

**FOR THE RULE  
OF LAW**

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**Bulletin  
of the  
International  
Commission  
of Jurists**

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## FOREWORD

With the appearance of Bulletin No. 7 the International Commission of Jurists completes a plan to cover four types of publication. The Commission will in the first place continue to produce from time to time, as the occasion may demand, special studies on a particular situation; the two publications "Hungary and the Rule of Law" and "The Continuing Challenge of the Hungarian Situation" may be cited as examples. Secondly, the Commission will publish a Newsletter (of which Nos. 1 and 2 have appeared in 1957 and a third will be issued before the end of the year) in order to give a periodical account of the activities of the Commission and of its National Sections. Thirdly, the Commission will publish a Journal, which will appear twice yearly and be devoted to detailed articles and book reviews on the general theme of the Rule of Law. The first number of this Journal is now being distributed.

The Commission considers however that there is a need for a regular survey in short and readable form of current developments, within the general sphere of the Rule of Law, in various countries. This Bulletin has been compiled to meet this need. It should however be observed that, while it is the standing purpose of the Commission to preserve a fair balance, according to the importance of the issues involved, between different parts of the world and different legal systems, limitations of space, the availability of information and the current interest of particular topics will naturally determine the choice of countries and subject matter in any particular Bulletin. Furthermore important issues may be omitted - Hungary and the treason trial in South Africa in this Bulletin, for example -

only because they have been dealt with at length in other publications of the Commission.

The success of a publication of this type depends on the cooperation of lawyers in many countries who are willing to supply the Commission with relevant information. In this connection it should be particularly emphasized that the object of the Bulletin is not merely to collect instances of the breach of the Rule of Law throughout the world but equally to give news of any developments which bear on or strengthen the application of the Rule of Law. The Bulletin is designed, in short, to keep lawyers throughout the world in touch with problems arising from the practical application of the principles which underlie the common traditions and loyalties of their profession.

The Hague  
October 1957

NORMAN S. MARSH  
Secretary-General

## **Fundamental Rights and the Rule of Law on the International Level**

There is a close connection between the observance of fundamental rights and the furtherance of the "Rule of Law". But on the whole lawyers who are concerned to defend the Rule of Law think in terms of national systems of law rather than in terms of international law. But in fact the struggle for human rights is necessarily conducted simultaneously on two levels: on the first, the primary purpose is to formulate a statement of human rights which may serve as a standard throughout the world; on the second, attention is given to the practical working out in individual legal systems of these standards. As regards the international aspects of this problem the United Nations (i.e. the Human Rights Commission of the Economic and Social Council and the Third Committee of the General Assembly) have been discussing since the proclamation by the General Assembly of the Universal Declaration of Human Rights on December 10, 1948 two draft covenants: one on civil and political rights, the other on economic, social and cultural rights. Progress on this ambitious project is necessarily slow; more immediately practical results may perhaps be obtained from the programme of advisory services on human rights initiated by the General Assembly and the Economic and Social Council, under which may especially be mentioned two regional seminars on the "protection of human rights in criminal law and procedure", the first of which is to take place in Manila in February 1958 and the second in Latin America probably later in the same year. The same tendency to turn from comprehensive formulations of rights to the discussion of and information on specific rights may be seen in the appointment by the Human Rights Com-

mission of a special committee to study the right to be free from arbitrary arrest, detention and exile. Similarly, a sub-commission of the Human Rights Commission has been engaged in a series of studies on discrimination in various fields, including education, religion and the exercise of political rights.

Within the European area however the protection of human rights has gone beyond the stage of discussion of principles, as the European Convention on Human Rights of 1950 constitutes as far as the signatory States are concerned a binding instrument with an established, although as yet not fully developed, system for the settlement of disputes arising out of the Convention. In Articles 2-18 the Convention prescribes in some detail a number of rights, such as right to liberty and security of the person, to freedom of expression and of association. The interest of lawyers, who even in the countries affected are not as yet fully aware of the implications of the Convention, lies now in the qualifications to the rights which are admitted in the Convention (e.g. "in time of war or other public emergency") or which may be read into the provisions. It is therefore of great importance to consider the machinery which has been set up to implement the Convention. Alleged violations may be referred to a Human Rights Commission by any State which is a party to the Convention. But the Commission only makes a report which, if it does not lead to a friendly settlement, is referred to the Committee of Ministers of the Council of Europe who decide on the basis of the Commission's report and by a two-thirds majority whether a violation of the Convention has taken place. The obviously more satisfactory course of a final appeal to a judicial rather than an essentially political tribunal is at present prevented by the lack of a sufficient number of ratifications of that part of the Convention which envisages the setting up of a European Court of Human Rights with compulsory jurisdiction. The machinery of enforcement is also incomplete in that only some of the signatory States have accepted the right of individual petition, so that in certain circumstances it may be difficult for an individual to secure the presentation of his case before the Commission.

Nevertheless the Human Rights machinery of the Council of Europe is in actual operation and this fact alone is of the greatest legal importance.

## The Universal Declaration of Human Rights and Constitutional Developments in Canada

The special difficulties and opportunities of a federal constitution in giving effect on a national level to the principles of the Universal Declaration on Human Rights are explained in a note which we owe to Judge Thorson, President of the Exchequer Court of Canada and of the International Commission of Jurists. He writes: -

Canada is not opposed to the principles expressed in the Universal Declaration of Human Rights. On the contrary, they are strongly approved. The fact that Parliament has not adopted it is largely due to the nature of the Canadian federal system. It was provided in the preamble to the British North America Act of 1867, an Act of the Parliament of Great Britain, by which Canada was established, that the Provinces that were united by it had expressed the desire to be federally united with a constitution similar in principle to that of Great Britain and it is generally assumed that effect has been given to such desire. In Great Britain the doctrine of the sovereignty of Parliament prevails. While such great charters of rights and freedoms as Magna Carta of 1215 and the Bill of Rights of 1689 are part of the law of Great Britain, they do not bind Parliament. Under them the people enjoy the practise of freedom but do so without any constitutional guarantee of their rights.

When Canada was established in 1867 it inherited from Great Britain the doctrine of the sovereignty of Parliament in a modified form. One modification is that Canada was established under a federal system instead of a unitary one so that the sovereignty had to be divided between the Parliament of Canada on the one hand and the legislative assemblies of the Canadian provinces on the other, certain subjects being assigned to the exclusive jurisdiction of the provincial legislative assemblies and others to that of Parliament with the residue of legislative power not specifically assigned to the provinces being left with Parliament. Specific provisions for the use of the English and French languages, and the life and frequency of sessions of Parliament constitute further modifications. But it has been assumed that, apart from such subjects, which are thus put beyond the reach of any legislative body in Canada, the whole field of self-government belongs to Canada and that in their

respective fields of jurisdiction the provincial legislative assemblies and Parliament are supreme. Thus the only constitutional question that can arise in Canada is whether a particular enactment falls within the jurisdiction of the legislative body that enacted it. If it does the enactment is valid.

It is in this situation that objection has been taken to the enactment of a Bill of Rights embodying the principles stated in the Universal Declaration of Human Rights and Fundamental Freedoms. This has been on two grounds. The first relates to the division of the field of self-government between Canada and its Provinces. It is urged that some of the subjects covered by the Declaration lie within the exclusive competence of the provincial legislative assemblies and that the enactment of a Bill of Rights by Parliament would, to that extent, be a constitutional intrusion into a field of legislation that does not belong to it. The other objection is of a different nature. It is urged that the enactment of a Bill of Rights is not necessary in Canada, which has inherited from Great Britain the great charters of liberty and freedom such as Magna Carta and the Bill of Rights.

While it is substantially true that the principles of the Universal Declaration find expression in Canadian law, it cannot be denied that there is a growing doubt of the value of the doctrine of the sovereignty of Parliament owing to disconcerting legislative interferences with certain freedoms. For example, in 1937 the Province of Alberta sought to compel newspapers to print statements prepared by the Government. In the same year the Province of Quebec passed the famous Padlock Act whereby, for the purpose of preventing the propagation of communism, the Attorney General was given arbitrary power to close certain establishments without recourse to the Courts. The Parliament of Canada has also offended. After the Winnipeg strike of 1919 it passed Acts authorizing the deportation of certain aliens without trial and interfering with the freedom of association. And in recent years it authorized the exile from their homes of Canadians of Japanese origin. While the Supreme Court of Canada invalidated the Alberta Press Act and the Quebec Padlock Act and some of the offending legislation referred to has been repealed by subsequent legislation the steps to remedy the breaches of freedom have been slow. There is fear of their repetition

and an uneasy feeling that the fundamental freedoms are not secure. This has resulted in a demand for a Bill of Rights.

The term Bill of Rights has been used in two senses, one meaning a declaration in the form of a legislative enactment and the other a constitutional guarantee. It is increasingly felt that the enactment of a Bill of Rights by the Parliament of Canada would have value as a reassertion of the rights and freedoms expressed in it even although, strictly speaking, it would not add anything to the existing law but would merely be declaratory of it. Two Canadian provinces, Alberta and Saskatchewan, have enacted a Bill of Rights Act and there have been declaratory enactments of individual rights and freedom in other provinces. It has been strongly urged that Parliament should follow a similar course. There would obviously be great difficulty in determining which of the human rights and fundamental freedoms expressed in the Universal Declaration could validly be dealt with by Parliament, but if it were to make a declaration of them, to the extent of its jurisdiction to do so, such a declaration would be welcomed by many Canadians.

But such a declaration would not bind Parliament and a Bill of Rights of such a nature would not satisfy those who believe that a constitutional guarantee of human rights and fundamental freedoms is necessary. Such persons desire a Bill of Rights that would be embedded in the Canadian constitution so that no legislative body, federal or provincial, could abridge the rights or freedoms guaranteed by it.

A Bill of Rights in this sense of the term would require an amendment of the British North America Act and this would have to be enacted by the Parliament of Great Britain. It would pass the necessary amendment only on the request of the Canadian Parliament that it should do so. But since such an amendment would involve a restriction of the sovereignty of Parliament and some of the subjects covered by it would be within the field of jurisdiction assigned to the provinces it is unlikely that Parliament would make such a request without their concurrence and such concurrence would be difficult, if not impossible, to obtain. There would be strong opposition in Canada to the surrender of the sovereignty of Parliament involved in such an amendment and even if Parliament would consent to it, so far as its jurisdiction extends, it is most unlikely that

the provincial legislative assemblies would be willing to do so in the field belonging to them. The likelihood of a Bill of Rights in Canada in the sense indicated is remote.

But a constitutional guarantee of certain freedoms may come about in another way. The opinion has been expressed by students of the Canadian Constitution that certain freedoms underlie the Canadian federal system and as such are inviolable so that neither the provincial legislative assemblies nor Parliament can abridge them. The freedoms considered to be in this category are freedom of discussion of public affairs, including therein freedom of speech and freedom of the press, freedom of association and freedom of assembly. Some students add freedom of religion. The contention is that these freedoms are essential to the working of the federal system and are implicit in the British North America Act although not expressed in it. The first judicial support for this opinion is implied in the reasons for judgement of the Chief Justice of the Supreme Court of Canada in the Alberta Press Act case. He expressed the view that the right of free public discussion is the breath of life for parliamentary institutions and belongs to all Canadians and is, therefore, not a "civil right within the Province". It was not within the power of any Province to restrict it. The Supreme Court of Canada has supported this opinion in several cases and it may reasonably be assumed that by reason of its decisions the fundamental freedom of discussion of public affairs is safeguarded against provincial interference. While it has been held that the protection of this right, not being within provincial competence, is vested in Parliament it does not follow that Parliament has the power to destroy it. There has thus far not been any decision on this point but there have been expressions of opinion by individual judges that since the right underlies the Canadian federal system not even Parliament can abridge it. The most direct opinion to this effect was expressed by one of the judges of the Supreme Court of Canada in its recent decision holding the Quebec Padlock Law to be invalid. The opinion referred to is gaining strength and its eventual acceptance may afford the guarantee which those who are pressing for a Bill of Rights desire, but progress to that end must necessarily be slow.

## Recent Legal Developments in Communist China

There is obviously no parallel between the aspirations of a settled social order, such as that prevailing in Canada, to strengthen by legal means the protection afforded to the individual and the attitude to be expected in a revolutionary and immediately post-revolutionary era, such as that through which Communist China has been passing. Of particular interest, however, to lawyers in other countries are any signs in the exercise of State power in China of a greater readiness to substitute a precise legal framework for a loose pattern of administrative regulation. That the Chinese authorities are sensitive to the frequently expressed criticism that they have neglected legislation and the judicial system is apparent from the characteristic statement of the newspaper *Kwang Ming Jih Pao*, reported on Radio Peking on August 3, 1957, that some 4018 laws and ordinances of the present regime refute "the fallacious views of the bourgeois Rightists that China had never paid essential attention to legislation and that there was no law among Government and judicial organs". Nevertheless a new Penal Code, although long under discussion, has not yet been promulgated and such special criminal laws have been passed, particularly in relation to allegedly political offences, contain many vague definitions of serious offences, even punishable with death. Thus the following acts, *inter alia* by Regulations of February 21, 1951, which are apparently still in force, are punishable, if committed "with counter-revolutionary intentions", by death: -

- (a) instigating the masses to resist and sabotage the collection of grains and taxes, labour service, military service or implementation of other administrative decrees of the People's Government,
- (b) alienating and splitting the solidarity between the government and the nationalities, democratic classes, democratic parties and groups and people's organizations, and
- (c) conducting counter-revolutionary propaganda and agitation, fabricating and spreading rumours.

Some indication of the extent to which such laws have been used to suppress political opponents, potential or actual, of the regime is revealed in the remarkable speeches of Mao Tse-tung on February

27 and March 12, 1957, released in June last. In a version first circulated in Eastern Europe, later published with the relevant figure suppressed, Mao Tse-tung admitted that between 1949 and the beginning of 1954 some 800,000 persons had been "liquidated". Moreover from a more recent speech of Chou En-lai on June 26, 1957, it would appear probable that this number constituted only a small portion of those punished, as in speaking of the period 1949 to 1952 he gave the following analysis of the treatment accorded to political suspect: 16.8% executed, 42.3% sentenced to forced labour and 32% placed under police surveillance, the rest being presumably acquitted.

In one passage of his speech Mao Tse-tung, referring to the elimination of "counter-revolutionaries" and admitting the existence of mistakes and the need for public measures of exoneration and rehabilitation, maintained that since 1956 the main forces of counter-revolution had been suppressed. For this new stage he advocated, in a much quoted aphorism, the policy of "letting a hundred flowers blossom" and "a hundred schools of thought contend". Yet since this appeal became known attacks on and arrests of critics of the regime, usually for "Rightist" deviations, have become a feature of the Chinese press. Among the groups attacked have been the "Rightist jurists" and towards the end of August it was reported from Peking that the Director of Political Science of the Peking University had been accused of being the leader of a group of jurists, whose activities had been under supervision since June. Moreover a decree of August 3, 1957 gives the administrative authorities wide powers to send to internment camps for labour training and for an indeterminate period:

- 1) the jobless, vagabonds, those who habitually commit minor thefts or frauds, not amounting to criminal offences, or violation of police regulations;
- 2) counter-revolutionaries and reactionaries against Socialism whose acts do not amount to criminal offences, if they have been dismissed from their jobs and have no means of livelihood;
- 3) those in government services, social organizations, economic enterprises, and schools, who refuse to work for a long period or

commit breaches of discipline or offend public order, if they have been dismissed and have no means of livelihood;

- 4) those who habitually refuse labour distribution or transfer, do not accept direction in labour, complain without reason, or damage public works.

It may be that a legal system which is so loosely organized and which in effect puts such immense power in the hands of the government and its servants will develop more precise standards as a Chinese legal profession is established. At present the provision of trained lawyers to advise the ordinary citizen on his contacts with the courts and government is obviously inadequate. How inadequate may be seen from the figures given on January 14, 1957 by the newspaper *Kwang Ming Jih Pao*: in a population of 600 million, it was then stated that about 3500 lawyers were available for consultation by the public and that about a thousand legal advice centres had been organized. Only in the course of 1956 did lawyers begin to practice for the public in general as well as for governmental agencies and public enterprises.

### **Crown Privilege and Administrative Tribunals in England**

The importance of the opinion of a powerful legal profession is well illustrated by developments in England in two spheres which closely touch the powers of the administration. According to English law the Crown through its ministers and other servants cannot be compelled to produce documents, important as these may be to a party in litigation, if, *in the opinion of the Minister*, the production of such documents would injure the public interest or endanger the proper functioning of the public service. In a case in 1953 Devlin J., referring to a situation where such a privilege had been claimed by the Crown, confessed to "an uneasy feeling that justice may not have been done because the material before me was not complete and something more than an uneasy feeling that, whether justice had been done or not, it will certainly not appear to have been done . . . The rule (of Crown privilege) means when a Government Department is defendant that every litigant against a Government Department - and such litigation is becoming more and more frequent as

the sphere of government activities is extended – is denied as a matter of course the elementary right of checking the evidence of government witnesses against the contemporary documents”.

The Bar Council of England has taken up the matter and made certain recommendations. They envisage different treatment of (i) national security documents, and (ii) documents not dealing with national security. The Bar Council suggests that with regard to the latter a Minister, if he refused to produce a document, would have to *satisfy the Court* (a) that the production would be against public interest and (b) that the detriment to the litigant by non-production does not outweigh the prejudice to public interest.

The Government through an announcement of the Lord Chancellor on June 6, 1956 has made important concessions. Crown privilege will be waived in a number of cases – such as in accidents involving Government servants or premises – but will still be asserted where disclosure of the relevant documents would endanger State security or diplomatic relations or the proper functioning of the public service. The legal critics remain dissatisfied however as long as the Government itself is the final judge of whether the public interest in a fair Court process is outweighed by the Government's concern to ensure the proper functioning of the administration.

What is the responsibility of the administration alone and what raises wider issues to which it is insufficient to apply purely administrative criteria has been authoritatively discussed with reference to administrative tribunals and enquiries in the Report of a Committee under the Chairmanship of Sir Oliver Franks published in July 1957. The problems raised by administrative tribunals are by no means peculiar to England; the machinery of the Welfare State necessitates the decisions of questions closely touching the liberties of the subject by bodies which lie outside, or only have a somewhat tenuous connection with, the ordinary courts. In England there has for a long time been concern about the working of administrative tribunals and enquiries, especially in regard to two points: 1) the fact that in many cases the final decision rests with the Executive, i.e. with the Minister concerned; 2) the lack of any common pattern regarding the organization of tribunals and their rules of procedure, e.g. as regards the legal or lay composition of the tribunal, the right to legal advisers, publication of the proceedings and of reasons for

the decision. The Franks Committee in a report which, as much for its clear and forceful style as for its substantive recommendations, is likely to become a classic constitutional document, proposes that administrative tribunals exercising appellate functions and tribunals of first instance as a general rule should have a legally qualified chairman. It considers that hearings should be held in public apart from exceptional cases and that there should in general be a right to legal representation. The reasons for the decision should be given and there should be a right of appeal on fact and law; such appeal should not in principle lie to a Minister. With regard to administrative procedures by which in England after a local enquiry by a government inspector the Minister concerned makes important decisions regarding the compulsory acquisition of property and town planning, the Franks Committee recommends major changes. The inspector's reports to the Minister should be published and the Minister's decision should be accompanied by a statement of his reasons and of the underlying findings of fact on which it is based.

The general tendency of the recommendations to separate bodies making decisions affecting the rights of the subject from the ordinary administrative machinery and to emphasize the judicial character of their work may be shown in a number of ways: for example, it is proposed that a Standing Council on Tribunals appointed by and answerable to the Lord Chancellor (the highest judicial officer in England) should supervise the work of tribunals and that the inspectors who carry out local enquiries preliminary to a Minister's decision should constitute a separate corps also under the control of the Lord Chancellor.

"The Rule of Law," says the Report, "stands for the view that decisions should be made by the application of known principles or laws."

The special interest of the Report is that, while recognizing that there are spheres of government where it is important to preserve flexibility of decision, it in effect favours a more extensive application of the "Rule of Law" in this sense within the administrative field. In reaching this conclusion it is of particular interest to note that the Committee paid great attention to the experience of other countries, especially of the United States and of France.

## **Administrative Decisions and the Rule of Law in Sweden**

Sweden is a country which may find much of interest in the Report of the Franks Committee on English administrative tribunals. In Sweden as a general rule administrative decisions cannot be challenged in the courts, and there has been in recent years a growing feeling – comparable to the climate of opinion in England – that the Rule of Law should be given greater influence in the Swedish administrative system. In this connection the work of two Royal Commissions is of interest. One was set up to strengthen legal safeguards of the rights of the individual in administrative procedures used for detaining special categories of persons (aliens, lunatics, drunkards, child criminals and neglected children), as there is not in Swedish law any procedure comparable to the English *Habeas Corpus*. The other Commission was entrusted with the task of drafting a bill improving the appeal procedure in administrative remedies in general.

The acceptance by Sweden in 1953 of the European Convention on Human Rights, and in 1955 of the clause permitting individual petition, creates the somewhat curious position that, in cases covered by the Convention, the only way to challenge an administrative decision may be to resort to the international authorities set up under the Convention. However Sweden has had since the Constitution of 1809 an interesting special institution, a kind of *tribunus popularis*, the main responsibility of which is to see that the individual's rights are observed by the courts and the administrative authorities. In 1957 the power of this special office has extended from the central administration to that of local authorities.

## **France and the Rule of Law in Algeria**

The traditional respect accorded in France to the Rule of Law which was studied with great interest by the Franks Committee has been shown by the concern in French legal circles with certain aspects of French administration in Algeria. Typical of this concern is the resolution passed by the General Assembly of the French Section of the International Commission of Jurists at Strasbourg in September 1957. This resolution after recalling that in conformity with the principles of French law the judicial authority is the traditional guardian of individual liberties and the best guarantee of the

fundamental rights of the individual, expressed the wish that:

- 1) the judicial authorities should be informed, in conformity with the provisions of Articles 29 and 106 of the Code d'Instruction Criminelle, of misdemeanors and crimes committed and of the measures taken;
- 2) in every pending trial the judicial authorities should have the sole competence to decide on the way in which the measures already taken are pursued;
- 3) the administration of places of confinement existing in Algeria should be subject to the control of the Ministry of Justice;
- 4) a special appeal should be available against administrative decisions taken by virtue of the laws granting "special powers".

The background to this resolution has been provided in a note which we owe to M. Raymond Castro, Avocat at the Cour de Paris, who acted as rapporteur to the discussion on Algeria of the French Section of the International Commission of Jurists. M. Castró writes:

The Algerian problem is not only the focal point of French political anxieties; it is studied with the greatest attention in the French legal world. French jurists were disturbed when some newspapers hostile to the Government's Algerian policy published accounts of acts of violence and protests against the disappearance of certain people. These unconfirmed reports were followed by outraged denials from the authorities in charge of law and order. Public opinion was roused and several Commissions went to Algeria to investigate. Their findings have not all been published yet but are known to disagree. The report of one Select Committee, which confirmed the legitimacy of the measures taken and showed there was no evidence of the alleged acts of violence, was ridiculed. It had however the merit of stressing the difficulty of fighting "in accordance with the usual rules" a merciless brand of terrorism under which neither women nor children are spared and acts of indescribable savagery are committed.

The problem is a most difficult one, too easily glossed over by solemn references to the fundamental principles of the French Penal Code, which every French jurist knows and acknowledges. Art. 3 of

the Universal Declaration of Human Rights states that "Everyone has the right to life, liberty, and the security of person". This right, which is the first stated in the Declaration, implies that every man has the right not to be murdered, and to be protected against terrorism. If it were shown that "the usual rules" do not allow this duty of protection to be carried out in Algeria in the present conditions, other rules should be made to that end. Indeed, no situation, however exceptional it may be, must escape the application of a Rule of Law, be it "usual" or exceptional.

In the past, situations such as the one that has existed in Algeria since November 1, 1954 used to lead to the declaration of a state of siege. During the French Revolution a state of siege was a consequence of a state of war. Declaration of a state of siege in the event of internal sedition was first made possible by Napoleon, in a decree dated November 24, 1811. Nowadays, declaration of a state of siege is governed by the laws of August 9, 1849 and April 3, 1878, under which a state of siege can be declared "in the event of imminent danger as a result of a foreign war *or of armed insurrection*".

The right of the threatened State to use *extreme measures* and its citizens' duty to accept them were stressed by the Conseil d'Etat in 1849, in the following terms: -

"The State of Siege is an exceptional measure. When the ordinary process of law, exercised through the usual legal machinery, no longer suffices to ensure public law and order and the respect of all rights, when the Government and Society are attacked and energetic defence is necessary to save them, the citizens' rights and safeguards are suspended for a while; the Command and the Armed Forces, which alone may act in such critical times, are concentrated in the same hands. Everyone must exercise self-denial in the interest of common salvation, in order to allow general defence more freedom and vigour. In such a dangerous situation, a refusal to forego the enjoyment of political rights and safeguards established by the Constitution for normal and peaceful times is tantamount to a misconception of one's duties as a citizen; to claim such rights and safeguards in order to use them as a weapon in the struggle within Society is tantamount to betraying the country and making oneself unworthy of the very freedoms one is abusing."

In the Chamber of Deputies, in 1878, M. Franck-Chauveau, Rapporteur on the State of Siege Bill, said of the state of siege: "It is an ultimate and desperate resort against the enemy from outside and against the rebels within the country. It is the last refuge of legality". It was by virtue of these time-honoured laws of 1849 and 1878 that, on the outbreak of the last war, the decree of September 1, 1939 declared a State of Siege in the 89 French Départements and the Territoire de Belfort, as well as in the three Départements of Algeria.

A few months before the outbreak of the Algerian rebellion, when the Constitution was under revision, the best-known spokesman of the extreme Left declared that the doctrine of the State of Siege belonged to the essence of "republican wisdom, reason and tradition", which was indeed true since the First, Second and Third Republics were instrumental in establishing it.

This Republican tradition was not kept up by the Fourth Republic. Instead of declaring a general or a local state of siege in Algeria, the National Assembly passed a Law on April 3, 1955, declaring a "state of emergency" (état d'urgence), hitherto unknown in French Law. This state of emergency could be declared "either in the event of impending danger as a result of serious breaches of law and order, or in the event of occurrences amounting to a public disaster by virtue of their nature or their gravity" (Art. 1). This formula is broader than that of the laws on the State of Siege, but, in fact, Algeria alone was in mind.

Why was the institution of a "state of emergency" preferred to the declaration of a state of siege? Neither the Rapporteur of the law nor the Minister of the Interior had sought to conceal the reason in the National Assembly: it was done in order not to reduce the powers of the Civil Authority, in favour of the Military Authority, which, in a state of siege, must hold in its own hands all powers necessary for the maintenance of law and order.

Indeed, in areas where the state of emergency was declared, it was the Prefect or the Governor General who were empowered

- to prohibit movements of individuals or vehicles in certain places and at certain times;
- to ban from the whole or part of a Département any person who seeks to hamper the action of public authority in any manner whatever;

- to confine to a given residence any person whose activity endangers law and order and public safety;
- to order the closing of places of public entertainment, public bars and meeting halls;
- to prohibit meetings;
- to order the surrender of arms and ammunition.

Under the state of siege formula these same powers were delegated to the military authorities. The powers of military courts in a state of emergency were the same as in a state of siege. In either case military jurisdiction could deal with a whole series of the more serious crimes affecting law and order (crimes against internal and external security of the State, etc.). When the military authorities claimed a case, the Civil authorities had to relinquish it. Procedure before the military courts was the same in either case. Such procedure is governed by the Code of Military Justice.

The regime of the state of emergency only lasted a few months, as it ended when the National Assembly was dissolved. The Opposition had taken a firm stand against the law on the State of Emergency and, having come to power, could scarcely revive it. M. Guy Mollet's Government, which was born of the elections of January 2, 1956, therefore asked the Assembly for, and obtained from it with the law of March 16, 1956, "The fullest powers to take all extraordinary measures dictated by the circumstances with a view to re-establishing law and order, for the protection of persons and property and for territorial security" (Art. 5). The same powers were also granted to the following Government, headed by M. Bourges-Maunoury.

The measures taken in Algeria under what has been called the "special powers" were the same as those previously in force under the law on the state of emergency, which in their turn did not differ greatly from the measures taken in the past under the law governing the state of siege. Apart from the name given to the measures, no matter how the various Governments were constituted, and no matter which authorities (the Military, the Prefects or the Governor General) held the extraordinary powers, the very nature of things made it necessary to use the similar measures in order to overcome analogous difficulties. This conclusion makes it possible to appreciate the true worth of the criticisms levelled at the measures of en-

forced residence and of administrative internment. Some people, who had remained silent when these measures were taken in Metropolitan France in 1939 and 1944, deemed them intolerable in Algeria devastated by terrorist activity. However, the Geneva Convention of August 12, 1949, admits the use of security measures, internment or enforced residence. It is true that this Convention applies to the protection of civilians in war-time. Nevertheless it has been demonstrated that armed insurrection is traditionally assimilated to a state of war in French Law.

When extraordinary powers are granted to the Administration and various authorities and jurisdictions can deal with the self-same cases, it is to be feared that this may lead to a certain amount of confusion and to abuses. The authorities must be able to act quickly, but not unchecked. The check cannot take place before the authorities have acted, but must be made afterwards. Any individual should, at any time, be able to justify and defend himself and to receive compensation if he has suffered damage.

These principles, which basically are the only essential ones and the only ones that must be safeguarded everywhere and at all times, inspired the resolution passed at Strasbourg on September 29, 1957 by the General Assembly of the French Section of the International Commission of Jurists.

The General Assembly worked on the basic principle that, in France, the judicial authority is the custodian of individual freedoms and, consequently, these freedoms can be safeguarded only if the judicial authority is kept informed, at least of any measures that may be taken by other authorities. The General Assembly has therefore expressed the hope that – as is prescribed by the Code d'Instruction Criminelle – the judicial authority be informed of crimes discovered and of arrests carried out.

Automatic arrest by the police or military authorities is recognized and even recommended in the case of *flagrante delicto* crimes. But the apprehended criminal should be handed over to the nearest police authority.

Furthermore, it is desirable that the internment camps that exist in Algeria – and where living conditions have been judged satisfactory – be placed under the authority of the Ministry of Justice, as is already the case with regard to Algerian prisons. Personnel of the

Administration Pénitentiaire are indeed the only persons with the necessary training for the running of places of detention.

Finally, the General Assembly of the French Section has requested that special appeal facilities be made available to persons who wish to complain against measures taken under the "special powers" provisions in Algeria. Certain persons may have been interned in error or through malice. They must be able to regain their freedom. At the beginning of the last war, in 1939, and after the Liberation, in 1944, inspection boards were set up, before which the internees, assisted by counsel if they wished, could state their case. And the Geneva Convention of August 12, 1939 recommended that decisions on enforced residence and internment should be subject to a right of appeal by those concerned; and where such decisions were confirmed on appeal they should be the subject of periodic revision, at least every six months, by an adequate authority. There are other measures, also taken for the good of law and order, that can prejudice legitimate interests. Those concerned must be able to obtain the cancellation of such measures or the payment of adequate compensation, and they must be able to do this more quickly than through the usual channels of appeal of the legal administration.

The above illustrates the spirit in which the French Section of the International Commission of Jurists has examined the legal aspects of events in Algeria. It has endeavoured, as far as possible, to conciliate the vital necessity of maintaining law and order in Algeria and the observance of the sacred right of every individual to law and justice, irrespective of his origin.

### **The Application of the Rule of Law in Cyprus**

As in Algeria so in Cyprus calm consideration of the administration of justice is made difficult by underlying political problems with which it is confused. Political opinion is moreover inflamed on the one side by acts of violence which by July 1957 had led to the death of some 78 members of the Security Forces and to the wounding of nearly 300 others, apart from civilians. On the other side, feeling runs high because nearly a thousand persons were in August 1957 still in detention camps and by July of the same year some 228 major offences had been tried by special courts, 22 persons had

been sentenced to death and 9, including one tried under normal procedure, executed. What however is within the particular province of lawyers is the suggestion that there has been ill-treatment in the handling of prisoners and detainees in a way inconsistent with the generally recognized standards of justice. The most extensive charges were made by Archbishop Makarios in Athens on June 17 when he announced that he had "317 signed statements made by persons subjected to varying degrees of torture in Cyprus". But in the absence of an independent enquiry, it is difficult to weigh the substance of these allegations against the answer of the Cyprus administration, which is, in effect, that such allegations have been greatly exaggerated for political ends and that all legitimate complaints, a few of which are admitted, are carefully examined and irregularities punished. Such is the essential argument of a White Paper published by the Government of Cyprus on June 11, 1957.

The Cyprus administration has admitted that since September 1955 six officers of the Army of Police have been convicted for assaults on prisoners and in at least four major cases the judge has refused to admit a confession on the ground that the prosecution had failed to prove that the statement was made voluntarily. In one of these cases the judge criticized the police for failing to show proper care for their prisoner, in particular for failing to give him proper and prompt medical treatment after his arrest. It is unfortunate that the investigation by the Courts of allegations of ill-treatment has been limited by a regulation of November 26, 1956 which effectively prevents any private prosecution of a security officer by requiring the prosecutor to obtain the leave of the Attorney General, such leave not having, as far as is known, yet been given to a Greek Cypriot.

The Bar of Cyprus has appointed from among its Greek members a Human Rights Commission under the Chairmanship of Mr. John Clerides, QC, to investigate allegations of ill-treatment by the Cyprus authorities and demands have been made for an international or, as has been urged by some sections of British political opinion, for a British judicial enquiry. In September 1957 a sub-committee of the European Commission on Human Rights, to which the Greek Government had complained of alleged British violations in Cyprus of the European Convention on Human Rights,

decided to send a mission of enquiry to Cyprus; it was announced in October that the sub-committee had approached the Governments concerned for the necessary facilities. Meanwhile it was announced on August 9, 1957 that 33 of a total of 76 emergency regulations have been revoked, although detention without trial is still possible under a law passed before the emergency regulations came into force and the death penalty remains mandatory for the illegal possession of weapons.

### **Recent Legal Trends in Czechoslovakia**

The Rule of Law as understood in countries such as England, Sweden or France is a different concept from the idea of "socialist legality" of which much has been heard in Eastern Europe since the XX Party Congress. Nevertheless even in such a country as Czechoslovakia, which has been less affected by the "return to legality" than either Poland or Hungary, until the Soviet intervention, there are developments to report which mark clear but limited victories for "legality" in a sense which is comprised in but does not exhaust the idea of the Rule of Law.

A series of laws enacted in December 1956 has amended the Criminal Code of 1950, as well as the Law on the Organization of Courts of 1952, the Code of Criminal Procedure of 1950 and the Law on the Procuracy of 1952. Among the changes effected may be mentioned:

- 1) The repeal of Section 36 of the Criminal Code which dealt with forced labour camps. These camps have been extensively used for the "re-education" of elements hostile to the regime. The repeal of Section 36 may be regarded in some measure as the result of the United Nations campaign against forced labour on which a UN Committee reported in 1953. On the other hand no statement has yet been made by the Czechoslovak Government that existing camps have been dismantled and their inmates released.
- 2) Loss of civil rights as an additional penalty which was made possible by Section 42 of the Criminal Code has been abolished.
- 3) In the pre-trial stage, upon completion of the investigation, the accused is now entitled to the perusal of all documents as well as to private consultation with his lawyer.

- 4) While the death penalty has been maintained life imprisonment has been abandoned and the upper limit of confinement set at 25 year in accordance with Soviet practice. The imposition of the death penalty – previously obligatory – for aggravated high treason, aggravated espionage, aggravated war-time acts against national defence and aggravated war-time treason, is now left at the discretion of the Court which may substitute for it a sentence of 25 years' imprisonment. A number of crimes against persons holding high official positions (e.g. the President and Members of the Government and of Parliament) which *inter alia* involved an obligatory death penalty for a politically motivated murder have been abolished all together. Finally it may be mentioned that forfeiture of property is no longer a necessary consequence of conviction for high treason, espionage, war time acts against national defence and war time treason.

On the other hand the law of Czechoslovakia continues to provide examples of vaguely worded offences which may be interpreted in favour of the political purposes of the regime and of the Communist Party. A clear hint of the judges' duty in this connection was given in the Party journal *Rude Pravo* (Red Law) as recently as June last when judges and lawyers were criticized for their "liberal tendencies" and blamed for their "leniency" towards increasingly frequent cases of unchecked violence against Party and Government officials. A new offence of very general character – "subversion of the Republic" – has been introduced in 1956. Other offences such as incitement against the Republic, marauding and sabotage, already very elastic terms, have not been made more precise by the addition of the qualifying phrase: when inspired by "hostility" towards the People's Democratic regime. Other newly adopted sections against terrorism (attempts to deter active participation in the construction of the People's Democratic Republic), parasitism ("earning a living in a dishonest way and shunning decent work") and acts of Public disturbance (activities in "obvious disregard for society") are in keeping with the spirit of the Code of 1950.

It is also interesting to note that the move to re-establish independent investigating judges in preliminary proceedings has failed to materialize in spite of earlier promises of reform. Changes brought

about in 1956 entrust the investigation of minor crimes to officials of the Procuracy whereas crimes punishable by imprisonment for five years or more including the important political offence of subversion, terrorism, marauding and sabotage, have been transferred to newly established "investigators of the Ministry of the Interior", who may also be authorized by the Procuracy to investigate any other criminal act. The general trend of these changes is to bring the Czechoslovak law of criminal procedure as regards preliminary proceedings into closer alignment with the Soviet system and to weaken the position of the judiciary.

### **The Legal Status Quo in Eastern Germany**

Whereas even in Czechoslovakia there have been since the XX Party Congress some changes in the administration of justice, in Eastern Germany, in spite of promises by leading authorities of the regime, no substantial changes have been made. Perhaps the most characteristic feature of the administration of justice in Eastern Germany has been the use of Article 6 of the Constitution of the German Democratic Republic to suppress any kind of disaffection with the regime. The text of this article is as follows: "Incitement to boycott of democratic institutions or organizations, incitement to attempt on the life of democratic politicians, the manifestation of religious and racial hatred and of hatred against other peoples, militaristic propaganda and warmongering as well as any other discriminatory acts are felonious crimes within the meaning of the Criminal Code. The exercise of democratic rights within the meaning of the Constitution is not an incitement to boycott."

That Article 6 of the Constitution of the German Democratic Republic continues to be used to suppress all kinds of political opposition, was strikingly demonstrated in March 1957 when Wolfgang Harich was sentenced to 10 years hard labour under this article by an East German Court. Harich, who was about 36 at the time of his arrest in November 1956, was professor of philosophy at the Humboldt University in East Berlin, Editor-in-Chief of the German Journal of Philosophy and Deputy Chief Reader of the Aufbau Publishing House in East Berlin. There can be little doubt that Harich enjoyed these important positions at a comparatively early age not only because of his mastery of Marxist philosophy but also

because of his unreserved support for the German Democratic Republic. He appears however to have had some doubts after the rising in East Berlin in June 1953, and these doubts culminated in a programme, worked out during the Hungarian Revolution in November 1956, for the regeneration of the Communist regime in Eastern Germany. According to the indictment of the East German authorities Harich's programme envisaged: the resignation of the government and the withdrawal of the Socialist Unity Party from its dominant position in political life, the dissolution of the army and withdrawal from the Warsaw Pact, the suppression of the Ministry of State Security and its dependent organs, limitations on national planning and a greater measure of free enterprise in industry and agriculture.

What however is more significant than the programme is the method allegedly envisaged by Harich to carry it out, as in many countries this would have been regarded as no more than setting in motion the normal machinery of democratic discussion. Harich intended to submit his programme to the higher direction and local committees of the Socialist Unity Party and to publish it in the leading theoretical journal of that Party. He also wished to call a conference of political theorists at which he could explain his programme. In the event of the authorities refusing to discuss it Harich planned to make his programme known by the West-German and Polish radio and press, and it was alleged that he kept in touch with intellectual circles in Hungary and Poland, with the Social Democratic Party in West-Berlin as well as with West-German newspaper publishers. A "conspiratorial" flavour was given to the offence by the allegation that he founded a group to discuss the program with two East-German university lecturers (who were sentenced with Harich to 2 and 4 years hard labour respectively). Harich's sentence throws a revealing light on the democratic rights which Article 6 of the Constitution of the German Democratic Republic in its concluding sentence purports to respect.

The strong resistance of the authorities in Eastern Germany to any changes in the administration of justice, in particular with regard to the restricted rights of the defence and the wide powers of police interrogators, has recently received striking confirmation. According to a report of the East-Berlin legal periodical *Neue Justiz*

the East-German Minister of Justice, Hilde Benjamin, the President of the Supreme Court, Dr. Kurt Schumann, and the Public Prosecutor-General, Ernst Melsheimer, have refused to contemplate any changes in the Code of Criminal Procedure, in spite of the recommendation of an officially appointed Commission, which for over a year has been considering the "democratisation of East-German criminal justice".

### **The Djilas Trial in Yugoslavia**

There are interesting legal parallels between the Harich trial in Eastern Germany and the trial in Yugoslavia on October 4, 1957 of Milovan Djilas, former Vice-President and former President of the Houses of Parliament of the Federal People's Republic of Yugoslavia. The trial drew the attention of world public opinion, but the precise legal issues involved are less widely known.

Mr. Djilas was charged with committing a criminal act of hostile propaganda against the socialist basis of the State and social system of the Federal People's Republic of Yugoslavia and against the interests of the foreign policy of that country. The alleged offence consisted in writing in 1956 a book under the title of *The New Class - an Analysis of the Communist System* and in having the book printed and distributed abroad through the publishing house of Frederic A. Praeger of New York.

The accusation was based on Section 118 of the Criminal Code of 1951 of Yugoslavia which reads as follows:

- (1) "Whoever with intent to undermine the authority of the working people, the defensive power of the country, or the economic basis of the socialist construction; or with intent to destroy the brotherhood and the unity of the people of the Federal People's Republic of Yugoslavia by means of cartoons, writings or speeches before a gathering; or in any other way, carries out propaganda against the governmental and social order or against political, economic, military, or other important measures of the people's authority shall be punished by imprisonment.
- (2) "The same punishment shall be inflicted on a person prosecuting fascist or other ideals inimical to the people and the government."

It should be added that according to Section 28 of the General Part of the Yugoslav Criminal Code the penalty of imprisonment may not be less than 6 months nor exceed 20 years.

Milovan Djilas had already been sentenced twice on the basis of the same section, the first time in 1955 to a suspended sentence of 18 months in prison, the second time on December 12, 1956 to imprisonment for 3 years. In the most recent trial he appeared before the District Court of Szemska Mitrovica, a provincial town of 15,000 inhabitants some 80 kilometers from Belgrado. The competence of this Court rested on the fact that he was undergoing his previous sentence of three years imprisonment in the local prison of that town.

Under the Judiciary Act of 1954, which replaced the Law on the Organisation of People's Court of 1946, the pattern of courts in Yugoslavia is as follows:

County Courts as the lowest trial courts hear minor civil cases and minor criminal offences; they have unlimited jurisdiction in some civil matters;

District Courts function as trial courts of unlimited and original jurisdiction and also hear appeals from cases decided by County Courts;

Supreme Courts of the six individual Republics render final decisions on ordinary and extraordinary legal remedies, both in civil and criminal matters;

the Federal Supreme Court only decides finally on ordinary and extraordinary remedies in criminal and civil matters when specifically provided for by law. Appeal to the Federal Supreme Court in civil matters will lie when new legislation is adopted but an appeal in a criminal matter does not lie except where the death penalty or imprisonment for life has been imposed or where a Court of Second Instance has retried a case and based its sentence on facts different from those established in the sentence of the lower Court.

The Chambers of District Courts sitting at first instance are composed of one presiding professional judge and two lay assessors (in sitting on appeal the Chamber is composed of three professional judges). If however the District Court is hearing a criminal case for

which capital punishment or imprisonment of 20 years may be imposed, the Chamber of the District Court at first instance consists of two professional judges and three lay assessors, as provided in Sections 16-37 of the Code of Criminal Procedure. Thus, in the case of Milovan Djilas the District Court, being concerned with a crime punishable with imprisonment of up to 20 years had 5 members, two being professional judges and three lay assessors. A preliminary investigation to establish the facts of the case had previously taken place before an examining judge in accordance with Sections 155-172 of the Code of Criminal Procedure.

During the preliminary investigation and at the trial the accused was defended by Mr. Viljko Kovacevic, a Belgrade lawyer of his own free choice.

The trial was concluded in one day, consisting of two sessions, the first from 8 a.m. to 2 p.m. and the second from 4 p.m. to 7 p.m. At the opening of the trial the wife and brother of the accused, as well as some 50 official persons and "public workers" were admitted. There were also present about 50 journalists, being Yugoslavs and foreign journalists accredited to the Secretariat for Foreign Affairs at Belgrade. Three foreign correspondents in Belgrade, of the *New York Times*, of the Italian *Corriere della Serra* and of the United Press Agency, were barred from the court room on the alleged grounds of "false and malicious reporting" in previous reports of the case.

The trial was opened by the presiding judge, Mr. Nikola Nikolin and he was followed by the Public Prosecutor of the District Court, Mr. Ante Djuka, who read the indictment, the full text of which has been put at the disposal of the Commission by courtesy of the Office of the Procurator General of the Federal Republic. After reading the indictment, which took about 30 minutes, the Public Prosecutor proposed that the public be excluded from the further course of the trial on the ground that the trial would be used by certain circles and individuals abroad as a means and as a motive for launching through the press and radio a campaign against Yugoslavia with the aim of interfering with her internal affairs and damaging to the foreign policy of that country. Strong objection was taken by the defence to the proposal that the court should go into secret session. The accused's counsel argued that a secret session

would be a violation of Article 10 of the Universal Declaration of Human Rights to which Yugoslavia had subscribed and which prescribes that "everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination with his rights and obligations and of any criminal charge against him". It was also argued by the defence that the exclusion of the public would be contrary to Yugoslav law; a secret trial concerning a book was equated with the official burning of that book.

Publicity of a trial under Yugoslav law is governed by Section 271 of the Code of Criminal Procedure which lays down that the public may be excluded from a trial for three reasons:

- (1) in order to preserve professional secrecy or the secrecy of an office;
- (2) in the interest of maintaining public order;
- (3) in order to protect morals.

After 15 minutes' consultation the Court however decided to comply with the request of the Public Prosecutor, the reason given being that it was necessary to prevent information concerning the trial from being misused in the conduct of hostile propaganda against Yugoslavia in foreign countries. The Court permitted the accused's counsel, his wife and brother, as well as 9 "official persons and public workers", to remain in court during the whole course of the trial. It should also be added that counsel for the defence informed a representative of the International Commission of Jurists that during the secret session the defence was not hindered by the Court in presenting its case.

On the other hand the exclusion of the press and the public from the trial must be considered detrimental to the accused and the defence in as far as the case for the prosecution had been widely publicised in the Yugoslav press, whereas the defence had to be conducted completely in secret session. This consideration is all the more important when the expression of a political viewpoint is at stake and where the act complained of is sought to be justified before public opinion. It should also be borne in mind that the book which forms the substance of the charge against the accused has been declared illegal in Yugoslavia and is not accessible to the Yugoslav public.

Another disturbing fact is that on the evening of October 4, 1957 after the conclusion of the trial but before sentence has been pronounced the Public Prosecutor gave an interview to a representative of the Tanjug Agency of Belgrade, the official Yugoslav news agency, in which he made a statement emphasizing the guilt of the accused in terms considerably stronger than those used in the indictment itself.

On October 5, 1957, the day after the trial, the District Court of Szemska Mitrovica pronounced sentence in public. The accused was found guilty and sentenced to seven years strict confinement. The term was added to the sentence of three years strict confinement pronounced by the District Court of Belgrade on December 12, 1956, which meant in effect that Milovan Djilas has to face a period of 9 years strict confinement. In addition the Court decreed, as is possible under Article 33 of the Criminal Code of Yugoslavia, a limitation of civil rights for a period of 5 years after release. As a consequence of the sentence Milovan Djilas is to be deprived of all his numerous Yugoslav decorations for military and public service.

In its judgement, the official text of which with permission of the Court will be put at the disposal of the International Commission of Jurists by the Yugoslav Government, the Court found that Milovan Djilas had committed a criminal act of hostile propaganda punishable under Section 118 of the Criminal Code. The Court based its finding, according to the judgement, upon the clear and definite admission, made by the accused, that in October 1956 he had written the book *The New Class* and had sent it to the publishing house of Frederic Praeger with the purpose of having it published. The Court further held that it had been established on the admission of the accused that the book *The New Class*, as published, is completely identical with the author's manuscript. The Court found that the book on the whole by its contents and purpose and by the attitudes and assessments expressed in it was directed towards the undermining of the authority of the working people, the defence capacity of the country and the economic foundations for the construction of socialism in Yugoslavia. The Court described the accused's acts as a counter-revolutionary scheme intended to undermine the purposes of security envisaged in Section 118 of the Criminal Code.

In the course of this account attention has been drawn to certain features of the trial procedure which must be disturbing to legal opinion, in particular to the implications of secret trial in an issue which raises a question of freedom of expression. Nevertheless, it is perhaps most important to emphasize the vague terms of Section 118 of the Criminal Code. The interpretation to which they have proved susceptible explains the importance to be attached to the limitation on freedom of expression, as guaranteed by the Yugoslav Constitution, which is imposed by Article 43 of the same Constitution:

“... it shall be illegal and punishable to make use of private rights in order to change or undermine the constitutional order for anti-democratic purposes.”

### **Political Trials in Spain**

Less is heard about political trials in the Iberian peninsula than about such trials in Eastern Europe, but it is important that some rather disturbing aspects of these trials and of their legal background should be widely known, as there are many indications that the regime in Spain, as well as in Portugal, is sensitive to world legal opinion.

During the year 1957 there have been reports from Spain of a considerable number of arrests and in some cases of trials for political offences. It has been a characteristic of many of these arrests and trials that they are directed against dissident elements as much of the Right or Liberal groups as of the Extreme Left. The significance of these events from a legal point of view can only be judged by reference to the existing law in Spain, both substantive and procedural, dealing with political offences.

On July 17, 1945 the “Fuero de los espanoles” was promulgated. It is in certain respects to be regarded as a charter of human rights, although as will appear below it has both in law and in practice been severely limited. For the purposes of this note, which is concerned only to give the minimum background to recent political arrests and trials, it is sufficient to refer:

- 1) To Article 12 of the “Fuero”, which recognizes the right of every Spaniard freely to express his ideas so long as they do not attack the fundamental principles of the State.

- 2) Article 14 gives the Spanish people the right to determine freely their place of residence within the national territory.
- 3) Article 15 guarantees the inviolability of the home and prohibits search without a warrant of the competent authority and in the form and circumstances allowed by the general law.
- 4) Article 16 allows to Spaniards the right of meeting and association for legal ends and in accordance with established laws.
- 5) Article 18 provides that no Spaniard may be kept under arrest except in the circumstances and in the way provided by law. Within 72 hours all persons arrested must be released or brought before a judicial authority.

The importance of the qualification in Article 12 of the "Fuero" is shown by the fact that in Articles 251 to 253 of the Criminal Code sentences from six months to six years can be awarded for the expression of opinions tending to destroy the social, economic or juridical organization of the State, or tending to suppress national sentiment or place in doubt the unity of the nation. Moreover the policy and personnel of the Press are closely supervised by a Board of Direction for Press and Propaganda. Non-periodical publications are subjected to censorship.

Article 14 regarding freedom of residence should be considered together with Article 18 concerning powers of arrest in the light of the decree-law of March 22, 1957. Already in February 1956 Articles 14 and 18 were suspended following student unrest in Madrid. The law of March 1957 gives the authorities in cases of crimes of a political nature power to keep persons under arrest without bringing them to trial or indeed to maintain arrest after release has been ordered by the Courts, as long as the situation created by the crime has not become completely normal. Article 15 regarding the inviolability of the home and prohibiting search without warrant has been suspended during the course of the present year. Article 16 is deprived of most of its importance by the laws which prohibit all political parties except the falange organization, and require in general official permission for all types of organizations.

Although the "Fuero de los espanoles" is in practice to a large extent nullified either by the suspension of its provisions or by laws which derogate from it, it still remains true that if a case comes be-

fore the ordinary courts the accused person will have the benefit of the safeguards recognized in democratic societies as well as the right of appeal and revision. But it is necessary to bear in mind a law of March 2, 1953 which in so far as is not inconsistent with the terms of the Criminal Code of 1944, is still in effect both as regards the special jurisdiction which it prescribes and the crimes over which that jurisdiction has competence. This law is of great practical importance as far as political crimes are concerned and in particular with regard to the arrests and trials of the present year. The law treats as guilty of military offences *inter alia* every person who spreads false or tendentious news with a view to disturbing public order or who brings about conflicts of an international nature capable of injuring the prestige of the State; the law also covers persons who participate in meetings or other manifestations for the same purpose. Military offences within the meaning of the law can be extended to cover disturbances to the public services and include such activities as strikes or sabotage. The significance of the law, however, which so far as the offences mentioned in it are concerned, is largely covered by the Criminal Code, lies in the special military courts which are thereby authorized to try the listed offences. Under military procedure, the trial of "flagrant" offences for which either death or 30 years imprisonment is laid down, is extremely summary in character. The accused remains in prison from the time of his arrest; the declarations of the witnesses are jointly stated in a written document; the accused is not entitled to the services of a civil lawyer but only of a military defender; the case for the prosecution and the defence have to be submitted in writing and there is no appeal against the verdict. In cases of certain other so-called "military" offences, bail may be allowed, there are wider possibilities of submitting evidence, and the accused may be defended by a civil lawyer, but there is equally no appeal against the verdict of the military tribunal.

Finally, it should be mentioned that a Special Tribunal was set up by a law of March 1, 1940, to deal with "Freemasonry" and "Communism". In cases brought before the tribunal there is no settled practice as to evidence, nor is the accused allowed a legal defender, which is all the more remarkable when it is borne in mind that sentences from 20 to 30 years can be awarded for offences which

may not have constituted crimes at all at the time when they were committed.

### **The Rule of Law in Portugal**

From a report which has been presented to the International Commission of Jurists by a lawyer who recently visited Portugal, it is possible to give a fairly detailed account not only of recent political trials but also of the legal aspects of civil rights in that country.

#### *The Government*

In 1925 Portugal was a democratic republic. At the General Election in 1925 the Democratic Party obtained a clear majority and constituted the Government. On May 28, 1926 there was a coup d'état and a military clique seized power by force and established a military dictatorship. They have been in power ever since.

There is a President, who is elected every seven years. The Prime Minister is appointed by the President. Dr. Oliveira Salazar, formerly Minister of Finance, has been Prime Minister since 1932 and has for 25 years been virtually dictator of Portugal.

There is a legislative body of 120 members, the National Assembly. The Government, however, is responsible to the President, not to the National Assembly. The members cannot initiate legislation. The National Assembly only sits for three months in the year. In the remaining nine months Dr. Salazar's Government legislates by Laws and Decree-Laws, the latter of which do not even require to be confirmed by the National Assembly. Further, by the terms of the Constitution the legality of any Ordinance promulgated by the President cannot be called in question in any Court. There is also a Corporative Chamber of representatives of local authorities and industrial, commercial, cultural and religious interests to which Bills are submitted for its opinion, but it has no legislative power.

#### *The Freedom of Elections*

Although the President is "elected" every seven years, there has never been a contested election. Candidates have to be approved by the Government. In 1947 General Norton de Matos, who had been Minister for War in the 1914-1918 war and had been Portuguese

ambassador to Great Britain, was the candidate for a united opposition but withdrew on the ground that no free or fair election was possible. In 1951, on the death of President Carmona, Professor Ruy Luis Gomes, a distinguished mathematician (whose recent trial is discussed below), and Admiral Quintao Meireles, a former Minister, were candidates. The former did not receive the approval of the Government and was therefore disqualified; the latter withdrew on the ground that the conditions in which the election was held did not permit of any true election.

Although the National Assembly is elected every four years, for similar reasons there has only been one occasion on which any opposition candidates have stood. No opposition member has ever been elected to the National Assembly. Law No. 2,015, which contains the major provisions as to elections, is not easy to summarise. In substance literate adults or those paying a specified minimum in taxes are entitled to be on the electoral register. Owing to the amount of illiteracy and poverty a substantial proportion of the adult population, probably over half, is disfranchised. A greater difficulty, however, is provided by Article 10, the effect of which is that to be entered on the electoral register it is necessary to make personal application and to submit proofs of the applicant's educational standard or of the taxes he pays. Even then the Law contains provisions disqualifying classes of persons so loosely defined as to leave the Government a wide discretion in their application.

Voting takes place by putting in a ballot-box either the official list of Government candidates which is sent to all electors, or, if there is one, an opposition list. The difficulties of an opposition election campaign (see below) are such that the Government candidates have never been opposed except in 1953 when some 28 opposition candidates were nominated. Although so requested the Government refused to issue the opposition list in the same size and format as the Government list, so that the election officials, to whom voters had to identify themselves before voting, could in fact tell whether the elector was voting for or against the Government candidates. The Government has consistently refused to allow any representative of the opposition to be present when the votes are counted.

### *Freedom of the Press*

The Constitution appears to guarantee freedom of expression of opinion, but under Article 2 of Decree-Law No. 26,589 no publication, whether periodical or not, may be established without the approval of the Government. Article 5 provides that: -

“The Division of Censorship Service can oppose the use of any denomination of journal, bulletin, review or other publication which might induce the public to error concerning the social doctrines or policies there customarily defended.”

Under Article 7: -

“The entry into Portugal, distribution and sale is prohibited of journals, reviews and other foreign publications containing matter the disclosure of which would not be permitted in Portuguese publications.”

In practice every newspaper and publication is subject to rigid censorship which excludes practically all criticism of the Government. The newspapers all bear the imprint “Passed by the Censorship Committee”.

During the General Election of 1945 the press censorship was lifted, but the criticism of the Government was such that within 48 hours it was reimposed. In October 1957 the censorship was partially lifted in view of the elections pending in November.

### *The Right of Association*

The Constitution appears to guarantee freedom of association, but in practice no society, association or organisation is permitted to exist unless it is one of which the Government approves.

Law No. 1,901 provides, by Article 1, that: -

“Associations and organisations carrying on their activities in Portuguese territory are obliged to provide the civil authorities of the districts in which they have their head office, divisions or branches with a copy of their constitutions or rules, and a list of their members with details of their officers and their names, and to give any other supplementary information about their organisation and activities which may be, for reasons of public security, requested from them.”

The same Article provides for punishment by fines, imprisonment and loss of pension. Article 2 provides that: -

“The following, being considered secret, are to be dissolved by the Minister of the Interior: (a) Associations and organisations carrying out their activities, in whole or in part, in a clandestine or secret manner . . .”

The same Article provides varying sentences of imprisonment for all ordinary members of such associations and organisations and increased sentences for “persons who, with or without remuneration, carry out managerial, administrative or consultative functions”. Article 3 provides that: -

“No individual may be appointed to a public position, whether civil or military, in the State or in the administrative organisations or corporations without presenting a document authenticated or drawn up by the Chief of the respective service, such as a sworn declaration, to the effect that he does not belong, and will never belong, to any of the associations and organisations referred to in Article 2.”

The Law ends: -

“Illegal associations which are discovered, whether they are secret or not, will be immediately dissolved and their officials arrested so that the objects of the association may be ascertained.”

All political parties, except Dr. Salazar's party, were dissolved in 1926 and liberty to associate is not in fact usually permitted except to religious organisations and to a monarchist society which supports the Government.

Further, Article 25 of Decree-Law No. 37,447 provides that: -

“It is forbidden to promote, set up, organise or direct in Portuguese territory associations of an international nature without the permission of the Ministry of the Interior. The affiliation of Portuguese associations to international organisations also requires the approval of the Government.”

In 1955 Portugal became a member of the United Nations. It is also a member of NATO. Nearly all the free peoples have their own United Nations Associations to encourage an interest in the work

of the United Nations. On the 11th June 1956 application was made to the Government for leave to form a Portuguese United Nations Association. On the 15th April 1957 the Government refused to allow it to be formed.

One of the few such non-Government societies allowed to exist is the Portuguese League for the Rights of Man, but its existence appears to be due to the fact that it had existed since 1922 and had been affiliated to UNESCO. Police shorthand-writers attend the few meetings of the League which take place, and it is of course powerless to take any action of which the Government might disapprove.

Even such rights as have existed in this field are still being curtailed. University associations of students used to be permitted. Under the recent Decree-Law No. 40,900 University students may now only associate in a society which is limited to those in the faculty in which they are studying, and the teachers of the faculty must also be members. Nor may students have contact, without Government permission, with any student organisation of any other country.

#### *The Rights of Government Employees*

Under the Fascist system of Corporations which exists in Portugal the number of public employees is exceptionally large. Any public employee would be well advised to vote for the Government party. Article 1 of Decree-Law No. 25,317 provides that: -

“Officials or employees, civil or military, who have shown, or show, a spirit of opposition to the fundamental principles of the Political Constitution, or who do not guarantee to cooperate in achieving the higher aims of the State, will be suspended or retired, if they have the right to this, or if not will be dismissed.”

Article 4 provides that: -

“Dismissal, retirement or suspension, and exclusion from examinations or schools is always under the jurisdiction of the Council of Ministers.”

Article 5 provides that: -

“The provisions of Articles 1 and 2 are applicable to the administrative organisations and corporations.”

Under this Decree-Law 33 University professors have been dismissed as well as many members of the armed forces and other civilian employees.

In addition Article 4 of Decree-Law No. 27,003 provides that: -

“Heads and chiefs of services will be dismissed, retired or suspended if any of their respective officials or employees subscribe to subversive doctrines and it is ascertained that they did not use their authority or did not inform their superiors.”

### *Trade Union Rights*

In a country where there is so much unemployment industrial organisation is of obvious importance. Under the Portuguese Constitution all industrial workers must be members of their appropriate industrial syndicate. All strikes and lock-outs are illegal. The punishment for any worker who strikes is from two to eight years imprisonment. The formation of any Trade Union, apart from the official syndicates, is a criminal offence.

### *The Political Police*

The security laws are numerous and far-reaching. Decree-Law No. 37,447 sets up a Council of Public Security consisting of the Commander-in-Chief of the National Republican Guard, the Commander-in-Chief of the Public Security Police and the Head of the International and State Defence Police. The Decree-Law creates various classes of people who are to be subject to police “supervision”. The political police are given wide powers to ban meetings and gatherings, to close public performances and “to search the residences of the individuals supervised”. Employers who engage men in districts away from their homes must report their engagement to the Police. Article 23 gives the Political Police power to close “places which serve as headquarters or may be used by their owners to facilitate subversive activities”, and Article 24 provides imprisonment for those “who print publications, manifestos, pamphlets or other literature of a subversive nature.”

### *The Political Courts*

Special Courts for the trial of political cases, with special judges, have been set up in Lisbon and Oporto and they sit continuously.

Article 21 of Decree-Law No. 37,447 empowers such Courts to apply to those convicted of crimes against the security of the State "the security measure". The "security measure" is that provided by Article 20, namely "internment as a measure of security for one to three years in a suitable establishment." Article 22 provides that it is the duty of the Political Police "to apply or extend the security measure" and adds that they "may apply the security measure temporarily". These powers of the Political Police are being extended and now enable them to keep men and women in prison indefinitely after conviction. Decree-Law No. 40,550 of March 12, 1956 provides that: -

"Article 7. The following will be subject to internment as a measure of security in a suitable establishment for an indeterminate period, from six months to three years, *which may be extended by successive periods of three years as long as they continue to show themselves dangerous.*" (our italics)

"The following" include communists, but also include many others, and is in practice applied to those who oppose the Government. The Clause reads: -

"those who found associations, movements or groups of a communist nature, or who carry out activities of a subversive nature" and include "those who belong to such associations, movements or groups, collaborate with them or follow, with or without previous agreement, their instructions", and "those who deliberately make possible their subversive activities, supplying a place for their meetings".

Under these laws many have been arrested by the Political Police and kept in their prisons or deported without trial for periods of years to the Portuguese deportation camps in Timor (East Indies), and in Portuguese Africa, or to the concentration camp of Tarrafal in the island of Sal in the Cape Verde archipelago.

### *Political Trials*

Many Western countries have wide and, indeed, necessary powers to deal with subversion. What matters from the point of view of the Rule of Law is whether such powers are exercised by the Courts

or by the Police, and whether they are in practice used to suppress legitimate political opposition to the party in power. Whereas, before the Government of Dr. Salazar, the Police could not arrest and detain anyone in prison for more than 48 hours without bringing them before a Court on some charge, under Decree-Law No. 35,042 the Political Police can now arrest and imprison without charge for three months (which, by two subsequent periods of 45 days each, can now be extended to six months with the permission of the Ministry); and this power to arrest, imprison and release is in common use – particularly in the case of University students just before their examinations. The Constitution provides for the Writ of *Habeas Corpus*, but in practice it is not in fact granted.

The position of those who are brought to trial may be judged from two recent examples: –

(a) *The Case of the University Students*

From December 1956 to June 1957, the trial took place before the special Political Court of Oporto of 52 young people. Only 3 of them were over 30: the average age was 22, over half of them being students. 7 of them were young women. The youngest under arrest was 17. A number of them were convicted and the sentences included imprisonment.

Undoubtedly the most disquieting feature of this trial was the considerable body of evidence, including medical evidence, that the students had been tortured by the Political Police (P.I.D.E.) while in their prisons awaiting trial. The students had been arrested between January and May 1955 and, although Portuguese law provides for trial within a year of arrest, they were kept in the prisons of the P.I.D.E. until the trial ended in June 1957. The form of torture most complained of was what is called the “statue” – having to stand upright against a wall until they answered the questions of the P.I.D.E. satisfactorily or signed “confessions”. One of the accused, Hernani Silva, endured this, with brief intervals for food, for 7 consecutive days and nights. Two men recently died under their treatment by the Oporto P.I.D.E. Some of the students endured the “statue” for periods up to 5 days and nights.

On March 23, 72 Jurists of Lisbon and Oporto addressed to the Government a request for an Inquiry into the conduct of the

P.I.D.E. in relation to these students, in the course of which they said: -

“Thus, the signatories have been repeatedly informed that, in the police force in question, there are normally used, as methods of investigation, reprehensible forms of torture, both physical and moral, which range from the well-known “statue” (in which the prisoners are forced to remain standing for days and nights facing a wall) to physical punishments, insistent interrogations, sometimes at all hours of the night . . . The alarm and unrest which all these facts provoke will become all the greater when it is known that, on February 15, last and on March 2, in the private prisons of the P.I.D.E. two political prisoners died in circumstances which should be explained, they being the subject of investigation, Joaquim Lopes de Oliveira of Fafe and Manuel da Silva Junior of Viana do Castelo. . . . The signatories, for moral, humane and professional motives inherent in their duties are unable to associate themselves with acts of such gravity or to identify themselves with them by their silence or indifference. . . . We request your Excellency, together with the Government of the Nation, to order, with all expedition, a full and detailed Inquiry under conditions of complete independence and impartiality, so that the illegal actions which have been carried out - and for which many of the signatories are prepared to produce proof - may be punished.”

A similar request was made to the Government by 33 Jurists of Coimbra of all political views, including Martin Afonso de Castro, the Deputy Civil Governor of Coimbra and Joao Faria, President of the Town Council of Condeira. In their request they said: -

“The lawyers of Coimbra, regardless of questions of a political or ideological nature, seeing that they are from the most diverse political groupings, some supporters of the present political regime, and others not, but all fraternally bound by the same concern for the dignity of the juridical and allied professions, and conscious that in this manner they serve the Law, and in accordance with Article 545 of the Judiciary Statute, request your Excellency, as the highest authority in the profession, with the

greatest fervour to use all your energies so that there should be instituted a rigorous, impartial and serious Inquiry into what takes place behind the walls of the P.I.D.E. in Oporto, and very especially into what took place in the two cases referred to above of Joaquim de Oliveira of Fafe and Manuel da Silva Junior of Viana de Castelo."

Except that some of the Jurists were threatened with "security measures" for having signed the request, no action whatever was taken by the Government in the matter.

(b) *The Case of Professor Gomes*

On June 13, 1957 Professor Ruy Luis Gomes and four others were brought to trial before the Political Court of Oporto. They were prosecuted because they had sent an article to the newspapers (which, owing to the Censorship, had not published it) in which they appealed for the restoration of free elections, the restoration of the right of free speech and of the right to form political parties, the revocation of the powers of the Political Police to keep men and women in indefinite imprisonment, and for negotiation with the Government of India over the difficulties which had arisen in connection with the Portuguese colony of Goa. They had been arrested in August 1954 and kept in prison until the first trial in April 1955 when they were convicted. They appealed and their conviction was set aside and a new trial ordered on August 1, 1956, when they were at once rearrested and kept in prison again until their second trial in June 1957.

The trial opened by the defence lawyers asking for an adjournment because they had not been able to converse with their clients for nearly a year. The Court allowed them one hour. When the trial reopened it began by the woman accused being cross-examined by the presiding of the three judges. The prosecuting advocate sat on the Bench next to the judges. No shorthand note or other record of the evidence was taken. The defence lawyers were not even allowed to take shorthand notes themselves. It was thus not possible to say on what evidence the accused were convicted or acquitted. On July 30, 1957 all the accused were again convicted. Four of them were sentenced to two years imprisonment and the fifth to ten months. Notice of appeal has been given.

### *Freedom of Advocacy*

The care which needs to be exercised by Advocates appearing for the Defence before the Political Courts is illustrated by the fate of Dr. Manuel Joao da Palma Carlos who, on July 23, 1957, was defending in a political trial before the Political Court in Lisbon. At a point in the trial when the Court intimated that they did not wish to hear Dr. Carlos any further, he was unwise enough to say "Your Excellencies judge as you feel like, with or without proof." On the same day he was charged, and in a trial lasting from midnight to 4 a.m. of the following day, convicted and sentenced for this remark to seven months imprisonment. A meeting of the Bars of Lisbon, Oporto and Coimbra, called by the President of the Order of Advocates took place on July 31, in order to protest against the sentence on Dr. Carlos, but the censorship forbade publication of the communiqué of the Order. An appeal by Dr. Carlos is pending.