of Atlanta*, 223 F. 2d 93 (5th Cir., 1955), aff'd. 350 U.S. 879 (1955); *Hayes v. Crutcher*, 137 F. Supp. 853 (M. D. Tenn., 1956); *Moorhead v. City of Fort Lauderdale*, 152 F. Supp. 131 (S. D. Fla., 1957), aff'd. 248 F. 2d 544 (5. Cir., 1957); *Holley v. City of Portsmouth*, 150 F. Supp. 6 (E. D. Vir., 1957); *Ward v. City of Miami*, 151 F. Supp. 593 (S. D. Fla., 1957).
³⁷ *New Orleans City Park Improvement Association v. Detiege*, 252 F. 2d 122 (5th Cir., 1958), aff'd. 358 U.S. 54 (1958); *Muir v. Louisville Park Theatrical Assn.*, 202 F. 2d 275 (6. Cir., 1953), 347 U.S. 971; *Watson v. Memphis*, 373 U.S. 526 (1963); *Tate v. Department of Conservation*, 133 F. Supp. 53 (E. D. Vir., 1955), aff'd 231 F. 2d 615 (4. Cir., 1956), cert. den. 352 U.S. 838 (1956); *Fayson v. Beard*, 134 F. Supp. 379 (E. D. Tex., 1955); *Willie v. Harris County*, 202 F. Supp. 549 (S. D. Tex., 1962).

³⁸ *Dawson v. Mayor & City Council of Baltimore City*; *Lonesome v. Maxwell*, 220 F. 2d 386 (4th Cir., 1955), aff'd. 350 U.S. 877 (1955); *City of St. Petersburg v. Alsup*, 238 F. 2d 830 (5th Cir., 1956), cert. den. 353 U.S. 922 (1957).
³⁹ *Turner v. City of Memphis*, 369 U.S. 350 (1962).

⁴⁰ *Derrington v. Plummer*, 240 F. 2d 922 (5th Cir., 1956), cert. den. 353 U.S. 924 (1957); *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715 (1961).

and another to Negroes⁴¹; attendance at a summer operatic performance located in an amphitheatre in a public park operated by a private concern under a lease from the city.⁴²

The possibility of disorders by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right to be present. Constitutional rights may not be denied simply because of hostility to their assertion or exercise.⁴³

The right of citizens to use publicly owned property and facilities without racial discrimination cannot be denied or abridged by a mere leasing or licensing of the property or facility to a private person to operate or manage.⁴⁴

(d) (2) Transportation Facilities: Interstate and Intrastate

Recently the Supreme Court stated that it is "settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities The question is no longer open; it is foreclosed as a litigable issue".⁴⁵

Interstate Commerce

Under the Federal Constitution, Congress is given power to regulate commerce with foreign nations and among the several States.⁴⁶

The Federal Interstate Commerce Act makes it unlawful for a rail carrier "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever".⁴⁷

Part II of the Federal Interstate Commerce Act,⁴⁸ which applies to motor carriers, provides:

It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person . . . in any respect whatsoever; or to subject any particular person . . . to any unjust discrimination or any unjust or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

⁴¹ *Johnson v. Virginia*, 373 U.S. 61 (1963).

⁴² *Muir v. Louisville Park Theatrical Assn.*, *supra*.

⁴³ *Watson v. Memphis*, *supra*; *Wright v. Georgia*, *supra*; *Taylor v. Louisiana*, 370 U.S. 154 (1962); *Garner v. Louisiana*, 368 U.S. 157 (1961).

⁴⁴ *City of Greensboro v. Sinkins*, 246 F. 2d 425 (4th Cir. 1957); *Muir v. Louisville*, *supra*; *Turner v. City of Memphis*, *supra*; *Tate v. Department*, *supra*; *Derrington v. Plummer*, *supra*.

⁴⁵ *Bailey v. Patterson*, 369 U.S. (1962); see also, *Morgan v. Virginia*, 328 U.S. 373 (1946); *Gayle v. Browder*, 352 U.S. 903 (1956); *Boynton v. Virginia*, 364 U.S. 454 (1960).

⁴⁶ Art. I, Sec. 8, Clause 3.

⁴⁷ 49 USCA, Sec. 3(1).

⁴⁸ 49 USCA, Sec. 316 (d).

The Supreme Court has held that State statutes requiring interstate and intrastate passenger motor buses to separate white and coloured passengers are in violation of the Commerce Clause of the Federal Constitution because they unlawfully burden interstate commerce.⁴⁹ The courts have applied the same principles to rail travel.⁵⁰

Segregation ordered by a bus driver within a State has been held to burden commerce just as much as if it were imposed by State law.⁵¹ The Supreme Court has held that an interstate carrier violates the Interstate Commerce Act by denying a Negro space in a railroad Pullman seat because of race or colour,⁵² or by requiring separate facilities for white and Negro passengers in a railroad dining car, such as separate seats or tables or by using partitions or signs.⁵³

In 1955, following the "School Segregation Cases", the Interstate Commerce Commission ordered an end to racial segregation in interstate rail travel and interstate bus travel.⁵⁴

Also unlawful is discrimination against interstate passengers in the use of restaurant facilities and other facilities and services located at a rail or bus terminal and owned, operated, controlled or made available by the carrier.⁵⁵

In two recent cases, decided since the passage of the Civil Rights Act of 1964, the Supreme Court has reversed judgments convicting white and Negro "freedom riders" under Florida's unlawful assembly statute and Mississippi's disorderly conduct statute, for using racially segregated facilities in intrastate bus terminals.⁵⁶

There are no State laws requiring segregation in airplanes, and State officials have not tried to enforce such a practice.⁵⁷ Racial discrimination in air travel is outlawed by the Federal Civil Aeronautics Act.⁵⁸

There are no laws requiring segregation in private automobiles travelling in intrastate or interstate commerce.

⁴⁹ *Morgan v. Virginia*, 328 U.S. 373 (1946).

⁵⁰ *Chance v. Lambeth*, 186 F. 2d 879 (4th Cir. 1951), *cert. den.* 341 U.S. 941 (1951); *Lee v. Commonwealth*, 189 Va. 890; 54 S.E. 2d 888 (1942).

⁵¹ *Whiteside v. Southern Bus Lines*, 177 F. 2d 949 (6 Cir. 1949).

⁵² *Mitchell v. U.S.*, 313 U.S. 80 (1941).

⁵³ *Henderson v. U.S.*, 339 U.S. 816 (1950).

⁵⁴ *NAACP v. St. Louis-San Francisco Ry.*, 297 I.C.C. 335 (1955); *Keys v. Carolina Coach Co.*, 60 M.C.C. 769 (1955).

⁵⁵ *Boynton v. Virginia*, 364 U.S. 454 (1960); *Taylor v. Louisiana*, 370 U.S. 154, 156 (1961).

⁵⁶ *Callender v. Florida*, 14 L. ed. 2d 265, Supreme Court, April 27, 1965; *Thomas v. Mississippi*, 14 L. ed. 2d 265, Supreme Court, April 27, 1965 reversing 160 So. 2d 657; 161 So. 2d 159 and 521.

⁵⁷ "Race Relations and American Law", Greenberg, p. 129.

⁵⁸ 49 USCA, Secs. 484(b), 403, 622(a); *Fitzgerald v. Pan American World Airlines*, 229 F. 2d 499 (2nd Cir. 1956).

Intrastate Commerce

In 1896 in the *Plessy* case,⁵⁹ the Supreme Court held, as to intrastate commerce, that a State statute requiring railroad companies to provide equal but separate accommodations for the white and coloured races did not violate the Fourteenth Amendment. This ruling was followed in several later cases.⁶⁰

Operating under this rule, most Southern States segregated by law or officially enforced custom local intrastate buses, street cars, trains and taxis.

However, in the Montgomery Bus Case in 1956⁶¹ the Supreme Court held that such statutes and enforced customs were invalid. That case involved a State statute and a city ordinance which required the segregation of white and coloured races on buses in the City of Montgomery, a practice that led to violence, arrests and court cases. The Supreme Court affirmed without opinion a lower court decision holding that such local statutes or ordinances, requiring segregation on a common carrier of passengers operating in intrastate commerce, violated the Due Process and Equal Protection clauses of the Fourteenth Amendment. The Court rejected the "separate but equal" doctrine applied in *Plessy* and held that there was no longer any rational basis upon which such doctrine could validly be applied to public carrier transportation. There have been other cases to the same effect.⁶²

(d) (3) Public accommodations*(a) Constitutionality of Public Accommodations Section of Civil Rights Act of 1964 Upheld*

As noted earlier in this article,⁶³ in 1883 in the Civil Rights Cases⁶⁴ the Supreme Court struck down as unconstitutional the public accommodations sections of the Civil Rights Act of 1875 on the ground that Congress had no authority under either the Thirteenth or Fourteenth Amendments to the Federal Constitution to enact that

⁵⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶⁰ *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U.S. 388 (1900); *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U.S. 71 (1910); *McCabe v. Atcheson, T. & S. F. Ry. Co.*, 235 U.S. 151 (1914).

⁶¹ *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala., N.D. 1956), aff'd 352 U.S. 903 (1956).

⁶² See, for example, *Garmon v. Miami Transit Co.*, 151 F. Supp. 953 (S.D. Fla., 1957), aff'd 253 F. 2d 428 (5th Cir., 1958).

⁶³ Journal, International Commission of Jurists, Vol. V, No. 2 at 270-271.

⁶⁴ 109 U.S. 3 (1883).

kind of legislation. Therein the Court left undecided the question of whether such legislation might have been justified, constitutionally, under the Commerce Clause of the Constitution. Partly to avoid that decision, the "public accommodations" section of the Civil Rights Act of 1964 was drawn so as to be based on the Commerce Clause as well as the Fourteenth Amendment, by defining a "place of public accommodation" as any of those establishments specified therein "which serves the public . . . if its operations affect commerce, or if discrimination or segregation by it is supported by State action".⁶⁵

The most important civil rights decisions of the Supreme Court in its current term were those holding this "public accommodations" section of the 1964 Act to be constitutional.

Immediately after that Act was signed on July 2, 1964, two test suits were filed in the Federal Courts.

One case was brought by the owner of a 216 room motel in Atlanta, Georgia, which served and advertised for interstate travellers, but refused to provide lodging for transient Negroes because of their race or colour, and expressed the intention to continue that practice. The motel owner brought suit to enjoin the United States Attorney General from enforcing the Civil Rights Act. The Attorney General filed a counterclaim to enjoin the plaintiff from violating that Act. A three-judge Federal Court upheld the constitutionality of the Act⁶⁶ and, in granting judgment on the counterclaim, issued an injunction requiring the motel to admit Negroes.

The motel owner appealed to the Supreme Court. In affirming the Supreme Court held⁶⁷ that the motel was engaged in interstate commerce as defined in the Act; that Congress has the power under the Commerce Clause of the Federal Constitution to regulate interstate commerce, including local activities which might have a substantial and harmful effect upon that commerce, such as racial discrimination by motels serving travellers; that the prohibition against discriminatory practices in the Act is a valid exercise of Congress' power under the Commerce Clause and does not, as plaintiff contended, violate the Fifth Amendment, as a deprivation of property or liberty without due process of law, or the Thirteenth Amendment, as "involuntary servitude". The Court further held that the decision in the Civil Rights Cases⁶⁸ was not applicable since it expressly left undecided the question of the validity of anti-discrimination legislation under the Commerce Clause.

⁶⁵ Section 201(b) of Civil Rights Act of 1964; Journal, International Commission of Jurists, Vol. V, No. 2, pp. 250-253.

⁶⁶ *Heart of Atlanta Motel, Inc. v. United States*, 231 F. Supp. 393 (N.D. Ga., July 22, 1964).

⁶⁷ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 294 (Dec. 14, 1964).

⁶⁸ 109 U.S. 3 (1883).

The other case involved a family owned restaurant in Birmingham, Alabama, which catered to a white trade and served few, if any, interstate travellers. It refused to serve Negroes in its restaurant, though it provided a food "take-out" service for Negroes and employed some Negroes. There was no proof that it advertised for or served interstate travellers, but a substantial portion of the food served by it had moved in interstate commerce. The owners of the restaurant brought suit against the United States Attorney General and others to enjoin the enforcement of the Act. A statutory three-judge court granted the injunction and held that the "public accommodations" section of the Act, as applied to this restaurant, was beyond the competence of Congress to enact and was violative of the Fifth Amendment of the Federal Constitution.⁶⁹ The Government appealed. The Supreme Court reversed, again upheld the constitutionality of the Act, and held that this restaurant was engaged in "interstate commerce", and was therefore subject to the Act, because a substantial portion of the food it served had moved in interstate commerce.⁷⁰

On the same date, the Supreme Court decided two other cases⁷¹ in which it held that lunch counters located within a variety store and a department store were places of "public accommodation" covered by the Act since such stores engaged in interstate commerce. In another very recent case it has been held that a bar-room that served drinks but no meals or other food is not a "place of public accommodation" within that Act.⁷²

In the *Hamm* and *Lupper* cases, the Supreme Court held that passage of the Civil Rights Act of 1964 had the effect of abating convictions pending against Negroes for prior violations of State trespass statutes for engaging in "sit-ins" at lunch counters or retail stores, on the ground that such activities come within the provisions of that Act and would not now constitute a violation of such statutes.

The same result was reached in another current case.⁷³

(b) Other Recent Supreme Court Decisions

On May 20, 1963, the Supreme Court decided five important racial discrimination cases involving public accommodations.⁷⁴

⁶⁹ *McClung v. Katzenbach*, 233 F. Supp. 815 (N.D. Ala. S.D., Sept. 17, 1964).

⁷⁰ *Katzenbach v. McClung*, 379 U.S. 294 (Dec. 14, 1964).

⁷¹ *Hamm v. City of Rock Hill*; and *Lupper v. Arkansas*, 379 U.S. 306 (Dec. 14, 1964).

⁷² *Walker v. Georgia*, 33 U.S. Law Week 3375, Supreme Court, May 24, 1965.

⁷³ *Cuevas v. Sdrales*, 33 U.S. Law Week 2587 (U.S. Court of Appeals, 10th Cir., May 10, 1965).

⁷⁴ *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963); *Lombard v. Louisiana*, 373 U.S. 267

In the *Peterson*, *Gober* and *Avent* cases, Negroes entered department stores open to the public and seated themselves at lunch counters therein. The lunch counters were then closed and the Negroes were asked to leave. Failing to do so, they were arrested by the local police or State agents and charged with violating local ordinances in Alabama, South Carolina and North Carolina respectively requiring separation of races in restaurants.

In reversing the convictions, the Supreme Court held that where a State agency passes a law compelling persons to discriminate against other persons because of race and the State's criminal processes are used to enforce the discrimination mandated by that law, there is "State action" and a "palpable violation" of the Fourteenth Amendment.

In the opinion in the *Greenville* case the Court recognized the rule of law that private conduct abridging individual rights does not violate the Equal Protection Clause of the Fourteenth Amendment unless to some significant extent the State in any of its manifestations has been found to have become involved in it, and that the Fourteenth Amendment applies only against "State action".⁷⁵

In *Shuttlesworth*, Negro ministers were convicted in an Alabama State Court for aiding and abetting the Negroes in the *Gober* case who engaged in the sit-down demonstration at a white lunch counter in violation of a local trespass ordinance. The Supreme Court reversed their convictions on the ground that since the convictions of those other Negroes were constitutionally invalid and had been set aside, it followed that these ministers did not incite or aid or abet any crime.

In *Lombard*, three Negroes and one white student entered a department store in New Orleans, open generally to the public, and sat down at the lunch counter operated therein on a segregated basis under local custom and State policy. They were refused service, the counters were closed and, upon request, the Negroes refused to leave. They were arrested by public officers and charged with and convicted of violating a State "criminal mischief" statute. No State statute or city ordinance required racial segregation in restaurants. However, the city officials had publicly announced that "sit-in" demonstrations would not be permitted and that segregation would be enforced.

The Supreme Court reversed the convictions, holding that a State or a city may act authoritatively through its executive branch, as well as through its legislative body, and that such official com-

(1963); *Gober v. City of Birmingham*, 373 U.S. 374 (1963); *Avent v. North Carolina*, 373 U.S. 375 (1963).

⁷⁵ *Peterson v. Greenville*, 373 U.S. 244, 247 (1963).

mands had as much coercive effect as an ordinance and, accordingly, resulted in a violation of the Equal Protection Clause of the Fourteenth Amendment.

On June 22, 1964, the Supreme Court decided another important group of "sit-in" demonstration cases involving public accommodations.⁷⁶

In the *Bell* case, Negro "sit-in" demonstrators in 1960 refused to leave a Baltimore restaurant, after being requested to do so solely because of their race. They were arrested by police and convicted of violating Maryland's criminal trespass law. Subsequently, in 1962, pending their appeals, Maryland enacted public accommodation laws which abolished the crime for which they were convicted and made it unlawful for restaurants to discriminate on account of race. The Supreme Court reversed, and remanded the cases to the State Court with a suggestion that the criminal proceedings must be dismissed because of the intervening changes in the law.

This case evoked several notable separate opinions by various members of the Supreme Court who discussed therein the merits of the case. In one opinion, Justices Douglas and Goldberg took a broad view of "State action" stating *inter alia*:

The Fourteenth Amendment says 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.'

* * *

Segregation of Negroes in the restaurants and lunch counters of parts of America is a relic of slavery. It is a badge of second-class citizenship. It is a denial of a privilege and immunity of national citizenship and of the equal protection guaranteed by the Fourteenth Amendment against abridgment by the States. When the state police, the state prosecutor, and the state courts unite to convict Negroes for renouncing that relic of slavery, the 'State' violates the Fourteenth Amendment.^{76a}

In another opinion written by Mr. Justice Goldberg, it was stated:

We cannot blind ourselves to the consequences of a constitutional interpretation which would permit citizens to be turned away by all the restaurants, or by the only restaurant, in town. The denial of the constitutional right of Negroes to access to places of public accommodation would perpetuate a caste system in the United States.

⁷⁶ *Bell v. Maryland*, 378 U.S. 226 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Robinson v. Florida*, 378 U.S. 153 (1964); *Griffin v. Maryland*, 378 U.S. 130 (1964).

^{76a} At 248-9, 260.

The Thirteenth, Fourteenth and Fifteenth Amendments do not permit Negroes to be considered as second-class citizens in any aspect of our public life.

* * *

The constitutional right of all Americans to be treated as equal members of the community with respect to public accommodations is a civil right granted by the people in the Constitution – a right which ‘is too important in our free society to be stripped of judicial protection.’

* * *

It is, and should be, more true today than it was over a century ago that ‘[t]he great advantage of the Americans is that . . . they are born equal’ and that in the eyes of the law they ‘are all of the same estate.’^{76b}

In a dissenting opinion written by Mr. Justice Black, a position was taken that the case involved merely private conduct and not “State action”. It stated, *inter alia*:

But the Fourteenth Amendment of itself does not compel either a black man or a white man running his own private business to trade with anyone else against his will. We do not believe that Section 1 of the Fourteenth Amendment was written or designed to interfere with a storekeeper’s right to choose his customers or with a property owner’s right to choose his social or business associates, so long as he does not run counter to valid state or federal regulation.

* * *

Our sole conclusion is that Section 1 of the Fourteenth Amendment, standing alone, does not prohibit privately owned restaurants from choosing their own customers. It does not destroy what has until very recently been universally recognized in this country as the unchallenged right of a man who owns a business to run the business in his own way so long as some valid regulatory statute does not tell him to do otherwise.^{76c}

In the *Bouie* case, Negro sit-in demonstrators entered a drug store which extended service to Negroes in all departments except the restaurant. No signs or notices barring Negroes were posted. After they were seated in the restaurant a “no trespassing” sign was posted. Refusing to leave upon request, the Negroes were arrested by the police and convicted under South Carolina’s criminal trespass statute. The Supreme Court reversed on the ground that the State Court, in giving retroactive application to its new construction of that statute so as to include this incident, deprived defendants of their right to a fair warning of a criminal prosecution and thus violated the due process clause of the Fourteenth Amendment.

In the *Barr* case involving a similar factual situation, the Supreme Court reversed convictions of Negro sit-in demonstrators in a South Carolina drug store lunch counter for breach of the peace

^{76b} At 288, 317.

^{76c} At 342-3.

and criminal trespass. The Court decided that the evidence did not justify a conviction for those crimes.

In *Robinson*, a group of Negroes and whites seated themselves at tables in a restaurant located within a department store. They were convicted of criminal trespass when they refused to leave upon request. This restaurant operated under State regulations requiring separate facilities for each race. The Supreme Court reversed the convictions on the ground that "State action" was involved which violated the Equal Protection Clause of the Fourteenth Amendment.

In *Griffin*, the Supreme Court reversed convictions for criminal trespass of Negroes who had entered a privately owned amusement park which excluded Negroes. They were arrested by a deputy sheriff possessing State authority and this was held to be "State action" forbidden by the Fourteenth Amendment.

(e) Public Education

(1) Public Schools

In the "School Segregation Cases"⁷⁷ Negro children in several States had been denied admission to public schools attended by white children under State Laws permitting or requiring segregation according to race and had sought admission to such schools of their community on a non-segregated basis. Concededly, the Negro and white schools involved were "equalized" with respect to buildings, curricula, qualifications and salaries of teachers and other "tangible" factors, so the decision turned, not merely on a comparison of such factors, but on the effect of segregation itself on public education. Relief was denied in the lower court on the basis of the "separate but equal" doctrine.

In the *Brown* case,⁷⁸ the Supreme Court held that segregation of white and Negro children in the public schools of a State solely on the basis of race was a denial of equal protection of the laws guaranteed by the Fourteenth Amendment (applicable to State acts), even though the physical facilities and other tangible factors of white and Negro schools may be entirely equal.

In the *Bolling* case,⁷⁹ racial segregation in the public schools of the Federal District of Columbia was involved. The Supreme Court repeated that the Fourteenth Amendment "prohibits states from maintaining racially segregated public schools", and held, further, that racial segregation in the public schools of the District

⁷⁷ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁷⁸ 347 U.S. 483 (1954).

⁷⁹ 347 U.S. 497 (1954).

of Columbia is a "denial of the due process of law guaranteed by the Fifth Amendment of the Constitution" (applicable to Federal acts).

In overruling the "separate but equal" doctrine established in *Plessy*,⁸⁰ the Court stated that separate educational facilities are inherently unequal and had no place in the field of public education and segregation in public education is not reasonably related to any proper governmental objective.

Subsequently, on the reargument of *Brown*⁸¹ as to the kind of relief to be accorded, the Supreme Court again declared "the fundamental principle that racial discrimination in public education is unconstitutional"; and "all provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle." Recognizing that "full implementation of these constitutional principles may require solution of varied local school problems", the Court remanded the cases to the lower courts to consider problems related to administration and the adequacy of any plans that might be proposed to meet these problems and "to effectuate a transition to a racially nondiscriminatory school system". The lower courts were told to proceed "with all deliberate speed" to effect such desegregation.

The rule of law of the "School Segregation Cases" has since been reaffirmed. For instance, in the *Goss* case⁸² the Court held unconstitutional plans for "desegregating" public schools which involved classification based on race for purposes of transferring students between public schools. It said such a transfer system tended to a "perpetuation of segregation".

Over ten years have now elapsed since the "School Segregation" decisions. Very recently, the Supreme Court said:⁸³

There has been entirely too much deliberation and not enough speed in enforcing the constitutional rights which we held in *Brown v. Board of Education* had been denied. . . . The time for mere 'deliberate speed' has run out. . . .

The process of implementing these decisions has been proceeding slowly, especially in Southern States where the desegregation of public schools has met with vigorous opposition, evasive and delaying tactics, and outright governmental resistance and defiance. Much litigation has ensued over various state and local measures designed to frustrate or avoid such desegregation.

⁸⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896); see Part II of this article in *Journal*, Vol. V, No. 2 at 271-3.

⁸¹ *Brown v. Board of Education*, 349 U.S. 294 (1955).

⁸² *Goss v. Board of Education*, 373 U.S. 683, 687-88 (1963).

⁸³ *Griffin v. School Board*, 377 U.S. 218, 229 (1964).

One example is the situation that developed in Little Rock, Arkansas. After the Little Rock School Board had operated for one year under a court ordered plan of public school integration, a local United States District Court in 1958 ordered the plan suspended until 1961.⁸⁴ On direct appeal, the United States Supreme Court first, on jurisdictional grounds, referred the matter to the local United States Court of Appeal suggesting action "in ample time to permit arrangements to be made for the next school year"⁸⁵ and thereafter, in a landmark decision, refused to allow the suspension of that plan in Little Rock,⁸⁶ stating:

In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'

* * *

State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.

Thereupon, the Little Rock schools were ordered closed by the State officials to avoid their integration and, in an effort to circumvent the Supreme Court's decision, a "private" school corporation was organized and many of the Little Rock public school pupils were sent to "private" segregated schools held in the former public school buildings leased by the School Board.

Thereafter, the United States Court of Appeals forbade the Little Rock School Board to lease its schools to such a "private" segregated school system.⁸⁷

Later, a Federal court ordered desegregation to proceed.⁸⁸

Another example is the resistance which developed in Prince Edward County in Virginia.

In 1956 Virginia enacted legislation to close any public schools where white and coloured children were enrolled together, to cut off State funds to such schools, to pay tuition grants to children in non-sectarian private schools and to extend State retirement benefits

⁸⁴ *Aaron v. Cooper*, 143 F. Supp. 855 (E.D. Ark., W.D. 1956); aff'd 243 F. 2d 361 (8th Cir., 1957).

⁸⁵ *Aaron v. Cooper*, 357 U.S. 566 (1958).

⁸⁶ *Cooper v. Aaron*, 358 U.S. 1 (1958).

⁸⁷ *Aaron v. Cooper*, 261 F. 2d 97 (8th Cir., 1958).

⁸⁸ *Aaron v. Cooper*, 169 F. Supp. 325 (E.D. Ark. 1959).

to teachers in newly created private schools.⁸⁹ When this legislation was held by the Virginia Supreme Court to violate the Virginia constitution,⁹⁰ the State Legislature, in 1959, enacted a new tuition grant plan and repealed the State's compulsory attendance laws and made school attendance a matter of local option.⁹¹ As early as 1956, the school authorities in Prince Edward County refused to operate public schools where white and coloured children were taught together. Upon being enjoined by a United States Court of Appeals to end such discrimination,⁹² the County authorities refused to levy any school taxes, with the result the county's public schools were closed, though in every other county in Virginia public schools continued to operate on State funds. Private schools for white children were then opened in Prince Edward County, operated by a private group and supported in part by private contributions, for which tax credits were given, and through tuition grants derived from public funds. This system was declared unconstitutional and enjoined by lower Federal court decisions⁹³ which were then reversed by a United States Court of Appeals decision,⁹⁴ which in turn was reviewed and reversed by the United States Supreme Court.⁹⁵

The United States Supreme Court held that the closing of the public schools in Prince Edward County, while public schools were operated in all other counties of Virginia, was a denial to Negro students of the equal protection of laws guaranteed by the Fourteenth Amendment, as was the closing of public schools and operating only private segregated white schools supported by public funds; and that a State cannot, constitutionally, allow a country to abandon public schools on the grounds of race and opposition to desegregation. The United States Supreme Court directed the entry of a court decree requiring the reopening of the public schools in Prince Edward County.

Still another example was that created when the State of Louisiana passed a series of laws designed to prevent even a gradual,

⁸⁹ Virginia Code, § 22-188.3, et seq., § 51-111.38:1.

⁹⁰ *Harrison v. Day*, 200 Va. 439, 106 S.E. 2d 636 (1959).

⁹¹ Acts, 1959, Ex. Sess., c. 53; Va. Code, § 22-251 to 22-275; §§ 22-275.1 to 22-275.25.

⁹² *Allen v. County School Board of Prince Edward County*, 226 F. 2d 507 (4th Cir., 1959).

⁹³ *Allen v. County School Board of Prince Edward County*, 198 F. Supp. 497 (E. D. Va. 1961); 207 F. Supp. 349 (E. D. Va. 1962).

⁹⁴ *Griffin v. Board of Supervisors of Prince Edward County*, 322 F. 2d 332 (4th Cir. 1963); see also, *County School Board of Prince Edward County v. Griffin*, 204 Va. 650, 133 S. E. 2d 565 (1963), which held Virginia could not be compelled to reopen public schools in Prince Edward County.

⁹⁵ *Griffin v. County School Board of Prince Edward County*, 375 U.S. 391, 392; 377 U.S. 218 (1964).

token, court-ordered⁹⁶ desegregation of the races in public schools in New Orleans, including an "interposition act" (similar to that adopted by other Southern States), setting forth the "interposition doctrine" which in essence denies the constitutional obligation of the States to respect those decisions of the Supreme Court with which they do not agree. Louisiana contended that it "has interposed itself in the field of public education over which it has exclusive control". A three-judge Federal court declared these enactments to be unconstitutional.⁹⁷ The Supreme Court approved that decision⁹⁸, pointing out that it had previously held⁹⁹ this "interposition" contention to be constitutionally unwarranted.

In another case, a United States District Court invalidated a Louisiana statute which provided a means by which public schools under desegregation orders might be changed to "private schools" operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools and provided, further, that "where public schools were closed", the school authorities were required to supply free lunches, transportation and grants-in-aid to the children attending the "private schools".

The United States Supreme Court affirmed, invalidating the Louisiana statute as a denial of equal protection.¹⁰⁰

The Supreme Court has made it clear in the Virginia and Louisiana cases that any plan works to deny coloured students equal protection of the law if it seeks to accomplish the perpetuation of racial segregation by closing public schools and operating only segregated schools supported directly or indirectly by public funds.

Desegregation of public schools is not merely a problem in Southern States. While most Northern States have statutes, constitutions or court decisions expressly forbidding racial segregation in public schools, there are some local areas where segregation purposely has existed due to "gerrymandering", racial assignments and other techniques. Another real factor in Northern education is "*de facto*" segregation resulting primarily from housing patterns, school zoning and site selections for new schools on a neighbourhood basis and concentrations of population of a particular race, nationality or colour. New York City schools provide examples of this. Numerous law suits are now pending in this field and educational

⁹⁶ *Bush v. Orleans Parish School Board*, 138 F. Supp. 337 (E. D. La. 1956), aff'd 242 F. 2d 156 (5th Cir. 1957), cert. den. 354 U.S. 921 (1957); 252 F. 2d 253 (5th Cir. 1958), cert. den. 354 U.S. 921 (1958).

⁹⁷ *Bush v. Orleans Parish School Board*, 188 F. Supp. 916 (E. D. La. 1960).

⁹⁸ *Bush v. Orleans Parish School Board*, 364 U.S. 500 (1960).

⁹⁹ *Cooper v. Aaron*, 358 U.S. 1 (1958).

¹⁰⁰ *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E. D. La. 1961), aff'd, 368 U.S. 515 (1962).

authorities and courts are seeking to advise and work out "balancing" and desegregation programmes in harmony with the above Supreme Court decisions.

There has been much conflict and litigation also over various types of "desegregation" plans which operate or are designed to delay or avoid desegregation or to effect only nominal or token desegregation.¹⁰¹

By its decisions, the Supreme Court has made it manifest that any measures or plans that prevent a bona fide desegregation of public educational facilities are in violation of the Federal Constitution. To this body of decisional law have now been added Title IV and Title VI of the Civil Rights Act of 1964 relating to desegregation of public education and non-discrimination in federally assisted programmes.

Since the passage of that Act a number of school districts in Southern and Border states have agreed to desegregate public schools in order to obtain Federal financial assistance.¹⁰²

In this latter connection, a Federal court has held very recently,¹⁰³ in overruling earlier cases,¹⁰⁴ that Negro children of military personnel serving on a Federal base in Louisiana are entitled to bring a class suit under said Title VI, seeking desegregation of the parish's public schools that receive Federal financial aid. Title VI expressly prohibits racial discrimination in any "program or activity receiving Federal financial assistance". The Court stated that when Federal funds are now received and accepted for the operation and maintenance of schools, those schools are obligated to provide the education for which the payments were received, without any racial discrimination.

(2) *Public Higher Education*

Prior to its decisions in the "School Segregation Cases" the Supreme Court had held that Negro applicants could not, pursuant to state segregation laws, be denied admission to state supported graduate colleges because of colour, without violating the equal protection clause of the Fourteenth Amendment.¹⁰⁵ The Court

¹⁰¹ See, generally, "Race Relations and American Law" by Greenberg, Ch. VII at pp. 208, et seq., (1960).

¹⁰² New York Times, May 17, 1965.

¹⁰³ *Lemon v. Bossier Parish School Board*, 33 Law Week 2551 (April 13, 1965, U.S. Dist. Ct., W. Va.).

¹⁰⁴ *United States v. Bossier Parish School Board*, 220 F. Supp. 243 (W. D. La. 1963); *U.S. v. Madison County Board of Education*, 326 F. 2d 237 (5th Cir. 1964).

¹⁰⁵ *Sweatt v. Painter*, 339 U.S. 629 (1950); *Mc Laurin v. Oklahoma State Regents*, 339 U.S. 627 (1950).

decided these cases without considering the "separate but equal" doctrine, but indicated quite clearly that segregated colleges for Negroes could not provide them with equal educational opportunities. The Court also decided that once a Negro had been admitted to a state supported graduate college he must be accorded the same treatment as students of other races and could not be assigned to a separate part of a classroom, cafeteria or library without violating his rights to equal protection under the Fourteenth Amendment.¹⁰⁶

Following the "School Segregation Cases", the Supreme Court ordered, without delay and without reference to the equality of facilities concept, the admission of a Negro to a state-supported graduate professional college,¹⁰⁷ which admission was eventually effected by a lower court order.¹⁰⁸

More recently it has been held explicitly that segregation because of race or colour has no place in state supported institutions of higher education such as colleges or junior colleges.¹⁰⁹ The Civil Rights Act of 1964 reflects the rules of Law developed in these decisions. It is clear from these decisions that segregation in any area of public education is unconstitutional and that separate educational facilities for white and coloured students are inherently unequal and discriminatory under the Federal Constitution.

(f) Peonage

The Thirteenth Amendment, ratified in 1865, not only ruled out "slavery" but also outlawed "involuntary servitude" in the United States, and gave Congress the power to enforce this by appropriate legislation. Congress in 1867 passed the "Anti-Peonage Act"¹¹⁰ abolishing peonage, defined by the Supreme Court as a voluntary or involuntary "status or condition of compulsory service, based upon the indebtedness of the peon to the master".¹¹¹ That Act nullified all State laws or usages designed to maintain peonage, and provided for a fine or imprisonment, or both, for inflicting peonage on a person. The Supreme Court has struck down State statutes

¹⁰⁶ Cf. *Sipuel v. Board of Regents*, 332 U.S. 631 (1948).

¹⁰⁷ *Hawkins v. Board of Control*, 350 U.S. 413 (1956); Cf. same, 347 U.S. 971 (1954).

¹⁰⁸ *Hawkins v. Board of Control*, 162 F. Supp. 851 (N. D. Fla. 1958).

¹⁰⁹ *Frazier v. Board of Trustees*, 134 F. Supp. 589 (M. D. No. Car. 1955), aff'd 350 U.S. 979 (1956); *Lucy v. Adams*, 134 F. Supp. 235 (N. D. Ala., W. D. 1955), aff'd 228 F. 2d 619 (5th Cir. 1955), cert. denied, 351 U.S. 931 (1956); *Tureaud v. Board of Supervisors of Louisiana State Univ.*, 347 U.S. 971 (1954); 207 F. 2d 807 (5th Cir. 1953).

¹¹⁰ 14 U.S. Stat. 546; now 18 U.S.C. § 1581.

¹¹¹ *Clyatt v. United States*, 197 U.S. 207, 215 (1905), upholding the 1867 Act.

attempting to enforce peonage, directly or indirectly,¹¹² saying on the most recent occasion:

When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work. Resulting depression of working conditions and living standards affects not only the laborer under the system, but every other with whom his labor comes in competition. Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor.¹¹³

(g) Employment

The first administrative agency established in the United States to protect and enforce equal employment opportunities for all Americans was the Federal Fair Employment Practices Committee (FEPC), formed by President Franklin D. Roosevelt on June 25, 1941 "to promote the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color or national origin". In 1943, the Committee was put under direct Presidential control; and, by Executive Order 9346, President Roosevelt, under his power as Commander-in-Chief of the Armed Forces, directed all employers, all Federal departments and agencies, and all labour organizations to eliminate discrimination in hiring, tenure, terms or conditions of employment, and in union membership. This Order also required all government contracting agencies to include a contractual provision that contractors and subcontractors could not discriminate in hiring. The FEPC was to implement all this, and could receive and investigate complaints of discrimination under the Order, conduct hearings, make findings of fact, and take appropriate steps to eliminate such discrimination. It could use the services of Federal departments and agencies, and state and local officials, and could promulgate appropriate rules and regulations.

With the end of World War II, the Federal FEPC passed out of existence, as Congress refused to make it a permanent government agency. But it had made its mark. A number of States and cities passed fair employment legislation and set up commissions modelled on the Federal one to administer these laws. The New York Legislature was the first to pass a State FEPC, in 1945.

¹¹² *Bailey v. Alabama*, 219 U.S. 219 (1911); *United States v. Reynolds*, 235 U.S. 133 (1914) (Alabama); *Taylor v. Georgia*, 315 U.S. 25 (1942); *Pollock v. Williams*, 322 U.S. 4 (1944) (Florida).

¹¹³ *Pollock v. Williams*, *supra* note 3, at 18.

The Federal government continued to press for nondiscriminatory employment practices on two fronts: within the government itself and in government contracts.

In 1948, President Truman created a Fair Employment Board within the Civil Service Commission for the former purpose. President Eisenhower replaced this in 1955 with the Committee on Government Employment Practice, to advise the President, the Civil Service Commission and the various department heads, review cases of discrimination referred to it, and render "advisory opinions" to department and agency heads.

As to the second aspect, in 1951 President Truman set up the Committee on Government Contract Compliance to insure that each government contract for goods and services contained a nondiscrimination clause. President Eisenhower in 1953 declared in Executive Order 10479 that nondiscrimination in employment on government contracts was "government policy", and he formed the Committee on Government Contracts, with the Vice President as its Chairman. It was to receive complaints against government contractors for discrimination in employment, upgrading, demotion, or transfer; in recruitment or recruitment advertising; in layoff or termination; in rates of pay or other forms of compensation; or in selection for training, including apprenticeship. Such complaints were to be sent by the Committee to the contracting agency with directions to investigate and to eliminate any discrimination found to exist.

The two Federal employment functions were consolidated and expanded in March 1961 by President Kennedy's Executive Order 10925 creating the Committee on Equal Employment Opportunity, with the Vice President as Chairman and the Secretary of Labor as Vice Chairman.

In 1949 Congress made explicit the policy in the United States Civil Service of "no discrimination with respect to the position held by any person, on account of sex, marital status, race, creed, or color".¹¹⁴

In 1954, Executive Order 10557 required that all government contracts state:

In connection with the performance of work under this contract, the contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin.

The 1964 Civil Rights Act, Title VII, ranges wider and has more teeth than any of the Federal governmental employment committees since the wartime FEPC, and in some respects goes beyond that measure, and on a permanent, not simply a wartime, basis.

¹¹⁴ 5 USCA § 1074.

Rider A

On February 5, 1965, President Johnson issued an Executive Order establishing the President's Council on Equal Opportunity, to be chaired by the Vice-President and composed of the top Federal government officials responsible for eliminating discrimination. The Council's broad purposes include: coordination of all government anti-discrimination programmes, recommendations to the President on new policies, programmes and actions, and inadequacies in existing ones; and recommendation of measures to co-ordinate Federal anti-discrimination programmes with State and local ones.

As to quasi-government employment, as in teaching schools, Negro and white teachers may not be paid at different rates.¹¹⁵ The Supreme Court has ruled that employment discrimination on other grounds is unconstitutional, under the Fifth and Fourteenth Amendments,¹¹⁶ and it appears that discrimination on racial grounds would, also, be disallowed.¹¹⁷

The Supreme Court has not yet passed on a case involving racial discrimination in private employment and in the professions. It declined to review a case involving a refusal to allow Negro doctors access to a hospital.¹¹⁸ But other types of discrimination have been banned as inconsistent with due process and the equal protection guarantee of the Fourteenth Amendment.¹¹⁹

Also, recently, the Supreme Court has stated that any State or Federal law requiring applicants for any jobs to be turned away because of their colour would be invalid under the Due Process Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹²⁰ In doing so, it upheld the Anti-Discrimination Act of the State of Colorado making it an unfair employment practice for an employer to refuse to hire a person because of race, creed, colour, national origin or ancestry. An interstate air carrier had refused to hire a Negro as a pilot at its headquarters in Colorado, claiming that Colorado's statute violated the

¹¹⁵ *Alston v. School Board of the City of Norfolk*, 112 F. 2d 992 (4th Cir., 1940), cert. den. 311 U.S. 693 (1940).

¹¹⁶ *Slochower v. Board of Higher Education*, 350 U.S. 183 (1952); *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

¹¹⁷ Cf. *Bryan v. Austin*, 148 F. Supp. 563 (E.D.S.C., 1957), appeal dismissed as moot, 354 U.S. 933 (1957).

¹¹⁸ *Eaton v. Board of Managers of James Walker Memorial Hosp.*, 261 F. 2d 52t (4th Cir., 1958), cert. den., 359 U.S. 984 (1959).

¹¹⁹ *Truax v. Raich*, 239 U.S. 33 (1915); *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

¹²⁰ *Colorado Anti-Discrimination Comm'n. v. Continental Airlines, Inc.*, 372 U.S. 714 (1963).

interstate commerce clause of the Federal Constitution by imposing an undue burden on interstate commerce. The Supreme Court rejected this argument.

The 1964 Civil Rights Act, among other things, marks a most significant step in enforcing nondiscrimination in labour unions. Previously, the Supreme Court upheld a State's right to forbid discrimination in unions,¹²¹ and has interpreted the Labor Management Relations (Taft-Hartley) Act of 1947¹²² and the Railway Labor Act,¹²³ which do not expressly mention race, as requiring that Negroes as well as whites within a bargaining unit, whether or not the Negroes are union members, must be fairly represented by the union which is the unit's exclusive bargaining agent.¹²⁴ Racial discrimination by the union may be judicially remedied by injunctive relief or an award of damages.¹²⁵ The constitution of the AFL-CIO, which is the parent body of dozens of unions and millions of working men, declares that one of its principles is "to encourage all workers without regard to race, creed, color, national origin or ancestry to share equally in the full benefits of union organization". But enforcement has been largely internal and has not reached the courts; and many unions have discriminated in their selection for apprentice training and membership, a few to the extent of picking only relatives of those already members. Non-discrimination clauses have not always been included in contracts with employers or with sub-contractors.

(h) Housing

In 1877 the Supreme Court stated:

Colored persons ... are citizens, and ... without distinction of race or color or previous condition of servitude, have the same right ... to inherit, purchase, lease, sell, hold and convey real and personal property ... as is enjoyed by white citizens.¹²⁶

A State statute cannot prevent a white from selling to a Negro, solely because the purchaser is a Negro.¹²⁷

As early as 1917, long before the "separate but equal" doctrine

¹²¹ *Railway Mail Association v. Corsi*, 326 U.S. 88 (1945).

¹²² 29 USCA § 158.

¹²³ 45 USCA § 151.

¹²⁴ *Railway Trainmen v. Howard*, 343 U.S. 768 (1952); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 199-200 (1944); *Syres v. Oil Workers International Union*, 257 F. 2d 479 (5th Cir., 1958); cert. den, 358 U.S. 929 (1959); see *Conley v. Gibson*, 355 U.S. 41 (1957).

¹²⁵ *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 203, 207 (1944).

¹²⁶ *Hall v. DeCuir*, 95 U.S. 485, 508 (1877).

¹²⁷ *Christ v. Henshaw*, 196 Okla. 168, 163 P. 2d 214 (1945).

was overturned, the Supreme Court held that a racial zoning ordinance violated the Fourteenth Amendment because it denied due process of law by unconstitutionally restricting the right of a white seller to dispose of his property.¹²⁸ The Court stated that the "separate but equal" doctrine did not apply to a Louisville, Kentucky ordinance which barred members of one race from residing, renting or using as places of public assembly, houses in areas where members of the other race occupied a majority of the houses. To the allegation that Negroes moving into white areas would depreciate the land values, the Court answered by pointing out that, even if this were true, certain types of whites could have the same effect. The Court rejected the argument that racial zoning was necessary or allowable to avert racial conflict:

Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.

In subsequent cases the Court struck down one racial zoning ordinance providing that a member of one race might occupy property in areas zoned for another race only if a majority of the residents consented,¹²⁹ and another providing that no one might purchase or lease in a block where most of the residents belonged to a race into which the prospective dweller could not, under the laws of the State, legally marry.¹³⁰

These cases make it clear that any zoning ordinance which is based on race must fall, constitutionally, if challenged. Since all zoning is handled locally, this means that no city may regulate by law where a Negro, or a person of any other race, shall live or not live.

The other major means for segregating private housing is the restrictive covenant based on race. It attempts to do indirectly what a racial ordinance does directly. This is a written or oral agreement between property owners in an area, or a clause in a deed or lease, that none of them will sell, or rent, to members of other races.

Such covenants are not unlawful *per se*, since they are only private undertakings, and voluntary adherence to them constitutes individual action only and violates no constitutional provision.¹³¹ But any attempt to have local officials or courts enforce such a covenant is unconstitutional, since if an arm of government seeks to enforce it by equitable relief or damages, that is "State action", and the

¹²⁸ *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹²⁹ *Harmon v. Tyler*, 273 U.S. 668 (1927).

¹³⁰ *City of Richmond v. Deans*, 281 U.S. 704 (1930).

¹³¹ *Corrigan v. Buckley*, 271 U.S. 323 (1926); see *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

Fourteenth Amendment's equal protection guarantee is violated thereby.¹³²

In 1948 the Supreme Court held in *Shelley v. Kraemer*¹³³ that a restrictive covenant against the sale of homes to "people of the Negro or Mongolian Race" could not be upheld by the courts, because judicial enforcement of such a covenant would constitute "State action". Rejecting the argument that judicial enforcement of such covenants was valid since some would be made by whites against Negroes, and some by Negroes against whites, the Court said "equal protection of the laws is not achieved through indiscriminate imposition of inequalities". In other words, equal protection was guaranteed to each person as an individual; any individual, regardless of race, who was barred by a restrictive covenant was not then receiving the equal protection of the laws.

In this landmark case, which defines the concept of "State action" as clearly as any of its decisions to date, the Supreme Court stated:

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements.

* * *

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

In a companion case, a court-enforced restrictive covenant in the District of Columbia fell afoul of the Fifth Amendment.¹³⁴ Later the Court held that damages could not be awarded against a white

¹³² *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹³³ 334 U.S. 1.

¹³⁴ *Hurd v. Hodge*, 334 U.S. 24 (1948).

covenanter who broke the covenant by selling to a Negro,¹³⁵ thus eliminating any means of enforcing such covenants if a covenanter does not wish to be bound.

Similarly, a private developer may devise a "controlled occupancy pattern" and may sell only to whites or only to Negroes, or to both in any desired ratio, but the developer cannot enforce his scheme in court if it is challenged.¹³⁶ This may mean the thwarting not only of segregated housing patterns, but also of current integration efforts by private developers or public authorities.¹³⁷

In 1962, President Kennedy signed Executive Order 11063 entitled "Equal Opportunity in Housing". It provided that Federal departments and agencies should actively work, and should sue if necessary, to prevent discrimination because of race, colour, creed or national origin in the sale, leasing, rental, or use of residential property and land or in lending practices relating to it, that is owned or operated by the Federal government, financed by it or with its help, or connected with an urban renewal or slum clearance project which is financially assisted by the Federal government. The Order also established the President's Committee on Equal Opportunity in Housing, with power: to hold public or private hearings it considered necessary to enforce the Order; to co-ordinate governmental housing activities; to confer with and inspect the "rules, regulations, procedures, policies, and practices" of any department or agency subject to the Order, and to recommend changes therein to the President; and to promote non-discrimination in housing through educational programmes by non-governmental agencies. Each department and agency affected might apply whatever measures were necessary to prevent discrimination, including cancellation of all federal financial assistance, refusal to give Federal approval to a private lending institution, and reference of complaints to the Attorney General for appropriate action.

Title VI of the Civil Rights Act of 1964, "Nondiscrimination in Federally Assisted Programs", contains similar provisions, as pointed out in Part I of this article.

The Public Housing Authority, created in 1937 to administer the Federal public housing programme, has considerable influence over local public housing agencies, since it controls the purse strings for their projects. The Authority reviews every aspect of requested projects, many of which are locally owned, to see if they warrant Federal assistance; and without heavy Federal contributions most

¹³⁵ *Barrows v. Jackson*, 346 U.S. 249 (1953).

¹³⁶ *Progress Development Corp. v. Mitchell*, 182 F. Supp. 681 (N.D.I.N., E.D. 1960), *affirmed in part, reversed in part on other grounds*, 286 F. 2d 222 (7th Cir. 1961).

¹³⁷ *Progress Development Corp. v. Mitchell*, *supra* note 136.

projects cannot be built. The Authority did not require that Federally-assisted public housing projects accept Negro applicants. This left local authorities free to segregate, and some did, although the Authority required them to distribute apartments on a "racial equity" basis. The reason for the "hands off" policy was the belief that a non-segregation policy in the South, for example, would mean the end of public housing there.

However, although the Supreme Court has not considered the question, two lower Federal courts have held that Negroes cannot be excluded from public housing projects under the Fourteenth amendment.¹³⁸ This legal rule is very important, since the Federal urban renewal and public housing programmes affect millions of citizens.

The Federal Housing Administration, created in 1934, has aided millions of homeowners, and many large developments, by insuring mortgages on their homes. It also has great control over many apartment houses. But until the Supreme Court decisions in 1950 barring enforcement of restrictive covenants, the FHA encouraged segregation because it helped neighbourhoods "retain stability". It and the Veterans' Administration, another large mortgage insurer, have continued to insure housing from which Negroes were barred, and the legislative history of the 1964 Civil Rights Act makes it clear that this area is not reached by its terms. Similarly, under the 1964 Act, the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation may continue to insure banks and savings and loan associations which help finance segregated housing.

(i) Jury Selection and Criminal Law

The Supreme Court has made it clear that any overt racial discrimination in the courtroom by those charged with the conduct of a fair trial, or in the trial atmosphere, so unbalances the scales of justice that the resulting conviction cannot stand.¹³⁹

The Court early struck down as contrary to the Fourteenth Amendment a State statute which qualified only white people for jury duty, stating:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed

¹³⁸ *Jones v. City of Hamtramck*, 121 F. Supp. 123 (E.D. Mich. 1954); *Vann v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N. D. Ohio 1953).

¹³⁹ *Rochin v. California*, 342 U.S. 165, 169 (1952); see also cases cited in note 148 *infra*.

by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.^{139a}

And time after time, the Supreme Court has held that a criminal defendant is denied equal protection of the laws under the Fourteenth Amendment if he is indicted by a grand jury,¹⁴⁰ or tried by a petit jury,¹⁴¹ from which members of his race or colour have been systematically excluded.

Discrimination in selecting either type of jury in a case will upset the conviction, even if the other jury was selected fairly.¹⁴² Systematic exclusion has been found where there is a history of no Negro representation on juries.¹⁴³

Under-representation or token representation over a period of years is also unconstitutional, as where Negroes constituted 30 % of the list from which jurors were drawn, but only one Negro had served on a grand jury in twenty-eight years.¹⁴⁴ Similarly ruled invalid was the use of a ticket of one colour to represent Negroes and a ticket of another colour to represent whites in the box from which the names of jurors were selected.¹⁴⁵

This does not mean that every criminal case with a Negro defendant must have at least one Negro on the grand and petit juries. The test is one of fairness of the method of selection,¹⁴⁶ and is

^{139a} *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879).

¹⁴⁰ *Arnold v. North Carolina*, 376 U.S. 773 (1964); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Cassell v. Texas*, 339 U.S. 282 (1950); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Neal v. Delaware*, 103 U.S. 370; (1880); *Norris v. Alabama*, 294 U.S. 587 (1935); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Smith v. Texas*, 311 U.S. 128 (1940); *Hill v. Texas*, 316 U.S. 400 (1942); *Akins v. Texas*, 325 U.S. 398 (1945); *Avery v. Georgia*, 345 U.S. 559 (1953); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Reece v. Georgia*, 350 U.S. 85 (1955).

¹⁴¹ *Coleman v. Alabama*, 377 U.S. 129 (1964); *Avery v. Georgia*, 345 U.S. 559 (1953); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Neal v. Delaware*, 103 U.S. 370 (1880).

¹⁴² *Cassell v. Texas*, 339 U.S. 282 (1950); *Eubanks v. Louisiana*, 356 U.S. 584 (1958).

¹⁴³ *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Hill v. Texas*, 316 U.S. 400 (1942); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Neal v. Delaware*, 103 U.S. 370 (1880). This applies not only to Negroes, but to any identifiable group which may be the subject of prejudice in the community, *Hernandez v. Texas*, 347 U.S. 475 (1954).

¹⁴⁴ *Arnold v. North Carolina*, 376 U.S. 773 (1964); for other examples of under-representation or token representation, see *Cassell v. Texas*, 339 U.S. 282 (1950); *Akins v. Texas*, 325 U.S. 398 (1945).

¹⁴⁵ *Avery v. Georgia*, 345 U.S. 559 (1953).

¹⁴⁶ *Ex parte Virginia*, 100 U.S. 339 (1879); *Gibson v. Mississippi*, 162 U.S. 565 (1896); *State v. Smith*, 93 Atl. 353 (R. I. 1915).

satisfied only if jurymen are "selected as individuals, on the basis of individual qualification, and not as members of a race".^{146a}

A convicted Negro who claims that there was systematic and arbitrary exclusion of Negroes from the juries which indicted and convicted him has the burden of proving unfairness.^{146b} But "long continued omission of Negroes from jury service establishes a prima facie case of systematic discrimination . . . [and] the burden of proof is then upon the State to refute it".^{146c} The claim of unfairness may be raised after the close of the original trial.¹⁴⁷

Recently, the Supreme Court held that a Negro convicted of rape, who alleged purposeful discrimination against Negroes in selecting of both grand and petit juries, had not met his burden.^{147a} The percentage of Negroes on grand and petit jury panels was 10 % lower than the percentage of Negro males over 21, but one to three Negroes were listed on 80 % of the grand jury panels, and on this case there were four or five of 33 empanelled and two Negroes actually served. No Negroes had served on a petit jury since about 1950, and none served in this case, but an average of six to seven were on the criminal case panels of about 100 people and eight were on this panel. No Negroes reached the petit jury of twelve because their names were struck out by mutual agreement of the parties or by the prosecutor. The Supreme Court upheld the "strike" system for selecting juries – basically two peremptory challenges by the defence, one by the prosecutor, until the venire of 75 to 100 is reduced to 12 – on the ground that to inquire into the prosecutor's reasons for striking whomever he pleased would entail a radical change in the nature and operation of the whole peremptory challenge system and such inquiry was not required by the Constitution.

Case after case of invidious discrimination by prosecutors against Negroes through the "strike" system would indicate a perversion of the system "to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population"; but here the evidence did not show prosecutors to be solely responsible because Negro defendants often preferred an all-white jury, prosecution and defence often agreed on an all-white jury, and once a defendant refused a prosecutor's offer for an all-Negro jury.

The Court held that purposeful discrimination could not be proved from these facts. Further, the jury commissioners made no

^{146a} *Cassell v. Texas*, 339 U.S. 282, 286 (1950).

^{146b} *Swain v. Alabama*, 380 U.S. 202 (1965), and cases cited therein.

^{146c} *Harper v. Mississippi*, 171 So. 2d 129, 132-33 (Miss. 1965); see *Norris v. Alabama*, 294 U.S. 587, 589 (1935).

¹⁴⁷ *Coleman v. Alabama*, 377 U.S. 129 (1964).

^{147a} *Swain v. Alabama*, 380 U.S. 202 (1965).

"studied attempt to include or exclude a specified number of Negroes." Although "the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented . . . an imperfect system is not equivalent to purposeful discrimination based on race".

Convictions resulting from a trial held in an atmosphere of racial hostility, as the conviction of five Negroes for murder following race riots and brief trials under mob surveillance, are an infringement of constitutional rights.¹⁴⁸ Similarly, a trial may not be conducted in a courtroom where the jurors or court officials are segregated by race.^{148a}

State and Federal courts have held that an argument of a prosecutor which appeals to racial prejudice calls for reversal of a conviction if it may have affected the outcome of the trial.¹⁴⁹

Governmental officials who wilfully subject Negroes to punishment by "ordeal" such as beatings, and thus deprive them of their constitutional rights to be tried and punished under due process of law, are subject to prosecution under Federal statute.¹⁵⁰

Federal civil rights statutes¹⁵¹ also condemn participation in lynchings by State officials and by private citizens acting in concert with State officials, and any attempts by private individuals to get police to cooperate with lynchers, and seizure by a mob of a prisoner from a Federal official.¹⁵² Lynchings, once a serious hurdle to administering justice fairly by legal methods to Negroes, are very rare today.

Poor criminal defendants, among whom are many Negroes, have been aided by recent Supreme Court decisions, decided under the Sixth Amendment of the Federal Constitution, insuring every person a lawyer and a convicted defendant an appeal and a transcript of the trial proceedings.¹⁵³

(j) Miscegenation and Domestic Relations Law

Anti-miscegenation statutes have been fairly widespread,

¹⁴⁸ *Moore v. Dempsey*, 261 U.S. 86 (1923); see *Shepherd v. Florida*, 341 U.S. 50, 55 (1951).

^{148a} *Johnson v. Virginia*, 373 U.S. 61 (1963).

¹⁴⁹ See cases collected at 45 A.L.R. 2d 303 (1956); see also *Berger v. United States*, 295 U.S. 78, 85 (1935).

¹⁵⁰ 18 U.S.C. § 242, *Screws v. United States*, 325 U.S. 91 (1945).

¹⁵¹ 18 U.S.C. §§ 241, 242; 18 U.S.C. § 371; 18 U.S.C. § 2(a).

¹⁵² *Logan v. United States*, 144 U.S. 263 (1892).

¹⁵³ *Gideon v. Wainwright*, 372 U.S. 335 (1963), overruling *Betts v. Brady*, 316 U.S. 455 (1942); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Draper v. Washington*, 372 U.S. 487 (1963); *Coppedge v. United States*, 369 U.S. 438 (1962); *Moore v. Michigan*, 355 U.S. 155 (1957); *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

existing in about twenty States, mainly Southern. A number of States have repealed such statutes in recent years. The California Supreme Court has declared its law, which forbade the marriage of a white with "a Negro, mulatto, Mongolian or member of the Malay race," unconstitutional under the Fourteenth Amendment as unreasonably restricting the choice of one's mate.¹⁵⁴ The Court stated, "Since the essence of the right to marry is freedom to join in marriage with the person of one's choice, a segregation statute for marriage necessarily impairs the right to marry."^{154a}

The United States Supreme Court has not yet reviewed a case involving a State anti-miscegenation statute, but the Court's recent decisions in other areas, and particularly its holding this year in *McLaughlin v. Florida*,¹⁵⁵ indicate that it will hold such statutes to be unconstitutional.

In *McLaughlin*, the Supreme Court unanimously declared unconstitutional "as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment", a Florida cohabitation statute which provided:

Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.¹⁵⁶

Since Florida provides no penalty for such conduct between a man and a woman of the same race,¹⁵⁷ the Court found that the statute "treats the interracial couple made up of a white person and a Negro differently than it does any other couple".¹⁵⁸ This legislative "classification based upon the race of the participants" was, in the Court's view, "an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race".¹⁵⁹ The Court rejected Florida's contention that the statute "is grounded in a reasonable legislative policy".¹⁶⁰ Nothing in Florida's general legislative purpose

¹⁵⁴ *Perez v. Lippold*, 32 Cal. 2d 711, 198 P. 2d 17 (1948).

^{154a} 198 P. 2d at 21.

¹⁵⁵ 379 U.S. 184 (1965).

¹⁵⁶ Florida Statutes § 798.05; see 379 U.S. at 184.

¹⁵⁷ Four related Florida Statutes proscribe adultery, fornication, and lewd and lascivious behaviour, by a couple of the same race as well as an interracial couple, and provide equal penalties; but conviction for any of these offences requires proof of intercourse, and conviction under the cohabitation statute does not, see 379 U.S. at 184-86 and notes 1-5.

¹⁵⁸ 379 U.S. at 188.

¹⁵⁹ *Id.* at 191-92, 196.

¹⁶⁰ *Id.* at 190 n. 8.

of promoting sexual decency made it essential "to punish promiscuity of one racial group and not that of another".^{160a}

The Supreme Court thus overruled an 1883 decision in *Pace v. Alabama*,¹⁶¹ where it had upheld a State statute providing a stiffer penalty for interracial adultery or fornication than for those acts between people of the same race. In *Pace*, the Court had reasoned that since the statute under attack provided that the Negro and the white committing interracial adultery or fornication were to be punished equally, there was no discrimination on the basis of race "for the same offence".¹⁶² In *McLaughlin*, the Supreme Court reevaluated *Pace*:

In our view . . . *Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court. . . .

This narrow view of the Equal Protection Clause was soon swept away. . . .

Judicial inquiry under the Equal Protection Clause . . . does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose — in this [*Mc Laughlin*] case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded. That question is what *Pace* ignored and what must be faced here.¹⁶³

The Supreme Court also rejected Florida's attempt to justify the statute as ancillary to Florida's anti-miscegenation statute, which Florida claimed was valid. Each statute must "itself pass muster under the Fourteenth Amendment", the Court declared.¹⁶⁴ Although it refrained from passing on the validity of the anti-miscegenation statute since that was not directly in question, the Court indicated that such racially-based limitations on marriage were out of step with the history and central purpose of the Fourteenth Amendment, which was "to eliminate racial discrimination emanating from official sources in the States".¹⁶⁵

^{160a} *Id.* at 193.

¹⁶¹ 106 U.S. 583 (1883). Two former attempts to re-test the issue of racially discriminatory cohabitation, fornication or adultery laws in the Supreme Court had been unsuccessful. See *Jackson v. Alabama*, 37 Ala. App. 519, 72 So. 2d 114 (1954), cert. denied, 348 U.S. 888 (1954); *Naim v. Naim*, 197 Va. 80, 87, S.E. 2d 749 (1955), *judg. vacated*, 350 U.S. 891 (1955), *judg. reinstated*, 197 Va. 734, 90 S.E. 2d 849 (1956), *appeal dismissed*, 350 U.S. 985 (1956) *for want of a properly presented federal question*.

¹⁶² 106 U.S. at 584-85. See 379 U.S. at 388-89.

¹⁶³ 379 U.S. at 188, 190, 191.

¹⁶⁴ 379 U.S. at 196.

¹⁶⁵ *Id.* at 195, 192.

Recently the Supreme Court affirmed a holding that a State statute requiring divorce decrees to carry a notation of the race of each party does not violate the Fourteenth Amendment.¹⁶⁶

A handful of State statutes or State court decisions make race a factor in the adoption or the awarding of the custody of children. The constitutionality of such statutes has not yet been reviewed by the Supreme Court.

(k) Regulation of Organizations

The Supreme Court has consistently upheld the right of an organization and its members, in the face of discrimination by a State, to be free to conduct its chartered business, including the active espousal of civil rights causes.

Recently, the Supreme Court has heard a series of cases involving Southern States and the National Association for the Advancement of Colored People, better known as "NAACP". The NAACP, a New York corporation, has long led the fight for Negro rights in the United States, and has carried much of the financial and legal burden of bringing many important civil rights cases to the courts. Through various statutes, Southern States have sought to put the NAACP out of business in their areas.

Alabama NAACP chapters, in that State since 1918, helped in 1955 and 1956 to finance Negro students seeking admission to the State university and supported a Negro boycott of the bus lines in Montgomery, Alabama, to compel the seating of passengers without regard to race. Thereafter, in 1956, Alabama sued to oust NAACP from the State because it had failed to comply with Alabama statutes requiring foreign corporations to register with the Alabama Secretary of State and perform other acts in order to qualify to do business in the State. Despite NAACP's denials of its need to do so, the State Court issued an *ex parte* restraining order against its doing business pending a trial on the merits and, also, an order that NAACP produce, among other records, its membership list. The NAACP refused to do so and was adjudged in contempt of court. The supreme Court overturned the judgment of contempt, stating:¹⁶⁷

It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.^{167a}

¹⁶⁶ *Tancil v. Woolls*, 379 U.S. 19 (1964), affirming 230 F. Supp. 156 (E. D. Va. 1964).

¹⁶⁷ *NAACP v. Alabama*, 357 U.S. 449 (1958).

^{167a} At 460.

Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.^{167b}

On remand, the Alabama Court again affirmed the contempt judgment, and again the Supreme Court reversed and declared further technical grounds urged by Alabama to be unconstitutional.¹⁶⁸

The NAACP was then unable to obtain a hearing in the Alabama State court on the merits, and brought suit in the Federal court to enjoin enforcement of the State Court's restraining order. Again the case went to the Supreme Court¹⁶⁹ and was reversed and remanded to the lower Federal court with a direction to try the case on the merits, if the Alabama State court failed to do so promptly.

Finally, at the last moment and late in 1961, the Alabama State trial court accorded NAACP a trial on the merits and then entered judgment permanently enjoining NAACP from doing business in Alabama, and the State Supreme Court affirmed. Once more, the United States Supreme Court reversed¹⁷⁰ and ordered the Alabama courts to enter a judgment vacating the permanent injunction and permitting NAACP to do business in Alabama.

The State of Louisiana also claimed that under two of its statutes, NAACP could not do business in Louisiana because it had not filed annually with its Secretary of State a list of its officers and members, and had not filed an affidavit that none of its officers or directors at a national or state level was a member of any Communist, Communist-front, or subversive organization as defined by the Attorney General or the House Un-American Activities Committee.

It was shown the statutes had only been enforced against NAACP and that disclosure of membership by some chapters in Louisiana had resulted in reprisals. On appeal, the Supreme Court held that the First Amendment's guarantee of freedom of association

^{167b} At 462-63.

¹⁶⁸ *NAACP v. Alabama*, 360 U.S. 240 (1959).

¹⁶⁹ *NAACP v. Gallion*, 190 F. Supp. 583 (M.D. Ala. 1960), reversed and remanded, 290 F. 2d 337 (5th Cir., 1961), affirmed 368 U.S. 16 (1961).

¹⁷⁰ *NAACP v. Alabama*, 377 U.S. 288 (1964).

had been incorporated into the Fourteenth Amendment¹⁷¹ and that these statutes infringed those rights, stating that they prescribed

regulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights.^{171a}

In another case the Supreme Court held that the legal activities of NAACP cannot be regulated or prohibited under the State's power to control improper solicitation of business by the legal profession. Those activities, including the furnishing of legal counsel and financial aid to Negroes whose constitutional rights were infringed by a State, were held by that Court to be association for lawful ends and a form of legitimate political expression protected by the First and Fourteenth Amendments.¹⁷²

The Court stated:

The NAACP is not a conventional political party; but the litigation it assists, while serving to vindicate the legal rights of members of the American Negro community, at the same time and perhaps more importantly, makes possible the distinctive contribution of a minority group to the ideas and beliefs of our society. For such a group, association for litigation may be the most effective form of political association.^{172a}

... the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.^{172b}

On April 26, 1965 the Supreme Court declared unconstitutional as too broad and vague to meet the requirements of the First Amendment two Louisiana statutes relating to "subversive activities" and "subversive organizations".¹⁷³ The statutes had been used to prosecute and threaten the Southern Conference Educational Fund, Inc. ("SCEF"), an organization active in fostering civil rights in Louisiana and other Southern States. In light of the harm already done to SCEF by raiding its offices, seizing its files and records, arresting its officers, and frightening away of membership because of its alleged "subversive" ties, the potential harm from the threat of repetition of these things, and the need to protect free expression regardless of whether SCEF could be convicted under a narrower, properly-drawn statute, the Supreme Court held

¹⁷¹ *Louisiana v. NAACP*, 366 U.S. 293 (1961).

^{171a} At 297.

¹⁷² *NAACP v. Button*, 371 U.S. 415 (1963); see *Harrison v. NAACP*, 360 U.S. 167 (1959).

^{172a} At 431.

^{172b} At 444-45.

¹⁷³ *Dombrowski v. Pfister*, 33 U.S. Law Week 4321, Supreme Court, April 26, 1965.

that the Federal District Court in Louisiana should not wait for the State court to construe the State statutes before hearing the suit for damages filed by SCEF and its officers.

(i) The Armed Forces

President Truman in 1948 signalled the end of discrimination and segregation in the armed forces of the United States with these words:

[T]here shall be equality of treatment and opportunity for all persons in the armed forces without regard to race, color, religion or national origin.¹⁷⁴

Progress toward this goal was more rapid in some services than in others, but all services and all branches of each service under Federal control, reserve units as well as the regular forces, have been desegregated. There are high-ranking Negro officers in all services, including Brigadier Generals in the Army and Air Force. But in spite of recruitment efforts, only a small number of Negroes enter the service academies or other programmes leading to commission as an officer.

Some units of the Civil Air Patrol, which is a civilian auxiliary of the Air Force, and the National Guard, which is under the control of the States (except when Federalized), still segregate or exclude Negroes altogether.

In Little Rock, Arkansas, in 1957, the Arkansas National Guard was ordered by the Governor of the State to prevent Negro children from entering an all-white school. Federal courts enjoined the Guard from interfering with school desegregation, and the Supreme Court refused to review this disposition of the matter.¹⁷⁵ President Eisenhower, acting in accord with the Constitutional duty "to take care that the laws be faithfully executed",¹⁷⁶ and his statutory power to use the militia or the armed forces to enforce Federal laws when conditions in a State prevent enforcement by normal means¹⁷⁷ then Federalized the Arkansas National Guard, and ordered them to aid the entry of the Negro children.

Since then, in a number of different States, the State National Guards have been turned by Presidential Order from an arm of the

¹⁷⁴ Executive Order No. 9981, July 26, 1948; see *Freedom to Serve* (1950), a report by the President's Committee on Equality of Treatment and Opportunity in the Armed Services.

¹⁷⁵ *United States v. Faubus*, 2 R.R.L.R. 957 (1957), affirmed *sub nom. Faubus v. United States*, 254 F. 2d 797 (8th Cir. 1958), cert. denied, 358 U.S. 829 (1958).

¹⁷⁶ U.S. Const., Art. II, § 3.

¹⁷⁷ 10 U.S.C.A. §§ 332, 333, 334.

State to an arm of the Federal Government. This hybrid nature of the Guard, its designation by Congress as "an integral part of the first line defenses of this Nation",¹⁷⁸ and its increased involvement in situations where race and constitutional questions are foremost, would indicate that a Supreme Court review of any National Guard discrimination or segregation will result in the outlawing of such practices as unconstitutional.

The Secretary of Defense recently announced that the Army and Air Force Reserves will be merged into the Army and Air National Guard, respectively. On the heels of this policy decision, President Johnson has issued an Executive Order stating that all units of the National Guard must desegregate immediately.

(m) State Legislation on Civil Rights

The limits of this article do not permit any analysis or discussion of the many State statutes and decisions relating to civil rights. A few generalizations must suffice.¹⁷⁹

All 50 States of the Union have State laws relating to a person's civil rights. The overwhelming number of the States have supported and promoted such rights. But a few States have enacted laws designed to prevent realization of those rights by some persons, notably Negroes.

An analysis of State legislation aiding or hindering the full realization of civil rights by Negroes makes it clear that the States in which slavery had been most deeply rooted have been among the leaders in anti-equality and integration legislation; while the leaders in anti-discrimination and integration legislation include many of the States which opposed slavery as a moral wrong.

Anti-civil rights State legislation includes statutes aimed at *preventing*: miscegenation, interracial cohabitation, public school and college integration, equal job opportunity and integration on the job, integrated housing, public accommodations and public facilities open to all on an integrated basis, integrated travel facilities, Negro participation in voting and the political process, jury service and activities espousing civil rights. States with all, or nearly all of these types of statutes on their books have been Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia, ten of the eleven Confederate States in the Civil War. Florida, the eleventh, has many of these laws.

One of the most severe areas of tension in the last decade has been the public schools. Statutes directed toward maintaining

¹⁷⁸ Universal Military Training and Service Act, 50 U.S.C. App. § 451(d).

¹⁷⁹ For a detailed reference to and citation of such State statutes, see Greenberg, "Race Relations and American Law", Appendix A (1960).

segregated schools have been passed in Arkansas, Virginia, Alabama, Georgia, Louisiana, North Carolina, Mississippi, South Carolina, Texas and Florida.

Each of the Civil War border States, which had slavery but were loyal to the Union, has an anti-miscegenation statute, but so do some eight other States in other parts of the country. This type of statute is the most widespread discriminatory legislation. About fifteen States, largely in the West or Middle West, had anti-miscegenation laws but have repealed them.

Alabama, Mississippi, Texas and Virginia are the only States which now have a poll tax for State and local elections. Arkansas has recently taken action to eliminate its poll tax.

State pro-civil rights legislation includes statutes aimed at making sure there is *no prevention* by any individual of equal opportunity in employment, housing, voting and education; and that there is integration in public schools and colleges, public accommodations and recreation, public facilities and transportation, public and public-assisted housing and in certain types of private housing, employment and labour unions. Such legislation includes provisions for effective enforcement measures to assure such non-discrimination and integration.

Thirty-two States have enacted statutes prohibiting racial discrimination in public accommodations, and in another State this has been effected by executive order. Some of these acts go back eighty years. The constitutionality of such State statutes stands unquestioned. All constitutional attacks on them in State and Federal courts have been unsuccessful. These laws but codify the common-law innkeeper rule, that to the extent of the available facilities proper accommodations should be furnished to all unobjectionable persons who in good faith apply for them.¹⁸⁰

In each of the States there is a large body of decisional law relating to the civil rights situation in that State.¹⁸¹

Thus, in the large majority of the States comprising the United States, any discrimination in the enjoyment of civil rights on account of race, colour, religion, national origin or sex is illegal and prohibited by constitutional, statutory and decisional law.

Needless to say, the whole body of Federal and State law in the United States on the subject of civil rights is immense and complex,

¹⁸⁰ See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 at 259-60 (1964) for a summary statement of the situation and a citation of the public accommodations statutes enacted by such States.

¹⁸¹ See, for example, the numerous case annotations under the anti-discrimination statutes in New York which are to be found in the State Constitution, Civil Rights Law, Labor Law, Executive Law, Penal Law, Public Housing Law, Election Law, etc.

but all of it would have to be considered in any exhaustive treatise on the subject, which this is not.

The most consistently aggressive State in promoting civil rights has been New York.¹⁸² It has the following "firsts" in civil rights legislation to its credit, State Fair Employment Practices Commission, non-discriminatory advertising of public accommodations, administrative agency to protect equal opportunity in education, non-discrimination in certain types of housing.

Other extremely active pro-civil rights States include California, Colorado, Connecticut, Massachusetts (the first State to ban discrimination in public accommodations, in 1865), Michigan, New Jersey, Oregon, Pennsylvania, Rhode Island, Wisconsin and Washington. It is interesting that most of these States are on the East or West coasts of the United States. Not far behind them are Alaska, Hawaii (which is one of the most naturally and happily integrated places in the world), Illinois, Indiana, Kansas, Maine, Minnesota, New Hampshire, Ohio and Wisconsin.

(n) The "Voting Rights Act of 1965"

On March 15, 1965, following civil rights demonstrations in Selma, Alabama, President Johnson addressed a joint session of Congress on the right to vote and submitted to Congress a bill to be known as the "Voting Rights Act of 1965". The bill was "S. 1564" in the Senate and was sponsored by 66 Senators; the House bill was H.R. 6400. The President stated that events in Selma had been "a turning point in man's unending search for freedom." He described the obstacles, particularly the "interpretation test" discussed by the Supreme Court a week earlier,¹⁸³ which a few states put in the path of Negroes wishing to vote:

Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of that right. There is no duty which weighs more heavily on us than the duty we have to insure that right.

Yet the harsh fact is that in many places in this country men and women are kept from voting simply because they are Negroes.

Every device of which human ingenuity is capable has been used to deny this right. The Negro citizen may go to register only to be told that the day is wrong, or the hour is late, or the official in charge is absent.

And if he persists, and if he manages to present himself to the registrar, he may be disqualified because he did not spell out his middle name or because he abbreviated a word on the application.

¹⁸² See Civil Rights Law, Book 8, McKinney's Consolidated Laws of New York.

¹⁸³ *United States v. Mississippi*, 380 U.S. 128 (1965).

And if he manages to fill out an application he is given a test. The registrar is the sole judge of whether he passes this test. He may be asked to recite the entire Constitution, or explain the most complex provisions of State law and even a college degree cannot be used to prove that he can read and write.

For the fact is that the only way to pass these barriers is to show a white skin.

Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books – and I have helped to put three of them there – can insure the right to vote when local officials are determined to deny it.

The proposed Voting Rights Act is more aggressive in enforcing voting rights than the Acts of 1870, 1871, 1957, 1960 or 1964. The Senate passed the proposed Act 77–19 on May 26, 1965,¹⁸⁴ after closure of debate had been invoked in the Senate by a vote of 70–30 on May 25, 1965.¹⁸⁵ It was passed in a slightly modified form by the House of Representatives on July 9, 1965, and the two versions of the bill were then remitted to a Senate-House conference committee with the object of resolving the differences between them.^{185a}

The proposed Act, *as passed by the Senate*, provides that “no voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color” (§ 2).

In particular it is aimed at any State-imposed “test or device” that can be arbitrarily and discriminatorily interpreted by State registrars to defeat a citizen’s right to vote. It seeks, by sending in Federal examiners to qualify voters, to speed up Negro registration in areas where such “test or device”, or other unfair standard or procedure, has frustrated Negro voting for many years.

A “test or device” is defined in Section 4 as:

any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

No person shall be denied the vote in a Federal, State or local election because of failure to comply with such a “test or device” which the Attorney General finds was maintained in a State or political subdivision on November 1, 1964 in which, according to the Director of the Census, under 50 % of those eligible to vote were registered as to that date or voted in the 1964 Presidential

¹⁸⁴ *New York Times*, May 27, 1965, p. 1.

¹⁸⁵ *New York Times*, May 26, 1965, p. 1.

^{185a} The Voting Rights Act became law on August 6, 1965.

election and, as of the 1960 census, over 20 % of the population of voting age was non-white. Upon institution of suit by the Attorney General, a court finding such conditions shall authorize the use of Federal examiners in those areas.

(This 50 % "automatic triggering mechanism" would apply to Alabama, Georgia, Louisiana, Mississippi, South Carolina and Virginia, and 34 counties in North Carolina.)¹⁸⁶

The examiner procedure shall also apply automatically where a census survey requested by the Attorney General discloses registration of less than 25 % of those eligible of any race or colour in a State or subdivision.

The "test or device" shall be suspended by a court as a voting qualification until the State or subdivision obtains, from a three-judge Federal District Court in Washington, D.C. a declaratory judgment that the effects of any abridgement or denial of the right to vote on ground of race or colour have been effectively corrected by State or local action and will not recur. A direct appeal lies to the Supreme Court. If, within the past five years, any Federal court has issued a final judgment that racial discrimination in voting occurred through such test or device "anywhere in the territory" of the State or subdivision, that judgment shall be *prima facie* evidence of the fact of such discrimination. The District of Columbia Court shall retain jurisdiction for five years over any State or subdivision which obtains a favourable declaratory judgment, and the Attorney General may reopen the action by alleging discriminatory use of a test or device (§ 4).

No other "voting qualification or prerequisite to voting, or standard, practice or procedure" can be administered by such a State or subdivision without a similar declaratory judgment that it will not deny or abridge the right to vote (§ 5).

Under Section 6, if a court has authorized the use of examiners, or if the Attorney General has received meritorious written complaints from twenty or more residents of a designated State or subdivision charging racial discrimination against their right to vote, or if the Attorney General believes it otherwise necessary to enforce voting rights, the Civil Service Commission shall appoint Federal examiners to register applicants to vote in such area. Essentially, the function of these examiners is to speed up registration. Their listing of voters will continue until the Director of the Census determines that over 50 % of the non-whites of voting age are registered, and the three-judge court decides that all voters have been listed properly and that there are no reasonable grounds to believe that voting discrimination will recur, or until the Attorney General so notifies the Civil Service Commission (§ 13).

¹⁸⁶ 23 Cong. Q. 586 (1965).

Section 7 provides that each examiner shall list applicants whom he finds "to have the qualifications prescribed by State law not inconsistent with the Constitution and laws of the United States", apart from any "test or device", pursuant to instructions issued by the Civil Service Commission after consultation with the Attorney General. Each applicant must state that he is not registered to vote and the Attorney General may require further allegations, including a statement that within ninety days of his application he has been denied under colour of law the opportunity to register and vote or has been found not qualified to vote. If a voter's name is sent to the appropriate election officials at least 45 days prior to a Federal election, he may vote in it unless his name has been removed through a difficult challenge procedure (see § 8).

The most important change in the bill submitted to the Senate concerns a prohibition against poll taxes for State and local elections. (The Twenty-Fourth Amendment to the Federal Constitution bars poll taxes for Federal elections.) The original bill contained no such prohibition, providing only that payment of the poll tax for the current year allowed a voter to vote, even if the tender was not adequate or timely under State law. On May 19, 1965, the Senate approved 69-20 an amendment now (§ 9) containing a declaration by Congress that poll taxes were being used "in certain States" to deny or abridge the constitutional right of citizens to vote,¹⁸⁷ and permitting the Attorney General to sue in the Federal District Courts in such States, with direct appeal to the Supreme Court, for a declaratory judgment or an injunction against the poll tax on the ground that its purpose or effect is to deny or abridge the right to vote. The provision allowing a voter to pay poll taxes for the current year has been retained for the period in which the suit is pending and in the event a State's poll tax is upheld (§ 9). A group of liberal Senators had sought an amendment prohibiting the collection of a poll tax as a condition to voting in any election. The Attorney General indicated that such a provision might be unconstitutional and, in spite of a strenuous effort by those Senators, the Senate voted 49-45 against it in early May.^{187a}

Another major addition concerns literacy test requirements. A number of States with a sizable number of Spanish-speaking Puerto Ricans - New York City has about 400,000 - all of whom are American citizens when they are born and do not have to be literate in English to obtain citizenship, require that voters pass a literacy test in English or prove that they went through sixth or, in some

¹⁸⁷ *New York Times*, May 20, 1965, p. 1.

^{187a} The Act does not prohibit the requirement of a poll tax outright, but declares it to be unconstitutional when used to abridge the right to vote. Its Constitutionality in specific areas will be tested in proceedings instituted by the Attorney-General.

States, eighth grade in an English-speaking school. Section 4(e), passed 48-19 by the Senate on May 20, 1965,¹⁸⁸ would allow any voter who was educated through the sixth grade, in any State or territory, Washington, D.C. or the Commonwealth of Puerto Rico, regardless of the predominant language spoken in the school, to vote in a Federal, State or local election so long as the voter complies with all other voting requirements of the State (which in some States would mean education through the eighth grade). The bill as passed by the House of Representatives does not contain this provision.

The term "vote" or "voting" has been broadly defined to include primaries, special elections and referendums as well as general elections (§ 13(c)(1)).

Criminal sanctions are provided under Sections 12 and 14 of the proposed Act for anyone: depriving or attempting to deprive any person of any rights secured by the Act; failing or refusing to permit a listed person to vote or to count his vote; threatening, intimidating, coercing or attempting or conspiring to do those things; in a designated State or subdivision, destroying or changing paper ballots or machine totals within a year of the election; committing civil or criminal contempts; or making false statements to examiners.

The Attorney General may sue to enjoin such acts or threats, and to direct election officials to honour listing (§ 12). If this is not done and is reported promptly, the United States Attorney for the judicial district may obtain an injunction against certification of the election results until the missing ballots are cast or counted, and included in the totals (§ 12).

It seems reasonably clear that all aspects of the proposed Act would be held constitutional by the courts.¹⁸⁹

(o) Conclusion

As observed earlier in the article, there is now in progress in the United States a dramatic and wide-spread struggle to achieve more fully the democratic ideal, expressed in 1776 in the American Declaration of Independence, of the equality of all men as to fundamental human rights. A more recent expression of this ideal was set forth in The Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on December 10, 1948.

This present struggle, basically, is concerned with the civil rights of American Negroes. It is centred, primarily, in some of the Southern States, where there still linger prejudices and problems developed out of the institution of slavery, which was abolished a

¹⁸⁸ *New York Times*, May 21, 1965, p. 1.

¹⁸⁹ See "Proposed Federal Legislation on Voting Rights", a report by the Committee on Federal Legislation and the Committee on the Bill of Rights of the Association of the Bar of the City of New York, in *The Record*, Vol. 20, No. 5 (May 1965), 310-20.

century ago, and out of the heavy concentration of Negro population there – though its general objective is to eliminate throughout the United States any deprivation of civil rights that may exist anywhere in respect of any persons because of discriminations on account of race, colour, religion, national origin and sex.

This movement against discriminatory practices has had the cooperation and support of a great majority of the people and governments of the 50 United States. It, also, has been greatly aided and expedited in recent years by the executive, legislative and judicial branches of the Federal government – by the Executive branch through proposals to Congress for various Federal Civil Rights Acts and through the use of the offices of the Attorney General and the Department of Justice and, on several occasions, of Federal troops, to assure justice in legal proceedings and the enforcement of judicial decrees; by the Legislative branch through the enactment of various Civil Rights Acts directed against discriminatory practices and laws and providing more effective enforcement procedures; by the Judicial branch, especially the United States Supreme Court, through many landmark and far-reaching decisions in civil rights cases.

But, as President Johnson said on March 15, 1965 in his address to a joint session of Congress in proposing the "Voting Rights Act of 1965":

The real hero of this struggle is the American Negro. His actions and protests – his courage to risk safety, and even to risk his life – have awakened the conscience of this Nation. His demonstrations have been designed to call attention to injustice, designed to provoke change, designed to stir reform. He has called upon us to make good the promise of America. And who among us can say that we would have made the same progress were it not for his persistent bravery and his faith in American democracy?

Already, as a result of this continuing struggle the civil rights situation, especially in the Southern States, is undergoing radical and far-reaching changes. These changes are being brought about through processes of democracy and with the necessary checks and balances of the Federal system of government. This democratic process permits freedom of expression by the minority groups by various means, such as oral and written protests, petitions, assemblies, marches, picketing and other demonstrations and by law suits to contest the legality and constitutionality of existing discriminatory laws and practices. Such law suits are processed through courts maintaining an independent judiciary and with the assistance of private and government attorneys.

Significantly, this struggle, unlike the struggle over slavery, is being waged by peaceful means and not by force of arms. While some of the demonstrations in support of, and in opposition to, the

position of the negroes have been marked by excesses, which have violated laws and personal and private rights of others and have provoked forceful arrests and incidents of violence, in the main the changes which are taking place in the civil rights field, as a result of this struggle, are being effectuated by a rule of law and not by a rule of force. The object of this struggle is to achieve the desired ends by establishing a legal framework by which discrimination will be ended and freedom and equality will be guaranteed by enforceable law to all men and women, irrespective of such criteria as race, colour and religion. The capacity of the law to change and affect race relations and to further human rights is again being demonstrated. But law, in itself, is not enough – it must be implemented by changes in the hearts and minds of people and by the uprooting of age-old prejudices.

There are few, if any, peoples or nations in the world which are free from prejudices and discriminations based on race, colour, religions, national origin or sex or on political or other opinions, property, birth or other status.

The United States is a nation of people of many races, colours, national origins, religions and opinions. Its problems in this field are complex. But it was founded on the ideal that all men are created equal and throughout its history it has ever been striving to achieve that ideal. It has done so with marked success. It has been in the forefront of the world struggle to the same end. Other nations, instead of criticizing the United States in the present struggle, might well adopt a sympathetic understanding of the problems involved in light of the historical and sociological factors that have given rise to the situation. They might, also, seek instead to solve comparable problems existing in their own countries.

This article was started with a quotation from the American Declaration of Independance. It is ended with a quotation from The Universal Declaration of Human Rights of the United Nations:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (Art. 1)

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social-origin, property, birth or other status. (Art. 2)

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. (Art. 7)

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OUTLINE OF MODERN SOVIET CRIMINAL LAW*

SUMMARY

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1. CRIMINAL LAW IN THE PRE-COMMUNIST PERIOD

Soviet jurisprudence justifies the class nature of criminal law by invoking as a principle the Marxist concept of law, in which the law, like all other superstructural phenomena, is determined (both as to form and as to content) by the economic basis of society. In particular, Soviet criminal law is of a class character inasmuch as it constitutes a section of that socialist law which springs from the

* For a more thorough discussion of the new Soviet criminal legislation, brought up to date in 1963, cf. T. Napolitano, *Il nuovo codice penale sovietico*, published by Giuffrè Milan.

dictatorship of the proletariat, expressly constituted to defend the vital interests of the working class and all workers.¹

(a) Continuing Nature of Criminal Law

Even today, when Soviet society considers itself to have reached a fairly high degree of socio-economic maturity, criminal law retains (in the opinion of one of the most authoritative Soviet jurists) its class character; but as the dictatorship of the proletariat is transformed into a whole people's State, so also criminal law is no longer the expression of domination by any single class but reflects the will and the interests of all Soviet citizens.² This means that the criminal law, like the State itself, must be considered to be of a class character in another sense: namely, in the sense and to the extent that the class structure of Soviet society has changed and is now free of antagonistic conflicts as a result of the elimination of opposing classes.

It is obvious that this change in the original class character of criminal law has considerable repercussions on its concepts, theories and aims, all of which the science of criminal law must view in their new essential nature. In fact, the notions of criminal conduct, punishment, moral rules, law, coercion by the State, social influence, etc., take on a different content because they must correspond to the particular objectives which the State has set itself in the last phase of its development. These are the notions which have inspired the new institutions, expressly created by the legislature for a society which is presumed to have acquired by this time a high degree of socialistic consciousness. In order, therefore, to understand the "Principles" on which the new Criminal Code of the Russian Soviet Federated Socialist Republic (RSFSR) is based (it came into force on January 1, 1961), and the "innovation" which it contains with

¹ It is of no little interest to note that more recent works by Soviet authors do not come to grips with the problem of the class nature of the new criminal law. The first manual for law faculties, which reached Italy while the above-mentioned book was in the press, merely indicates that Soviet criminal law protects the interests of socialist society, the State and citizens from socially dangerous acts and in particular from "dangerous acts by agents of the imperialistic camp" (p. 3). In the chapter devoted to "The Notion of Crime", the manual affirms laconically, without further explanation, that "crimes and punishment, and hence also criminal law, are class and historical phenomena" (p. 61). The adjunction of the term "historical" is apparently intended to stress the class origin of the entire socialistic law, which came into being as "an instrument of the socialistic state and the dictatorship of the working class" (p. 3). Cf. V. D. Men'shaghin, N. D. Durmanov and others, *Soviet Criminal Law, General Part*, Publishing House of Legal Literature, Moscow, 1962, published in Russian.

² A. Piontovski, *The Doctrine of Crime in Soviet Criminal Law* (Institute of Law, Moscow, 1961), p. 25.

reference to the 1926 code, it is necessary to study it in the light of the advance of Soviet society into the new pre-communist era.

(b) Features of the Third Soviet Criminal Code

"Soviet codes lay no claim to everlasting validity" (LENIN). On the contrary, one might say that they are born under the sign of provisionality and that their entry into force marks the beginning of their obsolescence. In little more than thirty years, Soviet Russia has had three different criminal codes (1922, 1926, 1960). Needless to say, the causes of these frequent recastings of legislation will not be related in this article to the "historical relativity" of criminal offences, which change according to time and place. From the viewpoint of criminal law, as in all other branches, these changes should be related to the very basis of Soviet Law, which affirms that its own positive determinations are temporary in relation to the particular problems encountered in each historical period.³

The third Criminal Code of the RSFSR, embodying the Principles already stated in 1958, came out of the special climate created at the XXth Congress by the unexpected denunciation of the errors committed and the harm done by the Stalin personality cult. The ferments of freedom, too long compressed, were rising in the country and the Party and Government solemnly resolved to re-establish legality in such a way as to prevent a repetition of this degeneration for another twenty years. The regime launched the new Party line through far-reaching reforms in economic and political institutions, declaring that it was time, after two decades of Stalinism, for socialist democracy to take up the thread of its development "following the Leninist principle of wider participation by the people in State administration."⁴

From its very nature, it is Soviet criminal law that registers most directly and immediately the changing doctrinal objectives of society and shapes the development process of the State. The new Criminal Code is clearly intended not only to reflect the new social reality but to underline the break between the new principles and formulas and those of the recent past and to some extent the progress that this represents. It goes even beyond this objective, since it not only brings principles and positive law into harmony with social

³ "The influence of Law on the Communist Education of Workers," Editorial in *Sovetskaya Yustitsia*, No. 21, November 1962.

⁴ "The Stalin personality cult and the errors committed in the past have slowed down the development of Soviet society and impeded its gradual transformation from a dictatorship State into a State of the people, although the economic and social premises were ripe for the change." See A. G. Lashin, "The Socialist All-People State," in *Vestnik Moskovskovo Universiteta*, No. 1, 1961.

reality but anticipates the process of social transformation and sets up rules to regulate relationships of cohabitation (Communist ones) that have not yet become part of the people's consciousness.

Seen in the light of the immediate "coming" of a Soviet society, the Criminal Code of the RSFSR which came into force on January 1, 1961, not only makes room for the principle of legality, with all its consequences, but considerably narrows, as from now, the scope of State coercion by reducing to the administrative level a whole series of offences previously classified as criminal; in addition to criminal responsibility it establishes other levels of responsibility called "social"; it introduces special "measures of social influence" applied by the collectives and social organizations; in order to prevent the law being applied in too formalistic a manner, it extends judges' powers to include permitting the court to go below the minimum penalties contemplated by the law or even to impose no punishment in view of the new evaluation as nil or negligible of the danger to society represented by the act or its author.

All the features of the new criminal code are pervaded by the general principle of lighter penalties⁵ for offences where the degree of social danger is not high. The maximum sentence of detention is lowered from 25 to 15 years; the age of criminal liability is raised from 14 (and for some offences 12) to 16 years; criminal liability is made personal; offences are strictly delimited by law; the death penalty is contemplated as an alternative to detention; forced residence may not exceed 5 years; and even for crimes against the State it is contemplated that an agent who denounces his own contacts with foreign intelligence services early enough may not be liable to punishment [Sect. 64 (b)].

The legal literature of the years 1958-1961 explains the tendency of the lawmakers to mitigate penalties and the punitive effects of a sentence (legal rehabilitation), by the high degree of maturity "undoubtedly reached in social consciousness, since thanks to it Soviet society has entered the more progressive pre-communist period". On the basis of this fundamental consideration, there were, as late as 1958, some jurists who proposed a new formulation of the *purpose* of penalties, when the Principles were being discussed (Principles, Art. 20). They felt that the lawmakers' choice of terms—"the penalty is not punishment alone"—placed undue emphasis on the retributive nature of penalties and too little on their now predominant purpose of re-education and making amends.

⁵ The provisional nature of Soviet codes, mentioned at the beginning of this article, is shown by the fact that penalties for many offences, even those not particularly dangerous, have been made more severe by the RSFSR Act dated July 25, 1962, less than two years after the publication of the new Criminal Code.

The arguments in support of the change of wording⁶ seem to be valid in principle and confirm the opinion as to the inopportuneness of the Soviet community's passing into a truly communist phase as urged during the discussion.

In fact, in the new Soviet penal law the purpose of applying a penalty is as much to punish as to make reparation. But the general stand taken in Soviet penal doctrine makes it imperative that the relationship between these two basic objectives of a penalty should change so as to remain in harmony with the evolutionary process towards communism. The educative function of punishment is gradually developed and consolidated as greater social consciousness leads to the limiting and restricting of its retributive function. In the present period of evolution towards communism – which prepared the masses for self-government through the gradual withering away of the State as an apparatus of coercion – the logical course would therefore appear to be to make the educative purpose of punishment predominate over the purely retributive.

(c) The Transformation of Criminal Law

The path along which criminal law should evolve is indicated, in the "Principles" and institutions, by the experimental forms of communist self-government which State authority indicates today as being indispensable for the gradual withering away of the State itself and of law in the highest phase of communism.

The perfecting of proletarian democracy, which follows on the transformation of the socialist State entity, must be achieved through the participation of all citizens, without exception, in all aspects of the administration of the country, including that of justice. This long-standing directive given by Lenin finds its concrete application from 1959 onwards in the strengthening of the "social organizations" and the transfer to them of certain functions of the State, for example, responsibility for public safety.⁷ Moreover, the practice of "comradely courts", abolished by Stalin as infringing upon the authority of the State, has been reinstated all over the country. Lastly, workers' collectives and social organizations may intervene in criminal pro-

⁶ The text proposed was as follows: "The purpose of penalties is to help convicted persons towards improvement and reeducation . . . and also to punish them." In this connection, cf. V. B. Utievski, "The Problem of Penalties in Criminal Law" in *Sotsialisticheskaya Zakonnost*, July 1958, No. 7.

⁷ Kruschchev, speaking at the XIIIth Congress of the Komsomol, said: "We say that under Communism the State withers away. What organs will be preserved? The social organs, naturally! The social organizations will be preserved, and through them society will regulate its own relationships . . ." From 1959 onwards, the maintenance of public law and order has been entrusted to a large extent to voluntary squads (*druzhinniki*).

ceedings in order to ask for exoneration from liability or mitigation of sentence.

It is easy to see how these reforms, which prepare the way for communist self-government, will influence the development of criminal law in the present period. The sphere in which legal rules are applied in connection with the use by the State of coercive measures is shrinking noticeably, whilst the scope of measures intended to have some "social influence" on the community is increased. In other words, the trend is towards legal rules based on "persuasion" rather than coercion. As the influence of ideological values increases, that is to say, as the norms of communist social living penetrate the consciousness of the community, so, in the opinion of modern Soviet criminologists, there is a greater possibility of relaxing measures of coercion, that is, of not having fixed sentences. As will be shown, the new Code adheres to these basic lines of penal policy. It introduces a trend away from the notion of minimum punishments; its provisions show a definite inclination to leniency, but paternalistic leniency, as urged by the social organizations, raises alarm and protests in high places.

The new forms of criminal law, which find expression in the Code in the two tendencies towards reforming criminals without punishing them and the physical elimination of criminals, are directed towards the withering away of the State itself and its laws under communism. When there is no more crime, criminal law too will disappear, and the process of extinction is now considered to have reached an advanced stage, as is shown by the new criminal law in its principles, norms and institutions. But, as political writers warn us, we may not delude ourselves into thinking that we can arrive by stages at the final disappearance of anti-social phenomena. The question of the withering away of the State and the law must be considered dialectically as a problem of the dissolution of the Socialist state entity into self-government by the workers.

Soviet law, of which the most interesting branch is perhaps criminal law, is closely related to what happens to the State. The problem of doing away with criminal law is therefore identical with the problem of transforming the State and becomes part of the general process of changing law into a system for the non-coercive regulation of communist relationships.

Another point to be borne in mind is that in the course of this process coercion exercised by the State changes character in relation not only to criminal law but also to all branches of Soviet law. For example, trade unions are already empowered to take binding decisions in labour disputes. Controversies in the *kolkhozes* are settled by rural administrative bodies without recourse to the ordinary courts. The powers of the comrades' courts are extended from labour

relations to family relations and even to minor criminal offences.⁸

In conclusion, the process of the withering away of the State and the law will certainly take a long time – an entire historical epoch, during which legal science in all its branches will be fulfilling the task of transforming law into a non-coercive system of rules for communist living. Criminal law will not cease to exist; it too will be transmuted into a system of non-coercive rules, sufficient, in a communist society, to safeguard living in society in all its aspects.⁹

2. THE TWO TRENDS OF THE “CRIMINAL CODE OF COMMUNISM”

If our understanding of the validity and cohesiveness of the new Soviet system of penal law, as defined in the Code we are now dealing with, is to be truly objective we must keep in view the final aim of that system: to eliminate delinquency from the communist scene.

(a) The disappearance of Crime and the Necessary Means of Control

Soviet authors all agree that this can never be achieved in a capitalistic society. In the eyes of Marxist sociologists, the primary cause of crime lies in the exploitation of the working classes and hence their needy condition in bourgeois societies. This is why bourgeois jurists consider crime as a lasting phenomenon, “because in their view the capitalistic structure is a permanent one and the idea of doing away with crime therefore appears utopian”.¹⁰ In a socialistic society, on the other hand, eliminating exploitation by

⁸ S. S. Alexeiev, “Development Trends of Soviet Law in the Current Phase of Building Communism,” in *Sovetskoe Gosudarstvo i Pravo*, September 1960, No. 9, pp. 10–20. The author sees in the gradual takeover of State functions by the social organizations and their increasing control over State administration of justice, a positive sign of the progress of Soviet society towards social self-government and hence a step forward on the road towards the withering away of the State and the Law.

⁹ Authors have not been lacking to propound the theory that the very science of law will gradually become extinct. The answer to this is that not only does jurisprudence not become extinct but the sphere of its duties and responsibilities broadens as a result of the transformation of the law within the framework of socialist legality. If the law becomes a system of rules intended to facilitate the achievement of communist community life, then the science of law too is gradually transformed into “that particular new branch of moral and social sciences whose purpose it is to study the forms and content of social self-government”. Cf. S. S. Alexeiev, “Development Trends of Soviet Legal Science in the Current Phase of Building Communism,” in *Izvestia Vysshikhachebaykh zavedenii* Leningrad, No. 2, 1962, p. 11.

¹⁰ A. A. Piontkovski, “Strengthening Social Organizations in the Endeavour to Control Delinquency and Some Problems of the Theory of Soviet Criminal Law,” in *Sovetskoe Gosudarstvo i Pravo*, April 1941, No. 4.

abolishing private ownership of the means of production is the basic premise for the gradual disappearance of crime.

The process of eliminating crime is by its very nature gradual, as is the process of the withering away of the State and the Law.

As early as 1910, one of the aims set out in the Party Programme was to extend the exercise of judicial functions to all citizens, with a view to making it possible some day to replace the system of punishment by one of educational measures (LENIN). This humanitarian intention, however, soon proved impossible to realize under the extremely precarious economic and social conditions of the time. Indeed, the opposition to the theories of Ferrian positivism – which socialist penal theory seemed to accept at first – led the lawmakers to adopt a very different position from 1935 onwards: measures for the repression of crime were strengthened, so-called “ordinary” penalties were made applicable to minors¹¹ and the maximum prison sentence was raised to 25 years.¹²

In 1961 the new Party Programme returned to Lenin’s original proposal. Thanks to the satisfactory level of material well-being and the high cultural level achieved through socialism, Soviet society had reached a point where it could envisage “the elimination of penal measures in favour of measures of social influence and education”. As was only logical, the new legislation laid down educational measures for minors and reduced the maximum sentence of imprisonment to 15 years.

The current programme does not confine itself to defining as a goal the disappearance of crime in the highly developed phase of communism. It also indicates the measures of control considered to be most appropriate to the present day. Measures aimed at the final elimination of crime must be so directed that (a) those who have strayed from the path of work may return to socially useful activity; (b) those who commit crimes dangerous to society, violate the rules or socialist community life or refuse to conform to the norm of an honest working life shall be visited with the severest penal sanctions.¹³

The indications given in the Programme – the drafting of which had begun in 1958 – provide Soviet criminal lawyers with abundant material for study; it should be noted that they have always taken great care to refer to the most authoritative political sources in order to ensure the cohesiveness and validity of the new penal system within the framework of the Marxist doctrine of social progress.

The most important task of those responsible today for penal policy, which is an integral part of Soviet social policy, is the choice

¹¹ Act dated April 7, 1935.

¹² Act dated October 2, 1937.

¹³ English edition: *The Road to Communism, Documents of the 22nd Congress of the CPSU*, Moscow, pp. 553-552.

of means to keep down crime in the pre-communist period. They will be guided by the two fundamental requirements of the moment, about which there can be absolutely no question: firstly, the law-makers' obligation to bear in mind the high degree of maturity that collective social consciousness is presumed to have reached and, secondly, the need for hastening the process of eliminating the most serious forms of delinquency as Soviet society evolves towards communism.

These two requirements create a situation which is manifestly contradictory. In a society that has reached so high a degree of political and social maturity, a system of punishment in the traditional sense must be considered to have outlasted its purpose. On the other hand, the undeniable survival of crime requires extremely severe intervention by the State, since in this pre-communist period society is near its goal of self-government, which cannot be achieved until delinquency has disappeared.

Soviet jurisprudence endeavours to reconcile these requirements in practice through recourse to the Leninist principle of "combining coercive measures with persuasion", which is felt to be valid even in the present phase.

In a society which is on the threshold of communism, the most dangerous outbreaks of crime remain limited, and may be attributed to sporadic manifestations on the part of individuals incapable of adjusting to a socialist way of life. On the other hand, less serious violations of the law (which are, after all, common to all types of social organization) appear, in a society based like the socialist one on social consciousness, to be not so much manifestations of criminality as signs of a still imperfect adjustment of the social conscience to the norms of socialist community living. The methods used to eliminate these crimes should therefore be different, not only from those required to deal with graver crimes, but also from those now applied to the same crimes in a society where conditions of capitalist exploitation still prevail.

On the basis of these arguments, which were very fully discussed in connexion with the drafting of the Principles, the Criminal Code resolves the contradiction as follows: while permitting the broadest application of measures of social influence in the case of first offenders who are only moderately dangerous to society, it provides for the most severe penal measures, even the death penalty, in the case of particularly dangerous recidivists guilty of serious crimes. From this principle spring the two main trends easily discernable in the current Criminal Code.

The first trend, which bears the stamp of *socialist humanism*, is aimed at rehabilitating offenders without using penal sanctions. The Programme states that immediate rehabilitation is possible in a society like the Soviet one where the degree of social consciousness

is high. To enable "all transgressors of the law to be brought back into the groove of socially useful activity", the lawmakers have made provision for *measures of social influence*, i.e., structures and measures aimed at influencing the offender more by the threat of a punishment avoidable under certain circumstances than by the inescapable suffering effected by a punishment.

The second, based on the notion that as society progresses towards communist self-government delinquents must be increasingly severely eliminated, is expressed through the maximum strengthening of penalties for particularly dangerous recidivists and, in general, those guilty of serious crimes (*penal measures to eliminate crime*).

(b) The Trend Towards Reforming Criminals without Punishment

The humanistic trend – initially to the fore in the new criminal codes of all the Federated Republics – met with the approval of all Soviet circles, the more so as it put an end to the practice of arbitrary political liquidations on the pretext of applying the criminal law more severely.¹⁴ Fairly soon, however, it became apparent that this humane tendency in the new Code was applied too enthusiastically by the People's Courts, with the dual result that absurdly favourable conditions for delinquents were created prior to the communist period and the authority of the State was weakened on the very eve of the expected end of crime.

Even today, jurists in the USSR, deploring the extreme clemency shown by the people in matters of justice, point out the following anomalies: the abnormal working of the new machinery for bringing acts before the comradely courts and the decision-making process in commissions for minors; incorrect application by the courts of the rules relating to exoneration from guilt and relaxation of punishments, indiscriminate suspension of sentences, etc.; the impossibility, for the Public Prosecutor, of supervising the uniform application of the law throughout the national territory; the indifferent attitude of those responsible for investigation towards the problem of discovering all the ramifications of an offence after the first conciliatory intervention of the social organizations.¹⁵

The criticism of Soviet jurisprudence is not, of course, directed to its principles but to the application of criminal law by the judicial and social organs now responsible for the administration of justice and for police functions. It deals mainly with the devolution of criminal procedure upon the comradely courts and denounces as clearly

¹⁴ Re the law of *automatic aggravation* of penal repressive measures see p. 66.

¹⁵ Even Khrushchev, while speaking highly at the XXIst Congress of the tasks entrusted to social organizations, felt it appropriate to emphasize that the passage of certain functions of the *social entity* to those organizations in no way implies the "weakening" of the State. This view is repeated by nearly all Soviet authors.

erroneous and dangerous the practice of substituting measures of social influence for effective penalties even in those cases in which only a penal sanction would fulfil what must be the purpose of any penal system: to safeguard the conditions of social cohabitation.

In practice, what writers deplore is that the People's Courts do not always understand the substantial difference between penal measures and those known as measures of social influence. A penalty, however light, is always in the nature of a punishment and affirms the authority of the State. Measures of social influence, on the other hand, since they are based on the moral evaluation of a criminal offence, are intended solely to awaken in the offender a sense of duty and responsibility, on the assumption that this will be sufficient to make him feel the necessity of amending his behaviour. They can therefore not be applied indiscriminately. In order to accomplish its purpose of dissuading the offender from committing further offences, the social influence measure "must reach his conscience, be understood in its full moral value and provide him with a governing principle for his future conduct". Hence it is clear that such measures can be taken only in respect of persons subjectively capable of turning them to good account.

(c) Critical Remarks

The practical drawbacks to this humane trend were recently made the object of a study by a body set up by the Ministry of Justice and the Supreme Court of the RSFSR, which gave the following explanation: "The courts, the Procuracy and the militia all interpret the rules relating to the passing of certain attributions of the State to the social organizations as an invitation *immediately* to apply measures of social influence in place of criminal sanctions, even to crimes very dangerous to society." The comment of the authoritative Review is extremely lucid and unequivocal: "This is an error . . . *This is anticipating the future* . . . the wholesale replacement of penalties by measures of social influence and education signifies that a step is taken today which the Party considers possible only at the end of our road, that is to say, after the final disappearance of the more dangerous phenomena of crime."¹⁶

The view taken in responsible judicial circles regarding the choice of methods for controlling delinquency in the present period is so clearly correct that it would be superfluous to go into further detail. The substitution of measures of social influence for penalties does appear to be premature in a society that is still as imperfectly constituted as is Soviet society and where, indeed, the continuing extension of the death penalty to more and more crimes strongly

¹⁶ "The Unyielding Struggle against Particularly Dangerous Crimes," in *Sovetskaya Yustitsia*, May 1962, p. 12 (italics added).

belies the affirmation that crime in general is decreasing.

But the phenomenon of the lenient, or paternalistic, attitude of the People's Courts seems to go beyond the limits of interpreting the criminal law wrongly or over-generously. Rather, it would appear to derive directly from the principles and institutions, or structures, on which the new criminal code is based, this same code being tailored to the needs of a society with a high degree of social and economic maturity which is presumed only to bolster up the claim that society has reached the final phase of communism. For we should not lose sight of the fact that the People's Courts are authorized to adopt the humanistic interpretation complained of according not only to positive law but also to their socialist legal consciousness. The 1960 Code is called the Criminal Code of Communism because it is the Code that inaugurates the new historical era, the Code that directly contributes to workers' self-government and hence must of necessity anticipate, in certain aspects, the Communist solution to the problem of crime.

The first application, so disconcertingly lenient, of the new laws, and the immediately apparent need to strengthen penalties by decrees of the Executive to broaden the scope of the death penalty and define further categories of criminal offences, all reveal the dramatic gap between the Code of Communism, which envisaged the prospect of workers' self-government, and the much less lofty reality of a socialist society still struggling to free itself from want and divided by class conflicts as a result of lasting conditions of economic and social inequality.

The 1960 Code – on which there is still no complete commentary and until 1963 no up-to-date text – has been discussed by collective judicial bodies and by representatives of the Procurator's office and the Ministry of Justice, in an endeavour to "combine" diametrically opposed principles, or rather, to correct when interpreting them those legal provisions which are premature. But the gap between precept and reality is the greatest obstacle to dialectical conciliation of the two streams of Soviet criminal policy today. The insurmountable contradiction resides in the fact that, although the formulations of the new Code are provisional,¹⁷ its structures are based on a

¹⁷ It is appropriate to note here that a request has already been made to the effect that the *Principles* of 1958 be revised; as is well known, these Principles form the general part common to all Soviet Criminal Codes. The enactment of Federal laws to modify the Principles in the light of subsequent social reforms is urged. For example, the participation of social organizations in the fight against crime is not specifically contemplated in the 1958 Principles because it was the XX1st Congress of the Party, in 1950, that decided that certain functions of the State should pass to the social organizations. The 1960 Criminal Code, based on the 1958 Principles, could therefore not exceed the limits fixed by the Principles then in force. Cf. Piontkovskii, "The Strengthening of the Social Organizations in the Endeavour to Control Delinquency and Some Problems of the Theory of Soviet Criminal Law," *op. cit.*, p. 70.

specific premise that must be realized in full but has for the moment no counterpart in reality; the assumption of a society freed from want, so advanced in social economic progress and social consciousness as not to require, in the majority of cases, any punitive action by the State to safeguard socialistic cohabitation.

(d) The Trend Towards Punishment as a Means of Eliminating Crime

As we have already mentioned, the second trend, that of increasingly severe penalties for crimes especially dangerous to society, fulfils the other requirement set forth in the Programme: the more rapid elimination of crime with a view to achieving the change-over to workers' self-government.

The simultaneous existence of two guiding lines in criminal policy – the humanistic one and the trend towards penalties designed to eliminate crime – is today proposed by Soviet authors as a dialectical correction of the so-called law of the *automatic aggravation of class conflict*, and hence of *penal repression*, towards the end of the transition period.

This theory of automatic aggravation was propounded by Stalin as a Party doctrine and was used by Vyshinsky at the time of the Moscow trials and ideological purges as a pretext for the utterly indiscriminate elimination of alleged class enemies. Its political basis was described as follows: in the advanced phase of building towards communism, the bourgeoisie, on the point of succumbing, has a last spasm of resistance which justifies self-defence on the part of the State through penal repression of the utmost rigour.¹⁸ After the change of political line at the XXth Congress, it was easy to demonstrate the falsity of the law of automatic aggravation: towards the end of the transition period, i.e. when the structures of the State have become almost entirely socialist, the forces of the surviving bourgeoisie are weaker, so that it becomes superfluous, and indeed vexatary, to increase the rigour of repressive measures.

The existence at this time of two different trends which characterize two aspects of the social reality and distinguish the

¹⁸ "Stalin saw the fight against crime entirely as a series of repressive penal measures... Following his directives, exceptional legislation was passed..., which made it possible to dishonour and liquidate loyal Soviet citizens devoted to the people and the Party... On July 10, 1934, a special Commission was set up within the People's Commissariat for the Interior, its activities being directly linked with the practice of unjustified repressions". Cf. "The Unyielding Struggle against Particularly Dangerous Crimes," in *Sovetskaya Yustitsia*, May 1962, No. 9, p. 11. Further, in connection with the theory of automatic aggravation, cf. V. F. Kirichenko, "Problems of Soviet Criminal Law Viewed in the Light of the Decisions taken at the XXIIInd Congress of the CPSU," in *Sovetskoe Gosudarstvo i Pravo*, No. 7, July 1962.

modalities of State intervention can be said, if we remember the wholly repressive nature of criminal policy in Stalin's time, to constitute a definite step forward on the road to perfecting methods of controlling delinquency. But it is of no little interest that the second trend is shown clearly only *after* the entry into force of the RSFSR Criminal Code.

The publication of the new Criminal Code, in the October 1960 edition, was hailed as the most lofty expression of socialist humanism, not only because it at last admitted the principle of strict legality but because of the leniency, generally speaking, of the penalties indicated and the reduction of the number of crimes invoking the death penalty. But the satisfaction of Soviet jurists was to be brief. The second trend, towards penalties to stamp out the more serious manifestations of criminality, began to show itself as early as May 5, 1961, barely four months after the new Code came into force. From that time on, a series of Federal laws were enacted to enlarge the application of the death penalty and introduce amendments and insertions that substantially altered the original character of the new Soviet Penal Code.

The reinforcement of penal repression manifested itself in the interval between May 5, 1961, and July 25, 1962. The more severe penalties give expression to what we have called the second trend, penalties aiming to eliminate crime, with the following practical consequences:

- the death penalty is made applicable to speculation in currency, homicide (when the victim is a soldier or a *druzhinnik* – voluntary policeman), physical violence, passive corruption and large-scale appropriation of State property,
- broad categories of offences may not be the subject of a conditional discharge;¹⁹
- penalties are aggravated for a whole series of offences,²⁰ while for other offences forced residence²¹ is added to the original penalty;
- new categories of offences are defined.²²

(e) Repercussions on the Criteria Determining Punishments

It is not without interest to note that, as soon as the trend towards eliminating crime by punishment had been defined in the amendments to the Code, a number of Soviets jurists enthusiastically

¹⁹ Cf. Sect. 53 P.C.

²⁰ The following Sections are amended: 87, 88, 96, 117, 158, 162, 169, 173, 174, 189, 190, 208, 224, 227.

²¹ Cf. Sects. 64, 65, 66, 68, 69, 70, 71, 77, 86, 103, 130, 131, 154, 167, 181, 192, 197, 209.

²² The new categories are inserted in the Code under the following new Sections 77¹, 88¹, 88², 93¹, 99¹,

hailed the strengthening of the State's authority, threatened by the humanistic tendency. Authors generally refer to the Programme ("as long as manifestations of delinquency exist, it will be necessary to take the severest repressive measures against those who commit crimes dangerous to society . . .") in order to justify their attitude and affirm that the people consider as just and necessary the criminal laws enacted after the Code came into force. "These laws permit our courts to punish unmercifully, even with the death sentence, not only murderers, but also thieves of social property, counterfeiters, speculators in currency and all those who commit dangerous offences while in penal establishments. Their severity gives them great influence over unreliable social elements, thus promoting the general prevention of dangerous crime."²³

Unfortunately, the strengthening of the second trend also brought about a too rigorous application of penalties in general.

The judicial authorities, zealous interpreters of the will of the political power, "went to the other extreme, refusing to suspend sentences and grant bail even in cases where the circumstances of the offence called for this step. The People's Courts, impressed by the authoritative exhortations to punish severely transgressors of the law, even referred to the *Ukase* dated May 4, 1961, (intended to combat the so-called phenomenon of parasitism), in order to threaten with deportation the mentally ill, disabled persons from the war or industry, even members of the Party, who were summarily sentenced as being idlers, with no serious intention of devoting themselves to stable, profitable work."²⁴

The criticism provoked nowadays by the sudden stiffening of penalties cannot be laid to the account of imperfections in the system which, in exhorting the People's judges to base their evaluation of the offence on the dictates of their socialist legal consciousness (Sect. 37), authorizes in practice the application of either lenient or severe penalties as indicated by the particular moment in history. It is instead attributed, for the most part, to the insufficient professional training of the judges, a situation which implies a cautious but

²³ V.I. Laputin, "The Programme of the CPSU and the Subsequent Strengthening of Socialist Legality and Public Order," in *Sovetskoe Gosudarstvo i Pravo*, November 1961, No. 11.

²⁴ A. Tsvetkov, "The Deviations Met With in the Struggle Against Parasitism Are not to be Tolerated," in *Sovetskaya Yustitsia*, February 1962, No. 3. "In October 1961 the militia of Leningrad deported a parasite aged 60 who had served for 34 years and was an invalid classed as second grade. . . Even pregnant women were deported, as in the case of Citizens S. and B., in their seventh month. . . Citizen Grigoriev N.I. is a Party Member . . . notwithstanding this, he was deported, still carrying his Party card, for four months."

specific denunciation of the inaptness of the elective system to provide a corpus of judges capable of carrying out the difficult task of administering justice under socialist conditions.²⁵

The increased rigour of crime repression and the introduction of new categories of offences after the Code had come into force are to be attributed to numerous and complex causes. In seeking the explanation for the second phenomenon we must certainly not neglect the lawmakers' concern not to overlook certain criminal actions that might escape punishment because of the rule that penalties shall be applied only to offences for which they are specifically provided. But in our opinion the fundamental reason for the new severity is that the "Criminal Code of Communism" was manifestly inadequate to safeguard social cohabitation in a society that still offered too fertile a ground for delinquency.

Nor can the increased penalties be justified by reference to sudden increase in crime. In spite of the lack of criminal court statistics, we know, thanks to the honest admission made by the Presiding Judge of the Supreme Courts of the USSR, that already during the years in which the Principles and the draft of the new Code were being discussed, extremely dangerous delinquency was gradually increasing, at least in certain areas.²⁶ But this essential datum was held in no account, since the Party had already decided to offer the shining example of a criminal Code based on principles of communism at the time of the first experiments. The corrections made so soon after the Code first came into force are a further proof that the body politic was aware of the fictitious nature of what the Code proclaimed – the passing of Soviet society into the communist phase.

²⁵ According to A. F. Gorkin, President of the Supreme Court of the USSR, the irregular working of the judicial system should be attributed *inter alia* to the fact that "due attention is not given to the selection and preparation of legal cadres". In fact, "not all judicial workers know how to apply correctly the principle of combining methods of coercion and persuasion. . . Many courts underestimate the share of the social organizations in the fight against crime; judicial activity is completely extraneous to the work of the collectives and the social organizations; bureaucratic methods are not eliminated, and there is little or no coordination between the lower and the higher courts."

²⁶ "In spite of the reduction of the number of sentences pronounced in 1961 as compared with those pronounced in 1958, recorded data on the number of criminal offenders prove that the success hoped for in the struggle against crime has not yet been reached. We cannot fail to note that up to 1961, in certain areas and localities, there was *an increase in the number of serious and dangerous criminal offences, against which the strictest forms of State coercion were found to be necessary*" (italics added). Cf. A. F. Gorkin, "The Tasks of Soviet Justice in the Present Circumstances," in *Sovetskoe Gosudarstvo i Pravo*, August 1962, No. 8, p. 4.

3. THE CAUSES OF CRIME

The process of eliminating crime is directly related to the necessarily elastic forms of criminal policy adopted by the Party and the Government as the State is gradually transformed into an organ reflecting the interests and the will of the entire national community.

(a) Need for Research

The political and social premises which, according to the Programme, must mature before crime disappears can be summed up in the following terms: a higher degree of material security (economic well-being) and a higher level of culture (education) for the entire Soviet people. It has been pointed out that, in the Stalinist period, the attempt to eradicate delinquency by imposing more severe penalties ended in failure precisely because the two objective conditions mentioned were lacking. In the pre-communist period, on the other hand, which presupposes the attainment of material well-being and a high level of social conscience. Soviet society is finally able to achieve its goal of eliminating crime, eventually substituting measures of social influence and re-education for punitive ones.²⁷

As we have already said, the law in all its branches is subjected to radical revision of concepts and institutions because it has ceased to be an instrument of power in the hands of a given class and is becoming a system of rules aimed at safeguarding not only the interests of the majority but, from now on, those of all citizens. But the law of the pre-communist period has a further basic peculiarity, which is that the translation of imperatives and prohibitions into practice – the implementation of the law – is of *direct* interest to all citizens, since it is becoming a function of the people as a whole.

Such is the background to the institutional modifications to which we have referred, whose cause and justification are to be found, as regards the field of criminal law, in the process, now in course, whereby the State hands over its tasks and responsibilities to the social organizations. In so doing the State furthers its own withering away and prepares “the people organized into a work community”, that is to say, the social organizations, to take its place. In respect of criminal offences and penalties, the social community is extending its sphere of influence to the repression and prevention of crime and preparing to take up the task of eliminating crime. In a further phase (that of true communism), it is the social organizations that will be responsible for carrying out the Programme and

²⁷ B. S. Nikiforov, “Some Questions of Criminal Law in an All-People’s State”, in *Sovetskoe Gosudarstvo i Pravo*, April 1963, No. 4, p. 60.

abolishing punitive measures in favour of educative ones and social influence.²⁸

Marxist sociology approaches the problem of eliminating crime with perfect optimism. In the opinion of Soviet jurists, the struggle against crime is not so much dependent upon the application of a penalty as upon the transformation of the institutions and the material and moral condition of society. This is why they insist upon the need for transforming the basis of the economy, thus raising the standard of living and social awareness of the masses, "failing which the transfer of the judicial functions of the State to the social community cannot be reinforced but must of necessity weaken the socialistic legal order." At the same time, Soviet doctrine observes that it is not possible to suppress delinquency unless its causes are first eliminated. Consequently, there is a need for preliminary study of the causes of delinquency under a socialist regime. Only by analysing such causes and carefully scrutinizing the conditions which favour the commission of criminal acts in a socialist regime can we discover the appropriate methods for eliminating them.

Investigation of the causes of crime has long been a theme stressed in Soviet treatises on penal law; an authoritative writer emphasizes its importance in the following terms: "We do not believe it would be wise to restrict the theory of criminal law solely to examination of the legal aspect of combating delinquency, or to require of a scientific discipline (criminology) that it study crime as a social phenomenon and means of preventing crime. The study of criminology, that is to say, of the causes of delinquency and the measures to be taken for the prevention of criminal offences, should in our opinion become an integral part of the science of Soviet criminal law."²⁹

The opinion thus expressed should surprise no one; it is in accordance with the postulates of the general theory of socialist law, based on the teaching of Engels. Like all social relationships, those referring to criminal law can be understood only through studying the material conditions of life in the relevant period and understanding their consequences.

²⁸ "It must not be thought that this substitution can be effected from one day to the next, with a mere signature to a *Ukase*." Like the passage from socialism to communism, the process of replacing penalties with social and educative measures will be a protracted one and will take place through the gradual attenuation of penalties, like that already seen in the new Criminal Code. "In fact, it would be absurd to expect that the death penalty and imprisonment could suddenly, one fine day, be replaced by mere admonitions and social censure." Cf. B. S. Nikiforov, *op. cit.*, p. 69.

²⁹ A. A. Piontkovskii, "The Importance of the Social Organizations in Combating Criminality and Some Problems of the Theory of Soviet Criminal Law," in *Sovetskoe Gosudarstvo i Pravo*, April 1961, No. 4.

To conclude, a preliminary study of the causes that induce men to commit crimes in a socialist society is indispensable if the phenomenon of delinquency is to be eliminated in the most effective way. Soviet criminology, upon which this task devolves, must refer to and coordinate the results of many other sciences. In this complex investigation, "a primary role, if not indeed the principal directive and organizational role, falls *not upon jurists* but upon men of science in general".³⁰

(b) The Marxist Theory of the Genesis of Crime

The causes of crime in Soviet society are generally attributed to the continuing influence of survivals from the past on social consciousness.

Even in the USSR, however, the general hypothesis of survivals from the past has begun to appear superficial and incomplete. If the main cause of crime is the exploitation of the masses (LENIN), and if crime still exists in the USSR in spite of the elimination of exploitation, it is obvious that an effort must be made to determine at least the circumstances and conditions which favour the persistence of the phenomenon.

Soviet criminology, in its most recent developments, denies that the future communist society can ever be described as "a multitude of angels, with rose-tinted wings, intent upon exchanging courtesies".³¹ The people who are now preparing to live under conditions of communism will always have different requirements, passions and sentiments, in spite of the high degree of social maturity they have achieved. And where there are different tastes and opinions there are inevitably conflicts, disagreement and interests at variance. Mature social consciousness does not consist in the absence of all passion but in the capacity to dominate passions and hence respect the dignity and the needs of others. Even in such an atmosphere, it would be absurd to deny the possibility of individual excesses.

The most authoritative writers observe that society is too complex an apparatus to be completely safe at all times from "excesses"

³⁰ Cf. Shliaposhnikov, *The Genesis of Criminal Law*, (Moscow, 1932), and B. S. Nikiforov, *op. cit.*, p. 61 (italics added). Marxism-Leninism, which is the general science of society, does not admit methodological pluralism; in other words, it denies that there are different methods of study peculiar to legal, economic, pedagogic and other sciences. The only method it recognizes as scientific is that of dialectically considering all human actions and phenomena in relation to their historical background. Such a method obviously hampers the independent development of the individual sciences; but in recent times Soviet legal science has shown signs of improving its backwardness by affirming that it is necessary to seek to determine the *specific* character of each discipline.

³¹ G. Sachazarov, "From the State to Communist Self-Government," in *Politics Self-Taught*, August 1960, No. 8, pp. 50-60.

committed by individuals. Even in a communist society there will be "excesses", born of the desire for luxuries, carelessness, presumptuousness, imprudence, attacks of anger, etc. But they will be only excesses: sporadic occurrences, departures from the norm.³² to repress which will no longer require intervention from the State but from the social organs only. And even these will disappear some day . . . but only when society has become a cohesive whole, permanently concerned with safeguarding public order.

In order to explain the persistence of a phenomenon – crime – of which it is claimed that the cause – exploitation – has been eliminated, the science of Soviet criminal law generally has recourse to two lines of argument: the theory of survivals from the past in the consciousness of the Soviet people and that of the still incomplete education of the masses to the communist way of living. Criminality, even taken as a mass phenomenon rather than an individual one, is recognized as still existing in Soviet society. But the specific affirmation is made that "the distinguishing feature of the new Soviet society is not delinquency but, on the contrary, a rapid increase in the people's social consciousness".

It cannot be denied that the opinions expressed up to the present time concerning the gradual extinction of crime in the USSR, and particularly concerning the causes of delinquency under conditions of capitalism and socialism, are fairly rudimentary and offer scope for criticism.

Under circumstances of fully achieved communism, so Marxist authors affirm, society witnesses the extinction of the causes of crime. The socialist economy has done away with the exploitation of man by man and eliminated unemployment; productive relations are based on solidarity and mutual co-operation among all social classes; class antagonism has disappeared; the well-being of the masses increases day by day. All this means that the well-spring of crime is drying up.³³

But there is in bourgeois societies an organic, unbreakable link between capitalism and crime. First of all, because capitalism means exploitation of the masses, need and want, which are the fundamental causes of the constant increase in professional crime. Secondly, be-

³² It was Lenin who defined as *excesses* the sporadic offences committed under conditions of communism. "With the elimination of exploitation, even excesses will gradually disappear. We cannot know when, or how long the process will take, but we know that they will cease. And when they cease, the State too will have ceased to exist." The quotation is reproduced in the chapter on "Causes of Delinquency in the USSR" of Piontkovski's work previously referred to, *Doctrine of Crime*, p. 91.

³³ A. A. Piontkovski, *op. cit.*, p. 95.

cause capitalism legalizes crime.³⁴ It creates that mode of living which is defined, precisely, as capitalist: a mode of living which expresses itself in so-called business dealings, the adulteration of goods, the struggle between monopolies, the corruption that permeates the apparatus of the State and results in a symbiosis between the government of the country and organized crime.

Lastly, no attempt is made on the Soviet side to deny that the bourgeois criminal codes originally envisaged such activities as criminal, but their perpetrators are rarely punished. "Almost all those sentenced for such activities are members of the proletariat, because bourgeois courts punish only the poor and allow those who have the necessary means to escape unpunished."³⁵

(c) Survivals from the Past

The Marxist theory of the genesis of crime, which attributes it to the social regime and not to any predisposition towards crime on the part of individuals: was recently confuted with the following observation: if Soviet jurists still wish to uphold their assumption concerning the social nature of crime they will be forced to the unpleasant conclusion that delinquency in the USSR is generated by the socialist regime itself, since it has been in existence for forty-three years.³⁶

These observations brought forth a sharp reaction from Soviet jurists, who pointed out that the theory of predisposition, like all other biological or biopsychical theories, does not explain the cause of delinquency but only serves to confuse the issue. How, they asked, can these theories explain repeated offences, professional or organized crime, the phenomenon of "white-collar criminals", etc.? Disagreeing with Maurach, who is German, they add that the mass crimes perpetrated, for example, under Hitlerism do not prove any predisposition to crime on the part of individuals but show the nature

³⁴ Soviet criminal experts quote the following passage from GORKI: "In capitalistic societies, a banker is different from a bandit in that while banditry is a criminal offence punished by the law, 'banking' is protected by the law and it is actually the bankers themselves that make the laws which facilitate their activities - the so-called 'banking' that pillages the people." This passage is taken from a previously unpublished work of Gorki, "Poem in Prose," in the *Literaturnaya Gazeta*, issue of April 2, 1949.

³⁵ Gertsenson and Smirnov, *op. cit.*, p. 135. Unfortunately, while the new Soviet jurisprudence pretends to have the utmost respect for its own theoretical constructions, it does not abstain, in the controversy with capitalism, from arguments and forms of confutation that are extremely banal and degrade this science to the level of political propaganda.

³⁶ R. Maurach, "Die gegenwärtige Situation der Sowjetischen Kriminalpolitik," in *Österreichische Osthefte*, No. 5, 1960.

of the capitalist regime in the most revolting form of imperialism.³⁷

The many bourgeois criticisms, the need to justify the increased severity of penalties soon after the publication of the new Criminal Code of Communism and, lastly, the need to find adequate methods of doing away with crime in view of the change-over to workers' self-government have led Soviet doctrine, in recent times, to go more deeply into the question of the causes of crime in the present pre-communist period.

The nature of the Soviet regime makes it impossible for objective causes to give rise to an anti-social psychology favourable to crime. Starting from this fundamental position, Soviet authors have, however, as yet to explain why there is still crime in the USSR in spite of the fact that the transformation of society's economic basis has created conditions more favourable to the disappearance of this phenomenon (material security, a high cultural standard, raising the level of social consciousness of all citizens).

The general explanation summed up by Soviet authors in the term "survivals from the past" means in practice admitting the extreme difficulty of breaking away from the capitalistic mentality within a reasonably short time. Survivals from the past are "a terrible force that weighs heavily on the consciousness of the living" and will continue to exercise its noxious influence "for a long time after the disappearance of the economic conditions that generated it".³⁸

For a number of reasons, the process of overcoming survivals from the past is fairly long and complex. First of all, progress away from the old mentality has been retarded by the destruction, cruelty and suffering caused by the war. Secondly, other obstacles are created by the "ideologists of imperialism who do everything in their power to keep bourgeois customs and prejudices alive in the Soviet collective consciousness in order to hamper our progress towards Communism".³⁹ Thirdly, the vitality of the survivals stems not only from the consciousness of single individuals but from the collective consciousness, since this psychological phenomenon has been inherited by generations that were born and have grown up in an era of fully

³⁷ "Modern Western criminology made a great scientific discovery indeed when, in 1961, it dusted off the eclectic theory of the anthropological factor and the social factor complementing each other, in order to explain the causes of crime . . . But this lame solution to the problem dates back to Ferri and List . . . not to mention Lombroso, who upheld the biological theory of the superior race which destroys the inferior race as a result of a natural law." Cf. A. A. Gertsenson and L. N. Smirnov, "The Calumnious Inventions of Mr. Maurach," in *Sovetskoe Gosudarstvo i Pravo*, April 1961, No. 4, pp. 131-139.

³⁸ A. Sakharov, "The XXIIInd Congress of the CPSU and the Task of Eliminating Crime in the USSR," in *Sovetskaya Yustitsia*, No. 6, March 1962.

³⁹ Krushchev, *Report to the XXIIInd Congress*, Moscow, 1961, p. 134 (Russian Edition).

developed socialism, so that it has continued to live after the disappearance of the causes that generated the capitalist mentality.

In practice, the term "survivals of capitalism" means anti-social habits and notions, foreign to the socialist moral view, such as cupidity, individualism, careerism, bureaucratism, lack of ideals, nihilism, holding women in scant esteem, indolence, nationalism, chauvinism, lack of discipline, etc. Soviet jurisprudence recognizes that it is not possible for men to free themselves in one leap from such concepts and habits which, during the phase of transition into communism, remain for a certain length of time in the consciousness of the Soviet people like warts or wens of capitalism, that is to say, survivals of the previous economic social forms.

(d) Accidental Causes of Criminality

In blaming survivals from the past as the general cause of crime even in the pre-communist period, Soviet doctrine has two fundamental aims: to confirm the Marxist doctrine of the economic genesis of delinquency and to refute the accusation that the socialist regime, like bourgeois regimes, creates organic conditions favourable to the development of crime.

According to the Soviet thesis, crime is and always has been a social phenomenon arising out of the heterogeneous composition of a society divided into antagonistic classes because of the different situations between citizens vis à vis the means of production (the owners on the one hand and the proletariat on the other). The process of doing away with crime keeps step with that of developing the forces of production: in the communist phase – in which the exploitation of man will have ceased and each will receive according to his need – the means of production are developed to the utmost and consequently the very motivation of crime is eliminated.

Soviet criminal lawyers, certain of their ground in this respect, repeat that the economic relationships established by socialism render the phenomenon of crime extraneous to the nature of the regime. At the same time, however, they openly concede that economic relationships are still imperfect at the present time, because the new democratic institutions have not yet reached the degree of stability planned for. This imperfect state of affairs, which forces the admission that social equality has not yet been reached, constitutes a possible source of anti-social conduct by individuals, conduct which can seriously threaten the socialist order. Under communist conditions this would not be possible. In other words, whilst reaffirming the validity of the doctrine in the framework of the system chosen, jurists ascribe the persistence of crime exclusively to the lacunae that subsist in the system.

Even while recognizing that the defects in the economic system

and the incomplete process of education of the workers are responsible for the crime still to be found in present Soviet society, Marxist sociology stresses the *accidental* character of delinquency under conditions of socialism. It is this particular feature which justifies the belief that criminality will disappear when the phase of true communism is reached.

In the USSR the accidental causes of crime generally cited by Soviet authors are not very numerous. The first is alcoholism, to which the more serious offences against the person and public order are attributed (homicide; damage to property or rights, with or without criminal intent; physical violence; hooliganism etc.). Next comes the housing crisis, which creates abnormal living conditions (promiscuity, intolerance, quarrels, hatred between families, etc.). Lastly, the excessive leniency of parents towards their children is deplored.⁴⁰ But it does not need pointing out that in the USSR there are other causes of crime which go much deeper. Notwithstanding the affirmations to the contrary in the Soviet Union, these causes are related directly or indirectly to the particular nature of the socialist regime. Suffice it to mention the low salaries, which have not eliminated want; the prohibition on engaging in certain occupations which are permitted in all countries; the heavy responsibilities placed on workers for the achievement of production goals – a situation which encourages the falsification of accounts; the monetary system, which does not permit citizens to own foreign currency even though they earn in with their own work; the prohibition of brokerage activities, which would be socially useful even in the socialist economy, etc.

In its more recent trends, Soviet criminology persists in affirming that in order to do away with crime it would be necessary first of all to eliminate the serious errors in and inadequacy of the work of educating the masses. Among the phenomena deplored are: *insufficient means of controlling production norms and consumption*, which favours the commission of offences for the purpose of gain (theft, misappropriation, speculation, private enterprise activities,

⁴⁰ Interesting debates take place in the USSR concerning the inadequacy of family education which show the authorities are laudably concerned with young people and their problems and that teenage delinquents exist in the USSR with characteristics identical to those of youth in other countries. Prof. Sakharov recently proposed that for every offence by a minor the parents should also be called to account to society for the inadequate education given to their children. "The son of a University professor, surprised by a volunteer militiaman in the act of robbing a young girl, struck at the representative of the law with a knife. When informed, the father wept: 'Why did he do this? We have never denied him anything . . . even when his allowance was stopped at school for poor progress, we used to pay him pocket money . . .'" See A. Sakharov, *op. cit.*, p. 7.

commercial brokerage, etc.); *bureaucratism and infringements of state discipline*, which increase the offences committed by civil servants in their work, abuses in the allocation of building sites, parasitism, etc.; *insufficient work by the organs responsible for fighting crime*. But this list of lacunae is only incidentally connected with the causes of crime, which appears in the Soviet Union in forms not too dissimilar from those observed in other countries.

The most recent legal literature clearly shows that Soviet authors overestimate the influence of education in the sphere of crime. But the excessive importance attributed to education is easily explained if we consider the basic hypothesis of Marxist Soviet criminology that when the social order (Communism) guarantees the complete satisfaction of the economic needs of all the members of the community, no coercive methods will be necessary as a reaction against infringements of that order (MARX).

The Marxist doctrine of crime has already been thoroughly studied and confuted and this is not the place to go back over old arguments. Garofalo, in Italy, has already observed, merely as an hypothesis, that the disappearance of crime would be foreseeable when no possible advantage could be derived from it.⁴¹

Soviet jurists are convinced that, with the transition to communism once begun, Soviet society is near its goal of eliminating the very reason for delinquency; but it should be remembered that the science of criminal psychology and the studies of the most eminent jurist of all countries have shown that economic conditions are not the only cause of disturbances of the social order. Sex and ambition, to mention only two possible motives, are at least as important as unfavourable economic conditions and may even be more important when the latter are eliminated.⁴²

(e) Investigation into the Causes of Crime

In the search for more effective methods of stamping out crime, it is important that the social organizations should obtain from the

⁴¹ *Criminology*, p. 165.

⁴² H. Kelsen, *The Theory of Communist Law*, published by "Community", 1956, p. 59. In confirmation of the validity of this statement, an example may be cited: Pederasty was made an offence in 1934 [Sect. 154 (a) of the Criminal Code of 1926] when the USSR was entering upon a period of relative economic well-being; hence this new offence was not the product of any needy circumstances or exploitation but actually coincided with an improvement in the economic conditions of society. The same considerations apply to the crime of "producing and selling pornographic material", introduced into the 1926 Code by the *Ukaz* dated November 25, 1935 (Sect. 182¹).

people a more rational participation in crime investigation⁴³ and that institutes of criminology and individual scholars should make a thorough study of the causes of delinquency. In the last resort, the work of both social organizations and scientific students of the causes of crime contribute to the prevention of crime in general and in particular; in the opinion of Soviet jurists such prevention can best be assured, not by the deterrent of penalties, but by the courts and the social organizations working with all the means available to them in the present phase of preparing for communism.

In view of the aims pursued at the present juncture, judicial organs could not be left out of the inquiry into the causes of crime, since they are created on the very purpose of examining cases of offences against the criminal law. Indeed, authoritative legal opinion had long urged that the people's courts should, in passing sentence, give due attention to the circumstances that had led to or encouraged the conduct of the criminal in each individual case. But this proposal was not favourably received. When the Code of Criminal Procedure was being revised, in 1961, the need to do this was again pressed and the legislature adopted a solution *sui generis*: laying down generally a practice previously little-used, it established a new procedure called the "individual decision" (*chastnoe opredelyenié*), the purpose of which is to extend the court's functions beyond the mere pronouncing of the sentence.⁴⁴

4. SUPREMACY OF THE PARTY AND SAFEGUARDS OF RIGHTS

As we have already said, the transition to communism appears to be a Party decision dictated by political contingencies on which

⁴³ The various ways in which the people can assist criminal investigation are as follows: (a) discovery and repression of offences; (b) giving police and investigating authorities information on crimes found to be planned or committed; (c) cooperating in the search for injured parties, witnesses, *corpus delicti* and other material evidence; (d) reporting suspected persons; (e) cooperating in the task of identifying and arresting criminals; (f) investigation of the factors which encourage crimes. Needless to say, up to the present time the participation of the people in criminal investigation would appear, generally speaking, to have caused much inconvenience to innocent citizens and hardly any to the perpetrators of offences. Cf. A. V. Valiliev, "Participation by the Social Organizations in Criminal Investigation," in *Vestnik Moskovskovo Universiteta*, No. 1, January-March 1962.

⁴⁴ The "individual decision" is a court procedure, adopted when circumstances so require, at the time of pronouncing sentence; after investigation of the causes which motivated or influenced the commission of the crime, the court draws the attention of the authorities concerned (leaders of the workers' collective undertakings, social organizations, etc.) to the conditions and circumstances of the crime, at the same time recommending suitable measures to eliminate any imperfections or errors discovered in the course of the investigation. This procedure is regulated by the Code of Criminal Procedure of the RSFSR which came into force on January 1, 1961 (Sect. 321).

it is not our concern to express any opinion. Scholars refer to this Party policy, in order to evaluate the changes in the original Marxist concept of the State and the law, the better to understand the line of development taken by Soviet law in general and, in particular, criminal law, to which this study is devoted. If this study makes frequent reference to Party policy, it is only because Party policy directly influences matters connected with criminal law.

In this connexion, we must point out that even at the present time Soviet jurisprudence accepts without criticism or reservations the changes decided upon by the political power. The confusion between science and politics, habitual in Soviet authors, often gives rise to contradictions and uncertainties in the interpretation of legal phenomena which are not easy to reconcile or resolve.

The Western world's scepticism concerning the current renovation of State structures and the changes in both form and content now taking place in Socialist law, is aroused by the socialist political system itself, dominated as it is by the idea of Party supremacy and lacking any effective legal checks on activities by the organs of power.

No one denies that in the new legislation – whether criminal, civil or procedural – increasing emphasis is laid on the rights of citizens. But safeguards for these rights are still confined within the narrow limits of controls exercised by the people outside legal procedures and hence too often ineffective. There is also a certain amount of perplexity because of the repercussions on the elaboration of a theory of subjective rights, the repeated affirmations on the directive function of the working class and the increasingly oppressive interference of the Party organs in all manifestations of social life, whether cultural, artistic, scientific, relating to work, etc.

It is well known that Soviet legal science emphatically denies that the evolution of law under communism need signify the “extinction of subjective rights” and affirms that the only change brought about by communism is that it is no longer necessary to provide those rights with a legal framework. This proposition directly prejudices the principle of guarantees which according to Marxists is automatically satisfied “by the very achievement of communist cohabitation or social self-government, thanks to which there is no need for a legal-administrative structure to protect subjective rights.”⁴⁵

It is difficult to agree with such a theory, which must in the end negative the very need for safeguards, whereas contemporary Soviet life shows the need to reinforce the system of guarantees through a legal discipline sufficiently strong to preserve citizens from arbitrary acts of the political power.

The right to freedom is, of course, confirmed in the Constitution

⁴⁵ N. G. Alexandrov, “The Law of the Whole People . . .,” *op. cit.*; see also p. 214.

of the USSR; but let us not forget that the Party – which according to Marxist theorists will survive even when complete communism has been achieved – still claims the right to manage the socialist State and the permanent function of educating all members of society politically and ideologically.⁴⁶ It therefore follows that there is no right or freedom that does not eventually find itself inexorably hemmed in by considerations of the over-riding interests of the Party. The whole organization of the State is oriented, not towards protecting the principle of citizens' freedoms (indirect safeguards), but towards preventing, by all conceivable means, the exercise of these freedoms from hindering the Party's performance of tasks which it considers from time to time to be essential to the cause of communism.

The authoritarian trend now dominant in the organization of public power in the USSR; the lack of institutions to define and regulate the relationship between individuals and the State; the fact that judges are not independent of the political powers; all these factors make it impossible to ensure effective safeguards . . . and rights without safeguards generally mean promises that are not kept. Citizens to whom the law does not guarantee the exercise and protection of their rights "remain alone and unarmed in the presence of power, not citizens but subjects", when indeed they are not victims awaiting posthumous rehabilitation.⁴⁷

TOMASO NAPOLITANO*

⁴⁶ A. Shchitarev, "The Party and Building Communism," in *Politics Self-Taught*, No. 8, August 1960: "As communism becomes more nearly perfect, so the Party increases its influence; it will subsist under communism, because it would be foolish to think that as soon as the technical and material basis of communism is established all the components of society will be changed, as at the touch of a magic wand, into citizens with a high degree of social consciousness."

⁴⁷ In Stalin's time, the absence of guarantees for the exercise of the rights recognized by the Constitution generated the climate of illegality denounced today by Soviet jurists. "Vyshinsky, when giving orders to his prosecutors, personally authorized them to ignore the provisions of criminal law and procedure. He claimed that such action was justified (and even necessary) on the basis of the theory of automatic aggravation of class conflict." (p. 43) "Through the violation of the provisions of the law, the most groundless repressions were perpetrated and the subjective rights and freedoms of citizens were trampled upon although expressly recognized by the law" (italics added). (Cf. N. G. Alexandrov, "The Law of the Whole People: A New Phase in the Development of Socialist Law," in *Sovetskoe Gosudarstvo i Prava*, September 1962, No. 9).

At the present time, the absence of safeguards enables the State, for example, to authorize the shooting of citizens, in contrast with the principle enshrined in the Criminal Code that even the most serious criminal law cannot be applied retroactively. Cf. *Bulletin of the International Commission of Jurists*, No. 12, 1961, and No. 14, 1962.

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RECENT RETROSPECTIVE LEGISLATION IN CEYLON

In a very recent case, which created history in more respects than one, the Ceylon Supreme Court, composed of three judges, made the following remarks in the course of an order rejecting certain preliminary objections of the defendants to the progress of the criminal trial for an offence against the State:

We share the intense and almost universal aversion to *ex post facto* laws in the strict sense, that is laws which render unlawful and punishable acts which, at the time of their commission, had not actually been declared to be offences. And we cannot deny that in this instance we have to apply such a law ... Nevertheless it is not for us to judge the necessity for such a law ...

In the final judgment in this same case, delivered on April 6, 1965, the judges observed:

The third charge, that of conspiracy to overthrow the government was framed in terms of the retroactive amendment of Section 115 of the Penal Code made by the Criminal (Special Provisions) Act No. 1 of 1962. This circumstance has not in fact been seriously disadvantageous to the defendants, because we hold in any event that those defendants whom we convict are guilty on the other charges which do not depend on the amendment. Probably also the proved conspiracy would have been punishable under other sections of the Code.

But we must draw attention to the fact that the Act of 1962 radically altered *ex-post facto* the punishment to which the defendants are rendered liable. The Act removed the discretion of the court as to the period of the sentence to be imposed and compels the court to impose a term of ten years' imprisonment, although we would have wished to differentiate in the matter of sentence between those who organised the conspiracy and those who were induced to join it. It also imposes a compulsory forfeiture of property.

These amendments were not merely retroactive: they were also *ad hoc*, applicable only to the conspiracy which was the subject of the charges we have tried. We are unable to understand this discrimination. To the courts, which must be free of political bias, treasonable offences are equally heinous whatever be the complexion of the government in power or whoever be the offenders.¹

¹ *The Queen v Liyanage and others* (1963) 65 New L.R. 73 at 84; also called the Coup d'Etat Trial (see Bulletin No. 15 of the International Commission of Jurists, April, 1963).

Although the observations made by the Court relate to retrospective legislation in the penal field, it is true of all retrospective legislation that the Courts of Ceylon cannot declare such legislation invalid on the ground *per se* that it is retrospective. There is nothing in the Constitution of Ceylon which prevents such legislation, not even Section 29(1) which grants legislative power "for the peace, order and good government of the Island"² nor Section 36 which states that "No Bill shall become an Act of Parliament until His Majesty has given his consent thereto". This latter section, it has been held, cannot be construed to mean that legislation cannot have retrospective effect because it does not become law till the date of consent by His Majesty³ and therefore must take effect as from that date. In that same case, it was held that the Criminal Law (Special Provisions) Act 1962 was not unconstitutional, although it purported to operate prior to the date of its enactment in so far as it stated that, "The provisions of this Act, other than the provisions of section 17, shall be deemed for all purposes, to have come into operation on January 1, 1962"⁴ while the Act itself received the Royal Assent and became law on 16th March 1962. It was also made clear that the Court could not declare legislation "to be void merely on the ground that it is unjust or oppressive, or that it is violative of supposed natural rights not specified in the Constitution".⁵

In another recent case⁶ the same principle was implicitly conceded when it was held that an Act⁷, which stated that the suspension of the death penalty which was enacted by previous legislation⁸ should be terminated and the death penalty imposed in respect of convictions for murder or abetment of suicide committed prior to the date on which the Act came into force, could not be construed to revive the death penalty in respect of acts committed prior to the date on which the Act came into force when the offence was conspiracy to commit or abetment of murder, because of the rule of construction contained in Section 6 (3) (b) of the Interpretation Ordinance.⁹

² See *ibid.*, at 83.

³ *Ibid.*, at 82.

⁴ Section 19, Act No. 1 of 1962.

⁵ *The Queen v Liyanage and others* (1963) 65 New L.R. 73 at 83.

⁶ *The Queen v Mapitigama Buddharakkita Thera and two others* (1962) 63 New L.R. 433 at 482 ff.

⁷ Suspension of Capital Punishment (Repeal) Act, No. 25 of 1959, section 3.

⁸ Suspension of Capital Punishment Act, No. 20 of 1958.

⁹ Ordinance No. 21 of 1901 Section 6 (3):

"Whenever any written law repeals either in whole or in part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected

(a) the past operation of or anything duly done or suffered under the repealed written law;

The implication arises from the fact that the judgment concedes that where the offence was murder committed before the coming into force of the Act under discussion, as was the offence of the fourth accused in the case, the death penalty revived, although at the time of the commission of the offence that penalty had been suspended, because the express provisions of the Act made it clear that this was the intention of the legislature.¹⁰

In another case, an expressly retrospective tax statute was given effect to by the Supreme Court, it being said that a tax statute did not have to be more strictly construed than a penal statute.¹¹

It has also been judicially held that the Universal Declaration of Human Rights, in so far as it declares that retroactive penal laws which make an offence of acts which were not an offence when committed shall not be enacted,¹² does not bind the Ceylon Parliament not to legislate retrospectively even to the extent stated in that Declaration, because "there is . . . *no law properly so called* and applicable by the Courts of Ceylon which would justify a decision that the Parliament of Ceylon cannot now validly enact an *ex post facto* law".¹³

Apart from the question whether the Declaration is binding in international law, this position is the logical consequence of the doctrine that international law does not impose legal restraints on the Parliament of Ceylon in the absence of its adoption in the Constitution, since Parliament is supreme within the limits specified in that instrument. This doctrine is the natural corollary in relation to Ceylon of the principle accepted in English Law that the sovereignty of Parliament is not limited by international law, thus making it possible for a statute to override international law.¹⁴

Thus, the conclusion is inevitable, as the law now stands, that the Courts have no power to prevent retrospective legislation of any kind, if the legislature manifests a clear intention that such legislation be retroactive. Nevertheless, it is important to note that the Courts will not be quick to give a statute retrospective effect, if such an intention is not clearly manifested, since there is a presumption against giving statutes a retrospective operation, which will be applied, generally, in accordance with the recognized prin-

(b) Any offence committed, or any right, liberty or penalty acquired or incurred under the repealed written law;

(c) Any action, proceeding or thing pending or incompleated when the repealing written law comes into operation, but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal."

¹⁰ *The Queen v Mapiitigama Buddharakkita Thera and two others* (1962) 63 New L.R. 433 at 484.

¹¹ *Abdul Basir v The Government Agent, Puttalam* (1963) 66 New L.R. 219.

¹² Art. 11 (2).

¹³ *The Queen v Liyanage and others* (1963) 65 New L.R. 73 at 83.

¹⁴ See *Mortensen v Peters* (1906) 8F. (Ct. of Sess.) 93.

ciples of English law.¹⁵ It is true that section 6 (3) of the Interpretation Ordinance¹⁶ states the principle to be applicable in a limited field.

But the principle is applicable generally, since, it is submitted, the Interpretation Ordinance does not state exclusively the rules of interpretation applicable in Ceylon. Thus, the principle will apply to the change of unwritten laws as well as written laws. It is important to note that in English law this general principle of interpretation requires that there be no presumption that such a retrospective effect was not intended where the enactments affect only the procedure and practice of courts, even where the alteration which the statute makes has been disadvantageous to one of the parties.¹⁷ This modification merely means that substantive rights which have already been violated so as to give rise to a remedial right of redress will have now to be enforced according to the new procedure, unless the statute expressly states otherwise, even if remedial machinery has already been set in motion.¹⁸ But even in this case the new procedure would be presumed to be inapplicable where its application would prejudice rights established under the old,¹⁹ or would involve a breach of faith.²⁰ However, in Ceylon, it would seem that, in relation to the change of a written law at least, there is a presumption that a repealing statute does not affect the procedure in an action which is pending.²¹

In line with these presumptions of interpretation it could be confidently stated that where legislation states merely that it "shall come into operation on such date . . . as may be appointed by the Minister by order published in the Gazette,"²² it will be interpreted as meaning that the Minister cannot appoint a date for the commencement of its operation which is prior to the date on which the Royal Assent was given to that legislation because the presumption is that the legislation cannot have retrospective effect.²³ On the other hand, where legislation is to come into force on a day to be appointed by someone, such as the Governor General, and it is specifically stated in that legislation that that date may be prior

¹⁵ For this English law principle see *Young v Adams* (1898) A.C. 469.

¹⁶ Ordinance No. 21 of 1901. See note 9 supra.

¹⁷ *Welby v Parker* (1916) 2 Ch. 1 (C.A.).

¹⁸ See cases cited in Maxwell on Interpretation of Statutes (1953) at 226-227.

¹⁹ *Ex parte Phoenix Bessemer Co.* (1876) 45 L.J. Ch. 11.

²⁰ *Vansittart v Taylor* (1855) 4 E. & B. 910; 119 L.R. 338.

²¹ See Section 6 (3) (c) Interpretation Ordinance, No. 21 of 1901.

²² See e.g. the Ceylon (Parliamentary Elections) (Amendment) Act. No. 26 of 1959, section 1(2), the Ayurveda, Act, No. 31 of 1961, section 1, the Anuradhapura Preservation Board Act, No. 32 of 1961, section 1, and the Ceylon Petroleum Corporation (Amendment) Act, No. 5 of 1963, section 4.

²³ See for example section 4 of the Ceylon Petroleum Corporation (Amendment) Act, amending the Ceylon Petroleum Corporation Act, No. 28 of 1961.

to the date on which that piece of legislation becomes an Act of Parliament, then it would follow that the appointed date may be prior to the date on which the legislation became an Act of Parliament and the legislation will have retrospective effect, albeit as a result of a decision directly taken by someone other than the King in Parliament but authorized by the King in Parliament. Thus, as a result of specific authority in the Finance Act of 1963²⁴, *inter alia*, changes in the law relating to estate duty and gift tax were made operative from a date prior to the date on which the Royal Assent was given to the Act.^{25, 26} The kind of retrospective legislation effected in the case of estate duty and gift tax under this Act by this mechanism of delegation cannot be prevented by the courts as long as express words are embodied in the Act.

The part that the independent Judiciary of Ceylon can play in preventing the retrospective effect of legislation is of a limited nature. It is therefore in terms of some guide to legislative action that the subject of retrospective legislation in Ceylon must be discussed. Clearly, the content of the concept of the Rule of Law as envisaged in the definition arrived at in New Delhi by the International Commission of Jurists does provide such a guide. The force of such a guide, it is admitted at the very outset, must in the context of Ceylon law in its present state, be extra-legal and political.

The Rule of Law as understood by the International Commission of Jurists is based on the principles, institutions and procedures which the experience and traditions of lawyers in different countries of the world have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.²⁷ At New Delhi in 1959, an International Congress of Jurists, meeting under the auspices of the International Commission of Jurists, concluded that, among other things, the principle that the Legislature must abstain from retrospective legislation was essential to the protection, by the Rule of Law, of the individual against arbitrary government.²⁸ It is significant in this context that the Universal Declaration of Human Rights does not go so far as to prohibit all kinds of retrospective legislation but does in Article 11 (2) state that a certain kind of retrospective legislation connected

²⁴ Act No. 11 of 1963.

²⁵ See Proclamation of the Governor General in the Ceylon Government Gazette (Extraordinary) No. 13, 868 of 24.12.63 at 2162.

²⁶ See *ibid.*, and Proclamation of the Governor General in the Ceylon Government Gazette (Extraordinary) No. 13,904 of 6.1.64 at 17.

²⁷ N. S. Marsh, "Domestic Jurisdiction and International Concern" 1(1) Journal of the International Commission of Jurists (1959) 3 at 6; J. F. Lalive, "The Rule of Law in a Changing World", 2(1) Journal of the International Commission of Jurists (1959) 3, note 2.

²⁸ "International Congress of Jurists - Conclusions", 2(1) Journal of the International Commission of Jurists (1959) 8 at 9.

with penal law is a violation of human rights.^{29a} Presumably there are kinds of retrospective legislation which would not amount to a violation of the Declaration, whereas according to the Conclusions of New Delhi, there apparently can be no exception to the principle that retrospective legislation is a breach of the Rule of Law.

With due respect to the learned jurists who met at New Delhi, for comparison with this categorical approach might also be taken the statement made by Sir Carleton Kemp Allen that

"... there may be occasions when public exigency compels a departure from the general principle, and it is impossible therefore to say that retrospective legislation is in all circumstances unjustifiable".^{29b} (See also note 30.) Indeed, it is submitted that, to say the least, a law, for example, which makes available a defence to a crime retrospectively when the criminal law is notoriously defective cannot be characterized as unjust. Thus, if insanity were only a mitigating circumstance to the offence of homicide and a law were to be passed making it a complete defence to that offence, that the accused was insane, the law to take effect in respect of offences already committed at the time the law was passed, it would seem that this is a case where one may correctly say that the retrospective effect of the law is not unjustified. Yet, it is difficult to disagree with the view that retrospective legislation is in principle to be avoided, though there may be exceptions to the principle. In this sense, the injunctions against retrospective legislation must be accepted, if

"The Rule of Law . . . is not in its final analysis a purely formal and legalistic conception but presupposes (whether such presuppositions are incorporated in a constitution or not and whether or not that constitution is subject to judicial review) the acceptance of certain fundamental human values in the structure of government and the legal system".³¹

It is with these considerations in mind that the following analysis of the retrospective legislation of recent years in Ceylon is offered. In terms of chronology, the Suspension of Capital Punishment (Repeal) Act³² which became law on December 2nd, 1959 has been chosen as a starting point. This Act was passed soon after

^{29a} Article II (a). "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed".

^{29b} Law in the Making (1951) at 444.

³⁰ See remarks of English Judge Willes J. in *Philips v Eyre* (1870) 6 Q.B. 1 at 27.

³¹ N. S. Marsh, "The Rule of Law: Form and Substance", 1(2) Journal of the International Commission of Jurists (1958) 153.

³² Act No. 25 of 1959.

the assassination of Prime Minister Mr. S. W. R. D. Bandaranaike and is a convenient starting point, since there was a change in the leadership of the country at that time.

The legislation since that date can be examined conveniently for our purposes under the following heads:

1. Penal laws,
2. Procedural laws,
3. Election laws,
4. Laws affecting Pension and Employment Rights,
5. Laws affecting Property and Rights connected therewith,
6. Laws affecting other rights of individuals excepting taxation laws,
7. Taxation laws.

1. Penal Laws:

The suspension of Capital Punishment (Repeal) Act, 1959 purported to impose capital punishment for the offence of murder and abetment of suicide, not only in relation to such offences among others committed after the date on which the Act came into force by repealing the Suspension of Capital Punishment Act,³³ but in regard to such offences which were committed prior to that date, provided the accused was convicted of such offence on or after the date of commencement of the Act.³⁴ As a result of this Act there were cases in which the accused was sentenced to death for murder when at the time at which he committed the offence he could have expected only a penalty of life imprisonment, the case of the assassin of the late Mr. S. W. R. D. Bandaranaike being one of them.³⁵ The Supreme Court has interpreted this Act to mean that the retrospective effect of the change of penalty from life imprisonment to death in regard to offences committed before the commencement of the Act does not extend to crimes other than the two specifically mentioned, such as conspiracy to or abetment of murder.³⁶

Thus, the effect of the Motor Transport (Amendment) Act of 1961³⁷ containing provisions which have retrospective operation³⁸ to the date of commencement of the Principal Act,^{39,40} and also the

³³ Act No. 20 of 1958.

³⁴ Act No. 25 of 1959, section 3.

³⁵ *The Queen v Mapitigama Buddharakkita Thera and 2 others* (1962) 63 New L.R. 433.

³⁶ *Id.* at 482 ff.

³⁷ Act No. 22 of 1961, section 23.

³⁸ *Id.*, section 26.

³⁹ The Motor Transport Act, No. 48 of 1957.

⁴⁰ See also Act No. 22 of 1961, section 26.

effect of the Motor Transport Act of 1952, sections 3-8⁴¹ has been to render punishable violations of the Principal Act and the regulations made thereunder, although they were not offences at the time of commitment, and also to render punishable acts done before the passing of the Amending Act, which would not have been offences at the time they were committed, nor were violations of the Principal Act at that time.

The Criminal Law (Special Provisions) Act 1962⁴² came into effect as from 1st January, 1962 although it was passed on 16th March, 1962⁴³ in respect of certain changes in the penal law. Thus, the changes were intended to have an effect on acts done between January 1st 1962 and March 16th 1962. That the *ex post facto* effect of this law was valid has been decided by the Supreme Court of Ceylon.⁴⁴ This retrospective effect extends to the creation of certain new offences and the attaching of stricter penalties to existing offences. These may be analyzed as follows:

- (i) (a) a conspiracy or an attempt or preparation to overthrow the Government of Ceylon, otherwise than by lawful means;
- (b) any act, or a conspiracy or attempt or preparation to do an act, calculated to overthrow, or with the object or intention of overthrowing, or as a means of overthrowing the Government of Ceylon, otherwise than by lawful means;
- (c) a conspiracy or attempt to murder the Governor-General or the Prime Minister or any other members of the Cabinet of Ministers with the intention of compelling him to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Prime Minister or Cabinet Minister.
- (d) the wrongful confinement of or conspiracy or attempt or preparation to wrongfully confine the Governor-General, or the Prime Minister or any other members of the Cabinet with the intention of compelling him to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Prime Minister or Cabinet Minister, are to be visited with death or imprisonment from ten to twenty years and forfeiture of property.⁴⁵

Some of these offences were already offences under the general penal law, such as (c) under the general law of homicide, but in these cases the punishment has been changed. For instance, in regard to the attempt to murder in (c) above the punishment now

⁴¹ Act No. 34 of 1962, section 11.

⁴² Act No. 1 of 1962.

⁴³ *Id.*, Section 19.

⁴⁴ *The Queen v Liyanage and others* (1963) 65 New L.R. 73 at 81 ff.

⁴⁵ Act No. 1 of 1962, section 6 (2).

imposed is death or imprisonment from ten to twenty years and forfeiture of property, while prior to the Act an attempt to murder carried a punishment of imprisonment up to twenty years and a fine.⁴⁶

Other offences are entirely new. Thus conspiracy or attempt or preparation to overthrow the Government of Ceylon, otherwise than by lawful means mentioned in (a) covers wider ground than conspiracy to overawe, by means of criminal force or the show of criminal force the Government of Ceylon, which was already an offence.⁴⁷

(ii) The offence of waging or attempting to wage or abetting the waging of war against the Queen was punishable by death or imprisonment up to twenty years and forfeiture of property.⁴⁸ The penalty has now been made more stringent. It is death or imprisonment between ten and twenty years and forfeiture of property.

However heinous and obnoxious the offences concerned in these charges may be, the retrospective effect of this legislation may still be impeached as a violation of principle.

By the Finance (Amendment) Act of 1962,⁴⁹ certain amendments were made to the Finance Act of 1961.⁵⁰ These amendments were stated to be deemed to have taken effect on the date on which the latter Act became law, i.e. 12th October, 1961, although the former Act was passed on 25th May, 1962.⁵¹ The Finance Act of 1961 made it an offence to contravene or fail to comply with any provision of the Act or any regulation made thereunder.⁵² The subsequent Act makes certain changes in the scope of these offences with retrospective effect.^{52a-55}

⁴⁶ Penal Code, Ordinance No. 2 of 1883, section 300.

⁴⁷ Penal Code, Ordinance No. 2 of 1883, section 115.

⁴⁸ *Id.*, section 114.

⁴⁹ Act No. 9 of 1962.

⁵⁰ Act No. 65 of 1961.

⁵¹ Act No. 9 of 1962, section 35.

⁵² Act No. 65 of 1961, section 61.

^{52a} (i) In so far as it added to the tax obligations contained in the previous Act, it makes it an offence to have evaded these obligations. (See note ⁵³ *infra*). (ii) It also adds to this list of offences, offences involving the making of incorrect declarations of income, the practising of professions when the registration is deemed to be suspended under the provisions of the Act and the carrying on of business in similar circumstances. (See note ⁵⁴ *infra*).

(iii) It also provides for the implication in offences of directors and officers of bodies corporate and partners of firms unless such director, officer or partner proves that such offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. (See note ⁵⁵ *infra*).

⁵³ This is the effect of Act No. 65 of 1961, section 61 and Act No. 9 of 1962.

⁵⁴ Act No. 9 of 1962, section 30.

⁵⁵ *Id.*, section 31.

The Finance (Admentment) Act of 1963⁵⁶ has the effect of creating new offences with retrospective effect. The amendments made in this act are stated to have taken effect on the date on which the Principal Act, the Finance Act of 1961⁵⁷ came into effect, namely 12th October, 1961⁵⁸, while the Act itself was passed on 27th March, 1963. The amending act makes obligatory the renewal of registration of professions⁵⁹ and business⁶⁰ in accordance with the Act, among other things, not contained in the Principal Act. By section 21, failure to renew registration of professions and businesses in accordance with the Act is made an offence punishable with a fine not exceeding Rs. 1,000/- or imprisonment not exceeding one year or both and a fine of Rs. 50/- for each day on which the failure is continued after conviction. As a result of the retrospective effect of these sections, there can be no prosecutions for non-renewal at a period when such non-renewal was not obligatory by law. As a result of this amending Act certain classes of companies⁶¹ that should have registered are exempted from registration. In these cases the Act has an indemnifying effect where such companies had not registered.

Further, like the Finance (Amendment) Act of 1962,⁶² this Act has the effect of creating new offences by imposing new tax burdens, the violation of which become offences retrospectively.

Under the Ceylon Petroleum Corporation (Amendment) Act⁶³ certain acts or omissions relating to certain employment matters⁶⁴ including termination of employment and payment of *ex gratia* benefits, committed by employers may be punishable, although they were not offences at the time they were committed.⁶⁵

In none of these cases does it seem that the creation of offences retrospectively can be justified. Generally it may be said that a retroactive penal statute is undesirable, unless, perhaps, it purports to mitigate punishment or indemnify.

2. Procedural Laws:

In matters of procedure, a change in the law may be regarded as retrospective, if it purports to affect the procedure in actions already begun at the date on which the statute became law.

⁵⁶ Act No. 3 of 1963.

⁵⁷ Act No. 65 of 1961.

⁵⁸ Act No. 3 of 1963, section 23.

⁵⁹ *Id.*, section 10.

⁶⁰ *Id.*, section 14.

⁶¹ *Id.*, section 14 (47 (3)).

⁶² See *supra*, at p. 11.

⁶³ Act No. 5 of 1963, section 11.

⁶⁴ *Id.*, section 4 (53).

⁶⁵ Act No. 28 of 1961.

The Supreme Court Appeals (Special Provisions) Act of 1960,⁶⁶ section 5, authorizes the hearing of appeals which have been presented but not finally disposed of at the time of commencement of the Act, in spite of certain errors, omissions or defaults in complying with any written law relating to such appeal, provision however being made for protection against material prejudice being caused thereby to the respondent.⁶⁷

The Language of the Courts Act of 1961⁶⁸ permits the use of English in courts from a date prior to the passing of the Act, although a former Act,⁶⁹ required the use of Sinhalese. Practical exigency could justify this retrospective legislation.

The Criminal Law (Special Provisions) Act of 1962⁷⁰ makes far-reaching changes in the realm of criminal procedure which were intended to take effect in relation to prosecutions instituted as a result of certain offences committed before the promulgation of the Act. The major changes concern police powers of investigation, confessions, trial at bar, trial *in absentia*, and appeal in regard to offences against the state.

(i) In regard to investigation, the usual procedure under the Criminal Procedure Code, Chapter XII⁷¹ was dispensed with by section 13 of the Act and no limitations were imposed on police powers of investigation, thus legalizing virtually any action taken by the authorities in this regard. The safeguard that in the case of these offences, where an investigation could not be completed in 24 hours, the police must report to a Magistrate and hand the suspect over to him, thus enabling the Magistrate to decide whether the detention of the suspect is necessary,⁷² had also been removed.⁷³

(ii) By section 12 of the Act all statements and confessions made by a suspect to a police officer even while in custody can be proved against him provided they were made voluntarily and they have been made to a police officer not below the rank of Assistant Superintendent, the burden being on the accused to prove that the statement was not voluntary. The provisions of the Evidence Ordinance which imposed certain stringent restrictions on the admissibility of confessions have been circumvented. These required that a confession made after a person was taken into custody should not be admitted, unless it was made before a Magistrate, who before recording it had to be satisfied that it was made voluntarily.

⁶⁶ Act No. 4 of 1960.

⁶⁷ *Id.*, sections 2-4.

⁶⁸ Act No. 3 of 1961.

⁶⁹ The Official Languages Act No. 33 of 1956.

⁷⁰ Act No. 1 of 1962.

⁷¹ Ordinance No. 15 of 1898.

⁷² *Id.*, section 126 A.

⁷³ Act No. 1 of 1962, section 13.

Also the protection afforded by section 30 of the Evidence Ordinance⁷⁴ against confessions made by one of several accused being tried jointly has been removed by section 12 (a) of the Act which permits proof of statements and confessions of one accused, if corroboration in material particulars is forthcoming.

(iii) Legislation having retrospective operation has also been passed in respect of that section of the Criminal Procedure Code dealing with trials at bar by three judges without a jury, on the directions of the Minister of Justice, in the case of sedition or certain other offences (see notes 75-81).

(iv) Trials *in absentia* of an accused were not permitted by the general law but this Act made provision for such trial, if the court was satisfied that he was evading arrest, or absconding or feigning illness.⁸²

(v) The Act by section 15 took away the right of appeal to the Court of Criminal Appeal in connection with the offences with which it deals.

These procedural changes, in so far as they were to take effect in relation to offences already committed, were retrospective. It is difficult to justify them, even though the offence which they were designed primarily to meet may have been exceptionally grave.

3. Election Law:

For the resolution of doubts, it was enacted that the new register of elections used for the by-election to the electoral districts of Ratgama and Kurunegala to fill a vacancy which occurred after the last general election was the proper register to be used, even though such registers had not been certified by the registering officer as required by the Ceylon (Parliamentary Elections) Order in Council, 1946, section 15 (2).⁸³ The procedure laid down for the preparation of electoral registers is intended to safeguard the integrity of democratic elections. Giving retrospective effect to changes in such procedure so as to validate an illegality may endanger democracy itself.

⁷⁴ Ordinance No. 14 of 1895, sections 24, 25 and 26.

⁷⁵ Ordinance No. 15 of 1898, section 440 A (1).

⁷⁶ *The Queen v The Jawathie Gunewardene* (1954) 56 New L.R. 193.

⁷⁷ See section 8 of the Criminal Law (Special Provisions) Act of 1962, repealed by the Criminal Law Act No. 31 of 1962, section 2.

⁷⁸ Criminal Law Act, No. 31 of 1962, section 6. ?

⁷⁹ *The Queen v Liyanage and others* (1962) 64 New L.R. 313.

⁸⁰ Criminal Law Act, No. 31 of 1962, section 6.

⁸¹ Act No. 1 of 1962, section 4 (2), repealed by Criminal Law Act, No. 31 of 1962, section 2.

⁸² *Id.*, section 14, repealed by Criminal Law Act of 1962, section 2.

⁸³ Parliamentary Elections (Special Provisions) Act, No. 11 of 1961.

4. Laws Affecting Pension and Employment Rights

The following legislative enactments have retrospective operation, namely:

- (a) The Motor Transport (Amendment) Act (1961)⁸⁴ relating to, *inter alia*, the remuneration of certain new employees of the Ceylon Transport Board and the commutation of the liability of such employees to pay pensions.^{85,86} Some of these provisions may impose retrospective burdens on the former employers of such employees, while others affect the right of workers against the Ceylon Transport Board.
- (b) The Port of Colombo Reserves (Gratuities) Act⁸⁷ relating to payment of gratuities in respect of work done and employment terminated before the passing of the Act (see also notes 88, 89).
- (c) On the 19th June, 1961, an Act⁹⁰ was passed with retrospective operation to validate contributions made to the Public Service Provident Fund (see notes 91-96).
- (d) The Special Areas (Colombo) Development (Amendment) Act of 1961 relating to the grant of certain gratuities has a retrospective operation.^{97,98}
- (e) The Local Government Service Pensions (Special Provisions) Act, 1961, increases certain pensions from a date prior to the passing of the Act.⁹⁹
- (f) The Police (Amendment) Act of 1962 authorizes the establishment of a scheme of compensation for police officers or their heirs, from a date prior to the passing of the Act.¹⁰⁰⁻¹⁰²
- (g) Under the Ceylon Petroleum Corporation (Amendment) Act of 1963, which became law on 22nd August, 1963, certain provisions relating to employees of persons who were carrying on

⁸⁴ Act No. 22 of 1961, sections 11 to 17.

⁸⁵ Act No. 48 of 1957.

⁸⁶ Act No. 22 of 1961, section 26.

⁸⁷ Act No. 47 of 1961.

⁸⁸ Act No. 10 of 1950.

⁸⁹ Act No. 47 of 1961, section 2 (2).

⁹⁰ Act No. 52 of 1961.

⁹¹ Act No. 18 of 1942.

⁹² Act No. 52 of 1961, sections 6 and 13.

⁹³ *Id.*, section 5.

⁹⁴ *Id.*, section 7.

⁹⁵ Gazette No. 7, 631 of February 24th, 1928.

⁹⁶ Act No. 52 of 1961, sections 9 and 13.

⁹⁷ Act No. 56 of 1961, section 4.

⁹⁸ *Id.*, section 10.

⁹⁹ Act No. 59 of 1961, sections 2 and 4.

¹⁰⁰ Act No. 15 1962, section 2.

¹⁰¹ *Id.*, section 3.

¹⁰² *Id.*, section 2, (28 A (3)).

business as importers, sellers, suppliers or distributors of petroleum were made retrospective as from 5th June, 1963.¹⁰³ The employment of such employees would not be terminated except with the written approval of the Commissioner of Labour or otherwise than in accordance with the terms or conditions subject to which such approval was granted. Termination of employment made between 5th June 1963 and 22nd August, 1963 which had not complied with these requirements would have become illegal. Also, where on or after 5th June 1963 any such employer granted to any employee any *ex gratia* gratuity or compensation or other benefit, then every person who was an employee of that employer on 5th June, 1963 became entitled to receive the same *ex gratia* benefits, the amount being determined by the Commissioner. Thus, an employee whose employment was terminated between 5th June 1963 and 22nd August 1963 would have become entitled to such a gratuity, if another employee whose employment had been terminated had also received a similar gratuity.

(h) The Overseas Telecommunication (Amendment) Act of 1963 provides for the establishment of a scheme for pensions and gratuities in favour of certain employees, which may operate from an earlier date.¹⁰⁴⁻¹⁰⁶

(i) The Local Authorities Pension (Special Provisions) Act, 1964, relates to the pensions of retired employees and under that Act benefits accrue retrospectively.¹⁰⁷

In so far as most of these Acts grant certain retrospective benefits to employees as against the Government of local government bodies, it may be said that their effect does not cause undue hardships to private citizens as such, but some amendments such as those in the Ceylon Petroleum Corporation (Amendment) Act do give the employee certain rights which involve retrospective burdens on private persons which could involve hardship on the face of it.

5. Laws Affecting Property and Rights Connected therewith

The Motor Transport (Amendment) Act of 1961 amended some provisions relating to the taking of property and the payment of compensation of the Motor Transport Act 1957¹⁰⁸ retrospectively.¹⁰⁹ The provisions were to take effect as from 31st October, 1957, while the Amending Act became law on 15th May, 1961. This means that the content of the individual rights against

¹⁰³ Act No. 5 of 1963, section 4 (5J).

¹⁰⁴ Act No. 8 of 1963, section 2.

¹⁰⁵ *Id.*, section 1 (2).

¹⁰⁶ *Id.* Section 3, 6 (3).

¹⁰⁷ Act No. 4 of 1964, section 2.

¹⁰⁸ Act No. 48 of 1957.

¹⁰⁹ Act No. 22 of 1961, sections 5 to 10 and 18 to 25.

the Ceylon Transport Board and the Government in respect of the taking of property and the payment of compensation have been changed retrospectively. Thus, among other things, what was illegal in the former case at the time of the taking has been legalized and the amount of compensation which the individual could have expected at the time the property was taken and had accrued due at the time has subsequently been changed.

The Special Areas (Colombo) Development (Amendment) Act 1963, contains certain provisions which are deemed to have come into force on the date of the amended enactment, namely 1st. October, 1947, while the amending Act itself became law on 19th June, 1961.¹¹⁰

(i) The standard for the calculation of rentals payable by the Government in respect of land requisitioned under the principal Act was varied and it seems that the retrospective effect redounds to the benefit of the individuals affected.¹¹¹

(ii) Land requisitioned for the purposes of fire-gaps under emergency powers is, although no demolition operations may have been carried out thereon under such powers, deemed to be land on which demolition operations have been so carried out for the purposes of the principal enactment.¹¹² This means that whereas such land was not considered land on which demolition operations had been carried out for the purpose of the application of the provisions of the principal Ordinance¹¹³ at the relevant time before the passage of the amending Act it now becomes land on which demolition operations had been carried out. Thus, such fire-gaps as are described in the amending section become land covered by the principal Ordinance, though at the time they were acquired they were not. This may work to the detriment of the private individual.

The Motor Transport (Amending) Act of 1962 which became law on 5th December 1962, contains certain provisions relating to the amount of compensation for property acquired¹¹⁴ under the Motor Transport Act, 1957, which are to take effect on the date the Motor Transport Act of 1957¹¹⁵ came into force, namely 31st. October, 1957.¹¹⁶

The Finance Act of 1963 purports to annul the sales of certain motor cars made between 2nd. August 1963 and 20th December, 1963 unless a certain tax imposed by that statute is

¹¹⁰ Act No. 56 of 1961, section 10.

¹¹¹ *Id.*, section 2.

¹¹² *Id.*, section 9.

¹¹³ Ordinance No. 40 of 1947.

¹¹⁴ Act No. 34 of 1962, sections 5 to 8.

¹¹⁵ Act No. 48 of 1957.

¹¹⁶ Act No. 34 of 1962, section 11.

paid,¹¹⁷ the Act having been passed on 31st. December 1963. Where the tax is not paid the purchaser will lose his ownership in the car as from the date of the sale.¹¹⁸

Retrospective legislation relating to property rights, in so far as it causes hardship to individuals is undesirable, but in so far as the legislation examined above purports to confer benefits upon them as against the Government it may, perhaps, be regarded as not repugnant to principle.

6. Law Relating to Other Rights of Individuals, Excepting Tax Laws

Certain provisions of the Criminal Law (Special Provisions) Act, 1962¹¹⁹ affect the rights of the individual relating to freedom from arrest and detention. The Act, which was passed on 16th March, 1962, came into effect retrospectively from 1st January, 1962, and that part of the Act concerned with arrest and detention is specifically limited in its application to offences against the State alleged to have been committed on or about 27th January, 1962.¹²⁰ Thus, the changes validate past illegalities connected with the arrest and detention of persons charged with these offences. The effect of the provisions of the Act is as follows:

- (i) Offences against the State in general having been made cognizable,¹²¹ arrest could have been made without a warrant, provided there was a reasonable complaint, credible information or reasonable suspicion, and this was true of any offence against the State. Prior to the Act, arrests made without a warrant in connection with these offences were illegal.¹²²
- (ii) In regard to the specific offences against the State above-mentioned, in addition to the powers of arrest under (i) the Inspector-General of Police, acting on mere suspicion, could arrest or authorize the arrest of a person for such offences.¹²³
- (iii) A person arrested under (ii) could be removed from the place of arrest to any other place situated anywhere in Ceylon and detained in custody for a period which could extend to 60 days, provided the place of detention and any subsequent change of such place was notified to the Magistrate.¹²⁴ The general law contained in the Criminal Procedure Code, whereby a person arrested without warrant must be brought before a Magistrate without

¹¹⁷ Act No. 11 of 1963, Part X, especially sections 114 and 110.

¹¹⁸ *Id.*, section 107 (2).

¹¹⁹ Act No. 1 of 1962.

¹²⁰ *Id.*, section 19.

¹²¹ *Id.*, section 5 (2).

¹²² Criminal Procedure Code, Ordinance No. 15 of 1898, First Schedule, section 114.

¹²³ Act No. 1 of 1962, section 2 (1).

¹²⁴ *Id.*, section 2 (2).

unreasonable delay but not later than 24 hours after the arrest¹²⁵ was declared inapplicable.¹²⁶

(iv) The Prisons Ordinance¹²⁷ and rules made under Part IX of that Ordinance pertaining to Visits and Correspondence were to apply only at the discretion of the Permanent Secretary to the Minister of Defence and External Affairs.¹²⁸ This affected the right of communication. Where the suspect was detained in any other place than a prison he had no right at all in this respect.¹²⁹

(v) The power which the Supreme Court had to grant bail was qualified in the case of offences to be tried at bar without a jury by the requirement that the consent of the Attorney General was necessary.¹³⁰ Further, the ordinary limitations on police powers of search under the general law or by court orders or warrant¹³¹ were relaxed in relation to these offences against the State by giving one who had the power to arrest a person in the manner described in (ii) above the additional power to search such person and seize, remove and retain anything used or suspected to be used in or in connection with the commission of any such offence and to enter and search any such premises as may be necessary for those purpose.¹³²

The effect of some provisions of the Control of Insurance Act of 1962¹³³ may be considered retrospective in so far as they affect rights under transactions already entered into by individuals. Provision is made for a life insurance policy which has acquired a surrender value after the payment of premiums for three consecutive years not to lapse in the event of non-payment of further premiums, notwithstanding any agreement to the contrary, but to be kept alive to the extent of its paid-up value.¹³⁴

Among other provisions with similar effect¹³⁵ is section 12 which invalidates certain acts done by insurers between 24th November 1961 and the date on which the Act commenced, the Act having been passed on 16th June, 1962. These acts are (a) investment of moneys forming part of the assets relating to the life insurance business in other than approved securities, (b) lending of moneys in a manner not in accordance with the provisions of the Act

¹²⁵ Ordinance No. 15 of 1898, sections 36, 37, 38.

¹²⁶ Act No. 1 of 1962, section 2 (8).

¹²⁷ Ordinance No. 16 of 1877.

¹²⁸ Act No. 1 of 1962, section 2 (5).

¹²⁹ *Id.*, section 2 (4) (a).

¹³⁰ *Id.*, section 4 (3).

¹³¹ Ordinance No. 15 of 1898, Chapters IV and VI

¹³² Act No. 1 of 1962, section 2 (3).

¹³³ Act No. 25 of 1962.

¹³⁴ *Id.*, section 25 (1).

¹³⁵ See *Id.*, section 25 (2), 26, 55.

(c) alienation of assets except where the loan or investment is in the best interests of the policy holders in the opinion of the appropriate Minister.

In passing it may be noted that the rights of village headmen to be called "Grama Sevakas" have been recognized by the Village Headman (Change of Designation) Act, 1964, which came into operation on 25th January, 1964, with retrospective effect from 1st May 1963.¹³⁶

With the exception of this last piece of legislation, it may be concluded that the retrospective effect of legislation in this category has been to cause hardship.

7. Taxation Laws

Taxation laws generally impose taxes on incomes earned during a preceding year. Thus, in Ceylon, the taxes on incomes earned or monies spent during the period 1st April 1963 to 31st March 1964 could generally be imposed after the latter date during the tax year 1964/65. This is made possible because such taxes would generally be collected after September 1964. Such imposition of taxes cannot strictly be considered retrospective. If this were not so, almost all the recent finance Acts imposing taxes on incomes and expenditure would have to be regarded as retrospective legislation. However where taxes are imposed on incomes earned or expenses incurred prior to the beginning of the tax year at a time after the end of that tax year, then such legislation must be termed truly retrospective. Also taxes imposed on past transactions or on a past state of affairs must be regarded as retrospective.

As an example of a tax statute passed in the period under review which is not retrospective in the sense defined above may be given the Surcharge on Income Tax Act, 1961 which was passed on the 20th February 1961 and imposed a 15 % surcharge on the tax payable on incomes earned between 1st April 1959 and 31st March 1960.¹³⁷ So also the Finance Act of 1961, which was passed on the 12th October 1961, imposed a 15 % surcharge on tax payable on incomes earned between 1st April 1960 and 31st March 1961.¹³⁸ Surtax was imposed in respect of incomes earned during the same period¹³⁹ and certain minor changes were made in the levy of expenditure tax on amounts spent during the same period.¹⁴⁰ The Finance (No. 2) Act, 1963 contains provisions imposing a 20 % surcharge on tax payable on incomes earned between 1st April,

¹³⁶ Act No. 6 of 1964, section 2.

¹³⁷ Act No. 6 of 1961, section 2 (1).

¹³⁸ Act No. 65 of 1961, section 13 (1).

¹³⁹ *Id.*, section 18.

¹⁴⁰ *Id.*, section 17.

1961 and 31st March, 1962,¹⁴¹ the Act having been passed on 21st March, 1963.

However, there has been retrospective legislation both in the field of income and expenditure tax and in the imposition of other duties and taxes.

The Rubber Export Duties (Special Provisions) Act of 1961 retrospectively validated the levy and payment of increased rates of export duties during a three and half month period and of fees for licences for the export of rubber for a one year period, which had been imposed by orders made without confirming resolutions passed by the House of Representatives as required by the empowering Act.¹⁴² It was also enacted that licence fees not paid during that one year period could be recovered as a debt.¹⁴³

Under the Business Registration (Surcharge) Act of 1961, a surcharge was imposed on the fee paid for registration as a business under the Business Names Ordinance¹⁴⁴ since 15th September, 1960 even if the concern had gone out of business since then, though the Act was passed on 25th April, 1961.¹⁴⁵

The Plumbage Export Duty (Special Provisions) Act of 1961 validated the levy and payment of duty on plumbage at a reduced rate between 12th November, 1959 and 24th April, 1961¹⁴⁶ the Act having been passed on 25th April, 1961 and the reduced levy not having been authorized by the Customs Ordinance.¹⁴⁷

The Heavy Oil Motor Vehicles Taxation (Amendment) Act of 1961, expands the definition of 'heavy oil' contained in the Heavy Oil Motor Vehicles Taxation Ordinance¹⁴⁸ with retrospective effect as from 13th July, 1956, although the Act was passed on 25th April, 1961¹⁴⁹ so that the tax in the Ordinance falls on a wider category of vehicles. In like style the definition of 'motor vehicles' in the Ordinance has been expanded with retrospective effect from 1st September, 1951, thus widening the area of incidence of the tax.¹⁵⁰ In *Abdul Basir v The Government Agent Puttlam*¹⁵¹ it was specifically held that the former amendment was valid though retrospective.

The following legislative enactments all relate to the imposition of tax or duties and have a retrospective operation.

¹⁴¹ Act No. 2 of 1963, section 20 (1).

¹⁴² Act No. 15 of 1961, sections 2 and 3.

¹⁴³ *Id.*, section 3.

¹⁴⁴ Ordinance No. 6 of 1918.

¹⁴⁵ Act No. 16 of 1961, section 2.

¹⁴⁶ Act No. 17 of 1961, section 2.

¹⁴⁷ Ordinance No. 17 of 1869.

¹⁴⁸ Ordinance No. 56 of 1935.

¹⁴⁹ Act No. 20 of 1961, section 2.

¹⁵⁰ *Id.*, section 2.

¹⁵¹ (1963) 66 New L.R. 219.

- (a) The Land Tax Act of 1961 (see notes 152, 153, 154).
- (b) The Companies' Tax Act of 1961.¹⁵⁵
- (c) The Finance (Amendment) Act of 1962.^{156, 157}
- (d) The Finance (No. 2) Act of 1963 (section 22).^{158, 159}

The Finance (Amendment) Act of 1963, passed on 27th March, 1963 but retrospective to 12th October, 1961¹⁶⁰ contains certain provisions which impose retrospectively heavier burdens on the tax payer. Thus, in so far as bonuses and commissions of employees were included in the income for the purpose of the National Development Tax¹⁶¹ a heavier burden was imposed.

The Finance Act of 1963¹⁶² became law on 21st December, 1963. As pointed out earlier¹⁶³ it contains provisions which leave room for wide retrospective effect. But in fact the retrospective effect of the Act has been limited to certain provisions alone. The general retrospective effect of the Act may be analyzed as follows:

- (i) By section 56 and 57, gifts made between 1st August, 1963 and 20th December, 1963 are to be taxed according to schedule containing higher rates of taxation than were to be applied to such transactions before the Act was passed.
- (ii) Certain transfers of property to persons who are not citizens of Ceylon made between 1st August, 1963 and 20th December, 1963 became liable to tax, although they were not so liable before the Act.¹⁶⁴
- (iii) Estate duty imposed on the estates of persons who died between 1st August, 1963 and 20th December, 1963 is to be on a higher scale than was current at the time of their death.¹⁶⁵
- (iv) Under section 114 of the Act, the sale of certain motor cars which occurred between 2nd August, 1963 and 20th December, 1963 is to be taxed retrospectively in accordance with the provisions of section 110 of the Act. This tax works out to 80 % of the difference between the sale price and the purchase price plus Rs. 250/-.

¹⁵² Act No. 27 of 1961.

¹⁵³ *Id.*, section 2 ff.

¹⁵⁴ The Finance Act No. 65 of 1962, section 15.

¹⁵⁵ Act No. 35 of 1961, section 3.

¹⁵⁶ Act No. 65 of 1961.

¹⁵⁷ Act No. 9 of 1962, section 35.

¹⁵⁸ Act No. 2 of 1963.

¹⁵⁹ Ordinance No. 33 of 1921. Certain regulations had been made under this statute, and the redefinition pertained to these regulations.

¹⁶⁰ Act No. 3 of 1963.

¹⁶¹ *Id.*, section 6 (33 (3)).

¹⁶² Act No. 11 of 1963.

¹⁶³ See note 24 supra.

¹⁶⁴ Act No. 11 of 1963, sections 53 and 54.

¹⁶⁵ *Id.*, section 61.

Such tax legislation which imposes added burdens on the tax payer retrospectively can cause hardship and cannot in principle be reconciled with the Rule of Law.

Conclusion:

Most of the legislation analyzed above has had the effect of increasing the burdens of individuals with retrospective effect. In exceptional cases, notably in the case of legislation concerned with pension and employment rights, individuals have stood to benefit from the retrospective effect of legislation. It is clear, however, that the legislation examined is predominantly violative of the essential principle of the Rule of Law against retrospective legislation, in that it purports to impose burdens on individuals retrospectively or grant benefits to individuals at the expense of other individuals retrospectively.

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POST-CONSTITUTIONAL DEVELOPMENT OF "PEOPLE'S JUSTICE" IN CHINA

The adoption of the Constitution in 1954 inaugurated a new period in the People's Republic of China. Having sufficiently consolidated their power, the Communists took a significant step to launch China into the stage of socialist transformation and construction. During the years immediately following the promulgation of the Constitution, Communist China appeared to be moving in the direction of a stable legal order and a strong judiciary. This trend, however, suffered a serious setback in mid-1957 when a nation-wide drive against the Rightists was staged. In this article we shall examine the development of "people's justice" from 1954 to the present. Special attention will be given to the legal debates carried on between non-Communist jurists and official spokesmen during the "Blooming and Contending" and Anti-Rightist Movements.

MOVE TOWARD LEGAL STABILITY, 1954-1957

In an effort to generate popular support and enthusiasm for the Constitution, the Communist regime employed an extensive propaganda campaign in 1954 to mobilize the masses to participate in the discussion of the draft document before its official adoption.¹ Bearing a striking resemblance to the 1936 Constitution of the U.S.S.R., the Chinese Constitution that was promulgated on September 20, 1954 signified a shift from the arbitrary and repressive processes of the "people's tribunals" to a more orderly development in the legal life of the country. A comprehensive bill of rights, for example, was

¹ For discussions of this campaign by authors of opposing views, see Chou Hsin-min, "Review of the Development of Legal Science in the New China during the Past Ten Years," *Cheng-fa yen-chiu* (Studies of Political Science and Law) Peking, No. 5, 1959, pp. 44-45 and Wang Hou-sheng, *Chung-kung chin-hsien p'ing-lun* (A Critique of the Making of the Constitution in Communist China), Hong Kong, 1955, pp. 61-113.

contained in Chapter III of the Constitution.² Among other things, it guaranteed equality before the law, freedom of speech, of the press, of association, of demonstration, and of religion, as well as the right to work, to leisure, to education, and to social assistance. Protection against arbitrary arrest was specifically insured by Article 89, which reads: "Freedom of the person of citizens of the People's Republic of China is inviolable. No citizen may be arrested except by decision of a people's court or with the sanction of a people's procuratorate." Based on this article, the Regulations on Arrest and Detention were promulgated in December 1954 to provide further safeguards in the form of concrete and detailed procedures.³

The Constitution, along with the Organic Laws of the People's Courts and the People's Procuratorates (September 21, 1954), also gave the judicial system in Communist China a permanent structure. Under the National People's Congress and its standing Committee, two separate but interlocking judicial hierarchies were set up. The "people's courts", headed by the Supreme People's Court, were given the sole authority to administer justice; the "people's procuratorates", culminating in the Supreme People's Procuratorate, were to exercise the supervisory power over the execution of the law. In addition, there were within the State Council certain executive departments, such as the Ministries of Justice, Supervision, Public Security, and Internal Affairs, charged with responsibilities relative to the maintenance of law and order. Until its abolition in 1959, the Ministry of Justice and the judicial departments at local levels handled matters pertaining to the staff and internal administration of the courts.⁴

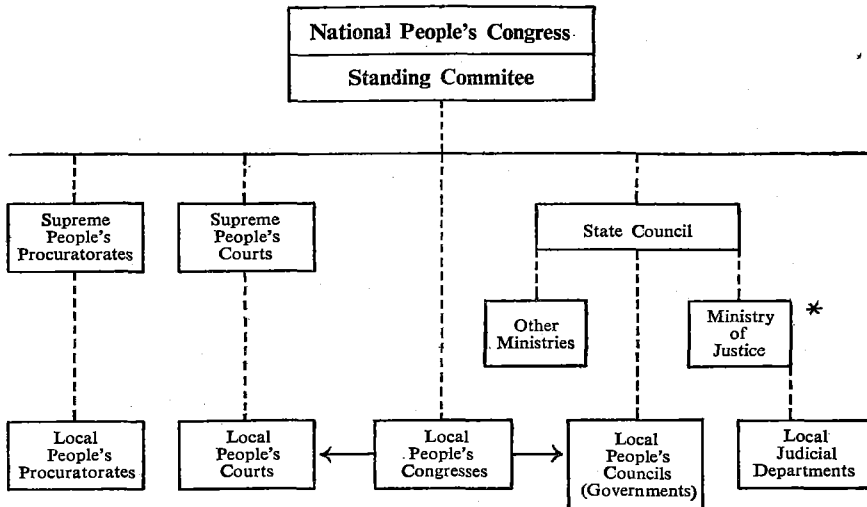
A number of democratic features of the new judicial system were introduced by both the Constitution and the Organic Law of the People's Courts. These included the right of legal defence, the institution of People's Assessors, and the principles of public (open) trials and withdrawal of judges. Probably more significant was the fact that for the first time the Chinese Communists seemed to accept in a limited form the concept of judicial independence. With identical tones, Article 78 of the Constitution and Article 4 of the Organic Law stipulated: "In administering justice the People's Courts are independent, subject only to the law." Article 80 of the Constitution

² Text of the Constitution is in *Chung-hua jen-min kung-ho-kuo fa-kuei hui-pien* (Compendium of Laws and Regulations of the Chinese People's Republic), Peking, Vol. 1 (1956) pp. 4-31. English translation is in *Documents of the First Session of the First National People's Congress of the People's Republic of China*, Peking, 1955, pp. 131-163.

³ Text of the Regulations is in *Chung-hua jen-min kung-ho-kuo fa-kuei hui-pien*, vol. I, pp. 239-242.

⁴ For the functions of the Ministry of Justice, see Articles 14, 35 and 40 of the 1954 Organic Law of the People's Courts. Text of the Law is in *ibid.*, pp. 123-132. English text is in *Documents of the First National People's Congress*, pp. 185-199.

Judicial Structure of Communist China



* Abolished in May 1959.

stated that the courts should be responsible to the "people's congresses" at corresponding levels and should report to them. This was in clear contrast with the previous laws which required the subordination of the courts to the leadership of the "people's governments". In other words, under the new system the courts were granted greater freedom in exercising their authority, with no interference from the local executive organs. To be sure they were still subject to other types of control and their independence had to be a qualified one. Writing on this subject, Communist spokesmen were quick to point out that in administering justice the "people's courts" not only must obey the law but must follow the guidance of the party, submit to the control of the people, and accept the supervision of the higher courts and the procuratorates.⁵

Following the promulgation of the Constitution and the Organic Law of the People's Courts, the Communist authorities proceeded to carry out the projected changes in judicial organizations and procedures. At the Judicial Seminar of November 1954 and in a joint directive

⁵ Wen Wen-po, "An Understanding of the Fundamental Problems Concerning the Organic Law of the People's Republic of China," *Cheng-fa yen-chiu*, No. 1 1955, p. 3; Wang Hui-an, "Superiority of our Judicial System," *Jen-min jih-pao* (People's Daily), Peking, October 16, 1954.

on December 7, 1954, the Supreme People's Court and the Ministry of Justice repeatedly call upon judicial workers throughout the country to study and implement the Organic Law of the courts.⁶ During the years between 1954 and 1957, steady growth and "democratization" of the judicial system had been reported by Shih Liang, Minister of Justice, and Tung Pi-wu, president of the Supreme Court.⁷ As of 1957, there existed in Communist China more than 2,700 "people's courts".⁸ The number of "people's assessors" increased from 127,250 in 1955 to 246,500 in 1957.⁹ Starting from scratch, the number of "people's lawyers" also reached 2,100 by 1957.¹⁰

The efforts made by the Peking regime to strengthen the judicial system reflected the importance it attached to the courts as useful instruments for stabilizing the new order and ensuring the socialist transformation of the national economy. In their joint directive of December 1954 on the study and implementation of the Organic Law of People's Courts, the Supreme People's Court and the Ministry of Justice clearly defined the major task of the judiciary:

The enforcement of dictatorship and the protection of democracy are the two inseparable aspects of the basic mission of the people's courts. The work of the judiciary must be made to serve the political mission of the State. During the transitional period, the judiciary's general task is to safeguard the smooth development of socialist construction and the socialist transformation of the State. The people's courts must not only punish people but also educate them. They must carry out their proper functions to serve socialist construction and the central task of the State through the medium of judicial activities.¹¹

In view of the above, small wonder that many of the cases handled by the judiciary were those involving economic construction and the counterrevolutionaries. According to incomplete figures, the "people's courts" of all levels dealt with 364,604 cases of such nature between January 1954 and May 1955 alone. Along with the procuratorial and public security organs, the courts were reported to have struck severe blows to counterrevolutionary and other criminal elements engaged in activities harmful to the programme of socialist

⁶ *Jen-min jih-pao*, November 27 and December 11, 1954.

⁷ See Shih Liang's speech delivered on July 29, 1955 before the National People's Congress in *Ta-kung pao* (L'impartial), Tientsin, July 31, 1955; her article, "The Judicial System in New China" in *People's China*, Peking, No. 12, 1957; Tung Pi-wu's speech delivered on July 22, 1955 before the National People's Congress in *Ta-kung pao*, July 23, 1955; his speech before the NPC delivered on June 25, 1956 in *Kung-jen jih-pao* (Worker's Daily), Peking, June 27, 1956.

⁸ Shih Liang's article in *People's China*, No. 12, 1957, p. 18.

⁹ *Ibid.*, p. 17, and Shih Liang's speech in *Ta-king pao*, July 31, 1955.

¹⁰ *Kuang-ming jih-pao* (Kuang-ming Daily) Peking, January 17, 1957.

¹¹ *Jen-min jih-pao*, December 11, 1954.

construction and transformation.¹² Just preceding the introduction of agricultural cooperativization, a new drive was launched by the Chinese Communists in July 1955 to liquidate the counterrevolutionaries. On July 30, in a resolution on the First Five-Year Plan, the Second Session of the National People's Congress called upon all state organs and the entire population to "heighten their revolutionary vigilance in order to uproot all counterrevolutionaries, open or under cover, and smash all subversive activities."¹³ Based on the traditional policy of "combining punishment with leniency", this new movement was carried out with great vigour and wide publicity.¹⁴ As a result, numerous counterrevolutionaries were exposed and arrested, and many others gave themselves up and confessed their guilt.¹⁵ In the Political Report of the Central Committee of the Chinese Communist Party on September 15, 1956, Liu Shao-chi praised the movement as a great success for breaking the back of the counterrevolutionaries. At the same time he urged the continuation of the fight against internal enemies within the framework of the law:

Our public security organs, our procurator's offices and our courts must continue to wage a determined struggle against counterrevolutionaries and other criminals. But . . . this struggle must be conducted with strict observance of the law, and, in accordance with the new situation which obtains today, further steps must be taken to put the policy of leniency into practice. The Central Committee of the Party holds that, with the exception of a handful of criminals who have to be condemned to death in response to public indignation caused by their atrocious crimes, no offenders should be given the death penalty, and, while serving their terms of imprisonment, they should be accorded absolutely humane treatment. All cases involving the death penalty should be decided upon or sanctioned by the Supreme People's Court. In this way step by step we shall be able to achieve our aim of completely abolishing the death penalty, and this is all to the good of our socialist construction.¹⁶

¹² Shih Liang's speech before the NPC in *Ta-kung pao*, July 31, 1955.

¹³ *First Five-Year Plan for Development of the National Economy of the People's Republic of China in 1953-1957*, Peking, 1956, p. 4.

¹⁴ A collection of press comments and reports on this movement is in "The Movement for Liquidating All Hidden Counterrevolutionaries," *Jen-min shou-ts'e*, 1956, (People's Handbook), Tientsin, 1956, pp. 342-362.

¹⁵ Tung Pi-wu, "Report on the Liquidation of All Counterrevolutionaries" (delivered on January 31, 1956 before the National Committee of the People's Political Consultative Conference), *Jen-min shou-ts'e*, 1957, pp. 219-222. According to Chou En-lai's estimate in late 1955, more than 76,000 counterrevolutionaries had been arrested and punished since the beginning of the campaign in July 1955. Chow Ching-wen, *Ten Years of Storm*, New York, 1960, pp. 155-156. In his report to the National People's Congress on July 1, 1957, Procurator-General Chang Ting-ch'eng said that more than 190,000 counterrevolutionaries had voluntarily reported and confessed their guilt. *Ta-kung pao*, July 2, 1957.

¹⁶ *Eighth National Congress of the Communist Party of China*, Peking 1956, Vol. 1, pp. 83-84.

It may be noted here that the question of observing the law was frequently referred to by Communist spokesmen during the years of 1954-1957. This actually reflected two opposite trends. One was the genuine move on the part of the Peking regime to establish socialist legality; the other the persistent tendency of government workers and party cadres to ignore laws and regulations. Some newspapers, for instance, reported the use by the courts of public notices, judgement-proclaiming meetings, and other propaganda devices to educate the people to obey the law and discipline.¹⁷ Others cited the punishment of law-breaking officials as a reminder that there was no exception to the observance of the laws by all citizens.¹⁸ An article in *Hsüeh-hsi* (Study) took the position that the Communist party members should be required to serve as a model for the Chinese people in obeying the law: "Party members are the vanguard of the proletarian class and have as their responsibilities the liberation of the working people, elimination of the classes, and establishment of a socialist society. As the Party is the leading force of national life, law-abiding has a special meaning for every Party member . . . Failure to obey the law is to violate the Party constitution and the obligations of Party members. The Party demands all its members to obey the Party discipline and to set an example in observing the law. No exception can be made to anyone."¹⁹

Probably more revealing were writings and reports by top judicial officials with reference to the observance of the law. In an article for *Cheng-fa yen-chiu* in 1956, Ma Hsi-wu of the Supreme People's Court pointed out that some judicial personnel openly violated the provisions of the Constitution and the Organic Law of the Courts by disregarding the legal rights of the accused in court proceedings. They even used illegal methods ranging from threats to corporal punishment to deprive the accused of the rights of defence and appeal.²⁰ In his report to the Eighth National Congress of the Chinese Communist Party on September 19, 1956, Tung Pi-wu admitted as a serious problem the existence in China of a small number of Party members and government functionaries who did not pay attention to the legal system of the State. According to him, cases of violating the law and infringements of the people's democratic rights had been discovered in some places and departments. Accidents had occurred in factories and mines due to violations of

¹⁷ *Hsin-Hunan pao* (New Hunan Journal) Changsha, August 31, 1954; *Kuang-ming jih-pao*, August 23, 1955.

¹⁸ *Chieh-fang jih-pao* (Liberation Daily), Shanghai, August 17 and October 17, 1954; *Jen-min jih-pao*, December 6, 1954.

¹⁹ Ch'en Han-pai, "A Discussion of the Law-abiding Spirit," *Hsüeh-hsi*, Peking No. 7, July 2, 1954.

²⁰ Ma Hsi-wu, "Several Problems concerning the Current Trial Work," *Cheng-fa yen-chiu*, No. 1, 1956, p. 6.

the labour protection regulations; disputes had arisen from failure to fulfil contracts on the part of certain economic departments; proper legal procedures had not been fully observed by judicial organs; maltreatment of criminals had taken place in prisons and labour reform units. One major reason for these occurrences, Tung said, was the profound hatred in the party and among the masses for the old system of law, which tended to breed contempt for all legal systems. It was possible, he added, that this contempt was increased by the mass revolutionary movements that swept the country in the early period after liberation, because such movements did not entirely rely on laws. He also referred to the "petty bourgeois background" of the overwhelming majority of the Chinese people as another reason for the general contempt for the legal system. For the future, however, all such law-breaking tendencies must come to an end he stressed. As demanded by the Central Committee of the Party,

all the laws must be strictly observed. No violations of the law should henceforth be permitted. Particularly all the judicial bodies should abide by the law more strictly. . . . We are opposed to all lawbreaking practices as represented by doing work not in accordance with the laws. In future any person who deliberately violates the law must be prosecuted even if he is in a high position and has rendered meritorious service to the state. As for those who are ignorant of the laws, we must not only teach them what the laws are but also educate them to abide by the laws. To demand everyone to do his work in accordance with the law is one of the chief methods to end the occurrence of violations of the laws of the state.²¹

Closely related to the question of observing the law was that of a complete legal system in Communist China. Although the Communists could boast in the mid-1950s a few important laws and regulations covering marriage, land reform, trade unions, agricultural producers' cooperatives, suppression of counterrevolution, penalties against corruption, etc., they nevertheless had to concede that "people's legality" still left something to be desired. One Chinese writer, for example, pointed out that the laws and decrees promulgated by the state were mainly in the form of provisional programmes and were not "well-developed" laws.²² Two other authors stated that there was much confusion in the Chinese legal system, resulting from the combination of vague terminology, conflicting provisions, and uncertain procedures.²³ Even Tung Pi-wu admitted in his report

²¹ For the text of Tung's speech on the legal system of China, see *New China News Agency*, Peking, September 20, 1956.

²² Li Ch'i, "Struggle to Strengthen the People's Democratic Legal System of Our Country," *Jen-min Jih-pao*, November 6, 1956.

²³ Wen Hung-chün and T'ang tsung-shun, "Strive to Strengthen the Construction of Our Legal System," *Hsin Chien-she* (New Construction), Peking, No. 12, 1956, pp. 8-9.

cited above that China was lacking in some urgently needed basic laws, such as a criminal code, a civil code, a law of procedure, a labour law, and a law of utilization of land. And many existing laws and regulations, he added, had to be revised in the light of changed political and economic conditions. The following passage from Liu Shao-chi's 1956 Political Report provided an official explanation for the absence of comprehensive codes and at the same time underlined the Peking regime's move to build up a complete legal system:

During the period of revolutionary war and in the early days after the liberation of the country, in order to weed out the remnants of our enemies, to suppress the resistance of all counterrevolutionaries, to destroy the reactionary order and to establish revolutionary order, the only expedient thing to do was to draw up some temporary laws in the nature of general principles in accordance with the policy of the Party and the people's government. During this period, the chief aim of the struggle was to liberate the people from the reactionary rule and to free the productive forces of society from the bondage of old relations of production. The principal method of struggle was to lead the masses in direct action. Such laws in the nature of general principles were thus suited to the needs of the time. Now, however, the period of revolutionary storm and stress is past, new relations of production have been set up, and the aim of our struggle is changed into one of safeguarding the successful development of the productive forces of society. A corresponding change in the methods of struggle will consequently have to follow, and a complete legal system becomes an absolute necessity.²⁴

Indeed, there were signs during 1956-1957 that certain fundamental codes were being prepared or ready for adoption. According to *Kuang-ming-jih-pao* on November 24, 1956, the Supreme People's Court had for some time taken steps to summarize the civil and criminal procedures of the "people's courts" at all levels. The draft summary had been sent to the Standing Committee of the National People's Congress for reference and to the Lower Courts for experimental purposes. The same source also reported that the Law Section of the Standing Committee of the NPC was about to complete a draft criminal code of 261 articles. On July 15, 1957, as reported by another source, the People's Congress authorized the Standing Committee to discuss and amend the draft criminal code in consultation with all concerned and then to have it published and put into effect on a trial basis.²⁵ Writing in the June 1957 issue of *People's China* Shih Liang also stated that both the civil law and the law of procedure were actively taking shape.²⁶ All this indicated that until the Anti-Rightist Movement got into full swing in late 1957 there had been noticeable efforts made by the Peking regime

²⁴ *Eighth National Congress of the Communist Party of China*, Vol. I, pp. 81-82.

²⁵ *New China News Agency*, July 16, 1957.

²⁶ "The Judicial System in New China," *People's China*, No. 12, 1947, p. 19.

to build up a more stable and complete legal system despite the obvious gaps existing between juridical niceties and political facts in the Chinese mainland.

THE REVERSAL IN 1957

The period of 1956-57 in Communist China was one of relative political freedom and intellectual ferment, characterised by the official policy of "letting one hundred flowers bloom and one hundred schools contend."²⁷ During this period and especially in the spring of 1957, a good many liberal-minded jurists took advantage of the opportunity to criticise the government for the lack of basic laws and the defective administration of justice. Suggestions were made to restore certain legal concepts and judicial procedures of Western tradition.

Alarmed at the strong criticism evoked by the "Blooming and Contending" Movement, the Peking Regime launched an Anti-Rightist Campaign in the summer of 1957 to counter-attack its outspoken critics. On the legal front this meant a serious setback for the development of a stable system of justice. In the course of the Campaign, those who had criticised the irregularities of "people's legality" were branded as "rightist" and their ideas as "anti-socialist" and "reactionary." Prominent among the "rightist" jurists so exposed were Ch'ien Tuan-sheng (President, Peking College of Political Science and Law) Yü Chung-lu (Advisor, Supreme People's Court), Yang Yü-ch'ing (Assistant Editor-in-Chief, *Cheng-fa yen-chiu*), Wu Ch'uan-yi (Bureau of Legal Affairs, State Council), Chang Ying-nan (Deputy Head, Legal Bureau, the Standing Committee of the NPC), Lou Pang-yen (Deputy Head, Peking Judicial Bureau), Wang T'ieh-yai (Professor, Peking University), Wang Tsao-shih (Professor, Fudan University), Yang Chao-lung (Professor, Fudan University), and Ch'en T'i-ch'iang (International Relations Research Institute).²⁸ Also included in this impressive list of names were a member of the Standing Committee of the NPC (Huang Shao-hung) four members of the Supreme People's Court (Chia Ch'ien and others), and a host of officials in the Ministry of Justice and the local judicial department and "People's courts."²⁹

Probably more important than who were denounced as "rightist"

²⁷ For useful information on this period, consult Roderick MacFarquhar, *The Hundred Flowers Campaign and the Chinese Intellectuals*, New York, 1960; and Theodore H. E. Chen, *Thought Reform of the Chinese Intellectuals*, Hong Kong, 1960 Chapters XIII-XIX.

²⁸ *Jen-min jih-pao*, September 13, 14, 15, 1957; *Chung-kuo ch'ing-nien pao* (Chinese Youth Journal), Peking, September 18, 1957; *China News Analysis*, Hong Kong, No. 203, November 1, 1957.

²⁹ *New China News Agency*, September 18, 1957; *Jen-min jih-pao*, September 20 and December 12, 1957.

was what ideas were attacked during the Campaign. An examination of the major points of contention between the "rightist" jurists and official spokesmen would seem to reveal much of the true nature of socialist legality in Communist China.

"Inadequacy of the legal system". During the "Blooming and Contending" period, the "rightist" lawyers were frank to point out that there was only policy but "no law to rely on." Even the few existing enactments, they said, were so full of confusing and conflicting provisions that the people hardly knew which laws to observe.³⁰ Citing the fact that the Soviet Union and Eastern European countries promulgated their basic law codes within three or five years after the establishment of socialist rule, Yang Chao-lung asked the Peking regime why the Chinese People's Republic founded eight years ago had failed to do the same.³¹ On the question of legislation, Huang Shao-hung also stated that "the country's legislative machinery is not perfect, and lags behind the development of the objective situation. The Criminal Code, the Civil Code, police regulations and regulations for the punishment of public functionaries have all not been enacted and promulgated. Economic laws and regulations are especially incomplete. The first five year plan is about to be fulfilled, and yet the country still has not enacted regulations governing weights and measures."³²

In reply, the Chinese Communists called these complaints unfounded and a bourgeois plot to slander "people's democratic legality," although Liu Shao-chi, Tung Pi-wu and others had in the recent past admitted themselves the existence of significant shortcomings in China's legal system. The official line now insisted that many important laws had been drawn up and put into force since 1949. According to an editorial of *People's Daily* on October 9, 1957, during the eight years of the People's Republic 4,072 different laws and regulations were passed, 3,452 before and 620 after the promulgation of the Constitution in September 1954. Among them were, before the Constitution, the Regulations for the Punishment of Counter-revolutionaries, Trade Union Law, Land Reform, and Marriage Law; after the Constitution, the Military Service Law, Model Regulations

³⁰ These views were expressed by many participants in the forums held in Peking between May 26 and June 7, 1957 by the Chinese Society for Political Science and Law. Note particularly the statements of Wu Ch'uan-yi, Yü Chung-lu, and Ch'en T'i-ch'ang. *Kuang-ming jih-pao*, May 29, June 1 and 10, 1957; *Jen-min jih-pao*, May 29, June 5, 1957.

³¹ "Why is it that the Promulgation of Our Important Codes has long been Delayed." *Hsin-wen jih-pao* (News Daily), Shanghai, June 6, 1957. Another lawyer, Chi Ch'ing-yi, just could not understand why the criminal code, under preparation for a long time, was still unpromulgated. This, he said, was like "only hearing the sound of footsteps on the stairs but seeing no one coming down." *Kuang-ming jih-pao*, June 1, 1957.

³² *New China News Agency*, May 16, 1957.

for Agricultural Producers' Cooperatives, Regulations on Factory Safety and Sanitation, and Regulations for Labour Protection. The delay in enacting complete codes of a fundamental nature was explained by the Communists as unavoidable in China where political and economic conditions were changing too rapidly. "For instance", stated Premier Chou En-lai, "it is difficult to draft the civil and criminal codes before the completion in the main of the socialist transformation of the private ownership of the means of production and the full establishment of socialist ownership of the means of production. Under these circumstances, it is necessary and proper for the state to issue provisional regulations, decisions and directives as terms of reference for general observance."³³

"The class nature of law". Another controversial subject during the period under discussion was the character of law. A number of liberal-minded lawyers criticised the Communist regime for over-emphasising the political and class nature of law to the neglect of its "technical and scientific character." They pictured law as a "special science", understood only by the experts and not to be led by politics.³⁴ Closely related to this was the continuity of law. Many lawyers regarded the old legal system as a part of historical heritage and maintained that the "successiveness" of law and its "class nature" were not mutually exclusive. Elements of the old law, they said, could and should be selectively adopted, modified, and developed to serve the needs of the new society.³⁵

Communist spokesmen, on the other hand, denounced the view on the nonpolitical character of law as an attempt of the "rightist" to take away from the working class the "weapon of dictatorship." According to a writer in a leading legal journal, "law possesses a strong class character. It is the manifestation of the will of the ruling class; it is an instrument used by the ruling class to protect its interest

³³ *Ibid.*, June 26, 1957. With a similar argument, a writer named Kao Ming-hsuan refuted Professor Yang Chao-lung's contention that China should have followed the Soviet example to promulgate important codes within three to five years after the establishment of the new government. According to Kao, The Soviet Union did it only after she had basically settled the question of socialist ownership of means of production, while in the case of China, the country was still going through the period of the socialist revolution and could not have possibly drawn up in the past important basic laws suited to long-term needs. *Kuang-ming jih-pao*, October 22, 1957.

³⁴ As an example, see Yang Chao-lung, "Relations between the Communist and Non-Communist Parties in the Legal Field," *Wen-hui pao* (Wen-hui journal), Shanghai, May 8, 1957.

³⁵ "Legal Circles Discuss the Class Nature and Successiveness of Law," *Jen-min jih-pao*, May 22, 1957; Yang Pai-yu, "Is there any Contradiction between the Successiveness of Law and Its Class Nature," *Kuang-ming jih-pao*, April 1, 1947; Ts'eng Ping-chün, "On the Question of the Successiveness of Law," *Cheng-fa yen-chiu*, No. 3, 1957, pp. 34-38; Chang Chin-fan, "Views on the Class Nature and Successiveness of Law," *Ibid.*, pp. 39-42.

and to repress the opposition of the oppressed classes As everyone knows, law and politics are inseparable and law must serve politics."³⁶ From the standpoint of the Communists, the new law in China reflected the "will and interest of the broad masses headed by the working class," while the old law, particularly the Six Codes of the Kuomintang reflected the "will and interest of the exploiting classes of landlords and bureaucratic capitalists." The two systems of law were irreconcilably opposed to each other and there existed no possibility of continuity between them whatsoever.³⁷ Consequently, those who advocated the succession of law, Shih Liang charged, really aimed at the revival of the old legal system. This was like "borrowing the corpse of the rightist element to resurrect the spirit of Chiang Kai-shek."³⁸

"Defective administration of justice." With respect to the problems and difficulties in the administration of justice in China, the "rightist" jurists complained specifically about the poor quality of judicial cadres and their arbitrary attitude toward the law. The Judicial Reform of 1952 was blamed for "killing the old judicial workers in one stroke" and creating a serious shortage of trained personnel in the courts. As a result of the sectarianism of the Communist Party, the critics charged, most of the former lawyers had been compelled to work in non-legal fields, some even as coolies, while party cadres who knew little about law had been given the responsibility of judicial work.³⁹ The cultural level of these cadres was so low that some of them did not know how to write a decision and others even confused "extradition" (*yin-tu*) with "ferry" (*lun-tu*) and "necessary" (*pi-hsü*) with "unnecessary" (*pou-hsü*).⁴⁰ As observed by Yü Chung-lu, many of the judicial personnel were unable to draw "the line of demarcation between crimes and non-crimes" and often passed sentences according to their whims rather than fixed rules.⁴¹ Professor Wu Wen-han of Lanchow University also declared that there was a number of leading cadres who tended to put the Party above the law and regard their own words as "golden rules and jade laws."⁴² Under the circumstances, the liberal jurists

³⁶ Yeh Ming, "Beat Back the Attack on the People's Legal System by Rightist Elements," *Fa-hsüeh* (Jurisprudence), Shanghai, No. 4, 1957, p. 1.

³⁷ Wan Shan "Refute the theory of Inheriting the Legal Heritage of the Fatherland," *ibid.*, No. 3, 1957, p. 5.

³⁸ Shih Liang, "Thoroughly Crush the Attack on Judicial Work by Rightist Elements," *Kuang-ming jih-pao*, August 31, 1957.

³⁹ *Wen-hui pao*, May 18, 1957; *Kuang-ming jih-pao*, May 29 and August 28, 1957.

⁴⁰ Yang Chao-lung's article in *Wen-hui pao*, May 8, 1957; *Kuang-ming jih-pao*, August 28, 1957; "Contradictions in Judicial Work Exposed," *Hsin-wen jih-pao*, May 19, 1957.

⁴¹ *Kuang-ming jih-pao*, June 10, 1957; *Jen-min jih-pao*, September 2, 1957.

⁴² *Jen-min jih-pao*, May 29, 1957.

stated, violations of laws and miscarriage of justice had become commonplace in the New China. The First Middle People's Court in Shanghai, for example, was said to have wrongfully adjudicated 34 per cent of its cases.⁴³

Against the above criticisms, the Chinese Communists first of all defended the 1952 Judicial Reform as a significant movement to purge the courts of "old legal concepts" and the "corrupt and law-violating personnel". Contrary to the charge that the old judicial workers were "killed in one stroke", Shih Liang reported that as a result of the Reform, 20 per cent of the lawyers were still retained in the legal profession, 70 per cent were given employment in other fields, and only 7 per cent were expelled and punished.⁴⁴ As for the quality of the new judicial cadres in the "people's courts", it was pointed out that most of them were of worker and peasant origin but were not necessarily Party members.⁴⁵ While admitting the low cultural level of a small minority among them one Communist writer insisted that these cadres as a whole possessed many outstanding qualifications, such as "a firm class stand," "clear and correct viewpoints," "high degrees of activism and efficiency," etc.⁴⁶ Just to show the excellent work the judges of worker and peasant background were capable of, Shih Liang said that between January and July 1957, the courts in Shanghai adjudicated correctly more than 96 per cent of some 7,000 cases they dealt with.⁴⁷ All in all, according to the official line, the "malicious attacks" on the "people's judicial cadres" and their work were a part of the "rightist conspiracy" to "usurp" from the Party the leadership over the judiciary and to "restore" the "reactionary, old legal order" throughout the country.⁴⁸

"The suppression of counterrevolutionaries." The legality of the campaign for the suppression of counterrevolutionaries was one of the major issues of dispute between the Peking regime and the intel-

⁴³ *Hsin-wen jih-pao*, May 19, 1957.

⁴⁴ Shih Liang's article in *Kuang-ming jih-pao*, August 31, 1957 (cited note 38). According to the 1953 data for the country, 2,369 old judicial workers were retained in their posts after the judicial Reform, and of this number 1,142 continued trial work. T'ao Hsi-shin, "On the Judicial Reform", *Cheng-fa yen-chiu*, No. 5, 1957, p. 15.

⁴⁵ Shih Liang, *Kuang-ming jih-pao*, August 31, 1957. To refute the complaint that "judicial workers are all communists," Shih Liang pointed out that she herself was not a Party member but had been the Minister of Justice for almost eight years. As another example, she cited the fact that out of 52 judicial workers in the Middle People's Court of Peking, 24 were not Party members.

⁴⁶ Hsi Tsu-te, "To Undermine the People's Judicial Organs is Absolutely not Allowed," *Wen-hui pao*, July 3, 1957.

⁴⁷ Shih Liang, *Kuang-ming jih-pao*, August 31, 1957.

⁴⁸ *Ibid.*; T'ao Hsi-chin, p. 15; Yeh Ming (cited note 36) p. 4.

lectuals. As charged by the latter, the arbitrary arrests and mob violence during the mass movement against the counterrevolutionaries infringed upon the people's civil rights and violated the constitutional guarantees.⁴⁹ One liberal critic, for instance, complained that in the course of the anti-counterrevolutionary drive members of the democratic parties were arrested without notifying their families or giving reasons for their arrests.⁵⁰ Another stated that the campaign against the counterrevolutionaries was so oppressive that "the 'red terror' is now the order of the day replacing the 'white terror' of the past."⁵¹ Two others blamed the "rather be leftist than rightist" tendency for putting too many persons to death during the campaign for suppressing counterrevolutionaries and called it unnecessary to continue this struggle "when the world is already in peace."⁵² There was a consensus among many jurists that the class struggle in China had come to an end and that the current important task of the courts was to handle the contradictions among the people. From their point of view, democracy should now take precedence over dictatorship, and persons accused of counterrevolutionary offenses should be treated according to democratic principles.⁵³

In defense of the anti-counterrevolutionary drive, Communist spokesmen pictured it as implementing the provision of Article 19 of the Constitution: "To safeguard the people's democratic system, suppress all treasonable and counterrevolutionaries." Criticism against this drive was called a "wicked scheme" of the "rightists" designed to discredit the "mass line" and Party leadership in political and legal work.⁵⁴ While admitting the occurrence of some mistakes in the nation-wide struggle against the counterrevolutionaries, *People's Daily* of July 18, 1957 insisted nevertheless that the achievements of this struggle far outweighed the mistakes. As a result of the 1955 campaign, it pointed out, over 81,000 counterrevolutionaries had been dealt with by law and some 190,000

⁴⁹ This type of complaint was made by Ku Chih-chung, a lawyer in Shanghai, who said that the Constitution of the Chinese People's Republic existed in name only. *Jen-min jih-pao*, June 26, 1957.

⁵⁰ A statement by Ch'en Ch'i-yu, chairman of the Chih-kung-tang, in *Kuang-ming jih-pao*, May 10, 1957.

⁵¹ Chin Yung-hsün, "In the Past it was the White Terror; Now it is the Red Terror," *Yünnan jih-pao*, Kunming, July 4, 1957.

⁵² See the joint speech made on June 10, 1957 by Chang Po-sheng and Huang Chen-lu of the Shenyang Normal College in *Shenyang jih-pao*, June 11, 1957.

⁵³ *Jen-min jih-pao*, September 17, 1957; New China News Agency, September 18, 1957.

⁵⁴ See Li Shih-wen, "Refute the Rightists' erroneous View 'Anti-Counterrevolutionary Campaign has Violated the Law,'" *Cheng-fa yen-chiu*, No. 5, 1957, pp. 33-37; Chin Wen-sheng, "Condemn the Rightist Slander against the Suppression of Counterrevolutionaries," *Cheng-chih Hsüeh-hsi* (Political Study), No. 9, September 13, 1957, in American Consulate General, Hong Kong, *Extracts from China Mainland Magazines*, No. 107, November 12, 1957.

counterrevolutionaries had given themselves up. Citing the continuous activities of the hidden counterrevolutionaries, Shih Liang said: "The anti-counterrevolutionary campaign is just as absolutely necessary as it was in the past. To deny the necessity and correctness of this campaign is in actuality to deny the people's democratic dictatorship. The Chinese people will never permit this."⁵⁵

"Independence of the judiciary." A group of liberal jurists took a strong stand for the principle of judicial independence during the "Blooming and Contending" stage. Chia Ch'ien (Chief Justice of the Criminal Division of the Supreme People's Court), for instance, was quoted as saying: "The Party realizes its leadership in judicial work through the enactment of laws. Since the law represents the will of the people as well as that of the Party, a judge who obeys the law obeys in effect the leadership of the Party. Hence all a judge needs to do is to obey the law; there is no need for any more guidance from the Party."⁵⁶ In Chia Ch'ien's view, the Party should only exercise its leadership over the judiciary in general policies and directions and should not interfere with the actual trial work of the courts. Otherwise, it would run counter to the provision of the Constitution (Article 78) that "in administering justice the people's courts are independent, subject only to the law." He was of the further opinion that "the Party committees do not know the law or the circumstances of individual cases. Their leadership therefore may not be correct."⁵⁷

The stand taken by Chia Ch'ien and others evoked a series of rebuttals from the Communist press and legal journals and in the subsequent Anti-Rightist Campaign. One article in *People's Daily* argued that Party leadership should be manifested not only in the process of legislation but also in the administration of justice: "the Party's leadership over the state is expressly set forth in the Preamble and Article 1 of the Constitution . . . The People's courts, being an instrument of the state, should of course follow the Party's guidance in the administration of justice. This is fully in accord with the constitutional provisions . . . Facts have shown that the Party's active intervention in the trial work of the People's courts not only breaches no law but can effectively supervise and correct unlawful phenomena that may appear in the judicial process."⁵⁸ A writer of *Fa-hsüeh* also stated: "To effect its leadership, the Party must first formulate correct policies and programmes. But this alone is not enough. The Party must also supervise and investigate how these

⁵⁵ *Kuang-ming jih-pao*, August 31, 1957.

⁵⁶ Jo Ch'uan and Ho Fang, "No Perversion of the Nature of the People's Courts is allowed," *Jen-min jih-pao*, December 24, 1957.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

policies and programmes are carried out by the People's courts; it must exercise correct leadership in the trial work of the courts in order to assure the thorough implementation of its policies."⁵⁹ As to the Party Committees' competency for legal matters, an article in *Cheng-fa yen-chiu* had this to say: "Our laws are the manifestation of the will of the people led by the working class . . . They are enacted and enforced by the people under the leadership of the Party . . . How can one say 'The Party Committees do not know law'? . . . Furthermore, the Party Committees have a complete grasp of the entire situation, know the political conditions as a whole, understand the relationship between the enemy and ourselves, and are well acquainted with the feelings and demands of the people. Therefore, they are most qualified to weigh the pros and cons of a case in relation to the situation as a whole and to properly direct the work of all departments. It is only under the leadership of the Party that the People's courts can be assured of the correct administration of justice."⁶⁰

"The benefit of the doubt for the accused." Among the major issues of the legal debate were the "benefit of the doubt for the accused" and the "presumption of innocence" advocated by Chia Ch'ien and the other "rightist" jurists. According to their view, "the accused must be presumed innocent until proven guilty in the criminal proceedings, and 'extenuating circumstances' must be considered in cases where the accused are found guilty of serious crimes." Also expounded by them was the related principle of "free conscientious judgement of evidence" under which "a judge is free to use his 'inner convictions' (conscience, justice, moral concepts, etc.) as the yardstick to determine the facts of a case and the validity of the evidence."⁶¹

Communist spokesmen, however, denounced all these principles as "theories of bourgeois jurisprudence," incompatible with the socialist judicial system. To apply such principles in the administration of justice, they contend, would be putting the interest of the accused above the interest of the people. This in effect would mean "the protection of guilty persons from punishment" and "the restriction of the freedom of the judicial organs and the masses in their fight against counterrevolutionary and other criminal elements." In order to strengthen the "people's democratic dictatorship" and consolidate

⁵⁹ Wang Nai-yuan & Ch'en Ch'i-wu, "Our Understanding Regarding 'In Administering Justice the People's Courts are independent, Subject Only to the Law'," *Fa-hsüeh*, No. 2, 1958, p. 32.

⁶⁰ Feng Jo-ch'uan "Refute Chia Ch'ien's Anti-Party Erroneous View of 'Judicial Independence'," *Cheng-fa yen-chiu*, No. 1, 1958, pp. 21-22.

⁶¹ Jo Ch'üan & Ho Fang, *Jen-min jih-pao*, December 24, 1963; "Anti-Rightist Struggle in the Supreme People's Court," *New China News Agency*, December 11, 1957.

the Party's guiding role in judicial activities, asserted the official line, resolute efforts must be made to combat and liquidate the "reactionary and dangerous" views of "presumption of innocence", "benefit of the doubt for the accused," and "free conscientious judgement of evidence."⁶²

RECENT DEVELOPMENT, 1958 – THE PRESENT

While 1957 marked the official reversal of the trend toward legality, the years that followed were also not conducive to the development of the stable legal order in Communist China. During the period between early 1958 and the present, the Peking regime had been preoccupied with the problems of socialist construction ranging from the Big Leap Forward to the resulting economic failures and retrenchment. At the same time it has been engaged with vigour in ideological struggles against both the "rightist" and "revisionist" influences at home and on the international scene. In the context of this political climate, most of the new laws and regulations adopted have been mainly concerned with economic matters and the work of the judiciary has been primarily geared toward the repression of opposition and advancement of the interest of socialism.

One noticeable feature of Peking's policy during the period under discussion has been its repeated stress on absolute Party leadership in judicial work. At the Fourth National Judicial Work Conference in August 1958, the principle was reaffirmed that "the people's courts should be absolute in their submission to Party leadership, and there could not be the least negligence and vacillation . . . Only in this way could court work be made to meet the change of situation as well as to implement concretely the lines and policies of the Party under the guidance of the correct lines."⁶³ "politics must assume command," and "obey the Party Committees" were also among the conclusions reached by the National Conference of Advanced Public Security, Procuratorial, and Judicial Workers, held in May of 1959.⁶⁴

The official line has been frequently expounded by writers in *Cheng-fa Yen-chiu*. One group of them, for instance wrote in 1959: "The policy of the Party is the soul of the people's democratic legal system; the people's democratic legal system is the instrument for implementing the Party policy. This is to say, the Party policy com-

⁶² Jo Ch'üan & Ho Fang, *Jen-min jih-pao*, December 24, 1963; Wu Lu, "Refute the View on the Benefit of the Doubt for the Accused," *Cheng-fa yen-chiu*, No. 4 1958, pp. 59-62; Chang Tzu-p'ei, "Criticism the Bourgeois Principle of 'Free Conscientious Judgment of Evidence'," *ibid.*, No. 2, 1958, pp. 42-48.

⁶³ *New China News Agency*, August 28, 1958.

⁶⁴ *Jen-min jih-pao*, May 23, 1959.

mands legal work and legal work can never be separated from the Party policy. Legal work can only serve as a tool for the Party policy and cannot be above or beyond politics . . . Without the leadership of the Party there would not be the people's democratic legal system. Therefore, legislative and judicial activities as well as other forms of legal work must all be under the absolute leadership of the Party."⁶⁵ Another writer stated in 1960 that the leadership of the Party in judicial work should be comprehensive and all-embracing, to be exercised over matters from principles and policies to organisation and concrete trial work. The "people's courts" according to him, must obey absolutely not only the leadership of the Central Committee of the Communist Party but also the leadership of the Party Committee at both higher and corresponding levels.⁶⁶ Writing in 1962, still another author pointed out that law could never be properly administered to fulfill its functions without the correct leadership of the Party and the guidance of correct ideology and policy.⁶⁷

The pursuit of the mass line in judicial work has, too, been strongly emphasised by the Communist authorities since the beginning of 1958. Several major features of this policy may be noted in the following. (A) Under the direction of the mass line, the courts have been brought directly to the people, judicial procedures have been simplified, and justice has been carried out on the spot. This was particularly evident during the years of the Big Leap, when the "5 goes" (go to factories, go to mines, go to communes, go to streets, and go to markets) and the "3 on-the-spots" (investigation on-the-spot, mediate on the spot and try and sentence on the spot) became a standard practice for judicial workers to "improve the quality of their work" and to "create closer ties between the people's courts and the masses."⁶⁸ In the province of Liaoning the "people's courts" reportedly tried and judged on the spot more than 80 per cent of the total number of cases handled from January to October 1959.⁶⁹ Judicial personnel in Hopei province adopted during the Big Leap the slogan: "When cases come up at daytime, they shall be disposed of during the day; when cases come up at night, they shall be dealt with

⁶⁵ Yin P'ing and others, "Several Problems relating to our People's Democratic Legal System," *Cheng-fa yen-chiu*, No. 2, 1959, pp. 7-8.

⁶⁶ Ch'i Wen "We must thoroughly Liquidate the Influence of the 'Judicial Independence' Concept of the Bourgeois Class," *ibid.*, No. 2, 1960, p. 55.

⁶⁷ Wang Chia-fu, "Certain Problems in the Compiling and Writing of 'The Theory of State and Law'," *ibid.*, No. 1, 1962, p. 37.

⁶⁸ See Li Lin, "Several Points in Our Understanding of Judicial Work during the Big Leap," *ibid.*, No. 5, 1958, pp. 42-48; Fan Min-hsin, "The Mass line is the Basic Line of Our Political and Legal Work," *ibid.*, No. 2, 1959, pp. 13-16.

⁶⁹ Liu P'eng, "Work Report of the Higher People's Court in Liaoning Province," *Liaoning jih-pao* (Liaoning Daily), Shenyang, December 22, 1959.

under lamplight; and if they cannot be settled in one day, then work shall be carried on continuously.”⁷⁰ A 1960 report from Honan province exalted the success of the mass line in elevating the legal outlook of the vast masses and in improving the quality of trial work. Not only were all kinds of civil and criminal cases handled with speed and accuracy, but some perplexing old cases were settled and the accumulation of cases was cleared up, so it reported.⁷¹

(B) Another important aspect of the mass line is the integration of judicial work with productive labour. Since the start of the ill-fated Big Leap, judicial cadres have been sent to lower levels for labour training and for productive work in all forms. They have been asked to live, eat and labour with the masses and to take a direct part in production. The legal personnel of Liaoning, for example, were said to have participated in production 1,685 times during a five-month period.⁷² The judges of a city court in Shantung, while working in a commune, reportedly collected 6,200 catties of manure and adjudicated 77 cases all within six months.⁷³ Justifications for this policy were presented by Communist spokesmen in such publications as *Hung-ch'i* and *Cheng-fa yen-chiu*. According to the official line of reasoning, the integration of judicial work with productive labour would help the judicial cadres to combat the influence of bourgeois ideology, strengthen their class consciousness and mass viewpoints, and solidify their relations with the working people. It was further pointed out that by participating directly in production along with the masses, the judicial workers would learn production skills, raise labour productivity, facilitate the correct implementation of the Party policy, and temper themselves into “red and expert” cadres.⁷⁴

(C) As a part of the mass line style of judicial work, the Communists have put a premium on the use of mediation for resolving disputes and on the “integration of court trial with mass debate.” Specific efforts have been made to encourage the masses to enter into “socialist patriotic pacts” with the professed purposes of promoting voluntary observance of law and social discipline, strengthening internal solidarity among the people, and maintaining socialist peace

⁷⁰ *Hopei jih-pao* (Hopei Daily), Tientsin, October 29, 1958.

⁷¹ Wang Kuang-li, “Work Report on the Higher People's Court in Honan Province,” *Honan jih-pao*, (Honon Daily) *Chengchou*, March 1, 1960.

⁷² *Jen-min jih-pao*, July 27, 1960.

⁷³ *China News Analysis*, Hong Kong, No. 397, November 17, 1961, p. 2.

⁷⁴ See Li Shih-ying, “A brief Discussion of the Meaning of the Participation of Political and Legal Cadres in Productive Labour,” *Cheng-fa yen-chiu*, No. 1 1959, pp. 17–22; “Participation in Collective, Productive Labour by Cadres is of Fundamental Importance under the Socialist System” (Editorial), *Hung-ch'i* (Red Flag), Peking, Nos. 13–14, July 10, 1963.

and order.⁷⁵ Letters and personal visits to the authorities have also become important channels for the masses to make complaints and report wrongdoings. Between January and October of 1961 the number of such letters and visits received in Kansu was estimated to be 29,000, an increase of 70 per cent over the previous year.⁷⁶ In 1962 the Kiangsu authorities at the *hsien* level and above were reported to receive 500,000 letters and visits from the people.⁷⁷

The courts being instruments of the People's Democratic Dictatorship, struggle against counterrevolutionaries has also continued to be a focal point of the judicial work during the period under discussion. Such a struggle was waged with special intensity in the 1958 campaigns for the Big Leap Forward and for the communization of agriculture. As told by a newspaper account that year, in Shansi alone 11,352 counterrevolutionaries and 12,898 criminals were uncovered and punished within a six-month period.⁷⁸ While claiming a great victory over the counterrevolutionaries, Vice Premier Lo Jui-ch'ing nevertheless said in September 1959: "Our enemies, although greatly weakened, have not been completely wiped out. They will not give up the struggle and are continuing to intensify conspiratorial activities. Recently, our public security organs arrested special agents and spies dispatched by American imperialism and the Chiang Kai-shek gang. At the same time they broke some cases of sabotage involving remnant counterrevolutionaries in our country. All these facts tell us that we must not become self-complacent and belittle the enemy and that we must not relax our vigilance and struggle."⁷⁹ Lo's statement was echoed by the Central Committee of the Chinese Communist Party in a passage of its communiqué on January 20, 1961: "The overwhelming majority, or over 90 per cent, of the urban and rural population in the country support the line and policies of the Party and the People's Government . . . There is, however, an extremely small number of landlord and bourgeois elements, accounting for only a few per cent of the population, who have not yet been sufficiently remoulded and are always attempting to stage a come-back . . . ; they have taken advantage of the difficulties caused by natural calamities and of some shortcomings in the work at the primary levels to carry out sabotaging activities."⁸⁰

⁷⁵ For discussion of these pacts, see Hsien Chia-lin and others, "The Utility of the Socialist Patriotic Pacts," *Cheng-fa yen-chiu*, No. 1, 1959, pp. 52-53; Wang Kuo-shu, "A Brief Discussion of the Socialist Patriotic Pact", *ibid.*, No. 1, 1961, pp. 38-40.

⁷⁶ *Jen-min jih-pao*, January 9, 1962.

⁷⁷ *New China News Agency*, Nanking, February 20, 1963.

⁷⁸ *Shansi jih-pao* (Shansi Daily), Taiyuan, December 8, 1958.

⁷⁹ Lo Jui-ch'ing, "The Struggle between Revolution and Counterrevolution over the Past Ten Years," *Jen-min jih-pao*, September 20, 1959.

The continual struggle against counterrevolutionaries has been underscored recently by occasional reports in the Communist press about the trials of saboteurs and secret agents in mainland China, especially in the southern and coastal regions. On April 27, 1962, the Canton Municipal People's Court held a judgment meeting, at which four persons were accused of being Nationalist agents. One was sentenced to immediate death, another to death with a two-year suspension of the execution, the third to 20 years' imprisonment, and the fourth, who gave himself up, was exempt from punishment.⁸¹ In January 1963 the courts in Kwangtung tried fifteen persons for the crimes of placing bombs and causing arson. Five of them were executed and the others either received sentences of varying kinds or were acquitted.⁸² Between October 1962 and October 1963, 24 groups of saboteurs and enemy agents were put out of action in the coastal provinces of Communist China. In dealing with them, the people's judicial organs were said to have always followed the principle of "leniency for those who confess; severity for those who resist; rewards for those who have merit."⁸³

To all these reports must be added some official pronouncements as further illustrations of Peking's concern with the problems of counterrevolution and class struggle. The Central Committee of the Chinese Communist Party pointed out in September 1962 that "throughout the historical period of proletarian revolution and proletarian dictatorship, throughout the historical period of transition from capitalism to communism, there is class struggle between the proletariat and the bourgeois and struggle between the socialist road and the capitalist road... This struggle is complicated, tortuous, with ups and downs and sometimes is very sharp."⁸⁴ Following the same line, many newspaper editorials and journal articles were written in 1963 to play up the incessant class war during the socialist era. Typically, the Chinese people and various state organs were urged to maintain their vigilance in the face of the combined threat of foreign and domestic enemies. Abroad, they should wage the class struggle against the "imperialists, reactionaries, and modern revisionists of different countries who have raised a hue and cry in the grand anti-Chinese chorus"; at home, against "those landlords, rich

⁸⁰ "Communiqué of the Ninth Plenary Session of the Eighth Central Committee of the Communist Party of China," *Peking Review*, January 27, 1961, p. 6.

⁸¹ *Wen-hui pao*, (Wen-hui News) Hong Kong, April 29, 1962.

⁸² *Jen-min jih-pao*, January 13, 1963.

⁸³ *New China News Agency*, November 18, 1963.

⁸⁴ "Communiqué of the Tenth Plenary Session of the Eighth Central Committee of the Communist Party of China," *Peking Review*, September 28, 1962, p. 7.

peasants, and bourgeois rightists who have not reformed themselves and the remnant counterrevolutionaries who are still seeking the restoration of the feudalist rule in China.”⁸⁵

Our discussion of the legal life in the post-1957 China would be incomplete without mentioning the fact that in the last few years the Peking regime has taken occasional steps to soften the prevalent rigidity of “people’s justice” and to allow the return of some legal discussions among the juridical circles. One sign of this limited relaxation may be seen in the amnesty granted to the reformed “war criminals” and the removal of the “Rightist hat” from the reformed Rightists.

The first amnesty order was issued by Liu Shao-chi, Chairman of Communist China, on September 17, 1959, in connection with the celebration of the tenth anniversary of the founding of the People’s Republic. It granted pardons to “war criminals of the Chiang Kai-shek clique and the puppet Manchukuo,” counterrevolutionaries, and common criminals who had, through a certain period of reform through labour, really changed and turned over a new leaf.⁸⁶ In accordance with this order the Supreme People’s court released in December 1959 33 major “war criminals”, including P’u Yi, ex-Emperor of Manchukuo, and Tu Yü-ming, former commander of the Nationalist forces in the North-East.⁸⁷ At the same time the provincial judicial organs set free a large number of counterrevolutionaries and common criminals. In the provinces of Anhwei and Honan, for example, 6,000 and 4,263 persons were granted special pardon and released respectively.⁸⁸

Subsequently, three more orders were issued by Liu Shao-chi granting amnesty to major “war criminals” of the “Chiang Kai-shek clique,” the puppet Manchukuo, and the puppet Inner Mongolian Autonomous Government who had genuinely reformed. On the basis of these orders the Supreme People’s Court pardoned and released 50 “war criminals” in November 1960, 68 in December 1961, and 35 in April 1963.⁸⁹ As a rule, those criminals were given their release at public meetings where they dutifully expressed their boundless gratitude to the Communist regime and voiced their deter-

⁸⁵ For this type of argument, see Editorial of *Jen-min jih-pao*, June 19, 1963; Huang-Wen-yü, “There is Still Class Struggle,” *Nan-fang jih-pao* (Southern Daily) Canton, May 28, 1963; Liu Hu-p’ing, “Correctly Recognise the Class Struggle during the Socialist Period,” *Cheng-fa yen-chiu*, No. 2, 1963, pp. 18-24.

⁸⁶ *Jen-min jih-pao*, September 18, 1959.

⁸⁷ *Ibid.*, December 5, 1959.

⁸⁸ *Anhwei jih-pao*, (Anhwei Daily) Hefei, December 28, 1959; Wang Kuang-li’s report in *Honan jih-pao*, March 1, 1960.

⁸⁹ See *Chung-hua jen-min kung-ho-kuo-fa-kuei hui-pien* (Compendium of Law and Regulations of the Chinese People’s Republic), Peking, Vol. 12 (1962) pp. 67-71; *Jen-min jih-pao*, November 29, 1960, December 26, 1961, April 10, 1963.

mination to continue remoulding their ideology and render their service to the building of socialism in China. For propaganda purposes, many of them were further given publicized interviews in which they usually recounted how they rid themselves of reactionary ideas through political education and learned to appreciate the value of labour as well as had their health improved through participation in production. The interviews were often concluded with an appeal to the people in Formosa for coming to grips with the true light and returning to the arms of the motherland.⁹⁰ All in all, the granting of amnesty to "war criminals" was described by official statements as a demonstration of "the prosperity and might of the country, the unprecedented consolidation of the state power of the People's Democratic Dictatorship, and the correctness of the policy of the Chinese Communist Party and People's Government of combining punishment with leniency and labour reform with ideological education." It also showed that "those who have committed crimes against the people will eventually be pardoned if only they confess their crimes and show signs of having truly changed."⁹¹

By the same token, the Central Committee of the Communist Party and the State Council made a decision on September 16, 1959, favorable to the reformed Rightists: "Anyone who has changed from evil to good and has shown that he has really changed in both views and activities will no longer be considered a bourgeois rightist from now on, that is the label of 'rightist' shall be removed from him."⁹² In accordance with this decision the central organs of the state and of the democratic parties proceeded to relieve 142 persons of their "Rightist designation" in December 1959, 260 in November 1960, some 370 in December 1961, and more than 100 at the end of 1962. Among those prominent figures so affected were Fei Hsia-t'ung, Huang Shao-hung, Ch'ien Tung-sheng, Ku Chih-chung and Ch'en Ming-shu.⁹³ Local authorities, too, occasionally removed the "Rightist label" from less-known individuals. Throughout the country altogether 26,000 Rightists had their "hats taken off" in 1959.⁹⁴

Another sign of the "sweet" side of Peking's recent policy is the "love the people month" movement. Since early 1959 the Ministry of Public Security has regularly directed its agencies at all

⁹⁰ For some of these Interviews see *Wen-hui pao*, December 13, 1959, (with Wang Yao-wu) *Ta-kung pao*, Hong Kong, December 13, 1959, (with Tu Yu-ming) *Ta-kung Pao*, Peking, December 19, 1959 (with P'u Yi) *Ta-kung pao*, Hong Kong, January 27, 1962, (with Liao Yao-hsiang).

⁹¹ Same sources as in Note 89.

⁹² New China News Agency, September 17, 1959.

⁹³ *Jen-min jih-pao*, December 5, 1959, November 25, 1960, December 17, 1961; *New China News Agency*, February 24, 1963.

⁹⁴ *Jen-min jih-pao*, January 4, 1960.

levels to launch a "love the people month" during the traditional Spring Festival, with the express purpose of rendering a helping hand to the production and livelihood of the masses. In February 1959, for example, public security personnel throughout the country "performed over four million good deeds for the masses, leaving behind many touching stories of self-sacrifice for and devotion to the people."⁹⁵ In the "love the people month" of 1963, more than 100,000 "good things for the masses" were reportedly done by the "people's police" in 15 provinces and municipalities.⁹⁶ Services rendered during the movement usually include distributing commodities, transporting manure, irrigating land, and repairing farm tools. An integral part of the mass line strategy, the "love the people month" movement further indicates Peking's attempt to mitigate the tensions within China arising out of political repression and economic failures in recent years.

More illustrative of Peking's limited retreat from the harshness of the Anti-Rightist and Big Leap Campaigns has been the reappearance of legal discussions in juridical circles. In the last few years legal forums have been held and textbooks and journal articles have been written on such subjects as "philosophy of law", "state and legal theories", "history of Chinese laws", etc. Reference again has been made to the implementation of the 1956 slogan "let a hundred flowers bloom, let a hundred schools contend". There has been a basic agreement among jurists that law is the expression of the will of the ruling class and that although subservient to the party policy, law has important functions to perform in the stage of socialist construction. Different opinions however, have been expressed as to what are the specific characteristics of law, which organs have the law-making authority, and whether legal coercion applies to all citizens or to the enemy only.⁹⁷

As a result of the Peking-Moscow split, juridical circles in Communist China have understandably begun to show more interest in legal systems other than that of the Soviet Union. This is reflected in the new attention given to the legal traditions of China by individual researchers and academic institutions. Interesting essays, for instance, have been published on the development of criminal legis-

⁹⁵ *New China News Agency*, December 27, 1959.

⁹⁶ *Ibid.*, February 19, 1963.

⁹⁷ Consult particularly the relevant articles and reports in the 1962 issues of *Cheng-fa yen-chiu*. A good summary on the legal symposiums held in Peking in 1962 (sponsored by the Research Department of the Chinese Association for Political Science and Law, The Editorial Board of the *Studies of Political Science and Law*, and others) is in "Concerning the Questions of Nature and Functions of Law during the Socialist Stage of Our Country," *Cheng-fa yen-chiu*, No. 3, 1963, pp. 23-24.

lation and criminal procedure in old China.⁹⁸ Major works have been undertaken to edit with annotations the laws of the imperial dynasties in general and the law of the T'ang dynasty in particular.⁹⁹ Law schools at Peking and Kirin Universities have organised scholarly discussions and prepared teaching material on topics like "the T'ang Law," "political philosophy of Han Fei-tzu," and "relations between *li* and *fa*".¹⁰⁰ The current official line is "critical inheritance of the cultural legacy." According to it, one should not cut off history and must understand the past in order to serve the present. Consequently, it is a duty of legal scholars today to examine the entire process of development of Chinese law in a scientific, objective and realistic manner. Only through the use of the Marxist-Leninist method of historical analysis, can one differentiate the elixir from the dregs and decide on what to accept and what to reject in the legal legacy.¹⁰¹

In a similar manner the Chinese have shown guarded and yet discernible interest in Western legal theories and institutions during the last few years. As an example, the well-known Commercial press has recently published a new translation of Montesquieu's *Esprit des Lois*. A *Cheng-fa yen-chiu* writer points out that since Montesquieu's theory holds an important place in bourgeois jurisprudence his writings should therefore be appropriately introduced.¹⁰² Another author writes with considerable enthusiasm about Rousseau, calling the latter an outstanding liberal of the 18th Century despite his "class and historical limitations".¹⁰³ Towards the contemporary jurists of the West, particularly those of the United States, the Communist Chinese attitude has been less sympathetic. Hans Kelsen's "pure theory of law" is described as a bourgeois trick and his concept of international law a tool of American imperialism.¹⁰⁴ Roscoe Pound's "sociological jurisprudence" is also pictured as reactionary and

⁹⁸ Fu Wong "The History of Chinese Criminal Procedure," *Kuang-ming jih-pao* March 20, 1962; Ch'en Kuang-chung, "A brief Description of Criminal Legislation in Ancient China," *Cheng-fa yen-chiu*, No. 4, 1963, pp. 28-35.

⁹⁹ The Research Institute of Political Science and Law of the Shanghai Academy of Social Science has undertaken such a project since 1959. *Jen-min jih-pao*, February 3, 1962. See also *China News Analysis*, No. 467, May 10, 1963.

¹⁰⁰ News Items in *Cheng-fa yen-chiu*, No. 1, 1962, p. 48 and No. 2, 1963, p. 42.

¹⁰¹ See, for example, Hsiao Yun-ch'ing, "Preliminary Discussion of the Study of the History of the Chinese Legal System," *Cheng-fa yen-chiu*, No. 3, 1963 pp. 25-35.

¹⁰² Chou Hsin-ming, "Some ideas Regarding the Study of Montesquieu's Theory," *ibid.*, No. 2, 1962, p. 41.

¹⁰³ Han Yen-lung "A Brief Discussion of the Political Thought of Rousseau," *ibid.*, No. 3, 1962, pp. 11-16.

¹⁰⁴ See articles by Wu En-yü, Chao Chen-chiang, and Chou Hsin-ming in *Jen-min jih-pao*, February 27, 1962.

serving only the interest of the monopolistic capitalist class.¹⁰⁵ Even all this, however, must not be viewed as purely negative. The fact that Chinese jurists now can go to some length to *describe* the "reactionary" theories of the West is a marked improvement over the total absence of any meaningful legal discussion during the Anti-Rightist and "Big Leap" Movements.

SHAO-CHUAN LENG *

¹⁰⁵ Kuo Wei-hsiung, "The Reactionary Pragmatic Legal Thought of Pound," *Cheng-fa yen-chiu*, No. 3, 1963, pp. 43-50.

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THE CENTRAL AMERICAN DRAFT CONVENTION ON HUMAN RIGHTS AND THE CENTRAL AMERICAN COURT

Introduction

The optimism of the League of Nations regarding the general acceptance of human rights could not be shared by the delegates who gathered in San Francisco to draw up the Charter of the United Nations. As a result, the Universal Declaration of Human Rights was subsequently approved and proclaimed by the General Assembly on December 10, 1948, thus supplementing the so-called economic, social and cultural rights set forth in the individual constitutions of democratic countries.

In *Bulletin* No. 17 of the International Commission of Jurists it is stated that "it would be idle to pretend that in itself the Declaration has the force of positive law: the guarded language of its Preamble and the explicit reservations that were made on this point by delegates of several countries point all too clearly to the unhappy divorce between paper declarations and reality in the field of human rights, on the municipal as well as the international law level".

The Universal Declaration disregards the essential difference existing between civil and political rights on the one hand and economic, cultural and social rights on the other.

Mr. P. Modinos, in his *Introduction to the Study of Human Rights*, gives a lucid explanation of this difference: "Civil and political rights demand that in exercising its political functions the State should respect fundamental human freedoms. It must protect the lives of its subjects, ensure equality before the courts, consult the people on the election of the legislative body. Civil and political rights enumerate, so to speak, the duties of the State towards the individual, limiting its role to observing the declared rules and maintaining the established order. Economic and social rights, on the other hand, entail heavy obligations. They oblige the State to ensure its subjects the effective exercise of their rights with respect to employment and its duration, conditions of health and safety, remuneration, rest, dismissal, vocational training and social and medical assistance."

Although from their beginnings the nations of the American continent have adopted the democratic form of government, the

first example of a convention for the protection of human rights was offered by those of Europe.

The Council of Europe, in its Convention for the Protection of Human Rights and the protocol of March 20, 1952, lists civil and political rights in much the same way as the Universal Declaration. As to their protection, however, the Council of Europe went further than the United Nations and set up machinery (the Commission and the Court) designed to decide claims that might arise through the violation of the rights recognized by the Convention.

Unlike the Universal Declaration, the Council of Europe did not include economic, social and cultural rights in the above-mentioned Convention and Protocol. The report submitted to the Consultative Committee of the Council on August 19, 1949, by Mr. Pierre-Henri Teitgen, on behalf of the Legal Committee, provided an explanation of the criterion followed and of the solution adopted. "The task facing us," the report states, "can be accomplished in three stages. We must first choose the objective that we shall attempt to achieve in the distant, near or immediate future. Naturally a desirable maximum goal, a theoretical ideal, exists. This would be to draft for Europe a complete code of all freedoms and fundamental rights; all individual freedoms and rights and all so-called social freedoms and rights. To realize this goal fully and completely, however, would be beyond our powers. We should need years of mutual understanding, joint studies and experiments even to attempt, after many years and with some hope of success, to formulate a complete and general definition of all the freedoms and all the rights that Europe could grant to all Europeans. Therefore, let us lay aside, for the moment, this desirable maximum goal. Being unable to attain it, we must content ourselves with the minimum target that we are able to achieve in the short term. This consists in defining the seven, eight or ten fundamental freedoms that are essential to democracy and that can be guaranteed by our countries to all their citizens. To reach a definition common to all these freedoms is to be preferred."

The Council of Europe, however, did not neglect other freedoms, and on October 18, 1961, it promulgated the European Social Charter relating to economic and social rights. Generally speaking, cultural rights have not been covered by either the Convention or the Social Charter, with the exception of the right of parents to educate their children according to their own religious and philosophical beliefs, as guaranteed by the provision contained in the First Protocol.

It was natural that the example offered to the world by the Council of Europe should have an impact outside Europe. Karel Vasak's article in the *International and Comparative Law*

Quarterly in October 1963 cites many examples of the repercussions it produced.

Among such examples, that offered by the American continent is beyond doubt the most interesting. At the Conference held in Bogota in 1949 the American Declaration of Human Rights and Duties was adopted. According to this Declaration, international protection of human rights should be the principal guide in the development of American law.

However, it was not until the Fifth Consultative Meeting of the Ministers of Foreign Affairs held at Santiago, Chile, in August 1959 that this idea took final shape. By Resolution VIII of the Ministers, referring to the European Human Rights Convention, the Inter-American Council of Jurists was entrusted with drawing up an American Draft Convention on Human Rights. The Council in turn appointed a committee, with the Guatemalan barrister, Carlos Garcia Bauer, as its chairman, to undertake this task; and the draft prepared by this committee was approved by the Council on September 8, 1959.

Over four years have elapsed without the Draft Convention being approved. Moreover, since Castro's assumption of power in Cuba it has been impossible to entertain any hopes that approval would be feasible in the near future. In view of this, "Freedom Through Law, Inc." has considered that the desired ideal could only be achieved by successive stages, just as the Council of Europe has succeeded in adding to its founders a growing number of members in Europe, and that the five Central American nations could, in this respect, set an example for the Western Hemisphere similar to that offered by the nations of Europe. A Draft Convention on Human Rights and the establishment of a Central American Court, which we shall examine below, was therefore drawn up.

The first thing that strikes one about this Draft Convention is that the reservations contained in the European Convention and the Draft Convention of Santiago are absent here. Given the identical nature of the traditions, interests and aspirations of the countries of Central America and the fact that a Court of Justice common to them has already existed, it would be illogical to presume that such a convention could not be accepted without reservations.

On dealing with the protection of human rights, the first question to be decided is what rights are to be protected. The three lists mentioned above – the Universal Declaration of Human Rights, the Declaration of the Council of Europe and that contained in the Draft Convention of Santiago – were taken into consideration in drawing up the Central American Draft Convention. The last of those lists served as the main basis, not only because it best represents Latin American mentality, but because it is more com-

plete than that of the Council of Europe. On the other hand, by excluding economic, social and cultural rights from the Convention, the model of the Council of Europe was followed. The reasons mentioned earlier, together with those stated in the pamphlet published by the Council on February 14, 1964, [H, (64)3], argue in favour of such an exclusion.

Although the Central American Draft Convention is based chiefly on the Santiago Convention on the grounds that it is better adapted to the democratic mentality of Latin America and that the civil and political rights it lists as deserving protection are more comprehensive, the Convention has departed from the Inter-American antecedent and followed the European model as far as the rights of property and education are concerned, considering them as falling under the heading of civil and political rights rather than that of economic, social and cultural rights.

The democratic form of government has its origins in the protection of property; although the demands of the Treasury and the thesis of the social function of property may justify certain limitations, the extreme must not be reached of suppressing property altogether if individuals are not to be totally subjugated to the State. The right of parents to educate their children springs logically from the notion of the protection of the family and is recognized both by the Santiago Draft Convention and the Draft Convention here under examination.

Article 16, after the example of the Santiago Convention, provides that citizens shall be free to move about the national territory, to choose their place of residence therein and to leave any country, and that they shall not be arbitrarily exiled. It must be a matter of some satisfaction to American juriconsults to note that the Protocol No. 4 signed on September 16, 1963, by the Council of Europe added these rights to the list established in the Convention and the First Protocol.

Two interesting provisions of the Santiago Convention, relating to freedom of thought and expression, have been embodied in the Central American Convention. The first, which has its *raison d'être* in American precedents unknown in Europe, forbids restrictions on freedom of expression by indirect means, such as the paper monopolies for newspapers or the use of any other means calculated to hinder circulation. The second refers to the so-called right of reply, whereby any person affected by inaccurate statements or libelled in press publications or other information media is entitled to publish in the same form his rectification or reply.

Following again the model of the Inter-American Convention, the Central American Draft Convention did not include the provision, contained in Article 17 of the European Convention, concerning subversive activities because it was considered that the

agreements adopted at Rio de Janeiro and Caracas by the Organization of American States were a sufficient safeguard in this respect.

In dealing with the right to vote the Draft Convention under review followed the Inter-American model because, unlike Article 3 of the Protocol which appears rather to impose on the signatory nations the obligation to hold free elections periodically, it recognizes the right of all citizens to vote and to be elected in periodic elections held on the basis of universal suffrage. The wording of the rule in this form can give rise to no doubts that any restriction of the right to vote of any person who is able to interpret the Constitution or who pays taxes constitutes a violation of the electoral right to vote.

With respect to the protection of human rights, the two draft conventions have followed quite closely the precedents established by the Convention of the Council of Europe. Both provide for a Commission and a Court to be set up as instruments for the protection of these rights; the Central American Draft Convention, however, had necessarily to depart from the European precedent more than the Santiago Convention. In Europe the Commission and the Court form an integral part of the Council of Europe; under the Inter-American Draft Convention they would likewise form an integral part of the Organization of American States since, on approval of that Convention, the entire machinery for the protection of human rights would be organized as an autonomous body. For this reason the Committee of Ministers of Foreign Affairs is included among the bodies entrusted with the protection of human rights.

The duties of the Commission and the conditions required for appointment to it are identical to those laid down in the Santiago Convention. However, its members are reduced to five in number and they must be appointed by the Committee of Ministers from the lists submitted to it by the Member States of the Convention.

Likewise, the provisions of the Central American Draft Convention referring to the Court are identical to those of the European Convention, except with respect to the number of judges and the method of their appointment, these provisions being identical to those laid down by the Draft Convention itself regarding the Commission.

As already mentioned, included among the agencies coming under the Central American Draft Convention is the Committee of Ministers of Foreign Affairs, whose duties are defined in Chapter III of Part II. Article 32 of the European Convention, as readers will know, stipulates that if a report of the Commission confirming a violation of common rights is not brought before the Court, the Committee of Ministers, by an absolute two-thirds majority, shall

decide whether the Convention has been violated. The Central American Draft Convention does not follow this precedent and, like that of Santiago, confines itself in this respect to stipulating publication of the Commission's report. Without firsthand knowledge of the reasons that led the authors of the two draft conventions to depart from the European precedent, one may none the less infer that this was done in the desire to restrict the settlement of violations of the Convention to the strictly judicial field and so to rule out any possible interference of political considerations or factors.

Part IV, devoted to General Provisions, provides for solutions to questions peculiar to a Central American organization and lacking, therefore, any precedents in either the European Convention or the Santiago Draft Convention.

For obvious reasons the European Convention and the Santiago Draft Convention did not have to establish the seat of the Commission or the Court, but in the case of the Central American Convention, since it does not come under the direct auspices of the Organization of American States, the procedure for establishing the seat of the Court had to be determined. It was possible that the reasons which had determined the location of the former Court of Justice were no longer valid and, consequently, the task of selecting the seat of the new Court was entrusted to the Committee of Ministers.

For the same reasons, the Central American Convention had to make provision for the expenses involved in maintaining the Commission and the Court. The contributions to budgetary expenses by the Member States of the Convention are laid down in Article 62, in proportion to their respective national budgets; and Article 63 stipulates that the Ministers of Finance of the Member States will meet in the city where the seat is established, or in any other place unanimously agreed upon, for the purpose of approving, by a majority, the draft budget submitted to them by the Committee of Ministers, being empowered at the same time to approve any modifications that they consider necessary.

The Draft Convention has also provided that the instrument of ratification of the Convention is to be deposited in the State first ratifying it. As soon as all five States have ratified the Convention, the Minister of Foreign Affairs of this State shall notify the other contracting parties that the Convention has come into force.

Human institutions tend with time to lose their original force or relevance. Legal institutions are a tangible example of this and thus the constitutions of democratic countries always make provision for reforms. Cognizance and resolution of any amendments that may be proposed to the Central American Draft Convention

fall to the Committee of Ministers; a majority of four of its members, however, is required to adopt such amendments. It is because the Committee has been so empowered that it was earlier described as the supreme organ of the Convention.

Approval of a convention for the protection of human rights will be the first step towards a uniform legal conscience on the continent. A second and perhaps more decisive step should then be taken in the field of education in order to prepare the new generation to exercise the vigilance required to protect democratic institutions. In this respect, too, an example and a precedent were offered by Europe when the Faculty of Law and Political Science of Strasbourg introduced a course in Human Rights, the first lecture of which, given by Modinos, was quoted in part above.

STAFF STUDY

THE CENTRAL AMERICAN DRAFT CONVENTION COMPARED

The Central American Draft Convention on Human Rights, the text of which is given below together with those of the Inter-American Draft and European Convention on Human Rights, is being sponsored by the association "Freedom Through Law, Inc.", which has made it available to the Commission for publication.

As the International Commission of Jurists stated when publishing the Inter-American Draft Convention on Human Rights in its Journal, Vol. IV, No. 1, (Summer 1962), "the idea of guaranteeing and protecting internationally human rights by conventions of a regional rather than world-wide applicability certainly deserves close scrutiny." Likewise, one of the resolutions of the African Conference on the Rule of Law, held by the International Commission of Jurists in Lagos, Nigeria, in January 1961, and known as the Law of Lagos, reads:

That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the Conclusions of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States.¹

The purpose of reproducing side by side the three texts mentioned above is to provide the reader with documents which will enable him to make a comparison.² The Central American draft does not pretend to introduce any innovation either in conception or in the contents of this type of convention, but is simply intended as a first step, in view of the community of interests, needs and objectives existing among Central American countries, towards wider conventions, which, being more ambitious, are perhaps more difficult.

Readers are invited to give their opinion and observations to the International Commission of Jurists.

¹ *African Conference on the Rule of Law, Lagos, Nigeria, January 3-7, 1961. A report on the proceedings of the Conference. International Commission of Jurists, Geneva, 1961.*

² The texts are taken from:

(a) *Draft Convention on Human Rights and the Central-American Court, Freedom Through Law, Inc., New York, N.Y., 1964;*

(b) *Final Act of the Fourth Meeting of the Inter-American Council of Jurists, published by Pan American Union, Washington, D.C., January 1960;*

(c) For the French and English texts: *European Convention on Human Rights, official edition of the Council of Europe.*

COMPARATIVE TEXTS

CENTRAL AMERICAN¹ DRAFT CONVENTION

HUMAN RIGHTS

WHEREAS:

In resolution VIII the Fifth Consultative Meeting of Ministers of Foreign Affairs entrusted to the Inter-American Council of Jurists the preparation, at its Fourth Meeting, of a draft Convention on Human Rights and of a draft or drafts of a Convention for the creation of an Inter-American Court for the Protection of Human Rights, and of other adequate organizations appropriate for the protection and observance of those rights;

At its Fourth Meeting, the Inter-American Council of Jurists prepared a draft Convention concerning the substantive part of human rights, as well as the institutional and procedural part of these rights, including the creation and functioning of an Inter-American Court of Human Rights, and Inter-American Commission for the Protection of Human Rights, and submitted this draft to the Council of the Organization of American States for the purposes of Part I, paragraph 2 of the above-cited resolution of the Fifth Consultative Meeting;

WHEREAS:

The States of the American Continent have reaffirmed their

INTER-AMERICAN² DRAFT CONVENTION

HUMAN RIGHTS

WHEREAS:

In Resolution VIII the Fifth Meeting of Consultation of Ministers of Foreign Affairs entrusted to the Inter-American Council of Jurists the preparation, at its Fourth Meeting, of a draft Convention on Human Rights, authorizing it to refer this task, if it should not itself accomplish it, to the Council of the Organization of American States, so that the latter might commission the Inter-American Juridical Committee, or the entity it considered appropriate, to prepare the draft; and it likewise entrusted to the Council of Jurists the preparation of a draft convention or draft conventions on the Creation of an Inter-American Court for the Protection of Human Rights and of other organizations appropriate for the protection and observance of those rights; and

This Council, at its Fourth Meeting, has prepared a draft convention concerning the substantive part of human rights, as well as the institutional and procedural part of these rights, including the creation and functioning of an Inter-American Court of Human Rights and an Inter-American Commission for the Protection of Human Rights;

EUROPEAN² CONVENTION

CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

*The Governments signatory hereto, being Members of the Council of Europe,
Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;*

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of Human Rights and Fundamental Freedoms;

Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;

Being resolved, as the Govern-

¹ American spelling is left unchanged to follow that of the Inter-American Draft Convention.

² Official English text.

profound faith in the fundamental freedoms that constitute the bases of justice and peace in the world, as evidenced in the American Declaration of the Rights and Duties of Man approved by the Fourth Conference held in Bogota in 1948;

WHEREAS:

The nations of Western Europe have given a magnificent example when the Council of Europe adopted a Convention for the Protection of Human Rights and Fundamental Freedoms;

WHEREAS:

Notwithstanding the time that has elapsed the Organization of American States has not succeeded, in a manner similar to that of the European States, in approving a convention for the protection of Human Rights;

WHEREAS:

Faced with the difficulty of realizing a more ambitious project, it is possible that the States that share a greater identity of tradition, interests and aspirations, as is the case of the five Republics of Central America, may agree on a Convention for the Protection of Human Rights, particularly if we take into account that the Central American Court of Justice functioned during the space of ten years.

The following draft Convention for the Protection of Human Rights, is submitted:

The Inter-American Council of Jurists

RESOLVES:

To transmit to the Council of the Organization of American States, for the purposes of Part 1, paragraph 2, of the resolution of the Fifth Meeting of Consultation cited above, in order that it may be submitted to the Eleventh Inter-American Conference and transmitted to the governments 60 days prior to the opening of the Conference, the following:

ments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration; Have agreed as follows:

DRAFT CONVENTION ON HUMAN RIGHTS

PART I HUMAN RIGHTS

Article 1

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all human beings within their territory and subject to their jurisdiction the free and full exercise of these rights and freedoms without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

CHAPTER I Civil and political rights

Article 2

1. The right to life is inherent in the human person. This right shall be protected by law from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries where capital punishment has not been abolished, sentence of death may be imposed only as a penalty for the most serious crimes and pursuant to the final judgment of a competent court, and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.
3. In no case shall capital punishment be inflicted for political offenses.
4. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age; nor shall it be applied to pregnant women.

DRAFT CONVENTION ON HUMAN RIGHTS

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The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all human beings within their territory and subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

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3. In no case shall capital punishment be inflicted for political offenses.
4. Capital punishment shall not be imposed upon persons who, at the time the crime was committed were under 18 years of age; nor shall it be applied to pregnant women.

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment.
2. Punishment shall not be passed on to any person other than the criminal.

Article 4

1. No one shall be subjected to slavery or to servitude, which are prohibited in all their forms, as is the slave trade.
2. No one shall be required to perform forced or compulsory labor. This provision cannot be interpreted as meaning that, in those countries, in which certain crimes can be punished by a sentence of imprisonment at forced labor, it prohibits serving such sentence imposed by a competent court.
3. Nor, for the purpose of this article, shall the term "forced or compulsory labor" include:
 - a. Any work or service normally required of a person legally detained;
 - b. Any military service and, in countries where conscientious objectors are recognized, any national service required of them by law;
 - c. Any service in cases of danger or calamity threatening the life or well-being of the community; and
 - d. Any work or service that forms part of normal civic obligations.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except for reasons

Article 3

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment.
2. Punishment shall not be passed on to any person other than the criminal.

Article 4

1. No one shall be subjected to slavery or to servitude, which are prohibited in all their forms, as is the slave trade.
2. No one shall be required to perform forced or compulsory labor. This provision cannot be interpreted as meaning that, in those countries in which certain crimes can be punished by a sentence of imprisonment at forced labor, it prohibits serving such sentence imposed by a competent court.
3. Nor, for the purpose of this article, shall the term "forced or compulsory labor" include:
 - a. Any work or service normally required of a person legally detained;
 - b. Any military service and, in countries where conscientious objectors are recognized, any national service required of them by law;
 - c. Any service exacted in cases of danger or calamity threatening the life or the well-being of the community; and
 - d. Any work or service that forms part of normal civic obligations.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except for reasons

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - (d) any work or service which forms part of normal civic obligations.

Article 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

established beforehand by law and in accordance with the procedure prescribed therein.

2. Anyone who is arrested shall be informed of the reasons for his arrest and shall be promptly notified of the charge or charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. Release may be subject to guarantees to assure appearance for trial.

4. Anyone who is deprived of his liberty by arrest or detention, or believes himself to be in danger of such deprivation, shall be entitled to recourse to a court, in order that such court may decide without delay on the lawfulness of his detention, or threat thereof, and if the detention is not lawful it shall order his release. This recourse may be had by another person acting in his behalf.

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4. Anyone who is deprived of his liberty by arrest or detention, or believes himself to be in danger of such deprivation, shall be entitled to recourse to a court, in order that such court may decide without delay on the lawfulness of his detention, or threat thereof, and if the detention is not lawful it shall order his release. This recourse may be had by the detained person or by another person acting in his behalf.

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

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

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

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

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

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

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c)

of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right of compensation.

Article 6

1. In the substantiation of any charge or accusation against him, or in the determination of his civil rights and obligations, everyone shall be entitled to a fair hearing.

2. Everyone accused of a criminal offense has the right to be presumed innocent until proven guilty according to law. During the trial everyone shall have the right, with full equality, to the following minimum guarantees:

- a. To be informed promptly, in a language that he understands and in detail, of the nature and cause of the accusation against him;
- b. To have adequate time and means for the preparation of his defense;
- c. To defend himself through legal counsel of his own

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Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be pre-

choosing; to be informed, if he does not have legal counsel, of this right; and to have legal counsel assigned to him, if for any reason he does not name his counsel within a reasonable period of time;

d. To obtain, whenever possible, the appearance and examination of witnesses on his behalf, as well as their confrontation with the witnesses against him, and to examine, or have examined, both types of aforementioned witnesses;

e. To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

f. Not to be required to testify against himself or to make a confession of guilt.

3. No one shall be tried by special courts or commissions established for that purpose.

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3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.

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No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed.

Article 7

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time

when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8

Everyone has the right to be protected by law against arbitrary or unlawful interference with his privacy, home or correspondence, and against attacks on his honor or reputation.

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Everyone has the right to be protected by law against arbitrary or unlawful interference with his privacy, home or correspondence, and against attacks on his honor or reputation.

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9

1. Everyone shall have the right to freedom of conscience and of religion. This right shall include freedom to maintain or to change his religion or belief, and freedom, either individually or in community with others, to profess his religion or belief, in public or in private.

2. No one shall be subject to coercion that might impair his freedom to maintain or to change his religion or belief.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

Article 9

1. Everyone shall have the right to freedom of conscience and of religion. This right shall include freedom to maintain or to change his religion or belief, and freedom, either individually or in community with others, to profess his religion or belief, in public or private.

2. No one shall be subject to coercion that might impair his freedom to maintain or to change his religion or belief.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

Article 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone shall have the right to freedom of thought and expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other medium of his choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to broader responsibilities, which shall be expressly established by law and be necessary to ensure:
 - a. Respect for the rights or reputations of others, or
 - b. The protection of national security, public order, or public health and morals.
3. The right of expression shall not be restricted by indirect methods or means, such as the use of government and private monopolies of newsprint or of equipment used in the dissemination of information or by any other means tending to block the communication and the circulation of ideas and opinions.
4. Public entertainments may be subjected by law to prior censorship, for the sole purpose of safeguarding public morality and national prestige and security.
5. Anyone, if defamed by untrue statements or libelled in the press or in other media of communication, shall have the right to have his rectification or reply published by the same medium.
 - a. The law shall establish

Article 10

1. Everyone shall have the right to freedom of thought and expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other medium of his choice.
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 - a. Respect for the rights or reputations of others, or
 - b. The protection of national security, public order or public health or morals.
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4. Public entertainments may be subjected by law to prior censorship, for the sole purpose of safeguarding public morality and national prestige or security.

Article 11

1. Anyone, if defamed by untrue statements or libeled in the press or in other media of communication, shall have the right to have his rectification

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

limits and procedures for making use of these rights.

b. The exercise of these rights shall not impair penal action that might result from such publication.

c. For the effective protection of its honor and reputation, every publication or newspaper, motion picture or radio or television enterprise shall be represented by a responsible person who neither is protected by immunities nor enjoys special privileges.

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2. The law shall establish limits and procedures for making use of these rights.

3. The exercise of these rights shall not impair penal action that might result from such publication.

4. For the effective protection of its honor and reputation, every publication or newspaper, motion picture or radio or television enterprise shall be represented by a responsible person who neither is protected by immunities nor enjoys special privileges.

Article 11

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or for the protection of public health or morals, or of the rights and freedoms of others.

Article 12

1. All persons shall have the right of freedom of association.
2. No restrictions may be placed on the exercise of this right other than those prescribed by law and necessary in a democratic society in order to safeguard national security, public safety or public order, or for the protection of public health or morals, or of the rights and freedoms of others.
3. No one shall be obliged to belong to any association.

Article 12

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or for the protection of public health or morals, or of the rights and freedom of others.

Article 13

1. All persons shall have the right to freedom of association.
2. No restrictions may be placed on the exercise of this right other than those prescribed by law and necessary in a democratic society in the interest of national security, public safety or public order, or for the protection of public health or morals, or of the rights and freedom of others.
3. No one shall be obliged to belong to any association.

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 13

1. The family is the natural and fundamental unit of the State and is entitled to protection by society and the State.
2. The right of men and women to marry and to raise a family, if they meet the conditions required by national law, is recognized.
3. No marriage shall be entered into without the free and full consent of the parties to the marriage.

Article 14

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 15

1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
2. No one shall be deprived of his possessions except by reason of public or social interest and subject to prompt and fair compensation and to the conditions provided for by law and by the general principles of international law.

Article 16

Subject to any general legislative enactments of the State concerned that provide for such restrictions as may reasonably be necessary to protect national security, public safety, public health or morality, or

Article 14

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3. No marriage shall be entered into without the free and full consent of the parties to the marriage.

Article 15

Subject to any general legislative enactments of the State concerned that provide for such restrictions as may reasonably be necessary to protect national security, public safety, public health or morality, or

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth

the rights and freedoms of others and as are consistent with the other rights recognized in this Convention:

1. a. Everyone legally within the territory of a State shall have the right to: i) liberty of movement therein and ii) freedom to choose his residence;
- b. Everyone shall have the right to leave any country, including his own.
2. a. No one may be exiled arbitrarily;
- b. Subject to the preceding paragraph, everyone shall have the right to enter his own country.

Article 17

All citizens shall enjoy the following rights and opportunities, with the exceptions established by their national laws, which may not abridge the guarantees provided in Article 18 of this Convention:

- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and by secret ballot, which guarantees the free expression of the will of the voters;
- c. To have access, under general conditions of equality, to the public service of his country.

Article 18

All persons are equal before the law. The law shall prohibit discrimination and guarantee to all persons equal and effective protection against any

the rights and freedoms of others and as are consistent with the other rights recognized in this Convention:

1. a. Everyone legally within the territory of a State shall have the right to (i) liberty of movement therein and (ii) freedom to choose his residence;
- b. Everyone shall have the right to leave any country, including his own.
2. a. No one may be exiled arbitrarily;
- b. Subject to the preceding subparagraph, everyone shall have the right to enter his own country.

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- a. To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and by secret ballot, which guarantees the free expression of the will of the voters;
- c. To have access, under general conditions of equality, to the public service of his country.

Article 17

All persons are equal before the law. The law shall prohibit discrimination and guarantee to all persons equal and effective protection against any

herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, col-

discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

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Article 16

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 19

Everyone has the right to effective, simple, and prompt recourse to the competent national courts, to protect him against acts that violate his fundamental rights recognized by the constitution or by law.

Article 18

Everyone has the right to effective, simple and prompt recourse to the competent national courts, to protect him against acts that violate his fundamental rights recognized by the constitution or by law.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 20

1. In time of public emergency, the existence of which has been officially proclaimed, the States Parties hereto may take measures suspending only to the extent required by the exigencies of the situation, their obligations contracted by virtue of this Convention, provided that such measures do not involve discriminations based solely on the grounds of race, color, sex, language, religion, or social origin.
2. The preceding provision does not authorize any suspension of the rights stipulated in Articles 2, 3, 4 (paragraph 1), and 7.
3. Any State Party hereto availing itself of the right of suspension shall immediately inform the other States Parties to the Convention, through the Committee of Ministers, of the

Article 19

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2. The preceding provision does not authorize any suspension of the rights stipulated in articles 2, 3, 4 (paragraph 1), and 7.
3. Any State Party hereto availing itself of the right of suspension shall immediately inform the other States Parties to the Convention, through the Secretary General of the Or-

Article 15

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which

provisions whose application it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

ganization of American States, of the provisions whose application it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

CHAPTER II

Economic, social and cultural rights

Article 20

All peoples and all nations shall have the right to self-determination, that is, freely to determine their political, economic, social and cultural way of life.

The right of peoples to self-determination also includes permanent sovereignty over their natural wealth and resources as one of the indispensable means for the effective realization of the rights considered in this Convention.

Article 21

The States recognize the capacity of all their inhabitants to enjoy economic, social and cultural rights.

At the same time they recognize that the exercise of these rights shall be subject only to the limitations imposed by law, to the degree compatible with the nature of such rights, and for the exclusive purpose of advancing the general welfare of a democratic society.

Article 22

Everyone has the right to employment, freely chosen, under just and satisfactory conditions, and to receive such remuneration as will ensure him

a standard of living appropriate for himself and his family. The free choice of employment shall be subject to the abilities of the person and to considerations of morality, public health, and security, in accordance with the law.

Article 23

The States shall ensure to workers of all types:

- a. The indispensable working conditions of hygiene and safety;
- b. Decent and adequate living conditions and treatment, not only for the workers, but also for their families;
- c. A reasonable limitation on working hours, the right to periodic vacations with pay, and the free use of leisure time.

Article 24

The States shall guarantee to all persons the free exercise of the right to organize, according to law, local or national organizations or labor unions, and freely to join labor unions and organizations already established, for the purpose of protecting their economic and social interests.

Article 25

The States recognize the right of all persons to social security, and for this purpose, they shall establish social insurance and social security systems that will protect them in case of declining ability, illness or death, disability or old age, unemployment, and other risks.

Article 26

Everyone has the right to establish a family, and the family has the right to be protected by law and by the State. For this purpose adequate legislative measures shall be adopted designed to:

- a. Protect the mother, especially during pregnancy, and during the period of time immediately after the child is born;
- b. Bring about conditions of health and hygiene that will reduce infant mortality and provide for the normal development of children;
- c. Prevent forced labor of children and supervise working conditions of adolescents;
- d. Promote improved housing and create a healthy family atmosphere that will provide children with a moral foundation in the home;
- e. Establish conditions favorable to ensuring the necessary medical care, preventive or curative; and
- f. Establish family allowances that will help strengthen the family economically.

Article 27

The States recognize the right of everyone to an education, which shall be based on principles of morality, liberty, tolerance, and human solidarity.

Article 28

1. Elementary education shall be compulsory, and state-provided education shall be free.
2. The States agree to make

available to everyone, under equal conditions, access to secondary and technical education, as well as to higher education and professional studies, -and they shall endeavor to provide on a gradual basis free education at all levels.

3. Parents and guardians shall have the right to choose for their minor children and wards institutions other than those established by the public authorities, in which they may not be discriminated against because of their scientific, religious, or any other convictions.

4. Private individuals may impart education of all types and at all levels, subject to the minimum requirements prescribed by law, which may not violate the human rights enumerated in this Convention. Academic freedom shall be respected.

Article 29

The States recognize the right of every person to participate in the cultural life of the community, to enjoy it and to benefit from it. The States shall protect the rights of authors of scientific, literary, or artistic works, and the rights of inventors, and shall take care to respect the freedom essential for scientific research and cultural activities.

Article 30

In order to guarantee the right of persons to an education, the States, within their economic resources, shall combat illiteracy and help one another combat it, in accordance with the programs of

co-operation approved by the States, inasmuch as the elimination of illiteracy is necessary for the proper functioning of a democratic way of life; and for the improvement of education and culture, they shall promote the exchange of publications and books, study travel, and the establishment of scholarships.

Article 31

The States shall guarantee the right to private property, and its individual or collective use, shall be subject to the interests of society, with respect at all times for the dignity of the individual and the inherent needs of family life.

Expropriation shall be legal in cases of public utility or social interest, in which case compensation shall be made.

Article 32

For the full effectiveness of the rights affirmed in this Convention, the States shall endeavor to promote a steady rate of production and an equitable distribution of goods and services, in both the social and the cultural fields, and to this end, in their respective plans, they should take into consideration their own natural resources, as well as those derived from the co-operation provided for in international agreements.

Article 33

1. No provisions of this Convention shall be interpreted as granting to any State, group, or person any right to engage in activities or to perform acts aimed at the destruction of the

rights and freedoms recognized in this Convention.

2. No restriction or lessening of any fundamental human right recognized by or in force in, a Contracting State by virtue of laws, conventions, regulations, or custom shall be permitted on the pretext that the present Convention does not recognize it or does so to a lesser extent.

3. No provisions of this Convention may be interpreted in the sense of limiting in any way the significance of the principles contained in the American Declaration of the Rights and Duties of Man, the Inter-American Charter of Social Guarantees, and the Declaration of Santiago, Chile.

4. The restrictions that may be imposed, under this Convention on the rights and freedoms recognized herein, shall not be applied for any purpose or reason other than that for which they were prescribed.

PART II ORGANS

Article 21

To ensure the observance of the commitments made by the High Contracting Parties in this Convention, there shall be established:

- a. A Central American Commission for the Protection of Human Rights, hereinafter referred to as "the Commission";
- b. A Central American Court of Human Rights, hereinafter referred to as "the Court".
- c. A Committee of Ministers

PART II ORGANS

Article 34

To ensure the observance of the commitments made by the High Contracting Parties in this Convention, there shall be established:

- a. An Inter-American Commission for the Protection of Human Rights, hereinafter referred to as "the Commission"; and
- b. An Inter-American Court of Human Rights, which shall be established in accordance with this Conven-

SECTION II

Article 19

To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

1. A European Commission of Human Rights hereinafter referred to as "the Commission".
2. A European Court of Human Rights, hereinafter referred to as "the Court".

of Foreign Affairs, hereinafter referred to as "the Committee of Ministers".

PART III CHAPTER I

Central American Commission for the Protection of Human Rights

Article 22

1. The Commission shall be composed of five members and shall carry out the functions hereinafter provided for.
2. The Commission shall be composed of nationals of the States Parties to the Convention, who shall be persons of high moral prestige and recognized competence in the field of human rights. Consideration shall be given to the usefulness of the participation of persons having judicial or legal experience.
3. The members of the Commission shall serve in their capacity as individuals and shall represent all the States Parties to the Convention.

Article 23

1. The members of the Commission shall be elected by the Committee of Ministers from a list of persons possessing the qualifications prescribed in the preceding Article and nominated for the purpose by the States Parties to the Convention.
2. Each State shall nominate three persons who may be nationals of the nominating State or of any other State Party to the Convention. At no

tion, hereinafter referred to as "the Court".

PART III CHAPTER I

Inter-American Commission for the Protection of Human Rights - Its Organization and Protection of Civil and Political Rights

Article 35

1. The Commission shall be composed of seven members and shall carry out the functions hereinafter provided for.
2. The Commission shall be composed of nationals of the States Parties to the Convention, who shall be persons of high moral prestige and recognized competence in the field of human rights. Consideration shall be given to the usefulness of the participation of persons having judicial or legal experience.
3. The members of the Commission shall be elected and shall serve in their capacity as individuals. They shall represent all the States that ratify or adhere to this Convention and shall act in their name.

Article 36

1. The members of the Commission shall be elected from a list of persons possessing the qualifications prescribed in Article 35 and nominated for the purpose by the States Parties to the Convention.
2. Each State shall nominate three persons who may be nationals of the nominating State or of any other State Party to the Convention.
3. Members of the Commission may be re-elected.

SECTION III

Article 20

The Commission shall consist of a number of members equal to that of the High Contracting Parties. No two members of the Commission may be nationals of the same State.

Article 23

The members of the Commission shall sit on the Commission in their individual capacity.

Article 21

1. The members of the Commission shall be elected by the Committee of Ministers by an absolute majority of votes, from a list of names drawn up by the Bureau of the Consultative Assembly; each group of the Representatives of the High Contracting Parties in the Consultative Assembly shall put forward three candidates, of whom two at least shall be its nationals.
2. As far as applicable, the

time may more than one national of any State Party be a member of the Commission.

3. At least three months before the date of the election of the Commission, other than an election to fill a vacancy in accordance with Article 24, the Secretary of the Committee of Ministers shall address a written request to the States Parties to the Convention inviting them to submit their nominations within two months before the Secretariat of the Committee of Ministers.

4. The Secretary of the Committee of Ministers shall prepare a list in alphabetical order, of all the persons thus nominated, and shall submit it to the other members of the Committee of Ministers.

5. The President of the Committee of Ministers shall determine the date of the election and shall convene its members to hold such election. The meeting for the election shall be held at the seat of the Court or at any other place within the States Parties to the Convention if so decided by the Committee by a majority of votes.

6. The Committee of Ministers shall elect, by majority of votes, the persons who are to be members of the Commission, but it shall not elect two persons of the same nationality.

7. The Minister of Foreign Affairs may be represented by delegates especially appointed to proceed to the election.

8. The members of the Commission shall be elected for a term of four years and may be re-elected.

Article 37

1. At least three months before the date of an election of the Commission, other than an election to fill a vacancy in accordance with Article 41, the Secretary General of the Organization of American States shall address a written request to the States Parties to the Convention inviting them to submit their nominations within two months.

2. The Secretary General of the Organization of American States shall prepare a list, in alphabetical order, of all the persons thus nominated, and shall submit it to the Council of the Organization of American States and to the States Parties to the Convention.

3. The Secretary General of the Organization of American States shall request the Council of the Organization of American States to fix the date of the election of members of the Commission and to elect such members from the list referred to in the preceding paragraph, in accordance with the conditions set forth in this part of the Convention. In the voting of the Council referred to in this paragraph, only the representatives of the Signatory States that have ratified or adhered to this Convention may take part.

Article 38

1. At no time may more than one national of any State be a member of the Commission.

2. An absolute majority of states authorized to participate in the voting shall constitute the quorum required to hold these elections, pursuant to the

same procedure shall be followed to complete the Commission in the event of other States subsequently becoming Parties to this Convention, and in filling casual vacancies.

Article 22

1. The members of the Commission shall be elected for a period of six years. They may be re-elected. However, of the members elected at the first election, the terms of seven members shall expire at the end of three years.

preceding article.

3. The persons elected shall be those who have obtained the largest number of votes provided that they also have an absolute majority of the votes of all the representatives authorized to participate in the voting.

Article 39

1. The members of the Commission shall be elected for a term of four years and they shall be eligible for re-election if renominated. However, the terms of three of the members elected at the first election shall expire at the end of two years. Immediately after the first election the names of these three members shall be chosen by lot by the Secretary General of the Organization of American States.

2. Elections at the expiration of a term of office shall be held in accordance with the preceding articles of this part of the Convention.

Article 24

1. In the event of a vacancy in the Commission by reason of death, illness or resignation of one of the members or for any other reason, the President of the Commission shall immediately notify the Secretary of the Committee of Ministers, who shall declare the seat vacant from the date on which the reason for the vacancy occurred.

2. When a vacancy is declared in accordance with the provisions of the preceding paragraph, the Secretary of the Committee of Ministers shall notify each State Party to the

Article 40

In the event of the death or the resignation of a member of the Commission, the Chairman shall immediately notify the Secretary General of the Organization of American States who shall declare the seat vacant from the date of death or the date on which resignation takes effect.

Article 41

1. When a vacancy is declared in accordance with Article 40, the Secretary General of the Organization of American States shall notify each State Party to the Convention which,

Article 22

2. The members whose terms are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary-General of the Council of Europe immediately after the first election has been completed.

Article 22

3. A member of the Commission elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

Convention, in order that, within the term of one month, they submit their list of nominees, which may not exceed the number of three, to fill the vacant seat.

3. The nominees submitted to fill the vacant seat shall be persons possessing the qualifications prescribed in Article 22, and must be of the same nationality as the member who is to be replaced.

4. The election to fill the vacant seat shall be held in conformity with Article 23.

for purposes of election to fill the vacancy on the Commission, shall, if necessary, complete within one month its list of available nominees so as to total three persons.

2. The Secretary General of the Organization of American States shall prepare a list, in alphabetical order, of the persons thus nominated and submit it to the Council of the Organization of American States and to the States Parties to the Convention. The election to fill the vacancy will then be held in accordance with Articles 37 and 38.

3. The person elected to replace a member whose term of office had not expired shall hold office for the remainder of that term. However, if such term of office should expire within six months after the declaration of the vacancy in accordance with Article 40, no nomination shall be made and no election shall be held to fill that vacancy.

Article 42

1. Subject to the provisions of Article 40, each member of the Commission shall remain in office until a successor has been elected. However, if prior to the election of such successor, the Commission should have started the examination of a case, the outgoing member, rather than his successor, shall continue to act in the matter.

2. A member of the Commission elected to fill a vacancy declared in accordance with Article 40 shall not act in any case in which his predecessor has acted, unless the quorum provided for in Article 47 cannot be obtained.

Article 22

4. The members of the Commission shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 25

The members of the Commission shall receive emoluments in accordance with the amounts assigned for that purpose in the budget of the Commission and of the Court.

Article 43

The members of the Commission shall receive emoluments on such terms and under such conditions as the Council of the Organization of American States determines, having regard for the importance of the Commission's functions.

Article 44

1. The Secretary of the Commission shall be a high ranking official of the Pan American Union, elected by the Commission from a list of three names submitted by the Secretary General of the Organization of American States.

2. The candidate obtaining the largest number of votes and an absolute majority vote of all the members of the Commission shall be declared elected.

3. The Secretary General of the Organization of American States shall provide the necessary staff and facilities for the Commission and its members. The staff shall form part of the Pan American Union.

Article 26

1. The Chairman of the Committee of Ministers shall convene the initial meeting of the Commission, and shall determine the place where it is to be held.

2. After its initial meeting, the Commission shall meet:

- a. As many times as it deems necessary;
- b. When any matter is referred to it under Articles 28 and 29.
- c. When convened by its Chairman or at the request of three of its members.

3. The Commission shall meet

Article 45

1. The Secretary General of the Organization of American States shall convoke the initial meeting of the Commission at the Pan American Union.

2. After its initial meeting, the Commission shall meet:

- a. As many times as it deems necessary;
- b. When any matter is referred to it under Articles 48 and 49; and
- c. When convened by its Chairman or at the request of not less than four of its members.

3. The Commission shall meet

Article 35

The Commission shall meet as the circumstances require. The meetings shall be convened by the Secretary-General of the Council of Europe.

at the seat of the Court or at any other city of the States Parties to the Convention, as may be decided by a majority of votes of its members.

Article 27

1. At its initial meeting the Commission shall elect its Chairman and Vice-Chairman for the period of one year, and its Secretary for a period of four years. They may all be re-elected.

2. The Commission shall establish its own rules of procedure.

at the seat of the Organization of American States or in any other American capital city, as decided by an absolute majority vote of all its members.

Article 47

1. The Commission shall elect its Chairman and Vice Chairman for the period of one year. They may be re-elected. The first Chairman and the first Vice Chairman shall be elected at the initial meeting of the Commission.

2. The Commission shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:

a. Five members shall constitute a quorum;

b. Decisions of the Commission shall be made by a majority vote of the members present; if the votes are equally divided the Chairman shall cast the deciding vote; and

c. The Commission shall hold its hearings and meetings in closed session.

Article 28

1. If a State Party to the Convention considers that another State Party thereto is not complying with any of the provisions of Part I of the Convention, it may, by written communication, bring the matter to the attention of the other State. Within three months after the receipt of the communication, the receiving State shall provide the complaining State with an explanation in writing concerning the matter, which should include, to the extent possible and pertinent, references to domestic pro-

Article 48

1. If a State Party to the Convention considers that another State Party thereto is not complying with any of the provisions of Part I, Chapter I, of the Convention, it may, by written communication, bring the matter to the attention of the other State. Within three months after the receipt of the communication, the receiving State shall provide the complaining State with an explanation in writing concerning the matter, which should include, to the extent possible and pertinent, references to do-

Article 33

The Commission shall meet *in camera*.

Article 34

The Commission shall take its decisions by a majority of the members present and voting; the Sub-Commission shall take its decisions by a majority of its members.

Article 36

The Commission shall draw up its own rules of procedure.

Article 37

The secretariat of the Commission shall be provided by the Secretary-General of the Council of Europe.

Article 24

Any High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.

cedures and to the remedies taken, or pending, or available with respect thereto.

2. If a matter is not adjusted to the satisfaction of both Parties within six months after the receipt of the initial communication, by the State complained against, either State shall have the right to refer the matter to the Commission by means of written notification addressed to the Secretary of the Commission, and to the other State.

3. Subject to the provisions of Article 30, in serious and urgent cases the Commission may, at the request of the complaining State, deal expeditiously with the matter on the receipt of such request in accordance with the powers conferred on it by this Part of the Convention and after notifying the States concerned.

Article 29

The Commission may receive petitions addressed to it by any person or group of persons, or associations or corporations legally recognized by the public authorities in which a violation by a State Party to this Convention of any of the rights recognized in Part I thereof, is alleged to have been suffered.

mestic procedures and to the remedies taken, or pending or available with respect thereto.

2. If a matter is not adjusted to the satisfaction of both Parties within six months after the receipt of the initial communication, by the State complained against, either State shall have the right to refer the matter to the Commission by means of written notification addressed to the Secretary of the Commission, and to the other State.

3. Subject to the provisions of Article 50, in serious and urgent cases the Commission may, at the request of the complaining State, deal expeditiously with the matter on the receipt of such request in accordance with the powers conferred on it by this Part of the Convention and after notifying the States concerned.

Article 49

1. The Commission may receive petitions addressed to it by any person or group of persons, or associations or corporations legally recognized by the public authorities in which a violation by a State Party to this Convention of any of the rights recognized in Part I, Chapter I, thereof, is alleged to have been suffered.

Alternative A

2. Every State may, when it deposits its instrument of acceptance of this Convention, declare that it does not accept in whole or in part, the rules governing petitions provided for in the foregoing paragraph. In such a case the provisions of Articles 49 and 51 and the pertinent parts of Articles 52, 53, 56 and 74 insofar as they

Article 25

1. The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

2. Such declarations may be made for a specific period.

refer to petitions, shall not apply to that State.

Alternative B

2. Every State may, when it deposits its instrument of acceptance of this Convention, declare that it accepts, in whole or in part, the rules that govern petitions provided for in the preceding paragraph.

The Commission shall accept petitions only when the State against which the complaint is lodged recognizes the competence of the Commission to receive such petitions.

3. Such declarations, which may be made during a specific period, shall be deposited in the Pan American Union, which shall transmit copies of them to the signatory States to this Convention, and publish them.

4. The Commission shall exercise the powers provided for in this article when at least six of the ratifying States have committed themselves by their declarations made in accordance with paragraph 2.

3. The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

4. The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

Article 30

1. Except for those cases in which justice has been denied, the Commission shall take cognizance only of matters submitted to it after all domestic remedies have been applied and exhausted, in accordance with generally recognized principles of international law, and within six months of the date of the final decision of the domestic authorities. The term of six months may be extended when it is shown, to the satisfaction of the Commission, that it has been im-

Article 50

1. Except for those cases in which justice has been denied, the Commission shall take cognizance only of matters submitted to it after all domestic remedies have been applied and exhausted, in accordance with generally recognized principles of international law, and within six months of the date of the final decision of the domestic authorities.

2. If the Commission should have knowledge that the petitioner was arbitrarily denied access to judicial remedies by

Article 26

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken.

possible to submit the matter within the aforementioned term.

2. If the Commission should have knowledge that the petitioner was arbitrarily denied access to judicial remedies by the authorities of his country, the Commission may accept the complaint submitted to it.

Article 31

1. The Commission shall not act on any petition submitted under Article 29, in the event that:

- a. It is anonymous; and
- b. It is substantially the same petition as one previously examined by the Commission or already submitted to another international procedure of investigation or peaceful settlement, and it contains no new facts.

2. The Commission shall consider inadmissible any petition submitted under Article 29 when it considers such petition to be incompatible with the provisions of the present Convention, manifestly groundless, or an abuse.

3. The Commission shall reject any petition addressed to it that it considers inadmissible under Article 30.

Article 32

When a case has been presented to the Commission in accordance with the provisions of Article 28 or when the Commission has acted upon a petition made in accordance with Article 29:

- a. It shall, with a view to ascertaining the facts, undertake, with prior notice to the

the authorities of his country, the Commission may accept the complaint submitted to it.

Article 51

1. The Commission shall not act on any petition submitted under Article 49, in the event that:

- a. Is is anonymous;
- b. Is is substantially the same petition as one previously examined by the Commission or already submitted to another international procedure of investigation or pacific settlement, and it contains no new facts.

2. The Commission shall consider inadmissible any petition submitted under Article 49 when it considers such petition to be incompatible with the provisions of the present Convention, manifestly groundless, or an abuse.

3. The Commission shall reject any petition referred to it that it considers inadmissible under Article 50.

Article 52

When a case has been presented to the Commission in accordance with the provisions of Article 48 or when the Commission has acted upon a petition made in accordance with Article 49:

- a. It shall, with a view to ascertaining the facts, undertake, with prior notice to

Article 27

1. The Commission shall not deal with any petition submitted under Article 25 which

- (a) is anonymous, or
- (b) is substantially the same as a matter which has already been submitted to another procedure of international investigation or settlement and if it contains no relevant new information.

2. The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded, or an abuse of the right of petition.

3. The Commission shall reject any petition referred to it which it considers inadmissible under Article 26.

Article 28

In the event of the Commission accepting a petition referred to it:

- (a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective con-

representatives of the parties, a critical examination of the subject matter or of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

b. It shall place itself at the disposal of the interested parties with a view to reaching a friendly settlement of the matter on the basis of respect for human rights as defined in this Convention.

the representatives of the parties, a critical examination of the subject matter or of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

b. It shall place itself at the disposal of the interested parties with a view to reaching a friendly settlement of the matter on the basis of respect for human rights as defined in this Convention.

duct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;

(b) it shall place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention.

Article 29

1. The Commission shall perform the functions set out in Article 28 by means of a Sub-Commission consisting of seven members of the Commission.
2. Each of the parties concerned may appoint as members of this Sub-Commission a person of its choice.
3. The remaining members shall be chosen by lot in accordance with arrangements prescribed in the Rules of Procedure of the Commission.

Article 33

When a matter has been referred to the Commission under Article 28 or a petition submitted in accordance with Article 29 and such petition has been declared admissible, the complaining State, the State complained against, or any other State Party to the Convention, petitioning individual, or nongovernmental organization, may present statements in writing to the Commission, and shall have the right to be represented at the hearings on the matter and to make oral statements.

Article 53

If a State has referred a matter to the Commission under Article 48, or has submitted a petition in accordance with Article 49, such State, the State complained against, and any State Party to this Convention and the petitioning individual or nongovernmental entity, may present statements in writing to the Commission and shall have the right to be represented at the hearings on the matter and to make oral statements.

Article 34

The Commission is empowered to request of the interested States any information it deems pertinent to the matter under examination.

Article 54

The Commission is empowered to request of the interested States any information it deems pertinent to the matter under examination.

Article 35

If a friendly settlement has been reached in accordance with Article 32.b, the Commission shall draw up a report which shall be transmitted to the States concerned and then communicated to the Secretary of the Commission for publication. This report shall be confined to a brief statement of the facts and of the solution reached.

Article 55

If a friendly settlement has been reached in accordance with Article 52.b, the Commission shall draw up a report which shall be transmitted to the States concerned and then communicated to the Secretary General of the Organization of American States for publication. This report shall be confined to a brief statement of the facts and the solution reached.

Article 30

If the Sub-Commission succeeds in effecting a friendly settlement in accordance with Article 28, it shall draw up a Report which shall be sent to the States concerned, to the Committee of Ministers and to the Secretary-General of the Council of Europe for publication. This Report shall be confined to a brief statement of the facts and of the solution reached.

Article 36

1. If a solution is not reached, within 12 months after the receipt of the communication referred to in Article 28 or of the petition referred to in Article 29, the Commission shall draw up a report on the facts and state its conclusions. If the report does not represent in whole or in part the unanimous opinion of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with Article 33 shall also be attached to the report.
2. The report shall be transmitted to the States concerned, which shall not be at liberty to publish it.
3. In transmitting the report, the Commission may make such proposals as it sees fit.

Article 56

1. If a solution is not reached, and not later than 12 months after the receipt of the communication referred to in Article 48 or of the petition referred to in Article 49, the Commission shall draw up a report on the facts and state its conclusions. If the report does not represent in whole or in part the unanimous opinion of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with Article 53 shall also be attached to the report.
2. The report shall be transmitted to the States concerned, which shall not be at liberty to publish it.
3. In transmitting the report, the Commission may make such proposals as it sees fit.

Article 31

1. If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.
2. The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.
3. In transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

Article 37

1. If the matter is not submitted to the Court and its jurisdiction accepted within three months from the date of the transmittal of the report of the Commission to the States concerned, the Commission shall decide by an absolute majority vote of its members as to whether the State complained against, or against which a petition has been presented has violated the obligations contracted under this Convention.
2. In the affirmative case the Commission shall prescribe a term during which the State Party concerned is to take the measures required by the decision of the Commission.
3. If the State Party concerned has not taken satisfactory measures within the prescribed term, the Commission shall decide by the majority of votes of its members to publish its report.

Article 38

Every member of the Commission shall, before entering upon his duties, make a solemn declaration in an open meeting of the Commission that he will exercise his power impartially and conscientiously.

Article 57

1. If the matter is not submitted to the Court and its jurisdiction accepted, in accordance with Article 74 of this Convention, within three months from the date of the transmittal of the report of the Commission, to the States concerned, the Commission shall decide by an absolute majority vote of its members as to whether the State complained against, or against which a petition has been presented has violated the obligations contracted under this Convention.
2. In the affirmative case the Commission shall prescribe a period during which the State Party concerned is to take the measures required by the decision of the Commission.
3. If the State Party concerned has not taken satisfactory measures within the prescribed period, the Commission shall decide by the majority provided for in the preceding paragraph to publish its report.

Article 46

Every member of the Commission shall, before entering upon his duties make a solemn declaration in an open meeting of the Commission that he will exercise his powers impartially and conscientiously and as a representative of all the member States of the Organization

Article 32

1. If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention.
2. In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.
3. If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph 1 above what effect shall be given to its original decision and shall publish the Report.
4. The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

of American States that have ratified this Convention.

CHAPTER H.

Protection of economic, social, and cultural rights

Article 58

1. The States Parties hereto agree that, in order to guarantee the observance of the economic, social, and cultural rights set forth in this Convention, it is proper to adopt the following measures, apart from others provided for in international law in force in the Americas:

- a. Data or reports;
- b. Requests for information;
- c. Observations and recommendations;
- d. Studies and research, including *in loco*;
- e. Provision of technical assistance;
- f. Meetings, including those on a regional level;
- g. Agreements and conventions for co-operation in the economic, social, and cultural fields;
- h. Publicizing of measures adopted.

2. Without prejudice to the competence of other international organizations, the Commission shall have competence to:

- a. Adopt the measures provided for in subparagraphs a, b, c, d, and h of the preceding paragraph. For the effective carrying out of studies and research *in loco*, the interested States shall provide all the necessary facilities, after exchanging views with the Commission.
- b. To request, suggest, or recommend to the competent

organs of the Organization of American States or of the United Nations the adoption of any of the measures provided for in subparagraphs e, f, g, and h of the preceding paragraph.

3. The directly interested States Parties and the specialized organizations may present to the Commission, or to institutions to which it has addressed itself, in accordance with subparagraph b of the previous paragraph, their comments or observations on the recommendations made by the Commission, or on any other measure it has adopted or suggested without prejudice if such should be the case to the carrying out of such measures. [Translation error corrected in paragraph 3 – Editor.]

Article 59

1. The States Parties hereto bind themselves to inform the Commission, by means of periodic reports, of the measures adopted in order to guarantee the observance of the economic, social, and cultural rights set forth in this Convention.

2. The intervals between these reports, which shall not be less than six months or more than one year, shall be fixed by the Commission; and for their preparation the appropriate specialized organizations of the Organization of American States shall provide technical assistance to the States that request it, to the extent of their ability within their respective programs.

3. Through prior consultation with the competent specialized organizations, the Commission

may permit the afore-mentioned reports to be submitted in parts, in accordance with an established program.

4. Every State that belongs to specialized organizations shall send to these organizations a copy of the afore-mentioned reports, or of the parts pertaining to the matters in which they are competent.

5. In the case of reports that are to be presented originally to specialized organizations, the States Parties hereto shall send a copy to the Commission, or if this is not possible, shall send to them the necessary data in order to identify the reports in the files of the afore-mentioned specialized organizations.

Article 60

Without prejudice to the periodic reports referred to in Article 59, the Commission may request specific information from any of the States Parties hereto that agree to act on the request within the indicated period; and if it should be insufficient, to act on the request within the shortest possible time, in order not to nullify, through delay, the purpose of the request for information.

Article 61

1. The Commission may bring to the attention of international organizations in the fields of technical co-operation or assistance, or of any other qualified international organization, any question deriving from the reports referred to in the previous articles of this Convention in order that such organizations may decide, each one

within its own field of competence, on the advisability of adopting international measures that will contribute to the gradual application of the present Convention.

2. The Commission shall request the above-mentioned organizations to transmit to it the result of the studies carried out as well as the measures that those organizations adopt on their own initiative on the basis of the reports in question.

Article 62

On requesting, suggesting, or recommending to the competent organizations the measures that they should take, in accordance with Article 58.2.b, the Commission shall be as explicit as possible in stating the reasons for and the purposes of its request.

Article 63

When it considers it advisable the Commission shall give publicity to the measures that it has adopted or the request it has made of other organizations, for the purpose of permitting the formation of national and international public opinion thereon.

Article 64

With respect to the protection of economic, cultural, and social rights, the Commission shall adopt rules of procedure that shall guarantee to the parties the possibility of sustaining and proving their allegations.

CHAPTER II CENTRAL AMERICAN COURT OF HUMAN RIGHTS

Article 39

1. The Central American Court of Human Rights shall be composed of five members, of which not more than two may be nationals of the same State.

2. The members of the Court shall be persons of high moral character and either possess the qualifications required for appointment to high judicial office in their respective countries, or be jurists of recognized competence.

Article 40

1. The members of the Court shall be elected by the Committee of Ministers, by a majority of votes, from a list of nominees possessing the qualifications prescribed in the preceding Article and nominated in accordance with Article 23 of the present Convention.

2. As far as applicable, the procedure provided for in Article 24 shall be followed in order to fill any vacancies that may occur.

Article 41

1. The members of the Court shall be elected for a period of nine years and they may

PART IV INTER-AMERICAN COURT OF HUMAN RIGHTS

Article 65

The Inter-American Court of Human Rights shall consist of a number of judges equal to that of the States that have ratified this Convention. No two judges may be nationals of the same State.

Article 66

1. The members of the Court shall be elected by the Council of the Organization of American States, by majority vote, from a list of persons nominated in the manner prescribed in Articles 36, 37 and 38 of this Convention.

2. As far as applicable, the procedure provided for in Article 41 shall be followed in order to complete the membership of the Court in the event of further ratifications or adherences to this Convention, and in order to fill any vacancies that occur.

3. The candidates shall be of high moral character and either possess the qualifications required for appointment to high judicial office in their respective countries or be jurists of recognized competence.

Article 67

1. The members of the Court shall be elected for a period of nine years and they may be

SECTION IV

Article 38

The European Court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State.

Article 39

1. The members of the Court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

2. As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new Members of the Council of Europe, and in filling casual vacancies.

3. The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognized competence.

Article 40

1. The members of the Court shall be elected for a period of nine years. They may be re-

be re-elected. However, the terms of two of the judges elected at the first election shall expire at the end of three years, and the terms of another two of the members shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the initial terms of three and six years shall be chosen by lot by the Committee of Ministers, immediately after the first election has been completed.

3. The judges of the Court shall make the declaration provided for in Article 38 of this Convention.

re-elected. However, the terms of one third of the judges elected at the first election shall expire at the end of three years, and the terms of another third of the judges shall expire at the end of six years.

2. The judges whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary General of the Organization of American States immediately after the first election has been completed.

3. The provisions of Articles 41.2, and 42 of this Convention shall be applicable to the judges of the Court.

4. The judges of the Court shall make the declaration provided for in Article 46 of this Convention.

elected. However, of the members elected at the first election the terms of four members shall expire at the end of three years, and the terms of four more members shall expire at the end of six years.

2. The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary-General immediately after the first election has been completed.

3. A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

4. The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

Article 42

The members of the Court shall receive a compensation for each day of duty, in accordance with the budget of the Court.

Article 69

The members of the Court shall receive for each day of duty a compensation to be determined by the Council of the Organization of American States.

Article 42

The members of the Court shall receive for each day of duty a compensation to be determined by the Committee of Ministers.

Article 43

1. The President of the Committee of Ministers shall convene the initial meeting of the Court and shall determine the place where it is to be held.

2. After its initial meeting the Court shall meet at least twice a year without having to be previously convened, and also;

a. As many times as it deems necessary.

b. When any matter is referred to it under the provisions of Articles 37 and 48.

Article 70

3. The Court may meet and function in any American Capital it considers appropriate.

4. The Secretary shall have his office at the Pan American Union, subject to his duty of attending the sessions of the Court.

c. When convened by its President or at the request of three of its members.

3. The Court shall meet at its seat, but it may meet and function at any other city of the States Parties to the Convention, as decided by a majority of votes.

Article 44

1. In its initial session, the Court shall elect its President, Vice-President and Secretary for a period of three years, and they may all be re-elected.

2. The Court shall formulate regulations for the exercise of its functions. It shall draw up, in particular, its own rules of procedure.

Article 68

The Court shall elect its President and Vice President for a period of three years. They may be re-elected. It shall appoint its Secretary in the manner prescribed in Article 44 of this Convention.

Article 81

The Court shall formulate regulations for the exercise of its functions. It shall draw up, in particular, its own rules of procedure.

Article 70

1. In the event that the Court should reach a membership of more than nine judges, there shall be established, for the consideration of any matter brought before it, a Chamber of nine judges, of which the judges who are nationals of any interested state shall form a part. The other judges shall be chosen by lot by the President before the opening of the case.

2. Without prejudice to the provisions of Articles 41 and 67.3 of the present Convention, the number and nationality of the judges who have started the examination of a case shall not be altered, even though one or more States should accept this Convention after the examination has begun.

Article 41

The Court shall elect its President and Vice-President for a period of three years. They may be re-elected.

Article 55

The Court shall draw up its own rules and shall determine its own procedure.

Article 43

For the consideration of each case brought before it the Court shall consist of a Chamber composed of seven judges. There shall sit as an ex officio member of the Chamber the judge who is a national of any State party concerned, or, if there is none, a person of its choice who shall sit in the capacity of judge; the names of the other judges shall be chosen by lot by the President before the opening of the case.

Article 56

1. The first election of the members of the Court shall take place after the declarations by the High Contracting Parties mentioned in Article 46 have reached a total of eight.

2. No case can be brought before the Court before this election.

Article 45

The States Parties to the present Convention, as well as the Commission, may be parties to a case before the Court.

Article 71

The States that have ratified or adhered to this Convention, as well as the Commission on Human Rights, the latter represented by a member or members appointed therefor, may be parties to a case before the Court.

Article 44

Only the High Contracting Parties and the Commission shall have the right to bring a case before the Court.

Article 46

The Court shall have compulsory jurisdiction in all cases concerning the interpretation and application of Part I of the present Convention that the High Contracting Parties or the Commission submit to it, in accordance with Article 37

Article 72**Alternative A**

1. The Court shall have compulsory jurisdiction in all cases concerning the interpretation and application of Part I, Chapter I of the present Convention that the High Contracting Parties or the Commission submit to it, in accordance with Article 74.

2. Nevertheless, any of the States Parties hereto may at any time declare that it does not recognize as compulsory the jurisdiction of the Court, in whole or in part, in accordance with paragraph 1 of this article.

3. The declarations referred to in the preceding paragraph shall be presented to the Secretary General of the Organization of American States, who shall transmit copies of them to the States Parties hereto and to the Secretary of the Court.

Alternative B

1. The Court shall have jurisdiction in all cases concerning the interpretation and application of Part I, Chapter I of the present Convention that the High Contracting Parties or the Commission, submit to it in accordance with Article 74.

2. Any of the States Parties hereto may declare at any time

Article 45

The jurisdiction of the Court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48.

Article 46

1. Any of the High Contracting Parties may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

2. The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

3. These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

that it recognizes as a matter of law, and without the need for a special convention, the jurisdiction of the Court on all matters relating to the interpretation and the application of this Convention.

3. The declarations referred to in the preceding paragraph may be made unconditionally or on the condition of reciprocity on the part of several or certain other contracting parties, or for a specific period.

4. The declarations referred to in the preceding paragraph shall be presented to the Secretary General of the Organization, who shall transmit copies of them to the States Parties hereto and to the Secretary of the Court.

Alternative C

The Court shall have compulsory jurisdiction in all cases concerning the interpretation and application of Part I, Chapter I of the present Convention that the States Parties hereto or the Commission submit to it, in accordance with Article 74.

Article 47

The Court may deal with a case only after the Commission has acknowledged that it has not been possible to reach a settlement, and the case shall be presented within the period of three months provided for in Article 37, paragraph 1.

Article 73

The Court may deal with a case only after the Commission has acknowledged that it has not been possible to reach a settlement, and the case shall be presented within the period of three months provided for in Article 57.1.

Article 47

The Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32.

Article 48

The Court may act at the request of the Commission, of a Contracting State of which the complaining individual or entity is a national, of the

Article 74

The Court may act at the request of the Commission, of a Contracting State of which the complaining individual or entity is a national, of the

Article 48

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties

Contracting State that has referred the case to the Commission, or of the Contracting State against which the claim or petition has been lodged.

Contracting State that has referred the case to the Commission, or of the Contracting State against which the claim or petition has been lodged.

Alternative A

2. In order that the Court may exercise its jurisdiction it is necessary that the High Contracting Party against which the complaint has been directed, should not have made the declaration provided for in Article 72.2, or that it not be applicable to the case, or if applicable, that the afore-mentioned Contracting State consent to the Court's exercising jurisdiction in the case submitted to it.

Alternative B

2. In order that the Court may exercise its jurisdiction it is necessary that the High Contracting Party against which the complaint has been directed, should not have made the declaration provided for in Article 72.2, or that it be applicable to the case, or if not applicable, that the afore-mentioned Contracting State consent to the Court's exercising jurisdiction in the case submitted to it.

Alternative C

(no paragraph 2)

Article 49

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court.

Article 75

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by decision of the Court.

concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Parties concerned if there is more than one:

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged.

Article 49

In the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 50

If the Court finds that a decision taken or a measure ordered by a legal authority or any other authority of a Contracting State, is completely or partially in conflict with the obligations arising from the present Convention, and if the domestic law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall provide, if according to law, that just compensation be paid to the injured party.

Article 51

1. Reasons shall be given for the judgment of the Court.
2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

Article 52

The judgment of the Court shall be final and may not be appealed. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties.

Article 53

The Contracting States undertake to abide by the decision of the Court in any case to which they are parties.

Article 54

The judgment of the Court shall be transmitted to the Committee of Ministers.

Article 76

If the Court finds that a decision taken or a measure ordered by a legal authority or any other authority of a Contracting State, is completely or partially in conflict with the obligations arising from the present Convention, and if the domestic law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall provide, if according to law, that just compensation be paid to the injured party.

Article 77

1. Reasons shall be given for the judgment of the Court.
2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

Article 78

The judgment of the Court shall be final, and may not be appealed. In case of disagreement as to the meaning or scope of the judgment the Court shall interpret it at the request of any of the parties.

Article 79

The Contracting States undertake to abide by the decision of the Court in any case to which they are parties.

Article 80

The judgment of the Court shall be transmitted to the Council of the Organization of American States.

Article 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

Article 51

1. Reasons shall be given for the judgment of the Court.
2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 52

The judgment of the Court shall be final.

Article 53

The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.

Article 54

The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

CHAPTER III**The Committee of Ministers of
Foreign Affairs****Article 55**

The Committee of Ministers shall be composed of five members, who shall be the respective Ministers of Foreign Affairs of each of the States Parties to this Convention.

Article 56

1. In its first meeting the Committee of Ministers shall elect its President and Vice-President for a period of one year, and its Secretary for a period of four years. The Minister who convenes this first meeting, in accordance with Article 64 of this Convention, shall act as the Secretary in said meeting.
2. The Committee of Ministers shall also proceed, at its first meeting, to determine the seat of the Court and of the Commission.

Article 57

1. After its initial meeting the Committee of Ministers shall meet:
 - a. As often as it deems necessary or as may be required under the provisions of this Convention.
 - b. When convened by its President, or at the request of three of its members.
2. The Committee of Ministers shall meet at the capital of the State Party to the Convention of which the President of the Committee is a national, or at any other city of the Contracting States, as decided by a majority of votes.
3. The Ministers of Foreign

Article 61

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by Statute of the Council of Europe.

Affairs may be represented in the meetings held by the Committee of Ministers, by delegates especially appointed for that purpose.

Article 58

1. In addition to the functions assigned to the Committee of Ministers by the provisions of this Convention, the Committee shall also seek to ensure the enforcement of the decisions adopted by the Commission or the Court.

2. The Committee of Ministers shall also be in charge of preparing the proposed budget of the Commission and the Court to be submitted to the Ministers of Finance of the States Parties to the Convention, in accordance with Article 62 hereof.

PART IV

GENERAL PROVISIONS

Article 59

The States Parties to this Convention undertake to provide, at the request of the Commission, the explanations as to the manner in which their domestic law ensures the effective application of all the provisions of the present Convention.

PART V

GENERAL PROVISIONS

Article 82

The States Parties to the present Convention undertake to provide, at the request of the Commission, the explanations as to the manner in which their domestic law ensures the effective application of all the provisions of this Convention.

SECTION V

Article 57

On receipt of a request from the Secretary-General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.

Article 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 60

In the exercise of their duties, the members of the Commission and of the Court shall enjoy diplomatic privileges and immunities.

Article 84

In the exercise of their duties, the members of the Commission and of the Court shall enjoy diplomatic privileges and immunities.

Article 59

The members of the Commission and of the Court shall be entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Article 61

The seat of the Court and of the Commission shall be established in a city of the State Party to the Convention, as determined by the Committee of Ministers by a majority of votes.

Article 62

The States Parties to the Convention shall contribute to the expenses set forth in the budget in proportion to their respective national budgets.

Article 83

The expenses of the Commission and of the Court shall be apportioned in the manner and under the conditions determined by the Council of the Organization of American States.

Article 58

The expenses of the Commission and the Court shall be borne by the Council of Europe.

Article 63

The Ministers of Finance of the States Parties to the Convention shall meet at the city where the seat of the Court has been established or at any other place unanimously agreed upon, for the purpose of approving by a majority of votes the proposed budget submitted by the Committee of Ministers, and they may introduce any amendments that they may deem necessary.

**PART VI
SPECIAL CLAUSES**

Article 64

1. The ratification of this Convention shall be made by the deposit of an instrument of ratification with the Ministry of Foreign Affairs of the first signatory State.
2. As soon as the five States of Central America have deposited their respective instruments of ratification, the Convention shall enter into force.
3. The Minister of Foreign Affairs of the depository State shall immediately inform the other Contracting States of the entry into force of the Convention.

Article 65

Within the fifteen days subsequent to the entry into force of the Convention, the Minister of Foreign Affairs of the depository State shall convene the others in order that within a term of not more than one month from the date of the notice of convocation, they constitute the Committee of Ministers, and hold its first meeting, establishing the place and date where and when it is to take place.

Article 85

1. This Convention shall be open for signature by and for the ratification or adherence of any member state of the Organization of American States.
2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as seven States have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any State that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.
3. The Secretary General of the Organization shall inform all members of the Organization of the entry into force of the Convention and of the deposit of each instrument of ratification or adherence.

Article 66

1. This Convention shall be open to the signature of the Members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary-General of the Council of Europe.
2. The present Convention shall come into force after the deposit of ten instruments of ratification.
3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of this instrument of ratification.
4. The Secretary-General of the Council of Europe shall notify all the Members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Article 86

1. Any State may at the time of the deposit of its instrument of acceptance of this Convention, make reservations if a Constitutional or legal provision in force in its territory should be contrary to any provision of this Convention, or if its legislation should not permit of the enforcement of such provision. All reservations should be accompanied by the text of the laws referred to.
2. If reservations should be made, it shall be considered that the Convention has entered into force between the State that presented the reservations and the other Contracting Parties that accept such reservations, with respect to all the provisions of the Convention, except those that have been the subject of the said reservations. Consequently, the reserving State may not invoke, with respect to any other High Contracting Party, those provisions that were the subject of its reservations.

Article 66

1. The Contracting States may denounce the present Convention at the expiration of a five-year period starting from the date of its entry into force, and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary of the Committee of Ministers, who shall so inform the other Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the Contracting State concerned from the obligations contained in this Convention

Article 87

1. The Contracting States may denounce the present Convention at the expiration of a five-year period starting from the date of its entry into force, and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall so inform the other Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the Contracting State concerned from the obligations contained in this Convention in respect

Article 64

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

Article 65

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a Party to it and after six months' notice contained in a notification addressed to the Secretary-General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in re-

in respect of any act that, being capable of constituting a violation of such obligations, has been performed by that State prior to the effective date of denunciation.

of any act that, being capable of constituting a violation of such obligations, has been performed by that State prior to the effective date of denunciation.

spect or any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.

3. Any High Contracting Party which shall cease to be a Member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 63.

Article 67

1. Any State Party to this Convention may propose an amendment and present it to the Secretary of the Committee of Ministers, who shall thereupon communicate the proposed amendment to the President of said Committee.

2. The President of the Committee shall convene the other members for the purpose of examining the proposal, and should it be approved by four-fifth parts of the members of the Committee, the amendment shall enter into force.

Article 88

1. Any State Party to this Convention may propose an amendment and present it to the Secretary General of the Organization. The Secretary General shall thereupon communicate the proposed amendment to the States Parties to the Convention, with a request that they notify him whether they favor the convocation of a Conference of the States Parties hereto, for the purpose of considering and voting upon the proposal. If at least one third of the States declare themselves in favor of such action, the Secretary General of the Organization shall convoke a conference under the auspices of the Organization of American States. Any amendment adopted by a majority of the States present and voting at the conference shall be subject to the procedure set forth in the following paragraphs.

2. Such amendments shall enter into force when they have

Article 63

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary-General of the Council of Europe that the present Convention shall extend to all or any of the territories for whose international relations it is responsible.

2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary-General of the Council of Europe.

3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

4. Any State which has made a declaration in accordance with paragraph 1 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the

been approved by a two-thirds majority of the States Parties to this Convention, in accordance with their respective constitutional processes.

3. When such amendments enter into force, they shall be binding on those Parties that have accepted them, the other Parties continuing to be bound by the provisions of the Convention and by any earlier amendment that they have accepted.

4. The Court may suggest to the governments of the States Parties hereto, through the Council of the Organization of American States, the advisability of proposing amendments to the provisions of Parts III, IV and V, of this Convention.

Commission to receive petitions from individuals, non-governmental organizations or groups of individuals in accordance with Article 25 of the present Convention.

Article 62

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

PROTOCOL TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this Article shall be deemed to have been made in accordance with Paragraph (1) of Article 63 of the Convention.

Article 5

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6

This Protocol shall be open for signature by the Members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all Members of the names of those who have ratified.

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Bulletin of the International Commission of Jurists

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