

FOR THE RULE
OF LAW

Bulletin
of the
International
Commission
of Jurists

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FOREWORD

This issue of the *Bulletin* is published during a particularly busy period for the Commission. The International Congress of Jurists, held in New Delhi in January 1959, resulted in a remarkable world-wide response as evidenced by correspondence and personal contacts, reports in legal periodicals and the press, and vigorous activities by the Commission's national sections. The text of the *Declaration of Delhi* and of the *Conclusions* of the Congress have been published with comments in *Newsletter* No. 6 (March-April 1959) and in the *Journal of the International Commission of Jurists*, Vol. II, No. 1, (Spring-Summer 1959). The Secretariat is now engaged in a heavy programme designed to implement the resolutions of that Congress and to derive full benefit from them. Some of the activities which the Commission has undertaken or is preparing consequent upon the New Delhi Congress are reported in *Newsletter* No. 7 of the Commission (September 1959).

In the Spring of this year, the International Commission was confronted with the very serious events taking place in Tibet. It was felt that these events, like those which had taken place in Hungary three years ago, constituted a grave threat to the Rule of Law, a threat to the ideal of *peace and freedom under law* which the Commission endeavours to promote. An investigation was immediately initiated and the preliminary conclusions reached by the Commission were published in July 1959 in a 208-page report, "The Question of Tibet and the Rule of Law". The main conclusions of this preliminary report were that the evidence so far available pointed to fundamental violations of the Sino-Tibetan Seventeen-Point Agreement of 1951 by the Chinese People's Republic, wanton violation of the most basic human rights and a *prima facie* case of a deliberate attempt to destroy the separate Tibetan nation and the Buddhist religion in Tibet

by acts some of which were specifically condemned by the Genocide Convention of 1948. It would seem that among these violations of human rights there are such acts as killings, arbitrary arrests, deportations and forced labour. In view of these preliminary findings, it was considered necessary to make a thorough inquiry and, accordingly, the Commission appointed a special body, the Legal Inquiry Committee on Tibet, composed of prominent international personalities under the chairmanship of Purshottam Trikanddas, Secretary General of the Indian Commission of Jurists which is the national section in India of the International Commission. A final report on Tibet will be published in due course. More information concerning this Committee is given in *Newsletter* No. 7. In view of this, it is not proposed to devote space in this *Bulletin* to Tibet. Although since the report was published in July 1959 there have been further disturbing events in and around Tibet, it was felt desirable to leave the account of these events to the final report.

In this *Bulletin* No. 9 will be found, in accordance with the pattern adopted previously, a series of items on recent legal developments and current events pertaining to the Rule of Law. Space limitations made it necessary to postpone publication of a substantial part of the material compiled by the Secretariat and this will appear in the next issue which will be published shortly. The *Bulletins* are especially designed for those numerous jurists and lawyers throughout the world who may be unable to devote much time to reading lengthy academic studies but who are interested in recent national and international legal developments. These readers belong to a spiritual community of lawyers and jurists bound together by a belief in basic principles of justice. In particular they realize that strong and effective machinery for the administration of justice is the best means for protecting human rights and fundamental freedoms. There is no room for complacency anywhere, for these rights and freedoms are sometimes threatened even in those countries which are traditionally the stronghold of such principles. Every effort must be made to encourage and develop the special solidarity uniting the world legal community. Their duty is one of constant vigilance to ensure that the spirit of freedom and justice under law shall prevail. That this objective must be attained without impeding vital economic and social progress was clearly demonstrated at the Congress of Delhi. The Commission is at present engaged in an intensive study of this latter problem and of the ways and means by which the desired result may be achieved.

Some of the articles in this *Bulletin* describe regrettable and disturbing events in a number of countries. Others, however, are encouraging and show important steps towards the establishment or strengthening of the Rule of Law at both the national and international levels. In accordance with its practice, the International Commission of Jurists will continue to follow such events closely and take such further steps as may be necessary under the circumstances.

Geneva, August 1959.

Jean-Flavien LALIVE
Secretary-General

THE EUROPEAN COURT OF HUMAN RIGHTS *

The protection and furtherance of human rights is one of the primary objectives of the Council of Europe, which groups 15 European States. It was, however, mainly by means of its European Convention on Human Rights that the Council was able to carry through this major objective. The above-mentioned Convention does not merely enunciate an ideal to be attained in the more or less distant future; it also defines civil and political rights essential for the preservation of democracy, and at the same time establishes for these rights internationally enforceable guarantees.

The Convention, which was signed in Rome on November 4, 1950, came into force on September 3, 1953. Its supplementary Protocol, which was signed in Paris on March 20, 1952, became applicable as of May 18, 1954.

To date, 14 of the 15 Member States of the Council of Europe are bound by these two treaties. Only France has not yet ratified them, but is likely to do so in the near future. The geographical extent of the Convention's application proves, in itself, the importance of the text which is, moreover, becoming known beyond the bounds of the European continent. The legal importance of the Convention rests however elsewhere: it establishes, historically, the first international tribunal on human rights.

It was within the framework of the International and Universal Exhibition of Brussels, and during the celebration of the fifth anniversary of the entry into force of the Convention, that Iceland and Austria deposited on September 3, 1958, the declarations whereby they recognized as compulsory the jurisdiction of the European Court on Human Rights.

Thus, the conditions required for the setting up of the Court had been fulfilled. According to the Convention, 8 ratifications were required (Ireland, Denmark, the Netherlands, the German Federal Republic, Belgium, Luxemburg, Iceland, Austria) for the first election of the members of the Court to take place (Art. 56).

* Compare A. B. McNulty and M. A. Eissen: *The European Commission of Human Rights: Procedure and Jurisprudence* (*Journal of the International Commission of Jurists* Vol. I, No. 2, p. 198 ff.) and articles in *Bulletins* of the International Commission of Jurists No. 7 (p. 3) and No. 8 (p. 4).

On January 21, 1959, the Consultative Assembly of the Council of Europe, basing itself upon a list of names proposed by the Committee of Ministers, undertook the election of the fifteen judges who were to constitute the Court. The following members were elected: Kemal Fikret Arik, Professor at the University of Ankara; Einar Arnalds, President of the Tribunal at Reykjavik; Frederik Marie Baron van Asbeck, Professor at the University of Leyden; Giorgio Balladore-Pallieri, Professor at the University of Milan; René Cassin, Vice-President of the French Conseil d'Etat; Ake E. V. Holmback, Professor at the University of Uppsala; Richard McGonigal, Barrister, Dublin; Lord McNair, former President of the International Court of Justice; Georges Maridakis, Professor at the University of Athens; Hermann Mosler, Professor at the University of Heidelberg; Eugène Rodenburg, President of the Tribunal of Luxemburg; Henri Rolin, Professor at the University of Brussels; Alf. N. Ch. Ross, Professor at the University of Copenhagen; Alfred Verdross, Professor at the University of Vienna, and Terje Wold, President of the Supreme Court of Norway.

The judges of the European Court of Human Rights have met twice since their election to work out their rules of procedure. These will doubtless be adopted before the end of the current year.

It is interesting to note that, whereas the jurisdiction of the Court "shall extend to all cases concerning the interpretation and application of the present Convention" (Art. 45), Member States or the European Commission on Human Rights can themselves refer to the Court, but the individual person can only appeal to the Commission in the exercise of his right of petition.

An individual cannot therefore bring before the Court any direct action against a State. This does not mean, however, that the Court is necessarily barred to him. If he is subject to the jurisdiction of a country that has recognized the right of petition for the individual (Austria, Belgium, Denmark, German Federal Republic, Iceland, Ireland, Luxemburg, Norway, Sweden), then he can lodge his complaint before the European Commission on Human Rights, an organ the judicial character of which is increasingly borne out by the nature of its work. More than 500 requests have already been deposited with the Commission. A certain number of these have been declared as justiciable and the Commission is now attempting to arrive at a friendly settlement. Should it fail in this effort, and the State concerned has recognized the jurisdiction of the Court, then the latter can be

appealed to either by the Commission or by an interested High Contracting Party. The individual in question will not be present during the proceedings, or rather, he will not enjoy the status of a "party" in the internal law sense of the term. He will not be the "dominus litis" of Roman law, yet his procedural absence does not imply an absence in effect; the Commission will see to this in its report which will constitute the basis for the Court's deliberations. Moreover, the fact that the arguments are heard in public will serve to mitigate the consequences of the rule of the exclusion of the individual concerned.

By these means, the Court is able to pronounce itself with full knowledge of the case and employing as the basis for its decisions the provisions of the Convention.

THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS

The fifth meeting of consultation of Foreign Ministers of the American States, held in Santiago, Chile, in August 1959 has made an important step towards the adoption of an Inter-American convention of human rights. After many years of negotiations, a working party composed of representatives of Argentina, Bolivia, Honduras and Panama coordinated nine earlier projects into a document providing for a draft Convention of Human Rights as well as for a separate body—probably in the form of an Inter-American Court of Human Rights—to enforce the Convention. It was further proposed that the Council of the Organization of American States appoint a Commission of Human Rights, composed of seven members serving in their private capacity. The Convention would give legal effect to the American Declaration of the Rights and Duties of Man, proclaimed by the ninth Inter-American Conference at Bogota in 1948. It is hoped that a draft of the Convention and of its machinery of enforcement will be soon submitted for discussion and eventual adoption and that a similar initiative will be taken in other parts of the world.

The Santiago meeting issued a Declaration expressing the faith of the peoples of America in the effective exercise of representative democracy and condemning methods tending to suppress political and civil rights and liberties. Among the eight points of the Declaration, the following deserve the particular attention of the

legal profession and are closely related to the conclusions of the International Congress of Jurists in New Delhi :

1. The principles of the Rule of Law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the state;

* * *

4. The governments of the American states should insure a system of freedom for the individual and social justice based on respect for fundamental human rights;

5. The human rights incorporated into the legislation of the various American states should be protected by effective judicial procedures.

* * *

SOME DANGERS OF THE ALGERIAN SITUATION

On August 8, 1959, the Secretary-General of the International Commission of Jurists sent the following telegram to General Charles de Gaulle, President of the French Republic :

“In the name of the International Commission of Jurists which represents a spiritual community of more than thirty thousand judges, professors of law and practising lawyers from fifty two countries of the free world I have the honour to draw the attention of Your Excellency to the great concern aroused by the case of the Algerian trade unionist Aïssat Idir. In view of the alleged circumstances of his death the communique published by the Délégation générale (of Algeria) on July 30, 1959 appears insufficient to reassure world legal opinion. In view of the ever-increasing published accounts of facts which, if true, would amount to violations of individual rights and liberties in Algeria, the International Commission of Jurists trusting in the great traditions of France considers it highly desirable that a thorough inquiry should be carried out by an independent and qualified body. I respectfully request Your Excellency to consider urgently the possibility of acting on this request which would help to dispel the increasing disquiet throughout the world and particularly amongst jurists devoted to the respect for human rights of which France has always been a champion and which were solemnly reaffirmed by the French constitution of 1958.”

The International Commission of Jurists has for a long time been concerned with some disturbing aspects of the hostilities in Algeria. The first article dealing with this problem appeared in *Bulletin* No. 7 (October 1957). Information has since been received from numerous sources indicating a regrettable trend towards practices which can hardly be reconciled with the great principles of human rights and individual freedoms proclaimed most recently in the French Constitution of 1958. Various allegations have been made, many of which contain specific charges not always convincingly refuted by occasional official denials and explanations. The acts alleged included attacks on the physical and moral integrity of persons—particularly by the use of torture—, restrictions of freedom of expression—seizures of books and periodicals—, limitations on the rights of the defence, and abuse of the administrative powers of internment and of assigning compulsory residence.

The only way to ascertain whether or not these charges are true is by a thorough inquiry. Meanwhile, the International Commission is examining the many and varied legal problems involved and intends to analyse and comment on them in its forthcoming publications.

The complexity of the legal and political questions inherent in the Algerian conflict cannot be denied. The argument of provocation, too, should not be altogether dismissed. However, this is no justification for methods which have caused increasing disquiet among the many supporters of the Commission who regard themselves as sincere friends of France.

It is known that the International Commission of Jurists refrains as a matter of principle from intervening in isolated instances and individual cases. It does take a stand wherever there appears to be a systematic and general violation of the basic principles of the Rule of Law. By taking up the case of Aïssat Idir, the International Commission does not propose to dwell on an isolated case. For there are features in this and other cases which may indicate a serious threat to such basic principles.

The following are, in brief, the facts of the case.

Aïssat Idir, a leader and organizer of the Union Générale des Travailleurs Algériens (General Union of Algerian Workers), affiliated with the International Confederation of Free Trade Unions, was arrested in May 1956 and tried before the Permanent Tribunal of the French Armed Forces in January 1959 on charges of endangering the external security of the State. He was acquitted on January 13 but his deprivation of liberty was not ended; he was reinterned in the camp of Birtravia where he suffered on January 17 serious burns attributed first to a suicide attempt, later to a negligently ignited mattress. His death at the Military Hospital Maillot at Algiers occurred on July 26, 1959.

From the date of the alleged accident, French authorities in Algeria prevented the lawyers of Aïssat Idir, headed by the prominent Belgian jurist and Senator Henri Rolin, from seeing him and refused their request for his transfer to a civilian hospital. Eventually, an exception was made in permitting one visit of a lawyer accompanied by a French officer.

On July 30, a communiqué issued by the General Delegation of the French Government in Algeria reiterated the second explanation of Aïssat Idir's injuries, that they were caused by a fire which, it was said, he admitted having started in his cell by negligence. It stated further that the deceased trade unionist was given the best available medical care, including twenty-two applications of general anesthesia and six skin grafts. The communiqué failed to explain, however, the legal basis of Aïssat Idir's continued detention after his unconditional acquittal by a competent French court. It did not clear up the contradictions in two previous official versions of the cause of injuries sustained by the detainee, nor did it adequately document medical developments in the long period between the date of the alleged accident and the date of death.

In response to the above-quoted telegram, copies of which were sent to the French Premier, M. Debré, and to the Minister of Justice, M. Michelet, the Secretary General of the International Commission received the following answer, dated August 17, 1959, from M. Pierre Racine, Directeur du Cabinet of the French Premier :

“ You were good enough to send me with your letter 9/2140 of August 9, a copy of a telegram which you sent on August 8 to the President of the French Republic concerning the death of Aïssat Idir. It may be useful to acquaint you with the text of a clarification published by the Delegate-General of the Government in Algeria :

“ Why was not Aïssat Idir set free ? Because he was a leader of the Algerian General Workers’ Union who was regarded as an important person by the F.L.N. It should also be made clear, that, although he was acquitted by a court, it did not follow that he should be released from the internment camp. Whether to release him was entirely a matter for the administrative authorities.

“ M^e Rolin, his lawyer, come to see me and told me a good deal in his favour, that he could be persuaded to change his views (“ que c’était un homme récupérable ”). I then sent for his file. Four days later he was badly burned. His account of how he suffered burns was never very clear. He said that it was suicide and then said that it was an accident. It is obvious that some thought he was tortured.

“ I cannot see why, with his trial over and my having sent for his file, Aïssat Idir should have been questioned again and tortured.

“ When it was known that he was in Maillot hospital, I received numerous requests to be allowed to see him. I considered them and rejected in particular that of the representative of the International Confederation of Free Trade Unions, whose attitude in this case had been especially violent.

“ Finally, I should like to say that an inquiry into the circumstances of his death will be held, and that its findings will be sent to the Prime Minister.”

The International Commission of Jurists notes that an inquiry was announced by the Delegate-General of the French Government in Algeria into the circumstances of the death of Aïssat Idir. It expresses the hope that the composition of the investigating body will take into account the world-wide concern aroused by the case and that the scope and the results of the inquiry will be such as to satisfy international legal opinion.

PROGRESS ON CYPRUS

The signature of the Zurich agreements between Turkey and Greece on February 11 1959, and the successful conclusion of the London talks between these two Governments, the Government of the United Kingdom and representatives of the Greek and Turkish communities on February 19, put an end to more than four years of unrest and civil strife on the island of Cyprus. With-

out entering into the substance of the agreements or into the political implications of this settlement, it may be useful to emphasize the basic principle which guided the Zurich and the London negotiators: the urgent necessity to find a peaceful solution to a seemingly insoluble conflict that had resulted in bloodshed and destruction in a community of more than half a million people.

This settlement is noteworthy for two main reasons. Firstly, the Zurich and the London agreements provide concrete proof that even the most complex problems can be solved by negotiation. Secondly, the constitutional implementation of these agreements will provide invaluable study material for jurists everywhere. The Zurich and the London agreements established a general framework for the future political structure of Cyprus but they left their application to the qualified representatives of the two island communities. The agreements list what the future constitutional structures *must not* contain but say very little as to what they *shall* contain. The framework thus established by the agreements is therefore to a great extent of a negative nature and it was left to the Cypriots themselves to implement it by positive constitutional rules.

The mixed Constitutional Committee, composed of qualified lawyers representing the two national communities, is assisted by Professor Marcel Bridel, of the University of Lausanne. It started its discussions late in April and it is expected to terminate its work in the near future. Many serious problems have already been solved and others have been set aside for the moment. Both sides participating in the work of the Committee have shown great understanding for each other's positions and a certain amount of flexibility, which is an indication that they are determined to arrive at an agreement at least three months before the island is proclaimed independent. The importance of their task does not have to be underlined as history has often shown what a chaotic situation can be brought about if a country attains independence without having the constitutional foundations necessary for guaranteeing the basic principles of the Rule of Law. It is hoped that the difficult task of the Constitutional Committee can be brought to a successful conclusion and that—in spite of the political legacy of the past—an order can be established securing fundamental freedoms and providing the legal machinery common to any system based on the Rule of Law.

CRIMINAL LAW REFORM IN THE SOVIET UNION

I. Background and scope of the law reform

At its session on December 22-25, 1958, the Supreme Soviet of the USSR adopted proposals for a reform of the Soviet Criminal Code and Code of Criminal Procedure.¹ These proposals had been discussed for quite some time. Drafts of the Penal Code had been published in June 1958, about half a year prior to the session.² The Soviet law-makers thus presented a new draft to the outside world for the first time in twenty years, and this action, as might be expected, gave rise to lively and heated discussions. These latter revealed, on several occasions at least, that there existed also among Soviet jurists considerable differences of opinion and divergent schools of thought.³ This most unusual event demonstrated very clearly that the Soviet Government and the judiciary had not only been preoccupied for some time with the question of criminal code reform, but that they were disposed to meet, in this important and controversial field of law, the need for greater legal protection.

The drafts which were with some amendments enacted as new law by the Supreme Soviet, comprise the following regulations :⁴

1. "Bases" of the penal legislation of the USSR and the Republics of the Union;
2. Law relating to criminal responsibility for crimes against the State;
3. Law relating to criminal responsibility for military crimes;
4. Law abolishing deprivation of the right to vote by court sentence.

¹ See Russian text in : *Vedomosti Verkhovnogo Soveta SSSR* (Moscow), 1959, No. 1, Arts. 6-12, and *Pravda* and *Izvestiia*, December 26, 1958.

² See among others : *Sovetskoe Gosudarstvo i Pravo* (Moscow), 1958, No. 6, 3-20.

³ See among others : John N. Hazard, *Soviet Codifiers Release the First Drafts*, in : 8, *The American Journal of Comparative Law*, 1959, 72-81; R. Maurach, *Die neuen "Strafrechtsgrundlagen" der Sowjetunion*, in : 9, *Osteuropa* (Stuttgart), 1959, 1-13.

⁴ See : Dietrich A. Loeber, *Die sowjetische Rechtsreform*, in : 9, *Osteuropa*, 1959, 355-359.

Laws on the reform of the judiciary :

5. "Bases" of legislation on the judiciary in the USSR, the Union and Autonomous Republics;
6. Law concerning the clause in the Procedure for the elections of People's Courts;
7. Statute of Military Tribunals;

Laws on the reform of the Code of Criminal Procedure :

8. "Bases" of the criminal procedure in the USSR and Republic of the Union.

These new laws on the Criminal Code and the Code of Criminal Procedure do not cover the entire field of criminal law. They contain, moreover, only the general Bases (*osnovy*), whereas the laws proper will have to be enacted by the individual Republics. By a decree dated February 4, the transitional regulations were issued and the Republics were ordered to adapt their legislation to these new Bases.⁵

II. Main features of the reform

1. Reintroduction of the principles "*nulla poena sine lege*" and "*nullum crimen sine lege*" which are Articles 3, 4 and 6 of the Bases of the Criminal Code. Whereas, until now, every socially dangerous act had been qualified as a crime, the viewpoint prevails now that only acts constituting a crime and punishable by law can be considered as an offense.⁶ Article 3 thus states: "Only a person who has committed, intentionally or negligently, a crime, that is a socially dangerous act forbidden by law, is liable to punishment." Article 6 supplements this regulation by stating that the question as to whether an act is punishable or not is determined by the law in force at the time when the act was committed. Thus, the question as to whether a crime was or was not committed is solely determined by law. Political considerations, which often led to convictions, have been excluded from the determination of guilt.

⁵ See: *Vedomosti Verkhovnogo Soveta SSSR*, 1959, No. 7, Art. 60.

⁶ See among others: Vladimir Gsovski, Reform of Criminal Law in the Soviet Union, in: 7, *Highlights of Current Legislation and Activities in Mid-Europe*, 1959, 7.

2. Closely linked to this important innovation is the *abandonment of analogy as a basis for sentencing*. Although it had not been abolished formally, the ill-famed analogy clause of the Soviet Criminal Code had not indeed been applied for some years. Mr. Poliansky, Chairman of the Codifying Committee declared in this connection: "Soviet courts were no longer able to apply penal law by having recourse to the analogy clause, that is, to sentence persons for an act not defined by criminal law."⁷ It is true that the rather broad concept of "socially dangerous" acts has been retained. However, Article 7 contains a regulation which states that a "socially dangerous act" can only be considered a crime, and become thus punishable, if it is specifically mentioned by law.

The collective term "counter-revolutionary crimes", formerly contained in Articles 58.1 and 59.1 of the Criminal Code of the USSR, was also abolished; punishable acts were defined individually.

3. The Soviet Criminal Code also contains, for the first time, *the prohibition against retroactive criminal laws*, unless they operate in favour of the offender (Art. 6).

4. Forthwith, acts committed in self-defence and under emergency have been recognized as justifiable (Arts. 13 and 14) and no longer, as has been the case up till now, as merely absolving from punishment.

5. Those familiar with Soviet practice will recognize the great importance of the stipulation in Art. 3.2 by which "Criminal punishment may be awarded only by court sentence, in accordance with the law". Thus, the so-called *monopoly of justice by criminal courts* has been re-established after having been seriously shaken by the introduction in 1937 of the Administrative Criminal Tribunals (Police Courts) of the Special Board of the Commissariat of Internal Affairs (the so-called "Private Conferences" of the NKVD, later MVD). To what extent this monopoly of the Soviet courts will, in fact, be maintained, cannot yet be stated; in view of more recent developments described below there would seem to be reason for doubt.

6. Finally attention should be called to the greater emphasis laid upon the *generally preventive nature of punishment*.

⁷ *Izvestiia*, December 26, 1958.

Whereas, previously, punishment was considered, in the main, as a means of improving or educating the offender, today its efficacy as a deterrent is being given greater emphasis. This change in attitude spells the end of the "protective criminal code without guilt and punishment", once acclaimed as a progressive innovation, and a return to penal legislation with its inherent correlation of guilt and expiation.

III. Individual provisions of the new criminal code and code of criminal procedure

A more detailed examination of the individual provisions of the new laws reveals several other improvements, in addition to the progress that has already been mentioned towards greater legal security. At the same time, however, certain very considerable deficiencies and gaps become also apparent.

1. Positive aspects of the legislative reform

The penalty system has been simplified to a considerable extent. Previously, 18 types of punishment could be applied. Now, according to the new law, there exist only seven main and two subsidiary penalties (Art. 21 of the Bases). The following penalties have been abolished: permanent exile from the USSR as an enemy of the workers; exile from the USSR for a stated period of time; deprivation of the right to vote; deprivation of parental rights; deprivation of rights to a pension; and the "imposition of the duty to repair an injury".

In general, a distinction is drawn between specific major and secondary penalties and such penalties as can be considered, as the occasion demands, either major or secondary.

The various forms of deprivation of liberty are replaced, in Article 21, by one which can, according to Article 23, be served in either a prison (tjurma) or a colony of correctional labour (ispravitelno-trudovaya colonia).

The maximum prison term has been reduced from 25 to 15 years, and the conditions for release on parole, because of good conduct, have been somewhat relaxed. However, the new determination of penalties indicates that for certain acts, and in particular for such as are directed against the State and public order, more severe penalties are being envisaged. Thus, the death penalty

by shooting, an "extraordinary measure of punishment" (Art. 22), is, in times of peace, applicable not only to high treason, espionage, sabotage and murder, but also to banditry and acts of terrorism; in times of war, capital punishment is applicable to especially serious war crimes. Doubtless it is intended that such an application of the death penalty will prove a strong deterrent for those "anti-social elements" which have over the last few years increasingly annoyed the Soviet authorities.

The introduction of criminal responsibility for crimes committed in a state of intoxication (Art. 12) is also a measure introduced for the purpose of maintaining public order. Two specific types of punishment, banishment of the convicted party from his habitual place of residence (vysilka), and deportation to a distant region (ssylka), have been retained.

The age of full criminal responsibility of young people was increased from between 12 and 14 years to 14 and 16 years, respectively (Art. 10); minors serve their sentences in special colonies.

From the viewpoint of criminal procedure, there is some significance in the improved rights to legal assistance. In the future, defence counsel may enter the case at the end of the preliminary investigation, that is, during the detention period (heretofore the counsel for the defence could only appear once the case was committed for trial), and the sentenced person can now appeal to the court of appeal (Arts. 22 and 45 of the Bases for Criminal Procedure). Other rights of the defendant are enumerated in Art. 23. However, even with the new procedural provisions, the defendant can be kept in pre-trial custody for as much as nine months before obtaining the assistance of a defence counsel.

The provisions on cancellation of criminal records show definite liberalization. Thus, for instance, cancellation is applicable after three years for persons sentenced to not more than three years confinement, while it formerly required six years for penalties between six months and two years.

2. *Gaps and deficiencies in the legislative reform*

The new laws still contain certain elements of a totalitarian legal system which lead one to question the effectiveness of the expanded legal guarantees.

In the *field of substantive law*, we are concerned here, primarily, with the new *laws on state and military crimes*. It is significant that their drafts were not published previously; it is probable that, for reasons of domestic policy, discussion was not

considered advisable, for these laws form the cornerstone of criminal law in the political field :

“ The factual elements in the definition of crimes against the State which cover treason, harmful activities generally (*vreditelstvo*) and anti-Soviet activities, are still so defined as to permit the suppression of any real, potential, or imagined opposition. This applies, in particular, to treason (Art. 1) used as a collective term, and to the regulation that any ‘organized activity’ in preparation of the above-mentioned crimes, represents a crime (Art. 9).”⁸

The hitherto employed concept of “counter-revolutionary activity” has been replaced by the notion “especially dangerous crimes against the State” (Title 1, Arts. 1-10). In view of the “international solidarity of workers”, crimes against another communist State are subject to the same penalties (Art. 10). The concept of treason has been widened: all Soviet citizens (not only officials) who refuse to return to the USSR are now liable to punishment. However, the notorious regulation stipulating the imprisonment of the family of an army deserter has now been repudiated. The penal clause relating to war propaganda is new (Art. 8); it leaves the door open to broad interpretations.

On the whole, the new Bases of the Code of Criminal Procedure show few changes. Their greatest deficiency is a lack of a specific regulation relating to the *presumption of innocence*.

There has been no presumption of innocence under Soviet law. Usually, it was for the defendant to prove that he had not committed the crime of which he was accused. It appeared that this great gap in Soviet criminal procedure was to be filled by the 1957 draft Code of Criminal Procedure of the RSFSR, Article 11 of which reads as follows :

“ The accused shall be considered innocent until his guilt is established by a final court judgment. ”

Furthermore, the draft of the Bases of 1958 stated in Article 13 :

“ The burden of proving guilt rests with the Prosecutor. A conviction cannot be based on assumptions but may be obtained only on the condition that the guilt of the accused in committing the crime has been proved. ”

⁸ Loeber, *op. cit.*, 358.

Significantly, this last paragraph disappeared from the final version of the Bases. The corresponding Article, now numbered 14, stipulates :

“ The court, the public prosecutor, the investigator and the person conducting the police examination shall have no right to shift the burden of proof on the accused. ”

The two statements made during the debate on this article on the floor of the Supreme Soviet and published in *Izvestiia* of December 27 1958 illustrate the controversy among Soviet jurists over the concept of the presumption of innocence. On one side, A. J. Gorkin, President of the Supreme Court of the USSR, interpreted Article 14 as meaning :

“ ... that the task of proving the charges was one of the duties of the prosecutor, and that the defendant was not obliged to prove his innocence. ”

In sharp contrast to this view stands a statement made by delegate B. S. Sharkov and clearly directed against any reception of the principle of the presumption of innocence : “ Efforts to include into our theory and practice obsolete dogma of bourgeois law, for instance, the presumption of innocence, deeply contradict the essence of Soviet socialist law. There was a proposal to include in the Principles of Criminal Procedure, as a principle of Soviet criminal procedure, the presumption of innocence in a formula like the following : ‘ The defendant shall be considered innocent until his guilt is established by the final court judgment. ’ Perhaps the jurists can understand the meaning of such a complicated formula, but great masses of the working people could hardly understand it... Therefore, the Legislative Drafting Commission of the Supreme Soviet of the USSR made a correct decision when it vigorously rejected similar attempts to introduce into the Principles of Judicial Procedure formal and purely declaratory principles foreign to Soviet legislation, which did not reflect real social relations and which could induce confusion among those who have to make investigations, the prosecution, and the courts. ”

The new Article 14 has abandoned the specific provision whereby convictions could not be based on assumptions of guilt as envisaged by the draft of 1958. The value of Article 14 for the increased legal protection of the individual thus appears questionable.

In addition to the points mentioned, the inadequate regulation of pre-trial investigation deserves special emphasis. It is either

carried out by investigators who are *attached to the public prosecutors*, or, when it is question of crimes against the State, by investigators of State security agencies (Art. 28). Only once the defendant had undergone such a pre-trial investigation—which is not subject to control by a regular court—is his case brought before the court.

The disadvantageous situation of the accused vis-à-vis the public prosecution remains unchanged in the case of an appeal.

These examples demonstrate that the new Bases for Criminal Procedure do not, by any means, fully embody the rights of the accused, and that the door still remains open for arbitrary acts of the State. It should be noted, in this connection, that it is still not obligatory in Soviet law to publish decrees prior to their entry into force.

IV. Conclusions

Close examination of the Soviet law reform reveals that, in spite of various changes, the general trend towards increased legal protection which had been noted in the draft has not been reversed in the laws enacted by the Supreme Soviet. *This trend reflects the transformations which Soviet society has been undergoing during the last few years: the evolution of new social strata, alterations in social structure and an improved standard of living.* All these developments serve to reinforce the demand of the people for greater legal protection and better guarantees against arbitrary actions of the State or its security agencies.

The Soviet law reform can only be viewed in its proper perspective if one keeps in mind its political-ideological motivation and implication. As long as legal reform is instituted for political motives rather than for reasons of principle, and its interpretation and application left with a judiciary dependent on executive control, such reform will remain relative. Since it will merely reflect the prevailing political, economic and social situation, it will be liable to repeal at any moment.

The statements of N. S. Khrushchev before the 21st Party Congress indicate that caution must be observed in attempting to assess the real value of the reform—while not, however, withholding due credit for its positive accomplishments. The Prime Minister declared himself in favour of a gradual transfer of State functions to competent “social organs”. He alludes here essentially to the judiciary organs which are called upon to maintain law

and order, and he questions the courts' monopoly of justice as reinstated by the law reform. According to Khrushchev, the courts, the militia and organs of public prosecution should maintain public order concurrently with the social organs. The sentencing of "parasites", for instance, is to be effected by neighbourhood "Assemblies" convened by district or other local committees (as already decreed in the laws of several republics).

In a similar fashion, the voluntary militia (narodnaya druzhina) and the Comrades' Tribunals (tovaritcheskii sud), neither of them a genuine judicial body, are to have jurisdiction over the maintenance of public order. Judging from past experience, such organs of "society" are bound to become instruments of Party policy and tools of the State. It is therefore advisable to suspend judgment on the question whether the announced reforms will in fact result in greater protection of individual rights.

THE SOUTH AFRICAN TREASON TRIAL

The South African Treason Trial has already received considerable attention in the publications of the Commission, chiefly in an article by the Commission's first observer, Mr. Gerald Gardiner, Q.C., (published in the *Journal of the International Commission of Jurists* Vol. I, No. 1, pp. 43-58), and again, more recently, in the last issue of this *Bulletin* (No. 8, December 1958) which contained a report by Dr. Edvard Hambro, who had attended the opening of the Trial on August 1, 1958, also as an observer appointed by the Commission.

The report in the *Bulletin* concluded with the information that the Court would sit again on the January 19, 1959, to commence the Trial of 30 of the 91 original accused on a charge of treason contained in a new indictment, the earlier indictment having been withdrawn. The new Trial was in fact adjourned to February 2, 1959, and was attended by Mr. Edward St. John, Q.C., a member of the Council of the Australian Section of the International Commission of Jurists. Mr. St. John went as an observer upon the invitation of the British Section of the Commission. His report appears below.

Report of Mr. St. John

The South African Treason Trial did not move much further towards a conclusion during my brief stay, in February 1959.

There is but one charge levelled against the accused at the present time—a charge of treason, in the form of a conspiracy, following the words of the indictment, “to subvert and overthrow the State by violence, and to substitute therefor a Communist State or some other State”. In support of that indictment the prosecution alleged a series of overt acts in furtherance of the alleged conspiracy, consisting of very numerous meetings, speeches, and publications, set out in Schedules, and the adoption of a Freedom Charter, containing demands which, according to the prosecution, “the accused intended to achieve by overthrowing the State by violence”.

Although I do not desire to cover matters already dealt with in reports by previous commentators, the situation has now become so confused to the average reader, what with withdrawals, dismissals, judgments, and appeals, that I feel I should begin by setting out, very briefly, the sequence of events from the first arrests in December, 1956, up to the time of the most recent reports which have reached me at the day of writing (2nd June, 1959).

It will be remembered that in December, 1956, 156 persons were arrested and charged with treason. After a preliminary hearing before the magistrate lasting some 13 months, 92 of those persons were indicted. Subsequently, the indictment against one of them, who was suffering from a serious illness, was withdrawn, thus leaving 91 accused. After protracted legal argument on the first trial, heard before a Court consisting of three Judges, the whole indictment was withdrawn by the prosecution.

Subsequently, it was announced that new indictments were to be framed and preferred against two groups of accused consisting of 30 and 61 persons, respectively, these being the various persons comprised in the group of 91 accused above-mentioned.

The trial which I attended last February was the trial of the group of 30 accused. Once again, there was a lengthy legal argument in support of applications by the defence to quash the indictment and to secure further particulars thereof, and applications by the prosecution to obtain leave to amend the indictment. The Court's decision was given on the 2nd March, 1959. The Court refused to quash the indictment, but allowed amendments to be made by the Crown, and ordered certain further particulars to be supplied.

From that decision an appeal has now been taken by the defence to the Appeal Court. Pending the decision on that appeal, the trial has been adjourned. The accused have never been arraigned, and no evidence has yet been taken.

In the meantime, the Crown decided to subdivide the 61 also into two groups, consisting of 30 and 31 respectively, and those two groups came up for trial, on two separate indictments on the 20th April, 1959. It had been known, however, that the Crown did not intend to proceed with the trial on that date, but would ask for a postponement, pending the outcome of the appeal. In these circumstances, prosecution counsel refrained from giving any particulars, such as had been given, or ordered, in relation to the prior indictments, apparently assuming that the formal skeleton would suffice at that stage. However, when the prosecution came to apply for the proposed adjournment, the defence challenged that assumption, and moved to quash for lack of particularity. After hearing argument, the Court upheld the defence objection, saying that it must have been clear, from the Court's previous judgments at the earlier hearings that in their present form the two indictments under consideration were defective. The indictment should not have been served in that form, and if the Crown had not been ready, it should have fixed a new date for the appearance of the accused in Court.

The most recent report appearing in the Australian press indicated that the Crown had appealed from that decision. In the result, therefore, there are now two appeals pending, one by the defence in relation to the indictment against the 30 accused, and one by the Crown in relation to the indictments against the 61, now divided into groups of 30 and 31. The decisions on these two appeals will probably settle the disputes which have centred around the form of the various indictments which have been preferred against the accused. Although the arguments have been concerned with the form of the indictments, they have involved matters of real substance, relating to the meaning of treason under the law of South Africa, the precise nature of the case which is to be presented against the accused, and the important question whether the Crown is entitled to indict the accused in groups, or whether they must be indicted and tried separately. The legal difficulties encountered by the prosecution flow to some extent from uncertainty as to the law of treason, particularly as it applies in peace time, the nature of the case it seeks to make (attempting to prove a conspiracy to overthrow the state by violence by an accumulation of circumstantial evidence), and the large number of accused whom it wishes to be tried, in the first instance, on a single indictment, or, at the present time, on three separate indictments—two groups of 30 and one group of 31.

The accused have been divided by the Crown into the present groupings in an attempt to avoid, or confine the operation of, defence objections on the ground of misjoinder, having regard to the fact that the accused were alleged to have joined the conspiracy at differing times. Thus the first group of 30 is alleged to have joined the conspiracy at its inception, whilst the second group of 30 is alleged to have joined the conspiracy between October, 1952, and December, 1954, and the group of 31 between October, 1952, and October, 1953.

The first appeal, taken by the defence, has been set down to be heard on the 15th June, 1959, and the 3rd August, 1959, has been fixed for the re-appearance before the Special Court of the 30 accused, the decision of the Appeal Court being expected to be known by that time.*

But to revert to the observations made in February 1959 during argument on the indictment relating to what I shall call "the first 30", I must begin by confirming what has been pointed out by all observers, that the accused appear to be receiving an eminently fair trial, and that they are ably represented by some of the most brilliant and learned members of the Johannesburg Bar, thanks to the astonishing efforts of the Treason Trial Defence Fund, which has raised up to the present almost \$100,000 for the payment of legal costs (charged at a minimal scale, but still enormous), and also the payment of subsistence allowances to the accused and their families, most of the accused having been out of employment since their arrest in 1956. I should add, too, that every courtesy was extended to me by the Court and Counsel on both sides.

In a very real sense, the Trials represent proceedings against the various organisations of which the accused were leaders—the African National Congress, the South African Indian Congress, the Congress of Democrats (consisting of white South Africans), and the South African Coloured Peoples' Organisation—in particular, a trial of the question whether their policy was truly (as they proclaimed), a policy of non-violence or a policy of violence. The evidence, so it seems, will be circumstantial evidence, in the sense that the prosecution will undertake to prove the conspiracy, on which it pins its whole case, and the nature of the conspiracy, not by direct evidence of conspiratorial meetings or correspondence, but by inference from the activities

* The Appeal Court has since refused to consider quashing the indictment and the trial therefore opened on August 3.

in which the accused engaged—the speeches they made, the matter they published, and so on. Now it is a fact that the prosecution, at the preliminary hearing, was able to lead evidence of many violent speeches and, without attempting to prejudge the issue in any way, it would be surprising if, amongst so many accused, there were not some men who believed in achieving their ends by violence, if only as a last resort. But on the other hand, as Mr. Gerald Gardiner pointed out in his so excellent report, the views of the accused “as publicly professed in the past, ranged from ‘Christian’, ‘pacifist’, and ‘moderate’ to ‘extreme left’.” (*Journal of the International Commission of Jurists* Vol. I, No. 1, p. 47.)

Unless, therefore, the prosecution is able to show these people to be something very different from what they previously professed themselves to be, it may find that although it can prove they were working towards common ends, they have not been unanimous as to means, and have subscribed, some perhaps with varying degrees of sincerity, and some perhaps with mere lip-service, to the declared policy of non-violence. It is only if the prosecution can show agreement, both as to ends and (violent) means, that it will be able to secure conviction of the accused.

No one can predict the future course of this marathon trial, except to say that unless the prosecution withdraws it will probably drag on for a long time yet. But let us not forget that, despite its inordinate length, and the hardships necessarily, or even unnecessarily, suffered by the accused, it is a trial—an attempt to reach a true verdict upon evidence given in open Court, after full argument by expert counsel. For the world at large, it has served to throw the spotlight on to South Africa, its various non-European races, and their agitation for equal rights, and also, necessarily, on to the Government and its policies against which that agitation is directed.

For behind the legal complexities of the Treason Trials, and reaching beyond even the vital question of guilt or innocence of the accused, there lie the abiding questions and problems of the Union of South Africa. What is to be the future of this troubled country? What is to be the role of the white man in coming generations? Will the policy of *apartheid* really work? How long can the non-European be held down? Is it wrong for the black man to agitate against the white man's laws, in a country whose government is committed to a policy which will exclude him from any voice in its politics, now or ever? These questions and problems demand an answer, even of those who might prefer

to pass over the surface, and enjoy the country and its amenities, without worrying over its politics. Wherever a few people gather together in any part of South Africa these things obtrude themselves—the one recurring topic of conversation which remains in the memory to haunt every visitor to the country.

The result of the Trials will not provide the answers, for they are concerned with one issue only, whether the accused have been guilty of high treason, in the form of a conspiracy to overthrow the State by violence. And the verdict pronounced on that issue may or may not help the white man, or the black man. It may give, or seem to give, the advantage to one or the other, but in fact will solve none of those poignant problems which still await the people of South Africa.

Editorial note

Throughout the years, the International Commission has vigorously condemned racial discrimination and will continue to oppose legislation and practices based upon such policies. Though the conduct of the Treason Trials by the South African judiciary is scrupulously fair, the vague and loose definition of treason from which the prosecution in this case arises undermines the freedom of expression and association in the Union and is inevitably conducive to serious abuses.

BAR ACTIVITIES IN SPAIN

Readers of the Bulletin have in recent years followed with concern a number of events in Spain showing an official attitude irreconcilable with the basic principles of the Rule of Law.

The Commission has received from various sources a great deal of material which is being carefully checked and will be used for publication in the near future. Some of it contains indications of a growing demand in intellectual circles for a liberalisation of the administration of justice. This is evidenced among other things by the remarkable letter sent in July 1959 to the Minister of Justice by almost one thousand leading Spanish personalities and reproduced in full at the end of this article. However, stern measures are still being taken against liberal elements in a way which challenges the conscience of the world legal community.

Some information concerning the administration of justice in political cases will be published in the next issue of the Bulletin. Here it is appropriate to report on some recent developments in the Spanish legal profession which show a marked tendency to

strengthen the independence of the Bar—a prerequisite for an organized society under the Rule of Law.

The Bar Associations of the major Spanish cities have recently held a number of regular and extraordinary General Assemblies to discuss a proposed reform of the Bar Statute as well as the more general problems facing practising lawyers within the framework of the existing regime. This movement seems to have gained an additional impetus in December 1958, when a group of ten Madrid lawyers submitted a draft resolution to the General Assembly of the Madrid Bar scheduled for January 31, 1959. This group was composed of Don Juan Antonio de Zulueta, Don Gregorio Arranz Olalla, Don Antonio Cases, Don Mariano Robles, Don Vicente de Piniés, Don Eugenio J. Alfaya, Don Augustin Barrera, Don Luis Benítez de Lugo, Don Juan A. Salabert and Don Enrique J. Gómez Comes.

The object of this draft resolution was to communicate to lawyers in Spain the conclusions of the report submitted by the special Committee of more than a hundred members set up for the purpose of studying the proposed reform of the Bar Statute. The authors of the resolution felt compelled to submit their text to the General Assembly as the General Council of the Madrid Bar had failed to communicate the Committee's conclusions to the members of the Bar, many months after the Committee had terminated its work.

The draft resolution dealt in the first place with various professional matters, such as the increasing number of lawyers and the economic problems that result from an overcrowded legal profession. It also pointed out that unemployment amongst lawyers is particularly high because a great number of legal acts are carried out without recourse to lawyers' services. The second point it brought out was the need to reform the Bar's General Council, "at present lifeless and static", by turning it into "a genuinely representative body of the profession, at its exclusive service, free from any other concern but the defence of its professional interests". The draft resolution then proposed that the reforms be discussed by the General Assembly and, perhaps, by a National Congress of the Bar before being submitted to the legislative bodies.

The meeting of January 31, in which this draft was discussed and adopted, constituted a striking example of the growing demand of Spanish lawyers for greater independence of the Bar and a Statute guaranteeing this independence from government interference. The Chairman of the Bar's General Council tried

to adjourn discussion on the draft but the vigorous reaction of the lawyers attending the General Assembly resulted in its immediate discussion. Don Juan Antonio Zulueta, the principal sponsor of the draft, was the first speaker.

After recalling the "glorious times of our profession", he stated: "Today, we are poor men who hardly uphold our professional dignity and, in many cases, we are just miserable beggars who try desperately to make a living... Since the decline of our profession is so evident and serious, it is our duty to investigate its causes". Sr. Zulueta then continued by refuting the argument which sought to explain the low standard of the legal profession by the very nature of modern societies. "I cannot however accept this explanation. In some countries, such as England and Germany, the same forces are at work and, in spite of this, the Bar preserves all its old prestige. I am bound to find another explanation... Fish need water and birds need the air; lawyers need the rule of law. Where there is no rule of law, where it is not possible to speak of a State governed by law, the position of the Bar automatically deteriorates." (Sr. Zulueta was interrupted at this point by long applause). "And I would like to ask a question", he continued, "are we under the rule of law? If I consider our political framework, I notice that our Parliament is not an efficient law-making body, simply because it is not a representative institution". The Chairman tried to interrupt the speaker at this point but the loud protest of the audience prevented the Chairman from being heard. Sr. Zulueta continued by stating: "If I turn my attention to other organs, closer to the Bar, such as the Judiciary, I cannot but think of the many legal matters where a lawyer is not allowed to act because of the special jurisdictions... In my view, the rule of law does not exist in a State where the rights of the individual are not safeguarded, and this is indeed the case here... It is also a fact that Spaniards are not allowed to meet for any lawful and noble end if that does not exactly suit somebody else's purposes. A Spaniard can hardly express his opinions. It is well nigh impossible to do so inside the Bar Association as we saw a moment ago."

In conclusion, Sr. Zulueta proposed that the Madrid Bar take the initiative to convene a National Congress where the proposed reforms of the Bar Statute would be discussed by qualified representatives of all Spanish lawyers. At the end of the meeting, the draft resolution was adopted by acclamation, and the applause that accompanied its adoption indicated beyond any doubt that it expressed the overwhelming opinion of Madrid lawyers.

On January 25, the San Sebastian Bar, in its regular General Assembly, adopted a resolution supporting the Madrid draft resolution and expressing its support for the action taken by the Madrid Bar.

During the weeks that followed similar meetings were held by the Bar Associations of Barcelona and most other Spanish cities. With the exception of the Valencia meeting, all these assemblies voted resolutions expressing their demands for a greater independence of the Bar. The impact of this movement has been such that even the traditionally conservative Chairmen of the Bar Associations have taken up the demands put forth by the group of ten Madrid lawyers and have been pressing the authorities to accept the proposed reform of the Bar Statute. Two days before the Madrid meeting described above, the representatives of the Madrid Bar had been received by General Franco. In the speech he delivered on that occasion, Dr. Escobedo, Chairman of the General Council, said: "We believe, your Excellency, that the time has come to revise all these special jurisdictions... To show the necessity for this revision, one has only, to consider the fact that there exist certain laws whereby summary trials are entrusted to the Police and the Police, your Excellency, is not the proper authority for this function". On June 24, the Minister of Justice, Sr. Iturmendi, in an address delivered to the assembly of Chairmen of the various Bar Associations, gave some indications that the government is taking seriously into consideration the demands put forth by Spanish lawyers.

Recent developments in Spain show that the legal profession is coming out of a long period of lethargy and is demanding those rights that the Rule of Law guarantees to the members of the Bar. Lawyers the world over follow with great interest and sympathy this evolution which may, it is hoped, bring about far-reaching modifications of the general situation in Spain. No regime can provide a proper protection of the individual unless the independence of the Judiciary and the Bar is guaranteed. Twenty years after the fratricidal struggle that caused the introduction of special jurisdictions and the restrictions of the rights of the Judiciary and the Bar, Spain may now be approaching a period of greater freedom for the legal profession.

However, the optimistic conclusions that readers may be tempted to draw from the recent Spanish developments reported above might be somewhat shaken by the news of the seizure of *Astrea*, the outstanding liberal legal publication in Spain. The

remarkable issue of the magazine that appeared in the spring of 1959 (Nos. 58-59) was seized by the Spanish authorities for carrying a detailed analysis of the above mentioned meeting of the Madrid Bar Association.

It is hoped that the Spanish authorities do understand the unfavourable impression created among legal circles in all parts of the world everytime they adopt measures limiting the freedom of expression or any other fundamental rights of the individual. The International Commission of Jurists will follow with keen interest any further developments of the *Astrea* affair.

Letter signed by almost one thousand outstanding representatives of the cultural, academic, legal and scientific circles of Spain

“His Excellency, The Minister of Justice.

Your Excellency,

The undersigned hereby wish to state to Your Excellency their views concerning a question we consider of vital importance.

We in Spain are still faced with the problem of our community life. As yet there are no firmly established bases which would allow the participation of all individuals in the life of the Spanish nation. There remain—as *Ecclesia* pointed out in its editorial of April 4—some gaps in the national soul to be filled in. One of the deepest gaps is that constituted by thousands of fellow countrymen who, because they are either in prison or in exile, are unable to collaborate with us in the tasks demanded by our national life.

However, we believe that there is no longer justification for this sad state of affairs. The time has come when the last wounds should be healed. Any obstacles to the reconciliation of Spaniards should be eliminated. We feel that a very necessary and effective step towards this end would be a general amnesty for all political prisoners and exiles.

We therefore respectfully request Your Excellency to transmit the expression of our hopes to the Council of Ministers so as to obtain full integration of all Spaniards in the national life.

We have no doubt that Your Excellency will understand the sentiments which move us and that our views will be sympathetically considered.”

DISTURBING SITUATION IN HUNGARY

The Hungarian claims to have liberalised the regime in recent months are contradicted by the reports concerning numerous trials that have taken place in Hungary since January 1959. Two of these trials should be cited here as striking examples of measures of "liberalisation".

1. An important trial of a large group of young people under the age of twenty took place in February and March. It was held *in camera* and the defendants were accused of anti-state activities. This particular group, whose members were induced to confess, comprised approximately half of the members of a group of fifty young people under arrest. The shocking aspect of the procedure followed in this trial was the filming of "confessions" for the use of propaganda aimed to discourage young people from opposing the government. The use of a trial as a stage setting for political intimidation is a disturbing feature of judicial process under the present Hungarian regime.

2. On March 15, sentences were pronounced in the trial of thirty-six defendants held in Ujpest, industrial suburb of Budapest. Investigation for this trial had started a year earlier and 182 witnesses were called for the prosecution. None, apparently, were called for the defence. Charges dated back to the 1956 revolution.

Ten of the accused were sentenced to death and the rest to terms of imprisonment, the shortest being five years. The prosecution then appealed against the prison sentences and the defence against the death sentences. Appeal proceedings began on July 13 and were held in the Fo Utca prison, in Budapest. The presiding judge of appeal was Janos Brofely. Among the accused sentenced to death, the names of the following are known: Pal Kosa, Laszlo Gabor, Miklos Peterfi, Sandor Nagy, and Marton Rajk. According to reliable reports, eight of the convicts were executed by shooting on or about August 13.

Executions and heavy prison sentences for the regime's opponents bear witness to the continued repression in Hungary, more than nine months after Mr. Erne Sik, Hungarian Minister for Foreign Affairs stated on September 22, 1958 at a meeting of the General Assembly of the United Nations: "As regards the calling to account of people, I am in the position to reassure you that these proceedings have been finally concluded and that they have come to an end".

In this connection it is worth mentioning that the efforts of the International PEN Club to bring about the release from jail of the Hungarian writers Tibor Dery and Gyula Hay were frustrated by the Hungarian Ministry of Justice despite intense international interest in their fate. Tibor Dery, one of Hungary's most famous authors, was arrested and tried for his participation in the revolt of 1956, and has been recently reported to be in a critical condition. The director of the Department of Investigation of the Ministry of Justice, Dr. Jaszai Dezo, informed the PEN Club that their request can not be granted at the present time. "... These Hungarian citizens were sentenced by a Hungarian court for crimes committed against the Hungarian people... Pardon could be considered only if the required conditions were present."

DEATHS OF MAU MAU DETAINEES IN HOLA EMERGENCY DETENTION CAMP

On March 3, 1959, a violent struggle between guards and detainees occurred at Hola Camp, Kenya, where Mau Mau detainees of "the inner core of the hard core" were and are being held. Eleven detainees died as a result of this clash and twenty-two others were admitted to hospital. Kenya, being a Colony of the British Crown, has its own Government, with limited powers, but is governed by the United Kingdom Government, the appropriate Minister being the Secretary of State for the Colonies. An incident in which detainees are killed whilst in custody by prison guards can, if there is a suspicion of illegality in the circumstances of the deaths, invoke a variety of time-honored means of investigation and redress.

Questions at once arise of criminal proceedings against members of the prison staff who were directly involved and of disciplinary measures against other members who, whilst not directly involved, may be administratively and morally to blame. Then, since prison administration is the immediate responsibility of a member of the Colonial Government and ultimately of the Secretary of State for the Colonies, there is the question of the political accountability of these two Ministers. In between, there is the administrative responsibility of members of the prison service who may be at fault. Then again, there is the necessity to hold a coroner's inquest on deaths which take place whilst the deceased

is held in custody, and, finally, the possibility of an inquiry into the death on the orders of a Minister of the Crown or by Parliament (which in practice means the same, since the Government always has a majority in Parliament).

Background to the deaths of the detainees

The background to the Hola deaths is objectively and succinctly described in the report of the coroner's inquest in Mombasa. The Secretary of State for the Colonies later described in the House of Commons the problem of rehabilitating the hard-core of Mau Mau and the work which had been and was being done. The coroner's findings took fully into account the difficult circumstances which existed in the camp. He accepted that the detainees at Hola, including the eleven deceased, were the inner core of the hard core of Mau Mau, hostile to and contemptuous of any form of authority. He had found them sullen, suspicious and utterly fanatical. They were potentially dangerous and would be ready to take immediate advantage of and exploit the slightest sign of weakness on the part of the camp staff. He took judicial notice of the Mau Mau atrocities. Despite the difficulty and provocation which faced the staff of the camp, there was no evidence to suggest that a single blow had been struck or any other form of ill-treatment had been practised before the incident of March 3.

The Colonial Secretary described to the House of Commons the magnitude of the task which faced the Government of Kenya and its prison service, and paid tribute to the progress which had been made in the rehabilitation of Mau Mau detainees. Other members pointed out in the same debate that they had themselves observed the ferocious demeanour of detainees of this group. It would seem that all sides agreed that these detainees were difficult and dangerous, and that the prison service of Kenya had done good work in its arduous task of rehabilitation.

The question of criminal proceedings

The coroner's finding of fact on the circumstances of the deaths make clear the enormous problems of ascertaining what really happened at Hola on March 3. He had no difficulty in accepting the medical evidence that the cause of death in each case was "shock and haemorrhage due to multiple bruising caused by violence", (the particular form of violence was beating with batons).

Beyond this, the coroner was gravely handicapped by his "misfortune" in this inquiry not to be able to feel that a single witness of the Hola prison, staff, warders or detainees, was making any real attempt to tell the "plain unvarnished truth". He also commented adversely on the first official press statement by the Government of Kenya that the detainees died after drinking water from a water cart which was also used by their guards and deplored this misleading suggestion of *post hoc ergo propter hoc*.

The coroner found it impossible on the evidence to separate the beatings inflicted by the guards for the purpose of preventing escape from those inflicted for the purpose of compelling the detainees to work. He held that the "former type of beating was justified and the latter unjustified and illegal". Secondly, "it was impossible to say on the evidence with any degree of certainty which particular person struck the blows, whether justifiable or unjustifiable". For these reasons, he came to the conclusion that the evidence was insufficient to disclose that an offence had been committed by any known persons, and also that he was not satisfied beyond reasonable doubt that an offence by persons known or unknown had been committed. However, he was unable to record that no offence had been committed.

The Attorney-General for Kenya decided for similar reasons that the evidence did not warrant the initiation of criminal proceedings, and in the debate in the House of Commons the Attorney-General for England expressed his concurrence. This view did not pass unchallenged by the Opposition, and the Attorney-General expressed his confidence that the Attorney-General for Kenya would reconsider the matter if further evidence came to light. There, for the time being at any rate, the matter rests.

Political accountability

In the debate on the Opposition motion of censure on the Government of the United Kingdom the resignation of the Colonial Secretary was called for as being the only person whom the House of Commons could hold accountable. The demand failed and the House approved an amendment fully supporting both Governments in the steps which they had taken to prevent a recurrence. The Opposition complaint was that such disciplinary measures as were being taken were against underlings and the blame, both actual and constitutional, should be laid on the shoulders of the Colonial Secretary. The Colonial Secretary told the House that neither he, the Governor, nor any Minister

or officer in Kenya would ever wish to shelter behind those who had to carry out the operations, and that if any further action was necessary, it would be taken.

Administrative responsibility

The extent to which officials can be disciplined for their shortcomings without involving the political responsibility of their Minister is a difficult problem, and it may perhaps beg the question to regard administrative and political responsibility as separate questions.

At any rate, the retirement, without loss of gratuity, of the Commandant of Hola camp, Mr. Sullivan, has been called for by a disciplinary committee, and the Commissioner of Prisons, Mr. Lewis, has felt it his duty to request permission to retire as soon as a suitable successor has been found. Disciplinary charges against the Deputy Commandant were found not to be sustained.

Mr. Sullivan was found to be in gross dereliction of duty, subject to the mitigating factor of failure by the Prison Commissioner to give him a copy of the plan for putting unco-operative detainees to work. Mr. Sullivan was given oral instructions only by Mr. Cowan, the author of the plan, and received no reply to his questions on specific points which he raised with the Commissioner. This criticism has led the Commissioner, who was not charged with disciplinary offences, to request permission to retire.

The setting up of an inquiry

On May 7, the Colonial Secretary announced that an inquiry would be held to consider the future administration of the remaining camps and the arrangements for their systematic inspection, as well as the investigation of complaints by persons detained. The inquiry was to be carried out, and is now being carried out, by a Prison Commissioner and Director of Prison Administration in England, a former Colonial Governor and a missionary. It was also announced that the International Committee of the Red Cross had offered the advice and help of its delegate and that this offer had been accepted at the request of the Kenya Government.

In informing the Kenya Legislative Council on May 6th that this inquiry was to be announced in London, the Chief Secretary stressed that the inquiry would look to the future rather than to the past. He explained previous rejections of demands for an

inquiry on the ground that "it might well interrupt the long and detailed process of rehabilitation for a large number of people". The terms of reference announced in London make it clear that the Government regards the problem as that of rehabilitation and the prevention of future repetitions of the Hola incident. But the demands for an inquiry were primarily for one to inquire into what had actually happened at Hola. As *The Times* put it on May 7: "The Government has rightly promised an inquiry into the future conduct of the four detention camps, including Hola; but the past has yet to be disposed of."

Disciplinary charges against the Commandant and Deputy Commandant of Hola have now been heard. But neither this inquiry nor the inquiry into the future administration of detention camps will give us the full truth of what happened at Hola; the outcome of the disciplinary charges against Mr. Sullivan and Mr. Coutts tells us only the extent to which Mr. Sullivan personally was to blame, and this degree of personal blame is mitigated by the finding that it was unfair to him to leave him unaided in a difficult task for which he was insufficiently experienced. The Prison Commissioner has felt obliged to retire. But laying the blame at the door of administrative officials is not satisfactory unless the blame lies solely with them. It is to be hoped that, whatever the difficulties on the evidence of what happened, every effort is being made to ensure that those responsible are brought to justice.

POST-REVOLUTIONARY LEGAL EVENTS IN CUBA

The news about the fall of the oppressive Batista regime in Cuba—January 1, 1959—was received with satisfaction and hopes by the International Congress of Jurists in New Delhi. The Commission expressed the prevalent feelings of the participants as it addressed a telegram of congratulations and best wishes to Dr. José Miro Cardona, former President of the Havana Bar who returned from exile to become Cuba's first Prime Minister after the fall of the dictatorship. The message, dated January 9, noted the Commission's pleasure over steps being taken toward the restoration of the Rule of Law in Cuba and offered its moral support to efforts in that direction. In his answer of January 16, Prime Minister Miro Cardona acknowledged with deep appreciation the Commission's communication.

The developments following the revolution were closely followed in international legal circles. It was readily recognized that the misdeeds of the agents of the former dictatorship, including mass murders and torture, could not pass unpunished. By the same token, the emotionally charged atmosphere of the early days of Fidel Castro's government proved hardly conducive to orderly legal proceedings.

It is known from authoritative Cuban sources that 700 individuals were executed on charges of violence committed by orders of the Batista regime : murder, torture, arson, mutilation, extortion, robbery, etc. The procedure before military courts was based on the " Law of Sierra Maestra ", a draconic and highly informal code of criminal law proclaimed by Dr. Castro in the early stages of his campaign, in February 1958. Having provided in this code a blanket endorsement of retributory justice administered after the fall of the Batista dictatorship, the new regime felt compelled by what was termed public pressure to exceed this authority and to resort to much criticized public trials, the most unconventional of which was held in a sports stadium before 15,000 spectators taking an active and vociferous part in the proceedings. In most early cases, there was no free choice of counsel and military personnel appointed by the court for this purpose fell short of their obligation toward their clients.

World legal opinion took exception to these methods in the belief that no amount of public indignation over past evils can justify such disregard of basic human rights of the accused. Though the trials and executions of Batista followers still continue, some of their more offensive features have recently been modified to approach traditional legal procedure.

Another positive development was the setting aside of two execution orders of April 1959. Following a speech by Premier Castro, in which he promised the death penalty for various acts including traffic in narcotics and counter-revolutionary activities, a military tribunal sentenced to death Humberto Bertematy Rodriguez, a seller of marijuana. The prosecution was based on Article 16 of the Rebel Criminal Code which does not provide for such a penalty. In light of Dr. Castro's speech the death sentence was justified as serving the " social good ". Such a rationale produced immediate reaction and apprehension. With the word counter-revolutionary not yet defined, and with the prospect of the will of one man creating substantive law, the term " social good " appeared both uncertain and ominous. The sentence of Bertematy was reversed and a new trial ordered

before a civil court. Also reversed and reduced to thirty years in prison was the sentence of Dr. Olga Herrera, an alleged informer, the first woman to be condemned to death in the history of the Republic.

The publicized reversal in March of the acquittals of 45 Batista airmen presents part of the negative aspect of the picture. Nineteen pilots, ten gunners, and sixteen mechanics were acquitted of genocide, murder, and homicide for casualties inflicted during government raids on Eastern Cuban villages. The defence showed that 6,080 bombs and 5,000,000 bullets killed eight and injured sixteen. It pointed to these figures as evidence that the attacks were consistently and purposefully misdirected to spare Cuban civilians. The military tribunal, also, admitted that the pilots did attack legitimate military targets, those where rebel forces were located. Dr. Castro demanded a retrial. The chief defence counsel was speeded to Havana and accused of excessive zeal in pleading his clients' cause while the Defense Minister was despatched to Santiago to organize a review court. It is the Premier's theory that if the accused is allowed the right of appeal, the "people" should also be granted that right. This refusal to recognize the principle of double jeopardy caused immediate protests on the part of the Havana, Santiago, and National Bar Associations. The protests were branded as reactionary by Dr. Castro. Upon retrial, the pilots received 30 year sentences and the non-pilots lesser terms. Two were acquitted.

In matters of procedure, hopes for the early lifting of the temporary suspension of the right of Habeas Corpus have failed to materialize. On January 6, it was announced that the Revolutionary Government should rule by decree for a period of 18 months, pending elections, and on January 30, four articles of the Constitution were suspended including the curbs on the duration of prisoner detention awaiting trial and on venue. Cuban jails are filled with prisoners awaiting trial by regular courts rather than the revolutionary tribunals established to try members of the Batista forces. These civilian prisoners have had no hope of trial during the reorganization of the Cuban judiciary. As early as February 19, 1959, 3000 were reported confined in Principe Prison alone. Cuban legal opinion is much concerned over this situation. The Government acknowledged the intensity of numerous pleas for the restoration of Habeas Corpus by making repeated promises to reinstate it within ninety days. While one deadline is followed by another, effective action remains yet to be taken.

An alarming aspect of the present situation is that as long as the civil courts remain closed no legal protection is available to the Cuban landowner—tenants and squatters are meanwhile reported to be occupying land without legal authority, but with the knowledge and protection of the new army.

Among recent developments, two more also appear disturbing. The first of these is the case filed in the Supreme Court of Cuba against former President Manuel Lleo Urrutia who was forced out of office in July after having been charged by Dr. Castro in a nationwide telecast with impeding the progress of revolutionary reconstruction. The case was turned down by the Supreme Court and handed over by them for decision to the Council of Ministers, a body whose independent judgment may be seriously doubted. The second event is the President's impending signature of a set of rules which define the application of the death penalty for various crimes. Among the counter-revolutionary activities carrying penalties that range from twenty years in prison to death are the organization of or participation in armed groups rising against the Government and in armed expeditions landing in Cuba. There is the possibility of a death penalty for flying over the island and alarming the people or distributing counter-revolutionary materials. All executions would be within twenty-four hours after the condemned was informed of the sentence and no publicity concerning the execution would be permitted.

Premier Castro is quoted to have said the following in regard to law in Cuba: "We shall be respectful of the law, but of the revolutionary law, respectful of right, but of revolutionary right—not of the old right, but the new right that we are going to make. For old law, no respect; for new law, respect. Who has the right to modify the Constitution? The majority. Who has the majority? The revolution!"

There the issue of the Rule of Law in Cuba rests, precariously, at this moment.

THE BAGHDAD TRIALS*

Since August 1958, trials have been in progress in the five-man People's Court in Baghdad, presided over by Col. Fadhil Abbas el Mahdawi. The trials concern two sets of cases. The first set of cases are against 108 people including nearly all the

* Cf. Bulletin No. 8, p. 36.

most prominent supporters of the old regime which was overthrown on July 14, 1958. The second set of cases are against persons (whose number is at present 93, but more and more persons are being brought under trial) who are alleged to have taken part in the abortive Mosul Revolt in March 1959.

The first set of cases include the trials of four former Prime Ministers, members of the last Iraq Cabinet, 80% of the members of the last Parliament, six leading generals, a number of members of the Army Intelligence Service from Captain upwards, about a dozen Directors General, a dozen high Police officers with the Director General of its Criminal Investigation Department, five Programme Heads of the broadcasting station with its Director General, three Baghdad editors and three well-known journalists.

The accused have been charged under the Conspiracy and Corruption Act of August 10, 1958. The political charges concern conducting policy in a manner contrary to the national interest, attempting to turn the country into a field of war and attempting to use the country's armed forces against other Arab countries. Other charges deal with restricting public freedom in contradiction to the nation's basic law, interfering in and falsifying elections, wasting the national wealth by disbursing it on unnecessary projects, issuing ordinances for the benefit of a person or private groups, accepting funds from other countries and tax evasion.

The persons involved in the second set of trials arising out of the Mosul Revolt are generally charged with treason under articles 9 and 22 of the amended Baghdad Penal Code coupled with article II of the Martial Administration Ordinance and article 46 of the Military Penal Code for attempting "to overthrow the Republican system provided in the Constitution in preparation for annexing Iraq and merging it with the Nasser dictatorship", and with other detailed incidents connected therewith.

In the first set of trials, 8 accused, including Baban, the Prime Minister of Iraq on July 14, 1958, Jamali, a former Prime Minister and Foreign Minister, Qazzaz, a former Minister of Interior, Aref, a former Deputy Prime Minister, were condemned to death; 6 were acquitted and the rest were sentenced to terms of imprisonment ranging from one year to life. None of the persons condemned to death has so far been executed.

In the second set of trials, 16 persons have so far been condemned to death, 19 to life imprisonment and some to varying jail terms. Among the 16 persons condemned to death, 9 officers were executed by firing squads and one civilian was hanged.

Besides, Abbul Salaam Mohammed Aref, a former Deputy Prime Minister and Rashid Ali Gaylani, leader of the 1944 pro-Nazi revolution in Iraq were tried and sentenced to death, the former for an attempt on the life of General Kassem and the latter for attempting to overthrow General Kassem's regime by a coup planned for December 1958.

In reviewing these trials, one has to take into account the special circumstances in Iraq, viz., that in Iraq there has not been an established tradition of an independent judiciary and that the country is today passing through a period of revolution. And there is a further fact that the record of the previous regime in the administration of justice has not been unsullied. But whatever be the form of government that a country may have and whatever be the crisis that a country is passing through, it is recognised that every country has to assure to its citizens a minimum standard of justice from both the point of view of substantive law and that of procedural law.

From the point of view of substantive law, it is found that in the first set of cases noted above, 108 persons have been charged under the Conspiracy and Corruption Act of 10th August 1958. The Act is loosely drafted. Under its provisions, it is an offence to bring the country nearer to war or to make it a war area, to use the country's armed forces against other Arab states, to instigate foreign Powers to endanger the country's security, to interfere in the internal affairs of other states or to squander public funds on international plotting. It is likewise an offence to indulge in corruption of any kind, to commit waste and to interfere with elections or with the course of justice.

Apart from its vagueness, the Act is open to criticism on two specific counts. The Act is retroactive to 1st September 1939 so that people can be tried for actions committed up to 19 years ago and entirely sanctioned by the laws in effect at that time.

Further, the Act stipulates that "If there is another law providing heavier sentences for such acts, any person who is proved guilty of the charges mentioned in this law shall be liable to punishment by the heavier sentence". This means that people can be charged under one Act and sentenced under another.

Again, the law does not provide for any appeal from the judgment and sentence of the People's Court even in cases of death sentences. The only condition specified is that death sentences have to be approved by the Prime Minister. There is thus no provision for appeal even to one higher court in cases where capital sentences have been passed.

From the point of view of procedural law, it is found that the proceedings in a trial consist of the preliminary proceedings and the trial in the People's Court. The preliminary proceedings in a trial are in three stages. Charges will first be submitted to an Investigating Committee consisting of a judge and a military officer who will be assisted by lawyers or other military officers. This Committee's findings will then be submitted to an Advisory Committee consisting of a judge, a deputy prosecutor and one or more military members. The Advisory Committee will send its findings to the Prime Minister, who as Commander-in-chief can quash the case or send the accused for trial by the People's Court. A prosecution committee similarly composed meets before the trial.

The proceedings in the People's Court are heavily weighted against the accused. In practice, accused persons do not generally seem to have the right to engage counsel of their own choice, and in cases where the accused have retained their own lawyers, the defence lawyers have been treated with scant respect both by the military prosecutor and by the president of the court.

At the trial of Muhammed Ali Karim, chief announcer of Baghdad Radio, charged with preparing programmes for the United States Information Service (U.S.I.S.) and accepting money from a foreign power, with having attacked Egypt and President Nasser and with having organised the clandestine radio station "Voice of Free Egypt" in 1956, the defence lawyer Ziyad Fahim Said is alleged to have made a statement in which he declared that the much-debated U.S.I.S. broadcasts were purely educational and illustrated this contention by quoting from one of their "Question and Answer" programmes. It was asked why Schubert had not finished the Unfinished Symphony, and who discovered streptomycin. He continued by saying that in accepting money from U.S.I.S. the accused had acted in accordance with an open agreement between the United States and Iraq. The Government had announced its intention of honouring existing agreements which presumably covered the one under discussion. Further, if the Court considered his client guilty because he accepted money from a foreign power, they should also consider guilty all students who had accepted scholarships from foreign powers (he quoted the case of four students who had recently been granted scholarships by the Italian Government) and all Iraqis working for foreign embassies. At some point in this statement, disturbances occurred in court, and the radio and television transmissions ceased. No account of his statement was published by the Baghdad

newspaper, *Jumhuriyah*, which normally covers the trials thoroughly. At the end of the session it was announced that the trial was completed and that the trial of Kadhim al Hydari would begin at the next session. Surprisingly, however, Muhammad Ali Karim again appeared in the dock in the following session on the pretext that a further witness should appear. The witness was quickly despatched and the prosecutor then delivered a blistering half hour of invective and insult in answer to the points made by the defence counsel at the previous session. In brief, he accused him of disrespect to the court, treason towards the Iraqi Bar, and sympathy for the imperialists. By implication he suggested that the defence counsel should not be surprised to find himself in the dock soon. His diatribe rose to a crescendo in demanding that the Iraqi Lawyers Association expel the defence counsel. The president added his censure and ruled that the defence counsel should leave the court and should not be re-admitted either as counsel or as spectator.

This attitude of the court may possibly be the reason why lawyers do not come forward to defend the accused in these trials. The president of the court requested two lawyers to defend accused Kadhim al Hydari and read out telegrams received in reply from those lawyers. The first had stated that the only sentence he would ask for would be hanging and the second agreed to take part in the case only if he were allowed to prosecute. The president's glee at these telegrams showed his thorough approval of their contents. Reading out inflammatory messages of this nature from the bench is far removed from accepted standards of judicial behaviour.

In the various treason trials after the Mosul Revolt, March 7 1959, the accused had no choice of lawyers, but defence counsel have been appointed by court. The *Iraq Times* of March 26 1959 reports that in the trial of the Four Air Officers "As none has appointed a defence counsel, the court has appointed Sayed Abboud al Khayyat to defend them". These four accused were sentenced to death and were executed by a firing squad. Again in the trial of the eleven Army officers, the court appointed Sayyid Munir Bannu to defend the accused. The *Iraq Times* of May 12, 1959 reports that "the defence counsel in conclusion said that out of faith he would acclaim whatever verdicts the court pass". Out of these eleven accused, six were sentenced to death and five were sentenced to rigorous imprisonment for life. Again in the trial of seventeen Army officers, none of the accused had appointed defence counsel, but the court named Miss Rasimah

Zainul to defend them. When sentences were passed, including death sentences and sentences for imprisonment for life, the *Iraq Times* of May 4, 1959 reported that "the defence counsel Miss Rassimah Zainul next rose and made too a brief address acclaiming the leader of the people and cheering justice. She also shouted slogans praising the president of the court, Col. Madshawi, and the Military prosecutor." Most recently, in the trial which started on August 12, 1959, of Brig. Nadhem Tabaqchali, former Commander of the Second Division in Kirkuk, 8 other officers and one civilian for complicity in the Mosul Revolt, the accused were not allowed to choose their own lawyers.

Another serious shortcoming of the proceedings is that the defence counsel are denied the customary right to cross-examine the prosecution witnesses to test their veracity. The only opportunity to make a statement for the defence is at the conclusion of the case.

Further, statements by the defence counsel and defence witnesses are frequently interrupted by the president, particularly if anything critical of the prosecution counsel or for that matter of the prosecution's case is uttered. Both the military prosecutor and the president of the court were also reported to indulge in invective and insult against the accused and those witnesses who give evidence against the prosecution. Reports of the trials paint a vivid picture of violent language and impassioned prejudice by the Court, with intermittent inflammatory outbursts from the public.

At the trial of Lt. Col. Ali Tewfik, for instance, a staff officer on whom the president of the court tried in vain to foist certain allegations against the United Arab Republic, the president reportedly addressed him in these terms :

" You are a traitor and the son of a traitor. You are a coward and the son of a coward. You are a dog and the son of dog. You are a sordid fool. Speak, you plotter, you beast, you coward, why don't you speak ?" Lt. Col. Tewfik strongly protested against these insults and persisted in saying that he had no information in his possession whatsoever, thus intensifying the president's exasperation.

Thus the Baghdad trials reveal grave shortcomings. Many of the accused have been facing charges under an Act whose provisions are not only very vague but also retroactive, making capital offences out of acts done under legal authority as far back as 19 years ago. The accused can be charged under the provisions

of one Act and if another Act provides for a heavier penalty, he can be sentenced under the latter. Even a conviction and sentence of death by the People's Court is not appealable to one judicial body; it is subject only to the approval of the Prime Minister. This entrusts the life and liberty of the citizens charged with political crimes to the care of a single member of the Executive. Such a situation—compounded with the atmosphere of an immediately post-revolutionary phase—is extremely hazardous. Further, the trials are heavily weighted against the accused. The accused does not in practice seem to have the right to engage a counsel of his choice; the court generally nominates the counsel for the accused. In cases where the accused have nominated their own counsel, the defence counsel have been treated with disrespect and calculated insult both by the military prosecutor and by the president of the court and have been debarred from attending court for no fault other than having put forward the defence case. The defence is denied the right to cross-examine the prosecution witnesses to test their veracity. The accused and the defence witnesses are subjected to insults and humiliation and attempts are reported to have been made both by the military prosecutor and the president of the court to silence them when they speak against the prosecution case. Intimidation is also being adopted for the purpose. The constant political comments, not relevant to the case, made by the president, and the court's toleration of comments and applause from the audience add to the excitement of the crowd and undermine the fairness of the trials.

The facts stated above and based on first-hand official and private reports will enable the world legal community to judge for itself whether the trials in Baghdad have been proceeding in accordance with accepted principles of the Rule of Law. It is to be hoped that future developments will produce an improvement in the administration of justice in Iraq.

NEW PROVISIONS OF THE RUMANIAN PENAL CODE

The establishment of the communist regime in Rumania after 1945 resulted in profound modifications in the legal structure of the Rumanian State. In the field of constitutional law, these changes brought about, by 1952, a complete break of continuity with the pre-1944 period. After the armistice, in August 1944,

there was reintroduced the Constitution of 1923, abolished by the 1938 coup d'Etat which brought back to the throne King Carol II. During the first few months of Russian occupation the legal continuity with the pre-1938 period was the official slogan of the government as well as of all political parties. After the abdication of King Michael in 1946 and the gradual seizure of power by the communists this constitution became a purely formal document in contradiction with the changing reality. This contradiction had become so evident by 1948 that the liberal constitution was abolished and the first "people's democratic" constitution was put into force. This new constitution was characterized by the deep modifications it introduced in the State structure of Rumania. By 1952, however, even the 1948 text had become obsolete and a new step was taken with its replacement by a new constitution which went much further in asserting the concept of the dictatorship of the proletariat with all its implications on the social, economic and political structure of the State.

The constitutional changes that had resulted from the seizure of power by the Workers' Party were accompanied by a series of amendments in the field of Criminal Law. The Criminal Code in force at the time of armistice was that enacted in 1936 and modified on twenty-four occasions between 1938 and 1944. This Code was known as the "Carol II Code". The first extensive amendment of the Code was carried out by the Government in 1948-1949 (Decrees Nos. 134, 212, 239 and 272 of 1948 and No. 187 of 1949). In 1950, Decree No. 67, and in 1953 Decree No. 202, introduced many new provisions pertaining to economic and administrative matters related to socialist property; while in 1950, Decree No. 199 reintroduced the death penalty for certain anti-state crimes.

In 1957-1958, a new series of amendments brought about some drastic modifications of the Code (Decrees Nos. 324/1957 and 318/1958). It is necessary to draw the readers' attention to the 1957-58 Decrees as they illustrate the excessive severity with which certain crimes are punished within the framework of a system based on the concept of socialist legality. By these decrees, a series of offences against State property or property of the working class, as well as crimes against the State itself, are made punishable with death and imprisonment for 15-25 years, together with total confiscation of property.

Though the concept of the Rule of Law allows a choice between different penal systems, there is a *communis opinio* amongst the lawyers of the world that sanctions or punishments which are

out of proportion to the transgressions committed are a clear violation of the Rule of Law. The New Delhi Congress of January 1959 has expressed this notion in its conclusions about "The Criminal Process and the Rule of Law" (Third Committee) by stating that the Rule of Law must necessarily condemn cruel, inhuman or excessive preventive measures or punishments.

1. For offences under the following Articles, which were previously punished by prison or hard labour sentences, the death penalty has been introduced :

- (a) Art. 187, dealing with any liaison or relationship between Rumanian citizens and subjects of a foreign power for the purpose of committing certain anti-state crimes. One of these crimes is stated as follows : " The commission of acts which could cause the Rumanian state to become involved in the declaration of neutrality or in the declaration of war."
- (b) Art. 188, para. 1, enumerating the crimes which, in time of war, constitute treason.
- (c) Art. 190, para. 1, defining the crime of treason by breaking allegiance to the fatherland.
- (d) Art. 192, para. 1, enumerating other crimes considered as treason to the fatherland.
- (e) Art. 212, para. 1, enumerating the acts which cause disorder in the state or endanger its security and which are considered as crimes of " military usurpation ".

2. In addition to the introduction of the death penalty for offences whose definition remains unchanged, the July 1958 decree provides the following sentences for newly formulated crimes against the state :

- (a) " Rumanian citizens who commit any act which could lead to the subjugation of the territory of the state or of a part of it to the sovereignty of a foreign state, or by which the independence of the state would be destroyed or harmed, commit the crime of treason to the fatherland and shall be sentenced to death. The same penalty shall be imposed if an act is committed which leads to the undermining of the unity of the state " (Art. 184).
- (b) " Rumanian citizens who use weapons against their fatherland or join the army of a state which is at war with the Rumanian state... commit the crime of treason to the fatherland and shall be sentenced to death " (Art. 185).

- (c) Rumanian citizens who plot or enter into agreement with foreign governments or with their agents, or with parties, associations or foreign groups of a political nature, in order to provoke war against the Rumanian state, or in order to facilitate or bring about foreign occupation, commit the crime of treason to the fatherland and shall be sentenced to death " (Art. 186, para. 1).
- (d) " Rumanian citizens who procure or transmit by any means, in original or in copies thereof, totally or partially, any of the plans, archives or documents mentioned in Art. 190, to the enemy or to his agents, or to a foreign power or its agents, or who, having knowledge of them, communicate these documents to them, or publish or reproduce them, even partially or incompletely, commit the crime of treason to the fatherland and shall be sentenced to death ". (Art. 191, para. 1).
- (e) Certain anti-state crimes normally punished by prison or hard labour sentences are punished by death if committed by an alien (Art. 194, para. 1).
- (f) " The transmission of state secrets to foreign states, counter-revolutionary organisations, or to private persons who are in the service of a foreign power, stealing or collecting information or documents regarded as state secrets, or holding such documents for the purpose of transmitting them to the above named, shall also be regarded as espionage and the penalty shall be hard labour for life and confiscation of property " (Art. 194(1) para. 1).
- (g) " If the facts mentioned in paragraph 1 of Art. 194 (1) refer to documents or information which, although not regarded as state secrets, are not destined for publication, the sentence shall be hard labour from 15-25 years and confiscation of property. If the offences had or could have had exceptionally grave consequences, the penalty shall be hard labour for life and confiscation of property " (Art. 194 (2)).
- (h) " Whenever the same facts mentioned in point 1 of Art. 194(1) refer to documents or information other than state secrets or documents not destined for publication, if these facts could lead to the undermining of the people's democratic regime, the penalty shall be solitary confinement from 5 to 15 years " (Art. 194 (3)).
- (i) " The act of a Rumanian citizen who, having a state mission or a mission of public interest abroad, refuses to return to the

country, shall be regarded as treason to the fatherland and the penalty shall be solitary confinement from 5 to 15 years, loss of civil rights from 4 to 8 years and confiscation of property. For failure to denounce acts preparatory to this offence before the offender has crossed the frontier or has been discovered by the agencies of the state, the penalty shall be imprisonment from 1 to 5 years and loss of civil rights from 1 to 5 years" (Art. 194 (5)).

In this connection it is interesting to note that in most cases under Art. 181-194 identical penalties apply to crimes committed against other countries of the Soviet bloc (Art. 227 (1)).

- (j) "Persons guilty of "jeopardizing interests of the state" or of "negligence towards state security" are punished by 10-15 and 5-12 years imprisonment, respectively.
- (k) Propaganda and agitation against the social order is punished by 3-10 years imprisonment and conspiracy against this order by 15-25 years imprisonment and, in exceptionally grave circumstances, by death.
- (l) Very vaguely described crimes of "undermining the people's democratic regime" are punished by 5-25 years imprisonment (Art. 209 (3), para. 1) while the death penalty is provided for causing disorder or endangering the security of the state (Art. 212, para. 1). Acts of contempt of the national flag and other state symbols are punished by 1-5 years imprisonment and the same penalty is applicable to similar crimes committed against the flag or state symbols of any foreign state (Art. 216 and 222).

3. Another category of crimes provided for extensively in the new Rumanian Criminal Code are crimes against state property and the national economy in general. The recent jurisprudence of Rumanian Courts indicates that the overwhelming majority of offenders brought to Court are accused of crimes falling within this category. The following are examples of the extent of penalties for such crimes :

- (a) One of the essential characteristics of the 1957-1958 amendments to the Criminal Code is the introduction of the death penalty for certain forms of fraud or embezzlement. The penalties for such acts remain unchanged for sums going up to 50.000 lei (3 months-15 years) and from 50.000 to 100.000 lei the sentences may vary from 14 to 25 years imprisonment with confiscation of property in both cases.

For any crimes involving sums of more than 100.000 lei the death penalty is provided. The death penalty is also provided for damages to the national economy amounting to less than 100.000 lei, if the offence represents an exceptional social danger. Instigators, accomplices and accessories are punished by the same penalty (Art. 236).

- (b) Fraud or any other economic damage caused to the armed forces or the population in time of war entails former minimum sentences increased by one half (Art. 201).
- (c) Breach of duty, non-fulfilment or abusive fulfilment of duty affecting the legal interests of the citizen, committed repeatedly, or if it is of particularly grave nature is punished by 2-10 years imprisonment or by a fine of 500-3000 lei. If such abuse has resulted in damage to state property, the Code provides for graduated sentences of 3 months to 12 years imprisonment (and confiscation of property for the maximum sentences), according to the amount of damage caused (Art. 245).
- (d) Article 268 (17) provides for an increase in the maximum sentence for profiteering from 4 to 5 years. This Article also gives a detailed description of what is meant by the term "profiteering". Extenuating circumstances may result in the reduction of the sentence to a minimum of 3 months (Art. 268 (18)).

4. A last category of criminal offences provided for in the 1957-1958 amendments includes various acts such as begging—6 months to 4 years—, offences against morality and the social order—6 months to 5 years—, armed robbery which is punished according to the scale established in Article 236. (Articles 338, 536 and 578 (4)).

5. The essential characteristics of this reform and its implementation by the Rumanian Courts are :

- (a) the increasing number of offences punished by the death penalty.
- (b) A more detailed description and definition of what is meant by various crimes of an "unorthodox" nature such as "profiteering", "damaging state economic interests", etc.
- (c) A loose interpretation by the Courts of the measures introduced. It thus occurred that a man was sentenced to death in Ploesti for "theft" of an unspecified amount and another was sentenced to hard labour for life for stealing a sum for which a maximum sentence of 25 years is provided, while

in five cases where the damage caused by theft or embezzlement should have resulted in death sentences, the offenders were condemned to sentences varying from 3 years of corrective imprisonment to 25 years hard labour.

Earlier in this note the Code amendments have been qualified as "drastic". The introduction of the death penalty for anti-state offences punished up to then by prison or hard labour and especially its introduction for offences against state or working class property undoubtedly justifies this qualification. From a careful analysis of the Rumanian jurisprudence since these amendments were adopted, it appears that it is mostly in the field of economic offences that the implementation of the new Code had had the most far-reaching consequences.

Commenting on the 1958 decree, *The Times* wrote on October 23, 1958: "This measure reflects the communist authorities' concern over the spread of corruption and civic indisciplines throughout the country's nationalized economy...." Such widespread corruption proves the absence of civic spirit within the framework of the regime established in Rumania more than fourteen years ago. However, the harsh penalties and their flexible application constitute also a serious danger of an intensified class warfare against the remnants of the bourgeoisie. Recently reported sentences seem to bear out this apprehension.

NYASALAND AND THE DEVLIN REPORT

In the spring of this year, large scale arrests and detentions took place in all three territories of the Central African Federation, but it was only in Nyasaland that these were accompanied by serious rioting and loss of life.

Nyasaland is a British Protectorate about the size of Scotland. Its population at the end of 1958 numbered about 2,720,000 Africans, 8,700 Europeans and 11,400 Asians and others. It is a fertile but overpopulated country and one of the main reasons advanced for including it in the Central African Federation, which was formed in 1953, was that it would derive great economic benefit from closer association with Northern and Southern Rhodesia. But this advantage was outweighed in the minds of the majority of Africans by fears of political and social consequences of being brought under the ultimate domination of Southern

Rhodesia with a European population of 200,000. Though certain progress in direction of desegregation has taken place in recent years, there are fears among some Africans that an "apartheid" policy may ultimately be pursued. These fears were increased by the Federal Franchise Bill and the Bill to amend the composition of the Federal Legislature which were passed in 1957 by the British Parliament although they had been pronounced to be discriminatory by the African Affairs Board set up to watch over African interests in the Federation.

Greater urgency was given to African fears by the possibility that at the review of the Federal Constitution scheduled for 1960 the Federation would be granted Dominion status, and the authority and protection of the Colonial Office would be withdrawn. Because of this, the Nyasaland African Congress has consistently demanded withdrawal from the Federation and full enfranchisement for the African majority. When peaceful agitation produced no results, Congress gradually became more extremist and the return of Dr. Hastings Banda to the Protectorate in July 1958 marked the beginning of a new phase of activity in which feelings became inflamed and a collision appeared inevitable. Dr. Banda was welcomed as the Messiah who would lead his people to independence and self-government and he made it clear in his speeches that, although he did not want bloodshed, nothing less than political power for the Africans would satisfy him.

In January and February of this year, in anticipation of the arrival of Lord Perth for talks on new constitutional provisions for Nyasaland, the Congress campaign was stepped up and there were a number of incidents and clashes with the police which provoked Sir Edgar Whitehead to declare a state of emergency in Southern Rhodesia on February 26 and to arrest all the leaders and active members of the African National Congress.

On March 3, 1959, the Governor of Nyasaland declared a state of emergency, ordered the dissolution of Congress, and arrested all its leaders, including Dr. Hastings Banda and his principal lieutenants. Also arrested was Mr. Orton Chirwa, the legal adviser of Congress and the only practising African barrister in Nyasaland. The Governor charged that a plot was discovered preparing mass murder of Government officials and of the white population. The arrest touched off widespread rioting and violence in the course of which 51 Africans were killed and 79 injured. 1332 were detained, of whom 649 have since been released, while 134 have been charged with specific offences and convicted.

There was an immediate demand in the British Parliament for an all-party Parliamentary Commission to go to Nyasaland, but this was rejected by the Government in favour of a non-parliamentary Commission of Enquiry headed by Sir Patrick Devlin, a distinguished High Court Judge. The other members were Sir John Ure Primrose, a former Lord Provost of Perth, Sir Percy Wyn-Harris, a former Governor of Gambia, and Mr. E.T. Williams, Warden of Rhodes House, Oxford, who had been a Director of Intelligence Services under Field-Marshal Lord Montgomery.

Despite the fact that the Commission was headed by a High Court Judge, the Government made it clear that this was not to be regarded as a judicial enquiry. The Commission had no power to compel the attendance of witnesses. All evidence was taken in private and witnesses for both sides were not confronted with each other or subject to cross-examination by anyone except members of the Commission. The Government, however, agreed that African Congress witnesses could be represented by counsel, that the substance of the charges to be answered would be communicated to counsel, and that statements could be taken by solicitors and counsel from all detained persons. For the purpose of the enquiry, the African National Congress was able to employ, with outside financial aid, a London solicitor and a team of three counsel, headed by Mr. Dingle Foot, Q.C., M.P., to whom every reasonable facility was given. It is also worthy of mention that, after the arrest of Mr. Orton Chirwa, the Governor of Nyasaland, following representations from the British Section of the International Commission of Jurists, made financial and administrative provisions for the legal defence of those Africans who were being immediately brought to trial.

The Commission heard the evidence of 455 individual witnesses and of about 1,300 others in groups, and visited all the detention camps and prisons. It enquired into every reported incident both before and after the declaration of the State of Emergency, and took further evidence on its return to London. The report, covering 143 pages, was issued on July 23, and debated in Parliament the following week. It dealt with three main aspects of the problem.

The first section covers the history of political developments in Nyasaland since Federation and gives a detailed analysis of the causes of the increasing tension. The Commission disagreed with the Government's view that "national aspirations are the thoughts of only a small majority of political Africans who think

that their prospects of office will be worse under Federation and that the great majority of the people are indifferent to the issue." On the contrary, it found that opposition to Federation was deeply rooted and almost universally held. It stated, "Witness after witness appeared for the sole purpose of stating that the cause of all the troubles the Commission was investigating was Federation."

The second section covers events and incidents leading up to the State of Emergency and the announcement of the discovery of the murder plot. After expressing the view that too much was made by the Government of a number of disturbances, the report deals at great length with the question of whether or not there was a murder or massacre plot. The Commission found that there had been some talk of beating and killing Europeans "but not of cold-blooded assassination or massacre". It did not think that "there was anything that can be called a plot, nor, except in a very loose sense of the word, a plan". The Commission also said "we are satisfied that intimidation was one of the weapons used by Congress, particularly in the case of any one who joined the Congress and then wanted to leave it. It was also used against Africans serving the Government... Nevertheless, we think the Government exaggerated the extent and effect of intimidation".

With regard to Dr. Hastings Banda, the Commission concluded that "he would never approve a policy of murder and would have intervened if he had thought it was so much as being discussed." On the other hand, the Commission severely criticised Dr. Banda for not appreciating and allowing for the emotive effects of his speeches on African crowds, and for not exercising sufficient control over his lieutenants.

Despite its failure to find any proof of a murder plot, the Commission nevertheless agreed that, in the situation which existed on March 3, the Government could not maintain order within the framework of the law and that the declaration of a State of Emergency was fully justified; "The Government had either to act or to abdicate."

The third section of the report covers the action taken by the security forces and subsequent conditions in the territory, where the Commission found that unnecessary and illegal force was used in making a number of the arrests and that illegal methods of restraint were also used. It further stated "Nyasaland is—no doubt only temporarily—a police state, where it is not safe for anyone to express approval of the policy of the Congress party to which before March 3rd the vast majority of politically minded

Africans belonged, and where it is unwise to express any but the most restrained criticism of Government policy."

The Governor of Nyasaland, in his reply published at the same time as the report, welcomed the Commission's view that the State of Emergency was justified and that the situation was caused by the adoption of a policy of violence by Congress; but he challenged strongly, and at length, most of the other findings, including the denial of the existence of a murder plot, the acquittal of Dr. Banda of responsibility for the violent policies of Congress, the criticisms of the conduct of the security forces, and the description of Nyasaland as a police state.

In the subsequent debate in the House of Commons, the Government's motion followed the lines of the Governor's reply, whereas the Labour Party moved an amendment to accept the whole report. The Government motion was adopted by 317 votes to 252.

The fact that large parts of a report of a Commission presided over by a High Court Judge were rejected has caused disquiet among lawyers; for it has given rise to the fear that the use of Judges in enquiries which are not conducted on judicial lines and are of an essentially political nature will lead to Judges being undesirably involved in political controversy and to a lowering of their dignity and status. What was first understood to be a Commission set up to ascertain and assess facts has, in the outcome, been relegated to an assessment of opinion only.

THE UNITED NATIONS CONFERENCE ON ELIMINATION OR REDUCTION OF FUTURE STATELESSNESS

The United Nations-sponsored Plenipotentiaries' Conference on Elimination or Reduction of Future Statelessness was held at the European Office of the United Nations from March 24 to April 20, 1959. Two draft Conventions on "Nationality including Statelessness" had been prepared by the International Law Commission of the United Nations in its 1954 session and submitted to the 9th Session of the General Assembly. By its resolution 896/IX, the General Assembly expressed the wish that an "international conference of plenipotentiaries be convened to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States have communicated to the Secretary-General their willingness to cooperate in such a conference". By August 1958, these conditions having been

fulfilled, the Secretary-General convened the Conference for March 1959, in Geneva. The following States finally attended the Conference : Austria, Belgium, Canada, China, Denmark, Finland, France, Federal Republic of Germany, Holy See, India, Indonesia, Iraq, Israel, Italy, Japan, Jordan, Lichtenstein, Luxembourg, Monaco, Netherlands, Norway, Pakistan, Peru, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, United States, and Yugoslavia. The International Commission of Jurists participated as an observer and followed very closely the work of the Conference as the subjects on its agenda were directly related to some of the objectives of the Commission.

The Conference had before it two draft Conventions drawn up by the International Law Commission, one on "Elimination of Future Statelessness" and the other on "Reduction of Future Statelessness", as well as a draft presented by the Danish Government. In its first meeting, the Conference adopted as the basis of its discussions the draft prepared by the International Law Commission on reduction of future statelessness.

In the course of the discussion, it became quite obvious that the difficulties facing the Conference from its very inception were almost insurmountable. Matters pertaining to nationality have always been considered as strictly reserved to municipal law and even most of the States that had agreed to participate in the Conference were very hesitant to follow the suggestions of the International Law Commission. Nevertheless many of the articles were passed by the Committee of the Whole in a more or less modified form and up to the last day of the Conference it seemed that a Convention would be adopted, even though the chances for its ratification by any sizeable number of States seemed rather meagre.

It was thus possible to come to an agreement on some very important points : (a) the definition of various means of acquiring nationality at birth, (b) agreement on a series of provisions guaranteeing that changes in civil status as well as territorial changes do not entail loss of nationality, (c) the creation of an agency within the framework of the United Nations to act on behalf of stateless persons and (d) an article limiting the exclusive national competence in procedures depriving citizens of their nationality.

This last provision, contained in articles 8 and 9 of the draft Convention, had been a target for serious criticism by a great number of States even before the Conference met. The draft

text read as follows : " 1. A Party may not deprive its nationals of their nationality by way of penalty or on any other ground if such deprivation renders them stateless, except on the ground mentioned in article 7, paragraph 3 (naturalized citizens may lose their nationality on account of residence in their country of origin for a given period of time) or on the ground that they voluntarily enter and continue in the service of a foreign country in disregard of an express prohibition of their State. 2. In the cases to which paragraph 1 above refers, the deprivation shall be pronounced in accordance with due process of law which shall provide for recourse to judicial authority." Article 9 of the draft stated : " A Party may not deprive any person of their nationality on racial, ethnic, religious or political grounds ". These two texts constituted a very substantial safeguard against arbitrary action of States which resort to the extreme measure of deprivation of nationality as a penalty for political acts or on ethnical and racial grounds. The Conference devoted a great part of its time to discussing article 8 and, after the original draft had been modified several times, a much longer text was finally approved. Paragraph 1 of the adopted version read as follows : " A contracting State shall not deprive a person of his nationality, if such deprivation would render him stateless ", but paragraph 2 allowed States to make a reservation at the time they signed, ratified or acceded to the Convention. Such reservations would however have been limited by the very text of the article. In the case of natural born citizens, a Party to the Convention would have been able to reserve its right to deprive them of their nationality either on the ground of entering or continuing in the service of a foreign State, when such service is expressly prohibited by the contracting State, or on the ground of declaring allegiance to a foreign country. Reservations concerning naturalized citizens would have been possible on those as well as on additional grounds. Finally, paragraph 3 provided for the respect of " due process " in any procedure for deprivation of nationality and the possibility for the citizen being the object of such a measure to submit the case to an independent and impartial body, not necessarily of a judicial character.

Though the text adopted by the Conference sitting as a Committee of the Whole did not go as far as the draft proposed by the International Law Commission, it constituted nevertheless a substantial advance in the direction of protecting the fundamental human right to a nationality. Non-governmental organisations attending the Conference were particularly satisfied with the expected favourable outcome of the Conference.

These hopes proved however to have been premature. On the last scheduled day of the Conference, the surprise adoption by a close vote of an amendment to article 8, proposed by the Federal Republic of Germany and introducing such a number of exceptions to the contents of the article that it tended to nullify its effects, provoked the resignation of the chairman, the delegate of Denmark, and a suspension of the Conference. Several States tried in the next few days to bring about some compromise solution but it soon became obvious that the majority of participants were not prepared to adopt any substantial text limiting their national jurisdiction. The Conference finally came to an end without adopting any text whatsoever.

From the legal point of view, this Conference was of great interest as it offered an excellent illustration of the immense difficulties encountered by any proposal, no matter how limited and reasonable it may seem, tending to introduce international rules limiting national jurisdiction in the field of Human Rights. The Universal Declaration proclaims that "everyone has the right to a nationality" and the Economic and Social Council of the United Nations called on member States to take joint or separate action "in cooperation with the United Nations to ensure that everyone shall have an effective right to a nationality", but the Conference of Plenipotentiaries failed because participating States insisted on reserving their *discretionary* right to deprive their citizens of their nationality. Such action may in fact constitute a violation of the basic principles of the Rule of Law, as expressed in the Delhi Conclusions by the International Congress of Jurists. The Commission can only express its regret at the unfortunate outcome of a conference whose purpose was to translate into positive legal rules some of the principles it has always upheld.

THE DRESDEN STUDENT TRIAL

The Constitution of the German Democratic Republic (GDR) guarantees to the people, in Article 9, the fundamental right of freedom of thought. However, serious infringements of this fundamental right have been repeatedly observed and have recently taken on even greater proportions.

An illustrative case is the trial that took place in April of this year in Dresden, in the course of which five students were accused of high treason. This is the most recent of a long series

of trials, and it demonstrates that the suppression of freedom of thought and the restrictions imposed upon scientific teaching and research arouse particular opposition within the intellectual and university circles.

Student trials of the last few years

Of the so-called opinion-trials that took place over the past eight years, brief mention may be made of the following :

June 1951: The sentencing of Rolf Schabe, a music student, to seven years hard labour, for allegedly attempting to stir up opposition "against the Government of the GDR" by means of his "Peace Letters" to Western Germany.

May 1952: The sentencing of two students, Miss Friedgart Hense and Mr. Rummel, to 4 and 5 years of hard labour, respectively, for having exhibited an "inimical attitude towards the State" in the course of public discussions, and also for having "carried out illegal activities against the GDR".

October 1953: The sentencing of three students, Krelle, Haut and Hermann, to a total of 4½ years hard labour, for having participated in the "Fascist provocations of June 17th" and for having "forced militia policemen" to "release workers whom they had apprehended".

January 1954: The sentencing of the student Ehrhardt to 3½ years hard labour for having, allegedly, distributed "literature inimical to the State".

October 1957: The sentencing of the students Schubert, Lanzrath and Maack to a total of 10 years hard labour for having formed an "illegal counter-revolutionary group".

September 1958: The sentencing of students Blobner and Seifert, each to 7 years hard labour, for having "organized illegal meetings with students from Western Germany".

The activities which are supposed to have led to the criminal prosecution of all the accused were the printing and small-scale distribution of leaflets demanding that the rights and freedoms guaranteed by the constitution should be implemented; this would seem to be the only charge against them. Criminal proceedings were obviously not directed against the crime as such; in order to provide a deterrent, their purpose was rather to make an example of any person who holds beliefs which the Communist regime considers detrimental to its existence.

Charges preferred at the Dresden student trial

At the trial, which took place on April 13-15 before the Criminal Division of the County Court of Dresden, Gerhard Bauer, Armin Schreiter, Hans-Lutz Dalpke, Christian Ramatschi and Dieter Brendel, all students of the Technische Hochschule, Dresden (Dresden Institute of Technology), and all aged between 20 and 21 years,¹ were accused of treason against the State, that is, of having attempted to "abolish the constitutional government or social order of the GDR by conspiring to overthrow them by violence or systematically to undermine them". (Art. 13, Suppl. Crim. Code). Particulars of the charges were as follows:

- (a) Printing leaflets in autumn, 1957;
- (b) Purchasing three gas pistols in West-Berlin and having in their possession firearms and chemicals which could have served for the manufacture of explosives;
- (c) Twice attempting, though unsuccessfully, to establish contact with the "Kampfgruppe gegen Unmenschlichkeit" (Fighting Group Against Inhumanity), and with the Ministry for All-German Questions, in West-Berlin and Bonn, respectively;
- (d) Preparing a new leaflet action for January 1959;
- (e) Drafting and dispatching a letter to the BBC, in which they raised objections to the Anti-Atomic Congress which was taking place at the Free University of Berlin.

The 16-point programme drawn up by the student group in September of 1958 is of especial interest. It contains, among others, the postulates of inviolability of the dignity and of the freedom of the individual, of freedom of thought and political association, of relaxation of planned economy, and of an independent judiciary.

The following exhibits were put in evidence submitted at the trial:

- (a) a 6.35 mm. pistol; the expert doubted, however whether it could have been put to use;
- (b) a 7.65 mm. revolver;
- (c) a pistol and three gas pistols;

¹ See the curricula and character descriptions of the students, as stated in the report of the observers of the Students' Association of the Techn. Univ. Berlin (Berlin Institute of Technology) and the Freie Univ. Berlin (Free University, Berlin), p. 3.

- (d) 73 chemicals in small quantities; 62 of these, according to experts, could not have been used for the manufacture of explosives;
- (e) several newspapers from the German Federal Republic;
- (f) a copying machine.

The trial

The trial, which had been very well prepared, was used by the press and radio for propaganda purposes. Although it was a public trial, no Western observers were admitted other than three students from West-Berlin. The general consensus of opinion was that the president of the court was restrained and objective. She attempted, nevertheless, to direct by leading questions the replies of the defendants so as to assist the prosecution. The public prosecutor was described as biased and prejudiced. His charges were governed by general political considerations; it is clear, from the observations of the West-Berlin students, that he had been in possession of certain information prior to the hearing of evidence—furthermore, this information was not even divulged at the trial. The two lay judges made little use of their right to cross-examine and they were hardly up to their task. Two of the defendants shared an assigned counsel; the three others had each a counsel of their own choice. The four counsel followed, more or less, the argument of the prosecution; they were cautious, and their defence of their clients was unconvincing.

The defendants seemed to be in good health. It was apparent, however, that Schreiter and Dalpke appeared to be strongly affected by pre-trial investigation. The upright attitude of two defendants, Bauer and Ramatschi, was much noticed. These two students, both of religious families, maintained, despite the severe punishment they had certainly expected, an attitude that earned them general respect.

The judgment

The sentences, which were pronounced on April 18, exceeded in some cases the severe penalties demanded by the prosecution :

Schreiter — 8 years hard labour (as requested by public prosecutor) ;

- Bauer — 10 years hard labour (public prosecutor had requested 9 years);
- Dalpke — 7 years and 6 months hard labour (as requested by public prosecutor);
- Ramatschi — 7 years hard labour (public prosecutor had requested 6 years 6 months);
- Brendel — 7 years hard labour (public prosecutor had requested 6 years 6 months).

They were further sentenced to confiscation of their property.

The reasons for the judgment were given orally. The judgment is not yet available in written form. The Court held that all the charges preferred against the defendants by the prosecution had been proven, this despite the fact that there had been no general and exhaustive hearings of evidence.

Once the Court adopted the viewpoint that the acts committed were directed against the security of the German Democratic Republic—and evidence failed to prove even this much—then it should have examined whether such acts did, in fact, constitute a “real danger to the working class”.

This duty to examine stems clearly from the Supplementary Law to the Criminal Code (StEG). The Supreme Court tends towards a broad interpretation of this law; nevertheless, it has repeatedly held that only “serious attacks against the State” warrant a conviction under its provisions.² Regardless of the inconclusive evidence, the court held that such acts had been committed; the court also declared that the defendants were “highly dangerous to society”.

Basing themselves upon these premises, the judges were obliged to pronounce sentences attuned to the general party line. The punishment which they meted out was measured neither by the seriousness of the acts, nor by principles of established guilt; it was rather based upon the danger which the defendants represented for the East German regime. The formula, “the greater the danger, the greater the punishment” disregards the principle that punishment must not exceed guilt. The acts committed by these five youths were not, therefore, interpreted as mere ill-considered actions which constituted infringements of the law but endangered in no way the existence of the State. The trial gave the impression that these infringements were the main

² See: Judgments of 25.4.58; 16.5.58; and 3.10.58, in: Neue Justiz 1958, pp. 392, 494 and 753.

concern of the prosecution; however, the severity of the sentences pronounced proved only too clearly that this had simply been another "opinion trial". The student observers from West-Berlin stated: "The trial was conducted on party lines, in conformity with prevailing ideology, and the extent of the punishment was clearly intended to serve as a deterrent".

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