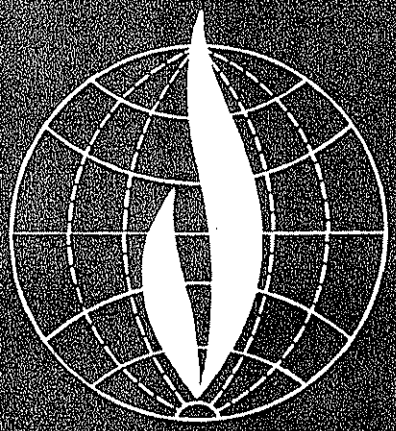


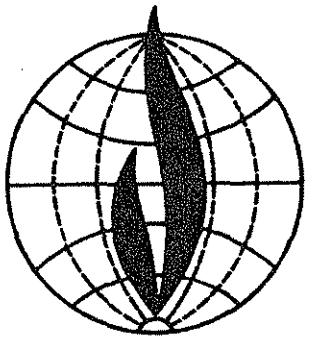
STATES OF EMERGENCY

Their Impact on Human Rights

INTERNATIONAL COMMISSION OF JURISTS

STATES OF EMERGENCY

Their Impact on Human Rights



A study prepared by the

International Commission of Jurists

C O N T E N T S

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INTRODUCTION

by

Niall MacDermot, Secretary-General of the
International Commission of Jurists

There is a frequent and perhaps understandable link between states of emergency and situations of grave violations of human rights. The most serious violations tend to occur in situations of tension when those in power are, or think they are, threatened by forces which challenge their authority if not the established order of the society.

Article 4 of the International Covenant on Civil and Political Rights recognises the right of governments "in time of public emergency which threatens the life of the nation" to derogate, with certain exceptions, from their obligations under the Covenant, "to the extent strictly required by the exigencies of the situation". There are similar provisions in the European and American regional human rights conventions.

Unfortunately there is a tendency for some governments to regard any challenge to their authority as a threat to "the life of the nation". This is particularly true of regimes which do not provide any lawful means for the transfer of political power and which in consequence are inclined to regard any criticism of the government as an act subversive of public order.

When these regimes feel threatened they often declare a state of emergency or other state of exception, and use their emergency powers to suspend what remain of the basic human rights and the procedures for their enforcement. Having dismantled the legal machinery for the protection of the citizen, they frequently permit their security forces to abuse the 'non-derogable' rights, including the right to life and freedom from torture, or other cruel, inhuman or degrading treatment or punishment. There result such inhuman practices as anonymous arrests, secret detentions, disappearances, extra-judicial killings and systematic practices of torture.

As an organisation devoted to the promotion of the Rule of Law and the legal protection of human rights, the International Commission of Jurists decided to undertake a study of states of emergency. Over 15 countries were selected which had experienced states of emergency in the 1960's and 1970's. The selection covers different kinds of emergency under different regimes and in

different regions. Experts from those countries were commissioned to prepare papers which would serve as the basis for the study. They were asked to outline the existing constitutional and legislative provisions governing states of emergency, to describe the circumstances in which emergencies were declared, and for what purposes, the action taken under the state of emergency and the extent to which it complied with the pre-existing legislation, the abuses, if any, which occurred, and the circumstances under which the emergency was terminated or, if such was the case, continued in force after the circumstances which gave rise to the declaration had ceased to exist.

The term 'state of emergency' was interpreted widely to include 'regimes of exception', i.e. regimes that have overthrown, and not merely suspended the previous constitutional order, and have assumed legislative and executive powers analogous to those under a formal state of emergency.

In addition to these country studies, two questionnaires were circulated to 158 governments. One requested particulars of legislation, procedures and practices concerning states of emergency; the other related to the practice of administrative internment or, as it is called in Commonwealth countries, preventive detention, i.e. indefinite detention on executive authority without charge or trial or any form of judicial determination. The reason for the second questionnaire was that most of the victims of the worst violations of human rights are persons who are detained by way of administrative internment under states of emergency. Replies to to these questionnaires were received from 34 countries of which 28 were not the subject of the more detailed country studies.

Based upon these country studies and the replies to the questionnaires the staff of the International Commission of Jurists made a comparative analysis of the legislation, practices and abuses of states of emergency in the different countries, and compared them with the established international norms governing states of emergency. Finally, recommendations were made as to further principles and practices, both at the international and national levels, whose adoption would ensure a greater protection against abuse.

The study by the International Commission of Jurists was carried out in parallel with a study by Madame Questiaux, the French Special Rapporteur of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. She was charged by the Sub-Commission to prepare a report on the Question of the Human Rights of Persons Subjected to Any Form of Detention or Imprisonment (a study of the implications for human rights of recent developments concerning situations known as states of siege or emergency).

The International Commission of Jurists cooperated closely with Madame Questiaux and furnished her with copies of papers it had commissioned from its experts.

The editor of the study, Mr. Daniel O'Donnell, prepared an interim report on states of emergency which was submitted to the UN Sub-Commission and distributed as UN doc. E/CN.4/Sub.2/NGO/93 of 26 August 1981. This was later expanded by Mr. O'Donnell to become the analysis and conclusions in the final chapter of the present study.

The International Commission of Jurists wishes to acknowledge its debt and express its thanks both to him and to the experts for their preparation of, or comments on, the papers which served as the basis for the chapters dealing with particular countries. It should be made clear, however, that these papers have been edited, sometimes substantially, by the staff of the ICJ, and the ICJ alone is responsible for the present text and, in particular, the conclusions at the end of those chapters. The experts, other than those who requested that their names not be published, are:-

Argentina - Susana Aguad; Canada - Prof. André Tremblay; Colombia - Alfredo Vasquez Carrizosa; Eastern Europe - G.P. van den Berg, Prof. F.J.M. Feldbrugge, Gary Sullivan; Ghana - Suzanne La Robardier, Andrew Addy; Greece - Stelios J. Nestor, Poly Papathanasopoulou; India - A.G. Noorani, Fali S. Nariman; Malaysia - Param Cumaraswany; Northern Ireland - Prof. Claire Palley, Douwe Korff; Peru - Diego Garcia-Sayan; Syria - Haciba Ounadjela; Thailand - Prof. Kosol Sobhak-Vichitr; Turkey - Bulënt Tanör; Uruguay - Alejandro Artucio; Zaire - Prof. Jacques Vanderlinden, Prof. Etienne R. Mbaya.

Finally, the International Commission of Jurists acknowledges with gratitude the grant from the United States Agency for International Development, which made possible the preparation and publication of this study.

Geneva, March 1983

THE PRESENT STATE OF EMERGENCY IN ARGENTINA

C O N T E N T S

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I. INTRODUCTION

When the military high command decided in March 1976 to assume the leadership of the Argentina state as the culmination of a process of militarisation of Argentine society, the situation in the country was considered by the Military Junta to be "a war against the enemies of the fatherland". Within this all-embracing concept, any ideology opposed to the military government was considered as endangering the peace and security of the nation.

The first act of the Military Junta was to assume all constitutional powers. The Statute for the Process of National Reorganisation (1) signified the replacement of the National Constitution as the basic law. The Military Junta not only gathered the constituent powers into its own hands, which entailed the enactment of institutional laws amending the Constitution, but assumed authority for the exercise of the three powers - executive, legislative and judicial - by reserving for itself a discretionary area of responsibility over all three, representing itself as the supreme organ of the State. It proclaimed that :

- the Military Junta (composed of the Commanders-in-Chief of the three services) appoints and removes the President of the nation and acts as the High Command of the Armed Forces (2) and

- the Congress is dissolved and the legislative power invested by the Constitution in the Congress is exercised by the Executive, with the assistance of a Legislative Advisory Committee, composed of nine high-ranking military officers (three being appointed by each of the armed forces). This Committee is only empowered to advise the Executive with respect to legislation. Since the assumption of power by the Junta no election, national or provincial, has been held.

- the Military Junta exercises judicial powers. The Institutional Act of 18 June 1976 states : "The Military Junta assumes the right to judge the conduct of persons who have prejudiced the supreme interests of the nation" (article 1). The Military Junta determines the persons who are offenders under the terms of article 1, and may impose the following penalties: loss of political and trade union rights, loss of the right to administer and dispose of property, and, in the case of naturalised Argentine citizens, loss of citizenship.

The effect of these changes is that the rulers of the State are not answerable to the people, who did not elect them, are not

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(1) Official Bulletin, 31 March 1976

(2) The Statute for the Process of National Reorganization provides that the legislative powers with which Congress is endowed by the National Constitution, including such powers as are exclusive to each of its Chambers, shall be exercised by the

entitled to dismiss them, and do not enjoy any political rights or freedoms. The principle of the separation of powers has been abolished. A whole set of repressive emergency laws have been introduced. These have their theoretical basis in the Doctrine of National Security, in which the major tenet is "bipolarity", or the division of the world into two opposed and irreconcilable blocs.

The Military Government and the National Constitution

In 1816 Argentina proclaimed its independence from Spain. However, the process of national organisation did not begin until much later, after a long period of internecine struggle between Buenos Aires - the capital - and the provinces. The governor of the province of Santa Fé, Justo José de Urquiza, resolved in 1852 to strengthen the central government. Until then, the political structure of the Argentine Confederation had been very weak, as it was based on respect for the autonomy of each province. Consequently, Argentine constitutional law came into being as the successor to the public law of the provinces. The provinces incorporated into their respective constitutions the principles in force in Europe for the organization of a liberal State, namely, the separation of powers, representative democracy, and recognition of the basic rights of the individual. The texts of the provincial constitutions were the immediate forerunners of the National Constitution of 1853.

The Constitution was drafted by a Commission comprising a representative of each of the fourteen provinces, who assembled at Santa Fé on 20 November 1852. Seven months later on 1 May 1853, they produced an agreed text.

The Constitution of 1853 was amended in the light of the decisions taken by the constituent conventions of 1860, 1866, 1898, 1949 and 1957, but the basic principles that remained in force are the guiding tenets of liberalism with regard to free enterprise, free trade and a general welcome to immigrants. The Constitution consists of a preamble and 110 articles. The normative part contains the declarations, rights and guarantees of citizens and the basic rules of law on which the structure of power is founded.

In the half century since 1930 a series of military coups have set aside the provisions of the Constitution. Apart from the government of General Agustin Justo (from 1932 to 1938) and the first period of General Peron's presidency (from 1946 to 1952), no constitutional government, elected by the general will of the people, served its full term. In 1930, President Hipolito Irigoyen was deposed; in 1943, General Arturo Rawson overthrew President Ramon S. Castillo, while in 1955, a coup d'état directed by General Lonardi put an end to the government of Peron; in 1962 President Arturo Frondizi was overthrown; in 1966, a delegation of generals notified President Arturo Illia of his removal from office; and in 1976 three military officers, acting

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/continuation of footnote (2)/

> President of the Nation ... A Legislative Advisory Committee /appointed by the Junta/ shall take part in the formulation and approval of the laws, in accordance with the procedure to be established.

on behalf of the Junta of Commanders-in-Chief, informed Sra. de Peron that she no longer held office and placed her in military custody.

Only once in the last fourteen years has the people of Argentina been able to vote for the government of its choice. This was in 1973, when it voted for the return of Peron. Since then military rulers have assumed office under various pretexts, such as "repressing crime and prosecuting delinquents", "restoring the situation to normal", and "protecting the peace and security of the nation".

"If I had to express in one word what has most vitiated the political scene in the last few years, I would say it has been demagoguery" said General Videla on taking power in March 1976. Referring to the election of Peron, he continued: "This is broadly what took place on 24 March 1973, and its background, which has existed for some time, is subversion. Subversion is, in fact, the consequence of demagoguery. It is subversion that pits father against son from one generation to another". (3)

Under article 22 of the National Constitution the act of usurping the power of government is an act of sedition. Article 22 states: "The people shall not deliberate or govern except through the medium of their representatives and authorities established by this Constitution. Any armed force or group of persons who usurp the rights of the people and speaks in their name commits the crime of sedition".

It is clear, therefore, that the military government which has been in power since 1976 is unlawful in form and in essence. In view of the length of time it has remained in power, it cannot be justified (as some have sought to do) as a "de facto" government, i.e., a caretaker government whose term of office is fleeting, and which will remain in power only until a "de jure" government has been elected.

The legal framework of the present system

The instruments which purport to establish the institutional framework of Argentina at the present time are:

- the Basic Objectives
- the Act on the Process of National Reorganization, and
- the Statute for the Process of National Reorganization.

The latter Statute established in article 12 "that the national and provincial governments shall adapt their actions to the

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(3) "La Razon" newspaper, Buenos Aires, 13 April 1976

basic objectives set by the Military Junta, to the present Statute and to the national and provincial constitutions, so long as they are not opposed to them".

The Constitution of 1853 thus removes the basis of the "legal order", and in it are to be found the criteria for determining the legitimacy or illegitimacy of subsequent political and institutional developments.

The nature of the Junta's "Objectives" is clear in its basic outlines. By reaffirming the supreme principles of the "enforcement of Christian morality", "national tradition" and the "dignity of being Argentinian", it attempts to ensure public and social order and "national security". The "communiques" (similar to "ordinances" or "decrees") which the Junta has issued ever since its first day in power, are directed towards this. Communique No. 1 stated "that the whole country is under the operational control of the Junta of General Commanders of the Armed Forces", while No. 4 informed "the people that all the sources of production and places of work, both State and private, shall be considered objectives of national interest"; No. 16 notified "the people that Special Standing Courts Martial have been set up throughout the country" purportedly under article 483 of the Code of Military Justice, and No. 25 authorized the institution of government control over the Confederacion General Empresaria (General Confederation of Entrepreneurs) and the Confederacion General de Trabajadores (General Labour Confederation /CGT/).

If any justification can be found for the military intervention, it lies in the fact that the previous government failed to rid the country of the three revolutionary armed forces which were committing acts of terrorism and disturbing the peace of the nation.

However, the objectives of the Military Junta go far beyond the restoration of law and order. On 7 July 1979, over three years after the coup, the Head of the Army High Command, General Suarez Mason, addressing members of the diplomatic corps in the Institute of Foreign Service to the Nation, said:

> "It would be absurd to presume that we have won the war against subversion simply because we have eliminated the threat of arms. As symptoms of subversive action, we should look at the recent attacks against the university law and against the question of Moral and Civil Training... The aim of this strategy (that of subversion) is to seize power, and, to confront this danger, there must be a comprehensive response on the part of the State. There are two strategies for this - the military and the political - and every Ministry should take an active part in the latter. It is the spheres of religion, politics, education, economics, culture and labour that are now the targets for subversive elements". (4)

The purported legal basis of many of the powers exercised by the Military Junta is the State of Siege, which was proclaimed two years

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(4) "La Voz del Interior", 7 July 1979

before the Presidency of Isabel Peron. As will be seen, the proclamation of this Siege was unconstitutional in form, and therefore invalid. It can be plausibly argued that at that time there was, in the words of the International Covenant on Civil and Political Rights (to which Argentina is not a party) a public emergency which threatened the life of the nation. At least three clandestine armed organisations were engaged in carrying out armed attacks against military units, public offices and private undertakings. However, by 1977, as is shown by the passage just quoted from General Suarez Mason, 'the threat of arms' had been eliminated. Since that time, the powers of the State of Siege have been used to impose a particular political ideology of 'national security' and to suppress all opposition to it.

Today, the situation in Argentina is one of unrelieved peace and calm, as the military are constantly claiming as the result of their rule (5).

Nevertheless, when the Military Junta announced the guidelines for government action in 1981-1984, it stated that "... the National Executive Power (henceforth to be assumed by another military officer appointed by the Junta) shall, in the performance of its actions in the near future, take as the centre of gravity for these actions the need to maintain and increase security and the rule of law". (6) The military government was to continue unchanged, as was the State of Siege in order to preserve national security as the primary objective in face of a supposed constant and latent danger.

After the survey made in Argentina by the Inter-American Commission on Human Rights (IACHR) between 6 and 20 September 1979, the Commission prepared a report, which was approved at its 67th session on 11 March 1980. In referring to the limits to the repressive action of the State (page 26), the IACHR stated:

> "In the life of any nation, threats to the public order or to the personal security of its inhabitants, which emanate from persons or groups who resort to violence, may reach such proportions that they entail the temporary suspension of the exercise of certain human rights."
>
> "Most of the constitutions of the Latin American countries accept such limitations and may even provide for certain states of exception, such as a State of Emergency or a State of Siege, in such circumstances. Naturally, considerations of extreme gravity must prevail for such measures to be taken, since the purpose of their introduction must be to preserve those very rights and freedoms that have been endangered by the disturbance of public order and personal security."

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(5) Message to the country from General Videla, "Clarin", 6 March 1980. "... Behind us, there lies a succession of frustrations and failures, which have been wiped out for ever. Now, at the end of four fruitful and decisive years, in which undeniable achievements have been made in every field, we are entering upon the long-awaited time of creativity".

(6) Guidelines for government action in 1981-1984, "Clarin", 19 August 1980

"Every government", adds the IACHR report, "which faces the risk of subversion must choose between, on the one hand, following the road of respect for the rule of law and, on the other, falling into State terrorism. When a government enjoys wide popular support, the choice of the first road will always prove successful, as a number of countries have demonstrated both in the distant past and in more recent times".

II. EMERGENCY POWERS AND LEGISLATION AND THEIR USE

The legal provisions in force in Argentina relating to the state of emergency can be classified in four categories:

1. The institution of the State of Siege, provided for in article 23 of the Constitution;

2. Emergency legislation, creating so-called "subversive" offences. This takes the form of emergency orders which outlaw a whole range of activities, and specifies procedures for enforcing them, including the extension of military jurisdiction and the application of the Code of Military Justice to civilians;

3. The provisions of the Institutional Act of 18 June 1976, under which the Military Junta assumed judicial powers; and

4. Other repressive legislation aimed at
   - ideological repression,
   - trade union repression,
   - repression of political activities,
   - expulsion of aliens.

1) State of Siege

Requirements for a Valid Declaration of a State of Siege

The institution of the State of Siege is governed by the terms of article 23 of the National Constitution which states: "In the event of internal disorder or foreign attack endangering the operation of this Constitution and of the authorities created thereby, the Province or territory in which the disturbance of order exists shall be declared in a state of siege and the constitutional guarantees shall be suspended therein. But during such suspension the President of the Republic shall not convict or apply punishment upon his own authority. His power shall be limited, in such a case, with respect to persons, to arresting them or transferring them from one point of the Nation to another, if they do not prefer to leave Argentine territory".

A State of Siege may, therefore, be legitimately declared only in the event of internal disorder or foreign attack. Even in those extreme circumstances, the State of Siege may not be declared unless such disorder or attack actually endangers the lawful authorities of the country and the Constitution, and may not be applied beyond the province or territory affected by the danger.

Although article 23 of the Constitution establishes no time limit for the application of the State of Siege, it should be interpreted as meaning that its duration shall not exceed that of the reasons for which it was declared. This interpretation is consistent with the limitation expressly established by article 86, paragraph 19, of the Constitution: "The President of the Nation has the following powers ... He declares, with the consent of the Senate, one or more districts of the Nation in a state of siege for a limited period in the event of foreign attack. In the event of internal disorder, he has this power only when the Congress is in recess, since this is a power belonging to that body. The President exercises this power under the limitations prescribed in article 23".

Internal disorder is understood to mean armed uprising, civil war or rebellion; and foreign attack the invasion of Argentine territory by foreign military forces for hostile purposes. A State of Siege is a constitutional remedy with certain very precise characteristics:

a) in the first place it is a juridical institution of an exceptional nature;

b) it cannot be invoked as a preventive measure, and it is essential that the reasons for it which are mentioned in the Constitution must genuinely exist;

c) the internal disorder or the foreign attack must be of such gravity that it has really endangered the Constitution and the authorities created thereby;

d) it must be limited territorially and temporally; and

e) its nature is not punitive - this being a function of the Penal Code - but defensive.

The State of Siege now in force was declared on 6 November 1974 during the Presidency of Maria Isabel Martinez de Peron. As has been stated, there was an active military threat at the time, which provided adequate justification for the introduction of the State of Siege, at least in parts if not in the whole of the country.

When the Military Junta seized power on 24 March 1976 it reminded the population that the State of Siege was still in effect.

It is quite clear from the speech of General Suarez Mason, which has already been quoted, that by 1977 there was no longer any 'internal disorder' and no constitutional justification for continuing the State of Siege. However, more than six years after the overthrow of the constitutional government it still remains in force.

Instead of safeguarding the rule of law, constitutional stability and personal security, this exceptional constitutional remedy has become an instrument of ideological repression designed not to protect the security of citizens, but to foster legal insecurity by discretionary acts of the Executive. In particular, the Executive is using its power to detain persons without any effective judicial review on purely political grounds.

Procedure for the declaration of the State of Siege

In the event of internal disorder, the organ of the State empowered to declare the State of Siege is the Congress (7), and, in the event of foreign attack, the Executive with the agreement of the Senate (8).

In order for the declaration of the State of Siege to be constitutionally valid, the two Chambers of the Congress must both give their consent, or it must be approved by them if the Executive has declared it while they are in recess. The decree issued by the Executive on 6 November 1974 declaring this emergency measure was promulgated while the Congress was in recess, and was not submitted to it for consideration when it reconvened. The State of Siege was therefore clearly unconstitutional, and was even more so after the overthrow of President Isabel Peron and the closing down of Congress in 1976.

Under the Constitution, the Executive lacks authority to declare a State of Siege when the Congress is in session, and during a congressional recess its authority to do so is entirely provisional, lasting only until the Chambers reconvene.

Conditions for Administrative Detention of Persons 'held at the disposal of the Executive'

The constitutional basis for the arrest and administrative detention of suspects without trial under a State of Siege rests upon the President's power of arrest in article 23 of the Constitution, which has already been quoted. The orders (called decrees) providing for administrative detention must fulfil the requirements set forth in law 19 549, article 7, relating to the competence, cause, object, procedure, motivation, purpose and form of the arrest. These provide that any order for arrest or transfer under the State of Siege must be issued personally, in writing, by the President. ('Transfer' means transfer to another part of the country). It must be based on real, concrete grounds. The reasons for the arrest must be shown to be related to the reasons for the declaration of the State of Siege. The decrees must therefore be individual and must state precisely the particular grounds in each case.

Nonetheless, most of the orders for the detention of persons 'at the disposal of the Executive', as it is called, have been signed long after the arrests took place, in order to counter pleas of habeas corpus made on their behalf; in other instances, when the courts have ordered the release of the detainees, finding the case brought against them inadequate, these orders have been used to keep them under detention. Apart from the fact that these orders are drawn up by the security or military forces and submitted to the Executive for signature after the actual arrests, they do not follow other legal requirements necessary for them to be valid.

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(7) Article 67, paragraph 26 of the Constitution

(8) Article 86, paragraph 19 of the Constitution

In many cases they are "collective" rather than individual orders, in which general charges are made against a number of citizens. Moreover, the specific reasons for each arrest order are not stated; instead, a stereotyped formula applicable to any detained person is used in all cases.

Among the cases mentioned by the Inter-American Commission on Human Rights, No. 2114 (Dora Goldfarb and Pedro Lucero) illustrates the ambiguity and vagueness of the grounds on which they are being held. Both were arrested on 24 March 1976 and held in the military jail of Mendoza without charges being brought against them. Several months later, on 29 June 1976, they were placed "at the disposal of the Executive, since they had been involved in activities jeopardizing the internal peace and the essential interests of the State" (decree 1120). Dr. Goldfarb was a judge in the city of Mendoza.

In the report of the Inter-American Commission on Human Rights (Chapter IV, The Right to Freedom, paragraph 3, page 140), the Commission finds, after considering all the observations and testimony before it, that: "The detention of individuals for an indefinite time, without specific charges, without trial, without defense counsel, and without effective means of defense, is a violation of the right to liberty and to due process of law. This is all the more serious if we bear in mind that in many cases, the detainees have been tried and their cases dismissed by the civil or military courts, and they are nonetheless still detained by orders of the Executive. The same situation occurs when individuals have completed their sentence, but despite this, they continue to be detained sine die".

The report of the IACHR pays particular attention to the detention of persons who have been charged with offences and brought to trial, and whose cases have been dismissed. Instead of being released, they are held in administrative detention 'at the disposal of the Executive'. The IACHR found these cases particularly grave, and mentions, among others, no. 3905, a disturbing account of the experiences of a doctor, Norberto Ignacio Liwsky, who was kidnapped from his home on 25 April 1978. After two months of clandestine detention, during which he was brutally tortured, he "appeared" at a police station in Greater Buenos Aires. A military tribunal (known as a Council of War) based at the 1st Command of Palermo, before which his case was brought, declared itself incompetent to handle it, and forwarded it to the federal courts. Meanwhile, in decree no. 1613 of 18 July 1978, the Executive ordered the arrest of Dr. Liwsky in the exercise of the powers conferred by article 23 of the Constitution. The federal judge, Dr. Martin Anzoategui, ordered that the case be dismissed and Dr. Liwsky released on the grounds of an infringement of law 21 325. During its visit, the IACHR received an authentic copy of the ruling of the federal judge. Nonetheless, Dr. Liwsky is still being detained at the disposal of the P.E.N. at Unit 9 of La Plata, where the IACHR was able to interview him.

With regard to persons who, although they have completed their sentences, are still in detention, the IACHR received numerous complaints, including the case of H. R. Perie (no. 3390) on which the Commission requested information from the Argentinian government. The government replied by note dated 17 October 1979. Among other things, it stated

that: "the Executive feels it advisable to keep Perie under detention; it is of the opinion that his release or his exit from the country would pose a threat to the domestic peace", and that "while it is Perie's human right to enjoy freedom it is also a human right - not just of one, but of thousands of Argentines - to live in peace".

The IACHR's comment on this official response stated, inter alia, that: "this is a misinterpretation of article XXVIII of the American Declaration of the Rights and Duties of Man. In fact, thousands of Argentines could not live in peace in the absence of the security that the decisions of the judiciary would be respected". (9)

The power of the Judiciary to review constitutionality

The fact that the State of Siege is in force does not mean that the Judiciary ceases to function or to exercise its full powers. Nor does it mean that the remedy of habeas corpus loses its effectiveness. The Supreme Court and the lower courts of the Nation have the duty to review the constitutionality of the acts of the executive power. Such a review may be demanded by a person directly affected, or by any citizen, as all citizens have the right to make sure that their rights and guarantees are being properly respected (10).

Constitutionally, all decisions of the executive power are subject to judicial review, as a result of which such acts may be acknowledged to be valid, or pronounced wholly or partially null and void. Although the application of the State of Siege by the military government of Argentina has led to the virtual elimination of the autonomy of the Judiciary, and to widespread limitation of its powers of review, including habeas corpus, there are some judicial rulings, such as the case of Carlos Mariano Zamorano, which confirm the power of review inherent in the Constitution.

In April 1977, the Federal Court of Appeal quashed the decision of a lower court which had rejected the motion of habeas corpus brought on behalf of Zamorano, a well-known advocate. The Court stated that, concerned over the length of time for which Mr. Zamorano had been detained, it had requested information of the Minister of the Interior, who replied that the prisoner had been detained pursuant to the powers granted to the National Executive under articles 23 and 86, paragraph 19, of the Constitution, that Decree 1761/74 had been issued for this purpose, and that the reasons which led to the issuance of the Decree continued to exist. The Court once again requested the necessary information, stating to the Minister that it had to "be informed of

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(9) IACHR report on Argentina, pages 162/3.

(10) Article 100 of the Constitution: "The Supreme Court of Justice and the lower courts of the Nation have jurisdiction over and and decide all cases dealing with matters governed by the Constitution".

the actual reasons for the particular arrest and detention". In reply the Minister sent a copy of Decree 1761/74 (i.e. the detention order). In its judgment the Court stated:

> "As regards the substance of the issue, it should be recalled that this Court has in previous decisions stated that the Judiciary is an integral part of the Government of the Republic and as such shares the administration of the State in its judicial and institutional organisation, acting within its own area of competence.
>
> "For this reason it is its bounden duty to safeguard the rights and guarantees contained in the National Constitution, which have been emphatically reaffirmed in the Institutional Acts which are the basis for the present process of national reorganisation.
>
> "It is not possible to accept the argument that the President of the Republic is alone empowered to examine the situation of those who are detained at his order. Although it is clearly beyond the scope of judicial activity to consider matters of political and not judicial import, it is equally clear that it is the duty of the Judiciary of the Nation to examine exceptional cases such as the present as to the reasonableness of the measures taken by the Executive and this is set out in Articles 23, 29 and 95 of the National Constitution.
>
> "The general interest has also to be balanced by individual liberty so that it must in no way be supposed that those who are detained at the pleasure of the Executive are simply to be left to their fate and are removed beyond the scope of any review by the national judiciary, no matter how long they might be kept under arrest.
>
> "It is self-evident that if at the end of two years of detention of a citizen the Administration can show no other basis for this detention than the Decree under which it was ordered, and if such an extended period of time has not been used diligently by the Administration to collect evidence against or in favour of the accused, this Court can only conclude that since there appear to exist no elements showing that Carlos Mariano Zamorano is particularly dangerous and in view of the time which has elapsed since his arrest, it would be unreasonable and unfounded to prolong such a situation."
>
> In conclusion, the judgment states:
>
> "although it is evident that the factual situation giving rise to the declaration of the State of Siege continues in its entirety, this in itself is not sufficient to justify the extension of detentions for such lengthy periods of time that they transform the exceptional character of the procedure in question into what is really a penal sanction."

In granting the motion of habeas corpus the Court of Appeal ordered the Executive to release the prisoner immediately. This order was not, however, executed. It was appealed by the Solicitor-General and the Supreme Court (in July 1977) requested further information from the Executive. The latter provided the information requested and this was accepted by the Supreme Court which, on the basis of the arguments presented by the Executive, decided that the detention of Zamorano could continue even though he was not brought to trial.

Effects of the State of Siege on constitutional guarantees

The judgment in the Zamorano case shows that it is legitimate to invoke habeas corpus or any other form of amparo while the State of Siege is in force, since the Judiciary is empowered not only to judge the constitutionality of the State of Siege but also the way in which the President of the Nation exercises the powers conferred on him by article 23 of the Constitution. Any act of the executive power which goes beyond the arrest or transfer of a person is unconstitutional. The Constitution confers this exceptional emergency power by virtue of the State of Siege because when it is not in force, only the judges are empowered to authorise the arrest and detention of citizens.

When the Constitution, in its first part, speaks of Declarations, Rights and Guarantees, the term "Guarantees" should be understood as meaning the practical measures for the protection of rights. Apart from the arrest or transfer by judicial order, no "practical measure for the protection of rights" is suspended during the State of Siege. The demarcation of the suspended guarantees is a fundamental question, as the exercise of all the other guarantees during the state of emergency depends on it. For that reason, when article 23 of the Constitution says that the power of the President "shall be limited... with respect to persons, to arresting them or transferring them from one point of the Nation to another, if they do not prefer to leave Argentine territory", it means that the only guarantees suspended during the State of Siege are those pertaining to the right not to be arrested or transferred except by decision of the regular judges.

Where a person is arrested or transferred under the emergency powers of the State of Siege, he has the right under article 23 of the Constitution to leave the country. If he expresses a desire to do this, he cannot be kept in detention, but must be immediately offered a chance to go abroad. This right of the detainee to leave the country, known as the "right of option" is absolute and of benefit exclusively to the arrested or transferred person. Any refusal or delay in granting the request to leave make the detention or arrest illegal, with the effect that a plea of habeas corpus resulting in an immediate release then becomes possible.

In practice, however, this "right of option" has become virtually an act of grace granted by the Executive on the basis of criteria which are so subjective and confidential that it is usually impossible to find out why a person, after years of detention, is granted or denied permission to leave the country.

The rules governing the right to leave the country were laid down in decree no. 807 of 1 April 1975, but they have become subject to progressively stricter conditions to the point where it is now no longer available except in cases in which the President and his Advisory Commission (11) find that "the detainee will not endanger the peace and security of the nation if allowed to leave the national territory".

After the coup, all requests to exercise this option were turned down, regardless of the stage which had been reached in each individual case (law 21 275 of 29 March 1976). Then the right was suspended for a period of 180 days by law 21 448 of 27 October 1976. On the same day, law 21 449 of 27 October 1976, made it possible to "request to use this right", though stipulating that the Executive shall grant it only to those detainees who, while outside the country, do not endanger national peace and security. However, law 21 568 of 30 April 1977 again suspended the right of option for 150 days starting on 1 May 1977. Eventually, a statute of 1 November 1977 lifted the suspension, and the granting of the right was made contingent on the assessment which the Executive and its Advisory Commission made of the potential conduct of the detainee outside the country (12).

Another law, no. 21 449, was also passed on 27 October 1976 stating that anyone who exercised his right of option and went abroad was prohibited from returning to the country until the State of Siege was lifted, unless he had a special authorisation to do so from the Executive. Anyone returning in violation of this law is liable to 4 to 8 years' imprisonment.

The procedure was again amended by law 21 650 of 26 September 1977. This provided that arrested persons can request the option ninety days after the date of the decree under which they are being held. An indication by the host country that it is willing to receive the detainee is required. The President is to grant or deny the request within the next 120 days. Six months after a denial, a new request may be made.

In an interview which the IACHR had with the Minister of the Interior, General Harguindeguy (page 170 of the report), he acknowledged that "any limitation on the exercise of the right /of option/ depends upon the degree of potential danger of the individual and upon reasons of security, and therefore consideration is given to the varying degrees of control that the governments of the receiving countries might have over the individuals to whom the right to leave Argentina is granted".

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(11) Presided over by the Ministry of the Interior and consisting of one representative of each of the Armed Forces, the Under-Secretary of the Interior and Justice, and an Under-Secretary of the Secretariat of State Intelligence.

(12) The Advisory Commission was created by the Institutional Act of 1 September 1977.

Conclusion

Both the declaration of the State of Siege and the way it has been put into effect by the military government are in violation of the constitutional norms to which it should conform if it is to be validly invoked.

For this reason, the IACHR included among its recommendations to the Argentine government (page 265 of the report) the following:

> "4. To consider the possibility of lifting the State of Siege, in view of the fact that, according to repeated statements made by the Argentine government, the reasons for which it was imposed no longer exist.
>
> "5. As regards detainees at the disposal of the Executive (PEN) and the right of option to leave the country, that the following measures be adopted:
>
> (a) That the power granted to the Head of State pursuant to Article 23 of the Constitution, which authorizes the the detention of persons during a state of siege, be made subject to a test of reasonable cause, and that such detentions not be extended indefinitely;
>
> (b) That the following persons, detained at the disposal of the Executive (PEN), be released:
>
> i. Persons who have been detained without reasonable cause or for a prolonged period of time;
>
> ii. Persons who have been acquitted or who have already completed their sentences;
>
> iii. Persons who are eligible for parole.
>
> (c) That the exercise of the right of option to leave the country be completely restored, so that the processing of applications not be delayed in any way that might hinder the actual exercise of this right."

2) Emergency Legislation

Jurisdiction of Military Courts

Laws 21 264, 21 268 and 21 272, which were enacted immediately after the new government had come to power (13) dealt with the application of the Code of Military Justice, the formation of military courts known as Special Standing Councils of War, trial by such Councils using summary wartime procedures, the application of penalties laid down in the Military Code, including the death penalty.

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(13) Published in the Boletin Oficial of 26 March 1976 (the first two) and 31 March 1976 (the third).

On 1 December 1976 these emergency laws were repealed by law 21 463 and replaced by law 21 461, whose scope far exceeds the limits set by the three former laws.

Law 21 461 set up a military system of justice and determined which types of offences covered by the Ordinary Penal Code and the Code of Military Justice should be tried by military courts.

Article 1 provided that military courts would try persons involved in the acts or situations listed in sub-paragraphs a) and b), which refer to certain categories of conduct described in the Code of Military Justice and the Penal Code, these were to be tried in accordance with military procedures by the Councils of War created under article 4 of the law.

Article 1, sub-paragraph a) covers the provisions of the Code of Military Justice dealing with the following offences committed by civilians: proposal of conspiracy; conspiracy; insubordination; violence; resistance with acts of violence; incitement or promotion of sedition; incitement to desertion and non-compliance with obligations under the Law of National Defence or service commitments (14).

Sub-paragraph b) of the same article refers to the following provisions of the Penal Code: article 80 bis, sub-paragraph 2) - qualified homicide when the victim is a member of the security forces, even off-duty; articles 92 and 93 - attenuated injuries; article 222 - disclosure of military or political secrets related to security; article 223 - espionage; article 224 - prohibited reproductions; and article 225 - attacks on the armed forces or security forces. Military jurisdiction covers offences involving damage to any building, installation, ship, aircraft, vehicle of any sort, and arms or any other property "placed at the disposal of the Armed Forces, the security, police and penitentiary forces, provided that such damage was the subversive purpose of the acts committed".

Article 3 of the law applies military jurisdiction to instigators (article 209 of the Penal Code); members of illegal associations (articles 210, 210 bis and 210 ter); persons advocating subversive acts; persons corrupting troops or usurping positions of command (article 234); persons guilty of receiving corrupt favours or of receiving goods of suspicious origin.

From article 4 onwards, the law deals with the establishment and functioning of the Special Standing Councils of War responsible for trying offences covered by the law. The commanders of defence zones and subzones, or officers of equivalent rank in the Navy and Air Force, are to be responsible for establishing the Councils in the light of the number of cases, and appoint their members (article 5). The President of the Council shall always be a high-ranking officer, general or the equivalent, for offences carrying the death penalty (article 6, sub-paragraph a), and a colonel or the equivalent if the maximum penalty is 25 years imprisonment (sub-paragraph b).

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(14) Articles 647 (last paragraph); 669, 671; 693; 727; 728; 820 (last paragraph); 826; 859; and 870 of the Code of Military Justice.

The applicable procedure is that set forth in articles 502 and 504 of the Code of Military Justice ("summary procedure in time of peace").

In firmly enunciating the principle of the separation of powers, and according a marginal status to the military jurisdiction, the Constitution followed the trend current at the time of its elaboration, drawing on the draft constitution of Juan Bautista Alberdi (Basic considerations and points of departure for the national organization) and on the thinking embodied in the constitutions of the United States and European countries (15).

Even in the case of a "foreign war", the civilian courts must deal with cases involving crimes against the sovereignty and security of the Nation if the offenders are civilians. The "war powers" of the Executive as Commander-in-Chief of all the sea and land forces of the Nation emanate from the Constitution, and cannot prevail over the norms which that Constitution establishes. In addition, the Penal Code makes specific provision for the intervention of civilians in the field of military action, these offences being punished by extremely severe penalties which were further strengthened after the reform of 1 July 1976 and include the death penalty.

The power or capacity of the Military Courts to pass judgment is confined to specifically military offences of which serving military personnel are accused.

The emergency laws with which we are concerned, however, are based on a different criterion, in that they ascribe to military jurisdiction a broad range of types of offences by civilians directed not only against the armed forces but also against other security forces, including police and prison personnel. They also include offences which have nothing to do with the armed forces, including many minor contraventions of the law.

In practice, through the application of the doctrine of national security, the superiority of the military over the ordinary civilian jurisdiction has now been established. Moreover, the military jurisdiction has conferred upon itself the power to determine its own competence, and guarantees of due process are lacking, with pre-trial enquiries being held to constitute full proof under law 21 460.

Powers of arrest and preliminary investigations

Law 21 460 was promulgated on 18 November 1976. This law is the most serious of the measures adopted by the military government in its repurcussions on individual security. It is procedural, empowering the federal police, the provincial police forces, the national gendarmerie, the naval prefectura and the armed forces to intervene in "the investigation of subversive offences" by detaining

(15) Cf. French law of 17 October 1977, article 4: "No offence is military unless committed by an individual who belongs to the army".

suspects. The law also stipulates - in article 9 - that statements and other evidence submitted to the (military) examining magistrate in the pre-trial proceedings shall have full value as proof until the contrary is demonstrated, with no need for verification (by the magistrate).

Unlike the normal procedure, in which the examining magistrate, who is a member of the judiciary, verifies the preliminary enquiries made by the police, law 21 460 presumes from the outset that the procedures carried out by the armed forces are wholly above reproach. Irregularities in the conduct of the preliminary enquiries remain uncorrected and judgment is pronounced on the basis of such evidence, the presumption of legality being applied to reject out of hand any doubt as to the accuracy of those enquiries.

As the preliminary enquiries are held to constitute fully valid proof, the effects of torture or any other form of duress are not considered or taken into account. As was to be expected, this led to a massive increase into the use of torture, already a frequent practice during interrogation, and in turn to the phenomenon of "disappearances" on a truly massive scale. Human rights organisations have details of the disappearance of over 6,000 suspects and they believe there are several thousand more cases which have not been reported to them.

When explaining the reasons for the law, the Ministry of Justice stated in the preface to the text that "this simple and flexible procedure will make it possible to assemble rapidly and concretely all the evidence which is necessary so that the competent court can, in due course, judge the matter and find the accused guilty or innocent".

Article 1 of the law states that investigation by means of the summary procedure shall be appropriate when information from any source whatsoever suggests that a subversive offence may have been committed.

The substance of the concept "subversive" is not only that governed by law 21 461, referred to above, but also that defined in the broadest possible terms by the emergency provisions which repress the dissemination of ideas, as well as strikes and other economic and social conflicts and political activities. These will be examined in more detail in Section IV below, together with Security Laws 20 840 (and amendments) and 21 338.

Article 2 provides for the intervention, in such cases, of the federal police, the provincial police forces, the national gendarmerie, the naval prefectura or the armed forces, giving them new powers to detain suspects caught in flagrante delictu or those in respect of whom there are strong indications or prima facié evidence of guilt.

Article 3 stipulates that "the chief of the unit or equivalent body shall be authorized to appoint the person in charge of the preliminary proceedings; while article 4 provides for the application of the provisions of the Code of Penal Procedure. However, the protection implied by this latter clause became a "dead letter" by virtue of article 9 of the law, whereby the military examining magistrate is not required to verify the evidence submitted to him.

The right of the individual to his 'natural jurisdiction'

Military jurisdiction is of an administrative and disciplinary character. For this reason, it is applied by officers of the armed forces on the basis of principles of hierarchy and discipline. The highest military authorities in the place or region concerned are empowered to appoint examining magistrates and also appoint the members of the Councils of War, and give or withhold their consent to their rulings. In other words, they apply principles which are completely different from the impartiality and independence which should govern the judiciary. Indeed, the judiciary (16) has been systematically and permanently pushed aside to make way for the armed forces and the security forces, which are engaged in operating a system of political repression.

The 1853 Constitution endowed Argentina with a legal system of scrupulously enumerated individual rights. Article 18 of that Constitution provides that "defence of the person by trial is inviolable; no inhabitant shall be denied trial by his natural judges, nor judged by special commissions". This provision is based on a historical tradition, whereby the ordinary civilian courts are empowered to handle all cases, including crimes against the sovereignty and security of the nation, and the judges of these courts are the 'natural judges' of civilians.

The natural judges of armed forces on the other hand, are the judges of the military courts, but they clearly cannot be the natural judges of civilians. Those who argue that the intervention of military courts emanates from the power of the State to protect its institutions from violent attack, not only circumvent constitutional principles and totally fail to take account of the principle of the division of powers and guarantees of due process, but also would have "states of emergency" become the normal way to respond to any emergency whatsoever. The Constitution would then govern those periods which were perceived to be "normal", in accordance with the assessment of those in power, and could be supplanted at any time they thought fit by systems diametrically opposed to the principles on which they, and the institutions of the nation, are supposedly based.

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(16) It should be noted that, under the Act for the Process of National Reorganization of 24 March 1976, the Supreme Court, the Attorney-General and the Higher Provincial Courts were removed from the sphere of the Judiciary. All other members of the Judiciary lost all security of tenure and became liable to transfer to other posts or to removal from office without any reasons or justification being given.

The guarantee of non-interference by the Executive in the administration of justice is set forth in articles 94, 95, and 100 of the Argentine Constitution which article 3 of law no. 27 of 6 October 1862 establishes as the fundamental law governing the national courts and judges in the discharge of their functions (17).

Military justice procedures

In peacetime the "summary proceedings" described in article 502 of the Code of Military Justice, are exceptional in nature, and apply only when "there is an immediate need to punish an offence in order to maintain the morale, the discipline and the fighting spirit of the armed forces, and in the case of grave offences such as treason, uprising, sedition, looting, violence against superiors, attacks on guards and the murder of sentries". Moreover they apply only to personnel of the armed forces. As has been seen, law 21 461 appliesthis summary procedure to a whole range of offences, of which very few fall within the "extraordinary situations" provided for in article 502 of the Code of Military Justice. On the contrary, apart from the fact that it refers to conduct on the part of civilians, the terminology of this law is so ambiguous that it applies loosely to almost any kind of situation: it could even include a speech made by a trade unionist in private or in public ("advocacy of an offence with subversive motivation or objectives"), or the distribution of leaflets by a member of a disbanded political organization ("unlawful association"), or participation in a strike which has been declared illegal ("non-fulfilment of obligations under the national defence law after a particular place of work has been declared a military installation"), etc.

Military procedure prevents the accused having a civilian defence lawyer. According to article 97 of the Code of Military Justice, the accused must be represented by a serving or retired officer, who need not be, and almost invariably is not, a lawyer.

It is apparent that the closed legal order of military procedure contains none of the prerequisites of due process. A military officer representing a defendant is performing an "act of service". He is doing his duty to the army, and cannot make value judgments unfavourable to the political or administrative actions of the government. In practice, he will not challenge the validity of the pre-trial enquiries made by the security forces, which need no verification by the examining magistrate or the trial court.

Under the military summary proceedings, the following requirements of due process are lacking:

a) the existence of an independent court consisting of judges who cannot be removed from office as long as their conduct remains above reproach;

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(17) Cf. Article 94 of the Constitution: "The Judicial Power of the Nation shall be vested in a Supreme Court of Justice and in such lower courts as the Congress may establish in the territory of the Nation". Article 95: "In no case may the President of the Nation exercise judicial functions, assume jurisdiction over pending cases or re-open those decided".

b) the right of the accused to choose his own defence lawyer;

c) the right of the defence lawyer to act from the moment of arrest;

d) the requirement that the charges be made public;

e) the right to be tried by an accusatory and not an inquisitorial procedure;

f) effective recourse at all stages of the proceedings;

g) equality of rights between the prosecution and the defence; and

h) presumption of innocence until the contrary is proved.

Referring to the guarantees of the administration of justice, the report of the IACHR (Chapter VI, page 224) points out that the "declaration of the presumption of innocence" provided for in article XXVI of the American Declaration of Human Rights and Duties has been abolished in Argentina as a judicial guarantee. As for the right to an impartial trial, the report states that "According to this information (received by the Commission) the military courts composed of officers involved in the repression of the crimes they are judging, do not offer guarantees of sufficient impartiality".

The IACHR recommends (page 265, paragraph 9) that the Argentine government adopt the following measures related to due process guarantees and legal defence:

"a) To assure legal due process guarantees to persons who are brought to trial before military courts, especially the right to a defence by an attorney of the defendant's choosing.

"b) To appoint a Commission of qualified jurists to study the trials conducted by military tribunals during the state of siege, and to make pertinent recommendations in those cases where due process guarantees were lacking.

"c) To guarantee and facilitate an effective judicial investigation of the cases of persons detained under the security laws.

"d) To facilitate the provision of an effective defence by attorneys providing legal services to defendants."

III. ASSUMPTION BY THE MILITARY JUNTA OF JURISDICTION TO TRY PERSONS FOR JEOPARDIZING THE HIGHER INTERESTS OF THE NATION

By article 1 of the Act of Institutional Responsibility of 18 June 1976: "The Military Junta assumes the power and responsibility to judge the conduct of persons having jeopardized the higher interests of the nation by failure to comply with basic moral principles in the performance of public, political or union functions or by activities detrimental to the public interest".

This extraordinary provision takes no account whatsoever of the fundamental principle on which the administration of justice should be based: nullum crimen, nulla pena sine lege. Moreover, it explicitly established the retroactivity of the law creating this vague new category of offence. Citizens are found guilty in respect of earlier conduct not covered by the categories of offences listed in the Penal Code but which, as soon as the special provision is enacted, become offences.

The characterization of the conduct on which the charges are based may be so thoroughly subjective as to make a mockery of the guarantee of respect for freedom. The Executive can choose to judge an official on the basis of his actions during an earlier period when his conduct was considered proper and lawful, or a union leader who, in the light of his past record (opposition to a certain economic policy, for example), could be regarded as having "jeopardized the interests of the nation".

These provisions are contrary to article 18 of the Constitution: "No inhabitant of the nation may be punished without a prior judgment pursuant to a law which antedates the offence", and article 95: "In no case may the President of the Nation exercise judicial functions, assume jurisdiction over pending cases, or re-open those decided".

IV. OTHER REPRESSIVE LEGISLATION

Ideological Repression

On 28 September 1974, during the period of constitutional government, Security Law 20 840 was adopted in order to "protect the institutional order and the social peace of the nation". Article 1 provides for penalties of 3 to 8 years' imprisonment, unless the offender is liable to some more severe punishment, for persons who, in pursuit of their ideological aims, "attempt or advocate", in any manner whatsoever, the disruption or termination of the institutional order and social peace of the nation in a manner not established by the Constitution and the legal provisions which organize the political, economic and social life of the nation.

After the coup d'état of 24 March 1976, the language of the article became clearly inapposite because of its reference to the Constitution, when a new legal order had been created on the basis of the Statute on National Reorganization and the Institutional Acts. This accounts for the change introduced by law 21 459, which, instead of the expression "not established by the Constitution and the legal provisions", reads: "not established by the normative provisions".

The content of the Security Law had already been extended, immediately after the assumption of power by the military authorities, through communiqué 19, which provides for an indefinite prison term for "anyone who in any manner whatsoever disseminates, divulges or propagates communications or images emanating from or attributed to unlawful associations, or persons or groups known to be devoted to subversive or terrorist activities. Anyone who in any manner whatsoever disseminates, divulges or propagates news, communications, or images with a view to disrupting, jeopardizing or slandering the activities of the armed forces, or security or police forces will be punished by up to ten years' imprisonment".

The application of article 1 of Security Law 20 840 in present circumstances assumes an almost farcical aspect. This law was enacted at a time of constitutional government. If ever the offence was committed of attempting or advocating "the disruption or termination of the institutional order .. in a manner not established by the Constitution", it was committed by the authors of the military coup of 24 March 1976. As there is now no way of terminating the existing institutional order in a manner "established by the normative provisions", it means that anyone who advocates the return to constitutional rule is committing an offence under this law.

Article 2 of the law refers to "acts of disclosure, propaganda or dissmentation tending towards indoctrination, proselytizing or instruction in the types of conduct described in article 1". The words "tending towards" are extremely vague to create a penal offence. For example, an opinion voiced by a teacher in the sphere of history, sociology or economics could qualify as an offence if it refers to contentious or polemical matters, and the mere teaching of certain periods or phases in the life of the people could become prohibited. The law also punishes anyone who possesses, displays, prints, publishes, reproduces, distributes or supplies material which serves to report on or to propagate acts, communications or images related to the categories of conduct described in article 1. These penal categories are incompatible with the guarantees of freedom of expression and of the press in articles 14 and 32 of the Constitution (18). The law puts at risk the journalist or radio announcer who conveys information which may be thought to tend towards indoctrination aimed at the termination of the existing institutional order, as well as the editor of any publication containing it.

The mere possession of such material is included among the penal categories defined by this order: in other words, someone who has prohibited publications in archives which he keeps for his own personal information, as well as someone who happens to be in possession of an offending leaflet, would both qualify as offenders.

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(18) "All inhabitants of the Nation enjoy the right to publish their ideas through the press without previous censorship"; "The Federal Congress shall not enact laws that restrict the freedom of the press or that establish federal jurisdiction over it".

An amendment to the Security Law, by law no. 21 886, relates to teaching. In violation of the constitutional "right to learn and to teach", teachers may find that they have committed an offence if what they tell their students falls within a broad range of prohibited areas (19).

The law as amended by the Military Junta, prescribes a punishment of two to six years' imprisonment for those who "by virtue of their knowledge, profession, duties, employment, authority or seniority behave in such a way that their influence on others should cause in them, either individually or collectively, the kinds of conduct described in article 1 of the Security Law". In other words, the innocent conduct of a teacher in giving instruction to his pupils may be punished merely because it may have aroused in one of them the idea of acting in one of the ways described in article 1.

The Argentine Federation of Bar Associations (FACA) made clear in a statement dated 4 August 1979 that "enforcement of law no. 20 840, prejudicial to freedom of the press, cannot be maintained without injury to the Republic, which is why its immediate modification is urged" (20).

Suppression of trade union rights

When it seized power on 24 March 1976, the Military Junta issued communiqué no. 3 from the headquarters of the General Army Command making infringements and shortcomings in the provision of public services subject to military authority and liable to punishment according to the Code of Military Justice. Communiqué no. 4, which was issued at the same time, stipulated that "The sources of production and both state and private places of work are considered to be objectives of military interest". In this way, at a stroke, all public services and all work places became subject to military jurisdiction.

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(19) The Provincial Secretariat of Education banned the teaching of modern mathematics in the city of Cordoba; the circulation of the works of various Latin-American authors such as Garcia Marquez and Pablo Neruda is prohibited throughout the country. The ban on the circulation of Le Petit Prince, by Saint-Exupéry, brought a vigorous protest from the writer Ernesto Sabato. At the present time, the Executive has banned the distribution, sale and circulation of the following publications: the Enciclopedia Salvat Diccionario y Universitas and the Gran Enciclopedia del Saber (Vols. 2 and 9), as officially announced by the Secretariat of Public Information (Clarin, 30 September 1980).

(20) 500 journalists have been obliged to leave the country and many others have disappeared or are being detained. The list submitted to the IACHR by the Commission of Relatives of Journalists gives the names of 68 missing journalists and 80 who have been detained on political grounds. (Report of the IACHR, page 236/7).

Communiqué no. 25 decreed the dissolution of the CGT, the trade union confederation, the seizure of its funds and the termination of the status of the trade unions. On 26 March 1976 military personnel occupied the central union headquarters of the engineering, metalworking, textile, construction and other unions of the federal capital. Decree no. 10 prohibited throughout the national territory any activity on the part of the principal trade unions, referred to as "the 62 organizations", or any others which might replace them. This decree was directed against the federations and unions which comprise 75% of the workers in the country. Paragraph 7 of the Act for the Process of the Reorganization of the Nation suspended trade union activities indefinitely, thus preventing any attempt to obtain improvements in working conditions. Decree 9776 prohibited the holding of any elections and the convening of any regular or extraordinary assemblies or congresses of associations of employers or workers' associations.

The restrictions on trade union activities announced in the first few months of the military government were gradually made more severe in some cases, while in others they were simply abolished (21).

Among the more important laws was law 21 400 of 3 September 1976, whereby measures of direct action on the part of employers and workers were suspended. Although the order was intended to apply to "circumstances in which the public order is disrupted, an economic or social emergency exists or a State of Siege has been declared", and the Executive was given discretionary powers as to when it should enter into effect, it did in fact enter into force as soon as it was enacted.

The penalties for workers who take part in any strike, work stoppage or slow-down or other action which could affect production are from 1 to 6 years' imprisonment, unless the offender is liable to some more severe punishment (article 5).

When speaking of trade union rights, the IACHR points out in its report that:

> "It is a matter of concern to the Commission that for several years, but especially since 24 March 1976, trade union leaders have been held prisoner in industrial centers of Argentina without judicial order, or detained at the disposition of the Executive (PEN) or have disappeared". (22).

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(21) Law 21 261 suspended for an indefinite period the right to strike. Law 21 322 dissolved the lower level union bodies.

(22) The provisions which restrict or abolish union rights violate article 14 of the Constitution, as enlarged by the amendments of 24 October 1957, which incorporate, inter alia, individual socio-economic rights. Article 14 guarantees freedom of assembly and association (IACHR report, page 241).

Prohibition of political activities

The Argentine Constitution of 1853 is based on the notion of representative democracy, which has two essential components: popular elections and public participation.

The principle of popular elections was endorsed in the preamble and in articles 1, 22 and 30, and the principle of the participation of all the sectors of the country in political decisions, in articles 1, 5, 6, 14, 37, 46, and 103. The supreme powers assumed by the Military Junta in March 1976 abolish this system. The establishment of new "categories of offences" for persons engaged in political activities is of unprecedented gravity in the institutional and legal history of the country. The prohibition of political activity contained in law 21 323 of 2 June 1976 is in itself sufficient to make the law unconstitutional. In addition, the insertion of the phrase "organizational work and political and ideological propaganda" means that the prohibition could cover any sort of opinion, not just on political matters, since the term "ideology" may involve underlying scientific, cultural, economic or other ideas.

Laws 21 322 and 21 325, enacted on the same day, prescribe prison terms of 3 to 8 years, and 2 to 4 years, respectively, for any participation or involvement in activities related to or connected with organizations which have been declared dissolved (as listed in law 21 322) or illegal (as listed in law 21 325). The distinction between the two is that the organizations mentioned in law 21 322 have no legal standing; those mentioned in law 21 325 appear to be legitimate but must be dissolved. Hence the penalities are lighter in the second case. The penal categories, however, are identical.

The most serious aspect of these provisions is that their effect is not limited to those who carry out or participate in the activities of prohibited political, union or solidarity groups (such as the Coordination of the Movement for Aid to Chile, or the Forum for Respect for Human Rights, to mention only two of the twenty-six restrictively listed by law 21 325). As in other laws, the language used is so vague that the subjective element of intent is not required in order for an offence to occur. For example, merely "being in possession" of some material related to the organizations which have been declared dissolved or illegal is quite sufficient (23).

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(23) Each of these laws punishes those who "have in their possession, display, print, publish, reproduce, distribute or supply by any means whatsoever printed or engraved material containing a full or partial account of facts, communications or images linked with or related to the groups or organizations mentioned in article 1".

V. ABUSES OF POWER: TORTURE AND DISAPPEARANCES

As a direct result of the extension of the powers of arrest and detention of the security forces, and the lack of any effective judicial supervision or review of their activities, abuses of power have taken place on an appalling scale. Apart from the general uncertainty and fear which inevitably invades any society in which fundamental freedoms are repressed, the worst categories of abuse have been those of the torture and disappearance of prisoners at the hands of the security authorities. Save in the case of persons whose detention is admitted within a few weeks of arrest, "disappearance" usually means that the victim has suffered "extra-judicial execution". The Argentine government even passed a law (22 068 of 12 September 1979) enabling the families to ask for a presumption of death earlier than in the usual case of missing persons. The law was deeply resented by the families of the disappeared and very few applications have been made under it.

During the first four years of the military regime torture and ill-treatment of detainees became a daily and generalised practice, used in secret interrogation centres by officials who had been trained in the use of scientific methods to increase the victims' sufferings. Torture, often accompanied by subsequent 'disappearances', was used in the first stage as a method of repression against members of the armed movements. Later they were turned against other left-wing groups, Marxist and non-Marxist, and finally were extended to all who were suspected of political opposition.

Torture normally takes place during the period in which suspects are held incommunicado, where they no longer exist for the outside world, since the suspects are deprived of all communication with their family, friends or lawyers. Torture has been used variously to obtain information, extract a confession, to punish the prisoner, or to intimidate the public in general, in order to avoid any opposition to the maintenance in power of the military regime.

There have been many cases in which detainees have died under torture, or have disappeared. Human rights organizations in Argentina have listed by name over 6,000 disappeared persons, and they believe that there are several thousand more whose names and particulars have not been reported to them. When persons disappear, the authorities give no explanation or information concerning the arrest and, indeed, usually deny that the persons concerned have been arrested. There are few subjects which have aroused such profound concern among public opinion as the phenomenon of disappearances. It constitutes the gravest challenge of all to the very concept of human rights, since it converts a person into a non-person and results in the violation of a whole series of individual human rights.

Even if disappearances are directed primarily against the prisoner, they also affect the wives, husbands, children and parents of the victim, increasing the suffering of the whole society. There have been numerous cases when women have been arrested with their children, or pregnant women have been arrested giving birth to their babies in custody, and the children, like their mothers, have disappeared. The movement of mothers and grandmothers in Argentina has submitted to the United Nations Working Group on disappearances a list of cases with the particulars of 96 disappeared children.

VI. SUMMARY OF CONCLUSIONS

- The state of siege, declared in 1974 before the military take-over in 1976 has been maintained in force ever since. It was, from the start, unconstitutional and illegal from a procedural point of view, because it was declared by the Executive during the annual recess of Congress and when the Congress met it did not make a decision approving the declaration of the state of siege, as required under articles 23 and 67 (26) of the National Constitution. Moreover, since, according to many government statements, peace and stability have been restored to the country by the military authorities, there is no legal justification under the Argentine constitution for the state of siege to continue.

- The National Congress, as well as the Provincial Congresses, have not been allowed to meet since the coup d'état in March 1976, so there is no legislative control over the way in which the Executive uses its exceptional powers under the state of siege.

- The military authorities claim to be defending Western values and the democratic system, but that statement is belied by the facts. Their use of the 'national security doctrine' imposes on the country an ideology which implies a new economic, political, social and cultural model, which is strongly opposed by large parts of the population. Supporters of this doctrine believe in the need for a new institutional structure, with an authoritarian government controlled by the armed forces which concentrates the principal powers of the state in its own hands. The result is that for the model to be imposed, it is necessary to repress all trade union and political activities with the consequence of denying the normal functioning of democratic institutions.

- Since March 1976 the authorities who rule the country have not been democratically elected, as established by the Constitution. The Argentinians are deprived of exercising their political rights and of their democratic representative system of government chosen in 1853 when the first Constitution was set up by a Constituent Assembly.

- The exceptional measures taken by the military government under the state of siege clearly exceed what is constitutionally permitted. Even when they were taken with a view to maintaining order, these measures were in excess of what was needed, violating the civil, political, economic, social and cultural rights of the inhabitants of Argentina, including non-derogable rights set forth in international instruments.

- Under a state of siege the Executive is invested with the power to arrest and detain people without charge (article 23 of the National Constitution). However, in the same article and in others, such as articles 18 and 95, limits are placed on the use of this power, including the right given to detained people to opt for exile rather than detention. This constitutional 'right of option' has not been fully respected by the authorities and has been illegally and severely restricted by decrees. The military government has frequently abused the exceptional power of administrative detention, by not giving any or any adequate explanation of the reasons for the detention. It has been used to eliminate or suppress all political and trade union opposition and to frustrate any attempt to organise the opposition.

- The judicial system and the independence and impartiality of judges have been undermined by administrative measures such as the transfer or dismissal of members of the Judiciary and threats and attacks (including arrest and disappearances) made against judges. The test of reasonableness by which the Judiciary could exercise control over a detention under the state of siege has become an empty form.

- The system of military justice has been extended to cover civilians and the military jurisdiction has taken over large areas of civilian jurisdiction. This was also illegal under the Constitution and under the state of siege.

- The rights of defence have not been respected by the military jurisdiction. Military procedures prevent the accused having a civilian defence lawyer; the defence must be carried out by a military officer. On the other hand, lawyers who defend political opponents or who advise trade unions have been harrassed and detained and some have disappeared, thus affecting the independence of lawyers.

- There exists overwhelming evidence that in the past years torture, kidnapping and disappearances have been used on a massive scale by the security forces as a weapon to suppress political and trade union opposition. No serious enquiries have been undertaken by the authorities about these crimes, following the complaints submitted by victims, families, lawyers and human rights organisations. In particular, the phenomenon of disappearances, which is perhaps the most evil of all violations of human rights, denies the right of a person to exist and to have an identity.

- Even if it cannot be said that all violations of human rights and fundamental freedoms in Argentina have been the consequence of the state of siege, or the result of actions by the armed forces, it is clear that the exceptional powers under the state of siege opened the way to abuses and to the destruction of the Rule of Law and the democratic system.

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THE LEGAL FRAMEWORK FOR STATES OF EXCEPTION IN CANADA

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THE LEGAL FRAMEWORK FOR EXCEPTIONAL SITUATIONS IN CANADA

I. INTRODUCTION

This report was prepared in the light of experience gained with respect to Canada's principal law applicable to emergency situations, that is, the War Measures Act (Revised statutes of Canada, ch. w-2.). It seeks to assist the ICJ in making appropriate representations to the United Nations Sub-Commission responsible for specifying international norms relating to exceptional situations. It contains a number of proposals for amendments to the above-mentioned law which, given their universal relevance, may also contribute to the stipulation of international laws applicable to exceptional situations.

II. THE WAR MEASURES ACT

The War Measures Act is the principal law governing emergency situations in Canada. This law was adopted during the First World War (August 1914), and its provisions are applicable after a declaration by the governor in council (of the Federal Cabinet) to the effect that a state of emergency, due to actual or perceived war or insurrection, exists in Canada. This law formally grants the governor in council wide powers, but in fact Parliament delegates to the Cabinet the legislative authority necessary to deal with the emergency. Thus, the Federal Cabinet may govern the country by means of regulations and may impose the rules and restrictions it deems appropriate; it may, inter alia, recognize new crimes, amend the rules relating to search, distraint and detention, introduce censorship, carry out deportations and impinge on the legislative competence of the provinces.

There are other laws, federal and provincial, which grant the executive branch of the government emergency powers which are more of a civilian nature, but these different laws do not fall within the purview of this study. None of these laws is as broad in scope as the War Measures Act, which was designed to deal with emergency situations which jeopardize national security or the integrity of the country either in wartime or in peace.

Despite the wide powers conferred on the executive by the War Measures Act, the courts have ruled that they would need very clear evidence to annul a declaration of a state of emergency and thus declare that the circumstances did not warrant or had ceased to warrant recourse to the use of emergency powers. (1) In reality, Canadian

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(1) Fort Frances Pulp and Power /Paper/ Co. Ltd. vs Manitoba Free Press Co., /1923/ A.C. 695; Cooperative Committee on Japanese Canadians vs. A.-G. Canada. /1947/ A. C. 87; In the Matter of a reference as to the Validity of the War Time Leasehold Regulations, /1950/R.C.S. 124. See also Gagnon and Vallières vs. R. /1971/ C.A. 454.

courts have never annulled a declaration of emergency, just as they have never invalidated regulations adopted under the War Measures Act. One may even say that they have left the federal executive free to chose the means to be used to face emergency situations, considering it to be a question of politics.

III. THE POTENTIAL FOR ABUSE

It may be said that to date Canadians have managed to avoid recourse to emergency powers leading to major abuse. However, the potential of the War Measures Act is vast and may even authorise the abuses observed in certain South American, Asian and African dictatorships. At present, nothing in the law precludes the federal government from restricting rights and freedoms during an emergency. Indeed, the Canadian Bill of Rights (2) ceases to apply during an emergency and it would be the same with the Canadian Charter of Rights and Freedoms contained in the new Canadian Constitution adopted in 1981. One may even say that the British North America Act (now called the Constitutional Act of 1867) as a whole could be set aside during an emergency. Finally, this federal law remains practically the federal government's only means of response when faced with an emergency, whatever its nature or extent. It is evident that the emergency powers of the federal authorities may be expressed in special laws as was the case in 1940 with respect to general mobilization, in 1970 as regards the October crisis, and in 1975 to combat inflation.

It is useful at this point to underline the fact that the War Measures Act was applied in Canada in 1970 to fight against the Quebec Liberation Front which advocated the use of force and violence to achieve, among other things, the separation of Quebec from the rest of Canada. After the kidnapping of a career diplomat and a minister of the provincial government, the federal government, at the demand of the provincial authorities, decided to apply the War Measures Act. Under this law, a regulation was enacted which outlawed the Quebec Liberation Front, gave police powers to members of the armed forces who were called in to help, enlarged police powers of arrests and search and allowed the Quebec Minister of Justice to detain those arrested, under the legal restriction, however, of the right of detainees to obtain a trial date not later than 90 days after their arrest. The order also contained elements of retroactivity in that it allowed actions which took place before 16 October to be used as evidence that a person was, as of 16 October or after, a member of the illegal organisation.

It constituted a significant development of the law and of criminal procedure, brought about by the executive. It did not derogate from the legislative competence of the provinces, but extended their powers relative to the application of penal laws. It demonstrated that Canada

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(2) See article 6 (5) of the War Measures Act. The Canadian Bill of Rights is a federal law which applies only to federal matters: Revised statutes of Canada, App. III.

was not particularly well equipped at the legislative level to confront a situation created by a terrorist group and, in order to do so, it had to apply strong methods conceived at a time of war with an enemy country. It indicates finally that important restrictions can be placed on fundamental freedoms by simple orders on the advice of the federal executive, once the War Measures Act is applied by proclamation of the Federal Cabinet. The Federal Parliament corrected this rather embarrassing situation on 3 December by adopting the law of 1970, a special law concerning public order (S.C. 1970-71-72 chap. 2) which dealt, in a retroactive way with all that had been done or accomplished under the War Measures Act. This special emergency law, which applied in Quebec only, ceased to be applied on 15 April 1971.

Other special emergency laws which do not concern the security of the country may concern economics, energy, or be aimed at regulating health problems or social disturbances. The federal parliament may adopt them and their application must be clearly temporary. This type of law can derogate from provincial legislative competence but this is not necessarily always the case. In 1975 the federal parliament adopted the anti-inflation law (S.C. 1974-75-76 ch. 75), whose object was to restrict inter alia profit margins, prices, dividends and remunerations in Canada, with the purpose of reducing inflation which Parliament considered incompatible with the interests of the country. The constitutionality of this emergency measure, clearly temporary, was recognised by the Supreme Court (3) even although it infringed on the prerogatives of the provinces; this law was based, according to the Court, on the power of Parliament to legislate in order to keep peace and order and good government in Canada.

The War Measures Act was conceived in wartime in response to a specific need. When it was adopted, the intention was certainly not that it should apply to all types of emergency situations, and very little thought was given to its human rights implications. In the opinion of the author, the treatment of Canadians of Japanese origin during the Second World War, the abuses committed during the crisis of October 1970 (several hundred people were arrested and a few were sentenced) and the fact that Canada has ratified the International Covenant on Civil and Political Rights, all point to the need for a revision of that act. The need for the executive to have the powers necessary to deal with emergency situations is not questioned, particularly where there is a threat to the peace and security of the country, but extensive exceptional powers in a framework which is weak in legal and democratic terms are unacceptable.

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(3) See Renvoi : Loi anti-inflation, /1976/ 2 R.C.S. 373

IV. RECOMMENDATIONS

It is in this spirit that the author makes the following recommendations:

A. Use of Emergency Powers

1. The War Measures Act should be abrogated and replaced by sectoral emergency laws, each governing only a certain category of emergency situations.

   Each piece of legislation should draw a distinction between the various types of emergencies and delimit clearly the special powers attributed to the executive to cope with the emergency situation. Drastic measures are not necessary for all situations. The aim should be to adopt a graduated approach, as is done in the Constitutions of Switzerland, India and the Federal Republic of Germany (4). A distinction could be drawn between economic calamity, natural disaster, war, insurrection and subversion. These different types of laws would allow the government to adopt appropriate measures, including those which to a certain extent would impinge on generally recognised rights and freedoms, without overstepping the terms specifically authorised by the law.

2. Parliament alone would be able to declare a state of emergency or exercise exceptional powers.

   This is of capital importance in a free and democratic society. The fact of the executive invoking its own emergency powers may open the door to abuse. Thus, Canadians should be assured that when the Federal Cabinet decides to use its special powers, their democratically elected representatives would have given their assent to the executive's action. Therefore, in order for a state of emergency to be declared, at the very least Parliament should be convened to ratify the executive's decision (5).

3. Such ratification should be done by a resolution adopted by a two-thirds majority of members of the House of Commons and the Senate.

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(4) See Robert R. Bowie and Carl Friedrich, Etudes sur le fédéralisme, Paris, L.G.D.J., pp. 439 et ss.; H. Marx, "The Emergency Power and Civil Liberties in Canada", (1970) 16 McGill L.J. 39; Yvon Pinard, Opening Statement, Federal-Provincial Ministerial Conference on Human Rights, 2-3 February 1981.

(5) In this regard, it is interesting to note the proposals of the Pepin-Robarts Commission on Canadian unity (1979), of the Canadian Bar Association Commission on the Constitution (1978), the Quebec Liberal Party Constitutional Commission (1980) and the McDonald Commission on the study of certain activities of the Canadian Royal Police (1981), which aim at modifying the mechanism for parliamentary approval of the use of emergency powers so as to make it more compatible with the exigencies of democracy.

A two-thirds majority ratification would not in the past have prevented the government from having recourse to the War Measures Act. Also, a resolution of this nature is essential to prevent abuses. It may be noted that the requirement of ratification would not prevent the government from using emergency powers when Parliament is not in session; in that case, Parliament would be convened by virtue of the declaration within seven days of its being made.

4. During the ratification process, Parliament should specify the powers it delegates to the executive. If this is not possible, the executive should as a rule exercise only those powers that are strictly necessary to cope with the emergency. This recommendation is particularly useful if Parliament does not distinguish between emergency situations. Furthermore, it is important that, upon ratification, Parliament should establish a parliamentary commission to approve the regulation adopted under law.

5. A declaration of emergency should state explicitly the duration of the emergency powers.

   In order to guard against possible abuse, a time limit should be imposed on the exceptional powers granted to the executive. As history has shown, emergency powers though temporary in principle, have remained in force for a very long time (6). It is suggested that the declaration of emergency should automatically become inoperative upon expiry of a period determined by Parliament which should not exceed one year. At the end of that period, Parliament should, if the case arises, renew the exceptional powers for a further period not exceeding one year.

6. The declaration should state the government's grounds for having recourse to its exceptional powers.

7. In case of an emergency situation limited to a single province and which does not pose a threat to the integrity of the country, the federal government should obtain the assent of the Province concerned.

   However, if a provincial government sought to subvert the established institutional order, the integrity of the country would then be threatened and in such a case the federal government should not need the opinion of the provincial government concerned in order to act. It is implicit that an emergency law should never be used against a group of citizens.

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(6) See H. Marx, op. cit.

B. Inviolable Human Rights

Certain human rights are, at all times, inalienable and inviolable. This is particularly true in a country which wishes to maintain the characteristics of a free, democratic society. Thus, Canadian legislation should enunciate clearly those human rights which may not be restricted in any way, whatever the circumstances. These rights should be as follows:

1. The right to life of each individual.
   This affirmation would be in keeping with article 6 of the above-mentioned International Covenant but, despite the wording of the Covenant, it should never be used to permit Canadians to re-introduce the death penalty, even in an emergency.

2. The right to be free from slavery or servitude.

3. The right of the individual to have access to the courts of law.
   All persons affected by a regulation or legislation should be entitled to access to the court. No one should be refused such access on any grounds whatsoever, even if it is recognized that this access may not necessarily be immediate.

4. The right not to be exposed to torture or to cruel or unusual punishment.

5. The right of each individual to keep his or her citizenship and not to be deported.
   It may be recalled that, in 1946, the courts recognized that the Federal Cabinet had the right to deport Canadians of Japanese origin (7). This measure was, however, never implemented, which perhaps bears out the above recommendation.

6. The free enjoyment of freedom of conscience and religion.

7. The free enjoyment of freedom of assembly, speech and the press, subject to those restrictions strictly necessary to deal with the exigencies of the emergency situation.

C. The Rights of Defendants

The use of emergency powers often, if not inevitably, leads to imprisonments. Those detained under emergency powers should have a minimum of protection, over and above the fundamental rights suggested earlier, which are aimed more specifically at protecting the physical integrity of those who are imprisoned.

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(7) Co-operative Committee on Japanese-Canadians vs. A.-G. Canada, /1947/ A.C. 87 and F.R. Scott, Civil Liberties and Canadian Federalism, Toronto, University of Toronto Press, 1959.

In this regard, there should be envisaged a series of procedural guarantees to ensure that detainees are not subjected to unwarranted treatment and also to safeguard the principle of lawfulness (supremacy of law). These procedural guarantees are as follows:

1. No individual should be sentenced for a retroactive criminal offence.

   Acts which were permitted when committed should never become illegal subsequently through adoption of retroactive legislation or regulations. Several people shared the impression, if not the conviction, that such was the effect of certain regulations adopted in 1970 under the War Measures Act or the Turner law (8).

2. The right of all to habeas corpus, subject to provisions suspending the exercise of this right within 48 hours of arrest.

   This prerogative writ remains one of the most significant means of undertaking legal proceedings in Canada. When it is suspended, courts are deprived of the opportunity to judge the validity or appropriateness of the recourse to special powers, and thus parliament is left as practically the only body which has the possibility of limiting abuse. If there is no habeas corpus, detentions can last a very long time.

3. The right of the individual to consult a lawyer immediately upon arrest.

4. The right of every individual to submit a full and comprehensive defence before an impartial court.

   The latter two rights form integral parts of the principle of supremacy of law, which may not be set aside even in an emergency situation.

5. The right of all to equality before the law.

   This concept should be taken to mean that all persons are entitled to equal treatment regardless of race, colour, religion or national origin.

6. The right of the detainee to be charged within 48 hours of the start of arrest.

7. The right of all detainees to be released on bail on expiry of the 48 hours of arrest in conformity with the rules usually applicable with respect to bail.

8. The right of every individual to be tried before ordinary courts of law, when these are able to function.

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(8) Public Order Act 1970 (provisional measures), R.S.C. 1970-71-72, c. 2.

D. The Role of the Courts

1. The courts should be able to supervise the action of the government during an emergency, particularly as regards the legality of the emergency declaration, legislation and regulations. In this regard, Canada's judicial precedents are far from satisfactory. There is general consensus today in favour of an increased role for the judiciary during a period of emergency. The courts should have the power to determine whether the circumstances justify the use of extraordinary powers, whether these continue to be needed and whether the regulations adopted are strictly necessary given the exigencies of the emergency situation*. In concrete terms, courts would still be hesitant to invalidate emergency legislation or regulations, but their right in this regard should be clearly recognised. Since the executive should establish in its declaration the grounds for its decision, the burden of proof would be eased considerably for persons undergoing trial. One might even suggest that in all cases, a declaration of emergency should be referred to the courts to determine its legality.

2. It should be provided by law that a certain number of parliamentarians (around 20) or a province, or any person affected should have the right to challenge in court the declaration of emergency or the regulation adopted within their domain.

   In the case of parliamentarians or provinces, they should be allowed to obtain a declaratory judgment on the legality of the use of the emergency powers, independently of the concept of interest which suffices to seize the courts of the matter.

3. The federal government should speedily and fully compensate all those who suffered damage as a result of abuse committed by the administrative authority in exercising its emergency powers. Without this assurance of compensation for damage incurred during an emergency, there can be no effective control of the government's action during exceptional situations. Provincial ombudsmen could well be designated to suggest the compensation, as shown by the ombudsman of Quebec following the October 1970 crisis. The Federal Parliament could establish its own compensation commission or tribunal.

E. Other Recommendations

1. The federal government should not resort to its emergency powers before exhausting the powers conferred on it by other federal laws.

2. No bill of rights (federal or provincial) should be set aside, except as is strictly necessary for the executive to exercise the powers and obligations conferred on it by Parliament to

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* (It is suggested that the courts should also have power to determine whether the manner in which the extraordinary powers are used is lawful - ICJ)

deal with exceptional situations. This should be valid as well for the Canadian Charter of Rights and Freedoms contained in the new Canadian Constitution adopted in 1981.

V. CONCLUSIONS

Amendments would therefore be necessary to the Constitution of Canada if these recommendations were adopted, as limitations to federal emergency powers cannot be enshrined only in an ordinary law of the Federal Parliament.

It is evident that the adoption of these recommendations would bring Canada's legislation more in line with its international commitments, in particular following Canada's ratification of the International Covenant on Civil and Political Rights. It is also clear that these amendments to federal legislation would allow for improved protection of human rights, significantly reduce the risks of abuse and allow Canada to live up to its reputation as a free and democratic society. However, it is with a feeling of uneasiness that we end these short remarks by citing article 1 of the Canadian Charter of Rights and Freedoms applied in Canada since 17 April, 1982:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

This loosely framed article cannot be said to solidly guarantee rights and freedoms in times of emergency.

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STATES OF SIEGE IN COLOMBIA

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I. Introduction

Colombia has both a long constitutional tradition and a number of abrupt constitutional upheavals. Attachment to things legal, amounting almost to idolatry of the written law, is an outstanding feature of the national character. Nevertheless, Colombia in the 19th and 20th centuries has experienced what has been described as "a permanent crisis of constitutional law". (1)

Before 1819, when the Republic of Colombia emerged, the country did not have a national constitution accepted by all the provinces which in 1810 had become free of Spanish domination. A number of provincial statutes were in force, some favouring a centralised government, some a federal one, but all sparked heated controversies and substantial disagreements. After 1819, the constitution was revised on an average every ten years: 1821, 1830, 1832, 1843, 1853, 1858, 1863 and 1886. The last one adopted a presidential system of government based on political centralisation and administrative decentralisation, a system that is still basically in force, though important changes have been introduced at different stages.

Colombia acquired its definitive constitution on 5 August 1886, but it was not fully operative until 1910, when the two principal parties, the conservatives and the liberals, agreed on several amendments aimed at preventing the abuse of presidential power by guaranteeing individual rights and establishing a system of judicial review of laws as well as of decrees issued by the executive branch. Legislative Act 3 of 1910 (articles 40 and 41) gave the Supreme Court the power to declare a law or a decree not enforceable at the request of any citizen, and its decisions were of general application and not merely inter parties. This is, indeed, a precious remedy seeking to avert the existence of an authoritarian government.

These articles read as follows:

Article 40. "In all cases of incompatibility between the constitution and the law, constitutional provisions will prevail."

Article 41. "The Supreme Court of Justice is entrusted with protecting the integrity of the constitution. As a consequence, apart from powers conferred upon it by the constitution and the law, it will have the following power:-

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1) Alfredo Vazquez Carrizosa, El Poder presidencial en Colombia, (Bogota, Enrique Dobry Editor: 1979).

To rule on the enforceability of Legislative Acts deemed unconstitutional by the government, or on laws and decrees impugned before it by any citizen as unconstitutional, having heard the opinion of the Procureur General". (2)

The constitution of 1886, with its subsequent amendments, provides detailed guarantees for and remedies to enforce basic human rights, including the right to life (the death penalty is outlawed); to personal integrity and liberty; to freedom from arrest, detention or search without a warrant; not to be compelled to incriminate oneself; to due process; to prohibition of retroactive laws; to strike; to private property; to inviolability of the home; to freedom of communication without interception; to freedom of education with compulsory free primary education; to freedom of association; of peaceable assembly; to petition; to freedom of conscience and religion.

II. Legal character of the state of siege

The 1886 constitution was written with a view to curtailing anarchy and civil war. Under the guidance of Miguel Antonio Caro, an illustrious humanist, the writers of the constitution invested the President with powers to dispose of the armed forces, appoint and dismiss members of the cabinet, governors of the departments, which are the main political and administrative units of the country, and, through the governors, to appoint and dismiss the mayors. Thus they expected to bring to an end the uprisings that had taken place in different parts of the country with the help of local authorities, particularly during the era of federalism between 1853 and 1886.

Additional measures were taken. The state of siege was institutionalised more strongly than before through article 121 of the 1886 constitution. Since then, this article has been the mainstay of the Colombian political system. The constitution gave the President the power to declare, in the case of external war or internal disturbances, the existence of a "disturbance of the public order and a state of siege in the whole territory of the Republic or a part of it." This has to be done by decree signed by the President and all his ministers.

Article 121 adds: "after such a declaration, the government shall have, apart from its normal legal powers, the powers granted by the constitution in times of war or disturbance of public order and the powers recognised by the rules of the law of nations during wars between nations.

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2) The Procurador General de la Nación is an independent senior official, appointed by the House of Representatives from a list of 3 candidates proposed by the government.

"Decrees issued by the President under those precise limits, will be mandatory if they carry the signature of all the ministers.

"The government may not repeal laws through these decrees. Its powers are limited to the suspension of those laws that are incompatible with the state of siege.

"Under no circumstances may the state of siege prevent the normal operation of Congress. In consequence, Congress will meet by its own right in ordinary session, and in extraordinary session when convened by the government.

"If Congress is in session when the government declares the disturbance of public order and establishes the state of siege, the President will immediately present to the Congress a report justifying the reasons for the declaration.

"If Congress is not in session, the report will be submitted on the first day of its ordinary session after the declaration.

.....

"The government will declare the restoration of public order as soon as the external war or the internal disturbances have ended. Extraordinary decrees issued during the state of siege will lose all effect."

The constitution provides for the responsibility of the President and the ministers for abuse of power if they declare a state of siege unnecessarily. It also establishes that the government will submit to the Supreme Court of Justice, the day after issuance, the legislative decrees issued under the state of siege, so that the Supreme Court may rule on their constitutionality.

When a state of siege has been declared, the government may decree that certain crimes relating to security committed by civilians may, instead of being tried by the ordinary justice system, be tried by military courts martial under military penal law for as long as the state of siege lasts.

Article 121 has lead to a confusion between external war and internal disturbances, resulting in two different situations being given equal treatment. That is to say, the state of siege is regarded as authorising a type of "internal war". This is the interpretation used nowadays for article 121 in order to enforce the "Security Statute" of 1978. However, this interpretation does not follow either the spirit or the letter of the article. It is important to keep in mind that the article deals with two different situations and that it was perhaps a mistake to place them in the same article. External war implies, by its nature, a rupture of

the normal legal order so as to make all means available to the State in order to defend the country and defeat the enemy.In contrast, during a situation of internal disturbances, there is no enemy to destroy, but rather an order to restore or defend.

III. The distortion of the state of siege

The situation of constitutional abnormality recently experienced in Colombia, with the application of military law and the "Security Act" for certain security offences, resulted indirectly from a tradition accepted by the liberal and conservative parties, which have shared power alternately.

Paradoxically, the return to democracy in 1957, which aimed at restoring constitutional rule and averting a new military government, did not end the tendency of both parties to resort to the state of siege. Since 1957 there has been frequent application of states of siege, and the solution of problems that could have been dealt with by the democratic institutions has been delegated to the armed forces. In 1968 extraordinary powers were enlarged with a constitutional amendment to article 122, providing for a state of emergency in situations of economic crisis, giving the government power to legislate by decree in economic matters.

Some of the declarations of a state of siege have been occasioned by the need for special measures to combat armed guerrilla movements, in particular the FARC (Colombia Revolutionary Armed Forces) and the M.19.

The FARC organisation has been in existence under that name since 1959, but according to the Colombian authorities it has been active as an armed movement in the rural areas since 1949. The M.19 movement also began in the rural areas but in more recent years has also carried out some daring operations in urban areas.

However, use of the state of siege has by no means been confined to countering guerrilla activities. A few examples will show the very varied situations in which the state of siege has been used since 1928. It has been applied, inter alia, to the following:

- labour unrest: on the occasion of a strike by workers of the multinational United Fruit Company in 1928, which left a toll of several workers dead or injured; a strike at the Antioquia Railway, 1934; a strike at the transportation service, department of Caldas, 1943; a strike of dock workers, 1945; a strike at the Social Security Service, 1976. The strike was soon settled, but this state of siege lasted over the whole country until June 1982.

- political disturbances: in 1944, there was an unsuccessful military coup against the Liberal government; the government decreed a state of siege, extended the recess of Congress (contrary to the provisions of the constitution) and issued a new Labour Code based on a new interpretation of "economic public order" which bore no relation to the attempted military coup. In 1949, the Conservative party government was faced with congressional opposition and decided to decree a state of siege , to suspend the Congress and to legislate by decree. This constitutional 'abnormality' lasted until 1957.

In 1958 the two parties began sharing power and the public administration at all levels; this agreement was known as Frente Nacional (National Front), and lasted until 1974. During these years four presidents were elected: Alberto Lleras Camargo (Liberal), 1958-1962; Guillermo León Valencia (Conservative), 1962-1966; Carlos Lleras Restrepo (Liberal), 1966-1970; Miguel Pastrana Borrero (Conservative), 1970-1974. After them there have been two more presidents: Alfonso Lopez Michelsen (Liberal), 1974-1978; and Julio César Turbay (Liberal), 1978-1982.

The National Front was a unique political arrangement that established the equal sharing by the two parties of the government -cabinet, governorships, mayors- as well as the Congress, the regional assemblies and the city councils. The claimed justification for the exclusion of other parties from government, the Congress and other political bodies was that the agreement was needed to overcome the violence and civil war that prevailed from 1948 to 1953.

Although the civilian government continued to be based on the constitution, it resorted to the state of siege intermittently. Thus, starting in 1958, more than 300 legislative decrees were issued in turn under states of siege by liberal and conservative presidents. The dates of these states of siege and number of decrees issued were as follows:-

August 1958 to January 1, 1962: 50
May 1963 to December 16, 1968: 123
October 1969 to November 17, 1970: 27
February 1971 to December 1973: 44
June 1975 to August 1978: 50

In August 1978, a new stage of the state of siege began with the application of the Security Act.

There is no doubt that the presidential power became stronger under the National Front. Parity in administrative posts and in elective offices to the exclusion of all other parties helped to limit opposition to the governement, because representation in Parliament, the regional assemblies and the city councils was granted only to the two traditional parties. The presidents made use of both ordinary and extraordinary powers established by the Constitution.

These powers were in three categories:

a) special legislative powers granted by Congress under article 76, section 12 of the Constitution.
b) extraordinary powers of the state of siege, under article 121.
c) extraordinary powers on economic matters, under article 122, as amended in 1968.

There are two constitutional checks to the issue of decrees under the state of siege: an immediate appeal to the Supreme Court of Justice, and political control by Congress. However, in practice they have not been as effective as was contemplated in the Constitution. The influence of the President has operated on many occasions to prevent a negative vote in Congress or to stop an unfavourable ruling by the Supreme Court.

The establishment of states of siege for long periods of time has led to a system of parallel legislation, the legislation by decree under the states of siege exceeding that passed by Congress.

IV. Measures adopted before 1978

Since 1958 the armed forces have played an increasingly political role in Colombia. At first, a military officer was appointed as minister of defence. Since then the post has by tradition been held by the highest ranking officer in service. This makes for a closed military organisation where civilians have no influence.

Carlos Lleras Restrepo, a former President and a leading member of the Liberal party, has recently suggested the need to return to the freedom enjoyed by the President before 1948 to appoint as minister of defence the person best suited to the office without any constraints as to seniority or rank.

The natural ambition to rise to a cabinet post has nurtured rivalries among candidates and prompted sudden dismissals of officers in order to clear the field for others. This is one reason - among others - for the politicisation of the armed forces.

Article 168 of the Constitution, which has often been ignored, states:

"The armed forces may not participate in political activities. They may not assemble unless on orders of the legitimate authorities nor may they sign petitions on matters other than the efficient service and morality of the army, and in accordance with the rules of the service".

Constitutional scholars for many years recognised the imperative nature of article 168 on the grounds that parti-

cipation of the military forces in political activities does not contribute to democracy and to the free expression of the citizen's opinions about public matters. (3) This attitude reinforced civilian rule in Colombia from 1910, and was the foundation of the National Front in 1957. On May 10, 1958, President Alberto Lleras made a speech before a group of soldiers that is considered a kind of gospel about non-intervention of the army in political affairs.

However, the frequent use of the state of siege has led to a civilian-military regime in which political power is shared not only between the parties, but also with the armed forces, owing to the powers conferred on them to apply military law to civilians in security matters, and the power given to military and police authorities to impose penalties without trial of up to one year's detention. A typical example of this contradiction of a civilian regime that is increasingly dependent on the armed forces is Law 141 of 1962, passed by Congress. This law, although approved after the restoration of civilian rule, adopted as permanent laws all the legislative decrees issued during the ten years from 1949 to 1958, thus renewing the powers of the armed forces after the ending of the state of siege.

As has already been mentioned, frequent recourse was had to legislative decrees under a state of siege after 1958. A study of some of them shows how widely the powers of article 121 continued to be used:

- Decree N° 330, 1958 (December 3), gave powers to the governors, the heads of other political divisions and the mayor of Bogota to ban demonstrations and to restrict the movement of persons and the exchange of information.

- Decree No.12, 1961 (October 13), banned broadcasting of speeches and political conferences, and all non-official information related to public unrest, military movements, riots and uprisings.

- Decree N° 17, 1961 (November 9), prohibited radio broadcasts of conferences, speeches and political interviews related to public order, military movements, riots and uprisings.

- Decree N° 1289, 1965 (May 21), forbade public meetings and gave powers to the governors, the heads of other political divisions and the mayor of Bogota to curtail the movement of citizens in the streets and to impose press censorship of newspapers and radio.

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3) See Tulio Enrique Tascon, Derecho constitucional colombiano (Bogotá, 1939), and Francisco de Paula Pérez, Derecho constitucional colombiano (Bogotá, 1942).

- Decree N° 2285, 1966 (September 7), restricted the right of assembly and granted mayors discretionary powers to authorise public demonstrations or parades. Illegal demonstrations could be dispersed by the police.

- Decree N° 2686, 1966 (October 26), authorised the 'confinement' of suspected subversives in places determined by the government, without any court order. It established a punishment of thirty days imprisonment for those Colombians who left their place of confinement without permission of the Administrative Department of Security. Foreigners and naturalised citizens could be expelled from the country.

- Decree N° 2688, 1966 (October 26), gave powers to the police corps (a branch of the armed forces) to punish with up to 360 days imprisonment persons who take part in demonstrations or in misdemeanours such as painting political graffitti on the walls or throwing objects against demonstrators.

- Decree N° 592, 1970 (April 21), gave powers to the governors, the mayor of Bogota and the heads of other political divisions to restrict the freedom of the press by requiring prior approval of news broadcasts and newspaper information.

- Decree N° 598, 1970 (April 22), empowered the president, the minister of interior and the minister of defence to appoint special supervisors in official enterprises, with powers to dismiss any employees upon discretion.

- Decree N° 593, 1970 (April 21), gave jurisdiction to military courts over the crimes against the existence and security of the state, crimes against the consitutional order and internal security, kidnapping, extortion, bank robberies and conspiracy to commit a crime.

- Decree N° 605, 1970 (April 24), gave powers to examining magistrates ("juges d'instruction") to investigate the crimes listed in decree N° 593, 1970.

- Decree N° 636, 1970 (April 30), extended the jurisdiction of military courts to two other crimes: defending crime and incitement to commit a crime.

Further extraordinary decrees were issued in subsequent years. The suspension of the right of assembly and restrictions on the right to strike suspended several articles of the Constitution: 18, 20, 23, 42 and 46. Decrees restricting freedom of the press became routine, as was the case with extraordinary decrees N° 12, 1961 (October 13); 592 of 1970 (April 21) and 255 of 1971 (February 27). Beginning in 1976, decrees became more specific and drastic and, in the view of many lawyers, exceeded the powers under aticle 121 of the Constitution.

Decree N° 2578, 1976 (December 8), gave powers to all mayors and police inspectors to impose recognisances to be of good behaviour upon individuals about whom there is a suspicion that they may commit a crime. These recognisances may be for up to Col.$1,000, and can be enforced against property owned by the suspects. This decree is based on the suspicion of a possible crime to be committed by any person, thus creating what may be called presumptive criminality. It enables the police to impose fines whenever they "suspect that a crime or an offence will be committed".

Decree N° 0070, 1978 (January 20), gave special criminal immunity to members of the police or the armed forces who commit homicide when investigating a case relating to kidnapping, extortion or drug traffic. A new ground for the exclusion of criminal responsibility was added by this decree to those already contained in article 25 of the Penal Code. It was not long before the effects of this were seen. On April 13, 1978, a group of secret police agents (F-2), broke into a house in the "El Contador" neighbourhood in Bogota and, suspecting that a gang of kidnappers was living in this house, waited till they returned and then opened fire and killed seven individuals who had no involvement whatever in kidnapping.

Decree 0070 was held by the Supreme Court of Justice to be in conformity with the Constitution in a judgment of March 9, 1978. This "licence to kill" opened the door to institutionalised violence and inaugurated a type of repression which it is submitted, is incompatible with Colombia's obligations under the UN Covenant on Civil and Political Rights. More than 30 lawsuits for compensation have been filed on the grounds of manslaughter committed by members of the armed forces.

In an advisory opinion the Attorney General opposed the constitutionality of Decree 0070. He wrote:

"This decree means that members of the armed forces may violate the right to life, security of the person, freedom of the individual, or the privacy of the home, when they take part in any operation to prevent or repress certain crimes, whether or not the person concerned has participated in those crimes. On the one hand, the decree exposes the rights protected by law of all citizens, without exception, to the arbitrary action of the armed forces; and, on the other hand, the exemption from responsibility, for example for homicide, cannot be determined until a court has decided the nature of the crime that the police were trying to prevent or repress." (4)

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4) II National Congress of Criminal Lawyers, Cali (Colombia), 23-26 October, 1980. Paper presented by Alvaro Mazo Bedoya, "Criminalización para la represión: Estatuto de Seguridad (Decreto 1923 de 1978)", p. 61.

Many violent deaths resulting from mere suspicion of guilt have occurred when the armed forces have used their "free hand" to shoot and kill even when they have not been attacked.

Colombia is a party to the International Covenant on Civil and Political Rights, and under Colombian law its provisions become part of the domestice law, overriding other laws. The Human Rights Committee established under the Covenant considered Decree N° 0070 in the case of Suarez de Guerrero (R.11/45). The Committee held that the decree violated "the supreme right of the human being", the right to life (which by the Covenant is not derogable under states of emergency) and recommended that it be amended. (5)

V. The concept of "internal war"

Decree 0070 (1978) reflects the attitudes which result from the concept of "internal war". The armed forces have invoked this tem widely to justify repression against persons or groups of persons.

General Luis Carlos Camacho-Leyva, the defence minister, stated during a debate in Congress in 1979 that the country faced a "state of war". With this, he indicated that it was impossible for the government to comply with the ordinary criminal law. The Constitution, however, does not support this simple assimilation of a state of siege to a state of war.

"Internal war" assumes that the established order is attacked by an organised group in a military offensive. When such a situation exists it should, it is submitted, be dealt with by a state of siege limited to the part of the country affected, and not apply generally to the whole country. However the Supreme Court has ruled (in July 1948) that the President can suspend, through decrees signed by all the ministers, the effect of laws throughout the entire nation even though the state of siege is partial, if he believes that those laws are incompatible with the need to reestablish public order.

The effect of Decree 0070 of 1978 as an instrument of the 'internal war' is to instil in the armed forces the war-like attitude that they can with impunity shoot to kill even suspects whose capacity for armed resistance is unknown. A recent example of this abuse in rural areas was brought to light on October 28, 1980, when the Conservative Senator José Vicente Sánchez, whose party supports the government, reported to Congress the killing of four peasants in

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5) cf. ICJ Review N° 28, June 1982, p. 48.

Caparrapi, Cundinamarca. The peasants were shot by members of the armed forces on the mere assumption that they were subversive elements.

Large parts of the rural areas of Colombia were brought under complete military control, resulting in extensive repression and violation of the human rights of peasants. In its 1980 report on Colombia (6) Amnesty International reported that in January of that year the following regions were controlled by the military: Uraba (Antioquía): parts of the department of Sucre; the southern part of Córdoba; the Middle Magdalena region (covering areas of Santander, Bolivar, Magdalena, Antioquía and César); Tierradentro (Caquetá); parts of Tolima and the southern part of Huila. The Guajira peninsula was also militarised to control the drug traffic. Among the methods of control applied in militarised areas were :

- All residents have to register at a military post. An identification card is mandatory.

- The army determines the amount of food that each family may obtain, so as to prevent peasants supplying food to guerilla forces. In remote places, this regulation forces the families to walk for up to ten hours or more to report to the military authorities after shopping at the market place, to enable the military to approve the items they have purchased and to certify that the amount of food complies with the maximum allowed.

- The control of pharmaceutical products is so strict that no drug can be introduced into a controlled area without a prescription. This makes it impossible for peasants living in remote areas to obtain and keep drugs to prevent infection in case of snake bite, accidents, cuts, injuries, malaria and other tropical diseases.

- Suspected individuals must report periodically to a military post.

Methods of intimidation include:

- Threats to community leaders to force them to leave the area.

- Arrest of the main peasant leaders under charges of subversion, based merely on information given by landowners or on their participation in the organisation of rural communities.

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6) "Informe de una misión de Amnistía Internacional a la República de Colombia 15-31 de enero de 1980". Published by Amnesty International, London, p. 37.

- Guarantees of impunity to 'hit-men' employed by landowners.

- Torture of arrested peasants.

- Hindering the free movement of peasants through constant frisking, arbitrary detentions, identity checks and confiscation of identity cards.

- Destruction of peasants' huts, crops and property.

- Insults and humiliations inflicted on men, women and children at military posts and in their own homes at any time of day or night.

The effect of these measures, justified by the military authorities on the grounds that guerrillas are operating in the areas, is to render these areas uninhabitable for months and even years, with grave loss to the population. The loss of harvests and the intolerable treatment force the peasants to move to the cities.

VI. The social crisis of 1977

The social crisis of 1977 in Colombia brought about a change that led to the passing of the Security Statute in 1978. To understand this it is necessary to review the principal features of the life of the country and its great social and economic imbalances.

First, the division among social classes did not abate with the increase of wealth and the relative prosperity of the country during the 50s and 60s, when industry boomed, exports of goods other than coffee (the commodity that earned most of the foreign exchange) increased, and urbanisation began to accelerate. The concentration of private capital in a few financial groups and economic conglomerates corresponded to the new demographic distribution in four big cities: Bogotá, Cali, Medellín and Barranquilla. These cities contain a high proportion of the total population and are centres of attraction to migrating peasants.

The increasing industrialisation of these cities led to increased migration toward the cities. Slums mushroomed and, with the increase of urbanisation and proletarisation, big centres of unemployment and marginality arose. Economic developments led to acute social problems, wealth and poverty being found side by side.

A forum on "The concentration of wealth and economic power", organised in 1978 by independent personalities at the House of Representatives, examined the Colombian situation. There was unanimous concern about the existence of large

conglomerates and financial groups that control the economy, and a general belief in the injustice of income distribution, which resulted in a handful of wealthy people and a mass of poor people.

The concentration of wealth included land concentration. In 1970, 73% of the farms were holdings of 10 hectares or less and represented only 7.2% of the cultivated land, whereas 8.4% of the farms were over 50 hectares and represented 77% of the cultivated land (7). Agrarian reform launched during the administration of President Carlos Lleras Restrepo in 1966, was later abandoned in favour of agro-industrial development.

An ILO report of 1970 showed that of a total labour force of 3 million, half a million were unemployed, and 5 million new jobs were required by 1985 (8). Of the 750,000 new entries into the labour force each year, only 150,000 were employed by industry.

The mounting unemployment, the continuing inflation, the fall in real wages, the decreasing share of labour in the national income, and the failure to redistribute the wealth flowing into the country from the coffee boom and the estimated US$ 2.5 billion foreign earnings from marijuana and other narcotics, all led to the general strike of 1977.

The strike began with a movement started by the Confederación Sindical de Trabajadores de Colombia -CSTC- and other unions in May of that year. It was based upon an eight-point memorandum demanding a general wage increase (50%), freezing of prices and utility rates, lifting of the state of siege, opening and demilitarisation of the universities, granting of all labour rights to government workers (application of laws 26 and 27, 1976, which ratified ILO agreements N° 87 and 98), land for the peasants and lifting of repressive measures in rural areas, an 8-hour day and basic wages for bus drivers, and abolition of the decrees that reorganised the Institute of Social Security (issued as a government response to the strike of the Institute's personnel in September, 1976).(9)

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7) House of Representatives of Colombia, "La concentración de la riqueza y el ingreso" (Bogotá, 1979). A lecture by Gerardo Molina, p. 229.

8) International Labor Organisation Geneve, "Hacia el pleno empleo" (A program of Colombia sponsored by the International Labor Organisation).

9) Alvaro Delgado, "El paro cívico nacional", Revista Colombiana de Ciencias Sociales. N° 15, 1978. p. 64.

None of these demands had a revolutionary flavour compared to those of other Latin American countries. They only proposed a necessary rectification of the inequalities created by the concentration of income in a few hands and the stagnation of the lower classes. The weak answer that the government gave to the demands encouraged the workers' protest. Other unions joined the movement (the liberal Confederación de Trabajadores de Colombia, -C.T.C.-, the christian-democrat Unión de Trabajadores de Colombia, U.T.C. and the Confederación General de Trabajadores - C.G.T.) and in July they proclaimed their demands and called for a general strike on September 14.

The demands referred to a law approved in 1959 (N° 187), under the administration of Guillermo León Valencia, which had never been enforced. It provided that all salaries should be increased according to the increase in the cost of living whenever it reached more than 5% per semester.

Other unions joined the strike which the government declared illegal, calling it a political movement. "In the same way as the government complies with its constitutional duties," said the President on September 12, "with the help of the public, the armed forces and the Supreme Court, all those who place themselves against the law will have to suffer the consequences of their attitude." (10)

VII. The consequences of the general strike

The general strike in fact met with severe repression. At least 19 persons were killed or injured and the army and police fired on unarmed demonstrators. According to official figures 2,236 people were arrested in Bogota, 237 in Barranquilla and 148 in Cali. Others claim that approximately twice that number were detained.

Both sides claimed victory. The unions claimed it had been a success, saying

"Today's journey is tomorrow's trumpet-call; our struggle is still oriented toward obtaining decent wages, safety, advanced labour laws, the right of collective bargaining for government workers, an eight-hour day for bus drivers and a decent salary for them; in short, the decision to fight for the workers." (11)

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10) This text was widely publicised by the press.

11) Statement released by the four labour unions, Sept. 14, 1977. See Oscar Delgado, op. cit., p. 48.

The armed forces expressed their satisfaction "for the way the troops behaved in the whole country and especially the troops of Bogota, that preserved the order and guaranteed the safety of the people with great spirit of sacrifice, discipline and self-denial". (12) In spite of this declaration, there was general concern about the role of the armed forces on 14 September, and the Congress summoned the Minister of Defence and debated the responsibility of the military for the deaths and injuries. It was evident that the government was opposed to any kind of inquest into the conduct of the army.

The armed forces, for their part, ignoring the social causes of the strike began to demand severer measures against the union leaders, whom they sought to brand as extremists, anarchists and subversives, invoking the 'doctrine of national security' developed by the military regimes in Latin America. The three main pillars of this doctrine are

- the identification of the state with the leadership of the armed forces.

- the assumption of the legislative and constitutional powers by the armed forces, and the control of public order.

- the notion of "internal war", as a permanent criterion to suppress all forms of social and political opposition.

VIII. The armed forces' demand for security measures

The culmination of this pressure was a remarkable open letter addressed by the heads of the armed forces to the President, and distributed to the press, which was a clear violation of the 'forgotten' article 168 of the Constitution prohibiting the participation of the armed forces in political activities.

The letter to the President, who is the supreme commander of the army (art. 120), was peremptory in tone and dealt with eminently political matters, going for beyond the permitted "matters related to the efficient service and morale of the army" (art. 168). It began: "The undersigned generals and admirals, members of the Bogota headquarters and in charge of the command and administration of the armed forces, consider unanimously that it is necessary to make the following public statement ..." (13)

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12) Interviews with General Abraham Varon Valencia, minister of defence, and General Luis Carlos Camacho Leyva, armed forces commander, broadcasted by "Caracol" a few days after the strike.

13) EL TIEMPO, Bogotá, December 20, 1977.

The document was divided into ten paragraphs concerning the situation of public order, the essential parts of which read:-

1) "In spite of the efforts made by the government within the classical legal framework and the accomplishments of the military forces, insecurity continues to be a threat."

2) "The measures taken by the government and the armed forces ... have been distorted by a systematic and widespread campaign of political opposition".

3) "The fair, necessary and unavoidable actions of the troops in order to protect the institutions ... has frequently become the target of unfair attacks by the press and, especially, by lawyers and judges. In the specific case of the strike of 14 September an incredible debate took place in the House of Representatives".

4) "This campaign is now oriented against the leaders of the military institutions ... with the clear purpose of weakening the internal unity of the army, which is the irreplaceable basis for peace and progress in the country".

5) "Most of the media have been used by columnists whose main interest is to create a problem where there is no problem at all. It has been suggested that it is time to start a loud campaign against the armed forces, which are one of the few institutions left to the Republic capable of assuring its institutional integrity and the defence of the life, honour and property of all the people."

6) "This libellous and abusive campaign against the army has led to a political classification of the generals, applying inadmissible political labels to them."

7) "It is regrettable that some retired military officers have joined this dishonouring campaign; there are not many of them, but it is nevertheless a cause of concern that they should have gone so far as to sign a protest against some measures taken by the government in regard to military rank. This is an unusual attitude against a constitutional and legal power of the government".

8) "As a result of the preceding considerations ... we have decided to ask again that the government take additional and effective measures, through the channels of the emergency procedures, in order to guarantee the army and its members their rights not to be insulted and to all citizens the security they need."

9) "We expect that the new measures that the government takes -and we reaffirm our strong support to the government-, and the actions that will be taken by the armed forces to guarantee the constitutional regime and the security of the citizens, no matter how drastic, will be received with understanding by the Supreme Court, as a branch of government and by the country as a whole."

10) "We also want to notify the country that, in the same way as we have devoted our life to serving our fellow countrymen without fear of the consequences of this sacrifice, we are ready to strongly defend our moral, personal and institutional patrimony ...".

"This declaration was also approved by telephone by all the commanders of the Army, the Air Force and the Navy. Bogota 19 December 1977." (14)

Each one of the underlined statements has a clear political intention. The document begins by pointing out the failure of "the classical legal framework"; it labels opposition to the government as an enemy of the armed forces; it challenges critcisms by "lawyers and judges", calling into question another branch of government; it considers that a parliamentary debate about the strike of 14 September is a provocation, with complete disregard for the constitutional role of the Congress to exercise political control over the executive; it demands from the Supreme Court acceptance a priori of the will of the armed forces, creating a dangerous unconstitutional precedent.

All this paved the way for the "Security Statute" of 1978, and set a new stage in political intervention by the Colombian armed forces.

IX. The Security Statute of 1978

The Security Statute of September 1978, promulgated by Decree N° 1923, was in part a re-enactment of existing provisions to be found scattered among many other decrees and laws, but at the same time created a number of new security offences and substantially increased the penalties of many others. Perhaps the most important change was the increase of the jurisdiction of the military courts to try civilians ranging from homicide and kidnapping to disturbances of the public order. The police, army, navy and air force commanders were given power to arrest and detain for up to one year persons suspected of one of seven rather vaguely defined offences relating to public order. Three of these were later declared unconstitutional by the Supreme Court, including one relating to "subversive propaganda". A summary procedure was instituted for a number of offences subject to trial by

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14) Ibid., and Mazo Bedoya, op. cit., p. 37-39.

military courts. There was a provision for the review of a sentence by the officer who gave it, but there is no right of appeal to a higher tribunal. Radio and television stations were debarred from broadcasting any news or commentaries relating to public order or to strikes.

The Security Statute, and in particular the manner in which it was applied by the armed forces caused widespread complaint and criticism during the nearly four years it was in force.

X. The use and abuse of the Security Statute

In January 1979 the M-19 guerrilla movement succeeded in stealing 5,000 weapons from an army arsenal in Bogota by digging a tunnel from a nearby house. The intelligence services recovered most of the weapons within a few days. Early in January, a business executive who had been kidnapped by M-19 was killed when the army raided the house where he was being held. This sensational arms robbery, together with other kidnappings, terrorist acts and guerrilla operations in 1978, including the assassination of a former Minister of the Interior, led to a wave of arrests throughout the country. It is believed that some 1,000 persons were taken into custody including alleged leaders and members of M-19. Others arrested included students, trade unionists, university professors, journalists, politicians, lawyers, artists, workers, peasants and Indians.

Persons arrested under the Security Statute were usually brought hooded to one of the army's secret interrogation centres, where they could be held incommunicado, unable to contact or be contacted by relatives, friends, lawyers or doctors.

Many allegations of torture were made by detainees either personally or through their lawyers. The complaints include allegations of blows, prolonged standing, hanging suspended, electric shocks, immersion in water, and psychological tortures, such as being forced to watch the torture of others, verbal abuse and blindfolding.

Among those to have made these complaints were 34 students who said they were tortured shortly after their arrest in September 1978. The Procureur General ordered an official inquiry by a military judge who reported in March 1979 stating that the students had not been tortured. However, the medical report of examinations made by the coroner's office was later made public. This showed that many of the students had lesions which were consistent with the accounts given by them of their torture. Photographs of the lesions were subsequently published by a colombian magazine. Few people

were willing to accept the report of a military judge on this matter since all security suspects are arrested, held, interrogated, charged and tried or freed by the military authorities.

A special Commission was appointed by the Municipal Council of Bogota, which included members of all political parties. It presented a report on 24 April 1974. The Commission itself did not reach any findings on whether torture had occurred, but set out all the evidence which it had collected from detainees in three prisons. The Municipal Council unanimously decided to publish the report and submit it to the President of the Republic.

Many of the practices and procedures adopted by the armed forces in applying the Security Statute not only violated Colombia's obligations under the International Covenant on Civil and Political Rights but were in conflict with the constitutional rights laid down in Chapter III of the Constitution, rights which remain in force even under a state of siege. Some, such as practices of torture or other forms of cruel, inhuman or degrading treatment or punishment were clearly illegal and unauthorised and were serious criminal acts under the domestic law.

The widespread practice of arresting and detaining suspects for interrogation was justified by the government by relying on Article 28 of the Constitution. This gives power to the government, with the prior approval of the Cabinet, to make a detention order for up to 10 days when "there are serious grounds to suspect disruption of public order". However, this is a power that cannot be delegated, and attempts to obtain copies of the supposed orders authorising the detentions were met with the astonishing reply that the government's decisions are official secrets. In practice the arrests were made arbitrarily by military patrols without any prior authorisation. The patrols would penetrate the privacy of people's homes and carry out unauthorised searches and arrests based on mere suspicion.

This was a violation of Article 23 in Chapter III of the Constitution, which provides that "No one shall be imprisoned or arrested and no house may be searched without an order written by the proper authority, complying with all legal formalities and based on a motive previously defined by the law".

It is perhaps significant that these powers were used to harass and invade the premises of progressive groups, such as church based centres for social studies, and to restrict trade union activity, and to arrest demonstrators protesting against social inequalities, whereas the massive smuggling of drugs and the corruption associated with it were not touched by the Security Statute.

When persons were detained as presumed members of subversive groups, it was almost impossible for them to prove their innocence under the conditions of physical and psychological pressure exerted upon them. The revealing case was that of two jesuit priests who were arrested by the army in 1979 on very slender grounds. Their names were revealed in a campaign of adverse publicity before any trial had started. It was alleged that they were accomplices in the assassination of a former minister, and even the minister of justice, who had no responsibility for the proceedings, joined in the public accusation. Thanks to a concordat between Colombia and the Vatican, they were tried not by a military court but before an ordinary court, with the result that they were acquitted for lack of evidence.

In a paper which he prepared to assist the International Commission of Jurists in preparing this study, Dr Alfredo Vázquez Carrizosa, the Chairman of the Permanent Committee for the Defence of Human Rights in Colombia, wrote:-

"The problem of constitutional states of exception in Latin American legal systems poses a contradiction of particular interest between the formal Constitution and the real Constitution. The former contains the guarantees and individual rights, impartiality of law and independence of justice, while the latter openly contradicts it.

The state of law under the formal Constitution falls apart under circumstances that lead the governments to suspend guarantees of individual freedoms and establish exceptional procedures for the investigation and trial of crimes before military courts. It cannot be said, then, that legality has disappeared in the country: it has been replaced, though, by a state of exception. More importance is attached to the words than to the essence of things, and heavy use of legal jargon is made in order to avoid saying that the state of law has disappeared.

Colombia is one of the Latin American countries where this situation occurs. The formal constitution does not correspond to the reality of the state of siege which contradicts it and violates many of its essential articles, as was the case with the Security Statute (Decree N° 1923, September 6, 1978). To begin with, this decree was issued under a state of siege that had been declared two years before to face a strike of social security workers, that bore absolutely no relation to the provisions of the Security Statute. Furthermore, the decree was signed by a president who had been elected and inaugurated on 7 August of the same year in an atmosphere of peace." (15)

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15) This passage was quoted in the Report on the Situation of Human Rights in the Republic of Colombia, Inter-American Commission of Human Rights, OEA/Ser.L/V/11.53, doc. 22, 30 June 1981, p. 44.

It is perhaps not fully correct to say that legality in Colombia was "replaced". Rather, it continued to exist in the ordinary courts, side by side with a system of military justice which was essentially an instrument of repression and which departed from and lowered the standards of justice of which Colombians are justly proud. However, as the civilian judges were no longer able to perform their constitutional r role of judicial review of the Executive, the contradiction between the formal constitution and the real constitution, of which Dr Alfredo Vázquez Carrizosa speaks, became more and more evident.

In November 1980 the National Convention of Magistrates and Judges, held in Bogota, discussed the situation of the judicial power and adopted motions on the state of insecurity and lack of protection for public servants in the justice system. The newspaper El Tiempo of January 10, 1981, quoted Dr Jaime Betancur Cuartas, President of the Council of State, as saying the previous day in Medellín "A state of law does not exist in Colombia: in fact, to the contrary, a constitutional dictatorship has been consolidated ... A dictatorship exists because the powers are concentrated in the executive and the legislative branches." (16)

This criticism was made notwithstanding the constitutional reforms of 1979. By legislative Act N° 1 of November 21, 1979, the Congress established, inter alia, the Attorney-General's office, made changes in the Procurator General's office and, as part of the latter, the organisation of the office of the Assistant Procurator General for Human Rights. The reform made the Procurator General and his agents responsible for defending human rights, securing social guarantees and supervising the public administration. He was given special powers to investigate complaints of human rights violations and, where appropriate, to commence legal proceedings, to safeguard the right to a fair trial and to watch over the conduct of public officials, and other powers to enforce the law. The office of the Attorney-General was made responsible for prosecuting crimes.

Unfortunately, so long as the state of siege lasted, these reforms became but another part of the formal rather than the real constitution, for their powers did not extend effectively to the armed forces.

The widespread use of torture in order, inter alia, to compel suspects to sign confessions was not only a violation of the prohibition against torture, but was a violation of Article 25; one of the non-derogable articles in Chapter III of the Constitution, which provides that "No-one may be

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16) Ibid, p. 135.

compelled, in criminal matters, to testify against himself..."

Detailed evidence of the practice by the army of torture and of extra-judicial killings is to be found in the 1981 report of an Amnesty International mission entitled "The Army in Rural Colombia: Arbitrary detention, torture and summary execution". This report identifies over 30 places where political prisoners were tortured and lists over 50 different methods of torture.

XI. Conclusions of the Inter-American Commission on Human Rights

The Amnesty International report confirmed the evidence and findings of the Inter-American Commission on Human Rights in their report published in June 1981. (17) In its diplomatic language the Commission of distinguished independent jurists stated among their conclusions:

"2. The Commission believes that the conditions deriving from the state of siege which has been in effect almost without interruption for several decades have become an endemic situation which has hampered, to a certain extent, the full enjoyment of civil freedoms and rights in that, among other things, it has permitted trials of civilians by military courts. The Commission also believes that in general the state of siege has not resulted in the suspension of constitutional guarantees and that, because of its peculiar features it has not posed a real obstacle to the operation of democratic institutions.

3. ...Although the Security Statute is exceptional in nature, it grants military and police authorities the power to impose penalties, it permits trials of civilians by military courts, restricts the right to a fair trial and other constitutional guarantees, and includes types of lengthy punishments that are inconsistent with the exceptional nature of the Statute.

5. In connection with the right to life ... the Commission is of the opinion that this right has been the object of violations in some cases. ... the government's efforts have not been totally successful in preventing or suppressing these abuses.

6. With respect to the right to personal liberty ... there have been abuses of authority such as mass arrests, illegal detention procedures and in some cases, illegal searches and seizures, and extension of the legal period for interrogation and investigation.

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17) op. cit., pp. 219 and 220.

7. ... the Commission believes that the right to personal security has also been violated. These violations have come during the interrogation stage of persons detained by reason of the measures promulgated to combat violence stemming from the action of subversive groups and have led to mistreatment and torture. ... It is obvious that the Government's efforts to prevent and repress such abuses have not produced sufficiently effective results.

9. As concerns the right to a fair trial and due process, the Commission believes that the ordinary system of justice is operating normally and in accordance with the laws governing it. The military justice system does not offer sufficient guarantees because its rules contain restrictions on the right to a fair trial and in practice, procedural irregularities that impede due process have occurred."

The Commission recommended that the Security Statute should be repealed 'as soon as circumstances permit'.

XII. General elections, political amnesty and the lifting of the state of siege

Following a government statement that public order had been reestablished, the state of siege was lifted by Decree No. 1674, of June 9, 1982. As a result the Security Statute of 1978, as well as other legislation passed by decree under the state of siege, ceased to have effect.

On March and May 1982 presidential and parliamentary elections were held, and on August 7 Dr. Belisario Betancur assumed the Presidency. All political parties that wished to do so, were able to present candidates and the elections were considered by both national and international observers to be free and democratic.

A law granting a limited amnesty for political offences had been passed in March 1981, but owing to its limited effect, it did not achieve its object of persuading the guerrilla movements to surrender their arms. Later, by Decree 474 of 1982, another attempt was made by the government through a revised amnesty decree, but this was again unsuccessful. Finally on November 19, 1982, the newly elected government succeeded in obtaining parliament's approval of Law No. 35 granting a general amnesty to everyone who had committed political offences of rebellion, sedition and rioting before the date of the law. Also comprised in the amnesty were common law offences linked with these, or committed with a view to perpetrating such political offences. The amnesty did not apply to persons who had committed acts of homicide, other than in combat, on defenceless persons or accompanied by acts of cruelty. By the same

law, a rehabilitation programme of land distribution, housing, credits, education and health services was provided to re-settle those benefitting from the amnesty as well as people living in regions which had been devastated by the armed hostilities. This amnesty law was accepted by most of the guerrilla groups, but some decided to continue their armed struggle.

As a result of these measures the new government is receiving widespread support in its efforts to consolidate the rule of law.

The responsibility for investigating crimes, including crimes of subversion, now rests with the civilian Attorney-General, the responsibility for ensuring the protection of human rights with the civilian Procurator General, and the responsibility for trying all offences of civilians with the much respected and independent civilian judiciary.

It is to be hoped that Colombia has now succeeded in living through the experience of repeated states of siege and will be able to settle down under a democratic civilian government to grapple with the country's immense economic and social problems.

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SOCIALIST LEGALITY AND THE STATE OF EMERGENCY: LEGAL DEVELOPMENT IN EASTERN EUROPE

CONTENTS

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SOCIALIST LEGALITY AND THE STATE OF EMERGENCY

> In a socialist state the citizen's rights are indivisibly linked with his duties ....A citizen's evasion of his duties renders him liable to measures of state coercion (1)

The link between rights and duties is the primary theoretical basis of public order in the socialist countries of Eastern Europe (2). Neither national nor individual sovereignty is inviolate; failure to perform specified duties could become the pretext for a suspension of basic rights. The extension of the linkage concept to the international arena results in the "Brezhnev Doctrine" - a theory that seeks to justify armed intervention by fellow socialist governments when one state is in danger of departing from the correct path (3). Analogously, any individual deviation from the socialist norm within a nation-state may justify state coercion including the suspension of individual rights and the imposition of extraordinary legal measures. The need for safeguards against the abuse of enhanced state power during a state of emergency is as compelling in socialist states as in any other type of state, even though the theoretical underpinnings differ.

Every Eastern European state has constitutional or legal provisions for some form of state of emergency. Under article 67 of the Albanian Constitution (4), the People's Assembly "proclaims partial or general mobilisation, the state of emergency, and the state of war ..." Under article 78, the Presidium of the People's Assembly may proclaim a state of emergency "when it is impossible to convene the People's Assembly ..." The Assembly may, under article 68, extend its session "beyond the term foreseen for as long as the state of emergency continues". Under article 94, section 8, of the Bulgarian Constitution, the State Council may "proclaim general or partial mobilisation, martial law, or any other state of emergency" during periods between sessions of the National Assembly. Article 69 empowers the National Assembly to extend its term in case of war or "exceptional circumstances". Article 52 of the Constitution of the German Democratic Republic provides :

> The People's Chamber decides on the state of defence of the German Democratic Republic. In emergency situations, the Council of State is authorised to decide on the state of defence. The Chairman of the Council of State proclaims the state of defence.

Under article 73, section 1, the Council of State also "passes fundamental resolutions on matters involving the defence and security of the country" (5). In Romania, under article 43, section 21, of the Constitution, the Grand National Assembly "proclaims a state of emergency in the interest of the country's defence, public order, or security of the state in some localities or throughout the entire territory of the country". The State Council of Romania has the interim power to impose a state of war or mobilisation (article 64, sections 7 and 8) but is not delegated the power to proclaim a state of emergency. That power is granted specifically to the President of the Republic by article 75, section 13.

The remaining countries of Eastern Europe will be discussed in greater detail, in the context of historically experienced states of emergency. Because the Soviet Union was the world's first proclaimed socialist state, the Soviet legal history of states of emergency will be outlined from the time of the Revolution up to the present. The states of emergency in Hungary in 1956, Czechoslovakia in 1968 (de facto) and 1969 (official), Yugoslavia in 1981, and Poland in 1956, 1970 and 1981-82 will then be analysed in an effort to discover the basic characteristics of a state of emergency in Eastern Europe.

THE SOVIET UNION

The Revolution and Civil War

Many of the basic principles of socialist law were forged during the October Revolution of 1917. Lenin himself approved of the extraordinary measures that Dzerzhinsky, the first head of the Cheka, deemed necessary to save the revolution (5a). But Lenin perceived equally well the need to construct and strengthen socialist legality. In November 1918, he wrote that extraordinary measures, essential in the struggle against counter-revolution, should be applied only exceptionally (5b). Lenin believed that the execution of extraordinary measures should be accompanied by a written explanation to guard against abuse (6). During the period of revolution, civil war and foreign intervention, however, a new legal and social order was being formed. Lenin and his followers were deeply suspicious of the legal system that had served the tsarist police state; consequently, from its inception socialist law acquired a class basis (7). The die was cast: consolidation of legality within the socialist framework, coupled with ruthlessness toward counter-revolutionary elements.

Revolutionary military tribunals were the watchdogs of legality in the Red Army and also in the rail transport system, which was placed under martial law during the "period of armed foreign intervention and the civil war" (8). Throughout the country, Dzerzhinsky's Cheka and its successor, the GPU, acted as a law unto itself, carrying out arbitrary arrests, secret trials and summary executions (9). Revolutionary tribunals, which consisted of a judge and six lay assessors, "dispensed primitive, severe, sometimes arbitrary justice" to suppress the foes of socialist revolution (10). 85.2 percent of the 26,738 persons brought to trial before the revolutionary tribunals were convicted (11). The harsh machinery, the swift and severe justice, and the suspension of due process (12) were considered necessary during the birth of the new socialist state. In effect, a wide-scale state of emergency prevailed. But the use of truncated judicial procedures was considered to be a temporary expedient concomitant to war communism (13).

Stalin and Emergency Judicial Procedures

After a period of retrenchment and consolidation during the era of the New Economic Policy (14), a period of "legal nihilism" ensued (15). The forced collectivization of the peasantry and liquidation of the "kulaks" (16) led to massive dislocations in Soviet society. Repression began to mount in 1928 (17) and by 1933, the security police (OGPU) had been given the power to execute citizens. Stalin felt that such drastic measures were necessary to eliminate "obstacles to socialist construction" (18). Most ominous of all was the creation of "special boards" (19) empowered to banish the "socially dangerous" to internal exile and labour camps or to

expel them from the country without regard to the provisions of the applicable criminal statutes (20). The primary function of the boards was to deter opposition to the state by creating a general atmosphere of terror (21). Summary procedures were instituted 1 December 1934, for terrorism, and 14 September 1937, for damage to state property and sabotage (22). Death sentences were immediate and non-appealable (23). Stalin fully intended to eliminate the "kulaks" as well as anyone else who might stand in his way. Professor Leo Kuper has documented the Soviet opposition to the inclusion of the category "political groups" as a protected class under the Genocide Convention (24). It was not the state or its apparatus that was withering away; it was legality.

During World War II, martial law was declared widely throughout the Soviet Union. The military authorities were given the right, inter alia, "to impose curfew, restrict street traffic, and whenever necessary, to search houses and arrest suspected persons ..." In addition, by means of "an administrative procedure", they could "deport from localities under martial law ... persons who are considered socially dangerous, either because of their criminal activities or because of their connections with the criminal world" (25). Thus, the wartime statute provided a clearer definition of the term "socially dangerous" than did the pre-war statute creating the special boards. During the war, all cases that involved "crimes directed against the national defence, public order, and state security", including speculation, hooliganism and crimes against the state, were submitted for trial by military tribunals (26). Sentences were not appealable, and could be altered only by way of supervision (27). All railroads were placed under martial law in April 1943 (28). This included the right to "impose administrative arrest for violators of discipline for a period up to twenty days" and, for service crimes, to send the transgressors "to the front into penal companies, unless they are subject to a more severe punishment" (29). This legal regime was extended to all water transport in May 1943 (30). Geographic regions placed under a complete regime of martial law included, but were not limited to, Stalingrad, the Chechen-Ingush ASSR, the Kabaradino-Balkar ASSR, the Northern Ossetian ASSR, the Ordzhonikidze territory, certain cities of the Transcaucasus, the shores of the Black Sea and the Caspian Sea, the Georgian SSR, the Azerbaidzhan SSR, Armenian SSR, and the Saratov and Tambov regions - restored to normal rule in September 1945 (31). Martial law in Lithuania, Latvia, Estonia and the western regions of the Ukraine and Belorussia was not lifted until 4 July 1946 (32). Undeniably, the USSR was under the gravest threat to its existence during what the Soviets call the Great Patriotic War. The remarkable aspect is the similarity between the wartime measures and the peacetime measures adopted by the Stalin regime.

Post-Stalin Reforms

In 1950, Professor John Hazard predicted "Emergency government will be tolerated ... but there is a limit even among the Russians. There cannot be an emergency for centuries" (33). Government by emergency decree led to an unprecedented abuse of power by the state. Perhaps as a signal to the Soviet public, the Special Boards were eliminated by decree in 1953, six months after the death of Stalin (34). A decree of 6 April 1956, repealed Stalinist decrees that had introduced extraordinary summary procedures for certain offences (35). First Secretary of the Communist Party, Nikita

Krushchev, revealed in a "secret" speech to the 20th Party Congress that the lawlessness perpetrated under the pretext of emergency measures to strengthen socialist construction had, in fact, damaged the cause it purported to serve. "Many thousands of honest and innocent Communists have died as a result of this monstrous falsification of such 'cases'", he said (36). Stalin's political police had followed "a path of falsification, mass arrests and executions" (37). General reforms of the legal system were undertaken in 1957 and 1958 to help prevent recurrence of some of the abuses (38). On 12 February 1957, all cases formerly under the jurisdiction of the special transport courts were placed under the jurisdiction of the general courts in order to implement "the simplification of the Soviet judicial system" (39). On 25 December 1958, the Supreme Soviet set out in detail the functions of the military tribunals in the USSR, specifying the principles of organization and operation, jurisdiction and other questions (40). From the dissolution of the special boards to recodification of statutes and limitation of judicial power, the movement toward increasing legality received much of its impetus from the bitter experience felt first-hand by the lawyers, politicians and bureaucrats of the maturing Soviet state. Extraordinary procedures spawned cruel and arbitrary "justice". Emergency measures usurped the dictatorship of the proletariat and led the Soviet people to the brink of tyranny.

Current Status of Emergency Measures

> The further strengthening of socialist legality and the legal order are ... clearly expressed in the draft of the new Constitution.
>
> We know, comrades, that some of the years following the adoption of the present Constitution were darkened by illegal repressions and violations of the principles of socialist democracy and of the Leninist norms of Party and state life. This was in violation of the rules of the Constitution. The Party has condemned this practice unreservedly and such things will never happen again.
>
> - L. Brezhnev
> 24 May 1977 (41)

Although it seems unlikely today that the special boards would be resurrected, the important question remains: what are the structural barriers to the recurrence of such a wide-scale suspension of basic rights ? The "illegal repressions" violated the Stalin Constitution of 1936. Only an increased legal consciousness and respect for the constitution can lessen the likelihood of abuse of emergency measures (42). The emergency actions at the disposal of the Soviet state today range from full martial law to specific emergency statutes to crackdowns under the cloak of over-broad statutes.

Under the 1977 Constitution, the power to proclaim martial law rests with the Presidium of the Supreme Soviet. Article 121 provides in pertinent part that the Presidium:

> /15/ proclaims, in the interests of the defence of the USSR, martial law in specific localities or for the whole country;

/16/ proclaims general or partial mobilization;

/17/ during the time between the sessions of the Supreme Soviet of the USSR, proclaims a state of war in the event of a military attack on the USSR or when necessary to fulfill treaty obligations concerning mutual defence against aggression.

Theoretically, then, the Presidium may declare war only if the entire Supreme Soviet is not in session, but could declare martial law even if the larger body were opposed. This may be justified on the ground that speed is of the essence; but it is noteworthy that there is no constitutional requirement for a timely confirmation by the full body, even for the proclamation of martial law throughout the entire country. There are provisions to convene the two chambers of the Supreme Soviet for extraordinary sessions under article 112, so it would be feasible to require a confirmation within a specified time period. The only operative limitation is that provided by the general phrasing of article 119, that the Presidium is accountable to the Supreme Soviet "in all its activities". A clearer requirement of confirmation would be advisable for a declaration with such far-reaching and potentially dangerous consequences.

The Council of Ministers of the USSR is vested with the power to execute the emergency measures. Under article 131, the Council:

/3/ takes measures to defend the interests of the state, to protect socialist property and public order, and to safeguard and defend the rights and freedoms of citizens;

/4/ takes measures to ensure state security .....

In the event of a state of emergency within the Soviet Union, the military tribunals may in some circumstances acquire jurisdiction over all cases. Article 10 of the amended Soviet law on military tribunals provides that "In localities where by virtue of exceptional circumstances ordinary courts do not operate, military tribunals shall consider all criminal and civil cases" (43). Professor Harold Berman states that an earlier, identical provision was applicable "not only where martial law has been declared within the Soviet Union but also where Soviet troops are situated outside the Soviet Union." (44)

A constitutional declaration of martial law may, however, be unnecessary to effectuate a generalized repression: a "crackdown" may suffice. There are two types of crackdowns, neither of which is unknown in many other political systems. The first is officious application of statutes in force. When the statutes in question are vaguely or broadly drafted, this type of crackdown can become a "quasi" state of emergency, or a means of suspending basic rights while circumventing the requirements of international covenants or even of the state's own constitution. This technique has proved to be an effective means of repression in the Soviet Union. The accordion-like offences include anti-Soviet agitation and propaganda (45), hooliganism (46), social parasitism (47) and various political offences (48). The extent of human rights violations in the USSR is beyond the scope of this chapter (49). The concern here is with an organized suspension of rights by the state in a manner designed to circumvent the state of emergency declaration.

The second type of crackdown consists of a large-scale crackdown that violates even the state's norms of legality in the interest of expediency. As Professor Stanislaw Pomorski has stated:

> Anti-crime campaigns ... tend to blur the line between administration, governed by considerations of expediency, and adjudication, governed by impersonal, general rules. They almost invariably involve substantial abandonment of the rules for the sake of expediency. They represent a major retreat of the due process function in favour of the crime control function ... (50).

Pomorski then cites the ex post facto imposition of the death penalty during the 1961-62 campaign against economic crimes (51). The two methods -- abuse of standing laws and violation of standing legal or constitutional provisions -- may of course be used in concert. The most pernicious innovation in officially sponsored suspension of basic rights is that of psychiatric abuse. Deprivation of rights may occur when compulsory commitment procedures are used to circumvent the regular requirements of criminal procedure:

> The accused need not be told that an order calling for his psychiatric examination has been made, nor need he be informed of the results. Once the accused's sanity has been called into question, the investigation officials are not required to inform him of new charges ... It is left to the court's discretion as to whether the accused or his relatives shall be allowed to attend the court hearing which decides upon his sanity and his need for confinement to a psychiatric hospital ... In many republics of the USSR the hearing need not be open to the public ... There is no need for officials to provide a smokescreen for the closed nature of such hearings, as they must do in political cases where no formal issue is made of the sanity of the accused. (52).

Dr. Anatoly Koryagin has pointed out the correlation between the time required to "treat" the victims of this process and the prison terms specified for the offences under which the victims were originally charged (53). In addition, by replacing the psychiatric meaning of the term "socially dangerous" by the judicial meaning that the patient may be capable of harming the Soviet system as a whole, the entire procedure may become a general suspension of due process rights (54). Before elections, major party congresses, US President Nixon's visit to Moscow in 1972, and the 1980 Olympics, "undesirables" were rounded up and committed to psychiatric hospitals, thus avoiding the necessity of meeting either criminal procedural requirements or international standards for emergency situations (55).

In spite of the official repudiation of illegal, Stalinist repressions, the spectre of Stalinism may be described in the crackdowns. During periods of tension or political activity, round-ups may be conducted by concerted use of broad statutes or by campaigns officially condoned, expressly or tacitly, that actually violate the Constitution. A combination of the worst of both worlds is the derailing of established legal procedures by using psychiatric commitment proceedings in order to (a) short-circuit the procedural rights of the accused without presenting evidence or facing due process guarantees, or (b) preventively detain without formal charges persons undesirable to the state.

Conclusions

Constitutionalism in the Soviet Union has strengthened significantly since the Stalinist purges. The continuation of this trend is the only guarantee of President Brezhnev's declaration that such lawlessness will never recur. More detailed specification of the requirements and powers of the government during martial law will serve the end of socialist legality in the USSR. The abuse of administrative procedures and broad statutes will lead to cynicism among legal professionals, government officials and the people -- and will ultimately harm legality and increase the probability of serious abuses of the state of emergency. In addition, the arbitrary application of overbroad penal statutes, circumvention of citizen's rights by administrative crackdowns, and the abuse of psychiatric institutions present serious obstacles to the construction of a genuine socialist legality.

HUNGARY

> As regards constitutionalism and the rule of law a remarkable progress may be recorded since 1949. Here we would merely mention that the multiplanar system of the guarantee of legality is now firmly established, viz. the general obligation of the representative and administrative organs and that of the judiciary in the observation of legality, the special functions of the prosecutor's office, the institution of the judicial supervision of certain decisions of the organs of public administration.
>
> - Dr. György Antalffy (56)

The progress of legality and constitutionalism in the Hungarian People's Republic has been at great cost. As Dr. Tibor Lukacs, head of the Secretariat of the Department of Justice, noted recently, "for a time the legal order ceased to exist" in late 1956 and 1957, and "the administration of justice came to a standstill" (57). There were two distinct periods of the state of emergency in Hungary, one declared by the Nagy government and the second period declared by the Kadar government. Neither prevented the bloodshed that scars the memory of Eastern Europe.

Constitutional Background

The first post-war Hungarian Constitution, enacted 31 January 1946, stated in its preamble that no one should be deprived of basic human rights without a legal procedure (58). Article 11, section 2, specified that the President could establish a state of war only by virtue of specific authority given him by the National Assembly. In the August 1949 Constitution, the preamble emphasized instead the struggle towards socialism and the debt owed to the Soviet Union for liberation and assistance (59). Parliament retained the power to declare war /article 10 (3) (g)/. Only the Parliament, by a two-thirds vote, could change the Constitution (article 15). The Parliament was allowed to extend its session in case of "war or other emergency"

under article 18 (2), and could be recalled by the Presidential Council under emergency circumstances under article 18 (3). The Presidential Council, under article 20 (3), could dissolve any local organ of government that infringed the constitution or was "seriously detrimental to the interests of the working people". Article 20 (4) re-emphasized that the Presidential Council exercised all the powers of Parliament when not in session, except the power to amend the Constitution. Article 20 (4) required that the legally binding enactments of the Council be submitted to the next session of Parliament. Section VII specifies the rights and duties of citizens.

Dr. Lukács considered the special courts abolished by Act II of 1949 "survivals of the bourgeois judiciary" (60). They remained mummified neverthelss in article 36, section 2: "By provision of law special courts may be set up to deal with specific groups of cases". "Specific groups" might mean political cases, but there is no guidance in the Constitution. Hearings were required to be conducted in public "unless otherwise prescribed by law" (article 40). With respect to "constitutionalism and the rule of law", the events of 1956 had disastrous consequences, particularly with regard to the judiciary.

The Nagy Government

On 23 October 1956, demonstrations in Budapest developed into a revolt; Soviet troops and tanks, at the behest of the government, were used against the rioters (61). On the following day, Imre Nagy was made premier, partly in response to the demonstrators' demands. Upon assuming office, he immediately declared a state of emergency (62). All public assembly was banned, telephonic communications were cut in some areas and a curfew was imposed from 6 p.m. to 6 a.m. (63).

After Nagy declared a state of emergency, he began to negotiate with the protestors. He formed a coalition government, promised an amnesty to all fighters and, on 1 November, proclaimed Hungary's neutrality and attempted to pull Hungary out of the Warsaw Pact (64). He declared a gradual amnesty of prisoners and unsuccessfully negotiated for the withdrawal of Soviet troops. On 30 October 1956, the Soviet government officially declared:

> The working people of Hungary, who have achieved marked progress under the people's democratic system, are legitimately raising the question of the need to abolish the serious shortcomings in economic development ... However, this just and progressive movement of the working people was soon joined by the forces of black reaction and the counter-revolution ... (65).

At dawn on 4 November, the Soviets launched a heavy attack on the capital. Nagy asked for asylum at the Yugoslav embassy (66). Janos Kadar formed a new government with himself as premier. As Dr. Antalffy phrased it, "Since the insurgents refused to obey the government appeal / to surrender / the armed liquidation of the rising took its course (67).

Kadar and the Judiciary

The changes in the administration of justice under the Kadar regime's emergency measures were pervasive (68). The first change was Decree-Law No. 22 of 12 November 1956, authorizing prosecution in

regular courts of persons accused of violent crimes without requiring the Procurator to submit a bill of indictment, issue a summons or set a date for the hearing (69). On 11 December, the second period of state of emergency officially commenced: martial law was declared. The Presidential Council decreed summary jurisdiction throughout the country for violent crimes such as murder, looting, damage of public utilities and unlicensed possession of firearms (70). Two days later, the death penalty was prescribed for crimes subject to summary procedure (71). Detailed rules for summary procedure were published on 13 December (72). Military tribunals were given jurisdiction over the summary proceedings (73). On 15 January 1957, Special Councils were created to process summary trials under article 2 of Decree-Law No. 4 of 1957 (74). Article 1 of that Decree-Law extended jurisdiction to such crimes as "organisation against the People's Republic ... and associating for this purpose".

The declaration of martial law was coupled with new measures for preventive detention. Decree-Law 31 of 13 December 1956, Concerning Public Security Detention, called for detention of anyone "whose activities or behaviour endangers public order, or public security, and in particular the undisturbed continuity of productive work and transport ..." (article 1), (75). A month later, the Minister of the Armed Forces and Public Security Affairs promulgated detailed rules for detention, providing a 48-hour time limit for the prosecutor to approve the recommendation of the police authority (article 2), a complaint procedure (articles 3 and 4), termination after six months (article 9) or when ordered, and deduction of the cost of detention from the remuneration for assigned work (article 7), (76).

The curfew ended in Budapest, 14 April 1957 (77). Summary jurisdiction was abolished 3 November 1957 (78). The role of the people's tribunals was limited in the spring of 1958 (79). Law-Decree No. 12 of 1959 ordered partial amnesty for certain crimes (80). Premier Kadar put a wide amnesty into effect on 4 April 1963 in order "to liquidate the remaining problems dating back to the events of 1956" (81). Another amnesty was announced 25 March 1970 by Law-Decree No. 7 of 1970 (82).

Implications

Today, Hungary is widely regarded as the most successful and prosperous country in Eastern Europe. The memory of the price paid in blood and tragedy, however, cannot be far beneath the surface. The crisis twenty-five years ago sent shock waves through every sector of Hungarian society: the workers, the peasants, the intellectuals, the judiciary (83), the legal profession (84), and the government (85).

In 1972, the Constitution was revised extensively. Article 54 (1) pledges that the Republic shall respect human rights. Article 54 (2) states that rights "shall be exercised in accordance with the interests of socialist society; the exercise of rights shall be inseparable from the fulfillment of the duties of citizens". Not surprisingly, the Constitution refers specifically to the consequences of "extraordinary circumstances" (article 28). Under article 49, trials are to be open except where provided by law, and persons under criminal proceedings are entitled to the right of defence. But the most significant provision is article 31:

/1/ The Presidium of the Hungarian People's Republic, in the event of war or danger which seriously jeopardizes the security of the state, may create a defence council empowered with extraordinary jurisdiction.

/2/ The danger that seriously jeopardizes the security of the state, and the termination thereof, shall be established and promulgated by the Presidium.

Dr. Antalffy has pointed out that constitutionalism is of a higher order than legality (86). Yet, article 31 seriously undermines the safeguard of constitutionalism in several ways. The same entity that declares the state of emergency also defines it without any constitutional limitations. "Extraordinary jurisdiction" is not defined or limited by the Constitution. Thus, the Presidium can exercise plenary powers, suspend legal rights wholesale, and resurrect summary jurisdiction without any limitation whatsoever. Article 31 enshrines the principle that basic human rights can be revoked in time of emergency.

CZECHOSLOVAKIA

> In our country, human rights always have a class and social content.
>
> - Rudé pravo
> 19 March 1977 (87)

> For me, socialism is inseparably linked to respect for legality. Insofar as some of my clients have been treated as second class citizens, I have objected because such practices have nothing in common with socialism.
>
> - Josef Danisz,
> lawyer for Charter 77
> signatories (88)

Recent history in Czechoslovakia illustrates the high tension between two competing, possibly irreconcilable, views of socialism. The first view is that human rights may be granted and revoked by the state based on class and state interests. The second view is that socialism assures certain basic rights based on a more equitable ordering of society. The latter point of view flourished during the Prague Spring of 1968. Then came a Soviet-led Warsaw Pact invasion in August, during which it may be said that a de facto state of emergency existed. This was followed by a step-by-step retreat from liberalization, culminating in a declared state of emergency a year later. In the end, it was the first view that held sway.

1968: Sovereignty and the State of Emergency

Internal political unrest and student protests in the fall of 1967 led to the election of Alexander Dubček as First Secretary of the Party, succeeding the deposed Novotný (89). On 30 April, the government declared the end of policies permitting wiretapping and press super-

vision (90). Censorship was totally abolished by the end of June (91). The law abolishing the "Central Office for Publication" passed the National Assembly by a vote of 251 to 30 (92). The action programme of the Party, published 5 April, called for fundamental structural changes, including the separation and control of state power (93). The programme called specifically for stricter control over the internal security forces, with "precise functions in the defence of public order ... laid down by law and ... directed by the national committees (94). Full independence of lawyers from the state bodies was to be guaranteed as well as the strengthening of legality founded on "proceedings in court which are independent of political factors and are bound only by the law" (95). The Soviets, distressed by what they perceived as an anti-Soviet drift in policy, met with the Czechoslovak Presidium in Bratislava on 3 August, along with leaders from Bulgaria, the German Democratic Republic, Hungary and Poland (96). Undeterred, the Czechoslovak Communist Party published draft statutes for sweeping reforms 10 August (97).

During the night of 20 - 21 August, Czechoslovakia was invaded by the countries whose leaders had met with its Presidium at Bratislava. In an extraordinary session on 28 August, the Czechoslovak National Assembly stated that the occupation was contrary to international law, the U.N. Charter and the Warsaw Treaty (98). The International Commission of Jurists condemned the invasion as "a ruthless attempt to impose by brute military force political, economic and military control on a free and sovereign people" (99). Indeed, the five leading progressive members of the eleven-member Presidium were abducted during the invasion and held prisoner (100).

Assessment of the emergency status of the country in the fall of 1968 is made problematic by the compromise of national sovereignty. Manifestly, a dire emergency existed. A curfew was imposed the night of 22 August in Prague from 10 p.m. to 5 a.m., public assemblies were banned, and the public was warned that street gatherings would be regarded as provocations (101). Reportedly, a curfew was also imposed on towns throughout Slovakia, and three towns, Kosice, Presov, and Nova Kamenica, were placed under martial law (102). The extraordinary 14th Party Congress was convened 22 August. The Interior Ministry announced that road, rail and air links with the outside had been cut (103). The Czechoslovak populace resisted mainly through non-violent means, though there were riots, bloodshed and mass arrests (104). These steps and others point to a de facto state of emergency. Some of the steps were taken by the invading forces; other steps were clearly coerced. The constitutional authorities were face to face with tanks and troops. Finally, on 13 September, under Soviet pressure, a newly constituted National Assembly introduced preventive censorship, banned the creation of new political organizations and limited the right to public assembly (105).

1969: The Husák Government

Sporadic demonstrations and riots continued, including November protests resulting in 167 arrests (106). Celebrations of a victory of the national hockey team over the Soviet team turned into virtual riots in April. On 12 April, using the hockey riots as a pretext, full censorship was reinstated (107). On 18 April, Gustav Husák, who had replaced Dubček as First Secretary the day before, declared that there

can be no freedom for those who misuse freedom and democracy to oppose the state (108).

Purges of the press continued from the fall through the summer; many publications were suspended or banned (109). In spite of the invasion, the unrest was not crushed. The government feared that the first anniversary of the invasion would be the occasion for major protest demonstrations. The Husák government called out tanks and troops as a show of force to impress not only the populace but perhaps also the Soviets (110). On 22 August, emergency status was instated in Czechoslovakia by Legal Measure of the Presidium of the Federal Assembly No. 99 "concerning some provisional measures essential for strengthening and protecting public order" (111). The preamble adverts to the existing gross violation of public order and cites article 58, paragraph 3 of fundamental (constitutional) law 143/1968 as authority. That paragraph reads:

> Urgent measures requiring the enactment of a Law are taken by the Presidium of the Federal Assembly in the form of Legal Measures signed by the President of the Czechoslovak Socialist Republic, the Chairman of the Federal Assembly, and the Chairman of the Government of the Czechoslovak Socialist Republic. Legal measures are promulgated in the same manner as Laws.

The following paragraph of article 58 requires that measures so taken be approved at the next session of the Federal Assembly.

The substantive provisions of Legal Measure 99 are far-reaching. Section 1 sets a penalty of up to three months imprisonment and/or a fine of 5,000 crowns for taking part in, inciting or supporting a violation of public order or violating work discipline. Section 2 prescribes banishment from place of residence from one to five years for section 1 crimes, as well as certain other anti-state crimes such as defamation of the state or of another Warsaw pact state. Section 3 provides that cases may be decided on the basis of information provided by the state security organs, that those organs may detain suspects up to three weeks without trial, that summary trials may be conducted with single judge courts, and that the defence attorney may participate only during the course of the trial (112). Section 4 calls for summary dismissal of workers who violate socialist order and of teachers who do not inculcate respect for the state. In addition, students may be barred from further study. Trade unions could not intervene on behalf of members to prevent the application of these measures. Section 7 declared that the measures would take effect immediately and remain in effect until 31 December 1969.

In the first few days of the state of emergency, the Interior Ministry reported that 3,690 persons had been detained for questioning, of whom 1,797 were later released (113). In addition to the measures discussed above, there were purges of local government bodies, widespread interrogations and, in May 1971, a mandatory renewal of party cards that purged Party ranks by twenty percent (114). In May 1971, at the regular Fourteenth Party Congress, Husák declared that normalization had been achieved (115).

Implications

The most disturbing aspect of the 1969 state of emergency is the incorporation of "temporary, emergency measures" into permanent positive

law. Legal Measure No. 150 of 18 December 1969 "concerning transgressions" incorporates into permanent statutory law many of the emergency provisions on violation of socialist order and destruction of socialist property (116). Legal Measure 148/1969 included other provisions, as Vladimir Kusin points out:

> This concerned sentencing a person to banishment from a named place and liability to severe punishment for such petty offences as failure to comply with a properly served demand to preserve public order ... breach of public order, refusal to fulfil duties deriving from a labour contract (strike ?) and breach of duty ... The Labour Code was simultaneously amended by ... a new provision according to which an employee could be dismissed "if his activities violate socialist social order, and he thus cannot be trusted ... to perform his present duties. (This formulation was taken over literally from the emergency legislation of 22 August). (117).

A formal declaration of a defence emergency automatically increases the severity of penalties and lessens the burden of proof for anti-state crimes (118). The ultimate extension of this pattern is section 2 (2) of Constitutional Act No. 155 of 17 December 1969, amending and supplementing chapter 8 of the Constitution, which reads in pertinent part:

> The Supreme Court of the Czechoslovak Socialist Republic shall review the legality of final decisions imposing capital punishment; exceptions may be provided for by an Act of the Federal Assembly only with respect to martial-law proceedings or to judicial proceedings in periods of defence emergency.

Even the most important safeguards may be suspended in emergency proceedings. The events of 1969 show that the same kinds of drastic steps that would be called for in the event of a foreign invasion will be employed in the event of any perceived threat to socialist order.

In the first seven years of normalization (1969-75), it is believed that 4,718 persons were sentenced for various political offences (119). The pressure has continued to the present. Forty people were detained in round-ups in May 1980; fourteen of them currently face charges under penal code provisions against subversive activities (120). The invasion in 1968 and the state of emergency in 1969 are two of the darkest pages in Czechoslovak history. Their shadow remains.

YUGOSLAVIA

> Any arbitrary act which violates or restricts human rights shall be unconstitutional and punishable, regardless of who has committed the act.
>
> - Yugoslav Constitution, article 198.

In a decision of 16 March 1977, the Constitutional Court of Yugoslavia stated that, based on section VII, paragraph 2 of the preamble to the 1974 Constitution, the generally recognized norms of international law form part of the law of the Socialist Federal Republic of Yugoslavia (121). The Court cited as evidence of binding law the United Nations Charter, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, and the Helsinki Final Act. In the formal, constitutional sense, then, Yugoslavia has rejected the notion that rights are pendent to duties. The non-derogable rights of international law are legally inalienable in Yugoslavia (122).

The 1974 Constitution allows the suspension of constitutional provisions relating "to individual freedoms, rights, and duties of man and the citizen" during a state of war or "if so required by the country's defence interests" (123). The Presidency may effect suspensions by a decree having the force of law, but is required to submit the decree-law to the Federal Assembly "as soon as / the Assembly / is in a position to meet". When authorized by statute in exceptional circumstances, detention may be ordered by an internal affairs organ rather than by a court of law (125). Under article 391 of the Code of Criminal Procedure, parties have the right of appeal as well as recourse to extraordinary legal remedies such as re-examination of the judgment or re-opening of proceedings (126). In sum, emergency derogations are anticipated but are limited by constitutional safeguards and by Yugoslavia's incorporation of the Covenant standards into domestic law.

Kosovo, 1981

Severe disturbances in the Autonomous Province of Kosovo in May 1981 were a major test of Yugoslavia's commitment to the rule of law. The main issue behind unrest in Kosovo centres around demands to upgrade the autonomous province to a full republic, which would entail the right to secede and, presumably, unite with Albania. 77.4 percent of the province's inhabitants are of Albanian nationality (127). At least one person was killed in nationalistic rioting in Priština, Kosovo's capital, on 25 November 1968 (128). Between 1974 and 1980, 89 persons were sentenced for organized irredentist, nationalistic activities in the province; 40 others went before correctional tribunals for the same offence. Kosovo security services sent another 503 persons before correctional tribunals for irredentist, nationalist agitation during the same period (129).

On 11 March 1981, about 2,000 students at Priština University rioted over bad food, inferior living conditions and inequality (130). The protests developed into widespread riots over conditions in Kosovo, which is the poorest province in Yugoslavia. The worst riots occurred 1 April, when over 10,000 protestors marched on Priština's town prison and clashed with security forces (131). 75 persons were wounded by firearms and 55 others were injured; four members of the security forces were

wounded by firearms and 127 suffered other injuries. In addition, according to official Yugoslav reports, eight demonstrators and one policeman were killed (132). There were other casualties besides those in the demonstrations. In one reported assault on a house in which two "outlaws" were hiding with their wives and children, the two suspects and four policemen were killed (133). By this point, the riots had taken on their separatist character (134).

On 2 April 1981, the province was placed under a state of emergency. All public gatherings and movement by groups of three or more people were banned by police order throughout the province and a dusk to dawn curfew was imposed in Priština and four surrounding towns (135). Foreign journalists were banned from the region until 18 April, when they were allowed to enter the region on guided tours (136).

1,700 persons were affected by the security measures (137). 506 persons had been sentenced as of 12 June, 287 of whom were charged with direct participation in the demonstrations; another 154 persons were on trial for crimes such as membership in clandestine organizations (138). The University was closed ten days early because of renewed protests (139). In the two months following the declaration of a state of emergency, 442 persons were expelled from the party (140), 109 teachers and professors lost their jobs, and 280 high school students were expelled from school (141). The trials and the unrest have continued; typical sentences range from two to eight years (142). Over 400 ethnic Albanians have been sentenced to prison and another 100 await trial; in addition, the Yugoslav Federal Government has reported, 1,200 persons have received light sentences for disturbing the peace (143). Over 50,000 Serbs have fled the province in the last decade, and the exodus has intensified since the April 1981 riots (144).

The Central Committee has stated that the emergency measures were indispensable (145). It placed the blame for the disturbance on weaknesses within the Party structure as well as on the pro-Albanian irredentist movement, and emphasized the importance of accelerating development in the Kosovo region (146). To avert similar serious emergencies, with their attendant dangers for the state and the individual, concerted efforts to address the underlying economic causes for unrest are essential.

POLAND

> No Polish problem can in the long run
> be solved by force.
>
> - Gen. Wojciech Jaruzelski (147)

The states of emergency imposed in Poland in the past two decades demonstrate the limitations and dangers of the state of emergency in Eastern Europe. The first major disturbances occurred 28 June 1956, when worker protests over poor living conditions led to three days of rioting in Poznan (148). Troops and tanks were used against the crowds, and a curfew was imposed (149). Over 200 persons were arrested; at least 54 persons were killed and over 200 were wounded (150). The government attempted to convert this de facto, temporary state of emergency into a full-scale emergency, not by official

legislation through the Sejm, but by using the judiciary. Three months later, during the open trials of those arrested during the emergency, the government prosecutors asked the courts to apply emergency provisions enacted during the period immediately following World War II. The provisions would have automatically increased all prison terms and could have made some subject to the death penalty. The courts, however, balked at the proposed judicial state of emergency, and applied ordinary criminal statutes (151). The emergency resulted ultimately in a change of government leadership and a temporary liberalization (152).

Student protests at Warsaw University in 1968 culminated in major riots. About 4,000 students clashed with 500 police over the issue of censorship (153). The students failed to gain the support of the workers. Unrest among the populace continued, however, until price increases in December 1970 set off wide-scale rioting, beginning in Gdansk. The government later acknowledged that a total of 45 persons were killed and 1,165 wounded (154). On 17 December, Premier Josef Cyrankiewicz issued a communiqué specifying emergency measures, including the authorization to use weapons against rioters, approved by the Council of Ministers (155). The authority for this state of emergency was article 32, section 7 of the revised 1952 Constitution (156). The Council's resolution was in effect throughout the country. Gdansk and Szczecin were placed under a dusk-to-dawn curfew; public meetings were banned and rail and air traffic were halted (157). The Council's orders were rescinded six days later (158) and the curfew in Gdansk was lifted 23 December (159). The government leadership was re-organized and economic aid measures were announced as a result of the protests (160). A monument to the slain workers now stands in Gdansk.

Price increases again sparked protests in 1976. According to Polish television broadcasts, two demonstrators were killed and 75 police injured in street rioting. The price increases were rescinded by the government (161).

Martial Law, 1981 - 82

The imposition of martial law at midnight, 12 - 13 December 1981, was an authoritarian response to two years of social unrest in Poland. Demands by the workers and intellectuals for labour reform had led to the recognition by the government of the workers' right to strike in the Gdansk Agreement of 31 August 1981 (162). Unrest continued, exacerbated by mismanagement of the economy; the workers, through the labour organization, Solidarity, demanded not only co-determination in the workplace, but also a voice in the political control of the government (163). Poland had amassed a debt to the West of over 26 billion dollars (U.S.) by 1981. Faced with a mounting social, political and economic crisis, the Council of State declared an unprecedented "stan wojenny" (state of war).

The Council created a "Military Council for National Salvation" and suspended the operation of all trade unions; major industries, including coal mining, were placed under military control. A 10 p.m. to 6 a.m. curfew was enforced by soldiers and security force personnel bearing automatic weapons. Transportation was limited; communications, including telephone and telex, were cut, and censorship

was reinstated. All public assembly, except for church gatherings, was banned. Preventive detention was authorized for anyone whose behaviour aroused "suspicions that ... they will conduct activity threatening the security of the state" (165). The right to strike or protest was suspended. Summary court procedures were instituted, with minimum penalties of three years and no right to appeal (166).

In a report to the Sejm Commission for Internal Affairs and the Administration of Justice, Boguslaw Stachura, the Deputy Minister for Internal Affairs, acknowledged that 17 persons had been killed in the first few days of martial law -- eight at the Wujek coal mine and nine in Gdansk (167). On 25 January 1982, in an address to the first session of the Sejm held after the declaration of Martial law, General Jaruzelski stated that 4,549 internees were being held at that time in jails or special centres, and 1,760 persons had been released (168).

Most major fighting had been suppressed within a week of the declaration. Major disturbances broke out sporadically thereafter, notably in Poznan (169), Gdansk (170), and Warsaw (171). In April, the rector of Warsaw University was ousted (172). The most serious riots occurred 31 August 1982, on the anniversary of the signing of the Gdansk agreement between Solidarity and the government.

Legal Implications

The adoption of the 1976 version of the Polish Constitution generated intense legal debate within Poland. The Constitution's drafters intended to insert a provision explicitly linking individual civil and political rights with the fulfillment of duties to the state. Because of the implication that all individual rights could be abrogated on the pretext that a certain duty was not fulfilled, the provision was finally eliminated (174). The principle has been resurrected, however, under the regime of martial law.

The new Constitution concentrates a great deal of power in the hands of the Council of State. Among the powers enumerated in article 30 are:

- calling elections and convening sessions of the Sejm (Parliament)
- overseeing the constitutionality of laws
- determining a universally binding interpretation of laws
- issuing decrees having the force of law
- ratifying and denouncing international treaties.

The same article specifies, however, that the Council "is accountable in all its activities to the Sejm". Furthermore, decree-laws issued in periods between sessions of the Sejm must be submitted to the Sejm for approval at the nearest session (article 31). The Council's power over the judiciary in overseeing constitutionality and interpreting the laws is reinforced by article 60, whereby judges and lay assessors are appointed and recalled by the Council (175). Article 61 allows the

Council to appoint and recall members of the Supreme Court. Finally, the Council of State is empowered to proclaim partial or general mobilisation or "martial law on part or on the whole of the territory of the Polish People's Republic, if this is necessitated by considerations of the defence or security of the state" (article 33, section 2).

The Sejm had been scheduled to meet the week after martial law was proclaimed. The Council's decrees were unconstitutional, because technically the Sejm was in session; the Council of State is empowered to issue decrees only when the Sejm is not in session. The Chairman of the Sejm judiciary committee, Mr. Witold Zakrzewski, stated that despite the fact that the Sejm was in session, the Council passed the decrees "for reasons of higher necessity" (176). Any government wishing to ignore explicit provisions of its own constitution could do so at will by invoking the disingenuous principle of "higher necessity". The principle is offensive to the concept of the rule of law: if socialist legality is subject to unilateral abrogation by the state, then the term is devoid of meaning.

Under martial law, summary proceedings are held not before ordinary courts of first instance composed of one judge and two people's assessors, but before the voivodship courts, or courts martial, composed of three professional judges (177). The lay assessors are a cherished institution in socialist legal theory. As Professor Stanislaw Waltós has written, the institution of lay assessors provides insight, injects the element of citizen participation (the popular will) and heightens the court's sense of autonomy (178). The removal of the participation of lay assessors in the administration of justice under martial law has been little noticed in the West, but according to socialist legal theory, the removal will significantly degrade the quality of justice.

The Polish Government notified the Secretary-General of the United Nations of its derogations from the International Covenant on Civil and Political Rights, to which Poland is party, on 14 December 1981. The Government has not complied fully with the Covenant, despite its fulfilment of this technical requirement.

It stated that "there has been a temporary derogation from or limitation of application of articles 9, 12, paras. 1 and 2, 14, para. 5, 19, para. 2, 21 and 22 of the Covenant, to the extent strictly required by the exigencies of the situation". It said that the decree of the Council of State on martial law and other decrees giving rise to the derogation had been approved by the diet/Sejm and that "temporary limitation of certain rights of citizens had been actuated by the supreme national interest. It was caused by the exigencies of averting a civil war, economic anarchy, as well as destabilisation of state and social structures. The purpose of the measures thus introduced has been to reverse an exceptionally serious public emergency threatening the life of the nation and to create conditions for an effective protection of Poland's sovereignty and independence".

This is probably the most detailed notice of derogation given by any state party to the Covenant. Nevertheless, it may be questioned whether some of the derogations, such as the suspension of the right of appeal under article 14 (5), was strictly required by the exigencies of the situation, and the very summary procedures adopted hardly gave an accused person "adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing", as required by article 14 (3)(b) from which no derogation was made.

Conclusion

By the time the Sejm convened on 25 January 1982, martial law was a fait accompli and 17 persons had died. The declaration itself was in violation of the Constitution and undermined the legitimacy of martial law. The Sejm had been effectively deprived of its legitimate law-making role, and was thus weakened as an institution. When the basis of a state's authority is weakened, the state's most likely recourse is to coercive force. Martial law has provided stability in the short run at great cost to the state in terms of the perception of the government's legitimacy and trust in the basic structure of the judiciary, legislature, and the Council of State.

GENERAL CONCLUSIONS

The International Covenant on Civil and Political Rights has been ratified by every Eastern European state (except Albania) and the Soviet Union. These ratifications are indicative of at least a formal commitment to the rule of law. Yugoslavia has judicially incorporated the standards of the Covenant into domestic law; in this respect, it is one of the leading countries in the world, although it is faced with a serious economic crisis in Kosovo. The Covenant is genuinely meaningful only when the States Parties recognise its standards as binding elements of the legal framework. The state of emergency can only be a temporary step; it cannot answer the need for structural reform.

States of emergency in Eastern Europe have not conformed to one model; they have ranged from full martial law to "crackdowns" -- concerted government actions to suppress the exercise of fundamental rights, without a formally recognized suspension of prevailing legal norms. It is a feature of socialist law that there is no provision for "preventive" or administrative detention except under states of emergency. In practice, this is no handicap to the governments in stifling expressions of opposition, since their laws contain a whole range of vague criminal offences of a political nature such as "anti-Soviet propaganda" and "anti-state activities", under which they can prosecute, condemn and imprison any critics of the state, its laws or the administration. Consequently, the "crackdowns" all take place strictly within a framework of "Soviet legality". The most common form of state of emergency, as in the 1970 Polish crisis, is the imposition of "emergency measures" by the ruling political elite. Martial law in Poland today, however, may be a harbinger of an emergent pattern. The Military Council that now governs with virtually no limitations is not provided for in the Polish Constitution. It is, however, quite similar to the "defence council" specified in article 31 of the Hungarian Constitution. That council, like the military council in Poland today, is to be "empowered with extraordinary jurisdiction". The jurisdiction is not in any way defined.

An urgently needed step in the development of socialist legality is that of specific limitations on the power of the state arbitrarily to deprive citizens of constitutional and international rights during times of crisis. The non-derogable rights of the Covenant should be specifically protected by domestic law, regardless of the supposed linkage between rights and duties. Finally, legislative and judicial procedures should be specified to guarantee that any derogations do not exceed the strict requirements of the emergency. Such steps would represent important additional progress in the development of socialist legality.

FOOTNOTES

(1) A. Makhnenko, THE STATE LAW OF THE SOCIALIST COUNTRIES 202-03 (1976).

(2) The linkage is emphasized in articles 39 and 59 of the Soviet Constitution. See I. SZABO, THE SOCIALIST CONCEPT OF HUMAN RIGHTS 79-81 (1966); Berezovskaya, Zakonnost'-Nepremennoe uslovie stroitel'stva sotsializma, in PROKURORSKI NADZOR V EVROPEJSKIKH SOTSIALISTICHESKIKH STRANAKH 15-16 (1981); Markovits, Law or Order-Constitutionalism and Legality in Eastern Europe, 34 STAN. L. REV. 513 (1982); Osakwe, Soviet Human Rights Law Under the USSR Constitution of 1977: Theories, Realities and Trends, 56 TUL. L. REV. 249, 264 (1981) (hereinafter cited as USSR Human Rights). See generally, R. DAVID & J. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 193-207 (1981). The concept has been accepted in varying degrees in most of European Europe. See infra notes 159-60 and accompanying text. The term "Eastern Europe" is used in its general sense to refer to the socialist countries of Central and Eastern Europe and the USSR.

(3) "The socialist sovereignty of each fraternal country actually includes the right and international duty ... to defend the dictatorship of the proletariat ... in any other country belonging to the socialist system." E. German marxist, Herbert Kroeger, Voploshchenie idei Leninizma, 1970 Mezhdunarodnaya Zhizn' No. 3, 115, quoted in W. KULSKI, THE SOVIET UNION IN WORLD AFFAIRS 316 (1973). See also F. KOZHEVNIKOV, MEZHDUNARODNOE PRAVO 66 (4th rev. ed. 1981). But see Tyranowski, The Warsaw Treaty, 4 POLISH Y.B. INT'L L. 101, 105, 112 (1971) (the only justification for armed interference by a fellow Warsaw Pact state is response to armed attack by an outside aggressor); V. LENIN, THE RIGHT OF NATIONS TO SELF-DETERMINATION 7-16 (Progress 1979).

(4) Unless otherwise noted, the socialist constitutions will be cited to the English translations in THE CONSTITUTIONS OF THE COMMUNIST WORLD (W. Simons, ed. 1980).

(5) On the state of emergency in East Berlin on 17 June 1953, see P. KECSKEMETI, THE UNEXPECTED REVOLUTION 128-29 (1961).

The Soviet Union

(5a) Lenin quoted in I. Lapenna, Soviet Penal Policy 43 (1968).

(5b) Id. at 45-46.

(6) Id. at 46. Cf. International Covenant on Civil and Political Rights, 16 December 1966, article 4, section 3, G.A. Res. 2000A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

(7) Osakwe, Due Process of Law Under Contemporary Soviet Criminal Procedure. 50 Tul. L. Rev. 266 (1976).

(8) Sud i pravosudie v SSSR 109-110 (A. Bazhanov ed. 1980) (hereinafter cited as Sud).

(9) Berman, H., Justice in the USSR, 29-32 (revised ed. 1963); Juviler, P., Revolutionary Law and Order 22-27 (1976); Makepeace, R., Marxist Ideology and Soviet Criminal Law 74-75 (1980); Hazard, Soviet Socialism and Due Process of Law, 48 Mich. L. Rev. 1061, 1076-77 (1950) (hereinafter cited as Soviet Due Process).

(10) Juviler, supra note 9, at 20.

(11) Id. at 27.

(12) Osakwe, supra note 7, at 267.

(13) I. Szabo, Socialist Concept of Human Rights 13-14 (1966). See also J. Hazard, Communists and Their Law 418 (1969).

(14) Hazard, id. at 420; Berman, supra note 9, at 33-37; Makepeace, supra note 9, at 94-135.

(15) Osakwe, supra note 7, at 269.

(16) "A wealthy peasant who exploits the work of others.", A. Smirnitsky (ed.), Russian-English Dictionary (1973).

(17) See Berman, supra note 9, at 33-65; Juviler, supra note 9, at Ch. 3.

(18) Juvilev, supra note 9, at 48.

(19) Decree of 10 July 1934, Sobranie Zakonov SSSR, 1934, I, No. 36, article 283; Decree of 5 November 1934, Sobranie Zakonov SSSR, 1935, I, No. 11, article 84. See Soviet Due Process, supra note 9, at 1062-64.

(20) Hazard, The Future of Soviet Law, 8 Sydney L. Rev. 590, 592 (1979) (hereinafter cited as Future).

(21) J. Hazard, The Soviet System of Government 77 (5th rev. ed. 1980).

(22) Juviler at 59.

(23) Id.

(24) L. Kuper, Genocide 25-29, 141-150 (1981).

(25) Edictof the Presidium of the Supreme Soviet, 22 June 1941, Vedomosti Verkhovnogo Soveta, 1941, No. 20, section 3(h); translated in H. Berman & M. Kerner, Documents on Soviet Military Law and Administration 133-34 (1955). See generally, H. Berman & M. Kerner, SOVIET MILITARY LAW AND ADMINISTRATION (1955).

(26) Id. section 7 at 134-35.

(27) Id. section 9 at 135.

(28) Edict of the Presidium of the Supreme Soviet, 15 April 1943, Vedomosti, 1943, No. 15; translated in Berman & Kerner, supra note 25, at 140.

(29) Edict of 15 April 1943, id. at section 6; Berman & Kerner, supra note 25, at 139.

(30) Edict of the Presidium of the Supreme Soviet, 9 May 1943, Vedomosti, 1943, No. 18; translated in Berman & Kerner, supra note 25, at 140.

(31) Edict of the Presidium of the Supreme Soviet, 21 September 1945, Vedomosti, 1945, No. 71; translated in Berman & Kerner, supra note 25, at 140.

(32) On the Repeal of the Edict of the Presidium of the Supreme Soviet of the USSR "On the Declaration of Martial Law in Individual Localities of the USSR", 4 July 1946, Collection of Laws of the USSR and of the Edicts of the Presidium of the Supreme Soviet of the USSR, 1945-46, at 180; translated in Berman & Kerner, supra note 25, at 141.

(33) Soviet Due Process, supra note 9, at 1076.

(34) Future, supra note 20, at 54. See generally, Berman, supra note 9, at 66.

(35) See Lapenna, supra note 4, at 53.

(36) Id. at 49.

(37) Id.

(38) Law of the USSR of 25 December 1958, on the Approval of the Fundamentals of Legislation on the Judicial System of the USSR, the Union and Autonomous Republics; extracts translated in Fundamentals of Legislation of the USSR and Union Republics 136 (1974). For Western reaction at the time of the reforms, see G. Hoffman (ed.), Recent Soviet Trends (1956).

(39) Vedomosti, 1957, No. 4, at 86. See Sud, supra note 8, at 133.

(40) Vedomosti, 1959, No. 1, at 14. See Sud, supra note 8, at 133. On the reforms in general, see Juviler, supra note 9, at 64-122.

(41) L. I. Brezhnev, Report to the Plenum of the Central Committee of the CPSU, 24 May 1977, Izvestia, 15 June 1977; translated in Feldbrugge, The Constitutions of the USSR and the Union Republics 192 (1979).

(42) On the 1977 (Brezhnev) Constitution, see R. Sharlet, The Soviet Union Since Stalin 93-107 (1980); New USSR Draft Constitution, 18 ICJ Rev. 29 (1977).

(43) Law of the USSR of 25 December 1958, as amended 21 February 1968, 6 July 1970, 12 August 1971, 26 November 1973; translated in W. Butler, The Soviet Legal System (1978). On the military tribunals in general, see Sud, supra note 8, at 182-191.

(44) H. Berman, Soviet Criminal Law and Procedure 97 (1972).

(45) RSFSR Criminal Code, art. 70. See Pomorski, Communists and Their Criminal Law, 7 (No. 1) Rev. Socialist L. 7, 13 (1981); Comment, Human Rights in the Soviet Union, 29 De Paul L. Rev. 819, 855 (1980) (hereinafter cited as Comment, Human Rights).

(46) RSFSR Criminal Code, article 206. See Pomorski, supra note 45, at 13; Comment, Human Rights, supra note at 857.

(47) RSFSR Criminal Code, article 209. See Makepeace, supra note 9, at 249-57; Pomorski, supra note 45, at 13; Comment, Human Rights, supra note 45, at 856. Documents on Anti-Parasite Laws have been collected in L. Lipson & V. Chalidze, Papers on Soviet Law 188 (1977).

(48) See Amnesty Int'l Press Release, 21 January 1981, reprinted in (No. 41) A Chronicle of Human Rights in the USSR 5 (1981). For an overview of the criminal justice system, see M. Bussionni, S. V. Savitst (ed.), The Criminal Justice System of the USSR (1979).

(49) There are an estimated 12,000 political prisoners in the USSR, mostly activists of various national minorities. 18 ICJ Rev. 29, 31 (1977). For an excellent overview, see Comment, Human Rights, supra note 45, at 819-68 and sources cited therein.

(50) Pomorski, supra note 45, at 13.

(51) Id.

(52) Yeo, Psychiatry, the Law and Dissent in the Soviet Union, 17 ICJ Review 11, 35 (1976).

(53) Koryagin, Involuntary Patients in Soviet Psychiatric Hospitals, 26 ICJ Review 49, 54 (1981).

(54) Id. at 52.

(55) Id. In a book review of F. Feldbrugge, The Constitution of the USSR and the Union Republics (1979), Yuri Luryi points out the coining of the term "congressophrenia" (s"ezdofrenia) by Professor A. S. Esenin-Volpin to describe the "illness" that breaks out during the party congresses. 7 Rev. Socialist L. 83, 85 (1981). See also USSR Human Rights, supra note 2, at 284-287.

Hungary

(56) G. Antalffy, "Thirty Years State and Power in the Hungarian People's Republic", in Hungarian Lawyers Association, Development of the Political and Legal System of the Hungarian People's Republic in the Past 30 Years 9, 35 (1975) (hereinafter cited as Development).

(57) T. Lukács, "Thirty Years of Judicature in Hungary", in Development, Id. at 153, 160 (1975).

(58) Peaslee, II Constitutions of Nations 162 (1950).

(59) Peaslee, II Constitutions of Nations 185 (2d rev. ed. 1956).

(60) Lukacs, supra note 57, at 159.

(61) See T. Aczel (ed.), Ten Years After: The Hungarian Revolution in the Perspective of History, 233-253 (1966); P. Bezushko, Konsolidatsiya revolyutsionnykh sil i stroitel'stvo sotsializma v Vengrii 65-108 (1971); C. Ronay, "Hungary", in A. Blaustein & G. Flanz, Constitutions of the Countries of the World, 26-51 (1976) (hereinafter cited as Blaustein).

(62) Id.; New York Times, 24 October 1956, at 2, col. 1.

(63) New York Times, id.

(64) Hungary officially became a member of the Warsaw Pact 14 December 1955.

(65) Milestones of Soviet Foreign Policy 1917-1967, 168 (Moscow, 1967).

(66) On 23 November, he was abducted from the Yugoslav embassy and was hanged without legal appeal, on 17 June 1958. See Blaustein, supra note 61, at 37.

(67) Antalffy, supra note 56, at 29.

(68) The International Commission of Jurists published three studies of the situation. The Hungarian Situation and the Rule of Law (1957) (hereinafter Report I); The Continuing Challenge of the Hungarian Situation to the Rule of Law (1957) (hereinafter Report II); Justice in Hungary Today (1958) (hereinafter Report III).

(69) Magyar Közlöny, No. 93, 12 November 1956, 568; reprinted in Report I at 68. See also Report I at 14-17.

(70) Decree having the force of law (hereinafter Decree-Law) No. 28 of 1956 of the Presidential Council of the People's Republic, Magyar Köslöny, No. 100, 11 December 1956; reprinted in Report I at 69.

(71) Decree-Law No. 32 of 1956 of the Presidential Council of the People's Republic; reprinted in Report I at 71.

(72) Decree No. 6/1956 (XII.11) of the Hungarian Worker-Peasant Government Concerning the Detailed Rules of Summary Jurisdiction Magyar Közlöny, No. 102, 13 December 1956; reprinted in Report I at 72.

(73) Article 4 of Decree-Law No. 28/1956, supra note 70. See also Lukacs at 160.

(74) Decree-Law of the Presidential Council of the People's Republic Regulating the Procedure of Summary Trials, article 2, Nepszabadsag, 13 January 1957, 1; reprinted in Report I at 83, 84.

(75) Magyar Közlöny, No. 102, 13 December 1956; reprinted in Report I at 77.

(76) Decree No. 1/1957 (I. 13) Concerning the Carrying into Force of Decree-Laws No. 31 of 1956 and No. 1 of 1957 Dealing with Public Security Detention, Magyar Közlöny, No. 4, 13 January 1957; reprinted in Report I at 79.

(77) New York Times, 14 April 1957, at 23, col. 4.

(78) Decree-Law No. 62 of 1957 of the Presidium of the Hungarian People's Republic Concerning the Abolishing of Summary Jurisdiction, Magyar Közlöny, No. 117, 3 November 1957; reprinted in Report III, app. V.

(79) The people's tribunals were gradually dissolved. Lukacs at 160.

(80) Blaustein, supra note 61, Hungary at 42.

(81) Id. at 42-43.

(82) Id. at 45.

(83) Dr. Gyula Szenasi, Supreme Public Prosecutor, stated that judicial officials who do not carry out the wishes of the government "try to dream of the judge's independence, of impartiality, though even they know too well that such dreams do not exist". Magyarorszag, 27 March 1957, quoted in Report II at 5.

(84) On the suspension of the autonomy of the Chambers of Lawyers of Budapest and Misolc, see Report III, app. VI.

(85) The Constitution was amended by Edict No. 33/1956 of the Presidium, a prima facie violation of article 20 (4) of the Constitution. See Simons at 192, Blaustein at 40. Overall property damage was estimated to be 22 billion forints. Antalffy, supra note 56, at 30.

(86) Antalffy, supra note 56, at 35.

Czechoslovakia

(87) Int'l Committee for the Support of Charter 77, White Paper on Czechoslovakia 264 (1977). (Hereinafter cited as White Paper).

(88) Wilberforce Council, Prague Winter 13 (1980). Danisz was disbarred and imprisoned in connection with his activities on behalf of his clients.

(89) Blaustein, supra note 61, Czechoslovakia, at 17-29. See also The Czech Black Book (R. Littel, ed., 1969); Z. Suda, The Czechoslovak Socialist Republic (1969); I. Svitak, The Czechoslovak Experiment 1968-1969 (1971).

(90) Blaustein, id.

(91) London Times, 28 June 1968, 8:1.

(92) Reimposition of Censorship in Czechoslovakia, ICJ Review No. 3, 7 (1969) (hereinafter cited as Reimposition).

(93) Reprinted in Winter in Prague 88, 91, 110 (R. Remington, ed., 1969).

(94) Id. at 111.

(95) Id. at 111-12.

(96) Blaustein, supra note 61, Czechoslovakia at 20.

(97) Reprinted in Winter in Prague, supra note 93, at 265.

(98) Blaustein, supra note 61, Czechoslovakia at 21.

(99) London Times, 22 August 1969, 6:8. See also Pavlov, On Soviet-Czechoslovak Relations (1969), Int'l Affairs No. 7, 59, 60 ("The development of relations between the Soviet Union and Socialist Czechoslovakia has become really all-embracing"); Whetten, The Legal Basis for Soviet Military Presence in Czechoslovakia, 47 Revue de droit international de sciences diplomatiques et politiques No. 4, 289 (1969).

(100) London Times, 22 August 1968, 1:4.

(101) London Times, 23 August 1968, 1:5.

(102) Id. at 1:3.

(103) London Times, 22 August 1968, 1:3.

(104) P. Windsor & A. Roberts, Czechoslovakia 1968 111-31 (1969); London Times, 23 August 1968, 1:4.

(105) Sbírka Zákonu Nos. 126, 127 & 129 ze dne 13 září 1968. See also Blaustein, Czechoslovakia at 21; London Times, 14 September 1968, 1:1.

(106) London Times, 9 November 1968, 5:1.

(107) (1969) ICJ Review No. 3, 5.

(108) Blaustein, supra note 61, Czechoslovakia at 23.

(109) See Reimposition, supra note 92, at 5.

(110) It was widely believed that if Husák did not act, the Soviets would.

(111) Sbírka zákonů 99, 22, srpna 1969, o nekterých prechodnych opatrenich nutných k upevnění a ochraně verejneho poradka.

(112) See also Taborsky, Czechoslovakia: The Return to "Normalcy", 19 Problems of Communism 31, 34 (November 1970).

(113) London Times, 26 August 1969, 4:7.

(114) E. Keefe, Area Handbook for Czechoslovakia 127-28 (1972).

(115) Id. at 129.

(116) Compare, for example, the similar wording of section 1 of 99/1969 and section 6 of 150/1969. Sbírka zákonů 150, 18 prosince 1969, o přečinech.

(117) V. Kusin, From Dubcek to Charter 77, 111 (1978).

(118) See, eg., Czechoslovak Penal Code section 200, Sbírka zákonů 113/1973.

(119) White Paper, supra note 87, at 243-44.

(120) New York Times, 21 September 1981, A13:1.

Yugoslavia

(121) Decision published in Politika, 25 March 1977. See discussion in Magarašević, The Generally Recognized Norms of International Law in the Practice of the Constitutional Court of Yugoslavia, 27 Jugoslovenska revija za međunarodno pravo 12 (1980).

(122) On the Constitutional Court, see Grupce, Constitutional Courts, 20 Yugoslav Survey No. 4, 57, 62 (1979).

(123) Article 317, para. 2. See Yugoslavia's report under Covenant article 40, UN Doc. CCPR/C/1/Add.23, 14 March 1978, at 8 (hereinafter cited as Covenant Report).

(124) Article 317, para. 1. See the general provision at article 338.

(125) Covenant Report, supra note 123, at 10.

(126) See id. at 6; Summary Record of 98th Human Rights Committee Meeting, UN Doc. CCPR/C/SR.98, 31 July 1978, at 3.

(127) Raičević, U čemu je smisao parole "Kosovo republika", 24 Socializam 893, 911 (1981).

(128) New York Times, 30 November 1968, at 43, col. 3. In June of the same year, the government temporarily banned public parades and demonstrations in Belgrade in connection with student riots in the national capital. New York Times, 5 June 1968, at 4, col. 4.

(129) Les événements en PSA du Kossovo, Documentation de la Revue de politique internationale 14 (Belgrade 1981) (hereinafter cited as Kosovo Events).

(130) Washington Post, 3 April 1981, at 7, col. 1.

(131) Id.; Le Monde, 21 April 1981, at 3, col. 3.

(132) Kosovo Events, supra note 129, at 16.

(133) Id. According to the official version, the four policemen (militia) were killed due to their not using means that would imperil the women and children.

(134) Speech by Fadilj Hodža in Documentation, Review of International Affairs 13, 14 (5 April 1981). But see Albabia's perspective of the events leading up to the protests in Albanie Aujourd'hui No. 3, 12-35 (1981).

(135) Washington Post, 3 April 1981, at 7, col. 1; New York Times, 4 April 1981, 4:3 Le Monde, 21 April 1981, at 3, col. 3.

(136) New York Times, 20 April 1981, at 2, col. 3.

(137) Le Monde, 12 June 1981.

(138) Id.

(139) International Herald Tribune, 5 June 1981.

(140) Le Monde, 6 June 1981.

(141) International Herald Tribune, 5 June 1981.

(142) International Herald Tribune (Zurich), 10 August 1981, at 1, col. 1; Nedjeljni vjesnik, August 1981, Week 2, at 20, col. 1 (Conviction under Criminal Code art. 114).

(143) Times (London), 1 April 1982, at 5, col. 8.

(144) Statement of Vukasin Jokanovic, an executive secretary of the Kosovo Communist Party. New York Times, 12 July 1982, at 4, col. 1.

(145) Kosovo Events, supra note 129, at 31.

(146) Id. at 32. Mahmut Bakali, head of the Communist Party of Kosovo, resigned in the beginning of May. New York Times, 7 May 1981, at 5, col. 5.

Poland

(147) Address to the Polish People over Polish television, 6.00 a.m. local time, 13 December 1981. Reprinted in Keesing's Contemporary Archives, 26 March 1982, at 31394; Pravda, 14 December 1981; Moscow News, 20 December 1981, at (supp.) 6.

(148) See New York Times, 18 December 1970, at 8, col. 2.

(149) Confirmed by Radio Warsaw. New York Times, 30 June 1956, at 3, col. 1. The curfew was lifted less than a week later. New York Times, 3 July 1956, at 1, col. 6.

(150) See New York Times, 18 December 1980, at 8, col. 2.

(151) New York Times Magazine, 14 October 1956, at 11.

(152) J. Hazard, Communists and Their Law 424 (1969).

(153) See New York Times, 11 March 1968, at 3, col. 5.

(154) A. Groth, People's Poland 75 (1972).

(155) Reprinted in New York Times, 18 December 1970, at 8, col. 5.

(156) Id.

(157) New York Times, 16 December 1970, at 1, col. 1; 17 December 1970, at 10, col. 1.

(158) Id., 23 December 1970, at 1, col. 1.

(159) Id., 25 December 1970, at 3, col. 1.

(160) See A. Groth, supra note 152, at 139-40.

(161) New York Times, 1 July 1976; at 13, col. 4, 21 July 1976, at 7, col. 1.

(162) See L. Weschler, Solidarity 209 (1982); Le Monde Dossiers et Documents, March 1982, at 3, col. 1. On the problems of reform, see Czachorski & Stelmachowski, Evolución del derecho civil en los países socialistas, 5 LXXV Anos de evolución jurídica en el mundo 19 (1976); Kowalski, Problemy reformy systemu politicznego Polskiej Rzeczypospolitej Ludowej, 36 Państow i Prawo 3 (March 1981); Stelmachowski, Les syndicats: le processus d'adaptation au système socio-politique (1981) (University of Warsaw, privately circulated); Zielinski, Strajk (Aspekty polityczno-prawne), 36 Panstwo i Prawo 3, 16 (April 1981) (threats and failure to recognize right to strike will create backlash against government; the only guarantee against massive strikes is social equity). For a detailed chronology of the events in Poland 1980-81, La Pologne Contemporaine (Warsaw) No. 13/14, July 1981.

(163) Solidarity had called for a referendum on the government to be held on 15 January 1982. Keesing's Contemporary Archives, 26 March 1982, at 31393.

(164) See Le Monde Dossiers et Documents, March 1982, at 11, col. 5; New York Times, 3 February 1982, at 10, col. 3 (role of Western bankers); Keesing's Contemporary Archives, 26 March 1982, at 31390.

(165) Journal of Laws No. 29, entry 159, 12 December 1981, Ordinance of the Council of Ministers on Internment of Polish Citizens, section 3 (1).

(166) Journal of Laws No. 29, entry 156, 12 December 1981, article 13 (3).

(167) New York Times, 9 January 1982, at 1, col. 1.

(168) Reprinted in Information Bulletin (Prague), May 1982, at 12, 15.

(169) According to the Polish Press Agency (PAP), 14 persons were injured, and 205 arrested in protests over 400% price increases. New York Times, 1 February 1982 at 1, col. 2; 5 February 1982, at 3, col. 4.

(170) At least 194 persons were arrested after clashes on 14 February. New York Times, 15 February 1982, at 1, col. 2.

(171) For an eye-witness account, see In These Times (Chicago), 26 May 1982, at 7, col. 1.

(172) Times (London), 16 April, at 5a.

(173) New York Times, 5 September 1982 at 2E, col. 1, 3E, col. 1. Unrest has continued as of this writing; riots broke out in Nowa Huta on 14 September.

(174) See Richard Szalowski's introductory essay to the Polish Constitution in Feldbrugge, supra note 41, at 284-85. See generally, Garlicki, Polish Constitutional Development in the 1970's, 3 Comp. L.Y.B. 247 (1979).

(175) See Blaustein, supra note 61, Poland at 6.

(176) Keesing's Contemporary Archives, 26 March 1982, at 31396.

(177) Journal of Laws No. 29, entry 156, 12 December 1981, article 10.

(178) Polish Academy of Sciences Institute of State and Law, Code of Criminal Procedure of the Polish People's Republic 69 (1979). See also I. Andrejew, Polskie Prawo Karne (1973), esp. at 297 (hooliganism).

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GHANA - EMERGENCY STUDY

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GHANA - EMERGENCY STUDY

I. INTRODUCTION

Human rights issues have dogged the affairs of Ghana since it attained independence from the British on March 6, 1957. A complicating factor in this situation has been the alternating pattern in which civilian and military regimes have replaced each other. To date there have been 4 civilian and 3 military governments. The fourth civilian government headed by Dr Hilla Liman and his Progressive National Party (PNP) is currently in power.

The protection of human rights has traditionally been found to be of the essence of constitutionalism and government by civilians. Consequently military rule, by the fact of its extra-constitutionality in its establishment and manner of governance, becomes a negation of political normalcy and hence necessarily akin to emergency rule whether or not an emergency is formally declared.

Consequently the total length of time Ghana has been under military rule gives rise to concern for the human rights situation there, particularly as even past civilian governments in the country have not been without serious blemishes regarding human rights. For these governments have on occasions resorted to emergency and quasi-emergency measures under circumstances that have been difficult to justify.

It is well known that, while safeguarding human rights, constitutions also invest the executive with powers that enable states of emergency to be declared, resulting in the drastic curtailment or even outright abrogation of the very rights purported to be protected. This is said to be done in the interest of public order, national security or public services.

Emergency law at independence

In addition to guarantees for freedom of conscience, lawful assembly, personal liberty, and for non-discrimination on grounds of race, creed or colour, and the prohibition of compulsory acquisition of property by the government without compensation, the Independence Constitution provided for the continuation of the existing Emergency Powers Orders in Council (1939-56) for up to 12 months after March 6, 1957. This ordinance was, however, soon superceded by the Emergency Powers Act, 1957. Under this Act local, limited or general states of emergency could be declared by the government in the interest of public health, safety and order, national security, or the uninterrupted provision of government services that were essential to the life of the community, provided the government was satisfied that a state of emergency existed, proclaimed its existence in the Gazette, and communicated the circumstances of the emergency to the legislature.

In an emergency the government could order the detention, deportation, and exclusion of persons either from the entire country or from emergency areas. In a general state of emergency (i.e. one

covering the whole country) the government could detain persons without charge for up to 14 days. Further it could, inter alia, take possession or control of any property or undertaking; acquire any property other than land; enter and search any premises; amend any law or suspend the operation and application of any law with or without modification. It could also delegate and complement its emergency powers as it deemed "necessary or expedient".

The Act required that emergency regulations be submitted to the legislature for confirmation within 28 days of such submission or else cease to have effect. Also, the government had no authority, in a limited state of emergency (i.e. one restricted to a part of the country) to detain a person for more than 14 days without trial, nor could it make it an offence for any person or persons to take part in a strike (not being a strike declared by law to be illegal) or peaceably to persuade any other person or persons to take part in such a strike. The Act prohibited trial of civilians by military courts.

Pre-independence political unrest

The imminence of independence had given rise to a host of ethnic and sectional groups, such as the Northern Peoples Party, the Togoland Congress Party, the Moslem Association Party and the National Liberation Movement (NLM). These were in active opposition to the Convention Peoples Party (CPP) which, under the leadership of Nkrumah, had by 1954 established itself as the dominant nationalist movement. The NLM, founded in 1954, was of particular significance because it was fostered and led by certain elements which, having been defeated in their bid for political control of the emerging country, resorted to disruptive political strategies to achieve a share of political power.

Immediately upon being formed the NLM started exploiting ethnic chauvinism, to agitate with violence for secession of the Ashanti region where they had some political influence, and which was the wealthiest part of the country. When this failed, they demanded a form of federation that would have completely undermined the authority of the central government. This move also failed and the NLM then attempted to obtain a share in the country's administration by making a proposal for far-reaching decentralisation of power.

The activities of the NLM caused much unrest, as was indeed intended. The CPP, which was sharing political and administrative control with the British during the period of internal self government (1951-57) was pressing for the immediate grant of full independence. The British on their part were not prepared to hand over government under such unstable political conditions. The CPP was therefore eager to restore peace and stability. The NLM, however, found in these conditions a perfect opportunity to blackmail both the CPP and the British into granting political concessions which it had been unable to obtain through the ballot box. In the result, it rejected all overtures made by the CPP and the colonial government to resolve the constitutional crisis, and even boycotted Parliament when the CPP tabled the motion for independence in August 1956.

The Preventive Detention Act of 1958 (PDA) and its abuse

Anxious to contain this disruptive opposition the Nkrumah government soon after independence enacted the Deportation Act, 1957 and the Preventive Detention Act, 1958 (PDA). Referring to the latter Nkrumah declared that "... the only persons who need to be alarmed about /the PDA/ are those who are either attempting to organise violence, terrorism or civil war or who are acting as fifth columnists for some foreign power interested in subversion in Ghana ..." He said that the purpose of the Bill was to enable the government to "deal resolutely and without delay with any attempt to subvert the state by force."

The PDA was not linked to states of emergency, but was part of the permanent legislation. It was soon to play a disquieting role in administrative detention under Nkrumah. By this Act, the Prime Minister could order the detention of any Ghanaian citizen if he was "satisfied" that such order was "necessary to prevent /such person/ acting in a manner prejudicial to the defence of Ghana, the relations of Ghana with other countries, or the security of the State". Any police officer had lawful authority to arrest a person against whom a detention order was issued. The Minister for Defence (Nkrumah himself) had authority, if he had "reason to believe" a person was attempting to evade a detention order, to publish a notice in the Gazette directing such person to report to a member of the police force within a specified period and at a particular place. Failure to report was made an offence.

A detainee was entitled to be informed of the grounds on which he was being detained within five days of his arrest, and had an opportunity to make representations in writing to the Executive with respect to his detention. Detention under the Act could last up to 5 years, and this could be prolonged (sometimes with retroactive effect) on grounds of activities in which a detainee may have been concerned and which had been carried on at times subsequent to the date of the original detention order. Persons who were detained, therefore, had hardly any meaningful protection under the law.

The Executive could suspend a detention order on condition that the detainee notified his movements to a specified authority and gave a bond for the observance of any conditions imposed, but suspension of orders was rare and even when made, was often followed soon by redetention.

The Act itself was to expire within 5 years of its enactment unless the National Assembly extended its life for 3 year periods. On the expiration date all orders issued under it were to cease having effect and detainees were to be entitled to immediate release. It was, however, renewed and at the fall of the Nkrumah regime on February 24, 1966, the PDA had been in force continuously for almost 9 years. The government had during this period made two formal declarations of emergencies; the first in September 1961, lasting for one week, the second in 1962, which was, however, never formally revoked, though certain restrictions attending it were lifted after a month. Estimates of the number of persons held under the Act by 1966, run from several hundreds to several thousands.

This uncertainty about the final figure of detainees reflected how the PDA was honoured more in its abuse than in its strict observance. Only the detentions of the first 300 persons or so, effected between 1958 and 1960 , were duly published in the official gazette. Thereafter detentions were made without public notice contrary to the terms of the Act.

The abusive application of the PDA was also revealed by the composition of the detainees released after Nkrumah's ouster. These ranged from prominent politicians both of the opposition as well as of Nkrumah's own party, to political non-entities whose threat to the security of the country was difficult to perceive.

An indisputable cause of the misuse of the PDA was the climate of impunity created by its administrative nature. This enabled police, party and government officials in particular to employ the Act or cause it to be employed against persons whose activities had not even a remote bearing on state security or public order, in the knowledge or belief that those responsible for the detentions were immune from restraint or punishment.

On its part the government's reaction to the disruptive elements in the opposition soon degenerated into the elimination of legitimate opposition with the passage of the National Assembly (Disqualification) Act, 1959, under which persons "against whom on order under the /PDA was/ in force or ... against whom such an order has been in force at any time in the period of five years ending with the date of election" was barred from standing for election to the Parliament. A member of Parliament would be forced to vacate his seat if a detention order was issued against him at any time during his term. These provisions applied ex post facto to any detention order, including those made before the enactment of the Act in question. This Act, therefore fostered the systematisation of abusive administrative detention.

The 1960 Republican Constitution and human rights

The first Republican Constitution was promulgated in 1960. Under Article 23(3) it authorised the Executive, in case of an emergency when the National Assembly was dissolved to "summon an assembly of the persons who were members of Parliament immediately before the dissolution to act as the National Assembly until the majority of results have been declared in a General Election". Also, as Commander-in-Chief of the Armed Forces, the President could "... order any of the said Forces to engage in operations for the defence of Ghana, for the preservation of public order, /and/ for relief in cases of emergency".

The Constitution made only broad references to human rights. Article 13(1) required the Executive President to solemnly declare his adherence, inter alia, to the principles "that no person should suffer discrimination on grounds of sex, race, tribe, religion or political beliefs"; that "every citizen of Ghana should receive his fair share of the produce yielded by the development of the country; that subject to such restrictions as may be necessary for preserving public order, moral-

ity or health, no person should be deprived of freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law". Article 13(2) entrenched these provisions and reserved the right to repeal or alter them for the people in a referendum.

II. THE EMERGENCY POWERS ACT OF 1961 AND THE FIRST DECLARATION OF EMERGENCY

In 1961, the Emergency Powers Act (1961) was passed to repeal that of 1957 and "to consolidate ... enactments conferring on the President certain powers to be exercised in cases of emergency". Although the Executive's powers under the new Act equalled or exceeded those it had previously, and although emergency regulations under this Act were to be laid before the legislature (within 10 days for a general state of emergency, and at the next meeting of the legislature for a localised emergency) the new Act, unlike the old, did not provide for automatic expiration of these regulations if rejected by the legislature. A vital form of control over the Executive's use of emergency powers was thus eliminated. Henceforth only the Cabinets' approval of these powers was required. Moreover publication of a state of emergency in the Gazette, previously required, was dropped under the new Act. One useful restriction placed on the exercise of emergency powers by the 1961 Act though, was that civilians could not be tried by military tribunals.

The first formal declaration of emergency during the Nkrumah regime under this Act was made soon after the Act was passed. The occasion for it was a strike in September 1961 undertaken by rail and dock workers at Sekondi-Taboradi against a general increase in taxes, including the introduction of property and sales tax and the deduction of income tax and compulsory savings at source.

A Presidential Commission, which was acting on behalf of Nkrumah while he was out of the country, declared an emergency in the strike area and issued regulations to restrict and control demonstrations and meetings, and to detain or remove persons from the area in question. In addition a curfew was imposed, and the Ashanti Pioneer, a newspaper which regularly criticised the government was censored under section 183 of the Criminal Code, 1960.

All these regulations were rescinded within 4 days with the return of Nkrumah. But three members of the opposition were detained on grounds of involvement in the disturbances.

The infusion of quasi-emergency verbiage into some documents on criminal law enabled the government to subject certain spheres of prohibited activities to emergency measures, through the criminal justice system, resulting in deprivation of certain rights. One sphere of activity that suffered from this integrated emergency-cum-criminal measure was freedom of information throught the media. Between 1958 and 1961, the relevant legislation in this connection was the Criminal Code of 1960, section 183, as amended in 1961.

This section empowered the President to introduce by an executive instrument, the censorship of any newspaper, book or document published periodically if he was of the opinion that there was systematic publication of matter calculated to prejudice public order or safety, or the maintenance of public services or the economy of the country, or that any person was likely to publish individual documents containing such matter. The executive instrument could require that "no future issue of the /periodical/ shall be published, or ... that no document shall be published by or by arrangement with /the person responsible for the publication/ unless the matter contained therein /had/ been passed for publication ...". The President's opinion on this matter was not subject to judicial review.

It is true that some elements of the opposition were fomenting rumours, fear and instability. However, no government can expect uncritical support for everything it does, and Nkrumah's government had become blind even to genuine and justifiable protests, and was isolating itself increasingly from the people. The rail and port workers strike in 1961 demonstrated this rapid loss of touch by the government with its political base.

In these circumstances the emergency laws effectively blocked all avenues of open communication, eliminated the possibility for meaningful evaluation of information, and fostered the very conditions for rumour-mongering and insecurity sought to be curbed.

The case of Baffour Osei Akoto

The increasingly repressive conduct of the government was challenged in 1961 in the celebrated case of Baffour Osei Akoto and others v The Minister of Interior (re Akoto), Civil Appeal 42/61.

In this case, Baffour Akoto and seven others were detained in 1959 under the Preventive Detention Act, 1958, for "acting in a manner prejudicial to the security of the state, in that /they had/ encouraged commission of acts of violence ... and had associated with persons who /had/ adopted a policy of violence as a means for achieving political aims ...". A habeas corpus application was rejected in the first instance, and on appeal it was argued, inter alia, that the grounds for the detentions did not cite specific "acts prejudicial to the security of the state", and that the PDA was in excess of powers conferred on Parliament by the Constitution of Ghana with respect to Article 13(1) of the said Constitution, or contrary to the solemn declaration of fundamental principles made by the President on assumption of office.

The Supreme Court rejected both arguments. On the first argument it held unanimously that the Habeas Corpus Act did not apply "because the Preventive Detention Act under which appellants are detained, vests plenary discretion in the ... President, if satisfied that such order is necessary. The court could not therefore enquire into the truth of the facts set forth in the grounds on which each appellant has been detained."

On the second ground the Court held that Article 13 of the Constitution which required the President to solemnly declare to uphold certain human rights specified therein "does not represent a legal requirement which can be enforced by the courts ...", because under Article 13(2) "the people's remedy for any departure from the principles of the declaration is through the ballot box and not ... the courts".

Consequently Article 13 was held not to be a justiciable bill of rights and therefore not to place any legal limitations on the executive power.

The re Akoto case was extremely important because it touched directly upon the protection of fundamental rights under the 1960 Constitution by the courts. Its dismissal was therefore regrettable is as much as it offered the Supreme Court the best opportunity it could expect under the conditions prevailing to mould some flesh on to the skeletal human rights provisions in the Constitution. This it could have done by reviewing the exercise of the wide discretionary powers wielded by the President under the PDA. Instead the Court not only refused to develop any meaningful yardstick for the exercise of these powers but further gave the sanction of the Constitution to them. This was in agreement with the Attorney General's contention on behalf of the government, that,

> "Article 20 of the Constitution of Ghana confers on the Parliament ... unlimited legislative authority except only in regard to amendments to the Constitution. The Supreme Court is, therefore, only called upon to declare void an Act of Parliament which alters or repeals one of the entrenched clauses or which purports to alter or repeal one of the non-entrenched clauses other than by an Act exclusively devoted to this purpose."

But Article 20(2) also stipulated that "so much of the legislative power of the state as is not reserved by the Constitution to the people, is conferred in Parliament". And Article 13 specified that "power to repeal ... or to alter its provisions otherwise than by the addition of further paragraphs to the declaration is reserved to the people" (emphasis added). Clearly the Constitution reserved legislative power to the people with regard to Article 13, within the terms of Article 20(2), which power was effectively altered "otherwise than by the addition of further paragraphs ..." by Parliament through the PDA. On this basis it is submitted that the court should have nullified the PDA and required its revalidation by the people in a referendum as provided by Article 13(2). This was the remedy available under the Constitution for any detraction by Parliament from the entrenched human rights provisions. In its form and content this remedy was both political and legal in as much as it involved the exercise of legislative power by the people, and hence it was justiciable. Yet the court chose to see the remedy solely in its political terms, thereby excluding its justiciability.

The injection of quasi-emergency qualities into the criminal justice system continued under the Nkrumah regime, with the enactment of the Criminal Procedure (Amendment) Act, 1961, this time at the expense of basic procedural rights and remedies under that system. This Act created a "Special Criminal Division" of the High Court to deal expeditiously with criminal offences against the safety of the state or against the peace ... and offences specified by the President by legislative instrument."

The jurisdiction of this court, the composition of its bench and its procedural requirements were intended to make more certain the convictions of perceived adversaries of the President. The bench comprised a presiding judge and two other members constituted by the Chief Justice in accordance with a request made to him by the President. Proceedings in this Division were by summary trial, i.e. without preliminary proceedings and without jury, and its decisions were final, minority opinions being undisclosable.

The Attorney General decided whether a case was brought before or transferred to the Special Criminal Division. The President was empowered, after consultation with the Chief Justice to "make such adaptation of the Criminal Procedure Code and such other regulations as he thought proper" by legislative instruments.

III. THE DISTURBANCES OF THE EARLY 60's AND THE SECOND DECLARATION OF EMERGENCY

In August 1962, Nkrumah was gravely wounded in an attempt on his life. Between the following month and January 1963, CPP rallies were repeatedly terrorised with grenade explosions resulting in the killing, maiming and wounding of several innocent citizens, including children. In January 1964 a second bomb attack was made on Nkrumah.

Nkrumah reacted to these violent activities, first by ordering the detention of two members of his administration and the General Secretary of the CPP in connection with the earlier attempt on his life. Regarding the bomb throwing incidents at CPP rallies, he declared a state of emergency (the 2nd and last official declaration) in the capital, Accra and in Terna, imposed a curfew in these areas, and issued strict emergency regulations under which the Executive, the Minister of Internal Affairs and the police could take certain measures against publication of 'disturbing' reports and the commission of acts prejudicial to public safety or likely to cause disaffection. Authorised measures included control of processions and meetings, erection of road barriers, issuing of detention and removal orders, and arrests without warrant. While the curfew and attendant restrictions were lifted after a month, the state of emergency was not formally revoked, and continued in effect until the overthrow of the government in 1966.

The ensuing intensification of the repression was accompanied by legal reinforcements. The PDA (Amendment) Act, 1962, broadened the scope of the executive power to re-detain by authorising the President "... if he is satified that any person who has been released after being detained under this act has subsequently concerned himself with activities prejudicial to the defence of Ghana, the relations of

Ghana with other countries or the security of the state" to "detain such ... person for a period not exceeding 5 years, in respect of each time he so concerns himself ...". Also introduced was the notorious "28-day rule" under the Criminal Procedure (Amendment) (No 3) Act, 1962, by which "... any person taken into custody may, with the consent in writing of the Attorney General, be held in such custody for a period of 28 days or such other period as the Attorney General may determine".

The President's powers of detention were enlarged even further by the PDA (Amendment) Act, 1963. This Act empowered the President "... at any time before the expiration of an order ... /to/ direct /that/ the period of the detention authorised by that order be extended for a further period not exceeding five years if in his opinion the release of the person detained would be prejudicial to the matters specified ...". All the amendments of the PDA were consolidated under the PDA, 1964, which also included an alternative measure to detention, namely an order restricting movement for up to 5 years in lieu of detention in respect of a person liable to be detained, if in the President's opinion a detention order would not be suitable on account of the age or health of the person, of for any other reason. "A restriction order may impose such conditions as may be specified in the order, in respect of his employment or business, and in respect of his association or communication with other persons". A existing detention order could be replaced by a restriction order on similar grounds. The deaths in detention of Obetsebi Lamptey and Dr Danguah due to ill-health suggest a sparing use of this alternative to detention.

The Newspaper Licensing Act, 1963, and the Regulations made under it, also augmented the powers of the executive to control the media. Under the Act and Regulations, every newspaper in the country was required to be licensed annually and the Minister of Information had power to attach licensing conditions and to refuse, revoke or suspend a license for failure to comply with such conditions. Non-compliance with these regulations was a criminal offence.

The creation of new crimes against against the state was similarly extended under the Criminal Code (Amendment) Act, 1964 which made it a first degree felony "to know of any act of treason and not to reveal it immediately to the President, a Minister or a police officer". The Act also authorised the President to declare an organisation a "prohibited organisation" if "satisfied that its objects or activities are contrary to the public good, or that there is a danger of the organisation being used for purposes prejudicial to the public good".

Mention should also be made of the States Secrets Act of 1962, which authorised up to 14 years imprisonment for "... any person who, for any purpose prejudicial to the safety or interests of the Republic", engaged himself in prohibited conduct with regard to a variety of stipulated concerns of the state, specified to be secret. The level of proof of "intent" under the Act, was low. Conviction under the Act could be obtained merely "... if, from the circumstances of the case, or ... conduct, or ... known character /of the suspect/ as

proved, it appears that his purpose was ... prejudicial to the safety or interests of the Republic".

The Treason Trial of 1963-64

The most significant governmental interference in the criminal justice system occurred when the three persons detained in connection with the first attempt to assassinate Nkrumah, were finally brought to trial. They were arraigned before the Special Criminal Division of the High Court established under the Criminal Procedure (Amendment) Act, 1961. The jurisdiction of this Court had been expanded by the Special Criminal Division (Specified Offences)(No 2) Instrument, 1963, to cover the newly created offences of "conspiracy or attempting to commit a specified offence, and harbouring a person who has committed a specified offence.

In accordance with the terms of the 1961 Act, the proceedings were summary (i.e. not on indictment) and without a jury, and the Court's decision was final. The Court acquitted the accused persons, but the President continued to detain them, and instead dismissed the Chief Justice (Arku Korsah) and introduced motions in Parliament to remove other judges. Two weeks after the Court's decision, on the instigation of the President, Parliament passed the Criminal Procedure (Amendment) Act, 1964. This changed the composition of the Special Criminal Division to include "the Chief Justice or some other judge of a superior court appointed by the Chief Justice after consultation with the President, sitting with a jury of twelve persons". The jury members were, however, to be selected from a "special list of jurors prepared from the register of electors by the Judicial Secretary".

More importantly, however, the amendment authorised the President "... where it appears to him that it is in the interest of the security of the state so to do, by an executive instrument /to/ declare the decision of the Court to be of no effect" such instrument being "... deemed to be a nolle prosequi entered by the Attorney General before the decision in the case was given". On the very day this amendment was effected, Nkrumah nullified the court's acquittal of the three accused persons, which opened the way for their re-trial.

On February 24 1966, while out of the country, Nkrumah was ousted from office by a military and police coup d'etat, the leaders of which proclaimed the National Liberation Council (NLC) which was the first military junta of the country.

IV. THE NATIONAL LIBERATION COUNCIL (NLC) REGIME, 1966 - 1969

The major objections to Nkrumah's government were its constitutional excesses and their disastrous consequences for democracy and fundamental freedoms.

The basis of the NLC's initial popularity, and hence of its legitimacy, was the convergence of the peoples political rejection of the constitutional government with the military coup.

The presence of some 500 persons detained by Nkrumah, afforded immediate opportunity for the NLC to demonstrate its commitment to human rights, by releasing all these detainees. This action boosted the image of the new regime tremendously. This was further enhanced when the NLC, in further demonstration of its commitment to democracy, promised a return to civilian government within three years. Greatly to its credit, and almost uniquely among African military coups, this promise was fulfilled.

However, certain political factors led to limitations on the NLC's liberalisation. The NLC basically sympathised with the anti-Nkrumah forces which were the initial targets of Nkrumah's human rights excesses. At the same time, however, though most of Nkrumah's supporters were disenchanted with him by the time he fell, they were still a highly organised political force, and no sooner had they lost power than they regrouped to regain it.

The absence of political neutrality on the part of the NLC, therefore set it on a collision course with the political forces who did not enjoy its sympathy.

The ostensible repudiation of political detention, and affirmation of belief in free and fair democracy did not, however, turn out in practice to be quite what it seemed.

Retention of the existing legal apparatus

First, the legal order, including emergency laws and other legislation existing under Nkrumah, was largely retained, except for the emergency powers under the 1960 Constitution which were inoperative because of the suspension of the Constitution.

However, this was replaced by the National Liberation Council (Consequential and Transitory Provisions) Decree, 1966, which empowered the Commander-in-Chief of the Armed Forces "... to order any of the Armed Forces to engage in operations for the defence of Ghana, for the preservation of public order, for relief in case of emergency or any other purpose appearing to /him/ to be expedient". The Emergency Powers Act, 1961, remained in effect.

On the question of detention, the NLC soon appeared to be concerned more with the liberty of certain sections of the population than with that of others. An example was the arrest of Mr Boye Moses, a party functionary in the Nkrumah government after a long man-hunt. So elated were the NLC government at his arrest that they caused him to be locked up in a monkey cage and paraded through the principal streets of Accra.

Without annulling the PDA 1964, which had been the core legislation affecting personal liberty under Nkrumah, the government superimposed its own legal instrument for administrative detention in the National Liberation Council (Protective Custody) Decree, 1966, which authorised the detention of persons "in such place and for such

period as the National Liberation Council may determine".

Later amendments to this Decree required persons who were released from protective custody to report any plans they may have for foreign travel to the police. Failure to do so was punishable by a fine of up to 500 cedis (then about US$ 400) or a prison term not exceeding one year or both.

Detention under the NLC

It is estimated that under the National Liberation Council (Protective Custody) Decree, 1966, the NLC ordered the taking into 'protective custody' of at least 546 persons during its first year in power alone. It also employed the criminal law system to assist in the curtailment of personal freedoms of its political opponents. The Criminal Procedure Code (Amendment) Decree, 1966, provided that "... a person taken into custody without a warrant may, with the consent in writing of the Attorney General, be held in custody for a period of 28 days or such other period as the Attorney General may determine and the provisions /relating to bail/ ... shall not apply to a person so held". Thus the military government reiterated the "28-day rule" established by the previous regime. In 1969, a new amendment to the Criminal Procedure Code, narrowed the scope of the "28-day rule" by making it applicable only to persons suspected of treason, subversion, murder, manslaughter and robbery with violence. The period a person could be detained without trial for other types of offences was reduced to 48 hours.

Numerous violations of human rights occurred during the time of the NLC regime involving arbitrary arrests and detentions, but since these were essentially directed at CPP members, it did not lead to the same general climate of insecurity that existed under the previous government.

Ex Parte Salifa

One of the most significant cases of arbitrary detention was that of ex Parte Salifa (1968) 2 G & G, 374). By paragraph 16 (9) of the NLC (Consequential and Transitory Provisions) Decree, 1966 (NLCD 73) a valid decree had to be published in the Gazette, numbered, printed and published by the Government Printer and purport to be a decree of the NLC. The applicant, Salifa, having been detained without any order, caused a habeas corpus application to be made on his behalf, whereupon the NLC purported to issue such an order in a decree which also provided that it "shall be deemed to have come into force notwithstanding that it has not been published in the Gazette ...". The validity of this order was challended on the grounds that it was unnumbered and was not published at the time of the detention, and that it was deemed to have come into force before it was actually signed by the Chairman of the NLC. In upholding the applicant's argument that such a document was not a decree, thereby invalidating his detention on order, the Court stressed that the NLC had exercised its power to detain the applicant in a manner otherwise than was lawfully permitted under the provisions of the law as laid down by NLCD 73.

Pursuant to this decision the applicant was released only to be immediately re-arrested and detained again under a similar unnumbered and unpublished detention order and charged with subversion. The applicant contested this second order again on similar grounds as previously. This time, however, the Court , presided over by a different judge, agreed with the Attorney General and held the decree to be valid, because evidence was lacking that the decree was not intended to be published. According to the Court "... the NLC now governs the country with power to make and issue decrees ... /and/ it is the intention that a decree could become operative and acted upon before its publication".

The régime also created new crimes against the state. First among these was the State Security Decree, 1966, which made it unlawful to communicate with or harbour Nkrumah or any of 85 other persons associated with the Nkrumah regime and named in the decree. Failure to comply amounted to a second degree felony; while receiving communication from Nkrumah or any of the 85 without reporting it to the authorities was a misdemeanour. The second source of new crimes was the National Liberation Council (Prohibition of Rumours) Decree, 1966 which declared that : "Any person who publishes or reproduces any statement, rumour or report which is likely to cause fear or alarm or despondency to the public or to disturb the public peace or to cause disaffection against the /N.L.C./ among the public or among members of the Armed Forces or of the Police Service, shall be guilty of an offence and upon conviction, shall be liable to a fine not exceeding cedis 1,000 or to a term of imprisonment not exceeding three years or to both". It was sufficient publication if it was proved that the accused person published the statement, rumour or report to one person.

Under the Armed Forces Act, 1962 (Amendment) Decree 1967 the NLC substantially enlarged the scope of subversive activities as previously defined under the Treason Act 1959. This Decree created a special military tribunal comprising officers of the Armed Forces whose decision was final, to try both civilians and military personnel accused of subversion. Those found guilty under the Decree could be sentenced to death by shooting, or imprisonment for not less than 25 years. The NLC secretly tried and publicly executed Lts. Arthur and Yeboah under this Decree in 1967. A third accused, Lt. Osei Poku, was sentenced to 25 years imprisonment. It can hardly be said that the accused received a fair and public hearing by an independent and impartial tribunal.

Political bias of the NLC and related violations of human rights

Perhaps the principal denial of human rights under the NLC was the exclusion of various sections of the community, particularly those who had been associated in one way or the other with the Nkrumah regime, from effective participation in the current and future political processes of the country.

Having promised a return to civilian rule within three years, the NLC proceeded to set up a Constitutional Commission to make proposals on a Constitution for Ghana. At the same time, the régime employed a mixture of political, administrative and emergen-

cy measures to guarantee the future political dominance of its civilian political allies, while barring all possible avenues for future participation in government by their political opponents.

One of the first actions the NLC took upon assumption of power was to disband and prohibit the CPP, in particular and place a general ban on all political activities, including political parties which act was not condemnable in itself. However, by a careful selection of the membership on the Constitutional Commission, and by the setting up of a 'Centre for Civic Education' staffed with former political opponents of the CPP; the NLC allowed these people to be politically active long before the general ban on politics was lifted, under the guise of educating the populace on their civic rights. The NLC also gave them the central role in the determination of the form and content of the future Constitution of the country, which no doubt favoured their political supremacy.

This objective of the NLC became clear when the ban on political activities was lifted in May 1969, in preparation for the elections. The elections were held in August 1969 under the Second Republican Constitution which had been promulgated on August 22, 1969. Those individuals and categories of individuals who were connected with the Nkrumah regime, the CPP or its affiliates, were disqualified from running for or holding public office for 10 years by the Elections and Public Offices Disqualification Decrees of 1968 and 1969. These Decrees prohibited "... the promotion by whatever means of the re-establishment of the dissolved /CPP/ in whatever form ...". An Exemptions Commission to hear claims of exemption from disqualification was established but this Commission's decisions were final and not subject to judicial review.

One hundred and fifty two (152) persons, including leading members of the Nkrumah regime were effectively barred from holding public offices, as a result of the Disqualifications Decrees. Moreover, a new socialist party, called the People's Popular Party was said to be made up of CPP sympathisers and immediately outlawed by the Prohibited Organisations Decree, 1969, on the grounds that it was for the public good to do so. Also, specific persons listed in the Decree were barred from campaigning for and holding public office as well as "from holding office in, or being founding members of a political party".

The result of the the ensuing elections for a civilian government was a victory for the Progress Party, whose leader, Dr Busia, had been the head of the Centre for Civic Education established by the NLC government and as such had been able to tour the country explaining the new Constitution before other political activity was allowed. The former Chief Justice Abuffo-Addo, who became the President following the elections, had been the Chairman of the Constitutional Commission which drew up the proposals for the Constitution of the Second Republic.

V. THE BUSIA GOVERNMENT

In terms of legal provisions the Busia government was well equipped to protect human rights. Admittedly the Emergency Powers Act, 1961 and paradoxically the PDA, 1964 remained in effect. But the 1969 Constitution contained detailed provisions regulating a state of emergency, which theoretically kept the exercise of such powers on a very short leash.

The 2nd Republican Constitution, 1968

Chapter four of the Constitution provided in great detail for the protection of civil liberties (Arts 12-25). The rights guaranteed pertained to life, liberty, security of the person, the protection of the law and unimpeded access to the courts of law. Also provided for were freedom of conscience, of expression, and of assembly and association, protection for the privacy of the home, correspondence and other property and from deprivation of property without compensation.

Characteristically, all these rights, except for those to life, the protection of the law and unimpeded access to the courts, could be curtailed in the interest of defence, public safety and order.

Article 26 of the Constitution defined a state of emergency as one which is "calculated to deprive the community of the essentials of life, or ... renders necessary the taking of measures which are requisite for securing the public safety, the defence of Ghana and the maintenance of public order and supplies and services essential to the life of the community". Power to declare an emergency was vested in the President who was required, upon proclaiming an emergency, to report the basis of his decision to the Council of State which had power to revoke the proclamation. If the emergency was to last for longer than a week, the National Assembly's approval was necessary. The Assembly could approve an initial extension of up to three months and thereafter by resolutions grant one-month extensions. The Assembly could at any time revoke a state of emergency it had previously approved.

By Article 54 (Chap. 5) the National Security Council was "... the authority ... responsible for the taking or implementation of such /emergency/ measures as are reasonably justifiable for the purposes of dealing with the situation that has arisen."

Special provisions under Articles 27 and 28 specifically sought to protect persons detained under emergency laws and to avoid the abuse of administrative detention. Under these provisions, a detainee and his next of kin were entitled to be notified of the grounds for detention

Other rights of the detainee included the right to periodic review of his detention order, the first being within fourteen days of his detention by a tribunal of three judges of the Supreme Court, the right to counsel and the right to have published in the Gazette within 10 days of the detention an announcement of the detention and the grounds for it.

In addition, the government had to make monthly reports to the National Assembly on the number of detained or restricted persons and its compliance with decisions of the review tribunal where appropriate. The High Court was vested with jurisdiction on matters concerning human rights without prejudice to other rights of the detainee (Art. 28). Finally Article 25(5) declared that "for the avoidance of doubts ... at the end of any emergency declared pursuant to the provisions of ... this Constitution, any person in restriction or detention or in custody ... as a result of the declaration of the emergency shall forthwith be released."

The laissez-faire ideology of the government led it to adopt economic and development models which many considered were disastrous for the underdeveloped economy of Ghana. The government appeared to be blind to the organic relations between certain socio-economic preconditions and the enjoyment of civil and political rights. As it were, the Constitution attempted to guarantee the latter while ignoring the former. The result was a classic vicious circle in which desperate socio-economic conditions resulting from governmental policies, led to protests which were met with repression by the government who saw them as threats to public order.

The Right of Association and The Industrial Relations (Amendment) Act, of 1971

When Busia's government came to a rather abrupt end, it had violated some of the very rights it pledged itself to protect at all costs.

Within a short time of assuming power, the policies of the government met with protests from certain sectors of the press and the students. By 1971, workers had joined the ranks of those protesting against the ineffectiveness of the government's economic policies, resorting to strikes to back demands for better wages and working conditions.

The government's response was simply to ban the Trade Union Congress. It passed the Industrial Relations (Amendment) Act, 1971, which dissolved and liquidated the Trade Union Congress, comprising some 13 % of the country's labour force. The Act also empowered the government to intervene whenever in the opinion of the Minister concerned a threatened or actual strike would if permitted to occur or continue, be prejudicial to the defence of Ghana, public safety, order, morality, health or the running of essential services, or, be injurious to the national economy.

"The Minister /could/ with the prior approval of the Cabinet, order that the strike or lockout shall not take place or that it shall not continue". The government thus violated the right to freedom of association and assembly guaranteed by the Constitution, by using quasi-emergency legislation.

Disregard of Court decisions

Busia's government on two occasions demonstrated a lack of respect for decisions of the Courts that went against it, which was somewhat unbecoming in a government dedicated to the rule of law.

One instance occurred within a few months of the government's assumption of power, when Busia dismissed 568 senior public servants. This was done pursuant to a transitional provision of the 1969 Constitution which empowered the government to dismiss public servants holding office established by, or in pursuance of, documents, decrees or orders of the previous military regime. One of the dismissed officials, Mr Sallah, challenged the validity of his dismissal on the grounds that his office had been established before the coup that created the NLC. The Court upheld his case in a declaratory judgement.

Busia reacted to the court's decision with a comment on the radio that no court could enforce any decision that sought to compel the government to employ or re-employ anyone, and even indirectly threatened judicial independence by remarking that he would not be tempted to remove a judge. Of course, the first part of Busia's comment was misdirected as a declaratory judgement does not require enforcement, but the latter part, containing the indirect threat to the judiciary was a rather astonishing pronouncement from one held up as the symbol of democracy and the rule of law.

The second occasion when Busia rejected a court's decision was more serious though less well known. The case involved the People's Popular Party (PPP), which on two occasions had been denied by the Inspector General of Police a permit to hold a procession in protest against Busia's foreign policy. In yet another declaratory judgement the Court upheld the PPP's contention that its right to freedom of assembly, association and movement had been violated. But Busia's government did not think fit to bring itself within the law as declared by the Court. It never granted the PPP the permit. Instead it outlawed the PPP under the Criminal Code (Amendment) (No 2) Act, 1971, which had been enacted specifically to prohibit the re-emergence within Ghanaian politics of either Nkrumah or his Convention People's Party. Since the members of the PPP were not disqualified as individuals by any existing laws from participating in political activities, their outright banning amounted to a selective application of quasi-emergency measures, so as to deprive this group of their group political rights.

VI. THE NRC/SMC REGIME, 1972 - 1978

Busia's government was overthrown by another coup d'etat on January 13, 1972 which installed the regime of the National Redemption Council, and later the Supreme Military Council (NRC/SMC).

A major hallmark of this military government was its consistent and progressive employment of political and civil repression to silence opposition to its rule. It was never a popular government despite the considerable but isolated instances of support it received for the anti-neo-colonial mirage created by its temporary repudiation of some

of the country's foreign debts, and also for the apparently well meant "Operation Feed Yourself" agricultural self-reliant programme. This transient support, however, quickly dissipated as both the anti-neo-colonial façade and the initially successful agricultural policy collapsed within a few years due to incompetence and corruption, as well as the poverty in ideas of the government.

The dissipating support of the public for the government soon turned into active hostility against the military because of the latter's growing unruliness and brutality against the helpless civilian populace.

The brutalities of the military arose directly from the Armed Forces (Special Powers) Decree of 1973, which vested members of the Armed Forces not below the rank of sergeant, with police powers in relation to the prevention and detection of crime. These officers could either on their own or through persons authorised by them cause the arrest of any person or the taking of possession of any property in the interest of "public order or the safety of persons or property". Persons arrested could be placed under military custody, which a 1976 ruling of the Court held to exclude habeas corpus orders. Having arrogated to themselves the roles of police, prosecutor and judge the soldiers proceeded to brutalise helpless civilians and steal their properties (movable and immovable) in an unprecedented manner.

Human rights consequences of the 1973 economic depression

The oil crisis and the severe international economic depression of 1973 had a devastating effect on the peripheral economy of Ghana to which the military government was unable to respond. Active opposition against the government, originally limited, began to mount, challenging the legitimacy of the regime, which had nothing but increasingly repressive measures under emergency decrees to offer.

Having been established on the basis of the abrogation of civil and political rights under the NRC (Establishment) Proclamation, 1972, which had dissolved the constitutionally elected National Assembly, suspended the Constitution and prohibited political parties, the NRC began as a de facto emergency government and remained so throughout its 6 year rule. It retained full powers to rule by decree and to revoke, repeal or suspend all enactments and rules of law existing before the coup.

Needless to say it retained the Emergency Powers Act, 1961 and issued the National Security Council Decree, 1972 under which the National Security Council had responsibility, subject to NRC directives, for taking measures during an emergency. The Armed Forces (Amendment) Decree, 1972 also empowered the Commander-in-Chief of the Armed Forces to order the Armed Forces to engage in operations for purposes appearing to him to be expedient. But the government never claimed to be acting under any of these emergency powers, which was unfortunate, since if it had, its actions might have been moderated through some of the conditions it would have had to comply with.

Decrees of political and civil repression

To secure itself politically during the first two years or so of seizing power, the new military regime issued numerous decrees granting it sweeping powers, in particular to curtail the civil and political rights of potential opponents, to control the news media and detain persons without trial. The Progress Party (PP) and Justice Party Clubs (Dissolution) Decree, 1972, outlawed clubs that were associated with the ruling and opposition parties in the dissolved National Assembly. The Public Order Decree also of 1972 gave the government, through the Commissioner for Internal Affairs and the Police Force, effective control over public meetings and processions. The government found this control useful when, in its last days, it selectively refused permits to opponents of its proposed 'Union Government', involving the military, police and civilians.

The NRC (Control of Publication) Decree, 1972, the Newspaper Licensing Decree, 1973 and the Newspaper Licensing Regulations (L.I. 810) 1973 determined the extent to which the press could be controlled by the government. The NRC (Control of Publication) Decree 1972, made it an offence for any person "to publish, distribute, sell, offer for sale, or circulate any of the newspapers specified in this Decree or any part of such newspaper or to be in possession of any such newspaper or part thereof ...". The Echo and The Pioneer, two newspapers that were critical of the government were banned under this Decree without reasons being given.

The Newspaper Licensing Decree 1973 provided that no printing, publishing or circulation of a newspaper was to be carried out "except under and in accordance with a license granted in respect of such paper to the publisher thereof." The Commissioner for Information was authorised to issue, suspend or revoke a newspaper license. And the Newspaper Licensing Regulations, 1973 required that newspaper licenses be renewed annually. These licensing requirements enabled the government effectively to curtail press freedom. The Legon Observer, for example, which had had to cease publication in 1974 made an application in December 1977 for a license to publish. It was still awaiting a decision 6 months later.

The government also used its control over import license allocations to suppress freedom of the press outside the framework of the above mentioned decrees by refusing or delaying the allocation of import licenses, or granting inadequate ones to publishers who needed to import printing materials and equipment to enable them to publish. By the end of this military regime only the Catholic Standard had not been effectively suppressed.

Included in the government's emergency rule legislation were the Prohibition of Rumours Decree, 1973 and the Subversion Decree 1972 (NRCD 60) as amended in 1973 and 1976, which created several new offences against the state. The Rumours Decree made it a crime for any person to publish or reproduce any statement, rumour or report which was false and likely to cause fear or alarm or despondency to the public or to disturb the public peace or to cause disaffection against the /NRC/ and the Executive Council among the public or among members

of the Armed Forces or of the Police Service ...". Not having enjoyed much affection from the people the government Rumours Decree was obviously directed at the majority of Ghanaians who were growing increasingly critical of the military rulers.

The Subversion Decree, 1972, included among subversive acts, robbery; stealing or smuggling of cocoa, diamonds, gold and timber; stealing of public funds or of money meant for the purchase of cocoa; theft of hospital drugs; bribing to obtain, or accepting a bribe, to give an import license; dealing in foreign currency; hoarding of essential goods; wilful damaging of public property; and organising or inciting a general strike. Convicted persons under this decree could be shot by firing squad or imprisoned from 15 to 30 years. A 1976 amendment to this decree provided that a person was guilty of subversion who "knowing or having reason to believe that any other person has committed or has been convicted of subversion, conceals or harbours or in any way aids such person, with the purpose of enabling him to avoid arrest or the execution of a sentence." This amendment was obviously intended to enable the regime to prosecute Dr Kofi Awoonor, who had been under detention on suspicion of having aided in this way one Brigadier Kattah who was wanted by the government for alleged subversive acts.

Military tribunals and subversion trials

The offence of subversion was triable by a military tribunal (Special Courts) whose decisions were final and not subject to appeal. Under the NRC/SMC regime, these tribunals gained notoriety for violating all accepted norms of a fair trial while maintaining a façade of legality and justice through the presence of Judge Advocates and legal representation. The courts comprised a number of military officers and a Judge Advocate. The military members were judges of law as well as of fact. The Judge Advocate merely gave guidance on issues of law.

Observation of any of these trials made it clear from the beginning that the guilt of the accused was presumed by the panel, and that conviction was predetermined, as all procedural rules that might favour the defence were flouted, valid legal objections of the defence arbitrarily overruled and the prosecution allowed latitude to do as it pleased knowing that however unproven the accused's guilt might be, conviction was certain in the end.

Many of the convictions were based on confession statements obtained under torture and ill-treatment during long pre-trial detentions.

The trial of ex Capt. Kodjo Tsikata

In one case involving ex Capt. Kodjo Tsikata, and others in 1976, the tribunal, at the request of the DPP, heard in camera the evidence supporting the allegation of torture and intimidation. When the tribunal was re-opened to the public the President of the Panel ruled against the defence and admitted the confession statements, though it is believed the torture was more than proved to have been used.

The veil of legality behind which these tribunals operated was torn away in the middle of this trial when all the counsel for the defendants, in a rare move, withdrew their representation on the grounds that their presence in reality served no useful purpose to their clients, but rather contributed to the false appearance of fairness and legality which only benefited those engaged in a mockery of justice. Though some of the defence lawyers later returned to represent their clients, the Ghana Bar Association resolved after the trial that its members would no longer represent defendants at any of these tribunals.

Deaths from torture and arbitrary detentions of adversaries

Victims of these trials were in a limited sense, fortunate, first in having survived the torture and secondly in getting a chance, albeit a dubious one to defend themselves. The publicity sometimes put unwanted pressure on the government. Some detainees such as Mr Joseph da Rocha and Mr E.D. Allotey, were not so fortunate; they died under interrogation, the former on April 1,1972 and the latter on March 2, 1976.

The linchpin of the government's emergency legislation was the Preventive Custody Decree, 1972 (NRCD 2) which was the second decree of the regime. This decree empowered the military regime to "authorise the arrest and detention of any person in respect of whom they /are/ satisfied that it /is/ in the interest of national security or in the interest of the safety of the person so to do". A person could be detained under this decree without trial and in such place and for such period and subject to such conditions as the military government may direct. Those detained were also required to be listed in an Executive instrument containing the order for their detention. However, it was normal for people to be arrested and detained outside the provisions of this decree, in a purely arbitrary fashion.

Beginning from January 13, 1972 when the military took over, thousands of Ghanaians who were considered supporters of the ousted civilian government were arrested. Although some were released later, those deemed likely to undermine the new government were kept in custody. In subsequent years, the government continued to arrest and detain people regarded as potential trouble makers. These amounted to some 450 at the fall of the regime.

There was a wave of arrests and detentions, beginning in November 1975 and involving about 200 military and ex-military personnel as well as civilians. Some of those detained were alleged to have been engaged in subversive activities, but most of them were not even acknowledged as having been detained. They were not arrested in accordance with the requirements of the Protective Custody Decree, and were just held incommunicado and without charges, in some cases for several months, in others for several years. Most of those arrested were Ewes from the Volta region of Ghana and it was only on the interventions of chiefs from this region that the government felt bound to acknowledge certain detainees and prefer charges in order not to appear to be persecuting Ewes.

Reconstitution of the régime under a "Supreme Military Council"

A month before this new wave of arrests the military government had been reconstituted in a manner that concentrated power in the Head of State and a few colleagues in a body called the Supreme Military Council (SMC). The NRC was charged with the day-to-day administration of the government, subject to the direction of the SMC.

This move by the military rulers was intended to entrench the military politically at a time when their incompetence and corruption was widely and openly recognised. The subsequent arrests and detentions in the month following the creation of the SMC signalled the government's determination to crush the opposition that was mounting against it. From this time until 1978 the SMC was to escalate its systematic repression in direct proportion to the growing opposition to its continued rule, deeply underscoring its complete disregard for basic rights. Already the Subversion Decree of 1972 had so vaguely defined the offence of subversion, which almost all of those detained were tried for or suspected of, as to cover virtually every form of protest against the military.

Finality of decisions of military tribunals

In addition, the Subversion (Amendment) (No 2) Decree, 1973 emphasised the finality of the decision of military tribunals, explicitly exempting them from judicial reviews. This was in direct response to the decision of the High Court in The State v. Ofosu Armaat affirming its jurisdiction over inferior courts including military tribunals. According to the Decree "No Court shall entertain any action or proceedings whatsoever for the purpose of questioning any decision, judgement, findings, order or proceedings of any military tribunal ...; and for the removal of doubts; no court shall entertain any application for an order or writ in the nature of habeas corpus, certiorari, mandamus, prohibition or quo-warranto in respect of any decision, judgement, findings, order or proceedings of any such Tribunal".

This drastic curtailment of the jurisdiction of the ordinary courts in favour of military tribunals went hand in hand with numerous political arrests, detentions and trials.

The SMC's persistant thwarting of the exercise of basic civil rights, came into play once again, when it issued the Criminal Procedure (Amendment) Decree in 1975. This decree purported to repeal Article 15(2) of the Suspended Constitution under which persons arrested, restricted or detained were entitled to be informed immediately in a language that they understood, of the reasons for such arrests, restriction or detention and of their right to consult counsel of their choice. The purpose of this decree was to overrule a court decision made earlier in the year, holding that the legal guarantee of fundamental human rights and freedoms under the 1969 Constitution and in existence even before then was not removed with the suspension of the Constitution by the NRC. The Court argued that this guarantee was derived from the Common Law which the NRC had declared remained in force.

Growing opposition

Opposition to the regime meanwhile continued to grow, reaching a crisis point in May 1977 when acute food shortages and spiralling inflation brought students from all three universities into the streets demanding the resignation of the SMC regime and the transfer of power to a caretaker government headed by the Chief Justice, pending a return to constitutional rule. The government reacted by closing down all three universities, and dismissing the Chief Justice as well as the Governor of the Bank of Ghana and some medical professors. A general strike by professional bodies immediately ensued, involving a shut-down of hospitals and a call for immediate return to civilian rule.

In reaction to this strike the government issued the Professional Bodies Registration Decree, 1977, withdrawing legal recognition from the professional bodies and disabling them from taking disciplinary action against any of their members who might be inclined to disobey the strike call.

The Union Government diversion and related repression

On July 1, 1977, however, the SMC appeared to bow to pressure by announcing a programme for return to civilian rule under a vague "Union Government" concept which excluded political parties, but included military and police and some civilian representation. A referendum to be held on this proposal was preceded by the setting up of an Ad Hoc Committee to collate and submit proposals from the public on the form which this concept of government should take.

The mandate of the Ad Hoc Committee excluded the acceptance of opposing views and the government did all it could to suppress free discussions of this 'new concept' of government. A seminar organised by the Professional Bodies Association on the issue was violently disrupted by government hired thugs. When the victims sought to take court action against those of the thugs who were identified, the government issued the Union Government (Civil Proceedings) Decree, 1977 (SMCD 139), banning the courts from entertaining any such action. Subsequently the government secretly revoked this decree; however, to the end, it consistently interfered with the court system and the rights and remedies associated with it.

A notable example of this interference involved habeas corpus applications brought by the Ghana Bar Association on behalf of the 450 or so persons in detention. Under the Protective Custody Decree, the right to a habeas corpus application could be suspended, and the government purported to have done so in the case of some detainees. However, a large number of detainees, some of whom had been in custody for several years, were not held under the Protective Custody Decree or any other law whatsoever. The court's habeas corpus order in respect of approximately 178 of this latter group of detainees, resulted initially in the release of some of them. But the government subsequently re-arrested these people again and refused to obey the court order.

Since it is generally accepted that the courts are the guarantor of basic rights for individuals, it should be said that the role played by the Ghanaian courts during this period was correctly described by Mr Justice Taylor (as he then was) in R v Inspector General of Police (ex Parte Ibrahim alias Telley)/1977/ 1 GLR 7 at p. 12 when he said "in the task of dispensing justice the High Court is acting as a sort of agent, but more correctly as a servant of the Supreme Military Council".

Having set out to impose his 'Union Government' on the people, the head of state, General Acheampong, attempted to suppress all those opposed to it. Nevertheless the various opposition groups, feeling more confident, proceeded to organise, resulting in the emergence of the People's Movement For Freedom and Justice (PMFJ), the Third Force, and the Front for the Prevention of Dictatorship. Public meetings of these associations were consistently brutalised by government agents, leading to the death of at least two people in one incident at Kumasi, and to numerous other injuries.

After a highly discredited referendum on the Union Government proposal, during which the Electoral Commissioner barely escaped an attack on his office by soldiers and was subsequently dismissed for attempting to ensure a fair procedure for counting the ballot papers, Acheampong issued the Voluntary Association (Prohibition) Decree, 1978 outlawing the three main opposing organisations on the grounds that they had been rejected in the referendum and therefore had no justification for continuing to exist. Leading members of these organisations who were not quick enough to flee the country were arrested and detained until released by the new head of the reconstituted SMC.

VII. SMC UNDER AKUFFO, 5 July 1978 - 4 June 1979

Akuffo's takeover from Acheampong as head of state was a victory for the forces demanding a return to constitutional rule. This was implied in Akuffo's broadcast to the nation upon his takeover that one of the reasons for Acheampong's ouster was his conversion of government into a "one man show" during the preceding few years. Return to civilian government being the major political issue at the time, Akuffo's statement was understood by most to mean that Acheampong had been the stumbling block in the way of political change.

Hence from July 5, 1978 until June 4, 1979 when Akuffo's government was itself ousted by the lower ranks of the Armed Forces led by Flt Lt Jerry Rawlings, its main task was to establish the constitutional and political condition for a return to civilian government.

Preparation for civilian rule

The restoration of civil and political rights, shelved since 1972, was a crucial aspect of the preparation for return to civilian rule. In this connection, the Akuffo government, among other things granted an amnesty to all political refugees and exiles and also made a series of orders releasing some political detainees.

As far as future direct participation in government was concerned, however, some 105 persons consisting mostly of former politicians, were prohibited from running for election or holding public office, by regulations issued in 1979 by Akuffo pursuant to the Elections and Public Offices Disqualification Decree, 1969. Those disqualified were generally politicians and public officials connected with either the Nkrumah, Busia or Acheampong regimes, who had been found guilty of graft, corruption or some form of abuse of public office by various commissions of enquiry.

A review tribunal whose decisions were final and not subject to judicial review was set up to hear claims of exemptions from disqualification.

For some of those disqualified particularly those connected with Busia's government, there was little credible evidence of their corruption or other abuse of public office.

However, having illegally overthrown Busia's government, it would have been too idealistic to have expected Akuffo and his SMC colleagues to have relinquished power under conditions which could have placed their fate at the mercy of their political antagonists. The disqualification of former public officials connected with Busia's government was an essentially political move. Although unable to stand for elections or hold public office, a significant number of those disqualified continue to play prominent roles in the broader politics of the country today.

The 1978 declaration of emergency

Heavy devaluation of the Ghanaian currency in 1978, and the introduction of an austerity budget for the fiscal year 1978-79, sparked off a series of workers strikes and lockouts (80 in all) over wage demands, between October and November 1978. These strikes resulted in a declaration of emergency in November, 1978 by the government under the Emergency Powers Decree of 1978 (which had repealed the Emergency Powers Act of 1961). This decree provided among other things for the suspension of basic legal rights and remedies, including applications for habeas corpus and the prerogative writs. The decree also made offences committed under it or under any regulations pursuant to it triable by a military tribunal.

Significantly there were no formal complaints of systematic or excessive abuse of human rights during the eight week period of the emergency.

An interesting aspect though was the government's announcement in reaction to the strikes, that it would pursue the objectives of the controversial budget to the letter, and that "... any attempt to sabotage them shall be severely dealt with ...". According to the government "strikes and other protests including damage to property to secure redress outside the framework of normal procedure shall be regarded as criminal acts against the security of the state and will be dealt with according to the relevant laws of the country".

The government's pronouncements blurred the distinction between threats to the interests of the state, and the threats to its own existence which were posed by the challenge to its economic measures through the strike actions which followed its introduction of the 1978-79 budget.

In general the Akuffo regime can not be said to have been guilty of systematic violations of human rights, such as would explain or justify his subsequent execution, along with other former SMC members, upon the seizure of power by the AFRC.

VIII. THE AFRC ERA, 4 JUNE - 24 SEPTEMBER 1979

On June 4, 1979 the Akuffo government was overthrown after heavy fighting in the capital Accra, between the bulk of the lower ranks of the army, and troops loyal to Akuffo led by the officer corps. The Armed Forces Revolutionary Council (AFRC) was formed with Flt. Lt. Jerry Rawlings as its Chairman.

"House cleaning objective"

While pledging itself to complete the preparations started by the Akuffo regime for return to civilian rule, the AFRC stated that it had seized power for the sole purpose of redeeming the image of the Army, which had been tarnished by the misdeeds of previous military regimes. In this connection the AFRC sought to do some "house cleaning" particularly within the Armed Forces to prevent senior officials known to have grossly abused their position in government from escaping punishment.

Pursuant to these objectives, the AFRC quickly ordered the arrest of about 100 persons comprising former high officials, both military men and civilians who had occupied executive and managerial positions in previous administrations, as well as some wealthy businessmen.

On June 16, 1979, the former Head of State Gen. Acheampong and Maj. Gen. Utuka, head of the Border Guards were executed after a military tribunal which had not been established by any decree found them guilty of "using their position to amass wealth while in office and recklessly dissipating state funds to the detriment of the country". On June 26, 1979, 6 other senior officers, including two former Heads of State, Gen's Akuffo and Afrifa were also executed on a similar charge.

Trials under the AFRC

Subsequently the AFRC issued a decree establishing military Special Courts for the trial of the remainder of those under arrest. The decree gave the Special Courts jurisdiction to try them for three main categories of economic crimes. These were "with intent to sabotage the economy of Ghana ... selling above the controlled price", "improper demand or acceptance of compensation, consideration or personal advantage in respect of the performance of any public duty", and

"intentional or reckless misappropriation of, or cause of loss or damage to public property".

Members of the Special Courts were to be appointed by the AFRC or by any other body authorised by it; and the Court was to be guided by the rules of natural justice in its procedures and decisions. The AFRC reserved the power to review and confirm the decisions of a Special Court and to "reduce the penalty if it thinks appropriate". Decisions of the AFRC and Special Courts were final.

The Decree allowed the defendant to be present at the trial, to hear the changes proferred against him and to enter a plea in this regard; to call witnesses "whose attendance can, having regard to the exigencies of the times, reasonably be procured", to submit relevant evidence; to cross-examine any prosecution witness; to address the Court and to answer any case made against him. A later amendment to the decree, however, provided for the trial in absentia of persons outside Ghana or who otherwise find it impossible to be present at the trial. Persons found guilty under the decree were "... liable ... to suffer death by firing squad or to imprisonment with penal labour for a term not less than three years and the confiscation to the state of any assets found by the Court to have been illegally or dishonestly acquired by such persons".

It has been estimated by Amnesty International that during the period between August and September, 1979, "at least 55 military officers, former officials and wealthy businessmen were sentenced to heavy prison sentences, ranging from 6 months to 95 years at the principal Special Courts at Pednase Lodge, near Accra", and that possibly as many as 100 were also sentenced to imprisonment by regional Special Courts. A further list of 68 individuals sentended in absentia, under the amended provision of the Special Courts Decree, 1979, to death by firing squad or to various terms of imprisonment, was published by the AFRC shortly before the return to civilian rule in September 1979.

Charges of human rights violations

Numerous accusations have been made of violations of human rights stemming from the activities of the AFRC. Examination of the Special Courts Decree reveals a failure to specify the offences for which each penalty could be imposed. Amnesty International contends that all the trials held under the AFRC, including those leading to the 8 executions, were unfair to the extent that they were hurriedly carried out with insufficient judicial investigation before the hearings.

Other criticisms are even more fundamental. It is alleged that, in addition to some being beaten by troops, defendants appearing before the Special Courts were denied counsel and a right of appeal, contrary to the terms of the Special Courts Decree; further, that even those acquitted by the Special Courts continued to be held in detention. It is said that in the case of some defendants the Special Courts simply sentenced them without trial. Some detainees are alleged to have been incarcerated under arrest warrants bearing

the signatures of unknown persons. If true, these were violations by the AFRC of standards it had set for itself.

To date it has been difficult to adduce concrete and direct evidence in support of these allegations, because the proceedings of the Special Courts were held in complete secrecy. This, of course, is in itself an indictment of the operations of the Special Courts.

IX. AFRC, A TRUE EMERGENCY GOVERNMENT

The AFRC was a true emergency government, distinct in its membership and objectives from previous military regimes in Ghana. This peculiarity stemmed from the developments that led to its establishment.

With Acheampong's ouster and Akuffo's announcement that Acheampong had converted government into a "one man show", Ghanaians awaited, though with much scepticism a demonstration of better government under Akuffo. Senior military officials, represented this time by Akuffo, who had been alternating control of political power with the civilian elite, had yet another chance to demonstrate their ability to raise rather than lower the economic and political condition of the country.

No doubt Akuffo was expected to restore civil and political rights in addition to making progress in tackling the economy. But, perhaps of more symbolic value than anything else, though crucial nevertheless under the circumstances, Akuffo was also expected to make Acheampong and some of his close associates publicly accountable for the corruption of his regime. Akuffo failed to take this step; he never brought Acheampong or any of his notorious colleagues to trial; not even for the charge of economic and administrative misconduct which he himself levelled against them.

This conduct of Akuffo's proved fatal to him. It was interpreted by the public as a move to set in motion a pattern of protection for those (including Akuffo) who were seen at once as culprits and beneficiaries of the country's economic and political crises.

This view appeared to be confirmed when, in April 1980, the Constituent Assembly drafting the third Republican Constitution decided to indemnify all officials of the SMC, as well as of previous military regimes, from any court action that could be brought against them.

This decision met with widespread protest from the lower ranks of the armed forces and from civilians. Within the army the outrage against a perceived 'ruling class' conspiracy manifested itself in an abortive coup by Rawlings on May 15, 1979. Shortly afterwards, however, on June 4, 1979 he led the successful uprising which brought the AFRC into power.

The support for the June 4 revolt was massive and evidenced by the numerous and widespread demonstrations of solidarity with the lower ranking soldiers. The stage had thus been set for a deep structural crisis, in which the beneficiaries of an acknowledged system of patronage and privilege were placed for the first time on the defensive.

After the dust of the initial violence settled and the decision was taken to bring to account some of the leaders and beneficiaries of the rejected order, the question arose of how this should be done. For the ruling lower rank officers whose training, in contrast with that of judges and lawyers, had conditioned them to eliminate identified enemies with despatch, execution or other punishment without trial by political decision seemed a natural choice.

There were, however, other forces and interests both from within and without, at play. In the result the AFRC felt constrained to set up the Special Courts, with jurisdiction to try those who had benefited from the system of privilege and patronage. The very nature of this jurisdiction disqualified the existing judges and lawyers, who were themselves considered to be beneficiaries of the system on trial.

It is hardly surprising that, in return, the members of the existing legal order were, with the exception of a few sympathisers, vociferous in accusing the AFRC of violating the rule of law and human rights.

Deprived of a sympathetic judiciary and bar who could have brought their training to bear upon the proceedings of the Special Courts, the Special Courts, composed largely of sergeants and warrant officers, committed serious errors of law and justice.

All the same, in the streets and on the university campuses, slogans such as "revolution is not made in the Court room" expressed the ordinary man's revocation of confidence in established legal procedure, but also reflected his reaction to the hostility and lack of sympathy from the professional members of the legal order towards the AFRC. In the result, at the execution site, chants of "finish them all", and "let the blood flow" expressed the ordinary man's approval of the rough justice of the Special Courts.

The AFRC period clearly signified a nation reaching back for a residue of energy to rid itself of a crippling socio-economic disease that was fast rendering life meaningless for most people. It was a major reaction by the active section of a people subjected to a system of massive corruption and political and administrative incompetence, a system which would not disintegrate of its own accord but rather was sustained by increasingly repressive measures and arbitrariness.

Inadequate as they were the AFRC's investigations into the acquisition of assets by government officials and certain influential individuals, as well as other measures taken by them such as their ultimatum to tax defaulters to make good the arrears and to hoarders of essential commodities to bring out these commodities exposed a disquieting picture. The depth of the corruption and maladministra-

tion revealed was beyond anything imagined, as was the immensity of the personal fortunes amassed illegally by a tiny minority of the people at the expense of the vast majority.

In addition the AFRC has to be credited with the release of the remaining political detainees held under the previous regime.

Questions of jurisprudence raised by the foregoing are whether human rights doctrine can recognise a people in legitimate uprising, and if so what are the legitimising factors and what gives them the law-making capacity that is consistent with the purposes and principles of human rights.

X. THE THIRD REPUBLIC

The AFRC handed over power on September 24, 1979 to a civilian government headed by Dr Limann, under the Third Republican Constitution of 1979. This Constitution was drafted by a Constituent Assembly set up in December 1978 with a membership of 136, comprising 61 elected representatives of district councils, 33 nominees of the Supreme Military Council under Akuffo, and 42 representatives of organisations such as trade unions and professional bodies (see J.E. Goldschmidt, "National and Indigenous Constitutional Law in Ghana", Leiden, 1981, pp. 158-159). The Constitution was accepted by the AFRC and promulgated by the Constitution of the Third Republic of Ghana (Promulgation) Decree, 1979 (AFRCD 24). It contains several detailed provisions on individual liberties. Chapter 6, which comprises articles 19-34 contains the civil and political rights. These include the right to life; the right to personal liberty - i.e. protection against illegal incarceration (Articles 21, 26, 34); protection from slavery and forced labour, inhuman treatment, arbitrary deprivation of property; rights of privacy and other property rights (Articles 22, 23, 24, 25). Articles 27, 28, 29 and 30 guarantee freedoms of conscience, expression, assembly and association, and of movement. Article 31 incorporates the principle of non-discrimination, while Article 32 guarantees equal rights for mothers, spouses and children in need of special care.

By Article 35, the High Court is empowered, through the use of writs and orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo-warranto, ultimately to ensure the enjoyment of the rights and liberties guaranteed by the Constitution. An independent judiciary is guaranteed in Chapter 12.

Articles 33 and 34 of the Constitution provide for the nature, use and control of emergency powers, in a manner calculated to protect the rights of the individual save where he has acted or threatened to act in a manner "calculated to deprive the community of the essentials of life", or "which renders necessary the taking of measures which are necessary for securing the public safety, the defence of Ghana and the maintenance of public order and of supplies and services essential to the life of the community."

The government of the third republic has not declared a state of emergency within the terms of the Constitution.

This study of states of emergency in Ghana outlines the main events up to mid-1981. Since then, as is well known, in 1982 there was another military coup led again by Flt Lt Rawlings, which established a revolutionary government. The International Commission of Jurists is not in possession of sufficient reliable information to carry the study beyond 1981.

XI. CONCLUSIONS

Ghana was the first colonial territory in Africa to win its independence. The outstanding feature of its short history has been the number of changes of regime which have occurred and the alternation between multi-party parliamentary regimes and authoritarian governments, usually military in character.

Ghana, unlike some other African countries, has a well-educated elite, an active and determined legal profession which has courageously resisted authoritarian repression of human rights, and an able judiciary. The legal profession has, indeed, played an important role in the re-establishment of civilian regimes, following both the dictatorial period at the close of Nkrumah's regime and collapse of the discredited military regimes.

The grave economic problems facing the country with which no government has successfully contended, has led to repeated periods of social unrest, fanned by resentment against corruption. In consequence, governments of all complexions have resorted either to declared states of emergency or to what has aptly been described as quasi-emergency legislation, providing for exceptional powers and restricting basic human rights and fundamental freedoms.

As elsewhere, the most severe repression has occurred under military regimes. These regimes, by their nature and from the outset are emergency regimes. The military forces seize power in the belief that their military discipline will enable them to provide a more stable and effective government. For the most part these regimes have fared no better than the civilian governments they have replaced. As whatever initial popularity they have had has waned, they have become increasingly oppressive, using ever stronger emergency powers not so much to preserve the security of the state as to seek to preserve their own regime in power.

The two exceptions to this picture have been the first military government which, when overthrowing Nkrumah, promised to return the country to democratic constitutional rule within 3 years, a promise which they fulfilled. The second exception was the first coup led by Fl Lt Rawlings who declared his intention of returning the country to civilian rule after a clean-up of the widespread corruption, an undertaking which was also implemented. It remains to be seen what will be the outcome of the present revolutionary regime under Fl Lt Rawlings' leadership.

Ghana is one of the few countries in Africa in which repeated attempts have been made to establish a free parliamentary democracy. The extent to which civilian governments have found it necessary to have recourse to states of emergency and the frequency with which they have been overthrown, calls in question the viability of this form of government in developing countries facing grave economic problems and torn by ethnic and social strife.

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HUMAN RIGHTS AND EMERGENCY LEGISLATION

GREECE 1967-1974

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I. INTRODUCTION

In the early hours of 21 April 1967 a small group of army officers in a swift, well-planned coup, overthrew the conservative government of Panayiotis Kanellopoulos and established a military régime which, with some changes at the top, lasted until 23 July, 1974. Thus Greece overnight acquired the dubious distinction of being the first West European country to fall under dictatorial rule after the Second World War. The military coup had been preceded by a rather tumultuous period of political events and uncompromising political crises. The main protagonists were young King Constantine and the leader of the Centre Union Party, George Papandreou, a veteran combative leader who in 1964, after more than three years of ceaseless political activity put an end to the almost uninterrupted post-war rule of the right-wing by gaining control of the country with a landslide of 53% of the popular vote. In less than 18 months, George Papandreou was forced to resign after an open confrontation with the king over the issue of who would retain control of the armed forces, i.e. whether the king or the elected prime minister had the right to appoint the minister of defence.

This, and subsequent manoeuvres of the monarch that strained the letter and the spirit of the Greek Constitution gave rise to massive popular demonstrations in Athens and other large cities. The people felt that the popular will was being subverted. The crisis was aggravated by the refusal of the king to call for new elections and his stubbornness in forming shaky governments from Centre Union faction deputies with the support of the right-wing opposition.

However, despite the atmosphere of tension and crisis in the political superstructure of the country (1965 to 1967), the economic and social infrastructures continued to grow vigorously, apparently undisturbed by "political instability". For example, gross national product annual growth rates continued at an extremely effective 8% level, while political demonstrations were relatively restrained. Finally, in the cultural and educational sectors Greece was experiencing rapid transformation and growth (1).

It is to be noted that during this period some incidents of sabotage took place in army units stationed near the border with Turkey and attempts were made to create fires and erect barricades during popular demonstrations. The hyperactive ultra-conservative newspapers attributed the incidents to communist infiltration. Later, it was discovered that the sabotage occurred in a unit led by Colonel G. Papadopoulos, the subsequent leader of the coup. There is also evidence that the fires were started and the barricades erected by members of paramilitary groups with the connivance of the police.

But in spite of the two years of fierce confrontation and the continuously deteriorating institutional situation the leaders of the major parliamentary forces, Papandreou and Kanellopoulos, reached an agreement and, therefore, general elections were set for 27 May 1967.

The electoral outcome would have probably brought the Centre Union back into power with a solid majority. Today it is known beyond any doubt that the king, determined to prevent Papandreou from winning the elections, was preparing his own intervention. At first he was preparing plans for declaring a state of siege on the occasion of widespread civil disturbances initiated by members of secret and paramilitary organisations. He would then apply article 91 of the constitution and suspend civil liberties for nine months. When those plans were frustrated by an intervention of Prime Minister Kanellopoulos, the king gave his consent to a military dictatorship to be led by the head of the armed forces, General Spandidakis. At this crucial moment Papadopoulos managed to outmanoeuvre the junta of the generals and to seize power.[2] Thus, the Greek people were prevented from exercising their right to elect their government.

That same morning of 21 April, the national radio network announced that the king, due to "serious disturbances and manifest threat to public order" had invoked art. 91 of the constitution[3] and, on the recommendation of his government, had issued a royal decree[4] declaring a state of siege, invoking the Martial Law Act "Delta Xi Theta" of 8 October 1912, and suspending articles 5, 6, 8, 10, 11, 12, 14, 20, 95 and 97 of the constitution.[5] It is important to note that the announcer did not mention the names of any of the responsible ministers signing the decree but referred to "the prime minister and the ministers". Later the king claimed that the putschists had forged his signature on the text of the decree.[6]

The decree was published in the official gazette under serial no. 280 and dated 21 April 1967.

Under normal conditions Royal Decree 280 was unconstitutional because it did not provide for the convocation of the parliament, which had been previously dissolved due to the forthcoming elections. As a guarantee of civil liberties, art. 91 of the constitution in force at that time, made the validity of any decree by which a state of emergency was declared, subject to ratification by the parliament. If the parliament was not in session or had been dissolved the decree had to provide for its reconvention within ten days. The parliament would then decide on maintaining or lifting the state of emergency.

The Colonels not only failed to summon the parliament but, claiming their revolutionary right to create new law, promulgated Constitutional Act "Alpha" (No. 1) on 5 May 1967.[7] This, after a preamble full of generalities and empty oratory, gave to the Colonels, in their capacity as a cabinet, the right to exercise constitutional authority by issuing constitutional acts until the enactment of a new constitution which, according to the same act, was to be drafted by the government and ratified by a referendum.

Vested with constitutional authority the Colonels issued, on the same day, Constitutional Act "Beta" (No. 2)[8] which, with the assumed power of a Constitutional Legislator and under no obligation whatsoever to observe the guarantees prescribed in art. 91 of the old constitution, reaffirmed the proclamation of martial law and the state of siege and ratified retroactively Royal Decree 280.

The same act increased the number of suspended articles of the constitution, adding art. 99, providing for the election of municipal authorities by the people, and art. 101, referring to the permanent status of public servants.

With the promulgation of Constitutional Acts "Alpha" and "Beta" the Colonels tried to give a facade of legitimacy to their arbitrary rule. They sought to frame in legal terms what in political language was their major claim since the first day, namely that their rule was a product of a revolution and not simply a coup d'etat. This theory[9] was extensively used by the junta in justifying their violation of all constitutional guarantees pertaining to civil, political and human rights. Once the obstacle of the constitutional provisions had been overcome the Colonels had at their disposal a very rich armoury of existing legislation enacted in former times of (real or assumed) emergency, which are not rare in contemporary Greek history.[10]

II. THE RIGHT TO LIBERTY AND SECURITY

Art. 5 of the constitution prescribes that nobody may be arrested or detained without an authorised warrant issued by a judicial authority. The same article provides for a limited period of three days during which the examining magistrate has the right to detain an individual without issuing a warrant of preventive detention.

After the suspension of art. 5 of the constitution and as expressly provided in art. 9(4) of Martial Law Act "Delta Xi Theta" the military authorities, who had become competent in all matters regarding public order (Martial Law Act, art. 4), had the right to arrest any person without applying the guarantees contained in art. 5 of the constitution. However, according to art. 11 of Martial Law Act "Delta Xi Theta", "during the state of siege citizens are entitled to all constitutional rights which have not been explicitly suspended". In view of this provision, the attorney general of the Supreme Court at that time, responding to a petition by the administration, rendered an expert opinion stating that the suspension of art. 5 of the constitution meant that

- the ordinary legislator was not bound by the limitations put forward in the above constitutional provision.
- an arrest without a warrant became constitutionally permissible through the application of art. 9(4) of statute "Delta Xi Theta".
- all other matters not covered by a specific provision of statute "Delta Xi Theta" were treated as before, even if those matters were subject to the constitutional provisions already in suspension, the sole implication of the suspension being that the legislator had the right to pass laws without taking into consideration the guarantees of the suspended constitutional provision. Thus since there was no other provision in statute "Delta Xi Theta" but the one referring to arrest without warrant, the status of the arrested person was governed by the relevant provision of the Code of Criminal Procedure for those who are to be tried by the regular crim-

inal courts and the provisions of the Military Criminal Code for those who are within the jurisdiction of courts-martial.[11]

However, in practice, this ruling was rarely observed. Arrested persons were detained for months without being charged and with no access whatsoever to lawyers or visits by relatives. The guarantees provided for by the law of interrogation and preventive detention were grossly violated. In most cases detainees were examined as witnesses with no official record of their deposition being made in writing. Under the stress of long-term detention and, in many cases, after torture, they were forced to disclose incriminating facts and circumstances that later were used against them by the prosecuting attorney in the indictment.

III. MILITARY COURTS

In view of art. 6 of statute "Delta Xi Theta" allowing the establishment of military courts, the junta issued Royal Decree 281/1967 by which special courts-martial were set up in ten major cities. But in spite of the fact that art. 6 of statute "Delta Xi Theta" also provided for special appellate courts-martial the Colonels not only failed to set up such courts but also ruled that judgements of courts of first instance were final and no appeals were allowed. However, under the pressure of international public opinion, the junta took special legislative measures from time to time allowing appeals.[12]

The purpose of those laws, which were given extensive publicity by the daily press and the mass media, was to signify a gradual return to normal political life. But the conditions and the exceptions under which the right of appeal was given were so many that hardly any political prisoner could meet the prerequisites of eligibility, and of the few who were considered eligible to apply only an insignificant percentage saw their sentences decreased to such an extent as to effect their immediate release.[13]

According to art. 5 of statute "Delta Xi Theta", military courts were competent during the state of emergency, to try offences against the security of the state, the social regime and public order. The same article, at para. 2, prescribes that military courts are also competent for any offence if, in the opinion of the military authorities, the security of the state or the public order is being jeopardised.

Under this last provision a small number of cases of profiteering were tried by military courts mainly during the first months of the coup when the Colonels were excessively eager to "purge" the country and fight corruption. However the main task of the military courts and the military authorities was to deal with the opponents of the regime. In close collaboration with the special branches of the police that had long experience in dealing with political offences, both during and after the civil war (1946-1950), the Military Police (ESA) and the Secret Information Branches of the Army (KYP) occupied themselves with the task of wiping out any sign of opposition to and resistance against the regime.

The feeling of omnipotence and immunity that the army and police officers enjoyed as law-enforcement and investigating authorities did not come as a result of the state of siege and the application of statute "Delta Xi Theta". For no matter how great the power that the above law conferred upon the military authorities, under no circumstances did it render them beyond any control whatsoever. What made the officers believe that they had the right of life and death over the citizens was the feeling that they were members of a revolutionary elite and therefore they were bound neither by the laws nor by the constitution. They used the dictum "Successful revolution is a law-creating fact" to counter any argument against their illegal and arbitrary actions. This feeling of omnipotence and immunity was furthermore passed down to the ranks by not holding them responsible for their illegal actions, as long as they were efficiently protecting public order and faithfully serving the "revolution".

Even in the most extreme cases, such as that of an ex-member of the parliament who died during interrogation at the hands of his torturers in a military compound in Thessaloniki, nobody cared to investigate to establish who was responsible. When the relatives of the deceased filed a complaint with the competent district attorney, the military commander of the area ordered that the file be handed over to the head of the Military Judicial Department. The latter conducted no investigation whatsoever and put the file in a drawer, where it was found after the fall of the dictatorship.

Although the Military Criminal Code which under the law of emergency applied to civilians, did not differ much from the ordinary Code of Criminal Procedure as far as pretrial investigation was concerned, the officers in command of the investigating units conducted the interrogation in a manner that completely violated the legal rules. Suspects were detained incommunicado sometimes for more than a month. Psychological and bodily torture were systematically used as interrogation methods. The European Commission of Human Rights carried out a detailed investigation into the situation in the course of examining applications of Denmark, Norway, Sweden and the Netherlands against the Greek junta. The Commission stated in its report that it "has found it established beyond doubt that torture or ill-treatment contrary to art. 3 (of the European Convention of Human Rights) has been inflicted in a number of cases".(14)

Torture was the main instrument used by the investigating authorities in establishing the facts of each particular case. The main pattern, in dealing with detainees suspected of belonging to a resistance group, was to pick up a small number of them, usually two or three, torture them, obtain information from each one individually, cross-check this information and finally interrogate the others on the basis of the facts already established. Then the army commanders issued the warrant, framed the charge and brought the case to court with their own agents as witnesses to the facts and information obtained from the victims. Very often a policeman testifying in front of the court-martial described in detail secret meetings of the defendants which had taken place in a private house, specify-

ing the position of each one around the table and the "exact words" used by every particular speaker (sometimes distorted to fit the charge). If he was questioned as to how he was aware of so many details there was always a standard answer. "from information obtained in my department". The obligation to disclose sources was not enforced at that time.

It is noteworthy that the systematic use of torture was suspended for a period in 1971. When the Commission on Human Rights of the Council of Europe was investigating the inter-state complaint against Greece, the government decided to invite the International Committee of the Red Cross (ICRC) to send representatives to Greece with permission to visit prisons and police stations and to investigate torture complaints. The ICRC did so, advertising their presence in the press and giving a telephone number which people could ring. This enabled the ICRC at times to visit places of alleged torture within minutes of receiving the complaint. The result was that during that year torture, if not abolished, was very substantially reduced. The Junta, however, refused to renew the authorisation to the ICRC, and in the following years the systematic use of torture was renewed.

As was mentioned above, the junta in its efforts to silence opposition used mainly preexisting laws that had been enacted during troubled periods in the past. In cases of individual dissenters or groups which, in the estimation of the military authorities, did not raise considerable problems for the junta or in cases where the Colonels had their own political reasons to treat defendants lightly, the indictment was so worded as to fit art. 10 of statute "Delta Xi Theta" which provided for a sentence of up to five years imprisonment for those who defied orders of the military authorities.

A second category mostly used for organised resistance was Law 509/1947 regarding the security of the state and the protection of the social regime and civil liberties. This law was part of a network of extraordinary measures enacted during the civil war (1946-1950) to suppress communist insurrection at that time. Unfortunately, 17 years after the end of the civil war that law was still in force and when the Colonels took over, it became their main instrument of oppression. Art. 2(1) of the above law reads as follows "Whoever pursues the application of ideas aiming apparently at the violent overthrow of the regime or at the detachment of the whole or part of the national territory, or tries to convert others to the above ideas is sentenced, if he is a leader or an instigator, to imprisonment from five to twenty years and in especially grave cases to life imprisonment or death and if he is a simple member, to up to five years imprisonment and in especially grave cases to imprisonment from five to twenty years."

It is evident even to those who are not familiar with its historical context that this law was drafted and enacted during a very crucial period of the civil war (1947) with the sole purpose of controlling the ever-growing activity of the Communist party. Its wording in fighting, not subversive action, but dissemination of ideas, apart from the constitutional problems that it raises, is characteristic of a particular period when the social regime was fighting for its

existence. In interpreting this law the courts of that period held that what is prohibited by the law is the ideology which aims at the overthrow of liberal parliamentary democracy for a socialist regime. The legislators of that time in their effort to defend the existing constitution, felt that such an overthrow would put an end to the civil liberties protected by it.

The junta made extensive use of this law against its opponents regardless of their ideology. The military judges in their decisions, used the same wording as their colleagues in the past, except that they tended to identify the term "regime" with the coup of 21 April. Therefore any opposition to the dictatorship, no matter where it came from, was interpreted as an effort to overthrow the regime. However this pattern sometimes created problems of elementary logic in cases where the defendants were outspoken conservatives who had nothing more in mind than the restitution of constitutional liberties, something that even the leaders of the coup did not deny at least in theory.

A third category of charges was based on the old statute 375/1936 concerning "crimes of spying and criminal acts threatening the security of the country from abroad". This law had also been used against the communists during the civil war mainly as an instrument for proving that communist insurgency was led by outsiders and was part of an international conspiracy. According to the above law, charges of spying were to be tried by court-martial even in periods of normality. The Colonels used that law in a number of cases, where soldiers and junior officers trying to form resistance groups within the armed forces had set up a primitive communication system among the military units in which they served. It was also used against a group of high ranking cadres of the Communist Party who came from abroad with fake passports to organise a party nucleus in the country.

Fourthly, the penal code was used in a number of cases against political opponents. In 1971, art. 187 of the Penal Code was amended by statutory decree 861/1971 so as to include within the meaning of conspiracy the committing of misdemeanours. Therefore, revised article 187 punishes any agreement between two or more persons for the purpose of committing by their joint efforts one or more felonies or misdemeanours. Under this new, enlarged definition, conspiracy became the basis of charges brought by ordinary state prosecutors after the junta had gradually abolished the extraordinary courts-martial and consequently the competence of military commanders to bring charges against civilians.(15) This application of article 187 increased the irrationality of the sentences imposed. For an action which in previous cases had been described as a violation of statute 509/1947 (ideas aiming at the overthrow of the régime) and led to a sentence of more than ten years, the ordinary courts charged the defendants with violation of art. 187 of the Penal Code (conspiracy) and sentenced them to less than two years imprisonment.

Finally, martial law, which had been gradually lifted from various districts since December 1971, was totally abolished on 20 August, 1973. However, it was reintroduced after the uprising at the Polytechnic School of Athens (18 November 1973) and the

overthrow of the Papadopoulos regime by the faction of Brigadier Ioannides, the leader of ESA. During that first period it is estimated that 4,350 persons were brought before military courts, whereas during the Ioannides regime which lasted from 18 November, 1973 until the fall of the junta (23 July, 1974) an additional 465 persons were tried by extraordinary and ordinary military courts.[16]

IV. ADMINISTRATIVE DISPLACEMENT

On the first day of the coup (21 April 1967) an extensive round-up was carried out by army units. The prime minister, party leaders and many members of the Parliament were among those arrested. In addition, in the capital alone, an estimated 7,000 civilians listed as left-wing by the Army Intelligence Service were arrested too. The whole operation in Athens as well as in other cities was carried out in accordance with a NATO plan (code name "Prometheus") designed to apply in case of an attack by eastern socialist countries.

The round-up continued during the following days and arrested persons were packed in police stations or athletic stadiums. There is evidence that in some cases mistreatment and torture were inflicted on the detainees. The whole operation cannot be justified by any legal provision whatsoever. Following the arrests most of the detainees were deported to concentration camps in remote islands.

Administrative displacement or "internal exile" is a well-known practice in Greek political life and consists in banishing a person from his home to live in some other specified and usually remote place. According to art. 2 of Legislative Decree 19/1924 "On Regional Public Security Committees", administrative committees set up in every prefecture of the country and consisting of the prefect, a judge of the court of first instance and the district attorney may decide on the displacement of anyone suspected of committing acts against public order and the peace and security of the country. The displaced person had the right of appeal to a higher committee.[17]

This initial legal document was further elaborated at different times of emergency and according to the exigencies of particular situations. But it was during and after the civil war that the law was extensively amended and used. Statute 511/1947 defined the authority of the local police regarding displaced persons. According to this law the police acquired the right a) to ask displaced persons to report on certain days to the police station, b) to prohibit them going out of their residences at certain hours of day and night, c) to restrict their movements to within the boundaries of the community, d) to oblige them to notify the police of every change of residence, e) to search their house any time of day or night, f) to prohibit their meeting together, g) to prohibit their setting up any club or association, h) to ban the editing, publishing or even the circulation of manuscripts deemed to be harmful to the public order, i) to ban any vocational activities if they are not necessary for daily living, j) to determine the maximum amount of money that each of the displaced persons had the right to possess, k) to check any parcel sent to the displaced person, l) to censor their correspondence.

The Colonels applied the same network of legal instruments to displace persons who were deemed to be opponents of the regime. Most of those arrested on the first days were displaced to various islands and were detained in concentration camps. Conditions of detention in concentration camps were little different to those of persons serving sentences in ordinary jails.

Public Security Committees were set up and decided a posteriori on the legality of the displacement of persons in internal exile. Some of them were released after they had submitted a written promise that they would not engage in any kind of political activity. In May 1969 the junta passed Legislative Decree No. 188/1969[18] by which a three-member Committee of Public Security was set up to sit in Athens and decide on the release of displaced persons. The decree defined the principles on which the committee should base its judgement.

Since the relevant information was given to the committee mainly by the local police, the latter exercised strong psychological pressure on detainees to force them to sign documents renouncing their ideas, expressing confidence in the "national revolution", etc. Thus the file presented to the committee reflected the degree of each detainee's submission to the pressure exerted by the police.

In addition to those detained without trial in concentration camps, who were mainly of the left-wing, there were a number who were either suspected of acts of resistance or simply undesirable in the eyes of the regime, and who were displaced to remote mountain villages. Among them were political leaders, well-known university professors and huamn rights lawyers as well as others whose presence in the main cities was annoying to the regime.

Thus, although the institution of administrative displacement was, stricto sensu, legal, the Colonels applied the relevant legislation in an arbitrary way, as an instrument of political oppression. Thousands of persons who were arrested on the first day of the coup were exiled without a previous decision of a regional Public Security Committee. Furthermore, administrative displacement as prescribed by the law presupposes that the person lives in freedom under certain restrictions mentioned above. Detention in concentration camps which is little different from imprisonment can not be legally justified and is not permitted even under emergency legislation.

V. DEPRIVATION OF CITIZENSHIP

In their omnipotence as constitutional legislators the Colonels passed Constitutional Act "Eta" (No. 8) on 11 July 1967.[19] Art. 1 of the above act gave the minister of the interior the right to deprive of their citizenship those Greeks who, having their residence abroad, acted at that time or in the past unpatriotically or in a manner incompatible with their capacity as Greeks or contrary to the interests of Greece or designed to serve a cause prescribed as criminal by statute 509/1947.[20] In para. 2 of the same article the term "unpatriotic activities" was defined in general terms so as to include the passing of false information which might

discredit the state or its principles in the eyes of the international public.

But the minister of the interior had issued decisions depriving Greeks living abroad of their citizenship on the above-mentioned grounds even before the promulgation of the constitutional act. Consequently, those decisions were legalised retroactively by para. 4 of art. 1, which ratified them all.

Finally art. 2 of this act provided for the total confiscation of the property of all persons deprived of their citizenship.

Deprivation of citizenship is not a novelty in Greek contemporary history. During the civil war, it was used extensively as a means of banning all those who had followed the defeated revolutionary army into neighbouring socialist countries.[21]

But although such treatment of a defeated enemy after a fierce and bloody civil war, may claim legal or political justification, it is certainly entirely unjustifiable in the circumstances under which it was used by the Colonels. Political leaders, artists, intellectuals, students and workers who had testified to parliamentary committees of various countries, expressed their views against the junta either through the mass media or at the Council of Europe, or taken part in political campaigns, became victims of this legislation which was used by the junta in its effort to intimidate Greeks abroad and prevent them from campaigning against the dictatorship.[22] It was only because of the willingness of most European governments to grant political refugee status to those Greeks who had lost their citizenship, that this method proved to be unsuccessful in preventing the mobilization of Greeks abroad.

Constitutional Act No. 8 and its extensive use raised very strong feelings against the junta, mainly in Western European countries. These feelings were reflected in the second applications (28 March, 1968) of the governments of Denmark, Norway and Sweden to the European Commission of Human Rights. The applicant governments alleged that Constitutional Act No. 8 violated art. 7 (retroactive punishment) of the European Convention and art. 1 (free enjoyment of property) of the First Protocol.

Under this heavy pressure, on 20 September 1968, the junta issued Constitutional Act "Lamda" (No. 30). This Act, which claimed to be an authentic interpretation of Constitutional Act No. 8, prescribed that deprivation of citizenship according to Constitutional Act No. 8 was permitted only if the acts under consideration violated a certain law in force at the time of their commission. Thus, Constitutional Act No. 8 ceased to be in contradiction to the general principle of nulla poena nullum crimen sine lege. Furthermore, in art. 2 the words "total or" of art. 2 of Constitutional Act No. 8 were deleted so that total confiscation was no longer permitted. Strictly speaking Constitutional Act No. 8, as amended, did not cease to violate art. 1 of the First Protocol of the European Convention. Confiscation, even partial, was not imposed in the public interest but as a sentence and, what is more important, the court of

first instance which was called to decide on the confiscation (art. 2 para. 4 Constitutional Act No. 8) had no option but to accept the motion of the minister of public order if his decision on the deprivation of citizenship fulfilled the formal prerequisites of the Constitutional Act. Since the decision of the minister could not be challenged on its merits (art. 1 para. 1 Constitutional Act No. 8) the court was obliged to impose the confiscation as an additional punishment solely because the minister's decision had been duly promulgated in the official gazette. Nevertheless, the European Commission of Human Rights held that: "promulgating Constitutional Act "Eta" which was later interpreted by Constitutional Act "Lamda", the respondent government has not violated art. 7 of the Convention or art. 1 of the First Protocol". And it was so decided by the Committee of Ministers of the Council of Europe.[23]

VI. THE PURGING OF THE ADMINISTRATION AND JUDICIARY

One of the most important endeavours of the dictators was on the one hand to get rid of undesirable public servants, judges and university professors, and on the other hand to intimidate and cause confusion among those remaining.

This was carried out with the help of Constitutional Act No. 2 that derogated art. 101 of the constitution providing for the permanent status of public servants and Constitutional Act "Delta" (No. 4), that provided for the inadmissibility of appeals to the Supreme Administrative Court (Council of State) against administrative decisions regarding the status of public servants, functionaries, judges, clergymen and personnel of the armed forces and the police.[24]

Having established their immunity and uncontrollable authority over the administration, the Colonels proceeded to promulgate a number of Constitutional Acts by which they attempted to subdue the most influencial nucleus of Greek society, namely the judges, clergy, university professors and teachers. Judges, bishops and university professors enjoyed life tenure or permanent status according to constitutional provisions which could not be derogated from by emergency legislation. Therefore, the Colonels had to use their authority as constitutional legislators to get rid of these undesired functionaries.[25] By Constitutional Act "Kapa Delta" (No. 24) they suspended for three days the life-tenure and permanent status of judges and district attorneys, and provided for the right of the Cabinet to dismiss within this period judges and district attorneys who "do not possess the moral prestige necessary for their public office and are not imbued with sound social principles" etc. This constitutional act also repeated in a more specific way the already existing prohibition from appealing to the Supreme Administrative Court.

Under the above subjective and obscure criteria the president of the Supreme Court and 29 judges and district attorneys were dismissed without being questioned or given the opportunity to defend themselves.

In spite of the prohibition the dismissed judges appealed to the Supreme Administrative Court, challenging not the substance of their dismissals, which was not permitted, but the failure of the administration to give them the opportunity to defend themselves and refute the charges made against them. The Supreme Administrative Court by a decision No. 1814/1969 accepted the appeal on the above ground and rendered the dismissals void. This decision is one of the most courageous acts of resistance against the arbitrary rule of the Colonels and also a legal text of great humanistic and theoretical value.

Naturally, the reaction of the dictatorship was one of passionate anger. Some days later the head of the junta, Papadopoulos, made a public statement accusing the Supreme Administrative Court of acting contra legem and stating that the government 'as a proxy of the revolution' considered the decision null and void. Next day, in confirmation of this statement, Statutory Decree No. 228/1969 was promulgated which declared the decision void. At the same time, by another decree it was announced that the resignation of Michael Stasinopoulos[26], President of the Supreme Administrative Court, was accepted and that he was put under house arrest for more than a year. As was disclosed later, his resignation had never been submitted and therefore his removal from office was another illegal and arbitrary act of the regime. Thus, the dictators suffered a very costly political defeat in their attempt to subdue the judiciary and it became evident, at a very crucial moment when the Greek case was being debated in front of the Commission of Human Rights of the Council of Europe, that the Colonels were unable to observe even the extraordinary emergency legislation which they had established. That legislation had proved impotent in securing their rule and therefore they were forced to violate their own legality and seek recourse to open arbitrariness.

A similar procedure was followed in the dismissal of professors and teachers of secondary and primary education, by means of Constitutional Acts "Epsilon" (No. 5), "Theta" (No. 9), "Iota" (No. 10), "Iota Epsilon" (No. 15) and "Iota Zeta" (No. 17). Under equally subjective and obscure criteria, the junta dismissed 56 university professors and assistant professors, 46 teachers of secondary education, 211 teachers of primary education and 13 functionaries of the ministry of education for lack of loyalty.[27] By the same constitutional acts (mainly Iota Epsilon) the government assumed a decisive role in the appointment of professors and, thus, the academic independence of the institutes of higher education was substantially curtailed.

Furthermore, the Colonels abolished the legally elected administration of the Greek Orthodox Church by dissolving the Collegium of Bishops and appointing eight bishops of their own choice to act as administrators of the Church and elect a new archbishop. The former archbishop was involuntarily replaced by means of Statute No. 3/1967 which established an age limit of 80 years for the position of archbishop, thus abolishing his previous life tenure.

VII. CONCLUSIONS

The material presented in this brief article suggests the following conclusions as far as the observance of human rights is concerned during the last dictatorial rule in Greece:

1) In declaring the state of emergency the Colonels applied only the formal constitutional and ordinary provisions pertaining to a state of siege. They failed to convoke parliament, which, according to the constitution and the law, is the only power guaranteeing the observance of the rule of the law.

2) On the pretence that their authority derived from a successful revolution the Colonels tacitly put aside the whole constitution and applied their arbitrary rule in the form of Constitutional Acts.

3) The main corpus of the emergency legislation was not drafted by the Colonels but was part of a pre-existing repressive mechanism, used by them with the excuse that they were doing nothing more than applying the laws of democracy.

4) During the dictatorship there was a systematic and widespread practice of torture of suspects in police stations and interrogation centres. This practice was substantially reduced during the year when delegates of the International Committee of the Red Cross were allowed to make visits without prior notice to places of detention.

5) There were also massive violations of other civil and political rights, including freedom from arbitrary arrest, rights of due process, freedom of expression, association, assembly and movement, freedom of the press and academic freedom. As found by the European Commission on Human Rights, these were in violation of the Greek government's obligations under the European Convention as there was not, at the time of the military coup or at any time thereafter, a 'public emergency threatening the life of the nation'. The dictatorship and its acts were, therefore, illegal in international law as well as under pre-existing domestic law.

6) Emergency legislation as such was only one of the factors which led to the gross violation of human rights. Mainly, what rendered the dictatorial rule entirely arbitrary and annihilated all the control mechanisms was the theory of primacy of successful revolution that was used extensively by the Colonels even in front of international fora such as the Council of Europe and the European Commission on Human Rights.

7) In view of the aforementioned, one might suggest that if something is to be done on behalf of the international community to limit the infringement of human rights by dictatorial regimes, we have to look for norms and guidelines which would circumscribe the law-creating authority of the constitutional legislator. In the area of conventional law the European and American Conventions of Human Rights could be used as examples.

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Footnotes:

(1) Report of a special study mission to Greece (18-24 January 1974) submitted to the Committee of Foreign Affairs of the House of Representatives of the U.S. Congress.

(2) See debate among Papaligouras (Minister of Defence in the government of Kanellopoulos) General Spandidakis (head of the armed forces) and Makarezos (second in the hierarchy in the Colonels' junta) in the newspapers "Vradini", "Acropolis" and "Eleftheros Kosmos" (December 1971).

(3) See appendix A.

(4) See appendix B.

(5) See appendix C.

(6) Constantine's message to the nation during his abortive coup of 13 December 1967 (S.N. Gregoriades, History of Contemporary Greece 1941-1974, Vol. V., p. 191, in Greek).

(7) See appendix D.

(8) See appendix E.

(9) See "Droit et Révolution" "Voix Grecques", Stelios Nestor, p. 111, Gallimard, 1973.

(10) The dictatorship of 1936-1940 and the civil war of 1946-1950 are the most productive periods of such legislation.

(11) Therapos' expert opinion in "Poenica Chromica", I.H. p. 148.

(12) 1) L.D. 183/1969 concerning the revisions of the decisions of military courts); 2) L.D. No. 550/1970 concerning the extension of the validity of L.D. No. 183/1969; 3) L.D. No. 964/25/30.9.1971 concerning the extension of the deadline for appealing the decisions of military courts; 4) L.D. 1310/18/18.12.1972 concerning the revising of the decisions of military courts.

(13) Unofficial statistics worked out by the prisoners themselves showed that out of 246 appeals filed in accordance with Statute 1310/1972, which was meant to be the most widely applied, 106 were denied a hearing on preliminary grounds. From the 70 cases given a hearing only 9 prisoners were released immediately as a result of commuted sentences. The remaining appeals never reached the court because in the meantime a general amnesty was granted in August 1973.

(14) See appendix F and the Report of the European Commission on Human Rights, Vol. II, Pt. 1, p. 417.

(15) The two main courts-martial of the country were abolished by R.D. 782/18.12.72 (court-martial of Thessaloniki) and R.D. 218/5.9.73 (court-martial of Athens).

(16) "ANTI" No. 69 April 1977, p. 15.

(17) It is worth mentioning that the junta, by statute 165/21.10.67, had modified the above law replacing the judge by the commander of the local police in the Regional Public Security Committee. By the same law, the higher Committee for Appeals was abolished and appeals were decided by the Minister of Public Security.

(18) See appendix G.

(19) See appendix H.

(20) See supra, p. 140.

(21) Resolution "Delta Zeta" (No. 37) of 4 December 1947 of the Greek Parliament. Art. 20 of Legislative Decree 3370/1955.

(22) It is estimated that 2,800 persons were deprived of their citizenship during the dictatorship, 30 of them on the basis of Constitutional Act "Eta" (No. 8).

(23) Resolution DH (70) 1 Committee of Ministers 15 April 1970 Council of Europe Doc. D. 36782 (1970) 9 ILM 781-85 (1970).

(24) See appendix I.

(25) See appendix J.

(26) Michael Stasinopoulos, President of the Supreme Administrative Court at that time, became the first president of the Greek Republic in 1975 after the restitution of democracy.

(27) See "To Vema" 4 August 1975.

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Appendix A

Article 91 of the 1952 Constitution

In case of war or general mobilisation due to external danger or any serious disturbance or manifest threat to the public order and security of the country due to internal danger, the king has the right on the recommendation of the cabinet to promulgate a royal decree suspending articles 5, 6, 8, 10, 11, 12, 14, 20, 95 and 97 of the constitution or part of them, throughout the whole or part of the territory and by enforcing the existing law on the state of siege to establish extraordinary tribunals.

The above law may not be amended by the parliament which is convened to enforce it. All administrative measures taken in connection with the present article are communicated without delay to the parliament in its first session following their promulgation. The parliament decides to maintain or to suspend them. If the administrative measures are taken during the recess of the parliament, the government is obliged by the same royal decree to summon it within ten days, even if its term had ended or the body had been dissolved.

Failure to summon the parliament renders the royal decree void. In both cases the parliament decides on maintaining or suspending the above royal decree.

The immunity of members of the Parliament as provided for in art. 63 is brought into force with the promulgation of the above mentioned royal decree.

The validity of the above decrees in case of a war may not be extended after the end of it whereas, in any other case, they are ipso jure suspended after two months unless the parliament decides to prolong their application.

Appendix B

Royal Decree No. 280 (1)

Article 1

On the proposal of the Council of Ministers, we hereby bring into effect throughout the territory the Martial Law Act "Delta Xi Theta" of 8 October, 1912, as amended by Section 8 of Legislative Decree 4234/1962, by Act 2839/1941 and by the Legislative Decree of 9-11 November 1922.

Article 2

1. From the date of publication of this decree we suspend throughout the territory the application of articles 5, 6, 8, 10, 11, 12, 14, 20, 95 and 97 of the constitution.

2. Military tribunals which are already in existence, military tribunals as may be set up as an extraordinary measure, and the competent military authorities shall exercise the jurisdiction, provided for by Act "Delta Xi Theta" as amended, and, in particular, in accordance with the decisions of the minister of national defence.

Article 3

Cases pending before the criminal courts shall not be transmitted to the military tribunals, unless the military judicial authority sees fit to request transmission thereof.

Article 4

This decree shall enter into force as from the date of its publication in the official gazette.

Appendix C

Suspended articles of the 1952 Constitution

Article 5

With the exception of persons taken in the act of committing an offence, no one shall be arrested or imprisoned without a judicial warrant stating the reasons which must be served at the moment of arrest or imprisonment pending trial. Any person taken in the act or arrested on the basis of a warrant of arrest shall without delay be brought before the competent examining magistrate within 24 hours of his arrest at the latest, or, if the arrest was made away from the seat of the examining magistrate, in the shortest time necessary for his conveyance. Within at the most three days from such appearance, the examining magistrate must either release the person arrested or deliver a warrant for his imprisonment. This time-limit shall be extended for up to five days at the request of the person arrested or in the event of force majeure, which shall be certified forthwith by a decision of the competent judicial council.

Should both these time-limits expire without such action, every jailer or other officer, civil or military, charged with the detention of the person arrested shall release him forthwith. Transgressors of the above provisions shall be punished for illegal confinement and shall be obliged to make good any loss sustained by the injured party and, further, to give satisfaction to said party by such sum of money as the law provides.

The maximum term of imprisonment pending trial, as well as the conditions under which the state shall indemnify persons unjustly imprisoned pending trial or sentence, shall be determined by law.

Article 6

In the case of political offences, the court of misdemeanours may always, on the request of the person detained, allow his release on bail fixed by a judicial order, which shall admit of appeal.

In the case of such offences, imprisonment pending trial shall under no circumstances be extended beyond three months.

Interpretation clause

The introduction in the future of general or special laws abolishing or restricting the term of imprisonment pending trial or rendering release on bail mandatory for the judge is by no means precluded. It is further understood that the maximum term of three months set in the second paragraph for imprisonment pending trial shall include the duration of both the entire investigation and the procedure before the judicial councils prior to the final hearing.

Article 8

No person shall be withdrawn without his consent from the jurisdiction of his lawful judge. The establishment of judicial committees and extraordinary courts under any name whatsoever is prohibited.

Article 10

Greeks have the right to assemble peaceably and unarmed. The police may be present only at public gatherings.

Article 11

Greeks have the right to association, with due adherence to the laws of the state which, however, shall under no circumstances render this right subject to previous permission of the government.

An association shall not be dissolved for violation of the law except by judicial decision.

The right of association in the case of civil servants and employees of semi-governmental agencies and organisations may by law be submitted to certain restrictions.

Strikes of civil servants and employees of semi-governmental agencies and organisations are prohibited.

Article 12

Each man's house is inviolable. No house searches shall be made except when and as the law directs.

Offenders against these provisions shall be punished for abuse of authority and shall be obliged to indemnify fully the injured party and further to give satisfaction to said party by such sum of money as the law provides.

Article 14

Any person may make his opinions public orally, in writing or in print with due adherence to the laws of the state. The press is free. Censorship and every other preventive measure is prohibited. The seizure of newspapers and other printed matter, either before or after publication, is likewise prohibited.

By exception, seizure after publication is permitted (a) because of insult to the Christian religion or indecent publications manifestly offending public decency, in the cases provided by law, (b) because of insult to the person of the king, the successor to the throne, their wives or their offsprings, (c) if the contents of the publication, according to the terms of the law, are of such nature as to (1) disclose movements of the armed forces of military significance or fortifications of the country, (2) be manifestly rebellious or directed against the territorial integrity of the nation or constitute an instigation to commit a crime of high treason; but in these cases, the public prosecutor must, within 24 hours from the seizure, submit the case to the judicial council which, within a further 24 hours, must decide whether the seizure be maintained or withdrawn, otherwise the seizure shall be ipso jure lifted. Only the publisher of the item seized shall be allowed to appeal against the judicial order. After at least three convictions of a press offence which admits of seizure, the court shall order the permanent or temporary suspension of issue of the publication and, in grave cases, shall also prohibit the exercise of the profession of journalist by the person convicted. Such suspension or prohibition shall commence from the time that the court decision becomes final.

No person whatsoever shall be permitted to use the title of a suspended newspaper for ten years from the date of the permanent suspension thereof.

Only Greek citizens who have not been deprived of their civic rights shall be allowed to publish newspapers.

The manner of rectifying through the press, erroneous publications as well as the preconditions and qualifications for exercising the profession of journalist shall be determined by law.

Enforcement by law of special repressive measures directed against literature dangerous to the morals of youth shall be permitted.

The provisions on the protection of the press contained in the present article shall not be applicable to motion pictures, public shows, phonograph records, broadcasting and other similar means of conveying speech or of representation. Both the publisher of a newspaper and the author of a reprehensible publication relating a person's private life shall, in addition to being subject to the penalty imposed according to the terms of the penal law, also be civilly and jointly liable to redress fully any loss suffered by the injured party and to indemnify him by a sum of money as provided by law.

Article 20

The secrecy of letters and correspondence by any other medium whatsoever shall be completely inviolable.

Article 95

Trial shall be by jury for criminal and political offences as well as offences of the press, whenever such offences do not concern a person's private life, and to any other offences which may by law be made liable to trial by jury. For the trial of the said offences of the press, mixed courts may be established by law composed of regular judges and jurors, the latter constituting the majority.

Criminal offences which have thus far been brought within the jurisdiction of the courts of appeal by special laws and resolutions shall continue to be tried by such courts provided they are not by law made liable to trial by jury.

Article 97

The details regarding courts martial of the army, navy and air force, piracy, barratry and prize courts shall be regulated by special laws.

Civilians may not be brought under the jurisdiction of courts martial of the army, navy or air force except for punishable acts affecting the security of the armed forces.

Appendix D

Constitutional Act "Alpha" (No. 1)

Concerning the constitutional and legislative authority and the revision of the constitution.

THE COUNCIL OF MINISTERS

In view of the resumption, on 21 April of this year, of the ruling of the country by the army, in order to save the Fatherland, the expressed will of the Greek people that the civilian and social regime in force be protected from all those who plot against it and in order that the constitutional acts be formed for that purpose, decides:

1

The constitutional authority will be exercised, until the enactment of the new constitution, by the Council of Ministers through constitutional acts.

2

1. The new constitution will be prepared by the Council of Ministers and will be submitted to a nation-wide referendum for its approval.

2. The basis of the new constitution is the constitution now in force, revised with regard to those articles that are not fundamental and do not involve a change of the regime.

By decision of the Council of Ministers a 20-member committee is set up in order to study the intended revision of the constitution.

3. The time and the procedure of the referendum, the time that the new constitution will enter into force and any other relative details will be fixed by decision of the cabinet of ministers.

3

The legislative authority is exercised, until the convocation of the Parliament, by the king with the responsability of the government, and with confirmation of compulsory laws issued up-to-date.

4

The present will enter into force upon its publication in the journal of the government.

Athens, 5 May 1967

COUNCIL OF MINISTERS

PRIME MINISTER DEPUTY PRIME MINISTER

MEMBERS

Appendix E

Constitutional Act "Beta" (No. 2)

Concerning the proclamation of martial law and the suspension of certain provisions of the constitution.

The Cabinet

Having regard:

1) to the Constitutional Act "A" concerning the exercise of constitutional and legislative authority etc. and

2) to the manifest threat to public order and security in the country arising from internal dangers, decides as follows:

Article 1

1. A state of martial law is hereby proclaimed throughout the country and the Act "Delta Xi Theta" of 1912 as amended by the legislative decree 4234/1962 is hereby brought into force.

2. The effect of Articles 5, 6, 8, 10, 11, 12, 14, 95, 97, 99, paragraph (2) and 101 of the constitution is hereby suspended.

Article 2

Matters at present stayed before the criminal courts shall not be transferred to courts martial, provided that the military judicial authorities may transfer such cases as they consider appropriate.

Article 3

The royal decree No. 280 bringing the "Delta Xi Theta" Act into force is hereby ratified with effect from its publication in the official gazette.

Article 4

The state of martial law shall be terminated either wholly of in part by royal decree.

Article 5

This constitutional act shall come into force with effect from its publication in the official gazette and shall cease to operate when the new constitution is promulgated.

Athens 5 May 1967

Cabinet

President Vice-President

Members

Appendix F

The Case Against Greece in the Council of Europe

Shortly after the promulgation of Royal Decree No. 280/1967 proclaiming a state of siege, proceedings against the Greek junta commenced in the Council of Europe. The Consultative Assembly, respecting its obligation to "preserve and promote the ideals and principles which constitute an interest common to the member states of the Council of Europe" (Statute of Council of Europe, art. 1), reacted promptly, adopting, during its regular session on 26 April 1967, Resolution No. 256, in which it called upon the Greek government to return to "constitutional order and the parliamentary regime."

On 23 June, 1967 the Standing Committee of the Consultative Assembly (following a recommendation of its Legal Committee) adopted Recommendation No. 346, in which it urged the governments of the states who were signatories to the European Convention on Human Rights, to "bring the Greek case either separately or jointly before the European Commission of Human Rights", in accordance with art. 24 of the Convention.

A few months later, independent proceedings began before the European Commission of Human Rights on the submission of four roughly identical applications (Nos 3321-3323/67 and 3344/67 of 20/27 September 1967), alleging that Greece had violated certain articles of the Convention. The applications were filed by the governments of Denmark, Sweden, Norway and Netherlands. At the same time, the governments of Iceland, Belgium and Luxembourg submitted letters of agreement supporting the action of the above governments, to the secretary-general of the Council of Europe.

Proceedings Before The Commission

The proceedings before the Commission were divided into three stages: (a) admissibility of the applications; this stage lasted until 24 January 1968, (b) investigation; this stage started with the submission of the observations of the parties and ended with the submission of their conclusions to the Sub-Commission, after the establishment of the evidence (examination of witnesses, visit to Greece), (c) report of the Sub-Commission to the Commission and the failure to reach a friendly settlement. Then, the Commission presented its report to the Committee of Ministers (6 October 1969).

Thus, the proceedings before the Commission lasted for two years.

Decision on Admissibility (24 January, 1968)

On 24 January 1968, the Commission declared the applications of the four governments admissible and fixed the deadline for the appointment of the parties' representatives to the Sub-Commission according to art. 28 of the Convention, and for the submission of their memoranda on the merits of the case.

The Greek Government had submitted two main arguments supporting the non-admissibility of the case.

Firstly, it challenged the competence of the Commission to examine the applications, particularly in relation to art. 15 of the Convention, on the basis that they concerned actions of a revolutionary government. Its allegation was that it came to power after a revolution and therefore the acts that brought it to power and the causes that led it to decide to attempt the revolution, were not subject to review on behalf of the Commission, as that would lead to approval or disapproval by the Commission of the revolution itself.

The Commission rejected the objection to its competence as unfounded on the ground that no such distinction regarding the actions of a revolutionary government is made either in international law in general or under the terms of the Convention in particular.

It is to be noted that the applicant governments in their common submission of December 1967 argued that a revolutionary government may not invoke "a revolutionary situation which it itself had created, as a justification for derogating from the articles of the Convention in order to remain in power."

Secondly, the Greek Government had also argued that the Commission, in reaching its judgement was inevitably biased and influenced by the position adopted by the Consultative Assembly; it had in mind Resolution 351 of 26 September 1967 of the Consultative Assembly, in which it declared itself ready "to make a declaration at the appropriate time of the possibility of the suspension of Greece from, or her right to remain a member of, the Council of Europe."

The Commission rejected the above argument declaring that the Commission "in the exercise of its functions under art. 19 of the Convention, is limited to a consideration of the substance of the case-file before it and thus acts in complete independence as regards any outside body" and that "furthermore and in particular, there is no basis for the suggestion that in the carrying out of its task, the Commission might be subject to influence as a result of any declaration of the Assembly."

Decision on the Admissibility of the Additional Allegations
(31 March 1968)

Three of the original applicant governments filed additional allegations on the basis of new facts that had emerged. They claimed violations of arts. 3 and 7 (prohibition against torture and retroactive criminal legislation) of the Convention and arts. 1 and 3 (the right of each person to peaceful enjoyment of his possessions and the obligation of contracting parties to hold free elections) of the First Protocol. In addressing the question of admissibility of the above new allegations, the Commission faced certain problems.

The Greek Government claimed that allegations of violation of art. 3 should be rejected in accordance with arts. 26 and 27(3) of the Convention on the ground of non-exhaustion of domestic remedies.

The Commission considered two counter-arguments put forward by the applicant governments in opposing the above claim of the Greek Government:

a) Since the allegations of torture and ill-treatment related to an "administrative practice" of the Greek Government then, following the Commission's decision on the admissibility of the original applications, art. 26 requiring the exhaustion of domestic remedies did not apply (the above-mentioned decision of the Commission stated that the exhaustion of domestic remedies is not required where an application raises, as a general issue, the compatibility with the Convention of "legislative measures and administrative practices").

b) Any domestic remedies which might be shown by the respondent government to be available to political prisoners in cases of torture and ill-treatment were in fact inadequate and ineffective.

The Commission rejected the first counter-argument on the ground that the applicant governments had not offered substantial evidence to show that such administrative practice existed in the absence of or contrary to specific legislation; therefore, its decision on the original applications did not apply.

However, the Commission accepted that the prevailing conditions in the judiciary did not allow the Greek courts to render justice independently. The Commission based its consideration mainly on the fact that the Greek Government had suspended the judges' tenure of office, which was guaranteed by the constitution, and therefore made possible the dismissal of the president of the Supreme Court and 29 judges.

Regarding violation of art. 7 of the Convention as well as art. 1 of the First Protocol, the Commission ruled that the mere fact that provisions of Constitutional Act "C", were in direct conflict with the above-mentioned articles of the Convention was enough to consider the complaints of the applicant governments admissible without considering whether the above provisions had been applied or not, as was requested by the Greek Government.

Finally, the Commission, although it ruled that the fact that no parliamentary elections had been held in Greece since February 1964 did not constitute a violation of art. 3 of the First Protocol, decided that the question related to the merits of the case.

On the above grounds the Commission declared the new allegations admissible.

Decision on The Merits

In addressing the case on its merits the Commission was confronted with the following problem:

Under the European Convention, human rights prescribed therein are subject to restriction on two levels:-

a) The enjoyment of certain rights may be limited by national law in the interest of, for example, public safety and the protection of public order, to the point "necessary in a democratice society". Those limitations, expressly allowed by the Convention, may never reach the point of suspension of the right.

b) Art. 15 of the Convention allows the contracting parties to take measures derogating from their obligations under the Convention under certain conditions, for example, in case of war or public emergency. Art. 15 is not intended to establish an exception to the principle of the rule of law; it is only a corrective measure. Thus, it offers the parties a safety valve to deal with certain exceptional situations of serious threat to public order without violating the Convention.

The conditions of applicability of art. 15 were prescribed mainly by the Commission and the Court in the Lawless Case (4 YearBook 438 (1961)). There, the European Court of Human Rights expressly decided that "it is for the court to determine whether the conditions laid down in art. 15 for the exercise of the exceptional right of derogation have been fulfilled in the present case." This ruling excludes the argument that the exercise of the right of derogation is not subject to review by the Convention institutions.

Furthermore the court in the above-mentioned case held that the provision refers "to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed". Substantially the same definition was adopted by the majority of the Commission.

The Commission went further, however, adding that having regard to the high responsibility which a government has to its people to protect them against any threat to the life of the nation, it is evident that a certain discretion - a certain margin of appreciation - must be left to the government in determining whether a public emergency exists.

Art. 15(3) holds the party availing itself of the right of derogation responsible for keeping the secretary-general "fully informed of the measures which it has taken and the reasons therefor." In the Lawless case the court left open the question of whether a breach of this provision would affect the validity of a government's derogation.

The Commission felt, however, that although the question can not be argued as an abstract proposition, it should be accepted, as a general rule, that a violation of art. 15(3) would not nullify an otherwise valid derogation under art. 15(1).[1]

The applicant governments in the Greek case challenged the validity of the derogation on two main grounds a) that a public emergency did not exist b) that the measures taken were not "strictly required by the exigencies of the situation". They also contended that the

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1/ T. Buergenthal 62 AJIL 441, especially 445.

Greek Government violated art. 15(3) by not keeping the secretary-general informed of the measures which it had taken and the reasons therefor.

The Greek Government at this stage again referred to its revolutionary origin stating that "a revolution creates such a disturbance in public life that it seems meaningless to try to assess the actions of a revolutionary government using the same criteria which apply in the case of a simple public emergency threatening the life of the nation."

The argument of the Greek Government was based on the assumption that the pre-existing threat to the life of the nation was the cause of the revolution and that this was not subject to review on behalf of the Commission, as it would lead to approval or disapproval by the Commission of the revolution itself.

This argument was not accepted. The Commission held that art. 15 and the text of the Convention in general did not distinguish between a government confronting exceptional situations and a revolutionary government. As the Greek Government subjected itself to the institutions of the Convention, showing its willingness to adhere to it, the validity of the application of art. 15 depends on the fulfilment of the requirement put forward therein.

Next was the primary question whether on April 21 there was a public emergency threatening the life of the nation and whether this emergency continued until the time of the judgement.

According to the standards set in the Lawless case the Greek Government had to prove a) the facts that constituted the alleged state of emergency b) that such facts did, in fact, constitute a state of emergency threatening the life of the nation, taking into account the above-mentioned "margin of appreciation".

The Greek Government alleged that the causes of the revolution and subsequently the derogation of the rights and liberties protected by the constitution and the Convention were (a) the imminent threat of a communist take-over; (b) the institutional crisis; and (a) the need to maintain public order.

More specifically, the Greek Government claimed that the outlawed Communist Party had been involved in subversive activity, aiming at the destruction of the constitutional regime and the violent overthrow of the existing government. Its activities, aided by the corruption and lack of power of conventional parties, had resulted in a crisis of the constitutional order and of public security and order, reflected in a constantly turbulent atmosphere in the parliament, swift changes in the succession of governments, party corruption and a series of bloody demonstrations and strikes, accompanied by an inability to control the situation. In short, the Communist factor was described as a decisive element which had infiltrated all areas of public life and caused constant insecurity which certainly would lead to a breakdown of the whole state machinery and public life.

The Commission examined about 30 witnesses with regard to the existence of the Communist danger, as well as several documents provided by the Greek Government referring to the armed forces and the regime. In its report the Commission held that "... As regards the internal situation, the Commission finds it established beyond dispute that, following the political crisis of July 1965, there has been in Greece a period of political instability and tension, of an expansion of the activities of the Communists and their allies and of some public disorder. It is also plain that these three factors which have already been reviewed were always linked and interacting". (para. 155).

The Commission did not find that the evidence adduced by the respondent government showed that a displacement of the lawful government by force of arms, by the Communists and their allies was imminent on 21 April 1967, indeed there was evidence indicating that it was neither planned at that time, nor seriously anticipated by either the military or police authorities. In particular:

1) the cases of arms found and described to the Sub-Commission were negligible in size and quantity. Former Prime Minister Kanellopoulos stated that no substantial arms deposits had been found or reported to his government. General Papageorgopoulos did not consider the importation of hunting guns to have been sufficient for an "uprising of great force", and no evidence was produced of the use or attempted use of firearms or explosives either in street demonstrations or elsewhere.

2) the authors of the "general plan of action" attributed to General Argyropoulos state in it that they envisaged the use of force in three possible situations only:

- the carrying out of the May elections with use of force or fraud by the Conservative ERE Party of Prime Minister Kanellopoulos;
- the indefinite postponement of elections by this party, based on a camouflaged royal dictatorship;
- unfavourable election results for the Right and the refusal to surrender authority to the majority party.

The authors declared that force was to be used by them only in the second and third situations. The second situation was to be met by "protest meetings pressed as far as bloody clashes ..." "Neither of these contemplated reactions to moves by the Right involved the imminent overthrow of the lawful government by force."

3) the fact that the respondent government, having had full access to all available information whether published officially or secretly had been able to produce only the very slender evidence already discussed, itself demonstrates that no Communist take-over of government by force of arms was anticipated. In view of the above-mentioned facts the Commission did not accept the argument of the Greek Government concerning the existence of a Communist threat.

As far as the institutional crisis and the threat to public order were concerned the Commission held that the indications mentioned such as street demonstrations, strikes and work stoppages, did not

attain the magnitude of a public emergency. "Though the street demonstrations, as is normal anywhere, created anxiety for persons and property in Athens and Salonica the record does not show the police forces to have been at or even near the limit of their capacities to cope with demonstrations and disorder." The Commission based its decision on the testimonies of government personnel that the government was in effective control of the situation. Their statements made clear that the University of Salonica had been cleared of its occupants "in a few minutes" on 11 April 1967, that the order prohibiting the "Marathon March" had been without violence and that the intervention of the army had never been necessary.

The argument of the Greek government was not well-founded and consequently appeared "dramatic" and unrealistic in the opinion of the Commission. The allegation that the situation as presented constituted a national emergency was addressed to the Commission at a time when other countries in Western Europe were experiencing similar situations. The Commission held that the picture of strikes and work stoppages did not differ markedly from that in many other countries of Europe.

In evaluating the facts, the Commission had to decide whether, taken together, they were of such intensity as to create a public emergency threatening the life of the Greek nation. In its decision, it held that "this examination is itself limited by the criteria of what constitutes a public emergency for the purpose of art. 15. In particular the criteria of actuality or imminence imposes a limitation in time." The criteria mentioned above were drawn from the decision of the European Court of Human Rights in the Lawless Case, formulated as follows: "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed." Besides the actual facts, the Greek Government had therefore to prove that the claimed public emergency i) was imminent or actual, ii) affected the whole nation, iii) threatened the continuation of the organised life of the community, and iv) was an expression of a crisis or danger which was exceptional, in the sense that normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate. As has already been mentioned, art. 15 establishes the qualitative standard for restrictions in fundamental freedoms. Although individual articles allow "restrictions" of fundamental freedoms, these restrictions can never reach the point of complete abolition of these freedoms.

Proceedings before the Committee of Ministers of the Council of Europe

Article 32 of the Convention provides that if within 3 months of the transmission of the Report to the Committee of Ministers of the Council of Europe the question at issue has not been referred to the Court (as was the case here), "the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the Committee whether there has been a violation of the Convention." If it decides that there has, the Committee shall prescribe a period

during which the Contracting Party concerned must take the measures required by the decision of the Committee of Ministers". If 'satisfactory measures' have not been taken within the prescribed period, the Committee of Ministers "shall decide (by the same majority) what effect shall be given to its original decision and shall publish the Report" of the Commission.

When the Committee of Ministers met on 12 December 1969 it was evident to the Greek government that there was more than the necessary majority in the Committee to support a decision that there had been a violation of the Convention: that the government would be called upon to take the necessary measures to bring itself into conformity with the Convention. In order to avoid this condemnation the Greek government denounced the European Convention and withdrew from the Council of Europe.

The Greek case illustrates the efforts of the concerned European institutions to protect human rights within the framework of the Council of Europe's policy of greater European integration.

The violation by Greece of 14 articles of the Convention confirmed by the Commission's Report amounted in practical terms to a rejection by the Greek Government of the Convention as a whole. The investigation by the Commission was not restricted to certain isolated facts but involved an examination of the basic structure and institutions of the regime.

Since the violations took place against a background of newly enforced legislative measures and administrative practices, the unavoidable conclusion, and the one to which the members of the Committee of Ministers of the Council of Europe came on examining the Commission's Report, was that the Colonels' regime represented a system of values and a form of state authority entirely incompatible with the values of western European democracy as envisaged in the Convention.

This was clearly stated by the French Foreign Minister Jean de Lipowski who said a few minutes before the dramatic Greek withdrawal, "At the present meeting what is being debated is a certain conception of Europe. It is not possible that such violations of democracy be accepted."

Appendix G

Statutory Decree 188/1969 - art. 2(4)

In forming its opinion the committee is obliged to take into consideration any piece of information likely to elucidate the particular case of the person under administrative displacement and especially information on which the displacement was decided, as well as information submitted or referred to by the person himself. The committee should also take into consideration the nature of the activities which led to the displacement, the reason and the circumstances under which he/she acted, his/her criminal record, and his/her behaviour during the displacement. The committee should also make a judgement on the anticipated behaviour of the displaced person and the eventual risk to the public security and order which the suspension of the displacement would entail. The committee may ask for information from any judicial, administrative, military police and security authority and may also be given access to classified information from the personal file of the displaced person.

Appendix H

Constitutional Act "Eta" (No. 8)

Regarding withdrawing the citizenship of those who act unpatriotically and regarding confiscation of their property.

THE CABINET COUNCIL

Having had in mind:

1) Constitutional Act "Alpha" and

2) the need to protect the nation from citizens who act unpatriotically, decides:

Article 1

1. Greek citizens residing abroad, temporarily or permanently, or having more than one citizenship, who act or have acted unpatriotically or who perform acts incompatible with the Greek citizenship, or contrary to the interests of Greece, or for selfish reasons, according to articles 1 and 2 of the Obligatory Law 509/1947, as this has been modified through article 2 paragraph 1 of Decree "Mi Eta"/1947, for dissolved Parties or Organisations, or such in the process of being dissolved, can be deprived of their Greek citizenship by decision of the minister of the interior, against which it is not allowed to appeal or to request annulment.

2. As unpatriotic activity in accordance with the present law, is considered the counterfeiting (falsification), by any means and intentionally, of the real facts as well as the spreading of false news or information, in this case falsification or spreading entails defamation of the state or its authorities to the international public opinion.

3. The violators of paragraph 1 (above) are subject to a minimum sentence of at least three months imprisonment and to a fine of at least drs. 20,000.

In case the act was committed abroad by fellow countrymen, the persecution takes place ex officio, independently of the conditions of article 6 of the Penal Code.

Modification or suspension of the penalty is not allowed, and the appeal has no suspending force.

4. The decisions of withdrawal of the Greek citizenship, issued up to the publication of the present since 21 April 1967, are confirmed.

Article 2

1. It is possible to order the confiscation of the whole or of a part of the immovable and movable property of any person who loses the Greek citizenship in accordance with article 1.

2. As property which can be confiscated, is considered also the property in the name of the husband or the wife of those who are declared having lost the Greek citizenship.

In this case the confiscation cannot exceed 1/3 of the whole immovable property.

3. Transmission of elements of property, belonging to persons according to paragraphs 1 and 2, made up to two months before the issue of the decision according to next article about confiscation is null and void.

4. The confiscation according to the previous article is imposed by decision of the Court of the first instance at the place of the last residence or stay of the person who will be deprived of his Greek citizenship, after proposal of the minister of the interior, to be transmitted to the court through the competent public prosecutor.

5. No legal action is allowed against the decision of the court of the first instance.

6. Upon issuance of the decision according to the above paragraph, the property to be confiscated is transferred to the full possession of the Greek state, and the relative decision shall be communicated by the ministry of finance to the competent director of taxation.

The validity of the present act commences upon its publication in the gazette of the government.

Athens, 11 July 1967

Prime Minister Vice-Prime Minister

Members

Appendix I

Constitutional Act "Delta" (No. 4)

Concerning the restriction of the right to appeal to and request annulment from the Council of State.

THE CABINET COUNCIL

having in mind the suspension through Constitutional Act "Beta" of the regulations of article 101 of the constitution and the fulfilment of the intended aim, i.e. to render the public services healthy the soonest possible, decides:

Article 1

It is from now on inadmissible to appeal to the Council of State or to request, according to article 83, paragraph 1, point c) of the constitution, annulment against any administrative act, issued from April 21 until publication of the present act, or against those acts which will be issued from now on, on subjects connected with the condition of service and the position of functionaries in general or judicial functionaries, the employees of state enterprises and agencies belonging to them, members of the army, the state safety police and the church (clergymen or priests of any rank), as well as against any administrative act issued or to be issued in execution of Obligatory Law 4/1967 as amended.

Article 2

The above-mentioned regulation applies also to the appeals and requests of annulments already pending with the Council of State against administrative acts issued after 21 April, 1967.

Article 3

The validity of the regulations of the present act can be abrogated or suspended, in whole or in part, by decisions of the Cabinet Council, published in the gazette of the government.

Athens, 23 May 1967

Prime Minister Vice-Prime Minister

Members

Appendix J

Constitutional Act "Kappa Delta" (No. 24)

Concerning the re-organisation of the Ordinary Courts.

THE CABINET

Having regard to Judicature Act No./A 1967.

Having regard to the need to re-organise the Ordinary Courts decides as follows:-

Article 1

1. Within three days from the publication of the present in the official gazette, the life-tenure and permanence of ordinary justice administrators under article 88 of the constitution is hereby suspended. They can be dismissed within that delay if:

(a) for any reason whatsoever they do not possess the moral stature required for exercising their office,

(b) they are not imbued with healthy social principles, or else, if their general conduct within society or the body of law cannot be deemed as being compatible with their duties and the dignity of their office, thus resulting in a lowering of their prestige among their colleagues and the public.

2. The dismissal of judicial functionaries referred to in the preceding paragraph will be effected by decision of the council of ministers, following an inquiry into the elements of their case, by royal decrees proposed by it.

3. Dismissals under the present act are not subject to recourse or plea for annulment before the council of state, or lawsuit for damages before ordinary courts.

Article 2

If, as a result of dismissals from office effected under the provisions of this act, vacancies should occur among those members of the Judicial Council chosen by lot from among the judges of the Court of Cassation (Areopagus) they may be replaced by the same procedure at a public session of the 1st Section of that court within one month of the publication of this official gazette.

Article 3

This act shall come into force with effect from its publication in the official gazette.

Athens, 28 May 1968

President Cabinet Members Vice-President

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THE STATE OF EMERGENCY IN INDIA

CONTENTS

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I. THE COLONIAL PERIOD AND THE WRITING OF THE CONSTITUTION

The historical origins of the Indian emergency legislation has its roots in the British rule. The United Kingdom Parliament passed statutes, first to regulate the affairs of the East India Company and later for the governance of India itself from 1858, when, by an Act of Parliament, the British Crown assumed sovereignty over the company's territories in India.

The Governor-General for long exercised legislative as well as executive powers. With the growth of legislative institutions, it became necessary to endow him with emergency legislative powers - Section 72 of the Government of India Act, 1919, stated :

> "The Governor-General may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian legislature."

The Government of India Act, 1935, which sought to establish a federation, separated the Governor-General's power to issue ordinances during a recess of the legislature from his power to issue a Proclamation of Emergency. In his discretion under Section 102, he had the power to declare that "a grave emergency exists whereby the security of India is threatened whether by war or internal disturbance."

On 3 September 1939, following the declaration of war between Britain and Germany, the Governor-General made a proclamation of emergency under Section 102. The Defence of India ordinance was promulgated, which was subsequently replaced by the Defence of India Act, 1939. Section 2 of the Act conferred wide rule-making powers on the Government of India. The Act authorised the establishment of Special Tribunals to try cases of violations of the Rules, known as the Defence of India Rules, 1939. Rule 26 empowered the state to detain a person without trial.

The Indian Independence Act, 1947, passed by the British Parliament, conferred independence on India and empowered the Constituent Assembly to frame a constitution. On 14 August 1947, a day before independence, the Governor-General made the India (Provisional Constitution) Order, 1947, making numerous modifications to the 1935 Act, but Section 102 of the Act, embodying the emergency provisions, was retained to be invoked only on the advice of the Council of Ministers.

Meanwhile, the Constituent Assembly, which first met on 9 December 1946, went ahead with its work in conditions of trauma, which had a clear impact on their deliberations. India was partitioned amidst unprecedented carnage and destruction. Some of the erstwhile primary rulers of the Indian States wanted to remain outside the union; in neighbouring Burma the political leaders were assassinated; and, finally, there was an armed revolt by communists in one of the States. All these events influenced the draftsmen of the Constitution to make the union strong and endow it with ample emergency powers.

Articles 275 to 280 of the Draft contained the emergency provisions. These draft articles were debated at length. The emergency powers were considered as a necessary evil and they were enacted with some modifications. The modifications were as follows:

> the expression 'war or domestic violence" was changed to 'war or external aggression, or internal disturbance'. The initial term of the proclamation pending parliamentary approval, was reduced from six months to two. Two more clauses were added, one to enable an Order to be applied only to a part of the country, and the other requiring it to be laid before each House of Parliament.

Articles 352, 353, 358, and 359 as they originally figured in the Constitution adopted by the Constituent Assembly, read as follows:

"352. Proclamation of Emergency -

(1.) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by proclamation, make a declaration to that effect;

(2.) A Proclamation issued under Clause (1.) -

(a) may be revoked by a subsequent Proclamation;

(b) shall be laid before each House of Parliament;

(c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

Provided that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the People takes place during the period of two months referred to in sub-clause (c), and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its re-constitution unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(3.) A Proclamation of Emergency declaring that the security of India or of any part of the territory thereof is threatened by war or by external aggression or by internal disturbance may be made before the actual occurrence of war or of any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

353. Effect of Proclamation of Emergency - while a Proclamation of Emergency is in operation, then -

(a) notwithstanding anything in this Constitution, the executive power of the union shall extend to the giving of directions to any state as to the manner in which the executive power thereof is to be exercised;

(b) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the union or officers and authorities of the union as respects that matter, notwithstanding that it is one which is not enumerated in the union list.

358. Suspension of provisions of article 19 during emergencies - while a Proclamation of Emergency is in operation, nothing in article 19 shall restrict the power of the State as defined in Part III to make any law or to take any executive action which the State would, but for the provisions contained in that part, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

359. Suspension of the enforcement of the rights conferred by Part III during emergencies -

(1.) Where a Proclamation of Emergency is in operation, the President may by Order declare that the right to move any Court for the enforcement of such of the rights conferred by Part III as may be mentioned in the Order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the Order;

(2.) An Order made aforesaid may extend to the whole or any part of the territory of India;

(3.) Every Order made under clause (1.) shall, as soon as may be after it is made, be laid before each House of Parliament."

II. THE PREVENTIVE DETENTION POWERS UNDER THE CONSTITUTION

Before considering the use which has been made of emergency powers, it is perhaps appropriate to summarise the constitutional and legal aspect of the laws of preventive detention in India.

Preventive detention laws were also a legacy of British rule. Enacted under war-time regulations (Defence of India Act and Rules, 1939) they were continued in the turmoil of the post-war years when the draft Constitution was prepared. Preventive detention in normal times was recognised as a legitimate subject of legislation. The only question debated by the Constituent Assembly was the nature of the constraints to this undemocratic power.

Part III of the Constitution of India, 1950, guaranteed certain fundamental rights. It included the right to life and personal liberty. "No person shall be deprived of his life or personal liberty except according to procedure established by law." (Article 21). Provision was also made in Article 22 inhibiting detention without trial and guaranteeing disclosure of the grounds of arrest and of the right to be defended by a legal practitioner. Article 22 (1) and (2) in the 1950 Constitution read as follows:

> "22. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
>
> (2) Every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the Magistrate and no such person shall be detained in custody beyond the said period without the authority of a Magistrate."

But, setting the pattern of post-war constitutions, there was a clause (3) to article 22, reading:

> "(3) "Nothing in clauses (1) and (2), shall apply to any person who is arrested and detained under any law providing for preventive detention."

The limits within which such a law could be made were laid down in clauses (4) to (7):

> "(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless
>
> (a) an Advisory Board consisting of persons who are, or have been or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:
>
> Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period subscribed

by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe -

(a) the circumstances under which, and the class or classes of cases in which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4)."

Preventive detention was only permitted if there was a law authorising it - detention by executive fiat was ruled out. Even the power to enact laws for preventive detention without trial was not unlimited: it was subject to the constraints in clauses (4) to (7) of Article 22. The fundamental rights guaranteed by clauses (4) to (7) to persons detained under any law for preventive detention related to the maximum period of detention, the provision of an Advisory Board to consider and report on the sufficiency of the cause for detention, the right to inspection of the grounds of detention and the right to have the earliest opportunity of making a representation against the order of detention. Reasonably adequate safeguards, it may be thought, but there was a catch in this, the longest constitutional document in the world. It was contained in Article 359 in Part XVIII, relating to Emergency Provisions. This Article provided that where a Proclamation of Emergency was in operation, the executive can by order declare that the right to move any court for the enforcement of any of the fundamental rights conferred by Part III of the Constitution shall remain suspended for the period during which the Proclamation is in force.

In pursuance of Article 22, Parliament enacted the Preventive Detention Act, 1950, empowering the central and the State Governments to detain a person "if satisfied ... it is necessary to do so" in order to prevent him from "acting in any manner prejudicial to the defence of India, relations of India with foreign powers, or the security of India, or the security of the State or the maintenance of public order, or the maintenance of supplies and services essential to the community."

The Act was to cease to have effect on 1 April 1951, but it was extended from time to time until 1970 when it lapsed because the Government could not muster a majority in the Parliament for an extension.

It was re-enacted substantially under a different name in 1971 as the Maintenance of Internal Security Act, which came into force on 2 July 1972. This was repealed in 1971, but on 23 September 1980, the President promulgated the National Security ordinance which was later re-enacted by the Parliament as the National Security Act, 1980.

These preventive detention laws were used by the Government in ordinary times and more widely during states of emergency.

III. FIRST PROCLAMATION OF EMERGENCY

The Constitution came into force on 26 January 1950, but Article 352 remained unused for a little over a decade thereafter.

On 26 October 1962, after China's attack on India, the President issued a proclamation under Article 352 declaring that a grave situation existed whereby the security of India was threatened by external aggression.

On the same day, the President promulgated the Defence of India Ordinance. Section 3 of the ordinance empowered the Central Government to make rules for securing the defence of India, the public safety, the maintenance of public order or the efficient conduct of military operations or for maintaining supplies and services essential to the life of the community. The Central Government accordingly promulgated the Defence of India Rules. Under the Rules, no grounds of detention needed to be given to the detainee, nor any opportunity for showing cause against the detention. There was no independent Advisory Board to review detentions. The maximum period of detention was also not fixed.

The Ordinance was re-enacted by Parliament as the Defence of India Act, 1962. Section 13 of the Act empowered the State Governments to constitute Special Tribunals to try offences under the Rules. Pre-trial committal proceedings were dispensed with and the Tribunals were authorised to adopt a summary procedure. Appeal to the High Court lay only if the sentence was imprisonment for a term of five years or more.

The President also made an order under Article 359 (1) suspending the right to move any Court for the enforcement of the fundamental rights relating to personal liberty and protection against arbitrary arrest embodied in Articles 21 and 22 respectively. This order was later amended to include Article 14 (right to equality before the law) along with Articles 21 and 22.

Within one month of these Rules coming into force, more than 200 members of the Indian Communist Party in various Indian States, including leaders of the opposition in West Bengal, Kerala and Andhra Pradesh, were arrested on the grounds that their activities were against the national interest. At the end of the fourth month the then Home Minister informed the Parliament that 957 persons had been detained under the Defence of India Rules, and that of the arrested persons 199 had been released and the remaining 758 were still in detention. These figures show the consequences of the first Emergency Proclamation.

China ultimately declared a cease-fire on 21 November 1962. The hostilities ceased from that date, but the Emergency lingered on amidst widespread charges of abuse of its powers.

In the words of Mr. M. C. Setàlvad, a former Attorney-General of India:

> "The arbitrary and extensive powers assumed under the Defence of India Act and the Rules have been exercised for the very ordinary purposes of Government - to prevent traders from hoarding commodities, to put down strikes and for a variety of other normal functions which could and should be dealt with under the powers conferred by the ordinary law of the land." (1)

The Emergency acquired a new lease of life, as it were, with the outbreak of armed conflict between India and Pakistan across their borders in April 1965, followed by a war in September that year. A cease-fire took place in accordance with a U.N. Security Council resolution and the two Heads of Government signed a declaration on 10 January 1966, laying down the procedure for the normalisation of relations.

However, even after the normalisation, the Emergency continued in force and criticisms of abuse of power began to be voiced even by the Courts.

In February 1966, 34 jurists and prominent citizens belonging to no particular political creed appealed to the President and the Prime Minister to take the bold step of revoking the Emergency. The appeal emphasized that the issue was not one of policy or for political debate:

> "The issue relates to the basic foundations of a democratic government. A democratic Constitution necessarily has to contain provisions to enable the nation to tide over emergencies. But the use of these emergency powers when the emergency has long receded is to turn a democratic government into what has been called a constitutional dictatorship." (2)

The International Commission of Jurists noted these developments and commented on them in its Bulletin in March 1967:

> "The International Commission of Jurists does not seek to arrogate the right of the Government to decide whether circumstances yet exist which would justify the continued suspension of fundamental rights. But such prolonged suspension of those rights, which are the very essence of a democratic form of Government, when the features of a grave emergency do not appear to exist any longer, has given rise to increasing concern in all parts of the free world where India has been looked upon as the bastion of fundamental rights and the Rule of Law in Asia."

On 18 March 1967, the Home Minister announced that the Government of India had decided to revoke the State of Emergency with effect from 1 July. A Proclamation revoking the Proclamation of Emergency was issued.

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(1) The Indian Express, 18 August 1965.

(2) Quoted in ICJ Bulletin, no.29-1967.

IV. THE SECOND PROCLAMATION OF EMERGENCY

On 3 December 1971, following the outbreak of hostilities between India and Pakistan, an Emergency was declared for the second time. Following the declaration of Emergency, the Parliament adopted the Defence of India Act, 42 of 1971 and the Government promulgated Defence of India Rules, 1971, in exercise of the powers conferred by Section 3 of the Act.

Section 6 (6) of the Act amended the Maintenance of Internal Security Act inter alia to add Section 17A which provided that a person may be detained without obtaining the opinion of the Advisory Board for a period longer than three months, but not exceeding two years, if the detention had been made on the grounds of the "defence of India ... Security of State or the maintenance of public order."

As before, even after the hostilities between India and Pakistan ceased, the Emergency continued. It was even reinforced by a Proclamation of the President in November 1974 suspending the right to seek the assistance of the Courts for enforcement of fundamental rights.

In early 1975, in a habeas corpus petition before the Supreme Court, the validity of the continuation of the Proclamation of Emergency issued on 3 December 1971, was challenged. The contention was that there was no threat of external aggression. The arguments in the petition lasted from March 1975 to the beginning of May 1975 when the Supreme Court closed for its summer vacation. Before judgment could be delivered on the re-opening of the Supreme Court in July 1975, a new Emergency was declared.

V. THE THIRD PROCLAMATION OF EMERGENCY

Late in the night of 25 June 1975, the President of India signed the following Proclamation:

> "I, President of India, by this Proclamation declare that a grave emergency exists whereby the security of India is threatened by internal disturbance."

In the two Emergencies, India had known until 1975, during the quarter century since its Constitution came into force, the justification for the initial Proclamations in 1962 and in 1971 was never in doubt. The armed hostilities in each case were there for all to see. But for the 1975 Emergency, the justification for the Proclamation on the basis of "internal disturbance" was disputed by many.

The situation was summarised later that year in ICJ Review no. 15 in the following terms:

"**The background to the crisis**

Ever since Independence in 1947 India has been governed by the Congress Party. In the 1971 elections, after a split within the party, Mrs Ghandi was returned to power with a two-thirds majority in Parliament. Her success was repeated the following year in the State elections when all but two of the States returned a Congress majority. Since then the popularity of the Congres Party has fallen steeply. The government's failure to control the high rate of inflation, bad monsoons causing poor food crops, the deteriorating economic situation, a flourishing black market, incompetence in the administration, growing charges of corruption involving members of the leadership of the ruling party, as well as internal quarrels within the party, had all contributed to this loss of prestige, which was reflected in a series of government defeats in by-elections in 1972, 1973 and 1974. The growing unrest manifested itself in strikes and in violent activity organised by the marxist-leninist communist party, popularly known as the Naxalites, and by students. In response to this situation, the much respected veteran leader Jaya Prakash Narayan, regarded by many as the spiritual heir to Mahatma Ghandi, had come out of retirement to lead a successful nation-wide campaign against corruption and urging a non-violent struggle for greater social reform.

Against this background, two decisive events occurred in June, 1975. In the state elections in Gujarat the Congress Party, although obtaining the highest poll with 46 % of the votes, lost control of the state since all the opposition parties succeeded in uniting to form a government. This portended for the first time a real challenge to the control of the central government by the Congress Party in the parliamentary elections to be held in 1976. On the day after polling closed, the Allahabad State High Court gave judgment in the actions brought against Mrs Ghandi by her opponent in the 1971 elections, alleging electoral malpractices. Twelve of the charges were rejected, but two were found proved. If upheld on appeal this judgment would have invalidated Mrs Ghandi's election to Parliament and her office as Prime Minister.

Against both of these severe blows to her prestige, Mrs Ghandi reacted with complete propriety. She accepted the Gujarat defeat, and has continued to do so. Even though the Congress Party received far more votes than any other party, no attempt has been made to replace the state's coalition government by direct rule from the centre. She appealed against the judgment in the election case. On June 24 the Supreme Court vacation judge refused to give an absolute stay to that judgment, but held that Mrs Ghandi had the legal and constitutional right to remain as Prime Minister and to attend Parliament, though not to vote, pending the final disposal of her appeal.

> In this situation the United Front, which had been formed of all the opposition parties represented in parliament with the exception of the Moscow-line Communist Party of India, held a public meeting in New Delhi on June 25. The hope and expectation of dislodging Mrs Ghandi from power overcame their patience. A civil disobedience campaign to begin on Sunday, June 29, was announced. Demands were made that the Parliament, which was in recess, be recalled at once, that Mrs Ghandi not appear in Parliament and that she should resign immediately as Prime Minister. Failing this, there would be a nation-wide campaign calling upon the armed forces and police not to obey the government, the civil service to bring the administration to a halt, and the people not to pay their taxes. It is difficult to imagine that any government would have stood by in face of such threats. Mrs. Ghandi's reaction was swift and draconian. "

The immediate consequences were the increased use of preventive detention against political opponents and economic offenders and suspension of the right to apply to the Courts for enforcement of fundamental rights. Twenty-seven organisations were banned immediately. The elimination of access to the Courts had the forseeable effects : ill-treatment of prisoners, increased corruption and nepotism, and insensitive implementation of Government programmes (notably slum clearance and population control).

A rigid and unprecedented press censorship was imposed, applying also to the foreign press. The censorship guidelines included a ban on reports of speeches in Parliament other than Government statements; reports of Court cases other than the names of judges and counsel and the operative part of the Court decision; names and places of detention of detainees; any reference to agitation or violent incidents; quotations "torn out of context and intended to mislead or convey distorted or wrong impressions"; or anything likely to bring the Government into hatred or contempt.

Fundamental rights under the Constitution, guaranteeing equality before the law (Article 14), protection of life and property of the citizen (Article 21), civil liberties (Article 19), protection against arrest and detention without being informed of the grounds of arrest (Article 22), and the duty to produce arrested persons before a magistrate within 24 hours (Article 22), were suspended.

A Presidential ordinance amended the Maintenance of Internal Security Act, by removing the detainee's right to be informed of the grounds of arrest. It was made sufficient for the authorities to declare that the arrest was made to safeguard the security of India.

A second amendment to the Act abolished the right to appeal in case of alleged illegal detention, and for the attachment of the property of wanted persons who failed to surrender. Also in the first

twelve months of detention of a detainee the Advisory Board had no right to reverse the detention order. By another amendment to the same Act, the grounds of arrest were forbidden to be disclosed even to the Courts. It was deemed to be against the public interest to disclose the grounds of arrest. Further, expiry of a detention order was not to bar the making of another against the same person.

The extensive amendments to the Constitution made during the Emergency were summarised and commented upon in the ICJ Review no. 17 (December 1976) as follows:

> Many of the provisions of the new Act to amend the Constitution of India have far-reaching implications for the rule of law and for the checks and safeguards in the Indian Constitution. The amendments sensibly alter the balance between the powers, restricting the powers of the judiciary and increasing those of the executive, as well as increasing the powers of the Central Government in relation to the State governments.
>
> This is done at a time when the government holds in detention without trial some two dozen opposition members of parliament under emergency laws and at a time when it has not thought fit to renew its mandate from the electorate at the end of its normal 5-year term. If and when free elections take place, the government could lose the two-thirds majority in Parliament (won in the aftermath of the successful campaign against Pakistan) which enables it to put through constitutional amendments of this kind. The government has now postponed elections for a second year under the Proclamation of Emergency, and can continue doing so year by year as long as it decides to continue the state of emergency. There have been many protests in India against making such far-reaching amendments at a time when the Parliament's and Government's powers have been extended under the emergency.
>
> In the explanatory memorandum to the Act the government stated somewhat ominously that its purpose was "to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles. It is also proposed to specify the fundamental duties of the citizens and make special provisions for dealing with anti-national activities, whether by individuals or associations".
>
> The Act contains no less than 59 sections, and the following are some of its principal provisions.
>
> **Fundamental rights**
>
> Section 4 virtually renders the guarantees of fundamental rights in the Constitution nugatory. An earlier amendment of the Constitution, in Article 31 C, had provided that no law giving effect to the Directive Principles of State Policy relating to the ownership control and distribution of material resources for the common good, or preventing the concentration of wealth and means of production to the common detriment, could be declared void by the courts on the grounds that it violated the fundamental rights provisions of the Constitution. Now it is

proposed to extend this exclusion of the fundamental rights provisions to any Act giving effect to *any* of the Directive Principles. Since almost all laws passed by the Central or State Legislatures can be said to give effect to one or other of the Directive Principles of State Policy (in Article 39 of the Constitution), the effect of the amendment will be to place almost all laws beyond any challenge based on the fundamental rights provisions. In view of the provisions of Article 31C it is difficult to see what kind of intended legislation the government feared might be struck down by the Courts as offending against the fundamental rights provisions.

Section 5 makes provision for laws to prevent or prohibit "anti-national associations" and "anti-national activities". These are defined very widely to include, for example, any activity which disclaims, questions, threatens, disrupts or is intended to threaten or disrupt the sovereignty of India or the security of the State or the unity of the nation; or is intended to create internal disturbance or the disruption of public services, or to threaten or disrupt harmony between different religions, racial, language or regional groups or castes or communities. In relation to any such law the constitutional guarantees of freedom of speech, assembly, association, movement, and residence, property rights and the right to choose one's profession, trade or business, are all abrogated.

The Judiciary

The powers of the courts to determine the constitutionality of laws is severely restricted. The constitutional validity of central laws is in future to be determined only by the Supreme Court and not by High Courts. A minimum of 7 judges must sit and a two-thirds majority is required to hold a law invalid (ss. 23 and 25). State laws can be struck down only by a two-thirds majority out of not less than 5 High Court judges (s. 42). As far as is known, this system of weighting in favour of judges who support the government is without precedent.

Amendments of the Constitution are to be questionable in the courts only on procedural grounds, and not on the grounds that they are inconsistent with the spirit or basic structure of the Constitution (s. 55). (Though many jurists have protested against this provision, the better view is probably that this is declaratory of the existing law.)

The courts are no longer to be allowed to see the internal rules framed under Article 77(3) of the Constitution for the convenient transaction of government business (ss. 14 and 28).

The qualifications for a High Court Judge (formerly 10 years practice as a High Court advocate or in judicial office) is now extended to anyone who is, in the opinion of the President (i.e. of the Cabinet), "a distinguished jurist" (s. 36). It remains to be seen how this power will be used, but it could affect the calibre and independence of the judiciary.

Provision is made in section 46 for laws setting up administrative tribunals to determine a wide range of disputes, complaints or *offences* relating to taxes, foreign exchange, imports and exports, industrial and labour disputes, land reforms by state acquisition, parliamentary or state elections, suppliers of food and other goods declared essential, as well as disputes and complaints with respect to civil service recruitment and conditions of service. The jurisdiction of the ordinary courts on these matters may be ousted (save for the review power of the Supreme Court), and the laws made under this provision may provide for the procedure of the Tribunals and alter the rules of evidence.

Powers of the Executive

Under section 13 it is made explicit that the President shall, in the exercise of all his powers, be bound by the advice of the Cabinet. He thus becomes a figurehead.

Proclamations of Emergency may in future relate to parts of India (s. 49). Proclamations of direct rule of States by the central government are to be valid for one year (instead of 6 months) without renewal by Parliament (s. 50) and any state laws made under direct rule are to remain valid until repealed or amended (s. 51).

The Central Government is to be able to deploy under its own control any armed force or other force of the Union "for dealing with any grave situation of law and order in any state", even when there has been no proclamation of direct rule or of an emergency (s. 43).

The powers of the Central Government are also to be increased by the transfer from the List of State Subjects to the List of Concurrent Subjects of the administration of justice, constitution and organisation of the courts (below the level of the Supreme Court and High Courts), education, weights and measures, forests and protection of wild animals and birds (s. 57).

There is a remarkable provision in section 59, whereby "if any difficulty arises in giving effect to the provisions of the Constitution as amended by this Act" the President (i.e. the Cabinet) may, by order made within two years of the passing of the Act, "make such provisions, including any adaptation or modification of any provision of the Constitution, as appear to him to be necessary or expedient for the purpose of removing the difficulty". There was a transitional provision of this kind in the original Constitution, but it lasted only until the first meeting of Parliament. To give such a power to the Executive for a 2 year period, when there is in existence a Parliament, is to give the government an extraordinary power to be judge in its own cause and to amend the Constitution by order. It is also an admission of the far-reaching nature of these constitutional amendments.

The Legislature

The duration of the Parliament and of the State legislatures is extended from 5 to 6 years (without prejudice to further extensions of the Parliament under emergency powers) (ss. 17, 30 and 56). No reason is given for this change in the explanatory memorandum.

The requirement for a one-tenth parliamentary quorum is removed and Parliament is left to determine its own quorum (s. 22). The powers, privileges and immunities of members of Parliament and State Legislatures are no longer to be defined by Parliament, but are to be "such as may from time to time be evolved by such House", whatever that may mean (ss. 21 and 34).

The allocation of seats and the boundaries of constituencies for the parliament and state legislatures are to be frozen until the year 2000. Whatever demographic changes take place in the meantime, there will be no alterations to ensure equal representation (ss. 12, 15, 16, 29 and 47).

Offices of profit under the Central or a State government will no longer disqualify a member of the legislature unless the office is declared by Parliament by law to disqualify its holder (ss. 19 and 32). In determining whether a Member shall be disqualified on such grounds, or on grounds of corruption, the President (i.e. the Cabinet) will no longer be bound by the opinion of the Election Commission (ss. 20 and 33).

Directive Principles and Fundamental Duties

The directive principles of state policy in Part IV of the Constitution (which are not enforceable in any court but are now to take precedence over fundamental rights) are to include the provision of equal justice and free legal aid to economically backward classes, participation of workers in the management of industrial organisations, and protection and improvement of the environment and safeguarding forests and wild life (ss. 7 9). There is also a new Part IV A enumerating "fundamental duties", which begins somewhat ironically with the statement that it "shall be the duty of every citizen of India (a) to abide by the Constitution and respect its ideals and institutions . . .". There is also a duty "to develop the scientific temper, humanism and the spirit of inquiry and reform" (s. 11).

Conclusion

Mrs Gandhi's opponents accuse her of intending to replace the democratic constitution of India by a dictatorial system. Whilst Mrs Gandhi protests that this is not the case, the government, with its present overwhelming majority in Parliament (gained after the successful military operation against Pakistan which led to the new state of Bangladesh), is equipping itself with powers which could be used to perpetuate the rule of the Congress Party.

In the first place there is nothing to stop the Parliament prolonging the state of emergency indefinitely. Most observers would say that there is no longer any need for the maintenance of the Proclamation, but there is as yet no indication when it will be brought to an end. It has already been used to extend the life of the Parliament by two years, to intern political opponents, and to suppress or severely restrict fundamental rights, including freedom of speech, of the press, of assembly and of association. Furthermore, the way is now clear for laws to be passed outlawing any political organisation which threatens the ascendancy of the Congress Party by saying that it threatens the security of the state, and the courts will not be able to strike down such a law on the grounds that it violates fundamental rights.

If this is not the objective of the Congress Party, it is difficult to see what is the object of the constitutional changes, or why they are considered necessary in order to bring about socio economic reforms. "

The Termination of Emergency

On 18 January 1977, the Prime Minister announced her decision to hold a General Election. This was followed by the release of opposition leaders to participate in the election and suspension of the Press censorship. A coalition of five opposition parties won an absolute majority in the lower house, the Loksabha. When the election results were confirmed, Mrs. Gandhi revoked the Proclamation of Internal Emergency, the order banning the 27 organizations, and the previously suspended censorship order.

The formal termination of the Emergency automatically remedied some of the most objectionable aspects of the legal situation. For example, the 1975 and 1976 amendments to the Maintenance of Internal Security Act, 1971, depended upon the existence of the Emergency and lapsed automatically when it ended, as did the Presidential Order suspending the right to apply to the Courts to enforce the Constitutional rights of equality before the law, protection of life and personal liberty, and protection against arbitrary arrest and detention.

Numerous commissions were created to investigate complaints arising out of the Emergency. The most important one was the inquiry conducted by Mr. Justice Shah. The Shah Commission, as it was called, did not have the benefit of Mrs. Gandhi's evidence on the issues before it nor of her cross-examination of the witnesses. So the inquiry was necessarily one-sided, but its conclusion cannot be ignored. The Third and Final Reports of the Shah Commission speak of wrongful confinements, torture, patently illegal detentions based on caprice, abuses of authority by public officials, indiscriminate demolition of houses, and unlawful implementation of family planning programmes.

VI. THE JUDICIAL RESPONSE TO EMERGENCY POWERS

Historically, the Indian Courts have had a strong tradition of zealous scrutiny of the exercise of Emergency powers by the executive. A newspaper report published in the year 1943 had this to say:

> "A compilation of the judgments of the Federal Court, the High Courts and the subordinate Courts on Emergency laws delivered during 1942-43 shows that the Indian judiciary, including its English members, acquitted itself most creditably during a period of great stress." (3)

After independence, when the 1962 Emergency was proclaimed, and an order suspending the judicial enforcement of fundamental rights was issued, the Supreme Court of the free India had for the first time to consider the Presidential order.

It ruled (4) that in view of the order, the citizen "lost his locus standi to move this Court during the period of the Emergency", although the Court's jurisdiction and power under Article 32 to grant relief were untouched.

Later, a Special Bench of seven judges heard together a batch of appeals raising a large number of issues. The judgment was delivered on 2 September 1963. The order was upheld by a majority of 6 to 1 (5).

Comparing Articles 358 and 359, the majority pointed out that Article 358 "removes the fetters created on the legislative and executive powers by Article 19." (Article 19 confers the fundamental rights). "Article 359, in contrast, suspended no right but the citizen is deprived of his right to move any court for the enforcement of the rights." (6)

The majority made the following observations which are of great importance:

> "If in challenging the validity of his detention order, the /detainee/ is pleading any right outside the rights specified in the Order, his right to move any court in that behalf is not suspended, because it is outside Article 359 (1) and consequently outside the Presidential Order itself. Let us take a case where a /detainee/ has been detained in violation of the mandatory provisions of the Act. In such a case, it may be open to the /detainee/ to contend that this detention is illegal for the reason that the mandatory provisions of the

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(3) The Hindustan Times, New Delhi, 1943.

(4) Mohan Chowdhury v. Chief Commissioner of Tribunal, A.I.R. 1964, S.C. 173, at p. 177.

(5) Makhan Singh v. State of Punjab, A.I.R. 1964, S.C. 381.

(6) Ibid. at p. 395.

> Act have been contravened. Such a plea is outside Article 359 (1) and the right of the /detainee/ to move for his release on such a ground cannot be affected by the Presidential Order." (7)

Similarly, a plea of mala fides or of excessive delegation was not barred by the order. In sum, what the order suspended was the right strictly to move the Court for the enforcement of fundamental rights embodied in the Articles 14, 21 and 22. It did not and could not suspend the Rule of Law itself.

As the Emergency of 1962 lingered on the Court became increasingly concerned as abuses of Emergency powers came to its notice.

When a detainee successfully urged before the Supreme Court that his detention was ordered mala fide, the Court upheld his plea that the detaining power had been "abused". Ordering the detainee's release, the Court observed:

> "When we came across orders of this kind by which citizens are deprived of the fundamental right of liberty without a trial on the ground that the emergency proclaimed by the President in 1962 still continues and the powers conferred on the appropriate authority by the Defence of India Rules justify the deprivation of such liberty, we feel rudely disturbed by the thought that the continuous exercise of the very wide powers conferred by the Rules on the several authorities is likely to make the conscience of these authorities insensitive, if not blunt, to the paramount requirement of the Constitution that even during an emergency the freedom of the Indian citizen cannot be taken away without the existence of justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which conceivably results from the continuous use of such unfettered powers may ultimately pose a serious threat to basic values on which the domestic way of life in this country is founded." (8)

The Courts During the 1975 Emergency

When writs of habeas corpus (9) were sought from the High Courts, the detaining authorities raised preliminary objections

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(7) Ibid. p. 399.

(8) G. Sadanandan v. The State of Kerala (1966) 2. S.C. J. 725.

(9) Article 32 - in the fundamental rights chapter of the Constitution - guarantees the right of every person to move the Supreme Court of India for the issue of writs including the writ of habeas corpus and provides that the Supreme Court would have power to issue such writs and other appropriate orders or directions. Under Article 226 of the Constitution, the High Court in each State is empowered to issue high prerogative writs including the writ of habeas corpus.

that the petitioners had no locus standi because they were seeking to enforce their fundamental right under Article 21, namely that they should not be deprived of their personal liberty except by procedure established by law. The High Courts of ten different States (10) rejected this contention and held, following earlier precedents, that though the petitioners could not move the court to enforce their fundamental right under Article 21, they were entitled to show that the order of detention was not under or in compliance with law or was mala fide. But this preponderant view of the High Courts was overruled by the Supreme Court. In what is now known as the Habeas Corpus Case (11), the Court held (by a majority of 4 to 1) that Article 21 was the sole repository of the right conferred - that the Constitution of India did not recognise any natural right other than that expressly conferred - and that accordingly an order of preventive detention issued at a time when Article 21 was under suspension could not be challenged either in the High Court or in the Supreme Court, nor a writ of habeas corpus issued, either on the ground that the order was not in compliance with the law authorising it or was illegal or was vitiated by mala fides, factual or legal, or based on extraneous considerations. In the next year (12), the Supreme Court held that during the period of suspension of Articles 21 and 22, detainees - most of them were political detainees - could not complain of prison conditions or prison rules regulating conditions of detention even if they were unreasonable or more harsh than those prescribed for persons convicted of crimes. The basis of these two unfortunate judgments was (in the words of then Chief Justice Ray) that :

> "Liberty itself is the gift of the law and may by the law be forfeited or abridged."

Thus, the voices of the High Courts which had taken a different view were silenced. As was said of the Supreme Court of the United States after the Dred Scott Case, the Supreme Court of India (after the Habeas Corpus Case) "suffered severely from self-inflicted wounds." A former Chief Justice of India (Mr. Hidayatullah, now Vice-President of India) has more than once publicly expressed the view that the suspension of Article 21 should not have led to the "hands off" posture by the Supreme Court. In his view (which many share), Article 32 guaranteed the right of every person to approach the Supreme Court and empowered the Supreme Court to issue a writ of habeas corpus. So long as that article was not suspended, the power to scrutinise the grounds and validity of a detention order remained with the Courts.

The Courts After the Emergency

Since the lifting of the Emergency in March 1977, the Supreme Court of India has been at pains to redeem itself. In the first year

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(10) High Courts of Allahabad, Andhra Pradesh, Bombay, Delhi, Karnataka, Madras, Madhya Pradesh, Punjab, Haryana and Rajasthan.

(11) A.D.M. Jabalpur v. S. Shukla, A.I.R. 1976, S.C. 1207.

(12) Union of India v. B. K. Gowda, A.I.R. 1977, S.C. 1027.

of the Supreme Court (in 1950) in Gopalan's Case (13), a restricted meaning was given to the words "except by procedure established by law in Article 21". Whatever the procedure the law enacted (even if in the opinion of the Court it were unfair or unreasonable) would be sustained as a sufficient constitutional justification for deprivation of life or liberty. The Court thus shut the door to 'due process' - largely for historical reasons. The draft Constitution did contain a due process clause but it was deleted by the drafting committee, mainly on the advice of Justice Frankfurter to the Indian Constitutional Adviser, Sir B. N. Rau. It was also held in Gopalan's Case that Article 22 was a self-contained code and therefore a law of preventive detention did not have to satisfy the requirements of Article 14 (prohibition against arbitrary or discriminatory laws) or article 19 (right to freedom of speech, expression, of assembly and of movement - subject to reasonable restrictions imposed by law) or Article 21 (right to life and personal liberty). However, a full bench of eleven judges in the Bank Nationalisation Case (14) disapproved the majority view in Gopalan. Subsequently, smaller benches (15), in dealing with a challenge to the Maintenance of Internal Security Act, 1971, accepted the position that a law of preventive detention had to be tested in regard to its reasonableness with reference to Article 19. A few years later, in Maneka Gandhi (16), a Constitution Bench of the Court held that the words "except by procedure established by law" in Article 21 did not open the door to any procedure, however arbitrary or fanciful, for depriving persons of their life or liberty. The law had to satisfy the requirement of reasonableness. Due process, so studiously kept out for more than 25 years, was introduced as part of constitutional law in matters relating to life and liberty. Since then the constitutional safeguards for persons detained under preventive detention laws are being construed very strictly against the detaining authorities (17). The scrutiny of detention orders and of the grounds of detention are meticulous - and where some State Governments have attempted to preventively detain political opponents on the ground that their apprehended activities would constitute a danger to internal security, such attempts have failed (thanks to the Courts) either on the ground of mala fides or the vagueness of grounds of detention or failure to conform to strict procedural safeguards.

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(13) A.I.R. 1950, S.C. 27.

(14) R. C. Cooper v. Union of India, A.I.R. 1970, S.C. 564.

(15) H. Sahai v. State of Bengal, A.I.R. 1974, S.C. 2154 (5 judges) and Kudi Ram Das v. State of West Bengal, A.I.R. 1975, S.C. 550 (4 judges).

(16) A.I.R. 1978, S.C. 597.

(17) See, for instance, Pritam Nath Hoon v. Union of India, A.I.R. 1981, S.C. 92; Saleh Mohammed v. Union of India, A.I.R. 1981, S.C. 111, Mrs. Hamida Qureishi v. M. S. Kasbekar, A.I.R. 1981, S.C. 489, Gurdip Singh v. Union of India, A.I.R. 1981, S.C. 362 Shalini Soni v. Union of India, A.I.R. 1981, S.C. 431, Tushar Thakker v. Union of India, A.I.R. 1981, S.C. 436, Mangalbhai Motiram Patel v. State of Maharashtra, A.I.R. 1981, S.C. 510.

VII. PLUGGING THE LOOPHOLES - THE AMENDMENTS TO THE CONSTITUTION

The Constitution Forty-fourth Amendment Act, 1978, has introduced stricter safeguards in the Emergency provisions. An emergency may now be declared only when the security of India or any part of its territory is threatened "whether by war or external aggression or armed rebellion" - mere "internal disturbance" will no longer sustain a Proclamation of Emergency. There is to be a stricter scrutiny of a Proclamation of Emergency by the legislative wing - a Proclamation of Emergency would cease to operate at the expiration of one month unless it has been specifically approved by resolutions of both Houses of Parliament (that is the House of the People and the Council of States). Article 359 empowering the executive to suspend the enforcement of fundamental rights conferred by Part III during the period of the Proclamation of Emergency has also been amended. Article 20 (protection against ex post facto laws and against double jeopardy) and Article 21 cannot be suspended at any time even during an Emergency. The right to life and liberty even if "the gift of the law" can no longer be forfeited or abridged. The power of the courts to issue writs of habeas corpus can no longer be taken away even by a law unanimously passed by both Houses of Parliament.

The Constitution Forty-Fourth Amendment Act, 1978, will, if and when it comes into force, further liberalise the provisions of Article 22 (14) by providing that the Advisory Board in each State (which looks into the grounds of detention) must be constituted in accordance with the recommendations of the Chief Justice of the High Court in each State - and must consist of a serving judge of the High Court as Chairman, its two other members being serving or retired judges of any High Court. An Advisory Board will not be able to be constituted of persons who are merely "qualified to be appointed as judges of a High Court ...": they must in fact be serving or retired judges of a High Court. Sub-clause (a) of clause (7) of Article 22 will also be deleted by the Constitution Forty-Fourth Amendment Act, 1978 - with the effect that Parliament will not any longer be able to prescribe by law the circumstances under which and the class or classes of cases in which a person may be detained for a period longer than three months under a preventive detention law without obtaining the opinion of the Advisory Board. Although the amendments of Article 22 by the Constitution Forty-Fourth Amendment Act, 1978 are valid constituent law - enacted in the exercise of powers vested in Parliament by the requisite majority to amend the Constitution - they have not yet been brought into force.

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(18) The new clause (4) of Article 22 reads as follows:

> '(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless an Advisory Board constituted in accordance with the recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient cause for such detention;
>
> Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving judge of the appropriate High Court and the other members shall be serving or retired judges of any High Court."

The amendments are not to come into effect until the Central Government notifies in the Official Gazette the date of their commencement. After a lapse of two years a case was brought before the Supreme Court, requesting the Court by an order for mandamus to direct the Central Government to issue a notification bringing the amendments into force. Whilst all the judges were agreed that there did not appear to be any adminstrative reason why the Government could not bring the amendments into force, the majority of the Court held that it is not for the Court to order the Government to do that which, according to the mandate of Parliament, lies in its sole discretion to do when it considers it opportune. The minority opinion was that the discretion of the Central Government did not entitle it to suspend indefinitely the coming into effect of the amendments. The minority argument has received much support from the legal profession in India.

VIII. CONCLUSIONS

The following conclusions may be drawn from the Indian experience:

1. Even in a country with such a strong commitment to the Rule of Law, detailed constitutional provisions designed to avoid abuses of power, a strong parliamentary tradition and a highly developed legal system, emergency powers are liable to be extended both in time and in scopebeyond what is 'strictly required by the exigencies of the situation'.

2. The risks of such abuse are inevitably greater when the Government in power commands, and continues to command, a sufficient majority in the legislature to enable it to prolong the emergency at will or to amend the Constitution so as to enlarge the scope of its emergency powers.

3. The first two emergencies proclaimed since independence in India were plainly justifiable, but equally clearly they were continued in force after the circumstances which gave rise to them no longer existed.

4. There is more controversy as to the necessity for the third proclamation of an emergency, but there are clearly strong arguments in favour of its validity. The measures taken, however, seen to have been clearly out of proportion to the threat or perceived threat to internal security, and the removal of all judicial control permitted widespread and gross violations of fundamental human rights by the forces whose duty is to enforce the law.

5. The constitutional amendments made under this state of emergency eventually became so extreme that they called into question the survival of the democratic tradition and the Rule of Law. At that point, Mrs. Gandhi wisely turned to the electorate to enable the people to decide the issue. It may be added that she has, since her remarkable return to power, justified the claim she always made to a commitment to democracy and the Rule of Law.

6. The experience of the third emergency has shown that where exceptional powers are granted, there is a greater prospect of avoiding abuses of power if the basic essentials of judicial control and 'due process' of law are maintained, and if unreasonable limitations are not placed on freedom of the press, freedom of expression and freedom of association. Above all, it is essential that a remedy of the nature of habeas corpus remain in force to enable any person in custody, including a person in administrative detention, to challenge the legality of his detention or of his conditions of detention.

7. Generally worded safeguards of basic rights are liable to be easily brushed aside or invalidated under an emergency unless they are reinforced by detailed procedures and effective remedies to ensure their enforcement. Considerable efforts were made by the coalition government after the third emergency to establish effective remedies against the possibility of similar abuse in the future.

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STATES OF EMERGENCY IN MALAYSIA

CONTENTS

I. BRIEF HISTORICAL BACKGROUND

The Formation of the Federation of Malaya

In AD 1400 a Malay prince from Tumasik established himself at Malacca, and established Malacca Sultanate, which lasted for about a hundred years. Although not all of the Royal Houses claimed descent from the Malacca Sultanate, unified loyalty was owed to the Malacca throne through a form of feudalism. Malacca became an entrepot of importance, attracting traders from Persia, India and China. (1)

The next epoch of Malayan history was the period of colonial rule. The Portuguese led the way, coming as traders in 1509 and aggressors in 1511. The Dutch followed and Malacca fell to them in 1641. During this period there were areas of European influence but these did not spread over the whole of the Malay peninsula.

Colonial dominance reached its zenith with British rule. The British initially came for the spice trade through the East India Trading Company. Then they acquired the ports of Penang in 1787, Malacca in 1795 and Singapore in 1819. Over the next century to 1914, through various treaties and support given to local leaders in internal conflicts, the territory now known as West Malaysia came by stages under British Administration.

The period of British Administration was one of massive migration. Tin was discovered in the peninsula in the mid-nineteenth century, and the rubber industry flourished by the end of the nineteenth century. To sustain this tremendous growth, Chinese and Indians were brought in to provide labour for the mines and plantations. It has been estimated that whereas in 1800 the Malays made up 90% of the population, by 1910, when the migration receded, Malays comprised only 50% of the population (2).

From 1914, the British ruled Malaya as a colony, until 1941, when, in the Second World War, it fell to the Japanese. The most lasting effect of the Japanese occupation was that it acted as a catalyst for the fervour of Malaysian nationalism. After the war, the British returned in 1945. During the next eleven years various local political parties were established. First, the United Malay National Organization (UMNO) was formed in 1946 by a fusion of Malay Organizations. In 1949, after a series of Chinese political parties with communist undertones had been suppressed, the Malayan Chinese Association (MCA) was formed. In 1955, the Malayan Indian Congress (MIC) was established and together with the UMNO and MCA formed the Alliance. This was a coalition representing all the races of Malaya. The British were then ready to concede that self-rule was imminent and in 1957, the Federation of Malaya, a new nation, was established, with the British ceding Penang and Malacca to the new federation.

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(1) Brown, C.C. Sejarah Melayu - The Malay Annals. Journal of the Malayan Branch of the Royal Asiatic Society, 1952.

(2) First Census of Malaya. Census Report, 1957.

When the Federation of Malaya was formed, Sarawak, Sabah and Singapore were excluded from the Federation and remained separate Crown Colonies.

In the early 1960's, when Britain was preparing to withdraw and grant independence to its colonies in South-East Asia, the proposal to unite the Crown Colonies of Sabah, Sarawak and Singapore with the Federation of Malaya was again mooted. In September 1963, this was accepted and the Federation of Malaysia was born.

The inclusion of Singapore was, however, short-lived. On the one hand, Singapore proved to be an unsettling influence on the internal politics of Malaysia, and, on the other hand, the people of Singapore objected to the dominance of the Malays in the political system. In August 1965, Singapore withdrew from the Federation and became an independent state.

II. SHORT CONSTITUTIONAL HISTORY OF MALAYSIA

The predecessor of the Malaysian Constitution is the Malayan Constitution, which came into force on 31 August 1957, known as "Merdeka Day" or Independence Day, when Malaya became an independent state. The Constitution provided for a constitutional monarchy, headed by the Yang di-Pertuan Agong, the Supreme Ruler of the Nation. His Highness is elected to serve a five-year term by his brother Sultans, the rulers of the States, at the Conference of Rulers held every five years.

Although the fundamental tenets of that constitution have remained, considerable revisions occurred in 1962 and in 1975, when the composition of the Federation changed.

Fundamental Liberties - Civil Rights in Malaysia

The Malaysian "Bill of Rights" is contained in Part II of the Constitution, consisting of Articles 5-13. In brief, these contain nine fundamental rights:

1. Article 5 - The right to life, personal liberty, habeas corpus, the right to notification of grounds of arrest, the right to legal representation, the right to be placed speedily in the hands of the judiciary when arrested;
2. Article 6 - The right to freedom from slavery and forced labour;
3. Article 7 - The right to protection against retroactive laws and double jeopardy;
4. Article 8 - The right to equality before the law;
5. Article 9 - The right to freedom of movement, the right to freedom from banishment;
6. Article 10 - The right to freedom of speech and expression, the right to assemble peaceably, the right to free association;
7. Article 11 - The right to freedom of religion;

8. Article 12 - The right to education;

9. Article 13 - The right to personal property, the right to compensation for governmental expropriation.

An examination of the text of the Constitution reveals that there are two categories of rights: those which are absolute, and those which are limited by the terms of the Constitution itself.

However, even rights which appear to be absolute have been diminished by judicial interpretation and by executive declarations of emergency which allow the government to act contrary to the Constitution. Thus, the appearance of "absolute rights" is misleading; in essence, all of the fundamental constitutional liberties are limited by legislative and judicial fiat. To illustrate further, a list (3) of laws is given under which people can be deprived of the rights to life and liberty:

(a) Life

A person may be deprived of his right to life by the following statutes -

1. The Penal Code (F.M.S. Cap. 45)
2. The Internal Security Act, 1960
3. Arms Act, 1960
4. Firearms (Increased Penalties) Act, 1971
5. Dangerous Drugs Ordinance, 1952.

(b) Liberty

A person may be deprived of his right to liberty by the following statutes -

1. Penal Code (F.M.S. Cap. 45)
2. Criminal Procedure Code (F.M.S. Cap. 6)
3. Internal Security Act, 1960 (Act 82)
4. Legal Profession Act, 1976 (Act 166)
5. Registration of Criminal and Undesirable Persons Act, 1969 (Act 77)
6. Summons and Warrants (Special Provisions) Act, 1971 Act 25)
7. Firearms (Increased Penalties) Act, 1971 (Act 37)
8. Prevention of Corruption Act, 1961 (Act 57)
9. Armed Forces Act, 1972 (Act 77)
10. National Registration Act, 1959 (Act 78)
11. Official Secrets Act, 1972 (Act 88)

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(3) This list is quoted from a paper presented to the 4th Malaysian Law Conference by Nik Abdul Rashid on "Erosion of Fundamental Rights by Legislation".

12. Women and Girls Protection Act, 1973 (Act 106)
13. Arms Act, No. 21 of 1960.
14. Dangerous Drugs Ordinance No. 30 of 1952 (Reprint No. 4 of 1973)
15. Emergency Ordinance, Numbers 1, 5, 7, 22, 30, 36, 51, 61 and 76
16. Kidnapping Act, No. 41 of 1961
17. Minor Offences Ordinance, No. 3 of 1955
18. Preservation of Public Security Ordinance, No. 46 of 1968
19. Preservation of Public Order Ordinance (Emergency Ordinance) No. 5 of 1969
20. Prevention of Crime Ordinance, No. 13 of 1959 (Reprint No. 10 of 1973)
21. Public Order (Preservation) Ordinance, No. 46 of 1958 (Reprint No. 13 of 1973)
22. Road Traffic Ordinance, No. 49 of 1958 (Reprint No. 5 of 1970)
23. Vagrants Act, No. 19 of 1965
24. Police Act, No. 41 of 1967.

Many of these are ordinances which were promulgated under an emergency and were passed under the emergency provisions of the Constitution. Before going into the details of the Constitutional provisions dealing with an emergency, the circumstances surrounding each of the four emergencies proclaimed so far may be examined briefly.

III. THE EMERGENCIES SO FAR PROCLAIMED

During the period between independence in 1957 and the time of writing there have been four Proclamations of Emergency. None of these have been revoked.

(a) 1964 Proclamation: Applicable throughout the Federation (4)

(b) 1966 Proclamation: Applicable only to Sarawak (5)

(c) 1969 Proclamation: Applicable throughout the Federation (6)

(d) 1977 Proclamation: Applicable only to Kelantan (7)

The first Proclamation of Emergency was issued in 1964, during the period leading to the birth of Malaysia - the joining of Sarawak and Sabah and the separation of Singapore. This political transition was not accomplished without hostility from Malaysia's immediate neighbours, Indonesia and the Philippines. The Philippines felt that it had a historic claim, and attempted to assert legal sovereignty over Sabah (8). Indonesia also registered strong protest. Indonesia based its opposition to the formation of Malaysia on the grounds that it was a British plot to perpetuate British colonial designs in South-East Asia. Although there was a series of meetings between the three nations, Indonesia sustained its disapproval and hostility. This led to the period of "confrontation" - a cold war between Malaysia and Indonesia. At the same time, the State of Kelantan refused its approval to the formation of Malaysia. Kelantan based its objection on the grounds that the Sultan of Kelantan should have been consulted before the federal government acted. Hence, it brought proceedings, claiming that the instrument for the formation of Malaysia should be declared null and void (9).

The second Proclamation of Emergency applied only to the State of Sarawak. The crisis was precipitated by an internal jostling for power in Sarawak. The Chief Minister at the time was Stephen Kalong Ningkan. On 16 June 1966, 21 of the 32 members of the Council Negeri (State Council) signed a petition stating their loss of confidence in the Chief Minister. The Chief Minister refused to resign, declaring that the

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(4) L.N. 271/3.O.1964

(5) P.U. 339 A/14.9. 1966

(6) P.U. (A) 145/15.5. 1969

(7) P.U. (A) 358/8.11. 1977

(8) M. O. Ariff, The Philippines claim to Sabah: Its Historical, Legal and Political Implications (Oxford University Press, 1970).

(9) The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Dutra Al-Haj, (1963) M.L.J. 355. The Government of Kelantan lost the case.

no-confidence petition should be debated in the Council Negeri in accordance with the Constitution. Tunku Abdul Rahman Al-Haj, the Prime Minister, demanded that Stephen Ningkan step down. The Governor of Sarawak also attempted to dismiss Ningkan, together with other members of the Supreme Council (or State Cabinet), and appointed Penghulu Tawi Sli as the new Chief Minister. However, the Federal Court issued an injunction declaring the appointment of the new Chief Minister void. This Emergency was declared on 15 September 1966.

The third emergency was imposed on the entire Federation of Malaysia, on 13 May 1969. The reason for it was the violent communal rioting that broke out between Malays and Chinese in Kuala Lumpur on the night of 12 May, continuing until 15 May (10). The rioting was widespread in the city of Kuala Lumpur, leading to considerable death and destruction. Nearly 10,000 people were given shelter in temporary refugee camps within the city and relief was provided to them through the Red Cross.

Initially, only a curfew was imposed but later as the riots continued to spread a national emergency was declared under which the government assumed powers to hold special trials, to suspend or amend any law, to revoke citizenship, to enter and search premises, and to impose any penalty, including the death penalty. The emergency powers also empowered the government to suspend the elections that were to take place in Sarawak and Sabah. Further rigorous censorship was introduced. On 18 May, the government announced that it had arrested, under the emergency powers, about 150 persons as communist terrorists.

The fourth Proclamation of Emergency, applying only to Kelantan, was imposed on 8 November 1977. Before the Proclamation, the Party Islam (P.I.) was part of the governing coalition of the National Front. P.I.'s leader was Mohammed Nasir, also the Chief Minister of Kelantan. He was appointed by the then Prime Minister, Tun Abdul Razak, leader of the Federal government and National Front, but his appointment was against the wishes of his own party. In mid-September 1977, Nasir was voted out of office and later expelled from the Party Islam. The Chief Minister's contention was that he was appointed by Tun Abdul Razak and the ruling National Front and hence could not be removed by anyone except by the National Front. This loss of confidence in the Chief Minister had grave political significance. The National Front was in danger of losing its control over the State of Kelantan without the support of Party Islam.

On 19 October 1977, demonstrators gathered in the state capital, calling for a dissolution of the state government and the holding of fresh elections. Although peaceful to begin with, it soon became violent. The demonstrators confronted the police, smashed windows, and overturned cars. The police managed to contain this outbreak of violence and a curfew was imposed. On 8 November 1977, an emergency was declared in the State of Kelantan.

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(10) For theories as to the causes of the riots, see Tunku Abdul Rahman, 13 May, Before and After, Utusan Melayu Press Ltd., Kuala Lumpur, 1969; John Slimming, Malaysia : Death of Democracy, London, John Murray, 1969; Karl von Vorys, Democracy Without Consensus, Princeton University Press, New Jersey, 1975.

IV. THE CONSTITUTIONAL PROVISIONS RELATING TO SPECIAL AND EMERGENCY POWERS

The Constitution of Malaysia incorporates provisions for the exercise of "special" and "emergency" powers in Articles 149-151:

1. Article 149 - entitled Legislation against Subversion - confers special powers on Parliament for dealing with subversion, including a limited power to legislate in a manner which would otherwise be contrary to provisions of the Constitution.
2. Article 150 - entitled Proclamation of Emergency - confers wide-ranging special powers on the legislative and executive branches upon the issuance of a Proclamation of Emergency, which include far wider powers than those allowed under Article 149.
3. Article 151 - entitled Restrictions on Preventive Detention - lays down certain requirements to be observed with regard to preventive detention.

The text of these articles, as amended, will be found in the appendix.

The Powers under Article 150

Article 150 enables the government to exercise a wide range of extraordinary executive and legislative powers. The main features are as follows:

The Proclamation is required to contain certain prescribed recitals. It is issued formally by the King, acting on the advice of the government. Except on matters relating to religion, citizenship and language, emergency legislation may be inconsistent with the provisions of the Constitution. Legislation dealing with preventive detention made during an emergency has, however, to comply with provisions of Article 151 of the Constitution.

When an emergency is proclaimed and Parliament is not in session, the executive is empowered to legislate through ordinances and such ordinances can be contrary to the provisions of the Constitution. Finally, except on matters relating to Muslim law, Malay custom and native law or custom in Borneo States, the Federal Parliament is empowered to legislate on matters pertaining to States and the Federal authorities are empowered to give directions to the authorities of the State governments.

Development of the Provisions by Constitutional Amendment

The steps by which Article 150 has been amended and strengthened between 1960 and 1981 are of some interest. It was amended on four occasions.

The first amendment by Act 10 of 1960 altered clause 3. of the original Article, which stipulated that a Proclamation of Emergency would be valid only for two months unless it was approved by the Parliament and that ordinances made by the executive would cease to have effect

fifteen days after the first sitting of the Parliament. The amendment altered this to provide that both the Proclamation and the Emergency ordinance would cease to have effect only when revoked or annulled. Thus this amendment gave indefinite life to the Proclamation and the ordinances.

The second amendment, by Act 26 of 1963, broadened the scope of Article 150. The amendment deleted from clause 1. the following words which qualified the type of emergency to be envisaged: "whether by war or external aggression or internal disturbance". Secondly, the amendment strengthened the Federal Parliament's competence to legislate over state matters. It also changed clause 6. which provided that emergency laws could not be inconsistent with the provisions of Part II dealing with fundamental liberties. This amendment stipulated that emergency laws could be inconsistent with any provisions of the Constitution other than those relating to religion, citizenship and language.

The third amendment, by Act 68 of 1966, was made in connection with a crisis in the State of Sarawak. It amended both clauses 5. and 6. to provide that emergency legislation would be valid even if it was inconsistent with the Constitution of the State of Sarawak.

Courts' Interpretation of Article 150

The substantive as well as procedural aspects of emergency powers have been clarified by the Courts through various decisions. On the question of whether the Yang di-Pertuan Agong (hereinafter referred to as "the King") proclaims an emergency on the advice of the government or not, the Courts have held that when issuing a Proclamation of Emergency, the King must act on advice of the government.

On the question of the powers of judicial review of the validity of the Proclamation, the Courts have consistently held that the determination by the government that an emergency exists, and the issuance of the Proclamation of Emergency, are not justiciable.

On the power of the executive to legislate through emergency ordinances, the Federal Court has held that the King has and is intended to have, plenary powers of legislation as large and of the same nature as those of the Parliament itself. The Courts have also held that the power to legislate contrary to the Constitution can be delegated.

The Powers under Article 149 (Legislation against Subversion)

Article 149 provides for limited special powers if an Act of Parliament recites that action has been taken or threatened by any substantial body of persons (whether inside or outside the country):

(a) to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property; or

(b) to excite disaffection against the King or any government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the security of the Federation or any part thereof.

Under Article 149, the government can enact laws even if they are inconsistent with the following provisions of the Constitution: Article 5 (liberty of the person), Article 9 (prohibition of banishment and freedom of movement) and Article 10 (freedom of speech, assembly and association). Laws created under Article 149 may be binding over State governments which do not have to be consulted in their enactment. As Article 149 does not prescribe any time limit, laws enacted under it will remain in force indefinitely unless repealed by Parliament.

Development of the Provisions by Constitutional Amendment

Article 149 has been amended once, by Act 10 of 1960. The original Article stipulated that laws could be enacted under it only if action has been taken or threatened by any substantial body of persons to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property. The amendment provided for the four additional kinds of action or threat enumerated in (b) to (e) above. It also removed the restriction that laws enacted under the powers of this Article will remain in force only for one year.

Powers under Article 151 (Preventive Detention)

This Article, which deals with preventive detention, stipulates that the detained person must be informed of the grounds and the allegations of fact upon which the detention order is made, other than facts whose disclosure the detaining authorities consider would be against the national interest. An opportunity has to be given for making representation against the order and any such representation has to be considered by an Advisory Board within three months or such longer period as the government may allow.

Development of the Provisions through Constitutional Amendments

Article 151 has been amended on three occasions. Originally, the Article provided that a person could not be detained for more than three months unless the Advisory Board so recommended. The first amendment, in 1960, made the Advisory Boards purely advisory, so that the detention could be continued even if the Board did not so recommend. The second amendment was formal. The third amendment, in 1976, removed the requirement that the Board must have considered the representations and reported with its recommendations within three months of the detention. The only condition now is that when representations are made by a detained person they have to be considered by the Advisory Board within three months of their being made, and this three months' limit can be extended by the government.

Courts Interpretation of Article 151

Numerous decisions have clarified the scope of the law on preventive detention. The Courts have held that the executive has complete discretion to detain a person and it is not for the Courts

to review the sufficiency or relevancy of the facts on which the executive based its decision. A possible exception is that the Courts may be willing to review the action of the executive if an allegation is made of mala fides, i.e. that the power of detention has been used in bad faith for purposes other than those prescribed by law. There is no decided case on this issue and there are conflicting obiter dicta on the subject (11).

V. THE EXERCISE OF EMERGENCY POWERS: INTERNAL SECURITY ACT, SPECIAL REGULATIONS AND THE SOCIETIES REGISTRATION ACT

The Internal Security Act, 1960

The major piece of legislation enacted under Article 149 and 151 is the Internal Security Act, 1960 (12). The Internal Security Act was derived from a similar British Colonial Act created in 1948 in the face of communist insurgency led by the Malaysian Communist Party (MCP).

The Internal Security Act is an extensive document. Only certain aspects will be discussed here. The powers of preventive (i.e. administrative) detention are provided for in Chapter II - Sections 8 to 11 and Chapter III - Section 73. Under Section 73, a person may be detained for up to 60 days on the suspicion "that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaya or any part thereof", Section 73 (1)(b). After sixty days, the person may be detained for a period of two years, at a place chosen by the Home Minister, and the detention is then renewable. Since a detainee has only the right to review by the Advisory Board at the beginning of his detention, and the Board has no power to release a detainee, detention orders can be renewed and incarceration may continue indefinitely. In some cases persons have been detained without charge or trial for over 16 years under these powers.

Other than imprisonment, restrictions can be imposed on other freedoms, as by house arrest, prohibition from addressing the public or holding office and prohibition from leaving the country (Section 8).

Although there is a duty to inform a detained person of the grounds of detention, there is no need to disclose the facts upon which such opinion is formed if it is considered against the national interest (Section 9).

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(11) Cf. Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No. 2), 1967, M.L.J. 46, at p.47, and Stephen Kalong Ningkan v. The Government of Malaysia, 1968, M.L.J. 119 at p. 124.

(12) Listed in the Government Gazette, Vol. IV, No. 17, as no. 18 of 1960.

The police are also given extensive powers of arrest. Any police officer may arrest a person without a warrant upon suspicion that the person may act prejudicially against the nation, Section 73(1). The police may also arrest a person for failing to establish his/her identity or for failing to establish a purpose for being at a particular location (13).

Under the Internal Security Act there are powers to mark certain areas as "security areas" or "danger areas". Any person found with unlawful firearms, ammunition, or explosives in a "security" area may be sentenced to death (Section 57).

The Malaysian government has consistently expressed the view that it has detained only those persons who have acted against the best interests of the nation, but as persons can be detained on suspicion, and no proof of any illegal act is required, it is impossible to verify this assertion. The number of persons who have been detained for periods exceeding two years under ISA orders are as follows: 1967 (265), 1975 (1,444) and 1977 (1,118). The number of persons detained for the 60 day investigatory period are 1969 - 75 (3,454) and 1970 - 77 (6,861), (14).

It is not questioned that a proportion of those detained are "communist subversives" who have engaged in violent acts of terrorism. However, it has been alleged that the Internal Security Act is also used to suppress political dissent from legal opposition parties as well as trade unions.

Emergency (Security Cases) Regulations, 1975

The definition of 'security offence' in regulation 21(1) of the 1975 Regulations empowers the Attorney-General to certify that an offence against any other written law affects the security of the Federation, in which event the person accused of that offence becomes liable to be tried in accordance with the rules of procedure and evidence prescribed by the 1975 regulations.

An article on this Regulation and on the Provisions of the Community (Self-Reliance) Regulations, 1975, in Review No. 16 (June 1976) of the International Commission of Jurists, stated:

> "The International Covenant on Civil and Political Rights recognises the right to suspend many human rights in the event of a "public emergency which threatens the life of the nation . . . to the extent strictly required by the exigencies of the situation". Regrettably, in more and more countries states of emergency are being proclaimed and maintained for very long periods accompanied by restrictions on basic human rights which appear to go beyond what is strictly required for protecting the "life of the nation" as opposed to the life of the government in power.

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(13) The police have a Special Branch to deal with security matters.

(14) Asia Forum on Human Rights, The State of Human Rights in Malaysia, p. 8.

The Essential (Security Cases) Regulations, 1975, passed under the long continuing state of emergency in Malaysia, appear to fall into this category. Under these Regulations suspects may be detained on the order of the Public Prosecutor for up to 60 days without being brought before a magistrate. A suspect who absconds and fails to surrender within 30 days of a proclamation will have all his property and assets confiscated. A person charged with a security offence will be tried by a judge alone, without a jury. There will be no preliminary proceedings and the defendant is not entitled to see any prosecution witness statement. The charges may be added to or amended at any time before trial. Bail may not be granted. Any number of offences or defendants may be joined in the same proceedings. Prosecution witnesses may be heard in camera without the presence of the defendant or his counsel, or their evidence may be given on affidavit omitting any matter from which the witness could be identified. Convictions can be based on hearsay evidence, as well as on uncorroborated testimony of an accomplice or minor. A police officer can give evidence of an identification by a third person without that person being called as a witness. If the case is proved it is mandatory for the court to impose the maximum penalty permitted by law for the offence, including in appropriate cases death or life imprisonment or, where the punishment includes whipping, "the maximum of such punishment ... in addition to any other punishment". There are limitations on the defendant's rights of appeal but those of the prosecution are unlimited. These regulations are to be seen against the background of the existing law in the Internal Security Act, 1960, under which persons charged with acting against the security of Malaysia could already be detained for indefinite periods.

Equally disturbing are the provisions of the Community (Self-Reliance) Regulations, 1975, which make every member of a household above the age of 14 responsible for the family's activities. This is either to be regarded as a form of guilt by association, or as a kind of reprisal. In either case it is a serious violation of basic principles of justice. Students have been singled out for more specific restrictions, apparently in response to widespread student demonstrations in support of the demands of farm labourers on strike in late 1974. The Universities and University Colleges (Amendment) Act, 1975, prohibits students from joining or supporting any society, political party, or trade union, inside or outside Malaysia, even if lawfully established. In addition, any student charged with any criminal offence is automatically suspended or dismissed from his College or University. Measures such as this are bound to drive underground a great deal of student activity and to create the conditions for the spread of the subversion which the emergency is supposedly intended to avoid.

It is encouraging that Malaysian lawyers have spoken out against these new regulations."

The Universities and Colleges Act of 1975, also restricted student activities in the country's campuses. In 1979, regulations were drawn up to forbid university lecturers from participating in politics.

Restrictions have also been imposed on other sections of society. In 1980, Parliament passed amendments to the Trade Union Ordinance, placing numerous restrictions on the activities of trade union organisations and giving much stronger powers to the Trade Union Registrar.

The Societies Act

In April 1981, amendments were made to the Societies Act, 1966, giving the government sweeping powers through the Registrar of Societies to control the activities of the 14,000 societies registered in Malaysia. As outlined in Review No. 27 (December 1981) of the International Commission of Jurists :

"- The changes make it illegal for any society to comment on political affairs or anything to do with government unless it has been registered as a political society.

The Registrar is given power to de-register any organisation, remove its office-bearers, amend its rules and include certain provisions in its constitution.

- Moreover, organisations may no longer challenge the Registrar's decisions in court. They can only appeal to the Home Affairs Minister, whose decision will be final.

- Organisations are no longer allowed to affiliate themselves with foreign organisations, nor to receive funds from any foreign source, except with the Registrar's permission."

Many varied societies representing a broad spectrum of Malaysian life jointly opposed the amendments made to the Societies Act. As a consequence, the government indicated its willingness to reconsider the amendments.

VI. ROLE OF THE JUDICIARY AND THE BAR

The role of the Judiciary has been limited. The Courts have consistently taken the view that the determination by the government that an emergency exists, and the issuance of the Proclamation of Emergency, are non-justiciable.

In contrast, the positions taken by the Bar have been exceptional. It has, on a number of occasions, made outspoken comments on emergency legislation or its application. Review No. 22 (June 1979) of the International Commission of Jurists drew attention in one of its reports, as follows:

> "The conditions of preventive detention in Malaysia appear far from adequate, according to a critical report of the Malayan Bar Council. The Council, in a document sent to the Prime Minister and the Attorney General and Law Minister set out the conclusions of an investigation it has made into complaints from the families of detainees regarding the conditions under which their relatives have been detained under the Internal Security Act of 1960.
>
> The Bar Council found that detainees are being treated as if they were criminals, although detention under the Act is a preventive and not a punitive measure. In its report, made public in March 1979, the Bar Council states that detainees have been subjected to solitary confinement, prolonged interrogation, restrictions of the right to counsel, limitations on access to reading material, as well as inadequate medical care.
>
> It is to be hoped that the action taken by the Malayan Bar Council in bringing to public attention the conditions of detention will be followed by bar associations in other countries where such conditions prevail. "

VII. CONCLUSIONS

In spite of the considerable social divisions in its population, and in spite of its having had to contend with attempts by Marxist-led guerrilla forces, dating from before independence, to overthrow the democratic form of society, the Federation of Malaysia can claim to be among the most democratic countries in its region, and to enjoy to a considerable degree fundamental freedoms under the Rule of Law.

During its history it has on four occasions experienced proclamations of States of Emergency, two of them being only local in their application. The need for these proclamations has not been seriously challenged.

As in other countries, there have been criticisms that the government has prolonged the states of emergency beyond the termination of the circumstances which gave rise to them, and has progressively extended, rather than lessened, the exceptional powers it has taken under them.

The fact that emergency measures are intended to be only temporary in character is lost sight of when, as has happened in Malaysia, persons are held in administrative detention for periods exceeding 16 years without any charge being preferred against them and without being brought before a Court. To extend emergency powers in this way is to strip constitutional rule of much of its meaning.

The problems confronting any government in Malaysia in maintaining stability and order are real, and it is never easy nor welcome for outsiders to seek to pass judgment upon the measures which have been adopted to secure the necessary stability. It is, however, difficult to avoid the conclusion that the emergency powers which have been assumed are unnecessarily wide. The whole range of security legislation in the country, including the provisions of the Internal Security Act, would perhaps benefit from an independent review by a high level Malaysian Commission in which its respected and competent jurists and advocates should be represented.

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DEVELOPMENT OF THE CONSTITUTIONAL PROVISIONS ON EMERGENCY POWERS

Provisions Recommended by 1957 Constitutional Commission

137.-(1) Subject to the provisions of this Article, if an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause, or to cause any substantial number of citizens to fear, organized violence against persons or property, any provision of such Act designed to stop such action or meet such threat shall be lawful notwithstanding that it is repugnant to any of the provisions of Articles 5, 9, 10, 68 or 73.

(2) Any Act of Parliament to which clause (1) applies shall cease to operate on the expiration of a period of one year from the date of the enactment thereof, without prejudice to the power of Parliament to renew such Act in accordance with the provisions of this Article.

Provisions of the Constitution as they originally stood on Merdeka Day

149.(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause, or to cause a substantial number of citizens to fear, organized violence against persons or property, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, or 10, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect on the expiration of a period of one year from the date on which it comes into operation, without prejudice to the power of Parliament to make a new law under this Article.

Provisions of the Constitution as amended and as they stand presently at time of writing (Oct.1977)

149.(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation --

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the security of the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is

138.-(1) If the Federal Government is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, whether by war or external aggression or internal disturbance, the Yang di-Pertuan Besar may issue a Proclamation of Emergency, in this Article referred to as a Proclamation.

(2) When a Proclamation is issued in accordance with the provisions of clause (1), if Parliament is not sitting it shall be the duty of the Yang di-Pertuan Besar to summon Parliament as soon as may be practicable.

150.(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, whether by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency.

(2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10, or would apart from this Article be outside that legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

150.(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency.

(2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

(3) A Proclamation shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to operate at the expiration of a period of two months from the date of its issue unless, before the expiration of that period, it has been approved by resolutions in both Houses of Parliament.

(4) While a Proclamation is in operation, notwithstanding anything in this Constitution --

(a) the executive authority of the Federation shall extend to any of the matters within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof;

(b) the legislative authority of Parliament shall extend to --

(i) any matter within the exclusive legislative authority of a State;

(ii) the extension of the maximum duration of Parliament or of a State

(3) A proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to be in force --

(a) a Proclamation at the expiration of a period of two months beginning with the date on which it was issued; and

(b) an ordinance at the expiration of a period of fifteen days beginning with the date on which both Houses are first sitting,

unless, before the expiration of that period, it has been approved by a resolution of each House of Parliament.

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

(3) A Proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2).

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

Legislature, the suspension of any election required by or under this Constitution or the Constitution of any State, and the making of any provision consequential upon or incidental thereto; and

(c) if and so long as either House of Parliament is not sitting and the Federal Government is satisfied that existing circumstances require immediate action, the Yang di-Pertuan Besar shall have power to promulgate ordinances having the force of law.

(5) Any provision of an Act of Parliament enacted while a Proclamation is in force shall be valid notwithstanding that it is repugnant to any provision of Part II.

(5) While a Proclamation of Emergency is in force Parliament may, notwithstanding anything in this Constitution, make laws with respect to any matter enumerated in the State List (other than any matter of Muslim law or the custom of the Malays), extend the duration of Parliament or of a State Legislature, suspend any election, and make any provision consequential upon or incidental to any provision made in pursuance of this clause.

(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, or in the Constitution of the State of Sarawak*, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.

(6) Any provision of an Act of Parliament which would, but for the provisions of this Article, be invalid shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as to things done or omitted to be done before the expiration of the said period.

(6) No provision of any law or ordinance made or promulgated in pursuance of this Article shall be invalid on the grounds of any inconsistency with the provisions of Part II, and Article 79 shall not apply to any Bill for such a law or any amendment to such a Bill.

(6) Subject to Clause(6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution or of the Constitution of the State of Sarawak*.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of the Malays, or with respect to any matter of native law or custom in a Borneo State; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

* Temporary amendment vide Act 68/1966 w.e.f. 20.9.1966 which will cease to have effect six months after the date on which the Proclamation of Emergency of 14.9.1966 (P.U. 339A/1966) ceases to have effect.

(7) An ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such ordinance --

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of fifteen days from the reassembly of both Houses unless before the expiration of that period it is approved by resolution in both Houses, and

(b) may be withdrawn at any time by the Yang di-Pertuan Besar.

(8) Where a Proclamation relates to a part only of the Federation, the expression "State" in this Article means a State wholly or partially within that part.

139.-(1) Where any law in force under this Part provides for preventive detention, no citizen of Malaya shall be detained under such law for a period longer than three months unless an advisory board, consisting of three persons who are or have been or are qualified to be judges of the Supreme Court, and are appointed by the Chief Justice, has reported before the expiration of the said period of three months, after considering any representation made in accordance with clause (2), that there is, in its opinion, sufficient cause for such detention.

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.

151.(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention --

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

(b) no citizen shall be detained under the law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a) and has reported, before the expiration of that period, that there is in its opinion sufficient cause for the detention.

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.

151.(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention --

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

b) not citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him

(2) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds thereof together with the allegations of fact upon which the order is based and shall afford him the earliest opportunity of making a representation against the order:

Provided that the said authority may refuse to disclose facts whose disclosure would be, in the opinion of the authority, against the national interest.

(2) An advisory board constituted for the purpose of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong from among persons who are or have been judges of the Supreme Court or are qualified to be judges of the Supreme Court, and two other members, who shall be appointed by the Yang di-Pertuan Agong after consultation with the Chief Justice or, if at the time another judge of the Supreme Court is acting for the Chief Justice, after consultation with that judge.

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

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under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

(2) An advisory board constituted for the purpose of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Federal Court or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members, who shall be appointed by the Yang di-Pertuan Agong after consultation with the Lord President of the Federal Court.

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.

THE STATE OF EMERGENCY IN NORTHERN IRELAND

CONTENTS

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I. THE EMERGENCY AND ITS BACKGROUND

The Northern Ireland problem is a legacy of England's 800 year long involvement in Ireland. From the time of Henry II, the Kings of England and then English Parliaments asserted their strategic and economic interests, conquering the local inhabitants and introducing large garrisons of settlers, particularly in the seventeenth century plantations. Large tracts of land in north-central and north-western Ireland, forfeited by the treason of rebellious lords, were parcelled out to English colonists without regard to the rights of Irish landholders and tenants. The Ulster plantation had been preceded over centuries by extensive informal migration of Scots settlers along Ireland's eastern coasts, a process which speeded up after the plantation in the second half of the seventeenth century. Most settlers were Presbyterians or Anglicans, whereas the earlier inhabitants remained loyal to the Roman Catholic Church and, as "Popish recusants", suffered major civil disabilities, only receiving full political rights with Catholic emancipation in 1829.

In contrast, the Protestant minority in Ireland (in particular the Anglicans) enjoyed an ascendancy throughout the island, exercising influence on successive British governments and having a disproportionately large share of the land and wealth.

There was, however, a fundamental difference between the settlers in Ulster and those elsewhere. In other parts of Ireland, the Protestant settlers were distributed throughout the territory and in time became integrated with the rest of the population, some of their descendants even becoming leaders in the movement for Irish independence. In Ulster settlers were of a different nature and were brought for a different purpose. Ulster had offered the strongest and largest resistance to British domination, and when finally their forces were defeated in the 17th century, the Ulster plantations were settled with self-contained communities mostly of Presbyterian sects. These settlers made no attempt either to integrate with the local population or even to dominate them. They simply drove them out of their land, with the slogan "To hell or to Connaught", Connaught being the wildest, most barren and most thinly populated province of Ireland. Consequently, for 300 years the Ulster Protestants have remained a community apart, fearful of domination by the Catholic population of Ireland, and looking to Britain to protect them from it.

When, in 1922, the British government recognised national Irish aspirations by granting Home Rule under the British Crown to the Irish Free State (the pre-cursor of the present Republic of Ireland) as a dominion within the British Commonwealth, it made provision for the exclusion from the settlement of six of the eight counties of the Province of Ulster. This was done under threat of armed rebellion by the Ulster Protestants. The eight counties of the Province of Ulster were evenly divided between Catholics and Protestants. The six counties were, therefore, carved out to create Northern Ireland, with a majority of two Protestants for every Catholic, a proportion which has remained ever since. A protected ascendancy in the North was thus assured. However, instead of demanding that Northern Ireland should become a fully integrated part of the United Kingdom, and thereby ensuring equal treatment for the Catholic minority, the British Parliament granted to Northern Ireland its own Parliament and government for its internal affairs.

Irish history therefore resulted in there being a minority of Protestants in the island of Ireland as a whole, but a minority of Roman Catholics in partitioned-off Northern Ireland. Tension arising from Ireland's colonial history, from population distribution, from socio-economic disparities, and from the approximate congruence of ethnic ties, religion and nationalism, thus gave rise to problems of self-determination and the protection of double minorities in the contest of democracy or majority rule - problems which led to an absence of consensus and to an unwillingness to recognise the legitimacy of the entity of Northern Ireland on the part of the Catholic minority. Grievances against the Protestant-dominated administration strengthened the alienation of the Catholic minority from the state: the Cameron Commission, a body appointed by the Northern Irish government in March 1969 to report inter alia, on the causes of the disturbances which had by then broken out, confirmed that there was widespread discrimination of Roman Catholics in housing and employment; that local government electoral boundaries had been deliberately manipulated to the detriment of the minority; that the Ulster Special Constabulary (the so-called "B" specials) constituted a partisan and para-military auxiliary police force recruited exclusively from Protestants; and that the authorities had failed to remedy or even investigate these grievances.

Against this background, civil unrest and intervention by illegal Irish nationalist para-military organisations occurred repeatedly, in particular in the periods 1922-1924, 1938-1939, 1956-1962. Northern Ireland has, in fact, been in an intermittant state of emergency since its creation in 1922, emergency legislation being a permanent feature of the system. In particular, the Civil Authorities (Special Powers) Act 1922 granted sweeping emergency powers, allowing the Minister of Home Affairs for Northern Ireland to take all such steps and issue all orders as might be necessary for preserving peace and maintaining order. Measures taken under the Act were contained in Regulations. The number and scope of Regulations in force varied over the years; they could be brought into use without any legislative act or proclamation - even though they could bear directly on civil rights. In 1971, the powers under the Act were utilised to effect extra-judicial deprivation of liberty.

The present emergency differs in origin from earlier periods of unrest in that it has its roots in a campaign for civil rights for the Catholic minority, begun in 1963. What is significant about this campaign is that it focussed on the granting of equal rights and opportunities to Catholics within Northern Ireland, rather than on the question of the legitimacy of the state as such. The failure on the part of the authorities to respond positively to the recognition of the state implicit in the demand for civil rights is one of the root causes of the present emergency: as Boyle, Hadden and Hillyard describe in their book, "Law and State: a case-study of Northern Ireland", effective legal redress for justified grievances was denied time and time again by the executive and judicial authorities. It is without doubt one of the most tragic aspects of the present emergency that it has its roots in a situation which also bore the seeds for an intercommunal settlement based on equal rights and opportunities for all citizens, Catholic and Protestant, within the entity of Northern Ireland, and that the legal system and the courts failed dismally in their task to uphold the rights of citizens in "the oldest democracy in the world". Had it done so, the present bloodshed might have been avoided.

As it happened, internecine violence (in which elements of the police force joined) led to a re-emergence of para-military organisations and of the old conflict about the legitimacy of the state of Northern Ireland.

The current wave of violence can be said to have followed on from a civil rights protest march held in Londonderry on 5 October 1968 by the largely Catholic Civil Rights Association. The march was suppressed by the authorities and further marches were banned. Thereafter, disorders escalated and actions by various groups heightened tension. Renewed protest marching by the Civil Rights Association and other Catholic groupings, Protestant counter-marches and demonstrations, sectarian rioting, indiscipline by some members of the R.U.C. and Ulster Special Constabulary, violence by extremist organisations, including both the (Catholic) Irish Republican Army and the (Protestant) Ulster Volunteer Force, created further civil unrest. Casualties and damage to property were extensive.

Violence had begun haphazardly, and initially there were no organised campaigns of armed insurrection by one side or of armed vengeance by the other. However, extremists in the communities inflamed passions and precipitated further violence. Eventually, in August 1969, simultaneous Catholic rioting in Londonderry and Protestant rioting and attacks on Catholic property in Belfast left the Northern Ireland government and its police incapable of suppressing the disorders. The British Army was, with United Kingdom Government agreement, called in to restore peace. Despite the Army's involvement, violence by illegal para-military groupings from both communities increased. From July 1970, the Army became the target of a reactivated Irish Republican Army, which developed both Official and Provisional wings, the latter being more convinced of the necessity for generalised violence and the former more reliant on political pressures. The Army's action in restoring order was perceived by the Catholic community as mainly directed against it, and this was re-emphasised when conjoined with some official misbehaviour and improper interrogation practices (cf. the Falls Road, Belfast operation of July 1970; Londonderry shootings in early July 1971; the internment operation of August 1971; and "Bloody Sunday" of 30 January 1972 in Londonderry). Simultaneously, Protestant para-military groupings initiated sectarian warfare against the Catholic community, which they saw as passively supporting the I.R.A. and re-unification of Ireland. When constitutional reforms were imposed by the United Kingdom Government, they resisted these. Indeed, in May 1974, the Protestant Ulster Workers' Council and para-military leaders were able to paralyse essential services and cause the collapse of the then Executive in Northern Ireland.

Nonetheless, major reforms and constitutional changes were undertaken in the period 1968 to 1972. These, however, did not settle the Northern Ireland problem. Reform is inevitably slow and never satisfies those who want a revolutionized society. Heightened expectations of change, indeed demands for instant miracles, and the fact that such reforms were obviously given unwillingly by the Northern Ireland government under pressure from Westminster and in the face of considerable opposition by members of the governing party, led to dismissal of, and disillusionment by the minority with, the reform programme. Rational explanations for delay are rejected in such an atmosphere of mistrust. Large-scale reform would inevitably be slow

because it was essential that it would be carried through without provoking major Protestant counter-reaction, and because time and adequate planning was essential for major restructuring of government, including the whole range of local government services. An extensive reform programme was initiated and was virtually fully implemented within three and a half years of its first announcement. There were major changes in law, structure of government and, most significantly, of power. The power changes comprised a shift of initiative and activity to the Government and Parliament at Westminster; a disbandment by the Government of Northern Ireland of its "private army", the Ulster Special Constabulary; the renunciation of para-military functions by its police force, the Royal Ulster Constabulary (R.U.C.); and full implementation of the democratic principle in parliamentary and local government elections. Structurally, the whole of local government was reorganised in order to remove possible controversial areas of power from local authorities, which were more likely to reflect partisan prejudices, and so as to transfer the administration of these powers into the hands of the independent Civil Service of Northern Ireland. Special institutions were created to ensure that there would in future be no discrimination in any aspect of public administration or in any respect of any public appointment. The institutions were the office of Northern Ireland Parliamentary Commissioner for Administration, Commissioner for Complaints, Minister of Community Relations, Community Relations Commission, Civil Service Commission, and Local Government Staff Commission, combined with codes of employment procedure and non-discrimination undertakings exacted in government contracts from contractors.

Although some modifications and amendments of the new legislative measures were desirable to make the new institutions more effective, it is fair to state that the grievances put forward in 1968 by the Civil Rights Association were largely remedied, but security legislation, particularly the Special Powers Act, remained.

In 1971, the Northern Ireland government introduced administrative internment of persons suspected of terrorist activities, against whom sufficient evidence could not be produced in court. Neither internment, nor political and social reform introduced since that time have, however, led to an end of the violence.

Further proposals for constitutional change to meet the Catholic community's demands for power-sharing and a reflection of an Irish dimension were insisted on by the Heath Government. They hoped to conciliate the Catholic third of the population, which was by and large disaffected and passively supporting urban guerillas with an adjacent friendly base (the Republic), while the Catholic-supported Parliamentary opposition had withdrawn from Parliament since mid-July 1971 because of refusal to hold a public inquiry into two army shootings in Londonderry. Despite imaginative proposals by the Unionist Government for functional parliamentary committees, a proportional representation electoral system, for periodic border polls, for a judicially reviewable bill of rights and an advisory Council of Ireland with equal membership for Belfast and Dublin Governments (1) they were told that

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(1) See Cmnd. 560, Belfast, H.M.S.O., 1971 and Cmnd. 568, Belfast, H.M.S.O., 1972.

law and order powers must be transferred to Westminster, and that constitutional changes were open-ended. Mr. Faulkner's government resigned. The United Kingdom Parliament then passed the Northern Ireland (Temporary Provisions) Act 1972. This provided for a Secretary of State for Northern Ireland as chief executive officer. The Parliament of Northern Ireland was prorogued. Her Majesty in Council would by Order make laws for Northern Ireland, while the Secretary of State would make all delegated legislation. Thus began Direct Rule, something intended to be in force for only one year, but renewable on an annual basis by parliamentary resolution. Direct rule is still in force.

As the emergency intensified, and the British government became directly involved in law enforcement, legislative intervention by the United Kingdom Parliament became necessary. Some changes were designed to avoid international criticisms (2), e.g. the Detention of Terrorists Order 1972 (3) substituted interim custody orders and detention for the detention and internment powers under the Special Powers Act and attempted to make the procedure for detention orders more akin to a judicial proceeding. The Northern Ireland (Emergency Provisions) Act 1973 (4) (NIEPA) replaced this Order after a Report had been made by a commission chaired by Lord Diplock to consider what measures other than internment by the executive could be used to deal with terrorism (5). The 1973 Act repealed and replaced the Special Powers Act, which was regarded as odious by the Catholic community. In fact, it made modifications to the law of evidence and criminal procedure which facilitated conviction of terrorists (see below). Following further public criticism, a Committee under Lord Gardiner reported on the working of the 1973 Act with a brief to preserve so far as practicable the maximum extent of civil liberties (6). The Report recommended a reversion to detention by the executive because the quasi-judicial procedures had brought the ordinary processes of law into disrepute.

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(2) The Republic of Ireland lodged an application against the United Kingdom at the European Commission of Human Rights on 16 December 1971. Ireland alleged inter alia that the measures taken in Northern Ireland were in violation of Article 5 of the European Convention on Human Rights since they failed to meet the requirements of Article 15.

(3) S.I. 1972 No. 1632 (N.I. 15).

(4) c. 53.

(5) Cmnd. 5185, Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, H.M.S.O., 1972.

(6) Cmnd. 5847, Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland, H.M.S.O., 1975.

Numerous safeguards in the proposed executive procedure were suggested. In the event, the Northern Ireland (Emergency Provisions) (Amendment) Act, 1975, partially enacted the Gardiner Report recommendations (7). The legislation was consolidated as the Northern Ireland (Emergency Provisions) Act, 1978 (NIEPA).

The other significant United Kingdom Act was passed to placate public opinion in Great Britain after the public house bombings in Birmingham in 1974, and went through all its legislative stages within three days. The Prevention of Terrorism (Temporary Provisions) Act, 1974, gave the police powers of arrest and detention which were increasingly employed in Northern Ireland from 1976. The legislation was subsequently re-enacted in 1976 (8). NIEPA 1978 and PTA 1976 are the major Acts under which the law enforcement authorities operate.

Among other legislative measures to deal with the special circumstances in Northern Ireland, the following may be mentioned: amendments were made to the Public Order Act to include greater powers of prohibiting processions and public meetings, and penalties for obstructive sitting in public places and trespasses in public buildings; the Prevention of Incitement to Hatred Act (N.I.) 1970, designed to impose penalties for incitement to hatred against any section of the public in Northern Ireland on grounds of religious belief, colour, race or ethnic or national origin; furthermore, to cover the gap left by the abolition of the crime of misprision of felony and the difficulty of securing information about terrorists, a duty was imposed on every person who had reason to believe that any other person had died or received grievous bodily harm or had been wounded as the result of the discharge of any firearm, explosive device or by any offensive weapon, immediately to inform a member of the police or armed forces on duty of all the facts and circumstances of the case so far as they were known to him.

Apart from creating specific offences, these statutes conferred executive powers, in some cases exercisable by the Secretary of State and in others by the law enforcement authorities, to protect society against terrorist action or against breach of the peace or public disorder. Failure to observe orders given under the executive powers are in most cases sanctioned by new offences. The executive powers relate to the proscription of organisations, exclusion from Northern Ireland or from the United Kingdom, dispersal of assemblies of three or more persons, the regulation and prohibition of processions, the regulation of funerals, the stopping-up of highways, the regulation and prohibition of road traffic, the stopping of trains, the closing of clubs and licensed premises and

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(7) For cogent criticism of the failure to enact many recommended procedural safeguards, see R. J. Spjut, "Executive Detention in Northern Ireland: the Gardiner Report and the Northern Ireland (Emergency Provisions) (Amendment) Act, 1975" (1975), X, Irish Jurist, 272-299.

(8) The Prevention of Terrorism (Temporary Provisions) Act, 1976, see c. 8, hereinafter referred to as PTA 1976.

the taking of property.

Before discussing a number of aspects of the emergency legislation in some detail, it may already be observed that generally this legislation has not only granted wider, more discretionary, powers to the executive authorities and the police, but at the same time has reduced judicial control over the exercise of these wider powers, leaving them more open to abuse.

II. EFFECTS OF EMERGENCY MEASURES ON CIVIL RIGHTS

Measures taken by the security forces in Northern Ireland to suppress terrorism built up strong feelings of resentment against the British Army by members of the community. In order to gather security information about terrorist activities, the army engaged in widespread search, arrest and "screening" operations. Information, not only on suspected terrorist activities of individuals but on whole sections of the (minority) community, was collected partly by surveillance by uniformed and plain-clothes personnel, partly by recording information obtained in searches and road-blocks, and in particular from information obtained as a result of widespread arrests and interrogation.

There have been complaints by the minority community, as well as by some parts of the majority community, that the use made by the Army of their powers was excessive and constituted a real and continuing source of grievance and friction. In particular, there have been complaints about arbitrary use of the powers of arrest and detention to build up data on persons not suspected of involvement in terrorism, and as a form of harassment of particular individuals and groups. Other criticisms were directed at the denial of various rights to persons under detention and to prisoners, and in particular since the ending of internment, at the various modifications to the criminal law and procedure made by the emergency legislation, and at ill-treatment of detainees. These will be discussed below.

Arbitrary Use of Arrest Powers

The general rule in Northern Ireland, as in England, is that no man can be arrested or imprisoned except under due process of law (Petition of Right, 1628 and Magna Carta, 9 Hen. 3, c. 29). An arrest may lawfully be effected by a police officer who acts on a written warrant for arrest granted by a Justice of the Peace, or other judicial authority who is empowered to issue warrants, after application supported by a statement on oath outlining the alleged offence. Police officers and private persons have power to arrest without warrant where they suspect with reasonable cause that a crime has been committed or to prevent the commission of an arrestable offence (Criminal Law Act, 1967, s. 2). The arrested person should be made aware of the fact that he is under arrest and also should be informed promptly of the reason for his arrest. If he is not so informed or is informed of a wrong reason, his arrest is unlawful.

The Diplock Committee was of the opinion that the above rules are not practicable for the initial arrest of a suspected terrorist in the extremist strongholds in Northern Ireland. Arrests at the time were usually made by soldiers (rather than by police officers), either in the course of an armed patrol, or at road-blocks, or when, as a result of intelligence information received, they conducted a surprise search of premises on which terrorists were thought to be present. Lord Diplock observed that such arrests were liable to be:

> "hindered by crowds of sympathisers, including women and children, hurling stones and other missiles and possibly carried out under fire from snipers."

Accordingly, it was enacted in s. 12 of the Emergency Provisions Act, 1973 (consolidated in s. 14 of the 1978 Act) that:

> "/1/ A member of Her Majesty's forces on duty may arrest without warrant, and detain for not more than four hours, a person whom he suspects of committing, having committed or being about to commit any offence.
>
> /2/ A person effecting an arrest under this section complies with any rule of law requiring him to state the ground of arrest if he states that he is effecting the arrest as a member of Her Majesty's forces."

Although envisaged by Lord Diplock as only to be used to establish the identity of the arrested person, and not otherwise for questioning, the power has been widely abused for general information gathering.

Equally wide, and equally unchallengeable powers of arrest, but combined with much wider powers of detention, have been granted to the police. S. 11 (1) of the 1978 version of the Emergency Provisions Act provides that:

> "Any constable may arrest without warrant any person whom he suspects of being a terrorist."

A person arrested under this section may be detained for up to 72 hours. As Judge Bennett noted, the power of arrest under s. 11 does not depend on the suspicion or commission of any specific offence; and it arises on the subjective judgment of the police officer. As a result, the arrests are de facto unchallengeable in court.

The Prevention of Terrorism Act provides in s. 12 that a constable may arrest without warrant anyone whom he reasonably suspects to be:

> "a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism."

Persons detained under this provision may be held for up to 48 hours on the authority of the police alone; the Secretary of State for Northern Ireland may extend this period by another five days, at the request of the police (neither the detainee nor his lawyer is heard).

In spite of the fact that "reasonable" suspicion is required, the willingness of the courts to accept a police statement that their suspicion is based on information which cannot be disclosed make arrests under s. 12 of the Prevention of Terrorism Act equally unchallengeable as those under s. 11 of the Emergency Provisions Act.

In fact, in a ruling on a habeas corpus application on behalf of Martin Henry Lynch, the Lord Chief Justice has held that under the emergency legislation repeated arrests in quick succession on the same suspicion are not unlawful, and that the treatment and conditions of persons detained under this legislation also do not affect the legality of that detention. The writ of habeas corpus is therefore not available in case of denial of access to a lawyer or in case of irregular police behaviour.

Although the emergency legislation also provides for powers of arrest based on suspicion of a specific offence (rather than on mere general suspicion of involvement in terrorism), the Bennett Committee established that in fact the police use the above two powers in all cases irrespective of the nature of their suspicion, because these powers allow for extended detention for questioning. The police thereby by-pass safeguards built into the provision dealing with arrests made with a view to criminal prosecution.

Denial of Access to a Solicitor

Access to a solicitor is governed by a principle of Common Law, set out in the preamble to the Judges' Rules (which govern interrogation in ordinary circumstances):

> "... every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody, provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so."

It has been stated that "this principle recognises that access to a solicitor in general be allowed but also recognises that the police have a discretion in certain specific circumstances to withhold access from a person in custody". However, the wording of the exception is so vague and subjective as to leave little force to the rule, and the courts have specifically declined to declare incommunicado detention unlawful (in re Martin Lynch, supra).

In 1978, Amnesty International, citing practicing solicitors in Northern Ireland, linked denial of access to solicitors directly with the incidence of ill-treatment of suspects. Although as a result of the Bennett Committee's recommendations access to a solicitor is now granted as of right after 48 hours of detention, access is still regularly denied until then, without any consideration of the individual case, which would appear to be an abuse of the discretion to deny access until then. Even when access is granted after 48 hours, the police have a right to be present, within hearing, at the meeting between the detainee and his lawyer. The latter has proved unacceptable to most lawyers.

The Administrative Directions to the police, appended to the Judges' Rules since the Bennett Report (see below), also give a person in custody the right to speak on the telephone to his solicitor or his friends.

Ill-treatment in the Course of Interrogation

At the time of the August 1971 internment operation, the persons arrested were interrogated, usually by members of the R.U.C., in order to determine whether they should be interned and to compile information about the I.R.A. Maltreatment during interrogation was investigated in the Compton and Parker Reports (9). The judgment of the European Court of Human Rights in the case of Ireland v. United Kingdom gives a picture so far as the Court could get information. (It concluded that neither the witnesses for the security forces nor the case witnesses had given accurate and complete accounts of what had happened.) (10). In general, it seems there were widespread assaults (kicking, punching, hair-pulling, etc.) and forcing prisoners to stand spread-eagled or to do tiring exercises. In particular, at one or more unidentified interrogation centres, 14 prisoners were subjected to "interrogation in depth", sometimes referred to as "disorientation" or "sensory deprivation" techniques. These involved wall-standing, hooding, subjection to high-pitched noise, deprivation of sleep and of food and drink. These techniques were, the Government conceded, authorised at "a high level". In the Compton Report, the techniques were found to constitute "physical ill-treatment" but not "physical brutality". The Parker Report, with Lord Gardiner dissenting, concluded that the application of the techniques, subject to recommended safeguards against excessive use, need not be ruled out on moral grounds. Lord Gardiner found all the techniques illegal both at English Law and under the United Kingdom's international obligations, while the majority found some if not all the techniques illegal at English Law. In fact, the 14 persons who brought civil proceedings to recover damages for wrongful imprisonment and assault, each had their claims settled for between £10,000 - £25,000 individually (11). On 2 March 1972, the Prime Minister announced that the government accepted Lord Gardiner's minority report and that the techniques would not in future be used. A direction on interrogation was then issued prohibiting the use of coercion and the five techniques. It also made it mandatory for there to be medical examinations, the keeping of comprehensive records, and the immediate reporting of any complaints of ill-treatment. Further Army and R.U.C. instructions in April and August 1972 enjoined the proper and humane treatment of prisoners, forbidding resort to violence, the five techniques and threats or insults. Again, in August 1973, new instructions

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(9) Cmnd. 4823. Report on Allegations Against the Security Forces of Physical Brutality; HMSO, November 1971 (the Compton Report), and Cmnd. 4901. Report of the Committee appointed to inquire into the Interrogation Procedures in Northern Ireland, HMSO, March 1972 (the Parker Report).

(10) Ireland v. United Kingdom, para. 93.

(11) Ibid., para. 107.

emphasised the need by the Army in making arrests to behave properly. However, the Commission of European Rights considered that there was a lack of satisfactory evidence as to how the regulations were implemented and obeyed in practice (12). Finally, the United Kingdom Attorney-General formally declared to the European Court on 8 February 1977 that the Government of the United Kingdom "now give(s)this unqualified undertaking, that the 'five techniques' will not in any circumstances be reintroduced as an aid to interrogation" (13).

The Government of the Republic of Ireland had claimed before the European Commission and subsequently before the Court of Human Rights that the ill-treatment was in breach of Article 3 of the European Convention on Human Rights. Although the Commission found the five techniques constituted "torture", the Court, by 13-4, found they did not. However, by 16-1 they found the techniques used in August and October 1971 constituted a practice of inhuman and degrading treatment in breach of Article 3. The Court also held, unanimously, that there existed at Palace Barracks in the autumn of 1971 a practice of inhuman treatment, but that it had not been established that the practice continued beyond the autumn of 1971. At Ballykinler, practices by the Army and R.U.C. were "discreditable and reprehensible" but not an infringement of Article 3 (14). In respect of other places and cases (the United Kingdom Government having compensated prisoners (15) and disciplined security force members) the Court considered that, bearing in mind preventive measures now taken by the United Kingdom, individuals' rights to pursue domestic remedies or individual applications, and the deterrent effect of the findings in respect of the five techniques and Palace Barracks, there was no need to re-open the case to hear further evidence or to undertake substantial research, and therefore concluded that there was no practice in breach of Article 3.

It is important to note, however, that the Commission's consideration regarded only the question of whether the interrogation practices were in breach of Article 3 (in that they constituted torture or inhuman and degrading treatment). Since the litigation arose out of arrests which were made with a view to internment, the question of the acceptability of practices which are held not to be in breach of Article 3, such as those practiced at Ballykinler, was not considered. Some remarks are made on this below.

After the autumn of 1971, scrutiny of newspaper reports reveals intermittant allegations of maltreatment and brutality. The most weighty allegation appeared in a Report by Amnesty International, published in June 1978 which concerned 78 persons detained for up to seven days under

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(12) Ibid., para.107.

(13) Ibid., para.102.

(14) Ibid. para. 181.

(15) Ibid., paras. 111-122, show that many claims alleging assault were settled by the authorities by the payment of compensation.

emergency legislation, most of them arising in 1977. This Report led to the appointment of the Bennett Committee, which reported fully on police interrogation procedures. The Bennett Report produced much evidence suggesting misconduct by police during interrogation. Between 1 April 1972 and September 1978, there were 119 claims commencing civil proceedings against policemen for damages for personal injuries arising from incidents in that period (16). The European Commission of Human Rights found that between 9 August 1971 and 30 September 1975, 798 tort actions alleging assaults by the security forces were commenced in Northern Ireland. Of this number, 222 cases were settled out of court for damages totalling £420,000 (17). In criminal proceedings against prisoners in the two years from 1 July 1976 to 1 July 1978, 15 statements were ruled inadmissible (most because of ill-treatment of prisoners). Additionally, the D.P.P. declined to prosecute 11 persons on the basis that he was not satisfied that the statements had not been obtained contrary to section 8 of NIEPA 1978, i.e. by inhuman or degrading treatment or torture and that this could not be disproved by the Crown (18). Again, police officers were prosecuted for offences against prisoners in custody or in the course of interrogation. Between 1972 and 1978 arising from 8 incidents, 19 officers were prosecuted (one of them twice) (19). In addition to these facts, the forensic medical officers charged with inspecting prisoners had, beginning in 1977, expressed considerable concern and protest at increasing finds of bruising, contusions and abrasions, of tenderness associated with hair-pulling and persistent jabbing, of rupture of the ear drums, increasing mental agitation and excessive anxiety states, of hyper-tension and hyper-flexion of joints. Particular concern was expressed about prisoners who had gone through Castlereagh (one of the main police offices for centralised interrogation) and in early 1978 concern for a short period arose in respect of conditions at Gough (the other main police office), but these improved after strong representations by the doctors acting there (20).

The Bennett Report made proposals designed to protect prisoners against being harmed while in custody, and also to protect police officers against false and exaggerated complaints. In order to clarify the situation concerning what constituted "degrading physical or mental ill-treatment" (the provisions about "force" being insufficiently specific) the Report recommended:

> "that the following should be specifically prohibited:
>
> (i) any order or action requiring a prisoner to strip or expose himself or herself;

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(16) Ibid., para. 155.

(17) Donnelly et al. v. United Kingdom, Final Decision of the Commission, 15 December 1975, para. 45.

(18) Cmnd. 7497, para. 156.

(19) The twice-prosecuted officer was one of the catalysts leading to the proceedings in Donnelly et al. v. United Kingdom, Application 5577-5583/72, wherein it was alleged that there was an administrative practice of ill-treatment.

(20) Cmnd. 7497, para. 159.

(ii) any order or action requiring a prisoner to adopt or maintain any unnatural or humiliating posture;

(iii) any order or action requiring a prisoner to carry out unnecessarily any physically exhausting or demanding action or to adopt or maintain any such stance;

(iv) the use of obscenities, insults or insulting language about the prisoner, his family, friends or associates, his political beliefs, religion or race;

(v) the use of threats of physical force or of such things as being abandoned in a hostile area; and

(vi) the use of threats of sexual assault or misbehaviour." (21)

Similarly, in order to counter frequent allegations (and some of these were not contested by the authorities) about the number and length of interviews undergone by prisoners, the Committee felt that the present rule that interviews should normally take place between 8 a.m. and midnight required more regulation:

"We recommend as follows:

(i) no single interview should go on longer than the period between normal meal-times, and interviews should not continue during meal-times;

(ii) an interview should not commence or continue after midnight, except where operational requirements (for example, an urgent need to find out where an explosive device has been placed) demand that it should;

(iii) not more than two officers should be present at the interview of one prisoner at any one time; and

(iv) not more than three teams of two officers should be concerned with interviewing one prisoner." (22)

The Chief Constable, with some minor qualifications, accepted these recommendations. However, he and the Northern Ireland Office considered that to attempt to define conduct which would constitute "degrading physical or mental ill-treatment" in the R.U.C. Code would be unprofitable, as this might appear to condone ill-treatment not specified in the list. Instead, a general prohibition against such conduct was made, and it is now for any disciplinary body to decide whether the spirit of the prohibition has been infringed in a particular case (23).

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(21) Ibid., para. 180.

(22) Ibid., para. 181.

(23) Action to be Taken, etc., pp. 3 and 4.

The R.U.C. Code also contains a special section for interviewing officers. Other significant administrative steps to improve interrogation standards are the establishment of a training programme for interrogators; a policy of rotating officers between interrogation and general detective duties; a rule that in future female suspects shall be interviewed in the presence of a woman police officer; the provision of more senior detective officers to supervise interrogation; the placing on duty at Castlereagh of a larger number of uniformed supervisory officers; the grant of power to uniformed inspectors to enter interviewing rooms and to stop an interview; the provision of viewing lenses in the doors of all rooms where persons are interviewed in respect of scheduled offences; the installation of closed-circuit television camera screens (c.c.t.v.) in all interrogation interview rooms, with monitor screens available for the uniformed supervisory staff on duty; the provision of access to c.c.t.v. for medical officers; the rule that throughout the Province medical officers will see all terrorist suspects and persons suspected of scheduled offences once every 24 hours; and the prominent display of large notices about prisoners' rights in places to which prisoners have access (24).

High Conviction Rate Based on Confessions

In 1973, Special Courts were established, following the recommendations of the Diplock Committee, for trying persons charged with various terrorist offences. Two important changes were made with the express intention of facilitating convictions.

First, trial by jury was abolished in order to avoid acquittals due to bias or intimidation. The result was that the accused are tried in courts by a judge alone, an innovation in the case of serious offences under the common law, or indeed under any system of law.

Second, the common law rules on the admissibility of confessions whether oral or written were substantially modified so as to make it easier for the prosecution to obtain a conviction based upon an alleged confession.

The common law rules exclude statements (whether complete confessions or admissions merely showing an incriminating fact) if these have been induced by threats, promises or some form of oppressive conduct. An involuntary statement (and this has acquired a technical meaning) must not be admitted. Additionally, if the limitations on questioning set out in the Judges' Rules (25) are not observed, the judge has a discretion to exclude any statement made to the police (26). Furthermore, there is an overall judicial discretion to exclude any

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(24) Recommendations 21, 22, 23, 32, 33, 34, 35, 36, 38, 40 and 44 as dealt with in Action to be Taken etc.

(25) Until 1976, the 1918 English Rules applied. Since then, the 1964 Rules have applied.

(26) According to the Diplock Report, the Rules were rigidly applied as if they were a statute by Northern Ireland judges: Cmnd. 5185, para. 83.

statement even if it is legally admissible if it is unfairly prejudicial to the accused. The Diplock Committee considered that the practice of the Northern Ireland Courts was "hampering the course of justice in the case of terrorist crimes and compelling the authorities responsible for public order and safety to resort to detention in a significant number of cases which could otherwise be dealt with both effectively and fairly by trial in a court of law." (27).

On the Diplock Committee's recommendation, what is now section 8 of NIEPA 1978, provided that in the case of scheduled offences tried on indictment any statement made by the accused may be given in evidence by the prosecution so far as it is relevant and is not excluded. The provision governing exclusion is section 8 (2), which is as follows:

> "If, in any such proceedings where the prosecution proposes to give in evidence a statement made by the accused, prima facie evidence is adduced that the accused was subjected to torture or to inhuman or degrading treatment in order to induce him to make the statement, the court shall, unless the prosecution satisfies it that the statement was not so obtained -
>
> (a) exclude the statement, or
>
> (b) if the statement has been received in evidence, either -
>
> (i) continue the trial disregarding the statement; or (ii) direct that the trial shall be restarted before a differently constituted court (before which the statement in question shall be inadmissible)."

The Diplock Report suggested that their recommendation would leave as the basis for exclusion subjection of the accused to torture or to inhuman or degrading treatment in order to induce making of the statement (28). Although the new section rendered much admissible that previously

(27) Cmnd. 5185, para. 87. The Northern Ireland judges had held that, even where there was no violence, if the interrogation set up were organised and operated to obtain information from persons who would otherwise have been unwilling to give it, i.e. the circumstances in which the accused was detained were such as to sap his will, the set-up was oppressive and statements could not be regarded as voluntary. See R. v. Gargan, 10 May 1972; R. v. Flynn and Leonard, 24 May 1972; and R. v. Clarke, 23 November 1972. These cases are discussed by D. S. Greer, "Admissibility of Confessions and the Common Law in Times of Emergency", (1973) 24 N.I.L.Q. 199. In April 1973, the Attorney-General informed Parliament that in the preceding year confessions had been excluded in 21 cases and in 55 cases a nolle prosequi had been issued because of the inadmissibility of confessions: H. C. Deb. vol. 855 c. 388.

(28) See the Gardiner Report, Cmnd. 5847, para. 48, quoting the Diplock Report, paras. 98-90.

must have been excluded (there no longer being any need to satisfy the judge that the statement was voluntary according to the technical common law rules) Lowry L.C.J. ruled that:

> "there is always a discretion, unless it is expressly removed, to exclude any admissible evidence on the ground that (by reason of any given circumstances) its prejudicial effect outweighs its probative value and that to admit the evidence would not be in the interests of the public." (29).

Furthermore, the Supreme Court later ruled that the requirement that the prosecution "satisfies it" that the statement was not obtained by the prohibited methods meant that there was a burden of proof resting on the prosecution which had to be discharged beyond reasonable doubt (30).

The circumstances in which the discretion to exclude should be exercised were indicated by McGonigal L. J. in R. v. McCormick and Others (31). He said:

> "It should only be exercised in such cases where failure to exercise it might create injustice by admitting a statement which though admissible under the section and relevant on its face was in itself, and I underline the words, suspect by reason of the method by which it was obtained, and by that I do not mean only a method designed and adopted for the purpose of obtaining it, but a method as a result of which it was obtained. This would require consideration not only of the conduct itself but also, and since the effect of any conduct varies according to the individual receiving it, possibly equally important its effect on the individual and whether, to use the words of the Commission Report already referred to, the maltreatment was such as to drive the individual to act against his will or conscience. It is within these guidelines that it appears to me the judicial discretion should be exercised in cases of physical maltreatment."

On this basis some rough treatment but not deliberate maltreatment, seems permissible. Thus some roughness, apart from a blow which produced a bleeding nose, was overlooked for purposes of exercising the discretion.

However, in R. v. Milne (32) the court set out a test which is more general. If not satisfied that the statement was voluntary, or if not satisfied that the accused person had not been driven by the conditions and circumstances under which the statement was made to act against his will or conscience, then the court should exercise the discretion. Reliance was placed on the meaning attached by the European

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(29) R. v. Corey and Others, 6 December 1973. See also R. v. Tohill, 6 March 1974, per Kelly J. discussed in (1974) 25 N.I.L.Q. 180,352.

(30) R. v. Hetherington and Others (1975) N.I. 164.

(31) (1977) N.I. 105.

(32) (1978) N.I. 110.

Commission on Human Rights to "will and conscience" when dealing with voluntariness, and also on the word "may" in section 8 in relation to a statement being given in evidence. Accordingly, when a suspect had been interrogated for 39 of the 72 hours he had been in custody and there was evidence that he was confused before making a confession of murder, this confession was excluded, although confessions in respect of other offences made before this stage were not excluded.

Generally speaking, however, as Judge Bennett observed, there are no clear rules as to when judges will exclude a statement. In the circumstances, there is a clear danger that this becomes a purely subjective decision - in any case, it is a decision which is neither subject to strict substantive legal rules nor to close supervision on appeal.

It may be recalled that many "discreditable and reprehensible" practices, used as part of interrogation in 1971, were held by the European Commission of Human Rights not to constitute torture, inhuman or degrading treatment: statements obtained as a result of such techniques are not automatically excluded as evidence.

In the absence of a jury as a separate tribunal of fact the change in the law in admissibility of confessions has tended to introduce an excessively large subjective element in the effective decision on guilt or innocence of the accused. "Case-hardening" of judges has consequently led to an increase in the conviction rate in contested cases in which the only evidence consists of a confession allegedly obtained under duress. Increasingly, the courts have convicted on the basis of alleged verbal confessions which the accused denies ever having made.

Strict legal rules for the presentation of evidence to the jury, and for its assessment by the jury, have thus been replaced by a virtually unfettered discretion by a single judge. In this crucial respect, therefore, the relaxation of the law of evidence, corresponding with an increase in judicial discretion to admit confession statements, has no doubt increased the number of convictions of guilty persons, but it has also increased the risk of unjust convictions.

Convicted Prisoners

In June 1972, in the face of a hunger strike, the Heath Government had introduced "special category" status for prisoners involved with para-military organisations. Realising that this had been a political error and a form of discrimination against ordinary criminals, the Wilson administration began from 1 March 1976 to phase out the status. No further grants of such "special category" status were to be made to prisoners who had committed offences on or after that date. Finally, in March 1980, the Thatcher Government commenced the abolition of the status for all offenders. In the meanwhile, in response to the phasing-out, an increasingly unpleasant campaign involving self-denial of facilities for personal hygiene and total refusal to observe Prison Rules or to cooperate with the authorities at the Maze Prison, was carried out by some persons convicted of terrorist offences committed after 1 March 1976 on the grounds that it was contrary to their freedom of conscience to be treated as ordinary criminals and not as political prisoners. (Simultaneously, the I.R.A. mounted an assassination campaign aimed at prison officers and the R.U.C.) After an initial period

of tolerance, the prison authorities responded with what the European Commission of Human Rights later termed as "inflexibility". This led to or was used as an excuse for the escalation by the prisoners of their campaign so that authorities and prisoners were locked into a vicious cycle of defiance and self-degradation by prisoners, punishment and denial of facilities, this then stimulating the prisoners into yet further obstinate acts of self-degradation. A complaint by leading "protesters" to the European Commission of Human Rights, alleging inhuman and degrading punishment and treatment and breach of various other Articles of the Convention, was declared inadmissible except on two issues (33). The first was whether adequate national remedies were available to prisoners. It involved complex analysis of the scope of judicial review of administrative action, i.e. whether it could provide a remedy against bad as opposed to merely unlawful decisions. The second raised the general Home Office policy of interference with prisoners' correspondence, and was to be considered in conjunction with other cases arising elsewhere in the United Kingdom.

However, when in 1981 the situation escalated further as a result of a number of orchestrated hunger strikes, interventions were made by the European Commission on Human Rights, the International Commission of the Red Cross and the (Roman Catholic) Irish Commission for Justice and Peace. This finally led to a situation in which the prisoners, without relinquishing their claim for special treatment in principle, ended their hunger strike and other self-degrading forms of protest, and in which the authorities imposed punishments more flexibly and with less harshness.

Other Areas of Complaint

There have been other areas of complaint with regard to the practice of the police and the army, most notably an apparent policy by the Army in 1978 to lay ambushes for suspected terrorists with a view to shooting dead those who did not immediately give themselves up (described by Boyle et al in "Ten Years on in Northern Ireland").

The powers of the authorities to "exclude" persons from parts of the United Kingdom without judicial authority has also been strongly criticised.

There have also been criticisms of "flexible law enforcement" as a threat to the Rule of Law. Colonel Evelegh, as a serving officer in Northern Ireland, has stated that since the extent to which the law would be enforced in order to show "restraint", or "political sensitivity" or to "win hearts and minds" or to keep a "low profile" had become uncertain to both law breakers and law enforcers, both sides drew conclusions which led to the collapse of the general framework of constitutional legality. The people of Northern Ireland, of all sections, concluded that law enforcement was subject to political direction, and that pressure on politicians by riots, demonstrations and uniformed marches would (and did) lead to concessions. The Army and R.U.C. concluded that they could not be sure of support from their professional or political superiors if they enforced the law impartially. They tended to reflect the day-to-day attitudes of Ministers, sometimes exceeding the law (as in case of interrogation in depth, but this was Ministerially authorised) and some-

(33) McFeeley et al. v. The United Kingdom, Application 8317/78.

times passively watching intimidation, large-scale sectarian eviction of persons from their homes, and countenancing no-go areas and usurpation of government functions including even the maintenance of order (34). Not only did troops come to terms with para-militaries to avoid a clash, but the Northern Ireland Office would be secretly negotiating with the terrorists and following a different policy from that of the Army (35). There were areas where the terrorists were permitted to hold sway (Catholic areas before Operation Motorman, 31 August 1972) while Protestant areas of East Belfast were permitted in October 1972 to be under U.D.A. control, and even peace-keeping operations were delegated to this para-military organisation. The most serious abdication of law enforcement came, on Ministerial instructions, in May 1974, when the Army and R.U.C. stood by and the Ulster Workers' Council strikers took over the regulation of essential services, control of transport and traffic and issued "ration cards" for essential goods. The policy of Ministers meant that there was a breakdown in the Rule of Law in that there was no consistency or certainty that law would be regularly enforced.

Administrative Internment

The practice of administrative internment had since its inception been a subject of constant criticism and complaint. As a method of controlling or reducing violence it had proved a failure. It probably served more than any other measure to increase recruiting into the I.R.A.

The power to intern administratively is now contained in Section 12 and Schedule I to the NIEPA 1978. This requires renewal annually by Parliament. In July 1980, when it was due for renewal, the British Government decided, in the light of the high conviction rate of terrorists in the Special ("Diplock") Courts, it was no longer necessary to have recourse to administrative internment. Consequently, the procedure was allowed to lapse and no further internments have taken place since then. It can, however, be renewed at any time with the agreement of Parliament. In urgent cases, the Secretary of State can introduce it at once by making an Order, but it will lapse after 100 days if not approved by both Houses of Parliament by then (36).

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(34) R. Evelegh, Peace Keeping in a Democratic Society, C. Hurst, London, 1978, pp. 22-23, 33, 37, and 49-50. Colonel Evelegh wrote: "I had great sympathy with the disaffected section of the population ... They never knew where they stood. One illegal procession would be allowed, and the next week firmly suppressed." Offences were openly condoned and persons had no idea when a turn of the law enforcement pressure valve would mean that condonation had ceased. See also Ireland v. United Kingdom, para. 51-52.

(35) Ibid., p. 113.

(36) NIEPA 1978, Section 32 (4) and Section 33 (3) (a).

III. REVIEW OF THE EMERGENCY AND EMERGENCY MEASURES

There are various judicial, legislative, political and administrative control mechanisms designed to ensure that the powers exercisable by law enforcement agencies are not abused. The most important of these will be briefly considered here.

Judicial Review

A particular, central, feature of the (unwritten) British Constitution is the concept of "sovereignty of Parliament", by which is meant that Acts of Parliament (Statutes) are unchallengeable by other authorities, in particular, the courts. This applies to Acts affecting fundamental rights as much as the other legislation: the courts (representing the King) are not guardians of constitutionally enshrined fundamental rights and cannot "defeat the will of Parliament" as expressed in formal legislation. Consequently, the courts can neither review whether an emergency proclaimed by Parliament in fact exists, nor assess the propriety of legislative restrictions of fundamental rights. Only within the legislative framework do the courts have the possibility to review executive action. Thus, power of review will arise when a statutory power has been exercised ultra vires or in a manner which is in breach of rules of natural justice. Proceedings may be brought against unlawful action, e.g. by way of habeas corpus where the legality of an arrest is challenged. At common law too, the rules of natural justice can be enforced. The European Court of Human Rights has accepted that the review exercised by the courts, although limited, is "valuable".

At the same time, it must be noted that in times of emergency the English and Northern Irish courts have tended to be deferential to the Executive (37), refusing to interpret emergency legislation in a manner as far as possible consistent with fundamental human rights. Mention has already been made of the refusal of the courts in Northern Ireland to provide remedies against justified grievances of discrimination and abuse of state power (see Boyle et al, Law and State: a Case-study of Northern Ireland). In the Republican Clubs Case, for instance, the courts upheld a Regulation made under the Special Powers Act which declared such clubs unlawful irrespective of any proof of their involvement in criminal or subversive action. It is significant that in the case of Martin Lynch, the court referred to case-law dating from the Second World War (as well as to a 17th century case) in which it was held that, where emergency legislation confers on "an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decisions in the absence of an allegation of bad faith." (38).

By accepting, in the case of Martin Lynch, the legality of

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(37) See David R. Lowry, Terrorism and Human Rights: Counter-insurgency and Necessity at Common Law, Nôtre Dame Lawyer, October 1977, p. 49.

(38) Carltona (1943) 2 All ER 560.

repeated arrests in quick succession of the same person on the same suspicion, the courts made illusory such time limits on detention as are contained in the law. (A different approach was taken in the Republic of Ireland where such arrests were held to be unconstitutional, but the court in Northern Ireland refused to follow this approach on the basis that the existence of a written constitution altered the legal situation.) An interpretation of the law which would have limited the legality of detention strictly to the time limits laid down in the statute would have demonstrated to the public that "amid the clash of arms, the laws are not silent" (from Lord Atkin's dissenting judgment in Liversidge v. Anderson). In the present circumstances, rulings such as Lynch, or such as the Republican Clubs Case before it, tend to undermine what confidence the minority population have in the Rule of Law.

As far as recourse to civil or criminal litigation is concerned, the first is too slow a process to provide an effective deterrent against irregular behaviour, whereas the second has been shown to be equally ineffective: no policeman was convicted of assault following the practice of ill-treatment in 1976 and 1977, and prosecutions of soldiers in cases of apparentexcessive use of firearms have also been unsuccessful.

As was further discussed above, the indirect means of control exercised by the courts in ruling on the "admissibility" of confessions has been explicitly reduced by the emergency legislation - although to a limited extent the exercise by the courts of a "residual discretion" to exclude statements has countered this.

Legislative Control

The duration of the emergency legislation is limited and subject to expiry unless renewed by order of the Secretary of State (39). An Order may continue in force for a period not exceeding 6 months and is renewable. The Order must either have been approved in draft by resolution of each House of Parliament or it must contain a declaration that it appears to the Secretary of State that by reason of urgency it is necessary to make the Order without prior approval of a draft. In the latter event, the "urgent" Order shall be laid before Parliament and shall cease to have effect if at the end of 40 days after its making it has not been approved by resolutions of each House. This means that both Houses of Parliament will be guaranteed periodic debates about the situation in Northern Ireland, and may, if either House thinks fit, deny the executive the considerable powers conferred by the Acts.

This procedure, however, has its limitations. Very limited time is available for debate and the "bi-partisan" approach to the situation in Northern Ireland has tended to take the edge off parliamentary scrutiny of the way in which the legislation is implemented, at least in the course of public debate in Parliament.

There are also other opportunities for debating or securing information about the emergency in Northern Ireland in Parliament. That most invoked is the question procedure. Numerous questions have been

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(39) Cf. for example, Sections 32 and 33 of NIEPA 1978.

asked about the employment of the Army and the exercise of police powers. Unfortunately, the data obtained does not give a comprehensive picture, partly because Ministers have refused to answer questions and partly because M.P.s have failed to ask appropriate questions. The significance of question-time lies more in the fact that those exercising power know that they may face embarrassing questions, and therefore tend to exercise restraint, than it does in ability to stop a particular abuse.

Control by the Executive

Although potentially the most effective means of control, internal administrative supervision of executive power provides only limited protection against abuse. Placing important powers of decision affecting the civil rights of citizens in the hands of senior officers of the state rather than at a low level can provide institutional safeguards against abuse, if diligence is exercised. For instance, the decision to prolong police detention beyond 48 hours under the Prevention of Terrorism Act lies with the Secretary of State for Northern Ireland. However, it appears that initially all requests by the police for such extensions are granted. The fact that the decision to use inhuman and degrading treatment in the course of interrogation in 1971 was taken at a "very high level", and that a widespread practice of ill-treatment occurred in 1976 and 1977, raises doubts about the effectiveness of internal mechanisms as safeguards against abuse.

More formal internal mechanisms for control can be more effective, but the machinery for the investigation of complaints against the police (the most important of such mechanisms) has failed to prevent, or even to punish, ill-treatment of suspects in custody.

More important than such strictly internal mechanisms have been standing or ad hoc commissions for monitoring or investigating security practices. The Standing Advisory Commission on Human Rights, for instance, has made valuable contributions to the debate on emergency measures. Official commissions of inquiry have established abuses (be it ex post facto) and have contributed significantly to changes in policy and procedures. For instance, public inquiries investigated and brought to light the grievances of the minority community which led to the emergency, "interrogation in depth" with the use of the "five techniques", internment, and, most recently, interrogation practices by the R.U.C. All these inquiries have led to re-consideration of emergency measures and security policy.

On the other hand, some aspects of the emergency legislation have not been subject to such scrutiny for a long time, in particular the operation of the Special Courts, which was last reviewed in full in 1974.

European Commission and Court of Human Rights

The United Kingdom had undertaken to secure to everyone within its jurisdiction the rights and freedoms guaranteed under the European Convention on the Protection of Human Rights and Fundamental Freedoms with its accession to the Convention in 1950. It is provided that either the Government of another state party to the Convention or an aggrieved individual may apply to the organs established by the Convention alleging breach of the Convention.

Article 15 (1) provides that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with its other obligations under international law". Certain provisions are non-derogable, e.g. Article 2 (right to life), Article 3 (prohibition of torture or inhuman or degrading treatment), Article 7 (non-retroactivity of criminal offences).

In accordance with Article 15 (3) of the Convention, the United Kingdom Government sent to the Secretary-General of the Council of Europe, both before and after the original application to the Commission, six notices of derogation. These notices were dated 27 June 1957, 25 September 1969, 20 August 1971, 23 January 1973, 16 August 1973 and 19 September 1975, and drew attention to the relevant legislation.

Several cases regarding Northern Ireland have been brought before the European Commission and the European Court of Human Rights dealing with denial of certain rights set out in the European Convention. In 1971, the Government of the Republic of Ireland brought an application against the Government of the United Kingdom. Its stated object was to ensure that the respondent Government would assure to everyone in Northern Ireland the rights and freedoms defined in various Articles of the Convention, to determine the compatibility with the Convention of certain legislative measures and administrative practices of the respondent Government in Northern Ireland, and to ensure the observance undertaken by the respondent Government in the Convention.

An important issue in this case was the use of sensory deprivation techniques (the so-called "five techniques") and of physical ill-treatment and exhaustion as part of interrogation, which has been discussed above.

On 9 August 1971, numerous persons were arrested by the security forces under the emergency regulations. In all, about 3,276 persons were processed by the security forces at various holding centres, police offices and barracks in order to determine whether they should be interned and/or to compile information about the I.R.A. Allegations of ill-treatment in 228 cases concerning incidents between 9 August 1971 and 1974 were made by the Irish Government in relation both to the individual arrests and to the subsequent interrogations. Inter alia, alleged violations of Article 3 (prohibition against torture or inhuman or degrading treatment), Article 5 (deprivation of liberty only under procedure prescribed by law) and Article 14 (enjoyment of freedoms and rights guaranteed by the Convention without discrimination) were examined by both the Commission and the Court of Human Rights.

Both the Court and the Commission were of the opinion that there existed an "emergency threatening the life of the nation". This was not contested by the applicant Government but it submitted that the right of derogation exercised by the United Kingdom Government had exceeded the "extent strictly required", and that there had been violations of non-derogable rights. The Court and the Commission found that the United Kingdom Government was not in breach of the Convention by having introduced extra-judicial deprivation of liberty under its

internment policy. The Court recognised that:

> "Unquestionably, the exercise of the special powers was mainly, and before 5 February 1973 even exclusively, directed against the I.R.A. as an underground military force. The intention was to combat an organisation which had played a considerable subversive rôle throughout the recent history of Ireland and which was creating, in August 1971 and thereafter, a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the provinces' inhabitants. Being confronted with a massive wave of violence and intimidation, the Northern Ireland Government and then, after the introduction of direct rule (30 March 1972), the British Government were reasonably entitled to consider that normal legislation offered insufficient resources for the campaign against terrorism and that recourse to measures outside the scope of the ordinary law, in the shape of extra-judicial deprivation of liberty, was called for." (40).

A safeguard against ill-treatment is provided by Article 3 of the Convention which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of the Protocols, Article 3 makes no provision for exceptions and, under Article 15 (2), there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.

As has already been stated, the Court held unanimously that the security forces had used the "five techniques" on 14 persons in certain detention centres in 1971. They found the use of these "five techniques" constituted a practice of inhuman and degrading treatment in breach of Article 3 of the Convention.

The Commission decided at the admissibility stage that the rule requiring prior exhaustion of domestic remedies in Article 26 of the Convention was inapplicable where an "administrative practice" consisting of repetition of acts and official tolerance has been shown to exist, and is of such a nature as to make court proceedings futile or ineffective. The level of tolerance here was decisive for determining this question in the circumstances of a particular case (41). The Court agreed with the opinion of the Commission on the issue, and noted that this decision of the Commission was not contested by the United Kingdom Government (42).

Another argument rejected by the Commission and the Court was that the United Kingdom Government had shortly after the filing of the

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(40) Ireland v. United Kingdom, judgment of the Court, para. 212.

(41) Report of the Commission, pp. 379-388.

(42) Report of the Court, p. 55.

application by the Government of Ireland, and independently of them, prohibited the use of the "five techniques". The Court noted that the United Kingdom had taken various measures designed to prevent the recurrence of the events complained of and to afford reparation for their consequences. However, the Court considered that the responsibilities assigned to it within the framework of the system under the Convention extend to pronouncing on the non-contested allegations of violation of Article 3. The reason for this was that the Court's judgments serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (Article 19).

As has already been mentioned, the (partial) decision of the Commission in McFeeley v. United Kingdom had an important impact on the situation in The Maze Prison, in that it prompted more flexibility on the part of the authorities in responding to the prison protest.

IV. CONCLUSIONS

The present emergency in Northern Ireland raises complex issues of self-determination, protection of minorities, majority rule, consensus and the legitimacy of state power, which can only be solved in the long term at the political level. However, emergency legislation and the way it is implemented, as well as social and political reform and the speed and determination with which they are introduced, all bear on the climate in which a solution may be found.

Successive British Governments bear a heavy responsibility for having brought into existence a Province of Northern Ireland which contained the seeds of its self-destruction, and for failing to take effective action to persuade or compel the protected majority governments of the Province to stop their massive discrimination against the Catholic minority until that minority was driven to support its violent extremists and make the Province as constituted patently ungovernable.

When the British Government and Parliament resumed direct responsibility for a direct governing of the Province, they acted with commendable energy to introduce long-needed reforms. Radical changes were made in the structure of local government in the Province: universal suffrage was introduced in 1969, proportional representation in 1972, local government boundaries were revised in 1973, and many important functions such as education and housing were transferred to special area boards or to central government bodies in the hope of ending or reducing the fear of discrimination in the social field. In 1969, the Northern Ireland Government established a Parliamentary Commissioner (i.e. Ombudsman) for Administration and a Commissioner for Complaints. The Standing Advisory Committee on Human Rights began in 1975 a detailed study of the extent to which the existing legislation provides a sufficient protection for human rights in the six counties. Legislation making discrimination unlawful in the private sector was introduced in 1976.

Unfortunately, these reforms were introduced too late to stop the vicious cycle of violence and counter-violence. All the efforts of the United Kingdom Government to find acceptable political solutions have failed to overcome the pervading disunity fanned by the continuing violence.

In these circumstances, the British have had to continue to resort to emergency powers in order to contain the violence and maintain a modicum of order. The use of these powers, and the abuses to which they give rise, have been meticulously examined by a series of official Commissions and inquiries, and action has been taken to give effect to their recommendations.

Unfortunately, the exercise of emergency powers does not bear solely upon those whose resort to violence has given rise to the emergency. All sectors of the population are affected to a greater or lesser degree, and any abuse or excessive use of emergency powers will help to build up a wall of resentment which makes even more difficult the finding of a political solution. In policy, therefore, as well as in international law, the use of such powers should be confined to measures 'strictly required by the exigencies of the situation'.

British governments have made real and sometimes remarkable efforts to restrict their emergencies measures in this way. Perhaps the most striking was the decision to do away with administrative or extra-judicial internment, known to English lawyers as 'preventive detention'. In almost all serious emergency situations throughout the world, administrative internment is widely used to detain without charge or trial large numbers of persons suspected of being engaged in subversive activities. The procedure is often used to intern persons against whom the authorities have considerable evidence coming from confidential sources which they cannot bring to court. In other countries, resort is had to torture to extract confessions, true or false, with which they can secure convictions.

The price which had to be paid to enable administrative internment to be abandoned in Northern Ireland was a heavy one, and fell upon the judicial system. In accordance with the recommendations of the Diplock Committee, the English laws of evidence concerning the admissibility of confession statements were relaxed so as to make it easier for the single judge of the Special Courts to convict on the basis of confessions which would not be admissible in advisory courts. The declared intention was to make it easier to secure a conviction. With such a pressure upon them, it is not surprising that many of these judges are accused of becoming "case-hardened". It is questionable whether it is proper in these circumstances to leave the determination of the issue of guilt to a single judge. A person on trial who is at risk for a long term of imprisonment can legitimately expect that if he is not to have the benefit of a jury trial, he should at least have a plurality of judges. In almost any other system of law, he would be tried by a bench of at least three judges.

Other criticisms of the justice system in Northern Ireland focus upon the issue of judicial review. Several of the complaints made arise from peculiarities of the common law system.

Thus, the right to see a lawyer before answering questions after arrest is left, under the common law, in a state of such uncertainty as to make it almost non-existent. Under other systems, it is clearly defined. When the suspect does have access to a lawyer, there is no quick effective way by which he can bring to the attention of a court a complaint of ill-treatment. The remedy of habeas corpus will go only to the issue of the legality of his detention, not to the way in which he was treated.

When complainants seek under procedures for judicial review to persuade courts to declare executive acts illegal, they are confronted by a judiciary dominated in its thinking by the narrow doctrine of parliamentary supremacy. Unlike their brethren in other countries, they have no constitutional declaration of principles by which to judge the propriety of executive acts. In consequence, if they find no law clearly forbidding the act of the executive in question, they are likely to find for the executive. An extreme case in Northern Ireland has been the decision which enables the security authorites to circumvent the statutory limits of detention by repeated arrests in quick succession. This has led to abuses such as widespread arrests purely for purposes of information gathering. This process is but a continuation of a defect in the justice system which failed to provide remedies against wholesale discrimination in Northern Ireland and this contributed indirectly but substantially to the existence of the emergency. It is not surprising in consequence that the judiciary have acquired the reputation of showing excessive deference to the executive.

These failings in the justice system have not helped to establish respect for the Rule of Law, an essential element in establishing a climate for a peaceful settlement in Northern Ireland.

The lessons that can be learned from the experience in Northern Ireland, from an international perspective, are that emergency legislation should be introduced and operated with the greatest restraint possible and that measures taken to counter civil unrest must be, and be seen to be, limited to what is strictly required in the exigencies of the situation, in accordance with international law.

If emergency powers are granted to the Executive and the police, then these powers should be subject to, if anything, stricter controls to ensure that they are used only for the purpose for which they were introduced. Action taken by the Executive and the police which impinges on human rights should not be excluded from judicial review and control. On the contrary, the courts should be empowered to review both legislative and executive acts in the light of established legal principles. Emergency powers should respect human rights to the maximum extent possible in the circumstances, and the question of what constitutes "the maximum extent possible" is not one which should be removed from the sphere of the judiciary.

Furthermore, in the case of a prolonged emergency, regular and independent review of legislation at all levels is required to prevent emergency legislation from becoming a semi-permanent feature of the law. Formal opportunities for debate in Parliament, and for questions to be put to Ministers, though valuable, do not suffice: from time

to time extensive, in-depth, reviews of all aspects of the emergency legislation should be carried out by an impartial body, with the possibility for non-governmental organisations and interest groups to make representation. Such commissions of enquiry have made a significant contribution to the reform of emergency legislation in Northern Ireland.

On specific matters, safeguards against torture, inhuman or degrading treatment generally, and against improper interrogation techniques in particular, are required. These ought to include procedural and evidentiary safeguards against convictions being based on confessions obtained under duress. Medical examinations, but above all access to a lawyer, is required, as is immediate access to the courts to have both the legality of detention, and methods of interrogation, tested contemporaneously.

The freedom of the press and the activities of non-governmental organisations and interest groups should be left undisturbed, if abuses are to be brought to light. Such activities have had many positive results in Northern Ireland.

Finally, acceptance by the Government of the jurisdiction of an international tribunal charged with ensuring the observation of fundamental human rights provides an important safeguard where domestic remedies fail.

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THE STATE OF EMERGENCY IN PERU

CONTENTS

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THE STATE OF EMERGENCY IN PERU

The expression "state of emergency" refers to general states of exception which are designated under varying names in the legislation of different countries. Such general states of exception have been a significant feature of recent Peruvian constitutional history. On some occasions - the gravest ones - legislation of general scope has been enacted to define and govern the state of exception. In other circumstances, constitutional provisions concerning states of exception have been invoked. In a third set of situations, certain arbitrary acts of power have occurred, unsupported by any legislative provisions.

Peruvian history is rich in examples of this latter type of situation. The stock response of those in power to social crisis has been to set aside certain rights and constitutional guarantees. At present, the country is under constitutional rule after 12 years of military government. Nothing, however, supports the supposition that there are satisfactory conditions of stability and democracy. Not only the weight of Peruvian historical tradition but also the gravity of the political, social and economic crisis which the country is facing at the present time, would lead one to expect that new states of exception may be invoked in the not too distant future.

It is noteworthy that in Peru the existence of the institution called a state of emergency is relatively recent. The expression also has different meanings. One of these signifies an exceptional situation in a general sense, covering all or part of the national territory. Another sense in which the expression is used is with respect to the proclamation of special "emergencies" in diverse sectors of the economy. A third meaning concerns natural disasters (floods, drought, earthquakes, etc.), the purpose in such cases being not so much the limitation of human rights as the provision of priority material and administrative assistance to the affected zones by the public authorities. Of particular interest for present purposes are the first and second senses of the expression. Nevertheless, as indicated above, states of exception in Peru both antedate and go far beyond the strict meaning of the term "state of emergency". The complex facets of these emergencies are the subject of the present study.

This paper consists of six parts. The first part sets out a brief historical outline of the states of exception that have occurred in Peru over the last 50 years. It describes the various measures which have been resorted to according to the dictates of the situation at the time. The second part is an analysis of the two means usually used to proclaim states of exception in the country - the suspension of constitutional safeguards and the proclamation of a state of emergency. The third section concerns the remaining safeguards with which the citizen can protect his eroded rights, with particular reference both to the 1933 Constitution which remained in force until 28 July 1980, and to the new 1979 Constitution, which then replaced it. The fourth part deals with a subject of crucial significance when states of exception are invoked - the application of military justice to civilians. As will be seen in this context, the last few years have witnessed a dangerous extension of military jurisdiction over the civilian population. The fifth part examines the new constitution in relation to states of exception and human rights and the sixth part takes the form of a concluding note.

I. STATES OF EXCEPTION DURING THE LAST 50 YEARS IN PERU

Repeated mention of the model of the liberal State, and of the collection of constitutional rights correlative to such a State, at every stage of preparation of each new Peruvian constitution has not, as a rule, had any impact on the real life of the nation. Throughout history, the gap between reality and the rights formally granted to the population has been a very wide one. Against such a background, the operation of democratic social institutions has tended to be superficial and fleeting. Superficial, because the very structure of Peruvian society covers such acute social and economic disparities among its members that this in itself necessarily results in the restriction of a whole series of rights of those parts of the population that are numerically predominant, especially the indigenous rural population. Fleeting, because the formal existence of constitutional régimes - with all their shortcomings - has frequently been flouted by the exercise of extra-constitutional forms of power.

Of the last 50 years, to use a relatively recent time frame, more than 30 have passed under states of exception or extra-constitutional rule. The remaining years witnessed civil governments that invoked more or less frequently the "suspension of safeguards" provisions made available to them by the constitution. A brief historical survey of these last five decades will give a better understanding of the subject of the present study.

The 1932 Emergency Act and Supplementary Legislation (1932-1945)

The Emergency Act, passed in January 1932, under the government of President Sánchez Cerro, is an important milestone. The Act, which remained in force until 1945, made it possible to remove members of parliament belonging to opposition groups (the Aprista and Decentralist Parties) in the Constituent Congress, which had been established in 1931, and was to enact a new constitution in 1933. The Act also deprived these members of parliament of their rights and prerogatives. Thus, at the very inception of the constitution that has governed the nation for almost 50 years, subject to the interruptions mentioned, an event of this magnitude took place. There is not the slightest doubt that from this moment the legitimacy of the constitution became dubious.

Other laws pertinent to the present study were enacted during the ensuing 12 months of political and social upheaval. Worth particular mention is Act no. 7491 of March 1932, enacting the death penalty with retroactive effect. This Act was passed the day after President Sánchez Cerro fell victim to a political assassination. Those guilty of this crime - or rather those presumed guilty of it - were summarily tried and sentenced to death. During the last few hours before sentence was due to be carried out, when the preparations for execution and burial were complete, they were reprieved. Some weeks earlier, Acts nos. 7542 and 7546 had been passed for the establishment of courts-martial to try those involved in the "Aprista" uprising which had just taken place in the northern city of Trujillo (1). Several

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(1) In that year (1932) militants of the then youthful and reformist "Aprista" party had attacked a part of the city in question. This event gave rise to an insurrection which spread to other cities

(footnote continued on following page)

hundred people were summarily tried and executed. This legislation was clearly in breach of the 1920 Constitution then in effect, which prohibited the trial of civilians by military courts. This prohibition was removed in the 1933 Constitution.

The 1933 Constitution was adopted after two years of discussions. It contained a host of constitutional rights and safeguards, which only came into effect some 12 years later when President Bustamante y Rivero came to power in 1945. The new constitution was the work of a Constituent Congress whose legitimacy was highly suspect and its provisions were subordinate, in respect of certain rights and corresponding safeguards, to those of the Emergency Act. Thus, in a leading case concerning the closure of a publication, when the injured party attempted to bring a petition of habeas corpus pursuant to section 70 of the new constitution (2), the courts rejected his appeal on the grounds that the provisions of the Emergency Act still prevailed.

During the years that followed, instead of diminishing the scope of the Emergency Act, the government of President Benavides, which followed that of Sánchez Cerro, widened its application even further. After having dissolved the congress, it issued Act no. 8505 in 1937, which extended the Emergency Act to provide for the same penal sanctions whether an offence was actually committed or was frustrated in the attempt. The new legislation also provided unequivocally for the jurisdiction of military tribunals in cases of political offences.

Act no. 8842, passed in 1939, brought newspaper publishers under the scope of the Emergency Act, and was used to close down a newspaper supporting a presidential candidate other than the one favoured by the government. When the Code of Criminal Procedure was issued later in the year, one of its final provisions suspended the exercise of the right of habeas corpus for as long as the Emergency Act remained in effect.

Internal Security Act (1949-1956)

Upon President Bustamante's coming to power in 1945, one of congress's first acts was to repeal the acts of exception issued during the preceeding years, while decreeing at the same time a fairly wide-reaching political amnesty. This democratic spurt was short-lived, however, for after the military coup headed by General Odría in 1948, two important political parties were outlawed, the APRA and Communist Parties. Also, Legislative Decree no. 11049, "An Act Concerning the Internal Security of the Republic", was issued, the purpose of which

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(1) continued....

in northern Peru. The insurrection, which according to certain versions did not result from decisions taken by the leaders of the Aprista Party at all, was ruthlessly quelled by the Sánchez Cerro Government.

(2) "Every individual and collective right recognised in this Constitution shall suffice to found an action of habeas corpus."

was to bring to justice "all cases of political and social delinquency".

The scope of the offences set out in this legislation was extraordinarily wide, ranging from "propagation of false information" to "advocating foreign doctrines". A frustrated attempt was deemed to be equivalent to a completed offence. Sanctions provided in the legislation for most of the offences varied from fines to exile. In the case of certain crimes against the "organisation of the State" and the "democratic peace of the Republic", however, the death penalty was applicable. The court of competent jurisdiction was the court-martial using summary procedures. A central feature of this Act was that it empowered the Ministry of Government and the Police (now called the Ministry of the Interior) to take any "preventive measures" designed to prevent the commission of offences defined by the Act. The introduction of these "preventive measures", which was not coupled with any requirement to bring the person in custody before a judge, gave rise to countless arbitrary acts on the part of the central government, such as false imprisonment, search without warrant and expulsion of citizens.

Under popular pressure and with the fall of General Odría's régime, certain amendments to the Internal Security Act were passed in 1956. These restricted military jurisdiction to some extent and provided that the Code of Criminal Procedure had to be applied. When a constitutional government was installed in July 1956, one of the first acts of the new Congress was to repeal the Internal Security Act and amendments thereto and to proclaim an amnesty for political detainees.

Other Legislation (1961-1963)

During the years that have elapsed since 1956, no general laws of exception or emergency acts similar to those of 1932 or 1949 have been issued. The customary procedure used both by civilian and military governments has been to "suspend constitutional safeguards", invoking for this purpose section 70 of the 1933 Constitution. On other occasions, governments have taken repressive measures without relying on any suspension of constitutional guarantees. Some legislation pertinent to this study was, however, issued during this period.

During Prado's presidency, in January 1961, Act no. 13488 was issued pursuant to which the Communist Party was outlawed and stiffer penalties were provided for those making any attack (in word or deed) "against the democratic organisation of the Republic and the representative system of government". Any such attack against the armed forces was deemed to be an aggravating factor. The only penalties provided for were terms of imprisonment. This was the first repercussion in the field of law of the possible effects in Peru of the Cuban revolution, which at that particular time had reached an important turning point.

The Prado government was overthrown in July 1962 (only ten days short of its regular term) by a military régime, which was to last for a year, until July 1963. Under that régime, a few months prior to the 1963 elections, the constitutional safeguards of the whole nation were suspended, and more than 1,000 left-wing political leaders were arrested and removed to a penal camp deep in the Peruvian jungle. Under this same military régime, legislation was enacted that was never published, called the "General Garrison Service Regulations" (Supreme Decree no. 14-CCFA of April 1963). Its crucial significance will be discussed below, in the part dealing with states of emergency in Peru.

The Guerillas and the Popular Movement

Under the constitutional rule of the Belaúnde Government which began in July 1963, political events of great significance took place in the country. On the one hand, there was a growing wave of rural unrest, which manifested itself, from the very first day of the installation of the new régime, in the seizure of land in the central and southern parts of the country. Indeed, Belaúnde's own electoral platform acted as one of the triggers - although no doubt quite unwittingly - since he had made agrarian reform one of the central issues of the election. On the other hand, in 1965, a guerilla movement sprang up in the central and southern highland regions. The trade union movement was becoming very militant, in particular the mining and metal workers, and there was widespread unionisation of bank employees. This provided the general background for the political stance adopted by the government.

In this connection, two types of measures can be identified: those taken against the guerilla movement and those taken against certain sectors of the population, particularly the workers. Of particular concern for present purposes are the legal instruments used to confront these situations, but it should not be forgotten that many other means were used in addition to legislation.

In response to the guerilla movement, Congress, at the proposal of the executive, enacted Law no. 15590 in August 1965. This provided that any attempt to alter the constitutional order by violence constituted a treasonable offence against the nation. The punishment for such an offence was death. Accused persons were to be tried by courts-martial set up pursuant to the Code of Military Justice. Other supporting legislation was passed, such as Act no. 15591, providing the state with a credit of 200 million soles (roughly equivalent to US$ 7,200,000 at the time) to be covered by an issue of bonds for public subscription. The purpose of this supplementary credit was to provide the government with the necessary resources to meet extraordinary expenses in connection with the repression of the guerilla movement. Supreme Decree no. 73, issued in December of that year, provided that travel to communist countries constituted an offence against State security.

The suspension of constitutional safeguards, which was another of the measures connected with the suppression of the guerilla movement, was also used against the rural and bank employees' resistance. The rural movement was dealt with particularly harshly. In view of the clearly defined location of these movements, constitutional safeguards were suspended only in those parts of the country where there was unrest. As for the bank employees, their confrontation with the government, which continued until 1964, coincided with a tragic occurrence in the Lima National Stadium, which cost the lives of more than 200 people. The government blamed the Left for this catastrophe and decreed that constitutional safeguards were suspended for the country as a whole. With the government's blessing, the banks dismissed some 600 managerial personnel within a few days. To a somewhat lesser extent, the same thing took place in the mining and metal workers' movement.

The 1968 Military Régime and the Constitution

The first law to be issued after the military coup in 1968, which overthrew Belaúnde and brought General Velasco to the presidency, was Legislative Decree no. 17063, known as the Statute of the Revolutionary Government. This law, which was in fact a sort of declaration of the principles and organisational bases of the new régime, provided, in its famous section 5, that the government would act in conformity with the constitution, laws and other regulations in effect "insofar as they are compatible with the aims of the revolutionary government". This provision, which undoubtedly made possible the introduction of certain important changes in the social order, was at the same time an instrument of repression by the government. It was used to ignore decisions of the judiciary granting habeas corpus applications brought by citizens who had been expelled from the country, as well as to restrict the freedom of the judiciary itself, by requiring that it recognise the supremacy of section 5 of the statute over the constitution. It was also invoked to deport citizens without any formal suspension of constitutional guarantees. More than 85 citizens were exiled by one means or another between 1968 and May 1980.

The crudest application of this extra-constitutional provision took place in 1977, when, in the wake of a nation-wide work stoppage, the government authorised the dismissal of workers involved in it (Supreme Decree no. 10-77-TR). The main justification invoked was that the country had been declared to be in a state of emergency. In this case, however, it was difficult to claim that the measure was one of social defence (as had been argued in the case of some of the deportations), because the result was the immediate dismissal of 3,498 white and blue collar workers, for the most part trade union leaders. A number of basic constitutional principles, among them that of the presumption against the retroactive effect of legislation, were called into question. Pursuant to section 133 of the constitution (3), a number of citizens in a group action before the courts, appealed against both this Supreme Decree and another dating from the previous year, which prohibited strikes and other industrial action. The judiciary, which has but limited independence from the executive in this kind of case, first resorted to delaying tactics in the examination of the case and finally declared the proceedings to have lapsed (4).

As mentioned above, no general law of exception, or, rather, none resembling the 1933 and 1949 Acts, was issued during the last 12 years of

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(3) "A group action may be brought before the courts against regulations and governmental orders and decrees of a general nature which violate the constitution or the law".

(4) The action was first brought in August 1977. The solicitor-general, whose certificate was required in order to permit the action to go forward, resorted to the expedient of delaying any further action for several months and then finally resigning without having done anything at all about the case. Later, when the action went forward to the clerk of the court, it was "mislaid" for several weeks. The petitioners' appeals were consistently left unanswered.

military rule. This is not to say, however, that there were not different periods of exception of varying scope. On the national plane, there were decrees suspending constitutional safeguards and/or proclaiming states of emergency at various times. The following section deals particularly with this sort of decree, affecting either the whole or a part of the country. In addition to these general measures, there were more specific ones, which had a particular impact on certain groups of workers.

The "Reorganisations' and States of Emergency

In the face of increased militancy on the part of workers' organisations and in the light of the aims they were pursuing, a number of corporations and institutions in the public sector were 'reorganised'. The salient features of this operation are worth recalling.

In November 1972, the Ministry of Fisheries was authorised to dismiss officials and employees and, indeed, many were fired. In June 1973, during strike action by the workers of the State Steel Corporation (SIDERPERU), a Special Legislative Decree no. 20043, was issued authorising the dismissal of workers without following the requirements of the existing law. About 50 workers were deprived of their jobs. A few months later, in October 1973, Legislative Decree no. 20201 empowered the Minister of Education to suspend, without a hearing and for as long as 12 months, "teachers who advocate subversive action". A number of teachers were suspended.

Other public bodies were subsequently declared to be 'reorganised', sometimes for reasons which may well have been valid, given the bureaucratic inefficiency prevalent in some of those agencies. Generally speaking, however, the reorganisation concentrated principally on dismissing workers, and those who had engaged in trade union activities usually figured prominently on the lists of those to be fired. In April 1975, the SINAMOS (National Support System for Social Participation) underwent 'reorgansation', as did the Peruvian Social Security Agency in December of the same year. In the following month, January 1976, the Maritime Industrial Service (the state-owned docks) was ordered to 'reorganise' after its employees had engaged in a strike lasting a few hours: 250 workers were dismissed. Several years later, during a strike of municipal employees, all of the municipalities of the Province of Lima were ordered to 'reorganise' (March 1978).

Alongside these 'reorganisations', of which only the most important have been mentioned, legislation proclaiming and applying a state of emergency in certain sectors of economic activity was issued. This particular application of a state of emergency had the prime purpose of restricting the right to strike. The first legislative provisions to this effect concerned the anchovy fisheries, which at that time were under the control of the state corporation, PESCA-PERU. Workers in this sector were prohibited from striking by a proclamation of a state of emergency by Legislative Decree no. 21450. At the same time, Legislative Decree no. 21451 ordered the 'reorganisation' of the corporation, involving the suspension of the legislative provisions guaranteeing security of employment. Pursuant to the new legislation, workers who were engaged in a strike at the time, in protest against a 'rationalisation' plan for the fishing fleet that threatened to leave several thousand fishermen jobless, were dismissed. Some months

later, after a widespread fishermen's strike, several thousand others were fired.

Another law, this time covering the mining sector, was issued in April 1976. Legislative Decree no. 21462 proclaimed this sector to be in a state of emergency, consequently prohibiting the right to strike. All strikes and work stoppages in the mining industry in Peru were outlawed and management could dismiss employees at will. Although the legislation was enacted at a time of drastic falls in the international prices for many minerals produced in Peru, it was maintained for more than four years, notwithstanding the marked improvements registered for metals during that period.

Almost a year later, in March 1977, the sugar industry was proclaimed by law to be in a state of emergency. This sector, which is controlled by cooperatives established during the agrarian reform, was facing an economic and financial crisis. The proclamation of the state of emergency set out a series of measures restricting wages and working conditions and prohibited strikes and work stoppages. The workers of one cooperative (Tuman) were actually put out of work for having engaged in a work stoppage.

Another case which should be mentioned is that of the employees of the national daily newspapers. When the newspapers were nationalised in 1974, the editors appointed by the government were empowered to dismiss employees. A year later, in June 1975, when the managing editors were replaced by government order, the new editors were given the same power for 30 days. Again, in March 1976, while the military government was changing its options, there was another switch in editors, and the job security of employees in the newspaper sector was again suspended, this time for 90 days.

It thus becomes apparent that in recent years 'reorganisation' measures and states of emergency have constituted an important aspect of the government's policies towards the very significant sector of the population comprising the workers. According to some estimates, more than 10,000 workers have lost their jobs since 1976 as a result of measures of this sort (including dismissals resulting from the application of Supreme Decree no. 10-77-TR, mentioned above).

The right to strike has also been repeatedly and continuously whittled away. Although strikes have been formally prohibited in certain cases (sectors of the economy in which states of emergency have been proclaimed, public employees, etc.), they have much more frequently been declared illegal by resorting to other means. One way has been to declare the work stoppage to be of no effect because the grievance or grievances were being considered according to proper procedures with a view to their resolution. Another way has been to declare that a decision regarding the grievance or grievances has already been made and that, therefore, any stoppage in respect of those grievances is improper. In special cases, particularly work stoppages of a local character, an argument has been relied on to the effect that several points in dispute were not strictly related to conditions of work and employment but were political in nature. In similar cases, the additional argument has also been made that the trade union organisations leading the dispute were not legally recognised.

Almost all of these arguments were used in respect of a strike lasting over three months, which was undertaken by teachers in 1979. According to conservative estimates, at least 4,000 teachers were dismissed. Some of them were re-engaged, but in many cases they were arbitrarily assigned to other posts.

Freedom of Expression

There have been a number of attacks on freedom of expression since 1968, amply illustrated by the expropriation of all daily newspapers by the state, which took place in 1974. The subject is an extremely complex one and many aspects of it have to be considered. It is highly undesirable to treat it superficially and hence run the risk of serious error. During the last 12 years of military rule, various bodies of the press were searched, closed down and their publications in circulation confiscated without warrant. A tendency to this sort of action became much more marked and widespread when the economic crisis and, ultimately, popular pressure intensified from 1976 on. The chief breaches of the right to freedom of expression that took place during the span of more than a decade, from 1968 to 1980, follow in chronological order.

In November 1968, pursuant to Legislative Decree no. 17094, the premises of the daily newspaper Expreso, which supported ex-President Belaúnde's policies, were searched and its publication suspended. In May 1968, the current edition of the magazine, Caretas, was confiscated and its managing editor sent into exile. The first Press Act, regulating offences committed by the press and broadcasting media, was issued in 1969.

In 1970, the Expreso was expropriated (by virtue of Legislative Decree no. 18169) and, on the basis of legal proceedings, the Aprista journal, La Tribuna, was suspended. In the same year, the Bolivian journalist, Elsa Arana, was deported, and the managing editor of Caretas was sentenced, under the Press Act, to six months' imprisonment and a fine of 10,000 soles. Two years later, in 1972, another reporter, Carlos Costa, editor of the weekly magazine Indio, was deported. The same year, the government indicted a number of journalists for certain articles that had been published - Anibal Aliaga for his article entitled "Revolutionary Democracy" and two reporters of the daily newspaper Ultima Hora for having published an article which allegedly "compromised Peruvian foreign relations".

Later, in September 1973, the government confiscated an edition of the magazine Sociedad y Politica edited by the Peruvian sociologist, Anibal Quijano. Another confiscation took place in January 1974, this time against Indio. In that year, Caretas was ordered to be closed down and its managing editor was again sent into exile. A new Press Act was issued in July, resembling its predecessor in most respects but adjusted to the new situation caused by the nationalisation of the press, which had just taken place. In November of the same year, the English-language review, the Peruvian Times, was closed down for quoting information concerning a pipeline then being built, that was not to the government's liking. As in many other cases of closure, this was quite simply an abuse of power, having no legal basis whatever. Similarly, in March 1975, for instance, Caretas (which had published an article that the government disliked about shortages in hospitals) was closed down merely by means of an official notification.

In August 1975, the Left-wing publication, Marka, was closed down for criticising the Chilean government. Along with the closure, not only the editor but also all the staff of the magazine were deported. In September, the closure and deportation orders were cancelled. A decree was issued in March of 1976 requiring that anyone editing a publication must first apply for a licence from a certain government agency. Shortly afterwards, in July, the seven most important magazines in the country were closed down pursuant to Legislative Decree no. 21539. In December of the same year, some of them were allowed to publish again, and the others were permitted to re-open in September 1977, i.e., after more than a year of suspension. Thereafter, however, the Ministry of the Interior instituted a system of "anticipatory censorship", which lasted until November.

All newspapers and journals were closed for a month in 1978, right in the middle of the election campaign for the Constituent Assembly. In January 1979, the publication of most of the periodicals was "suspended" in accordance with a Legislative Decree issued for the purpose (no. 22414). Subsequently, some were allowed to publish again but the rest remained closed. After a hunger strike by a number of people, including journalists of quite a variety of political persuasions, the government permitted the re-opening of all the periodicals that it had closed down.

It is clear from the above that, during this 12 year period till May 1980, even though no Emergency Act was issued or state of exception proclaimed, legislation was passed and policies implemented that, in many cases, involved breaches of basic human rights. The rights of workers and freedom of expression were all compromised in various ways. Personal freedom was also violated on many occasions as a result of arbitrary arrests, and more than 80 deportations took place during this period. It should be recalled also that the way in which the authorities reacted, and in many cases over-reacted, to popular protest resulted in a significant number of deaths and woundings, in connection with demonstrations, occupation of factories and farmlands, etc.

A final point to be mentioned with regard to this period is the marked expansion of military tribunals. As will be seen below, these courts were progressively extending their competence to offences that were in no way military and in respect of which the accused were civilians.

II. SUSPENSION OF CONSTITUTIONAL SAFEGUARDS AND DECLARATION OF STATES OF EMERGENCY IN PERUVIAN LAW

The 1933 Constitution, which remained in effect in Peru until 28 July 1980, provided, at section 70, for the suspension of constitutional safeguards. The condition precedent required by this section in order for it to come into operation was that state security should be in jeopardy. The executive was empowered to order suspension and, insofar as congress was functioning, the executive "shall immediately inform it thereof". The suspension of constitutional safeguards could apply to all or part of the national territory and only affected the guarantees set out in sections 56, 61, 62, 67 and 68, the substance of which will be described later. It might be decreed only for a term of 30 days, renewable only by means of a new decree. There was no restriction on the number of times that the suspension could be renewed. There was merely

a final phrase in the section to the effect that "the law shall define the powers of the executive during the suspension of constitutional safeguards". No such law had ever been issued, however.

During a significant portion of the time when this constitution was formally in effect, there were emergency acts (such as the Emergency Act from 1932 to 1945 and the Internal Security Act from 1949 to 1956) that rendered recourse to the suspension of constitutional safeguards superfluous.

In other periods, particularly during the latter years of the military régime that took office in 1968, the suspension of constitutional safeguards tended to be part of a more or less habitual phenomenon taking place in the face of social upheaval of varying kinds. Under the military government, the preamble to the proclamations of suspension of constitutional guarantees referred to section 70 of the constitution, mentioned above, and also to section 213 thereof, concerning the armed forces. As will be seen shortly, this reference was not without significance for the progressive extension of the scope and portent of the suspension of constitutional safeguards.

The expression "constitutional safeguards" is used here without entering into abstruse jurisprudential considerations current in Peruvian constitutional legal theory, whose purpose is to demonstrate on various grounds that the suspension of certain constitutional rights or guarantees can be justified in the name of defending the collective interest as a whole. Thus, Bidart, for example, states that "... in view of the relative character of individual rights, certain limitations thereof are justified when the collective interest so requires".

On the basis of this premise, of which a single example is mentioned here, an equally abstruse and prolix discussion has arisen between those who maintain that the question is one of "suspension of rights" and those who argue that it is one of "suspension of safeguards". According to the first group, certain constitutional rights are themselves suspended, while according to the second group, the rights as such continue to exist but the constitutional safeguards making them enforceable are suspended. From the point of view of practical effect, however, the controversy has been, and continues to be, purely academic. It is quite obvious that the suspension or absence of instruments enabling a right to be enforced ("suspension of safeguards") amounts, indirectly, to the suspension of the right itself. Conversely, the suspension of a right as such renders the question of the existence of a safeguard, whose purpose should be to enforce it, completely irrelevant. It should be remarked, however, that certain safeguards (habeas corpus, for instance) can continue to be useful with respect to such rights as have not been suspended. In the light of this disputation, Peruvian constitutional law (both in 1933 and more recently, in 1979) has opted in favour of the formulation "suspension of safeguards", but if the sections to which the suspension permitted by the constitutional provisions is applicable are examined closely, it will be seen that they concern rights rather than guarantees of the exercise of rights. Group actions or habeas corpus petitions, for example, are not subject to suspension. It follows simply that rights that have been suspended cannot - temporarily - be enforced by the safeguards in question.

The present article uses, however, the time-honoured constitutional formula. Thus, when "suspension of constitutional safeguards" is mentioned, what is meant is the same as what is meant by the respective Peruvian constitutions, even though, practically speaking, what is being alluded to is the suspension of rights. Five of these 'safeguards' could be subject to suspension under the 1933 Constitution: no arrest without judicial warrant and without, in all cases, being brought before a judge within 24 hours of being taken into custody (section 56); no invasion of private premises without a warrant (section 61); the right of assembly (section 62); the right to move freely within the country and to enter and leave it without hindrance (section 67); and no banishment from the country without a judicial order (section 68). It obviously followed from any suspension that there could be no recourse to habeas corpus, as guaranteed by the same constitution (section 69), against an administrative or police act based on such suspension and directed against a suspended right.

Important constitutional rights could thus be put aside by a simple order of the executive, and the legislature had merely to be informed of this decision. Such suspension could be renewed indefinitely so that the executive, and through it the police forces, took on very considerable importance without being in any way in violation of the constitution. The right to bring a petition of habeas corpus, even with the limited practical effort that such an action may have, was simply brushed aside.

Between 1960 and 1980, there were no fewer than 50 suspensions of constitutional safeguards pursuant to these provisions, respecting either the whole or part of the national territory and amounting to an aggregate total time span of not less than four years. In this connection it should be mentioned that, since 1976, the repeated renewal of the suspension of safeguards for the country as a whole became more or less routine. Thus, there was a long period of suspension, of 14 months, from July 1976 to September 1977, then two further months in May and July 1978 (when the Left-wing candidates for the Constituent Assembly were deported) and finally another such period in the first three months of 1979 (the suspension of section 56 remained in effect until January 1980). In addition to all those which applied to the entire nation, in the same period there were a number of suspensions for parts of the country in response to situations that were of limited geographical incidence. These additional measures began in 1976 and were in many cases accompanied by curfew orders (Lima Province, for example, was under a curfew order for 14 consecutive months from July 1976 to September 1977) and by the proclamation of a state of emergency. The real social causes of these measures were undoubtedly the various demonstrations and protests taking place from that time on against the marked deterioration in living conditions resulting from the way the economic crisis was being handled. First, there was the closing down of the state anchovy fleet and then the general reduction of the real level of the already meagre workers' wages, which lost 32% of their purchasing power within five years (1973-1978). The "collective interest" being defended was thus a contested and contestable economic policy, which was being severely criticised by the 'collectivity' in question.

An issue which is clearly of prime importance concerns the powers of the executive during the suspension of constitutional safeguards. Obviously, the rights that have been expressly suspended are not observed. This has resulted and still results in the arbitrary detention of political and trade union figures (in most cases the custody is purely "preventive"), the violation of private property, the prohibition of trade

union meetings (and rather less frequently, of political meetings) and the exile of citizens. On other occasions, these measures are taken without being founded on any suspension of safeguards, but in such cases the authorities resort to other means of preventing the use of habeas corpus or similar guarantees. But this is not the real issue.

In July 1972, when there was considerable student and popular unrest and agitation in the city of Puno, not only were the safeguards suspended but the County of Puno was also proclaimed to be in a state of emergency. The same thing took place in Cusco in November 1973 and throughout the entire national territory in February 1975, in the wake of events that occurred during the strike of the regular police forces. Since then, 29 suspensions of safeguards have been coupled with proclamations of states of emergency. From July 1976 to August 1977, the whole country was placed in a state of emergency, and this occurred again in May 1978 (the month of elections to the Constituent Assembly) and during the first two months of 1979. What was involved in this sudden emergence of a legal phenomenon - a state of emergency - that had not been resorted to before and was not provided for in the constitution or in any other known legislation ?

These proclamations of states of emergency were based on legislation decreed in April 1963: the General Garrison Service Regulations (Supreme Decree no. 14-CFFA). This Supreme Decree has, however, never been published, a fact which, in itself, deprives it of legal effect since section 132 of the 1933 Constitution provides that a law (in the wide sense) is mandatory as of the day following its adoption and publication. A law of general scope, as this Supreme Decree would appear to be, has not the force of law at all, therefore, for as long as it remains unpublished.

It was nevertheless on the basis of this secret piece of legislation that states of emergency were proclaimed, coinciding with the suspension of constitutional guarantees by the executive. It is impossible to guess the contents of an unknown law, but certain elements can be deduced from the practical consequences of the states of emergency proclaimed in recent years. Unlike a simple suspension of constitutional safeguards, a state of emergency involves a transfer of political and military power to the military commanders of the different zones. Pursuant to the explicit terms of the decrees proclaiming states of emergency, the commander of the military zone concerned "herewith takes over the political and military authority in the area". Thus, what is involved is not merely a suspension of a safeguard (or right) to give the executive broader powers, but the delegation of such powers by the executive to the armed forces, which have no constitutional authority for exercising them. Consequently, a situation arises in which the military commanders not only decide on the ordering, the scope and the lifting of curfews and the patrolling of the streets by regular army, navy and air force units, but also exercise the prerogatives which, under a simple suspension of constitutional safeguards, would pass to the executive.

Such a situation, which was irrefutably unconstitutional and most serious in its implications, was somewhat irrelevant in practice since the country was under a military government anyway. Insofar as the political authorities that were brought under the control of the military pursuant to the state of emergency were approved by the same military authorities in the first place, no substantial change of rôles actually took place.

The military government exerted considerable pressure on the majority political parties in the Assembly, which met in 1978 and 1979, however, and since those parties were anxious to take over the reins of government without major setbacks, they agreed to incorporate important provisions governing states of exception into the new constitutional document. It is worth examining this crucial issue since it is undoubtedly germane to possible future developments in Peru regarding states of emergency.

The chapter of the new constitution covering states of exception contains a single section, section 231, providing for the existence of two possible states of exception: the state of emergency and the state of siege. In both cases, the executive proclaims the states of exception and informs Congress or the Standing Committee thereof. The state of emergency is applicable to cases of "... threats to peace or public order, disasters or serious circumstances affecting the life of the nation". The state of siege, on the other hand, concerns cases of "... invasion, foreign or civil war or any imminent danger thereof". Even though, somewhat strangely, the scope and purport of the state of siege are not defined in the constitutional text, there are some particulars as to the state of emergency which it is useful to examine in greater detail.

In the first place, it is provided that certain constitutional safeguards may be suspended during a state of emergency. Repeating the language of the 1933 Constitution as regards "safeguards" rather than "rights" it is provided that the safeguards that may be suspended are those relating to individual freedom and safety, inviolability of private dwellings and freedom of assembly and movement within the country. The application of the sanction of exile is explicitly prohibited under a state of emergency.

Secondly, it is provided that during a state of emergency "... the armed forces shall be responsible for the maintenance of public order when the President so orders" (section 231(a)). This provision brings an important change to the situation envisaged in the 1933 Constitution, insofar as the 1933 Constitution contained no faculty for the executive to delegate its powers to the armed forces during a suspension of constitutional safeguards. Nevertheless, under the new constitutional provision, it would not appear that the proclamation of a state of emergency automatically entails the transfer of power to the military. On the contrary, this is left to the President of the Republic to decide.

The new provision does, however, bring within the terms of the constitution actions that were previously irregular and unconstitutional because they were based on unpublished legislation. As from 28 July 1980, the proclamation that "the military commanders herewith take over the political and military authority in the area" is not automatically in breach of the new constitutional order. This provision of the new constitution seems to be connected with developments in the policies of governments in a number of Latin American countries. Many of them - Colombia is probably the most typical - have carefully preserved the forms of democratically elected government while, in actual practice, much greater power is concentrated in the hands of the armed forces. According to some commentators, this gives the armed forces real authority as regards the essential issues of the life of a society, while the civilian authorities are left only snippets of power and have merely

the appearance of conducting the affairs of state. In the opinion of many, this division of power is tending to become entrenched in a number of countries and the new provision in question is seen as providing a constitutional basis for the maintenance of states of emergency over protracted periods with the inevitable consequences.

Thirdly, it is significant that the period of validity of a proclamation of a state of emergency is 60 days, thus doubling the time provided for the suspension of safeguards in the 1933 Constitution. As with the suspension of safeguards in the previous constitution, the proclamation of a state of emergency can be renewed upon expiry for as many times as necessary by simple order of the executive. When the term of the suspension was being defined in the new constitutional provision something took place which may seem purely anecdotal but is not devoid of relevance. When the chapter on states of exception was before the Plenary of the Constituent Assembly for approval, it was agreed that the period of effect of a proclamation of a state of emergency should be 30 days. In accordance with the standing orders of the Assembly, the text then went to the Drafting Committee and was to be returned to the Plenary for final adoption of the wording formulated by the Committee. Curiously, the text which came back from the Committee to the Plenary had been changed substantially by doubling the effective period to 60 days. Clearly the Drafting Committee had exceeded its terms of reference. In spite of this, the text, as amended, was adopted by the Assembly. Apparently no one noticed, at this stage, the change that had been introduced. In the last analysis, however, since this was the text finally adopted by the Assembly, this is the text which came into effect on 28 July.

As regards states of siege, these too must be proclaimed by the executive but only for a maximum period of 45 days. The approval of Congress is necessary for their renewal.

III. SAFEGUARDS FOR THE PROTECTION OF RIGHTS BREACHED

The 1933 Constitution provided for two sorts of action in cases of breach of constitutional rights. Firstly, habeas corpus (section 69) invoked in cases of violation of the individual and social rights recognised by the constitution. Secondly, the group action (section 133) against regulations, decisions and orders of the government which infringed the constitution or laws in effect. Habeas corpus was intended to be used against acts of authority in breach of constitutional rights, whereas the group action was intended to be invoked against legislation in violation of the constitution or laws in force. The aim in the first case was to put an end to the arbitrary act being committed, while in the second, it was to prevent the application of the legislation impugned. The 1933 Constitution made no provision for the courts to be empowered generally to declare direct or subordinate legislation unconstitutional.

Habeas corpus is pertinent to our subject because it is an instrument for enforcing individual rights and freedoms, protecting the privacy of the home against unwarranted trespass and upholding freedom of movement within the country. From its very inception, however, the 1933 Constitution met with a number of situations that seriously compromised the impact of this guarantee.

The first situation was the suspension of the right to have recourse to habeas corpus. This took place under the Emergency Act until 1945, under the Internal Security Act from 1949 to 1956 and during the countless periods when constitutional safeguards were suspended in Peru.

The second situation was that of the aggrieved person or members of his family (in cases of unlawful imprisonment) invoking habeas corpus when the constitutional guarantees were not suspended. In certain cases, habeas corpus petitions were made and the court proceedings were conducted properly, with the result that the aggrieved person had his legitimate request guaranteed. In other cases, however, and with rather depressing regularity, the authorities acted in a manner designed specifically to avoid possible resort to habeas corpus. The usual means was for those who had arrested the individual and had him in custody on their premises to deny this. The effectiveness of this method depended on the difficulty which members of the family of the person concerned (and/or the judicial authorities) may have had in physically locating the victim so as to have him liberated by habeas corpus. In furtherance of this method, a procedure commonly known as the "roundabout" was used, consisting of secretly transferring a person from one place of detention to another. Another means used for the same purpose was to take the detainee to a destination completely inaccessible to those seeking him, thus rendering judicial intervention practically impossible. This happened, for example, in December 1975 when a group of lawyers, who were legal advisers to trade unions, were arrested and sent to El Sepa, a penal colony located in the jungle. In spite of the fact that the constitutional safeguards had not been suspended and that they were kept in custody for several months (without a warrant of any kind and without being subjected to any other kind of judicial proceedings) habeas corpus could not be used because no judge was able to reach the place of detention.

The third situation in which the habeas corpus problem arose was when the petition was granted but, notwithstanding this, the executive opposed the enforcement of the judicial order, which thus became both inapplicable and irrelevant. This took place under the military government in connection with citizens who had been expelled from the country without either judicial decision or suspension of constitutional rights. There were even cases, especially at the beginning of the régime in question, when, in the wake of a judicial granting of a habeas corpus petition in favour of an aggrieved party, one of the highly placed spokesmen for the government stated publicly, "Let him try to come back if he can !".

The group action is a relatively recent phenomenon, even though it was also contained in the 1933 Constitution. The problem was that when the constitution was drafted and adopted, it was taken for granted that the corresponding legal procedures would be defined subsequently. These procedures were in fact defined only 30 years later when the Basic Judiciary Act (5) was issued. Although the procedure of the group action

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(5) In another provision, the constitution made reference to group actions for a different purpose. This is section 231, which laid down that a group action would lie to impugn abuse of office and other offences committed by the judiciary. It could also be used to contest acts in breach of judicial decisions. The Code of Criminal Procedures also contained a section (section 76) providing for the introduction of a group action in cases of persons caught in flagrante delicto.

has been used on a small number of occasions against legislation affecting individual rights of the population, most of the rare cases when it has been used have been in connection with issues only marginally related to the subject of our inquiry.

The 1979 Constitution provides machinery rather more extensive than that available under the 1933 Constitution, since it establishes a constitutional supervisory body called the Court of Constitutional Safeguards. This new constitution also defines - more restrictively - the scope of habeas corpus petitions, maintains the group action and establishes actions of petition of right and certiorari.

Habeas corpus safeguards the citizen against acts or omissions of any authority, official or person that violate the individual's rights. Compared with the 1933 Constitution, the new provision of the 1979 Constitution limits the scope of habeas corpus because under the previous legislation it could be used to enforce all individual and collective rights, and not merely individual freedoms guaranteed by the constitution. On the other hand, there is a considerably more flexible requirement with respect to the definition of the person committing the violation. There is no condition that the impugned agent must be a government official, as judicial precedents had been tending to establish hitherto. It is sufficient that the impugned act be a violation of individual freedoms.

The petition of right covers all the other rights recognised by the constitution, with some latitude in respect of the identity of the agent. The group action is defined in similar terms to those contained in the 1933 Constitution with the additional element that the legislation that can thereby be contested may be not only orders of the executive but also those issued by regional and local government and other public law authorities.

Undoubtedly, the most important innovations are the action of certiorari and the establishment of the Court of Constitutional Safeguards. The purpose of the action mentioned is to have laws, legislative decrees, regional legislation of a general character and municipal bye-laws disallowed as unconstitutional, either in whole or in part, when they are in breach of provisions of the constitution. This signal development, which is something of a novelty in Peruvian constitutional law, is coupled with the creation of the Court of Constitutional Safeguards as the supervisory body of the constitution (6). If it gives a decision of unconstitutionality, the decision shall be communicated to Congress, which shall then pass a law repealing the unconstitutional legislation. If after 45 days no such repeal has taken place, the unconstitutional legislation will be deemed to have been repealed ipso jure. The range of persons empowered to introduce this sort of action is limited, however, to the President of the Republic, the Supreme Court of Justice, the Solicitor-General of the Nation, 60 members of Congress (of a total of 180), 20 Senators (of a total of 60) or 50,000 citizens, whose signatures are certified by the National Elections Commission.

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(6) The Court of Constitutional Safeguards is composed of nine persons, three appointed by Congress, three by the executive and three by the Supreme Court of Justice.

IV. THE EXTENSION OF MILITARY JURISDICTION

During the last few days of the military government which held office from 1962 to 1963, Legislative Decree no. 14612 containing the Military Justice Act and Legislative Decree No. 14613 containing the new Code of Military Justice were enacted. Both pieces of legislation resulted from the first experience in Peruvian history of an institutionalised military government. Military rule had been frequent in the past but this was the first time that the armed forces had been defined as an institution in a political policy which ultimately led in 1968 to the military régime headed by General Velasco. One of the cornerstones of this policy was "national security". This was a notion interconnected with the armed forces' duty not only to prepare to defend the country's borders in the event of attack from without but also to attack the bases of instability and unrest that might arise within. This presupposed two sorts of complementary measures - on the one hand, implementing certain social reforms aimed at reducing potential focal points of tension and conflict and, on the other, reaffirming and extending the role of the armed forces as the "defenders of the fatherland". It is for the second of those measures that legislation such as the two legislative decrees mentioned above were passed.

It is in this context of national defence that the preamble to the new Code of Military Justice proved to be capable of developing into a progressive extension of military jurisdiction. It states, for example, that "... it is necessary to define more accurately certain offences and to extend the categories of crime to include those which have in the course of time and because of the changes which have taken place become manifest and are used to undermine the defence of the nation, and are thus contrary to the proper fulfilment by the armed forces of the specific mandate which the constitution confers on them".

It was since 1968, especially, that the extension of military jurisdiction became ever more apparent. This took place largely as a result of new legislation that defined new offences or brought offences formerly within the competence of the ordinary courts under military jurisdiction. It was effected also by means of judicial decisions that increasingly extended the powers of courts-martial to cover matters that were clearly of a political nature.

These extensions by means of law shared a common feature - they extended the jurisdiction of courts-martial to include offences that were not of a military character and to cover the trial of civilians. There were four main elements involved in this process.

Sabotage of Agrarian Reform

The first element was the enactment, pursuant to the Agrarian Reform Act of 1969, of the offence of "sabotage of agrarian reform" to be tried by a court-martial. If the offence was proved, the penalty provided was for not less than one and not more than ten years' imprisonment. There was no procedure for conditional release. Although it may be assumed that this legislative provision was enacted to combat the possibility that the landowners to be affected by the act might resist its application, it was, in fact, directed to quite a different purpose. In fact, in more than ten years of agrarian reform, it was virtually unknown for landowners to be charged under this provision, in spite of the fact that it was public knowledge that there

had been a number of flagrant cases where landowners removed goods (machinery and livestock) that had been the subject of expropriation orders. There were a large number of cases, however, where the accused were rural farmers, i.e. those in whose interest the legislation was supposed to have been enacted.

Such was the case, particularly, for peasants who occupied estates in the face of the grinding slowness with which agrarian reform measures proceeded in some parts of the country. As may well be imagined, this snail's pace enabled landowners who were to be expropriated to strip the farms of capital investment, except in a very few isolated instances. The same treatment was meted out to peasants who occupied lands, especially in the highlands, belonging to the new corporations that sprang up out of agrarian reform. The deep-seated cause of this kind of action was that communities that had not benefitted from the reform were desperate for more land while the vast land-holdings of these corporations were often inefficiently farmed or quite simply abandoned. Many peasant groups were tried by courts-martial (7). In other cases, the accused were not peasants invading lands but wage-earners of the cooperative itself who organised into unions and undertook action in furtherance of their claims.

Sabotage of Telecommunications and Acts of Political Terrorism

Another legislative extension of military jurisdiction was contained in the General Telecommunications Act of 1971 (Legislative Decree no. 19020). This legislation provided that it was a crime to bring the operations of the public telecommunications and broadcasting services to a standstill.

Again, there was no provision for conditional release. Penalties ranged from a minimum one-year sentence to a maximum of three years' imprisonment.

The third example of this legislative extension of military jurisdiction related to political assassinations. The legislation was set out in Legislative Decree no. 20828 of December 1974. Wartime ("theatre of operations") procedures were applicable in such cases, with the result that all the formalities were drastically compressed, since the investigation, the sentence and its execution had to be completed within 48 hours from the beginning of the criminal investigation. Sanctions were also drastic: death, in the case of death or wounding of the victim; imprisonment for not less than 25 years, if any material damage was caused; and imprisonment for not less than 20 years for a mere attempt, even if no harm was incurred. There were neither conditional release, suspended sentences nor parole.

Attacks Involving Bombs or Explosives

The same Legislative Decree, no. 20828, provided for military

(7) Article 282 of the new Constitution states that military jurisdiction is not applicable to civilians unless there is a state of external war.

jurisdiction in cases of attacks on human life involving bombs or explosives. The same summary procedures were applicable in such cases as in the previous ones. In the few instances in which acts that might be considered as falling within the scope of this offence occurred, preliminary investigations never led to the actual indictment of anyone. Thus, the persons responsible for the explosives found on two Cuban ships in 1975, those located in the residences of Cuban diplomats and those in the homes of two ranking officers of the navy considered to be "leftists" (Vice-Admiral Arce Larco, in 1976, and Vice-Admiral Faura Gaig, in 1975) seem to have gone unpunished.

According to some observers, the legislation under discussion was intended to cover cases in which the political orientation of the act was exactly the opposite of that underlying the attacks which actually took place. It has been said also that the authorities preferred to opt for silence in these cases because of the involvement of members of the armed forces, particularly of the navy, in the alleged criminal acts.

Extension Through Judicial Decisions

Whereas the legislative extension of the jurisdiction of the courts-martial can be catalogued with precision, this is not the case as regards its extension through judicial interpretation. Access to records of proceedings of military courts, whether in respect of decided cases or those still pending, is very difficult. It can nevertheless be deduced from information available and the experience of the last few years that cases of a political nature were increasingly brought within the definition of the crimes of "attack on the nation, its symbols and the armed forces".

Cases of public demonstrations (officially known as "disturbances of the peace") were brought under military jurisdiction on the basis of such incidental elements as the fact that, during the demonstration, tracts and handbills were distributed criticising the government or the President of the Republic. The various teachers' strikes during the last ten years were consistently the subject of court-martial proceedings against the leaders. Situations of social unrest, during which there was conflict between police forces and demonstrators in the heat of mass protest, were brought within the scope of the crime called "attack on the armed forces".

This extension by judicial decision conferred on the armed forces a practically impenetrable protective mantle of great significance in situations of crisis and social upheaval. Not only did it serve to extend their jurisdiction, it also sheltered them when proceedings were instituted against them from time to time in the ordinary courts for damage incurred by the civilian population and caused by the armed forces. When sectors of the population were injured by acts of the police that were indubitably in violation of the law, the ordinary courts declined jurisdiction in most cases on the grounds that the accused were military personnel. There was a single exception, a case which took place in 1976, in which those responsible for the death by torture of a young student, Fernando Lozano, were finally brought before the ordinary courts and sentenced to a term of imprisonment. A few weeks later, however, the government issued an Act of Pardon. In most cases, matters were handled in the same manner as a case in the community of San Juan de Ondores, where the policemen charged

for an assault and eviction with judicial warrant which resulted in the death of two peasants, a number of woundings and loss and damage amounting to some US $ 1,200,000, were not tried in the ordinary courts. The ordinary courts refused to pursue the criminal proceedings initiated before them, alleging that the accused were members of the police force and had, therefore, to be tried by the competent police authority.

The 1979 Constitution provides that civilians shall not be subjected to military jurisdiction (section 282). It provides further that there shall be no death penalty, except in cases of high treason, while the country is in a state of war. This constitution was approved by the Constituent Assembly on 12 July 1979 and came into full effect on 28 July 1980. The Constituent Assembly itself excluded some of the chapters (8) of the constitution from immediate entry into effect. The military government, for its part, "took note" of this partial entry into force of the constitution and decided that the full entry into effect would take place on 28 July 1980. Among the provisions of which the executive specifically "took note" were those prohibiting the death penalty and those removing civilians from military jurisdiction. The subsequent practice of the military authorities demonstrated, however, that as far as they were concerned these provisions were of no effect.

During the latter months of 1979, the Supreme Court was seized of the case of two young people of left-wing leanings accused of having murdered a policeman. The Advocate-General (of a military court) called for the death penalty for one of the accused, Raymundo Zanabria. The other accused, Justo Arizapana, was a minor when the offence with which he was charged was committed, so, in his case, only imprisonment was requested. The key question as to the effect of the constitutional provision enacting that civilians should not be brought before military tribunals was thus posed concretely and dramatically. At the same time, the Advocate-General, by calling for the death penalty, ignored the constitutional provision prohibiting this sanction. Thanks in large measure to the pressure of domestic and international public opinion, the court finally refused to retain the death penalty and sentenced Zanabria to 25 years' imprisonment. In the reasons for judgment, however, no mention is made of the constitutional provision, the only grounds invoked being extenuating circumstances making the death penalty inappropriate in this case.

V. THE NEW CONSTITUTION AND HUMAN RIGHTS

After the entry into force of the new Constitution (July 1980), democracy was consolidated under the leadership of President Belaúnde

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(8) The chapters concerned are two of those contained in the Part on "Basic Rights and Duties of the Individual", cap. 1 entitled "Of the Individual" and cap. 7 entitled "Of Political Rights". Similarly, cap. VII on Agrarian Reform in the Part on the Economic Order. Also sections 87 (providing for the supremacy of the constitution over the legislation therein mentioned), 285 (prohibiting the death penalty) and 282 (providing that the Code of Military Justice is not applicable to civilians). It covers also the general and transitional provisions.

who took office in July 1980, following 12 years of military rule.

The new Constitution contains a long and exhaustive list of human rights, making it particularly wide-reaching in comparison with the general run of Constitutions. Two reasons can explain this. After 12 years of military government the population was tired of military rule and was anxious to enshrine as many human rights in the Constitution as possible. The second reason is an external one, resulting from the fact that during the period in which the deliberations of the Constituent Assembly took place, human rights issues were particularly focussed and debated in international circles, and the military government was most anxious to improve its international image.

Chapter I of Part I contains the list of individual rights: to life, to equality before the law, to freedom of conscience, freedom of information, opinion, expression and publication, the right to personal and family privacy, freedom of intellectual, artistic and scientific creation, the inviolability of private property, of private papers and communications, free choice of residence, freedom of movement within the national territory and to and from the country, prohibition of exile, freedom of assembly, of association, freedom to aspire to a standard of living adequate to ensure well-being, participation in the political, economic, social and cultural life of the country and personal freedom and security.

As regards to the right of personal freedom and security, the following specific rights are defined inter alia: not to be tried for a criminal act or omission which at the time of commission was not considered to be criminal; to be presumed innocent until such time as found guilty by a competent court of law; no arrest except pursuant to a judicial warrant or during the actual commission of an offence; in all cases a person in custody must be brought before a judge within twenty-four hours of arrest (except for cases of "... terrorism, espionage and illegal trafficking in drugs", discussed below); the right of every arrested person to be informed immediately and in writing of the grounds of his arrest; the right of a detained person to communicate with, and to be counselled by a lawyer of his choice as from the time of his being arrested or charged; prohibition against holding prisoners incomunicado and the duty of the authorities to inform those concerned of the place of detention of a person in custody; nullity of statements obtained through violence; impossibility of being transferred to a jurisdiction not provided for by law and of being judged under procedures other than those duly provided for by law; no extraordinary tribunals or special commissions to be established for this purpose.

The 1980 Constitution provides that civilians shall not be subjected to military jurisdiction (section 282). It will be remembered that during the 12 years of military government there was a marked expansion of military justice. Military tribunals progressively extended their competence to offences which were in no way military and in respect of which the accused were civilians. One of the reasons for this was the "ideology of national security", according to which the duty of the armed forces was not only to prepare to defend the country's borders in the event of attack from outside, but also internally to attack the bases of instability and unrest which might arise within the country.

Section 235 of the Constitution provides for the abolition of the death penalty except in cases of high treason when the country is in external war (but not under a state of emergency).

Among the rights of citizens are the set of political rights in Chapter VII of Part I, such as the right to participate in political affairs, to vote and to organise political parties. In addition, there are others relating to social security, health and well-being (Chapter III of Part I), and to education, knowledge and culture (Chapter V of Part I). Among the rights of workers are the right to security of employment (section 48), the right to establish trade unions without prior authorization (section 51), the right to collective agreements which have the force of law (section 54) and the right to strike (section 55).

The right of insurrection should also be mentioned. Section 81 states that power emanates from the people. The authorities act as the people's representatives. Section 82 states that nobody shall obey a usurper government or those who assume public functions in violation of the constitution and laws. Their acts are void. The people has the right to insurrection in defence of constitutional order.

If all these rights were applied it would represent a significant innovation in the daily practices of the authorities in respect of civil liberties. Whilst some of the provisions are not new others are very much so. An example is the right to be informed of the grounds of arrest. This would do away with the frequent cases of political and trade union personalities being arrested without having the slightest information as to the charges against them. Previously, they were not informed of the charges during the whole time of their detention. They were just kept in "preventive custody" at the behest of the public authorities.

Another significant new feature is the right to be assisted by legal counsel as from the moment of arrest. This constitutional provision is an important tool both for lawyers in the free exercise of their calling and for the protection of those arrested. The difficult situation in previous years of legal advisers of trade unions and political leaders could be singularly improved. The provision prohibiting the concealment of detainees by giving the right of communication is also important.

There is, however, an exception to the rule that persons in custody must be brought before a judge within twenty-four hours. The exception covers terrorists, spies and drug traffickers who, pursuant to section 2, sub-section 20(g), can be kept in preventive custody for up to 15 days. Given the latitude with which governments sometimes endow the expressions "terrorist" and "spy", there is a danger that the use of this provision could become a regular practice when dealing with political prisoners. Indeed, on 12 March 1981, President Belaúnde used his executive powers and passed a legislative decree on terrorism which gave considerable powers to the Civil Guard, classified terrorists according to various criteria and established prison sentences of up to 20 years for those convicted of terrorism. The constitutionality of this law has been questioned by Church and opposition groups.

Judicial Remedies for the Protection of These Rights

The new Constitution provides for four remedies: habeas corpus, amparo, the popular action and the action of unconstitutionality. Habeas corpus proceedings safeguard the citizen against the acts or omissions of any authority, official or persons which violate or threaten individual security. Amparo proceedings give protection against threats or violations concerning other constitutional rights. Compared with the 1933 constitution the new provision (section 295) limits the scope of habeas corpus and amparo. Formerly, it could be used to enforce all individual and collective rights, not merely the individual freedoms guaranteed by the Constitution. On the other hand, there is a considerably more flexible requirement with respect to the definition of the person committing the violation. There is now no condition that the impugned agent must be a government official; it is sufficient that the impugned act be a violation of individual freedoms.

The third remedy, the "popular action", enables interested groups to contest rules of a general character, not relating to particular cases, such as general regulations issued by the executive, or issued by regional and local governments and other public law authorities. It can also be used to impugn abuse of office and other offences committed by the judiciary. It covers all the rights recognised by the constitution, with considerable latitude in respect of the identity of the agent.

Finally, the "action of unconstitutionality" (section 298) enables legislation, including laws, legislative decrees, regional legislation of a general character and municipal byelaws to be set aside as unconstitutional, either in whole or in part, when they are in breach of provisions of the Constitution. As in the case of the popular action, the petitioner need not have a personal interest in the outcome of the action. This action is brought before a new body, the Court of Constitutional Safeguards, composed of three members appointed by Congress, three by the executive and three by the Supreme Court of Justice.

As previously stated above, when a decision declares a law unconstitutional in whole or in part it must be communicated to Congress, which is then required to pass a law repealing the unconstitutional legislation. If after 45 days no such repeal has taken place, the unconstitutional legislation will be deemed to have been repealed ipso jure. The range of persons empowered to introduce this kind of action is limited. Petitions may be submitted by the President of the Republic, the Supreme Court of Justice, the Solicitor-General of the nation, 60 members of the Chamber of Deputies (of a total of 180), 20 Senators (of a total of 60) or 50,000 citizens, whose signatures are certified by the National Elections Jury.

States of Exception

The chapter of the new Constitution covering the states of exception contains a single section, section 231, providing for two possible states of exception: the state of emergency and the state of siege. In both cases it is the executive which proclaims the states of exception and then informs Congress or its Standing Committee.

A state of emergency can be proclaimed in cases of "... threats to peace of public order, disasters or serious circumstances affecting the life of the nation". Its period of validity is for 60 days, thus doubling the time provided for in the 1933 Constitution. The proclamation

can be renewed upon expiration as many times as necessary by simple executive order.

The state of emergency has two consequences. First, certain constitutional safeguards relating to individual freedom and safety may be suspended, namely the inviolability of private dwellings, freedom of assembly and freedom of movement within the country. Imposition of the sanction of exile is explicitly prohibited. Secondly, it is provided that during a state of emergency "... the armed forces shall be responsible for the maintenance of public order when the President so orders" (section 231(a)). Thus, under the new constitutional provision, it would appear that the proclamation of a state of emergency does not automatically entail the transfer of power to the military. This is left to the President of the Republic to decide.

There are very few provisions concerning the state of siege. It may be imposed in time of "... invasion, foreign or civil war or any imminent danger thereof". A state of siege may be proclaimed by the executive but only for a maximum period of 45 days. Approval of Congress is necessary for its renewal.

The Congress plays no part in the declaration of either a state of siege or a state of emergency. It is not even required to approve the declaration ex post facto. Moreover, its consent is not required for the renewal of a state of emergency, which can, therefore, be proclaimed and extended indefinitely solely by decision of the executive. The Congress has, however, some limited control over action taken by the executive during a state of exception. The Chamber of Deputies has the power to lay charges against the President of the Republic or his Ministers for violation of the Constitution or other serious offences (article 183). These charges are then considered by the Senate. If the Senate agrees with the charge the President or Minister will be suspended and sent to trial before the courts. The President is not authorised to dissolve the Chamber of Deputies during a state of emergency or siege (article 229). (He can never dissolve the Senate.)

It is a common feature of many constitutions that a declaration of a state of emergency will lapse after a few days if it has not been approved by the Parliament, which, if not in session, must be recalled immediately for the purpose. The history of states of exception, not only in Latin America but in other regions, shows the need for such a provision if human rights are to be adequately protected. It would also be desirable to give the judiciary an express power to enquire into the situation of detainees under a state of exception, in order to protect their lives and their personal integrity. This could be done by means of a law regulating the functioning of article 231 of the Constitution.

The Political and Economic Situations

The 1980 Constitution of Peru contains improved protection of human rights. It is clear that the government is making genuine efforts to return to democracy, but the path is not easy. The social and economical situation has deteriorated and there exists serious discontent in the society, particularly among the poor. Trade unions have been actively engaged, including strike action, and the Congress is discussing a new law regulating the right to strike. The opposition has alleged widespread corruption in government circles.

In the city of Cuzco, an indigenous region, the police reacted harshly against a demonstration of workers and students protesting against fare increases in public transportation. One of those detained was Antonio Ayerbe, a student who later died in prison. After this serious incident, the Minister of the Interior resigned from his post apparently because he did not approve of the "strong methods" to be applied by the police, as demanded by some leading members of the army and also members of his own political party.

The power to declare an emergency was used for the first time in October 1981. A political group of Maoist ideology had perpetrated a number of bomb attacks in the Ayacucho province. This group, the so-called Luminous Path (Sendero Luminoso) from the name of a newspaper in Ayacucho, is in fact a group which splintered from the Communist Party in 1970. Its members adopted Maoist positions and did not participate in elections for the Constituent Assembly in 1978. With the appearance of terrorism in Ayacucho the police invaded the National University in Huamanga, searching for arms and weapons which they did not find. The University authorities strongly protested against the invasion, at the same time denouncing the terrorist activities of the Luminous Path.

This situation led the government to proclaim a state of emergency in the Ayacucho province at the beginning of October 1981. The Commission of Human Rights of the Chamber of Deputies published a report expressing their concern about the situation and describing some cases of violations of human rights in Ayacucho province following the declaration of the state of emergency.

VI. CONCLUDING NOTE

Like the majority of Latin American countries, Peru has, throughout its history, lived through various states of exception that, whether pursuant to general legislation on emergencies or otherwise, have been in breach of civil rights in different ways and under various forms. The plain fact is that periods of relative observance of constitutionality, which is the watchdog of civil rights, have been notoriously few and far between. As has been pointed out, however, not all of these restrictions on human rights have been unconstitutional in character. The constitutional provision authorising the "suspension of safeguards" or, in the new constitutional terminology, the proclamation that the country is under a state of emergency or a state of siege, are so wide as to constitute a kind of blank cheque for the perpetration of abuses on the population.

In this context, an interesting question arises which has two facets - on the one hand, the very existence of states of exception and, on the other, the constitutional and legislative provisions governing these states of exception. The first issue is not really a legal or constitutional one, because it is the acute social conflicts that arise and will inevitably continue to arise in societies founded on deep-seated disparities that are at the root of the various situations of exception. These disparities are tending, unfortunately, to become constantly more acute. Indeed, the deterioration in the standard of living of the mass of the population has already overstepped the limits of what is conceivable in many parts of the globe.

The civil or military power groups that rule in this type of society have a tendency to use states of exception as a means of perpetuating situations that are inherently volatile and explosive. In this sense, it would seem to be obvious that to overcome the use and abuse of states of exception, the problems which give rise to recourse to such measures have to be confronted and resolved.

Nevertheless, what takes place on the legislative plane is not without significance, even in the social and economic situation of such countries. Legislation provides an important means by which both the effectiveness of certain rights of the individual can be increasingly protected, and some kind of limitation can be placed on abuse of power by the authorities. The first and indispensable requirement to this end is that the legislative provisions, be they in the constitution or in regular legislation, should be clear and precise so that they cannot be misused because of their ambiguities. Such provisions should also indicate, as precisely as possible, what the prerequisites are for the proclamation of a state of emergency, or, in general, any state of exception. As regards the procedures for the proclamation of such a situation of exception, the time limits and powers of the executive should also be clearly defined. Finally, there must be provision giving the citizen access to legal procedures and judicial bodies by means of which he can, if necessary, contest abuses of law during the life of the state of exception.

It is possible to outline the elements that should underlie the drafting of provisions on each of these matters. With respect to the prerequisites for the proclamation of a state of exception, these should clearly consist of exceptional events or circumstances of particular gravity. These conditions must, moreover, be rehearsed clearly in the preambular considerations of the legislation proclaiming the state of exception. This last point is important so as to make it possible to define the scope of the régime of exception. It provides a basis for resisting possible acts (by the administration or the police) formally invoking the state of exception but which bear no relation to the events underlying it, either because of the nature of the violation or by reason of the kind of act committed.

The procedures for the proclamation of a state of exception are also of fundamental importance. In this connection, experience shows that granting wide discretion to the executive in this area can frequently lead to abuses. More power in this respect should, therefore, be given to the legislature in view of the serious implications of a state of exception. The same point should be made with regard to the length of periods of exception. In this connection, the rule could be that a state of exception can be proclaimed by the executive in the first instance, but subject to the obligation to convene Parliament within a short time for the purpose of endorsing or rejecting this measure. In any case, the measure should not be for longer than 30 days and be renewable only with the consent of the legislature and with the support of at least two-thirds of its members.

As regards the discretion of the executive, the issue is undoubtedly one of some complexity. At least one matter of central importance must, however, be mentioned. Under no circumstances (except foreign war) should the executive be empowered to delegate its powers to the armed forces. This presupposes also that under no circumstances should military tribunals take jurisdiction over civilians. There

might be an exception, of course, with respect to offences of a military character committed during foreign war.

One final matter should be mentioned and that is the necessity that there be special judicial instances and procedures for the citizen to contest such abuses of law as may be committed during the period for which a state of exception is in force. Any administrative or police act against individuals or institutions or in relation to events that are not connected with the causes underlying the proclamation of the state of exception, should be open to contestation by the injured party or his family members, and the same should be the case for acts which are manifestly out of proportion with the grounds for the state of exception. The purpose of such actions should be immediate restitution of the rights violated and appropriate sanctions against the authorities responsible for the impugned act.

These general considerations do not pretend, of course, to be valid for all countries, given the wide variety of existing political systems and situations. There are certainly many other basic conditions that should have to be met in a large number of other countries. At the same time, in places where violations of human rights have sunk to complete barbarity, less ambitious aims, more consonant with what is practically realisable at this stage, will have to be pursued - at least in the short term.

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STATES OF EMERGENCY IN SYRIA

CONTENTS

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I. INTRODUCTION

When Syria was part of the Ottoman Empire no emergency legislation existed; all crimes and disturbances were handled by recourse to Ottoman penal law, which had been in effect throughout the entire empire since 1854. At the beginning of this century, the movement for liberation from the Ottoman Empire became increasingly important, particularly in Syria, Lebanon and Palestine. Jamal Pacha (who later came to be known as "Jamal the Bloody") promulgated a royal decree creating a "martial council" at Alia, Lebanon, and various leaders of the Arab revolution were brought before this council for trial. Twenty-one of these leaders were sentenced by the council and executed on 6 May 1916, a date which is still remembered as the "Day of the Martyrs" in the Arab world. This royal decree can be considered the first manifestation of emergency legislation or martial law in Syria (or Lebanon).

With the end of Ottoman rule came the colonisation of these two territories by France and the commencement of the French mandate on 24 July 1920. Syria (and Lebanon) then became subject to laws promulgated by the president of France, including those relating to states of emergency or siege. Thus Decree No. 415 of 10 September 1920 provided that acts committed against the occupation forces came within the jurisdiction of French military tribunals, created in Syria and Lebanon and composed of French military judges. In 1923, the French occupation authorities promulgated a decree bringing into existence martial councils, the first effort to install emergency rule in Syria. From 1923 onwards several laws were adopted pursuant to this decree concerning inter alia the protection of the French occupation forces, the betrayal of military secrets and the regulation of the sale and possession of weapons.

At the onset of the Second World War, Decree No. 233 L.R. was promulgated, imposing martial law throughout the territory of Syria and Lebanon. This was followed by other decrees regulating security matters, essential supplies, civil defence, lighting, the use of violence and the creation of military tribunals and the procedure to be applied therein. This collection of decrees can be considered as constituting a state of exception which remained in force even after the end of the French mandate in 1946 and continued to be applied until the beginning of the Palestinian War on 15 May 1948, when Decrees Nos. 400 and 401 were promulgated. The first concerned the proclamation of martial law in general; the second proclaimed martial law for a period of six months. Several decrees, both organic and executory, followed concerning various measures necessitated by the state of war, including control and defence alertness, blackouts, propaganda, the banning of travel abroad and in zones where military operations were taking place, and the calling up of doctors, nurses, engineers and technicians.

In June 1949, Decree No. 150 concerning the administration of martial law and defining the jurisdiction of military tribunals was enacted. Without expressly abrogating Decree No. 400 of 1948, it reiterated all substantive provisions of the earlier Decree. It remained in effect until after the union with Egypt, throughout a ten-year period of legal and political instability which witnessed four military coups and the promulgation of two new constitutions (in 1950 and 1953). The union between Syria and Egypt took effect in February 1958 and a new provisional constitution entered into force the following month. On 27 September 1958, Decree No. 162 was promulgated abrogating the emergency decree of 1949 and proclaiming a new state of emergency.

In September 1961, a military coup in Syria led to the dissolution of the union, and Decree No. 1 of 30 September suspended the provisional constitution of 1958 and the 1950 constitution was restored.

On 12 November 1961, a new provisional constitution, to come into effect after approval by referendum on 1-2 December 1961, was decreed. It provided, inter alia, that :

> A constituent assembly for the purpose of drawing up a permanent constitution would be elected by secret ballot in 53 constituencies. All men and women of 18 or over, the police, and certain other specified categories would be able to vote. The assembly would have a term of four years and would meet within 10 days of the publication of the election results. It would complete the task of drafting a new constitution within six months and would thereafter transform itself into a legislative assembly.

On 1-2 December, the provisional constitution was adopted and the constituent assembly met for the first time on 12 December 1961.

Another military coup in March 1962 prevented this project from being carried to completion. The new government which was then appointed dismissed the constituent assembly. The 1950 constitution - which had been reinstated - was amended. On 22 December 1962, the government promulgated Decree No. 51, entitled "Martial Law". It abrogated the emergency decree then in effect, Decree No. 162 of 1958, and enunciated the new conditions governing the promulgation of states of exception. Its provisions regulate the present state of emergency, which was declared on 8 March 1963 and in a sense it may be considered the basic law of the country not only because its provisions override those of the constitution, but also in that it has been constant in a period when the country has known a succession of constitutions :

- the provisional constitution adopted in April 1964 was suspended on 25 February 1966 by the Regional Command of the Ba'ath Arab Socialist Party following a military coup;

- the new provisional constitution of May 1969 was amended in February 1971, after a bloodless military coup;

- the present constitution was officially put into effect by a presidential decree of 14 March 1973, a national referendum having taken place three days before. The constitution had been drafted by a People's Council (the parliament) whose members had been designated by a presidential decree issued on 16 February 1971.

II. CONDITIONS AND PROCEDURES FOR THE PROCLAMATION OF A STATE OF EMERGENCY

The president's power to declare states of emergency is set forth in article 101 of the constitution of 1973, which states that he "can declare and terminate a state of emergency in the manner stated in the law" (1)

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(1) English translation by Ahured Razaoui in "Constitutions of the World"

The conditions which warrant declaration of a state of emergency are not further defined. Article 1 of Decree No. 51 of 1962 enumerates three conditions which permit the proclamation and application of martial law : a state of war; the threat of war; or danger to security or public order, in all or a part of Syrian territory, by reason of internal troubles or natural disasters.

Article 2 provides that the declaration be made by the council of ministers presided over by the president of the republic, that it be approved by two-thirds of the council, and that it be presented to the parliament at its next session.

Two amendments to this procedure made by Decrees Nos. 147 and 148 of 23 October 1967, facilitate the proclamation of a state of emergency. Decree No. 148 permits the declaration to be made at ministerial level : by the minister of defence in case of war or threat of war, by the minister of the interior in case of threat or risk of threat to national security and public order, and by the "minister concerned" in the case of natural disasters. Thus a state of emergency may be declared as soon as one of the three conditions specified in the Decree of 1962 appears imminent, or as soon as the authorities fear for the public order in all or part of the national territory.

The second amendment provides that all decisions taken by the council of ministers shall be made by a simple majority, the vote of the president of the council being decisive in the event of a tie. Since this rule is expressly stated to prevail over all pre-existing inconsistent law, it follows that the two-thirds majority established in Decree No. 51 of 1962 is no longer required. A state of emergency can thus be declared by a minister with the agreement of a simple majority of those present in the council of ministers, provided that a quorum of 50% is present.

The proclamation must then be submitted to the parliament for approval. If it is approved when the parliament meets, it remains in effect. If it is not approved, it terminates as of the parliamentary non-approval. However, the non-approval is prospective only. The parliament has no power to affect the validity of the emergency during the period from its proclamation to the vote of the parliament. Assuming it is approved by the council of ministers and the parliament, the state of emergency is terminated only by the decree of the authority who initially proclaimed it. It is of unlimited duration, and there is no requirement of periodic re-submission to parliament for approval. The decree instituting a state of emergency likewise cannot be questioned in any court of law.

III. POWERS OF THE PRESIDENT AND OTHER AUTHORITIES UNDER THE EMERGENCY

The state of emergency declared on 8 March 1963 centralises and greatly augments the power of the executive at the expense of the other branches of power as well as of the rights of the citizens. All security forces, internal or external, are put under the control of an emergency law governor (to be appointed by the president of the republic) (2) and who has the power to declare martial law ordinances in writing,

(2) Law No. 51 of 1962, article 3(a),

personally or through subordinates. These ordinances may concern, inter alia :

- the placing of restrictions on the freedom of individuals in respect of meetings, residence and changes of residence involving passage through particular places at particular times;

- the precautionary arrest of suspects or of anyone endangering public security and order;

- the authorisation to investigate persons and places;

- the delegation of these tasks to a person of his choosing;

- the censorship of letters and all communications and the prior censorship of all means of expression, propaganda and publicity, such as newspapers and periodicals, which can be seized and confiscated and have their future issues suspended, and their places of operation closed;

- the opening and closing hours of public places;

- the revocation of permits and the seizure of weapons, munitions and explosives;

- the evacuation or isolation of certain regions;

- the limitation or control of communications between different regions;

- the assumption of control of any building;

- the surveillance of organisations or establishments; and

- the rescheduling of the payments, debts and other obligations of any person whose goods have been requisitioned. (3)

All martial law ordinances are by nature administrative acts, but while some are purely administrative others are considered "sovereign acts" ("actes relevantes de la souveraineté"). All ordinances of general applicability, such as decrees instituting a total curfew for a limited period (whether in a particular region or the entire country), the censoring of newspapers and postal correspondence, the withdrawal of arms permits, and the confiscation of arms fall within the latter category and as "sovereign acts" cannot be attacked for abuse of authority nor challenged before any forum whatsoever.

Individual measures such as the expropriation or occupation of a building are "non-sovereign" or purely administrative in nature. Any citizen can therefore appeal to the Council of State in its capacity as supreme administrative tribunal to declare illegal or suspend the application of this type of measure.

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(3) Ibid., article 4.

IV. ARREST AND DETENTION UNDER THE STATE OF EMERGENCY

The emergency legislation gives the security forces wide powers to arrest and detain persons for an indefinite period. In particular, the emergency law governor is entitled to order (in writing) the preventive detention of anyone held to be endangering public security and order. Thus, a majority of non-violent political detainees remain without trial during the period of their detention, in the absence of any evidence against them.

Neither before nor after his arrest has the detainee the right to obtain a copy of the warrant for his arrest or to be notified of the grounds and circumstances of his arrest. No official announcement of the arrest is published in the official journal or in regular newspapers. Friends and relatives are usually not notified of the place of detention until the police interrogation is completed, and sometimes not even then.

On arrest, and for the investigation period, the political detainee is held in provisional military prisons or in detention centres where strict discipline prevails and solitary confinement may be imposed for an unlimited period of time, as opposed to civilian prisons, where no difference is made in the treatment of political and common law cases, and where the conditions are less severe. The social and financial status of the detainee largely influence his conditions of imprisonment as does his relationship with prison officials. Thus, the conditions of imprisonment of political detainees are mainly individualized.

While normal prisons are inspected by members of the public prosecutor's office, places of detention are under the sole control of administrative bodies and security authorities. The parliament may submit to a court requests for information regarding political detainees' conditions, the grounds of imprisonment and even requests for release, but it has no actual control of any kind whatsoever.

With respect to the legality of arrest or detention, there are two types of cases. When the arrest is in consequence of a martial law ordinance and there is a specific charge, the detainee is brought before a special court, i.e. a military court or the State Security Court (4).

At this point, addressing himself to the "juge d'instruction" or the court, as the case may be, the accused can request dismissal of the charges against him. The decision of the court on this request may not be appealed if the request is denied, the sole avenue open to the detainee is to reformulate the same request to the same authority, which he can do after the lapse of a period of time.

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(4) Decree No. 47 of 28 March 1968, provides for the formation of one or more State Security Courts. These courts, to be convened in Damascus or in any other city at the instance of the emergency law governor, are composed of a chairman and a number of members appointed by the president. Article 5 of this decree gives the State Security Court jurisdiction "over any /other/ case referred to it by the emergency law governor". The State Security Courts replace military courts previously established by Decree No. 6 of 7 January 1965, while retaining the latter's jurisdiction over specified offences and crimes.

The release of a person subject to military arrest or detention who is neither charged nor brought before any court, can be decided only by the authority which has detained him, whenever this authority deems it appropriate.

The detainee has no possibility of opposing this procedure.

V. THE EFFECT ON THE JURISDICTION OF THE ORDINARY COURT

The state of emergency enlarges the power of the executive and reduces the role of the judiciary. The emergency law governor himself can decide and impose penalties of up to three years in prison and/or a fine of up to 3,000 Liras for violations of martial law ordinances and can bring violators of martial law directly before the State Security Courts. He can also decide whether or not an ordinary crime concerns national security, thus determining whether it will be heard in the ordinary courts or military courts. Furthermore, he has the power to determine the outcome of a conflict of jurisdiction between ordinary courts and special military courts in any type of case (5).

The president of the republic and his delegates also have the power to ask a special military court to suspend consideration of any case submitted to it (6).

Certain powers, ordinarily within the sole competence of the ordinary courts, are bestowed on the emergency law governor by virtue of article 4 of Law No. 51 of 1962, for example, the power to order preventive detention; to authorise searches at any time; and to seize arms.

Political cases are referred to the State Security Courts only when "hard" evidence exists and cases tried before those courts are usually security-related, such as sabotage or espionage. When summoned before the court, the detainee may be assisted by a defence counsel but is often denied prior access to him. Procedures followed for the trials before the State Security Courts are governed by Decree No. 47 of 28 March 1968. However, according to article 7(a) of the decree : "although the rights of defence laid down in current legislation shall be retained, the State Security Court shall not be confined to observe the usual measures prescribed for them /the rights of defence/ in current legislation in any of the stages and proceedings of investigation, prosecution and trial".

Trials are held in camera and proceedings may be summary. Death sentences, which must be approved by the president, can be passed and carried out as quickly as two days after the offence has been committed.

Capital offences are embodied in a number of legislative provisions, and there have been recent moves to increase their number :

- the Penal Code contains seven offences against the state punishable by death :

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(5) Law No. 51 of 1962, article 8.

(6) Law No. 1 of 9 March 1963.

- bearing arms in the ranks of the enemy;
- successful conspiracy or contact with any foreign country to encourage it to take hostile action against Syria;
- conspiracy or contact with the enemy to bring about the defeat of the army;
- attempt to paralyse the country's defences in time of war or at the outbreak of war;
- successfully causing civil or sectarian strife by arming the Syrian people or by arming some portion of the population against the rest;
- incitement to kill or to plunder premises;
- commission of a terrorist act if it leads to the death of a human being or the partial or total destruction of a building if one or more persons are inside.

- decrees Nos. 6 and 7 of January 1965 (still in force) prescribe :

  - a mandatory death penalty for certain specified forms of collusion in verbal or physical acts hostile to the aims of the Ba'athist revolution and for an attack on any public or private establishment, incitement to disturbance, strife and demonstrations;
  - a non-mandatory death sentence for "actions held to be incompatible with the implementation of the socialist order in the state whether they are written, spoken or enacted, or come about through any means of expression or publication" (decree No. 6, article 3(a)) and all offences against "legislative decrees which have been or are to be issued in connection with the socialist transformation" (decree No. 6, article 3(b)).

- decree No. 49 of July 1980 which is retroactive inter alia designates membership of the Moslem Brotherhood (a militant, fundamentalist Islamic group in opposition to the Syrian régime) as a capital crime.

Although the ordinary courts do have a limited power to suspend the application of certain martial law ordinances on the grounds that they are inconsistent with the constitutional provisions in force or that they exceed the scope of the decree declaring the state of exception, in general, review of the acts of the martial law authorities (including review of laws and martial law decrees and of the legality of arrests) escapes their jurisdiction.

VI. THE GENERAL IMPACT OF THE EMERGENCY

Although a proclamation of a state of emergency may restrict or suspend certain fundamental rights the following rights included in the Universal Declaration of Human Rights in principle may not be infringed :

- the right to liberation from slavery;

- the right to be recognised everywhere as a person before the law;

- the right to a nationality and the right not to be arbitrarily deprived of it;

- the right to marry and to found a family;

- the right to own property;

- the right to freedom of thought, conscience and religion, including the freedom to manifest one's own religion or belief;

- the right to equal access to public service;

- the right to work and to rest;

- the right to social and economic security;

- the right to education.

In Syria, however, some of the rights in the Universal Declaration have been totally abolished either by law or in practice. The provision that a death penalty be carried out only after a final judgement rendered by a competent court (7) and the prohibition of conviction under retroactive laws (8) are both denied by Decree No. 49 of July 1980. Moreover, the fundamental right to life has been violated by the Syrian Special Forces units which have carried out mass executions (9).

Likewise, the prohibition of torture and cruel, inhuman or degrading treatment or punishment is repeatedly violated in the detention centres where torture is reported to be a common method to obtain a "confession" or to impose punishment (10).

Maltreatment is also inflicted by the "Defence Squadrons" on the civilian population during house-to-house searches, and systematic attacks on private property - including destruction of houses - are also carried out.

Syria ratified the International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Civil and Political Rights and was the first state party to be examined by the Human Rights Committee in 1977 and 1979.

In accordance with article 40 of the International Covenant on Civil and Political Rights, Syria submitted a first report to the Human Rights Committee in 1977, in which the provisions of the laws in force

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(7) Article 6, al. 2 of the International Covenant on Civil and Political Rights.

(8) Article 15, al. 1 of the International Covenant on Civil and Political Rights.

(9) For example, the Palmyra prison massacre in June 1980, and summary executions in Hama in April and December 1981, and in Damascus in September 1981.

(10) Amnesty International Briefing: Syria 1979.

(such as the constitution of the Syrian Arab Republic of 1973, the Penal Code and the Code of Criminal Procedure) were shown to be fully compatible with the obligations arising from the International Covenant. In 1979, Syria submitted a supplementary report and the Human Rights Committee expressed its concern about the state of emergency, the Court of State Security and the failure of the Syrian government to inform the Committee of the obligations from which derogations had been made under the state of emergency, as required by article 4 of the Covenant.

In response to a number of questions posed by members of the Committee during the consideration of the 1977 report, the Syrian representative stated that torture was punished under law and that the death penalty was limited to the most serious crimes and rarely implemented. Regarding the state of emergency, the Syrian representative alleged that the emergency measures had been adopted for purposes of state security.

Despite this claim, it can be said that the purpose of the measures enforced is less to preserve state security than to suppress the strong opposition to the government's Ba'ath party ("leading party in the society and the state" according to article 8 of the 1973 constitution) and the armed forces, dominated by Alawites, a sect of the Shia branch of Islam, who represent only 2% of the total population. The largest opposition sect is the Sunni Moslems, and in particular the Moslem Brotherhood which has been held responsible for acts of violence and political assassinations from 1976 onwards.

Other opposition movements include, inter alia, divergent branches within the Ba'ath Party, the Kurdish Democratic Party, Marxist groups, Nasserist and socialist movements. The communist party is divided between the Soviet-oriented wing and the branch led by Riad Al-Turk, which is banned. Protests at the continued repression of individual rights have been raised, inter alia, by professional associations, for example, the Syrian Bar Association, which called for a strike of lawyers on 31 March 1980, in protest against the current situation in the country pursuant to the state of emergency. Not only were lawyers arrested, but the bar association and the association of medical practitioners, engineers and architects (whose members supported the strike) were dissolved for "exceeding their mandates". The independence which the bar association enjoyed since 1972 has been abolished by a decision of the government to reconstitute the bar association with a government-nominated bar council.

Mis-use of the detention powers under emergency legislation was publicly recognised by President Assad himself on 9 March 1978, when he released 179 people wrongly detained under emergency legislation. However, the majority of these persons were detained for minor civil infractions, and political opponents have continued to be detained under the conditions mentioned above.

In short, the state of emergency, proclaimed 20 years ago, not only far exceeds the restrictions on liberties normally permitted to protect national security and public order, but violates international standards governing public emergency situations through arbitrary legislation and alarming repressive measures.

The danger of such a continuous emergency rule is the institutionalisation of the emergency itself, and to some extent that has already occurred in Syria.

The Syrian government has a duty to review the emergency and provide for adequate safeguards against abuses.

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STATES OF EMERGENCY IN THAILAND

CONTENTS

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I. GENERAL CHARACTERISTICS OF THAI POLITICS AND THE USE OF EMERGENCY LAWS IN THE LAST 50 YEARS

States of emergency in Thailand are closely related to the internal politics of the country. In 1932, a handful of civil and military officials in Bangkok brought to an end one of the world's oldest, absolute monarchies and instituted a system of parliamentary government and limited kingship. In the following 50 years, Thailand has seen about 15 governments and 13 constitutions. Among the main features of Thai politics have been :

- the use of coups or shifting factional alignments rather than electoral methods to achieve major changes of personnel and policy;
- the major political role of the police and armed forces;
- the use of bribery, graft and related practices as a cohesive force in the formation of power coalitions; and
- the violence that generally accompanies political change.

These general characteristics are reflected in the use of emergency powers by the shifting power blocs. Table I* shows that of the ten emergencies imposed between 1932 and 1977, only two were due to external wars. The others resulted from internal conflicts.

To explain the nature of states of emergency in Thailand, it is proposed to examine the Martial Law Act and the Emergency Act (both of which give extensive powers to the executive) along with the relevant provisions of the constitution. The temporary decrees enacted by the government in power during states of emergency are also discussed as well as the Suppression of Communist Activities Act, which arms the executive with wide powers creating a de facto emergency situation.

II. EMERGENCY PROVISIONS IN THE CONSTITUTION (1932-1978)

After the monarchy was overthrown, the Temporary Administration Act 1932 was enacted, authorising the Revolutionary Committee to curb the freedom and liberty of individuals. Section 29 of this Act provided that in case of emergency where the Committee was unable to convene a meeting of the Parliament, and was of the opinion that it was necessary to enact a law immediately, the Committee was authorised to do so but such legislation had to be submitted to the Parliament for approval.

In the 1932 constitution, section 53 provided that the King may declare martial law in accordance with the form and procedure specified in the Martial Law Act of 1914. This provision was reiterated in the 1946 and 1947 constitutions. However, section 152 of the 1949 constitution deprived the monarchy of its ability to invoke martial law by placing this power in the hands of the military authorities and the 1952 and 1968 constitutions contained provisions similar to this.

The first two paragraphs of section 193 of the 1974 constitution were identical to section 152 of the 1949 constitution. But section 193

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* see following page

TABLE I

S.NO.	Dates	Area covered	Reasons for imposition of martial law
1	12-10-1932 to 22-11-1933	Whole country	An unsuccessful counter-revolution led by the Monarchists
2	7-1-1941 to 31-3-1941	24 provinces, mainly in the north and north-east parts of Thailand	Franco-Indo-China war
3	10-12-1941 to 23-1-1946	Whole country	Declaration of war during the Second World War
4	30-6-1951 to 6-9-1951	Bangkok and Dhanbouri area	A coup attempt by the navy
5	16-9-1957 to 10-1-1958	Whole country	Declared by Marshal Sarit Thanarat after ousting the previous government in a coup
6	20-10-1958 to 25-4-1971	Initially in the whole country. After 1971 it still existed in 34 provinces held to be communist infiltrated areas	The régime was generally authoritarian, used extreme measures
7	17-11-1971 to 16-10-1973	Re-introduced in the whole country	
8	21-5-1974 to 23-5-1974	Whole country	Prime Minister Dr. Sanya Thammasak submitted his resignation and General Kris Sivara, the C.in.C. of the Army, proclaimed a nation-wide state of alert on the same day. Dr. Sanya agreed to form a new Cabinet on 23 May
9	6-10-1976 to 31-3-1977	Whole country	Seizure of power by the armed forces after the student demonstrations at Thammasat university
10	20-10-1977 (on 22-4-1979 elections were held and in August 1979 Decree 22 which gave wide powers to the prime minister was abrogated)	Whole country	The previous government was overthrown and the new military leaders declared martial law

had an additional clause that stated "ten days after the declaration of martial law, not less than 25 members of Parliament, either separately or in a joint sitting, may propose to the House the removal of the state of martial law". Such a motion had to be passed by an absolute majority in order to take effect.

The present constitution, which came into force in December 1978, has the following emergency provision :

> "Section 157. In case of an emergency when there is an urgent necessity to maintain national or public safety or national economic security or to avert public calamity, the King may issue an Emergency Decree which shall have the force of an Act.
>
> In the next succeeding sitting of the National Assembly, the Council of Ministers shall submit the Emergency Decree to the National Assembly for consideration without delay. If the House of Representatives disapproves it or approves it but the Senate disapproves it and the House of Representatives reaffirms its approval by the votes of not more than one-half of the total number of its members, the Emergency Decree shall lapse; provided that it shall not affect any act done during the enforcement of such Emergency Decree.
>
> If the Senate and the House of Representatives approve the Emergency Decree, or if the Senate disapproves it but the House of Representatives reaffirms its approval by the votes of more than one-half of the total number of its members, such Emergency Decree shall continue to have the force of an Act.
>
> The Prime Minister shall cause the approval or disapproval of the Emergency Decree to be published in the Government Gazette. In case of disapproval, it shall be effective as from the day following the date of its publication in the Government Gazette.
>
> The consideration of an Emergency Decree by the Senate and by the House of Representatives in case of reaffirmation of approval of the Emergency Decree must take place on the first opportunity when such Houses hold their sitting."

III. SUMMARY POWERS OF THE PRIME MINISTER UNDER THE CONSTITUTIONS (1959, 1976, 1977 AND 1978)

In the 1959 constitution, section 17 vested the Prime Minister with enormous powers to curb the opposition and eradicate all activities affecting the stability of the Revolutionary Government. This provision was introduced by Marshall Sarit Thanarat after his successful coup. From 1959 onwards, any new government after overthrowing the old one retained a similar provision in the constitution.

Section 17 of the 1959 constitution read :

> "During the life of this constitution, where the Prime Minister is of the opinion that, for the benefit of prevention and suppression of any subversive activities concerning national security or the monarchy, or agitations or threats to public order either initiated in or outside the Kingdom, he may, with the consent of the Cabinet, issue orders, or take actions promptly, and such orders or actions are deemed legal."

Section 21 of the 1976 constitution which was promulgated after the 1976 October coup gave the Prime Minister, subject to the approval of the Cabinet and the Advisory Council :

> "The power to issue any orders and to take any action" where he "deems it necessary for the prevention or suppression of an act subverting the security of the Kingdom, the throne, the national economy or state of affairs or disturbing or threatening public order or good morals or ..... public health."

This power applied retroactively and any action taken under it was to "be considered lawful".

This power was subsequently used to condemn persons to death without trial and to authorise their execution.

Section 27 of the interim constitution promulgated after the 1977 October coup, gave the Prime Minister the same powers of summary execution or other punishment as he had under section 21 of the 1976 constitution.

The present constitution, which came into force in December 1978, also had a similar provision under section 200, which read as follows :

> "Section 200. From the date of the promulgation of this Constitution until the new Council of Ministers takes office, in a case where the Prime Minister deems it necessary for the prevention, averting or suppression of an act subverting the security of the Kingdom, the Throne, the national economy or the State affairs or of an act endangering or jeopardizing public order or good morals or of an act destroying the natural resources or detrimental to public health, whether such act has occurred before or after the date of the promulgation of this Constitution, either within or outside the Kingdom, the Prime Minister shall, with the approval of the Council of Ministers and the National Policy Council, have the power to issue any order, or take any action, and such order or action as well as acts performed in compliance therewith shall be considered lawful according to the laws in force and to this Constitution.
>
> Having issued any order or taken any action under paragraph one, the Prime Minister shall inform the National Assembly of it.
>
> After the end of the period of time under paragraph one, all orders of the Prime Minister issued under this section which are still in force shall continue to be in force, and the repeal or modification of the said orders shall be made by an Act."

Neither section 200 nor sections 21 and 27 of the earlier constitutions are in force now but while they were in force they were used extensively.

To quote Amnesty International's report of 1979 :

> "This extraordinary power to impose harsh sentences without any judicial process has been used with some frequency, even in the interim period before the elections. In January and February 1979, at least 8 people were sentenced to death in this way and another 17 were sentenced to long prison terms without trial. Those sentenced to death were executed almost immediately." (1)

According to another report (2) 69 persons who were sentenced without trial by former prime ministers under these sections, were still in prison in May 1982. This is an anomaly in that the laws or decrees under which these persons were arrested are no longer in force, but they continue to be detained and, in effect, are kept imprisoned without any legal sanction.

IV. MARTIAL LAW ACT 1914

This is the main act which is used whenever an emergency is declared and some of its more important provisions are given below :

"When and Where Effective to be Notified

> Section 2. When necessity arises to maintain peace and order so that the country may be free of danger from within and without the Kingdom, it shall be by Royal Command that the whole or part or parts of any section or sections of the Martial Law /shall be notified to be enforced/, including the fixing of conditions in the application thereof in any part or parts or of the whole Kingdom, and if when and where notification of enforcement is effective all provisions in any act or laws being inconsistent with the provisions of Martial Law then enforced shall be revoked and replaced by the provisions of the Martial Law then enforced.

Description of Notice

> Section 3. If the notification does not specify enforcement of Martial Law over the whole Kingdom it shall state clearly in which province, district or area that the Martial Law shall prevail.

Person Empowered to Exercise Martial Law

> Section 4. When there is a war or strike in any

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(1) Amnesty International Report of 1979, page 114.

(2) Report of the Coordinating Group for Religion in Society, Bangkok (C.G.R.S.), May 1982.

place or places, the military chief in command at such place or places having forces under his command not less than one company or the chief in command of a fort or a stronghold of any kind in military use shall be empowered to proclaim the enforcement of Martial Law within the area limited to the command of such military forces; but a report shall be immediately made to the government.

When Revoked must be Notified

Section 5. The lifting of Martial Law in any place or places shall be effected by Royal proclamation.

Jurisdiction of Military and Civilian Court of Justice when Martial Law Prevails

Section 7. In areas where martial law has been proclaimed, civilian courts shall continue to have the power to try and adjudge cases as usual except those which are under the jurisdiction of court martial and whoever is empowered to proclaim martial law shall also be empowered to proclaim the jurisdiction of military courts over criminal cases in which the offence coveredin whole or part and/or part of any section of the Schedule annexed hereto occurred within the area and during the time in which martial law is proclaimed. This will include the power to modify or revoke such proclamation.

Proclamations conferring jurisdiction on military courts under the preceding paragraph shall apply to cases in which the offence occurred on or after the date specified in this proclamation. Such date may be the date of issuance of the proclamation itself or some later date. Such proclamation shall be published in the Government Gazette.

Apart from the said cases, if a criminal offence occurs in an area in which Martial Law has been proclaimed and there is a special reason concerning the security of the country or public peace and order, the Supreme Commander of the Armed Forces may order such offence to be tried in the military courts.

Power of Military Officer

Section 8. When Martial Law is notified to be enforced in whateverdistrict, town and province the military officers shall have full power to search, to appropriate labour, to forbid, to seize, to dwell in, to destroy or make alterations to premises and to carry out the eviction.

Search

Section 9. The power to search is to be carried out as follows :

1. To search all things to be appropriated or prohibited or seized or any unlawful dwelling and possession. The searching can be carried out on any person, vehicle, dwelling house, building or anywhere and at any time.

2. To censor all communications by letter, telegraph, or package sent to or from within the area where martial law is enforced.

3. To censor books, printed matter, newspapers, posters or literary works.

Appropriation

Section 10. The power to make appropriations shall be made as follows :

1. To appropriate labour from civilians to assist military forces in any work which is related to the defence of the realm or assist in military service in all respects.

2. To appropriate vehicles, beasts of burden, provisions, arms and implements, tools and equipments from persons or companies which the military service may require for use in the forces at that time.

Prohibition

Section 11. The power to prohibit may be carried out as follows :

1. To forbid holding of meetings and gatherings.

2. To forbid issuance of books, printed matter, newspapers, literary works.

3. To forbid publication, entertainment, receiving or emitting of radio or television.

4. To forbid the use of public ways for communication whether by means of land, water or air, including any railway or tramway used for public conveyance.

5. To forbid possession or utilization of any communication, instrument or arms, parts of arms and chemical products or others which will cause danger to person, animal, plant or property or which can be used to produce chemical products or others of the same qualification.

6. To forbid the staying out of his dwelling place by any person during the curfew.

7. To forbid any person entering or dwelling in any district which the military officers /find it necessary to clear for purposes of/ battle strategy, suppression or the maintenance of peace and order. When and after the prohibition is notified, persons who live in the said area shall evacuate it within the prescribed period.

Claims or Fines may not be Demanded from Military Authority

Section 16. Where any damage arises from the exercise of power by the armed forces as referred to above in Sections 8 to 15, no person nor company may claim damages nor compensation of any kind from the armed forces because all power so exercised by military officers in the carrying out of their duty under Martial Law amounts to the defence of the King, country and faith. Progress, liberty, peace and order is preserved by the armed forces freeing the country of the enemy from within and without the Kingdom."

V. ORDERS NOS. 1 AND 29 OF THE NATIONAL ADMINISTRATIVE REFORM COUNCIL, OCTOBER 1976

These two decrees, issued by the National Administrative Reform Council (NARC), enlarged the jurisdiction of the military courts.

Order No. 1 transferred a large part of the criminal jurisdiction from the civilian courts to military tribunals. In particular, it grants jurisdiction to the military courts over the following specific offences:

- offences which harm the King, Queen, Crown Prince and the King's Regent;
- offences which affect the national security committed within or without the Kingdom;
- offences which affect foreign relationships;
- offences which disrupt the public order, such as gangsterism, conspiracy to threaten others with weapons, instigate disorder, etc.;
- offences which cause danger to others;
- sexual offences, for instance, to procure or deceive women or girls for sexual purposes ...;
- murder;
- assault; and
- offences against property, for instance, bag-snatching, blackmailing, armed robbery."

Order No. 29 reads as follows :

"At 7.00 p.m. on 6 October 1976, the NARC declared Martial Law and ordered that particular types of criminal offence fall within the jursdiction of military courts. Nonetheless, there are persons or groups of persons who instigate disorders and unrest and behave in such a manner as to endanger society and threaten the lives and property of other people. In order to suppress and prevent such crimes the NARC deems it necessary to make judgments and orders of the military court immediately effective, therefore :

1. All offences which fall under the NARC Order No. 1 are to be within the jurisdiction of the military courts with no right of appeal.

2. Defendants under the first category of offences can have a legal counsellor as representative, except in the cases prohibited by the Military Court Procedure. (3)

3. For those cases in the first category, which have already been appealed to the appellate or supreme court before the announcement of this Order, the court can proceed with each case but the judgment of the next level is final."

On 21 August 1979, the Thai Cabinet reduced the scope of military courts by withdrawing their jurisdiction to try cases involving sexual offences, offences constituting public danger, or threats to life, limb or property. However, military courts continued to be responsible for trying cases involving national security, armed insurgency, kidnapping, arson and sabotage. Persons tried in military courts were granted certain defence rights, including the right to counsel, but the verdict could still not be appealed.

VII. GOVERNMENT ADMINISTRATION EMERGENCY ACT 1952

This Act (hereinafter called 'the Emergency Act' was passed concurrently with the Communist Activities Control Act. They were designed to cope with political disturbances and communist insurgents. In this Act 'Emergency' is defined as a situation which may constitute a threat to national security or which may create a chaotic or war condition; 'National Security' as defined in the Act includes the stability, safety and independence of the country or welfare of the nation as well as the practice of democracy under the constitution. The interpretation is virtually left to the executive.

The Emergency Act comes into force when a state of emergency is declared. However, when the emergency comes to an end, it remains in force until the revocation of the Act has been officially announced. The Prime Minister and the Minister of the Interior have charge and control of the execution of the Act and have the power to appoint competent officials, to issue orders and to prescribe other acts for the purpose of carrying out the Act. As there is no mention of any particular authority to bring the Act into force, this power is presumably vested in the Prime Minister or Minister of the Interior.

Once a state of emergency is declared, this Act imposes certain restrictions and limitations as follows :

Curfew : the period of curfew is to be prescribed by the authority in charge;

Search : the competent officials appointed under this Act have the power to search any houses or building between

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(3) The defendant is not allowed to have legal representation in these cases.

sunrise and sunset, where there is reasonable ground of suspicion that there has been a breach of any of the provisions of this Act;

Arrest and Interrogation : a competent official may arrest, interrogate and detain any person where there is reasonable ground of suspicion that he or she has committed or is attempting to commit an act constituting a threat to national security, but interrogation must not exceed seven days;

Association : The Minister in charge may issue orders prohibiting any kind of meeting or assembly at any place without permission from the competent officials;

Publication : the Minister in charge may issue an order prohibiting any publications which, in his opinion, may adversely affect national security or may be likely to cause public disorder;

Emigration Control : where there is reasonable ground to believe that the emigration of a person may adversely affect national security, the Minister in charge may issue an order prohibiting him from leaving the country;

Communication and Postal Interception : where there is reasonable ground of suspicion that a person is cooperating with others in a foreign country for the purpose of committing an act prejudicial to the Kingdom, the Minister in charge may order a search and an interception of the mails including other materials addressed or directed to that person;

Seclusion and Deportation of Aliens : aliens may be secluded from the strategic area and deported on grounds of national security and prohibited from engaging in certain activities considered as a threat to national security.

The Emergency Act was mainly invoked in times of border crises. Between 1953 - 1957, there were declarations of states of emergency along the south, north and the north-east border provinces, which were considered as communist infiltrated areas. Emergencies were also declared in August 1958 along the Thai-Cambodian border, and in July 1974 in the Bangkok area, when there were riots in the district known as China Town.

VII. COMMUNIST ACTIVITES CONTROL ACTS, 1952 - 1979

As mentioned earlier, the wide powers of this Act bring it within the scope of emergency laws.

The Communist Activities Control Act was first passed in 1952 to check communist infiltration. It was revised in 1969, 1976 and in 1979. These revisions have broadened the definition of communist organisations and activities, widening the powers of the authorities and increasing the penalties.

Most political suspects are charged with engaging in communist activities. They are, therefore, usually arrested and detained under this Act, which has its own interrogation process in addition to the normal Criminal Procedure. This Act is always invoked during states

of Martial Law. Offenders under this Act are often tried in Special Courts-Martial rather than the Criminal Court of Justice.

The Statements of legislative intention annexed to the Act reads as follows :

> "Since Thailand is facing communist aggression, public order, rights and freedoms of individuals and the democratic government can survive only if there is a law for its control and suppression, but there has not been this kind of law so far, therefore, it is necessary to pass this Act for the purpose of national security."

Under this Act, a communist organisation means a group of persons having the purpose of engaging in communist activities. The persons within the group must possess some kind of membership, and have the common purpose of engaging in communist activities. Communist activities may be engaged in three ways :

1. by abolishing the democratic government which has the King as the Head of State;

2. by changing the economic structure, expropriating private property without fair compensantion;

3. by threatening and engaging in terrorist activities, or by applying deceit for the purpose of securing the achievement of 1. and 2.

Any person holding membership of a communist organisation is guilty under this Act regardless of whether he or she has committed an offence. Support in any form to a communist organisation is also an offence.

In 1958 the then Revolutionary Government issued Announcements Nos. 12 and 15 to speed up the trial of the political offenders arrested and detained during the Revolution. These Announcements authorised interrogation officials to interrogate and detain all communist suspects under the Communist Activities Control Act. The interrogation and trial did not have to comply with the Criminal Procedure Code and all the cases during the state of Martial Law were tried in Courts-Martial regardless of whether or not the offences had been committed before or after the declaration of martial law. These Announcements certainly had retrospective operation, for offences under the Communist Activities Control Act are in the jurisdiction of the Criminal Court of Justice in normal times. In addition, these Announcements authorised interrogating officials to detain suspects until the interrogation was completely finished, which, in turn, was equivalent to the suspension of habeas corpus. The suspects or accused might not be tried at all, even by Court-Martial.

These Announcements were challenged and the Supreme Court ruled that the power of interrogation officials to detain suspects under the Communist Activities Control Act for an unlimited period, i.e. until the interrogation was finished, was void and contrary to section 87 of the Criminal Procedure Code, which guaranteed the freedom from unlimited detention and a right to be tried by a competent court within a reasonable time. The Supreme Court held further that the Announcements might

extend the period of inquiry or interrogation but cannot completely defeat section 87 of the Criminal Procedure Code.

After the Revolutionary Announcements Nos. 12 and 15 were successfully challenged, the then Revolutionary Government passed an Act in 1962 known as An Act concerning the Custody of the Offenders under the Communist Activities Control Act. This Act simply restored the power conferred on interrogation officials by the Announcements, but provided further that the interrogation of suspects under the Communist Activities Control Act did not have to comply with the Criminal Procedure Code, except where it was expressly mentioned. In effect, the Act virtually overruled the decisions of the Supreme Court. This Act gave rise to a heated controversy among academics and civil rights advocates. In practice, it created the mechanism for administrative detention. Most political offenders were detained and some were held in jail awaiting trial for several years depending on the mercy of the Minister of the Interior, who has the authority to consider the petitions of the detainees.

Bad as the situation was, the government passed three further pieces of legislation : an Act amending the Revolutionary Announcement No. 12 giving the Supreme Military Commander power to interrogate and detain suspects under the Communist Activities Control Act with the same authority as that of interrogation officials attached to the Ministry of the Interior. The second Act authorised the Supreme Military Commander to consider the petitions of detained suspects. The third Act was passed five years later enabling interrogation officials to detain suspects for an unlimited period of time. It should be noted that all these Acts were passed under the same Revolutionary Government, which was in office for over a decade, during which the constitution was suspended. This Act was the last straw. Due to the accumulated violations of human rights, especially political rights, there was a massive protest, the dictatorial government came to an end and all legislation concerning the detention of communist suspects except the Communist Activities Control Act was repealed in 1969.

The Communist Activities Control Act No. 2 was passed in 1969. It provides, inter alia, that interrogating officials have the authority to detain communist suspects for the purpose of inquiry for up to 30 days from the day the suspect arrived at the inquiry office and, if it is necessary to detain him any further, approval must be obtained from the Director-General of the Police Department or from the Court, depending on the case. Unfortunately, three years later, another Revolutionary Government issued Announcement No. 199 authorising interrogation officials to detain suspects for an unlimited period. This, in fact, virtually repealed section 12 of the Communist Activities Control Act No. 2 (1969) and simply ignored section 87 of the Criminal Procedure Code.

In 1976, the National Administrative Reform Council Decree No. 25 again amended this Act, defining even more widely the concept of communist activities, by including acts detrimental to national security, religious institutions, the monarchy and the democratic system of government with the King as head of state. Increased power was also granted to officials, and the penalties for all "communist offences" were made heavier. Moreover, any offences committed under the Communist Activities Control Acts, even prior to the announcement of the National Administrative Decrees Nos. 1, 8, 14 and 29, came

under the jurisdiction of special military tribunals and the accused had no rights to counsel or of appeal.

In 1979, the Act was once more revised; the reason for the revision was stated as follows :

> "the current Anti-Communist Activities Act empowers the Director for the Prevention and Suppression of Communist Activities and other officials to prevent and suppress communist activities in the communist infested areas only; however, in certain circumstances the suppression has to be carried out outside these areas. Therefore, it is proper that the communist infested areas should be abolished and the power and duty of the Director for the Prevention and Suppression of Communist Activities be revised and improved." (4)

By abolishing "infested areas" the special powers previously given to authorities only in these areas can now be used over the entire country.

The Act allows the administrative officials, soldiers and policemen of 3rd class upwards (e.g. police sub-lieutenant) to search or arrest any person at any place and at any time without warrant. After a person is arrested, he can be detained up to 480 days before charges are formally placed.

The commanders of the four armies are empowered to restrict and prohibit all means of communications. They have the power to censor all letters, telegrams, documents, parcels, etc.; to ban the printing, distribution and sale of printed materials, newspapers, pictures, books, etc.; to close public highways, air or water routes; to ban television and radio broadcasting; and to make a restriction over the ownership or the sale of food, medicines and all other necessities.

The provincial governors are empowered to ban any meeting, advertising or entertainment programmes; to order the owner or the manager of any private business to make a report on the background and behaviour of their employees and give these reports to the officials; to detain any person for interrogation and re-education for up to 15 days; and to announce a curfew.

It should be noted again that all these special powers are held by government officials all over the country, and not only in sensitive areas, and that nobody can ask for compensation for any injustices or damages that occur in any of the suppression activities.

In principle, the Act is intended to maintain national security free from communist aggression. However, several of its provisions are widely used to curtail individual freedom and liberty, especially during the states of martial law or emergencies, when opponents of the government are liable to be arrested and detained.

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(4) Final note of the Anti-Communist Activities Control Act, 1979.

VIII. DECREES ISSUED UNDER MARTIAL LAW

Whenever martial law is declared it is usual for decrees to be proclaimed by the government in power. Mention has already been made of Decree No. 25 which enlarged the scope of the Communist Activities Act, and Decree No. 1 which enlarged the scope of military courts. This list is not complete without mentioning Decree No. 22, proclaimed a week after the coup d'état in October 1976.

This decree granted the police sweeping powers to arrest and detain "persons dangerous to society". Under the decree, the police can arrest these persons at their discretion and hold them for 30 days or more if their alleged conduct has not been proven satisfactory to the authorities. Such a suspect can be held without access to legal counsel or without being brought before a court for a hearing.

This decree was copied from the Revolutionary Council Decrees Nos. 22, dated 2 November 1958; 43, dated January 1959; and 199, dated August 1972.

The following were considered to be "dangerous to society" :

(a) persons who trouble, bully, coerce or take any actions wrongfully against others;

(b) vagrants;

(c) persons whose occupations are contrary to public peace and order and good morals;

(d) persons with illegal stocks of firearms, ammunition or explosives for trading purposes or for other wrongful acts;

(e) persons who incite, stir up, use or encourage the people to create disturbances within the country;

(f) persons who, by one means or another, urge the people to have faith in or support any régime other than a democratic system of government with the King as head of state;

(g) persons whose occupations concern illegal gambling, prostitution or operators of illegal lotteries;

(h) persons who hoard commodities for profiteering purposes or who raise commodities prices illegally; and

(i) persons who jointly stage a strike or lock-out illegally.

This decree was extensively used. According to the Corrections Department of Thailand, by January 1979, 6,054 people had been arrested and released and 581 were still in detention, and many believe these figures are an understatement.

In August 1979, this decree was abrogated by the Parliament. But proclamation of such decrees with wide-sweeping powers are perhaps the most disturbing aspect of emergencies in Thailand.

IX. THE EFFECT OF MARTIAL LAW ON THE JUDICIAL SYSTEM

A criminal offence committed by a civilian is tried in the Criminal Court of Justice, except where the offence is one of those specified by the person declaring martial law or the supreme military commander. A person committing such an offence automatically comes under the jurisdiction of a Court-Martial. The power to specify certain offences as falling under the jurisdiction of Courts-Martial in effect empowers the military to curb the jurisdiction of the Criminal Court of Justice. This in turn curtails the rights of representation and of appeal of the defendants, who are usually persons suspected in one form or another of political offences against the military government.

During the state of martial law, civil judges may be appointed as judges of Courts-Martial, and public prosecutors may be appointed as military prosecutors. As a result, the civilian judiciary is harnessed to serve the needs of the military justice system. Since military justice is essentially an instrument of the executive, this unavoidably affects the independence of the judiciary. The effect of this merger has been to enable the executive to exercise increasing influence upon the judiciary both through its power of appointing judges to Courts-Martial and in other ways.

It should be mentioned that the courts have admitted the coup as a legitimate method of change. Forced to rule on assertions that the government of November 1947 was illegal and that "no coup d'état can change or repeal the law of the land", the high court held that it was immaterial how a government came into being and that the only real test of its legitimacy was whether in fact it could rule.

Later, in 1958, when Marshal Sarit Thanarat, the then Revolutionary leader, declared martial law, the supreme court was asked to decide whether a revolutionary leader had power to declare martial law, since under the Act only the King had the power to do so. The supreme court ruled that all Revolutionary Announcements were deemed to be law with the same competence as any other law and that a Revolutionary Announcement need not receive royal assent (5).

X. THE IMPACT OF THE EMERGENCY DECLARATIONS

It is difficult to summarise the effects of states of emergency since there have been so many of them. On the many occasions upon which declarations of emergency have been made in modern times in Thailand, they have been accompanied by declarations of martial law and have brought into force an extensive armoury of special powers in the hands of the executive, and in particular of the armed forces. In recent years the emergencies have purportedly been aimed at communist subversives but the anti-communist legislation has been so widely framed as to permit its use to suppress virtually all opposition to the government in power at the time.

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(5) Supreme Court Decisions 46/2496 and 1662/2505.

The transfer of a very wide category of criminal cases from civilian to military jurisdiction and the denial on several occasions of any right of appeal from military courts, have not only undermined basic principles of the Rule of Law in a manner which was in no way justified by the emergency conditions, but have also undermined the independence of the civilian judiciary. In 1958, on one of the rare occasions when the Supreme Court resisted the illegal assumption of powers by the executive, the Revolutionary Government simply passed an Act overruling the court's decision. The numerous changes of government by military coup have also had to be accepted by the judiciary, a factor which has further undermined their independence and authority and paved the way for abuse of executive power. The report of the International Commission of Jurists on the 1976 emergency (6) describes a typical example of the impact of emergency declarations in Thailand :

> "All political parties and political gatherings were banned. All daily newspapers were temporarily stopped, and all publications subjected to censorship. All communist literature was banned. Later in October 1976, a series of orders and decrees were issued. Decree No. 8 revived the Anti-Communist Activities Act of 1952 in which communist activities are defined so vaguely as to include inter alia 'advocating doctrines leading to communism'. It gives the armed forces power to arrest and detain without warrant or charges persons suspected of communist activities whether these occurred before or after the proclamation of martial law. A further 4,287 persons were detained for communist activities and the maximum period of detention without trial was extended to 180 days under Decree No. 28. 'Communist-infested zones' were created in which all liberties may be suspended and which may be declared out of bounds for habitation.
>
> Decree No. 22 describes nine categories of persons as being 'dangerous to society'. These categories include six for criminal activities and three for political conduct, all of which are couched in very vague terms. The government is given sweeping powers to arrest people in these categories and to hold them indefinitely without trial. In May 1977 habeas corpus was suspended for these detainees who wished to challenge that there was any sufficient evidence that they were'dangerous to society'.
>
> All persons charged with offences under martial law or under the Anti-Communist Activities Act are subject to the jurisdiction of military courts. Once a person is charged with an offence under the Anti-Communist Activities Act, all other charges may be dealt with by the military court. Also in such cases there is no right to be represented by an attorney (though some defendants have been able to consult lawyers before their trial), there is no possibility of bail, and no right of appeal from any decision.
>
> The majority of those arrested in October 1976 have been

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(6) ICJ Review No. 19, 1977.

released. However, many still have to report weekly to local officials and some state that they are unable to find employment because of their arrest. Others have been sent to re-education camps and some have been re-arrested for other unspecified charges under other decrees. There are reports of a great deal of indiscriminate use of official authority in outlying areas.

Fifty-seven journalists who had been investigated before the coup were arrested and charged with having 'committed acts endangering national security and serving communists'. All major newspapers have been closed temporarily at least once during the past year for printing matter considered damaging to the government. One newspaper was closed for ten days for printing an editorial which criticised a report that Malaysian troops were to be based in Thailand permanently. The threat of temporary suspension has resulted in self-censorship, as these closures threaten the economic viability of the newspapers. The police have confiscated and burned thousands of books and other printed material considered to be pro-communist. In addition, small journals representing a wide spectrum of views have been banned. In August 1977, the Ministry of Education announced that private publishers were prohibited from printing text books on subjects concerning national security.

Strikes and any form of workers' demonstrations were banned in January 1977. Offenders are subject to arrest as being dangerous to society. Later in the year, the Labour Department said that state enterprises are not covered by Labour Law and therefore banned all state enterprise labour unions. A committee was established to enact new legislation on such workers' rights, benefits and welfare."

XI. CONCLUSIONS

The surface features of government in Thailand look much like those in any number of other states. There is a written constitution describing the branches of government and setting forth their powers and responsibilities. There is a hierarchy of ordinary courts, and there is a special court to interpret and apply the constitution. There are functional and territorial divisions of administration similar to those found in most modern unitary states. There are political parties and elections, shifting factions and changes of power. Even the philosophic basis of the state is familiar to all versed in the doctrines of Western representative democracy.

But external features are the least significant part of the whole. Ancient ways persist long after they have been formally abolished : while the revolution of 1932 undermined the absolute monarchy, much of the spirit and many of the techniques of absolute rule still underlie government in Thailand.

In short, the structure of Thai government today combines ancient institutions with recent innovations. Upon an administrative and moral foundation which survives basically intact from the time of the absolute monarchy, is raised a superstructure of formal democratic institutions.

The use and misuse of emergency powers has to be seen in the whole context of Thai history and political tradition. If the mistakes of the past are not to be repeated, then a new political tradition has to be evolved, both by the Thai leaders and the people.

There are indications that the old pattern many now be changing in fact as well as in form.

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STATES OF EXCEPTION IN TURKEY

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STATES OF EXCEPTION IN TURKEY

1960 - 1980

Turkey is a country which politically claims to be a democracy. Its leaders or statesmen always boast of "having proved the applicability, viability and even stability of a democratic and liberal system" since 1945 in a country which is, nevertheless, insufficiently developed from an economic and social point of view.

Yet the truth remains that the political life of the country is also marked by an abundance of political crises which sometimes take the form of the rupturing of constitutional power (by military take-overs, attempted coups d'état, etc.) and by successive impositions of martial law. Indeed, in spite of the political régimes installed after the military take-overs of 1960 and 1971, and two attempted coups d'état in 1962 and 1963, it should be recalled that in 10 out of the 20 years between 1960 and 1980, martial law has been applied. Even today, a good number of provinces remain under the martial law declared on 12 December 1970.

The result is that political and constitutional disruptions or crises as well as actual states of exception form an integral part of Turkish constitutional reality. This is an undeniable fact which evokes doubts about the viability of the existing system. Examining the causes and consequences of this issue, however, goes beyond the proposed scope of this article, which is to give a general idea of the juridical aspects of the states of exception to the reader who has little knowledge of Turkish law.

In order to do this, it is necessary to begin with a few general points about definitions and classifications (Part I) and follow this up with a study of the most widely used state of exception, that is, the State of Siege (Part II).

I. GENERAL COMMENTS

In view of the multiplicity and variety of experiences in this domain in Turkey, a distinction must first be made between "régimes" and "states" of exception before drawing up an inventory of actual states of exception recognised by Turkish constitutional law.

Distinction between "Régimes of Exception" and "States of Exception"

It would be useful to define the terms of this distinction to begin with and to follow this up with a glance at certain historical cases.

Definitions

By "régimes of exception" is meant "de facto situations" of a purely political character, the existence of which is not legalised by any judicial act or norm in conformity with pre-existing law. These systems of exception can be established after revolutions, coups d'état or forceful take-overs of government, that is to say, inter-

ventions which can neither be justified by the constitution nor by already established laws, against the established system of government.

On the other hand, states of exception, while also being extraordinary modes of administration, are provided for by the laws of the country and are subject to them for their declaration and implementation. The distinction between "régimes" and "states" of exception is, in short, between what is "de facto and what is presumed to be de jure".

This formulation or simplification should not, however, give the impression that régimes of exception continue to be de facto systems devoid of any idea of legality or legal framework. To the contrary, once in power the new leaders at the helm of state affairs are at pains first to legitimise themselves and then to construct a new legal arsenal, using the usual technical instruments : the constitution, laws, decrees, etc. Indeed, it is at this stage that a second distinction between régimes and states of exception appears. While régimes of exception affect or alter to a greater or lesser degree the pre-established constitutional framework, states of exception in principle work within the limits circumscribed for them by the constitution and laws to which they owe their existence.

Historical Cases

Since 1960, Turkey has had two régimes of exception in the sense defined above. Their dates are 1960-61 and 1971-73. They are called "the 27 May régime" and "the 12 March régime" respectively.

The Régime Known as "the 27 May Régime"

On 27 May 1960, a group of young officers supported by a large majority of the army overthrew the democratic party government of A. Menderes. This political party, in power since 1960, had always had a very large and dependable majority in Parliament through which it had been able to pass laws and take decisions of a most undemocratic and arbitrary nature. Its anti-social policies were disadvantageous to the popular masses and especially to the middle-class, members of which formed part of the army at the time.

The revolutionary officers, who soon after the military take-over formed a revolutionary committee called the Committee of National Unity (CNU), assumed state power and took charge of the administration of the country. The Committee dissolved Parliament and replaced the existing Council of Ministers with another whose members it designated (1).

At first, it was a de facto power, as is shown by the setting up of a commission made up of law professors to prepare draft proposals for a new constitution. This it did in its report of 28 May 1960 (2).

Later on, however, the CNU, with the massive support of the youth, public opinion and pressure groups (the press, trade unions, universities, etc.) began to legalise all these political changes and its own de facto situation by a "Provisional Law on the Abrogation and Modification of Certain Articles of the Constitution of 1924" (3). This text thus constituted the Provisional Constitution of a régime in transition to democracy.

Indeed, the CNU set itself the task and goal of creating the legal base for a liberal democracy and a legal state and then allowing liberal politics to take their normal course. In other words, the revolutionary cadres devoted themselves as much from the point of view of the sphere of implementations as of the duration of the transitory régime to the following major goal : the institutionalisation of democracy. This objective is clearly emphasised in the preamble to the "Provisional Law".

The text of this law is interesting from another point of view. There is a clear indication in it of an attempt by the CNU to legalise the military take-over of the 27 May Revolution and the various instruments promulgated by the CNU after this date. On the one hand, the law of the internal functioning of the army, whose duty it is to "defend and protect the Turkish Fatherland and the Republic of Turkey", can be found in this text in order to justify the direct take-over of power. On the other hand, the same law legalises retroactively all decisions taken or resolutions passed by the Committee up to that point and dating from 27 May 1960 (article 26).

What are the legal characteristics that allow us to refer to this system as a system of exception ? Examples can be cited from different spheres.

Firstly, in the exercise of sovereignty we note that a military body, the CNU, not elected by the people assumed "the right to exercise sovereignty in the name of the Turkish Nation". It endowed itself with all the prerogatives of the Grand Turkish National Assembly (First article of Law No. 1). These are the legislative power, which the Committee itself exercised, and the executive power which it exercised through the Council of Ministers, whose members were appointed by the head of state, General Cemal Gürsel, who was also the president of the CNU, with the approval of the Committee (article 3). The CNU could always monitor the ministers and remove them from office whenever it saw fit. We thus see a system of government by consensus par excellence; a system suited to a time of crisis or of revolution. The result is that here again we are face to face with a system of exception from the point of view of organisation of political power. It would be proper to end our assessment of developments in this area by adding that the 1961 constitution adopted a parliamentary system with a flexible separation of legislative and executive power based on a slight superiority of the former over the latter.

In the area of legislative activity, the most outstanding act of the 27 May régime was its development of the 1961 constitution. The formation of a constituent assembly (with two houses : the CNU and the House of Representatives) whose task it was to prepare the new national constitution is a proof among others of the exceptional nature of that period (4).

It is now necessary to enter into the field of judicial organisation in order to detect the impact on it of the régime of exception.

According to the provisional law, judicial power is exercised in the name of the nation and within the limits of the law by impartial and independent courts (article 5) which does, however, provide for a special court whose features are rather contradictory to those of a court of justice in normal times.

This court, established by article 6 of the said law and named the High Court of Justice, was to judge the ex-president of the republic, the ex-prime minister, ministers and collaborators of the former régime. It was thus a court constituted subsequently to the commission of those crimes, contrary to the principle of "natural justice". Furthermore, the judges of the High Court of Justice were selected by the CNU from among candidates proposed to it by the Council of Ministers (article 6 of the Provisional Law). Here again, is seen a tendency clearly in contradiction with principles expressly provided for by the same law, namely the impartiality and independence of the courts (article 5 of Law No. 1). It should also be noted that article 6 of the law was amended subsequently to exclude any access to any form of appeal against decisions made by the High Court of Justice, except for sentences of death, which had to be approved by the CNU before they were carried out (5).

Other facts should be added to this jurisdictional characteristic of revolutionary times. Article 146 of the Penal Code was amended retroactively and enabled members of parliament who had supported the deposed government to be tried on a charge of "complicity" (6). The criminal procedure applicable to senior civil servants presumed to have broken the law and committed crimes and offences was modified by a similar amendment in order to bring the accused before the High Court of Justice (7). Here again, the law had retroactive effect. All these practices were criticised in a report drawn up by a mission of international legal observers (8).

The High Court of Justice sentenced hundreds of accused persons to terms of imprisonment. Among the 15 condemnations to capital punishment, three were approved and the executions were carried out, those of ex-prime minister Menderes and of Polatkan and Zorlu, ministers of finance and foreign affairs, respectively. Others were commuted to life imprisonment, including the sentence given to the ex-president of the republic, Mr. Celâl Bayar.

A final example of the jurisdiction of exception is the "Law on Revolutionary Courts" (9). This introduced the dubious notion of the offence of "Propaganda", increased lighter sentences, even up to the death penalty, provided for the establishment of new courts where thought necessary, under the supervision of the Committee, and excluded any appeal against their judgments (article 3/iv). This law was never subsequently applied.

As to public liberties, certain laws or practices pertaining to them can be noted. Even though Provisional Law No. 1 maintained the section of the 1924 constitution on "The Public Rights of Turks" (articles 66-88), a "Provisional Law for the Defence of the Revolution" (10) empowered the police to use administrative detention. Thus, persons disturbing or threatening public order or the security of the state and those on whom there was enough proof of the will to violate or threaten the above could be incarcerated for a period of 30 days. This power, initially granted to provincial authorities, was subsequently conferred upon the Minister of the Interior, who also had the power to modify the decision of provincial governors (11). Finally, a third amendment repealed the 30 day detention for those who had been incarcerated since 27 May 1960 (12). It is very clear that this text bears the mark of a revolutionary period, although in practice it was not used as a means of terrorisation; rather it played a deterrent role (13).

It should be remembered that the two largest cities in Turkey, the capital Ankara and Istanbul, were at that time under martial law which was not lifted until after the elections of 14 October 1961 and 30 November 1961. Moreover, the activities of political parties were temporarily suspended by the CNU and the government (14). This ban was lifted by the government at the beginning of 1961, but the political parties were required to continue their activities within the limits set out by the 27 May régime (15).

In the interim, the Menderes' democratic party had been dissolved by a court (16). Finally, with regard to the reorganisation of certain public institutions, three attempts can be noted. The first affected the ranks of the army: more than 4,888 officers, of whom 235 were generals, were retired (17). The second hit the universities : 147 lecturers were relieved of their duties by a special court (18). Finally, the State Council (the supreme administrative court) was emptied of all its technocrats (the judges) with a view to a total reorganisation (19).

Another revolutionary measure hit the big landowners (the Aga's) of whom 55 were detained without charge, solely on the basis that their social status was that of oppressors (20).

All these factors indicate that here it was not simply a question of the application of martial law but of an extraordinary régime or a "régime of exception". The proof of this is to be found in the abolition of the existing constitutional norms and framework, the building of a new constitutional structure and the re-organisation of certain state institutions.

However, it must be noted immediately that this extraordinary régime, which lasted largely until the meeting of the Constituent Assembly (6 January 1961) and ended with the adoption of the new constitution by referendum (9 July 1961) or perhaps even after the general elections of 14 October 1961, was clearly marked by a democratic tendency. Indeed, the revolutionaries had already made it clear that their political programme was one of transition towards a liberal régime by carrying out a series of legal reforms which would permit such a system to function (Law No. 1). The basic goal of the government, for its part, was to arrive at the transition to democratic order based on the Charter of the United Nations and the Universal Declaration of Human Rights. Law No. 157 on the convocation of a Constituent Assembly demanded, besides the ordinary conditions for eligibility, the condition of not having approved of activities, publications or attitudes contrary to the constitution, and human rights up until the revolution on 27 May 1970 (article 6/3). Finally, the implementation of a liberal and democratic constitution which recognises the separation of powers, the independence of the judiciary, fundamental rights and liberties, and the creation of an efficient system to monitor the legality and constitutionality of administrative and legislative instruments are the most interesting innovations of this transitional régime. All this should enable us to call it a transitional régime of exception with democratic goals (21).

The Régime Known as "the 12 March Régime"

The second example of a régime of exception was in power between 1971-1973. This régime was instituted on 12 March 1971 after a memorandum from the upper echelons of the army had been deposited

with the President of the Republic as well as the presidents of the two chambers of parliament. This ultimatum, signed by the chief of staff and three commanders of the ground, air and naval forces demanded the resignation of Mr. Demirel's government which was to be replaced by another supported by the army. The 12 March régime was to have from then on governments "above party politics" of which the first two were presided over by Mr. Erim. The former parliament and government were accused in the memorandum of bearing the major responsibility for the anarchy and disorder prevailing in the country. Even though the governments of that period resorted to a vote of confidence before the parliament which was upheld, the real centres for decision-making were elsewhere.

Indeed, in spite of the parliamentary façade it was the generals of the upper ranks who in reality controlled the political power and manipulated the régime according to the directions of a certain "Greater Council of the High Command", a body which was recognised neither by the constitution nor the law. Interventions into the functioning of the system were decided there and implemented by the government. The President of the Republic played his part in spite of the symbolic status assigned to him by the constitution : the role of mediator or "transmission belt" on the one hand between the military and civilians and, on the other hand, between the higher echelons of the army and parliament (22).

It would be inadequate, however, to judge the 12 March régime only on the basis of the above factors. To confine oneself only to changes in the balance of power between civilians and the military runs the risk of confusion between the "27 May" and "12 March" régimes of exception, both of which are marked by the common characteristics of a considerable widening of military power over civilian power. This could even lead the observer to consider the 12 March régime as more democratic than that of 27 May (since contrary to the preceeding régime it at least kept the parliamentary façade) while in fact the 12 March régime was essentially characterized by a regression from the point of view of democracy and liberties. For the 1971-73 period was marked by a very strict application of martial law which held sway over the whole country while being declared in only 10 provinces. Practices such as mass detention; banning of the right of assembly and association; press censorship; total deviation from the principles of privacy of personal life and inviolability of domicile; torture and summary executions; strict restriction on trade union activities and of the right to strike; mass trials, after which thousands of accused were sentenced to very severe terms of imprisonment etc., affected the popular masses as well as intellectuals, especially university lecturers (23).

Furthermore, the semi-military régime lost no time in modifying the democratic 1961 constitution in its entirety in an atmosphere of heavy repression in order to institutionalize its attack against democracy and freedom. The modifications imposed by the higher echelons of the army in a letter sent to the President of the Republic essentially covered three points : restriction or suspension of most democratic rights and liberties, strengthening of the executive arm at the expense of the legislative arm, and restriction of juridical control over political powers (24). All these changes were consolidated by a series of new legislative measures affecting democratic rights and liberties - new laws on the state of siege, associations, the penal

procedure, etc. This assessment of the 12 March régime was presented and critically examined not only by Turkish jurists but by foreign organisations, press, observers and authors, whose impartiality cannot be doubted (25).

In short, the 12 March régime was an example of a transitional régime of exception with authoritarian goals, a fact which clearly differentiates it from the 27 May régime. However, while there was political and ideological opposition to these two armed take-overs, the fact remains that they are similar from a certain point of view. The two take-overs were first and foremost illegal according to the law in force for no system which considers itself democratic and liberal can tolerate the intervention, whether direct or dissimilated, of the armed forces in political life and - should they fail - the perpetrators of such acts are judged and condemned according to the penal laws (which was indeed the lot of Colonel T. Aydemir, former commandant of the Military Academy and leader of two unsuccessful military take-overs, successively in 1962 and 1963, the latter of which cost him his life).

Moreover, anxious about their legitimacy, the leaders of the 27 May 1960 revolution had the following phrase inserted into the preamble of the 1961 constitution :

> "The Turkish Nation .... which brought about the revolution of 27 May by way of exercising their right to resist oppression."

On the other hand, the higher echelons of the army, signatories to the 12 March memorandum, strived to justify their action like the revolutionaries of 1960 by basing their actions on the Law on the Internal Operations of the Army, which gives the armed forces the duty to "defend and protect the Turkish Nation and the Republic of Turkey".

It can be inferred from all this that we are face to face with de facto régimes in each of these cases. We are thus still far away from the concept of a state of exception which by definition should be legally decided and declared.

Next, in each of the examples we see a politico-constitutional change. In other words, the state machinery has been profoundly affected and altered by these interventions, a fact which is not included in the definition given to states of exception. One would thus have to look elsewhere for states of exception, properly so called. Only a study of the positive law will permit us to indicate its varients.

Types of States of Exception Recognised by Turkish Positive Law

Turkish public law recognises four types of states of exception. Three are specifically provided for by the constitution and the fourth is accepted by juridical practice but its constitutionality remains controversial.

The constitution provides for the following two states of exception under the heading "Methods of Exceptional Administration" : (a) Exceptional Circumstances (article 123), and (b) State of Siege and State of War (article 124).

Article 123 appears initially to regulate a single type of state of exception, whatever the reasons for its declaration. Article 124 appears ambiguous since it seems to allude to two types of states of exception - the state of siege and the state of war. The state of war in itself cannot be considered a state of exception based on certain factors in Turkish Positive Law. In times of war, the executive is empowered to take two possible lines of action. It can either declare a state of siege, where it considers this necessary, or it can content itself with exercising its power to implement articles 3, 15 and 16 of the law on the state of siege (without being obliged to declare martial law) and certain provisions of the law on exceptional circumstances (article 123 of the constitution). Thus it turns out that the state of war, not being governed by a "system of its own", does not constitute a distinct state of exception but borrows its legislation from those provided for exceptional circumstances (article 123) and for the state of siege (article 124). We would thus venture to say that article 124 only makes provision for a single type of state of exception - that is the state of siege.

A third form of the state of exception is regulated by article 120/7 of the constitution. This provision, which did not feature in the original text of the 1961 constitution, was incorporated in the revised version in 1976 (26). The reaction in political circles against student activism in 1968-1969 is worth noting, for the new provision attributed to government the power to take direct control of the administration of universities and individual faculties (autonomous bodies under the constitution) in case of serious disturbances, the remedy for which was beyond the capacities of the universities themselves.

Finally, a fourth category of states of exception deals with a set of powers at the disposal of the government in times of economic crisis through the implementation of certain special laws enabling it to intervene directly in the flow of the national economy. This fourth category does not emanate directly from the constitution, it comes from pre-constitutional legislation.

Nevertheless, the fact that their existence is approved and legitimised by the Constitutional Court allows us at least to cite it among the states of exception recognised by Turkish Public Law, if not by the constitution itself.

II. THE STATE OF SIEGE

The legal problems relating to the state of siege can be grouped under three headings : Implementation, Legal Effects, Review of its Legal Conformity.

Implementation

By "implementation" we mean declaration, approbation, renewal and abrogation.

It is within the prerogatives of the Council of Ministers to decide on and declare the state of siege. This decision must be signed by all the ministers, the prime minister and the President of the Republic. This is a rule followed since the era of the 1924 constitution.

Nevertheless, it is important to cite two important exceptions which have occurred, between that time and the present day. The 1955 state of siege had been decided and declared not by the Council of Ministers, but by the President of the Republic and the Prime Minister during a train journey to Istanbul on the night of 6 to 7 September 1955. Moreover, it was not published in the official gazette until 5 days later (27). The second example took place in 1960 and is the state of siege declared by the CNU, that is by a body other than the Council of Ministers, after the 28 May revolution (28). This can be explained by the exigencies of that period, as the Committee was the only authority in the country at the time.

The declaration itself is presented in written form and is made by a "decision of the Council of Ministers". It should be justifiable in order to permit a possible legal review. Its publication "by appropriate means" is undertaken by the Minister of the Interior (29).

In the final area dealing with procedure, a current practice attracts our attention. The Council of Ministers always has recourse to the advisory opinion of the National Security Council without being bound to consult it (30); for such an advisory opinion is not included among those enumerated in the organic law on the National Security Council (31). It should also be noted that until now, governments have always followed the "advisory opinion" of the NSC.

A state of siege can be declared for a period of no more than two months. It can cover one or several regions or the entire country. In the majority of past cases the territorial space of the state of siege has included large urban centres (like Istanbul, Ankara, Izmir), border areas (events in neighbouring Arab countries, the Cyprus crisis ..) and the Province of Eastern Anatolia (ethnic matters).

The constitution does not provide for the duration of a state of emergency concerning the universities. The Law on Universities (No. 1750) had limited this duration to two months, but the article was abolished by the Constitutional Court (1975). The Law on Universities empowers the Council of Ministers to extend the state of exception for a two-month period. This decision must be approved by the Grand National Assembly of Turkey.

The conditions for a declaration of a State of Siege are defined as follows :

> "Article 124 - The Council of Ministers can declare a state of siege for reasons of state of war or threat of war or rebellion or the outbreak of strong and persistent intrigues against the state, or the outbreak of widespread acts of violence from internal or external sources endangering the indivisibility of the territory and nation or having the tendency to destroy the system of free democracy or fundamental rights and liberties recognised by the Constitution."

This numerus clausus inventory indicates that the powers of the Council of Ministers are strictly limited. Any attempt to declare a state of siege based on reasons other than those provided for in article 124 of the constitution would be in violation of it. But it must also be seen that the government disposes of quite wide discretionary powers in this area given the inevitable ambiguity of the

concepts used in the said article. Because of this, the government was able to consider workers' protests against a bill on trade union liberties a "rebellion" which served as a pretext for it to declare a state of siege. Similarly, a few, very limited, acts of terrorism and violence served as the pretext for the declaration of a state of siege on 26 April 1971. The constitution at that time only made provision for four conditions for the declaration of a state of siege. These were "state of war, the existence of a threat of war, rebellion or the outbreak of evidence categorically indicating the existence of strong and persistent intrigues against the fatherland and the Republic" (original form of article 124). But parliament, which approved the state of siege in question, inserted a few months later the following phrase : "or the outbreak of widespread violence endangering ..." (32).

This indicates that parliament was not certain about the constitutionality of the declaration of the state of siege and thus by inserting the above phrase was resorting to attempted retroactive legitimisation.

The system of the state of siege is implemented with the declaration and begins immediately to produce its legal effects. Its continued existence depends on the will of another body, however, and here it was a matter of "approbation" by this body. According to the constitution, the Ministerial Council was bound to immediately submit its decision and approval to the Grand National Assembly of Turkey (GNAT) which is composed of the National House and the Senate, sitting in joint session. These assemblies are immediately convened if they are not in session. The GNAT can then either approve the declaration of the state of siege as it stands, reduce its duration or abolish it entirely. However, the Council does not have the right to prolong its duration at the time of initial approval since the period cited in article 124 (2 months) is maximal (33). To date, parliament has on three occasions refused to give its approval to the declaration and has thus decided its abrogation (34).

The state of siege is renewed by the same body each time for a period of not more than two months. Only the Council of Ministers can ask for an extension. Members of parliament and senators have the right to propose a reduction in the duration of a state of siege or its abolition but have no right to propose its renewal (35).

The lifting of the state of siege can take place in different ways. Either the Council of Ministers decides on an anticipated lifting and submits its decision to the approbation of the GNAT (for example, the 1955 state of siege had been lifted on the initiative of the Council of Ministers after a decision by GNAT which was unicameral at that time (36)) or parliamentarians can make a proposal and submit it to the GNAT; or else bureaucratic inertia at the time the given period for the state of siege expires can cause it to lapse - which is the most common form in Turkey. Also, the GNAT can abolish a state of siege declared by the Council of Ministers by failing to approve it (37).

Legal Effects

The legal effects of the declaration of a state of siege should be examined at the administrative and judicial level as well as in relation to the field of economic rights.

Administrative Level

After the declaration of a state of siege, the Council of Ministers must fulfil two obligations : that of appointing the Commanders of Martial Law, of setting up the necessary military organisation and of establishing military courts (38).

At a lower administrative level, we see the passing of powers and attributions of the security forces to the military authorities who are the commanders of martial law. In addition, all the forces of order are put under their control (article 2 of Law No. 140). This total absorption of the "civilian sector" by the "military" is one of the characteristics of the new law on the state of siege on which the régime of exception of 1971-1973 left its mark. Indeed, the repealed 1940 law on the state of siege (Law No. 3832) made provision for a limited transfer of police powers to the military authorities (only those governing national security and public order). Furthermore, the powers transferred could only be exercised through the local civilian police and not by the military authorities themselves. This restriction and the distinction made between "the power of decision" (military) and "the power of execution" (civilian) thus constituted a guarantee for the citizens, a guarantee which had been removed by the new law. There is another disadvantage : the total absorption of the civilian sector by the military causes the removal of another guarantee recognised until then which the lower ranks have against illegal orders from their superiors, a right which constituted, in the final analysis, the protection of individuals against arbitrary behaviour by the administration. Thus, given the condition of total absorption of police powers by the authorities of martial law, the prohibition of the execution of illegal orders imposed by the constitution could never function because of the exceptions relating to military administration which are provided for within the constitution (39).

Recognised police powers under the control of the martial law commanders are of two types. Some relate to police power of a judicial nature such as detention, seizure, etc.; others to administrative police power such as a ban on assembly, press censorship, police checks, etc. (article 3 of Law No. 1402). It is this sort of power of regulation that is given to the martial law commanders who are responsible (for their actions) to the President of the Council of Ministers. The prime minister has the responsibility of assuring the cooperation and coordination between the commanders of martial law in different regions (40).

Judicial Level

The implementation of the state of siege can be seen at the judicial level through the extention of the competence of the military judicial system at the expense of civilian justice. In this area four broad themes for discussion have always preoccupied Turkish juridical doctrine and jurisprudence.

The Constitutionality of Courts Known as "Martial Law Courts"

Article 138 of the constitution governing "military jurisdiction" is worded as follows : The law specifies the offences which and the persons whom it is within the competence of the military courts to try in time of war or of state of siege" (paragraph 5). As the

wording of the text shows, this clause does not make any provision for the establishment of new military courts in times of war or during a state of siege. It only alludes (with the first paragraph of the same article which stipulates that "military jurisdiction shall be maintained by courts imbued with military discipline") to a single type of judicial institution : the military court. Consequently, military justice in times of war or state of siege cannot be administered by courts other than those already in existence. It is only their jurisdiction which varies according to whether these are applied in peace time, war time or during a state of siege. Military courts are vested with wider competence in the latter two cases as compared with the first. This seems to us, moreover, to be the only interpretation in conformity with article 32 (amended) of the constitution which prohibits the establishment of occasional courts, in order to ensure the impartiality of the judges and the confidence of the accused in them. This article stipulates that "No person can be tried before any authority other than the court to whose jurisdiction he is legally subject. No exceptional authority endowed with jurisdictional powers to prevent a person in this manner from appearing before a court to whose jurisdiction he is legally subject can be set up." (41).

However, it must be admitted that in practice things do not take this direction. The law on the state of siege empowers the Ministry of Defence to establish as often and in as many regions as it deems necessary courts called "martial law courts" and to appoint judges to them (article 11/7). We shall discuss later, under the heading "The Independence, Impartiality and Guarantees of Judges," the inconveniences of this system. For the moment, it is enough to stress that the practice of establishing new courts laid down by the law contrary to the letter of the two constitutions is legitimised by a judgment of the Constitutional Court. It is to be noted, concerning the reasons advanced for this judgment that juridical reasoning gives way, to a great extent, to concerns about appropriateness such as the inability of existing courts to carry out extra duties for which they would be responsible in case of a state of siege. Thus the Constitutional Court arrived at the conclusion that article 11/1 of the Law does not violate articles 32 and 138 of the constitution (42).

Besides, 13 months after their decision was given, an amendment inserted into the constitution the term "martial law courts" in order to permit military courts to function even after the abolition of the state of siege. In this context, the amendment could not thus be evoked as proof of justification or constitutionalisation of "martial law courts". It is really a matter of a purely formal, procedural clause relating to the functioning of the courts after the lifting of the state of siege to permit them to finish with trials in progress.

Before closing this discussion, another particularly interesting aspect of the same judgment should be raised. According to the Constitutional Court, article 15 of the law in question contradicts the principle of "the regulation by law of the material competences of "martial law courts", in that it has the effect of conferring on the military commanders responsible for implementating the state of siege the discretionary power to decide if the knowledge of the crimes and offences enumerated in article 15 should be referred to civilian or military courts; while according to the terms of article 138 (amended) of the constitution, military courts are only qualified to recognise crimes and offences which the law specifically makes provision for. With regard to article 32 of the constitution, the Court took note of a

second violation, since the effect of article 15 of the law is "to attribute to the military courts the competence to receive files on crimes and offences committed before the declaration of a state of siege, whilst according to the terms of article 32 (amended) of the constitution, the competence of a court of law should be defined by law prior to the effective commitment of the crime or offence" (43).

Based upon this judgment of the Constitutional Court, the legislator could intervene to regularise the law on the state of siege and to model it on constitutional principles (44).

The Question of Jurisdiction

Material jurisdiction of military courts during the state of siege is governed by article 15 (amended) of the law on the state of siege mentioned above. We find quite a long listing of crimes and offences. This list is taken from the Penal Code, the Law on the Freedom of Assembly and of Organising Demonstrations, the Law on Associations, etc. Moreover, with article 16 of the law on the state of siege, contraventions of the orders of the Martial Law Commander as well as "the propagation of false or exaggerated information" which could provoke panic in public opinion become criminal offences. The trial of these crimes also comes under the jurisdiction of "martial law courts".

Personal jurisdiction of military courts during the state of siege covers individual perpetrators of a crime which, among others, would have caused the declaration of a state of siege. Moreover, the trial of persons whose crimes are related to those which already fall within the jurisdiction of the "martial law courts" comes within their competence (45). Exceptions of certain categories of persons such as magistrates, ministers, members of parliament, senators, etc., are listed in article 21 (amended) (46).

Territorial jurisdiction of military courts in case of a state of siege is not restricted to crimes committed in regions under martial law; it can cover the whole country. Indeed, article 13 of the said law states that certain crimes (i.e. those committed along with other crimes specifically within the competence of the military courts) are held to be within the competence of these courts even if they were in fact committed outside the region affected by martial law. It is thus a question of the fusion of proceedings.

The temporal competence of military courts during a state of siege must be limited to the duration of the state of siege. It is a principle which follows necessarily from the distinction between "normal (or ordinary) times" and "states of exception". This rule is brilliantly reaffirmed by the Constitutional Court which in its judgment of 15-16 February 1972 repealed article 23 of the law on the state of siege which made provision for the continuation of the activities of the military courts after the lifting of the state of siege. According to the Court, this clause had an import which was "manifestly contradictory to article 32 (amended) of the Constitution" (47).

But the cancellation of this article was ineffective for the GNAT ensured that the repealed clause was inserted into the body of the constitution in order to render the decision inoperative and to prevent a future review of the constitutionality of this point. Thus the insertion of the provisional article 21, stipulating that these courts

should continue to function even after the lifting of the state of siege (48) furnishes a typical example of "constitutional fraud". A similar clause was introduced subsequently into the text of the law on the state of siege (49). In the interim, the Constitutional Court had decided on the constitionality of provisional article 21 of the constitution (50).

The Independence, Impartiality and Guarantees of Judges

The military courts are composed of two military judges and one ranking officer (51). The original text of article 138/4 of the constitution stipulating that "the majority of the members of a military court must have the qualification of judge" was revised subsequently to allow for departures from this principle in times of war. This amendment, however, was repealed by the Constitutional Court (52). It decided in another judgment that the nomination of ranking officers to military courts did not contradict the constitution (53).

The judges of these courts are appointed by the Minister of National Defence (54) and therefore by the executive, even though with regard to the appointment of civilian judges the general rule provided for in the constitution prohibits any executive intervention in this area. It is the Superior Council of the Magistracy, made up of judges, which can "rule on all the qualifications of judges" (article 144/1 of the constitution). There is no provision made for this latter guarantee in the organisation of military justice. The system thus suffers from a serious flaw for there are several reasons for believing that political preferences play a certain role in the appointment of judges to "martial law courts", especially because they are made after the majority of the crimes under the jurisdiction of these courts have been committed. It is for this reason that the list of appointees provokes reactions of discontent in left-wing political circles when the government has a conservative tendency (during the 12 March régime, for example) and in right-wing circles when the government tends to be progressive (as in the case of the state of siege declared by the government of Mr. Ecevit on 26 December 1978). Furthermore, any change in government affects to a greater or lesser extent the composition of these courts : an experience which occurred very recently after the resignation of Mr. Ecevit's government and the formation of that of Mr. Demirel which caused noticeable changes in the judicial ranks of these courts.

Another danger for the independence of the courts is that the minister has the power to dissolve a military court even if it is in session, and send its file to another any time he deems it appropriate. Court No. 1, responsible to the martial law commanders of Istanbul met with this fate for it refused, contrary to the others, to apply article 146 of the penal code which sanctioned "attempts to overthrow constitutional order" by capital punishment for persons accused of having attacked banks, kidnapped people, taken hostages, etc. For, according to this court, these acts did not constitute "appropriate means of overthrowing constitutional order" and their perpetrators should only be condemned by virtue of the articles governing common law offences. Court No. 1 was thus dissolved by the Ministry and its files transferred to Court No. 3, known for its favourable position towards the application of article 146 of the Turkish Penal Code (55).

Another threat to the independence of judges is the fact that their career advancement depends on the wishes of their military

superior (56); that is, the martial law commander in this case. A judge who fails to gain promotion within the time limits provided for by the law can be dismissed as well as one who "takes on opinions proscribed by law" (article 22 of Law No. 337). Moreover, judges are forbidden to resign during the period of the application of the state of siege (article 2).

The Constitutional Court has, to date, never had the opportunity of making a pronouncement on the conformity or non-conformity of these clauses with the constitution (57). However, the clauses concerning this system of promotion which makes judges dependent on the executive were removed from the laws governing two organs of the miliary system of justice. Indeed, the Constitutional Court, considering that such a system would endanger the independence of the courts and the guarantees provided for judges, repealed the few legislative clauses on the status of judges of the Military Court of Cassation as well as those of the Supreme Administrative Military Court (58). According to the Court, the principle of independence recognised by the Constitution and the guarantees it provides for judges should be valid for military judges even in case of war or state of siege (59). But in these latter proceedings concerning the examination of a constitutional amendment, the Constitutional Court did not have the means to enter into details and to tackle the system itself directly as was the case in its judgment of 15-16 February 1972.

The Penal Procedure

We will limit ourselves to pointing out under this heading the few clauses of the military penal procedure which seem incompatible with the fundamental principles of law.

First of all, the right to defence is severely restricted in the case of a declaration of a state of siege because of articles of the law on the organisation of the penal procedure of military courts (Law No. 353). The right of the accused or defendant to examine his file is not recognised (60). The accused or defendants presumed to have disturbed the smooth running of sittings are prohibited from entering the courtroom and in the event of a subsequent offence, permanently deprived of the right to be present at any other sessions of the trial (61). Lawyers sometimes have prison sentences imposed on them for having insulted the bench during a session. The right of the accused or of their counsel to challenge on suspicion of partiality is rescinded (62).

With regard to the publicity of sessions, the law permits the court to censor the circulation of reports. This measure makes it impossible to inform the public on the impartiality of the military judges (63). Moreover, the number of formalities and the difficulties they present make access to the sessions difficult.

Finally, the court can base its judgment on evidence from a single witness even if the witness does not appear before it (64). This boils down to accepting a situation in which evidence from an imaginary "witness" is enough to condemn the accused even to capital punishment, since according to the terms of the law, military courts can content themselves with evidence collected by the police during preliminary inquiries.

In principle, the clauses which have just been cited are only applicable in times of war within the system of the law on the organisation of the penal procedure of the military courts. But their implementation even in case of the declaration of a state of siege is made possible by a special clause of the law on the state of siege (article 18). This clause constitutes the keystone of the system of penal procedure applied by military courts during a state of siege.

Rights and Liberties

Contrary to the constitution of 1924 which specifically enumerated rights which could be suspended during the implementation of the state of siege, and whilst in the draft 1961 constitution the same issues were specifically mentioned (article 59/3), the text of the 1961 constitution is silent on the subject. Article 24 merely treats it in abstract and general terms : "restriction or suspension of liberties". It authorises the legislator to determine its rules. The lack of a precise constitutional clause in this domain constitutes a serious draw-back in legislative measures taken in this case.

This is indeed the context for the laws on the state of siege and the organisation and procedure of military tribunals. These laws restrict and make provision for suspensions which cover almost the whole range of human rights including the right to defence before judicial authorities. As for the universities, the Law on Universities - and not the constitution - gives the Council of Ministers extraordinary powers which could, if effectively applied, challenge the rights and liberties to teach or to be taught.

But the problem of freedom during a state of siege cannot be reduced merely to the question of making or not making an inventory of rights that can be suppressed. The crucial question is : to what extent can the law restrict or suspend a right or freedom ? This problem is also in part posed by the contradiction between two clauses of the constitution. While article 124 speaks of "restriction and suspension" of liberties, article 11/2 stipulates that "the law cannot affect the essence of fundamental rights and liberties". Should this article, to be found in the First Chapter, entitled "Fundamental Clauses" of the second part of the constitution, be respected even in case of a state of siege, or to the contrary is article 124 an exception to it ?

The Constitutional Court seems clearly in favour of the second interpretation or solution (65). But its stand did not prevent the Supreme Court from deciding in the same proceedings that a clause of article 15 of the law on the state of siege which gave the commander the power to detain accused persons for a period of 30 days without being obliged to take them before a judge, contrary to article 30 of the constitution (66), was unconstitutional. Thus, the existence of a precise constitutional norm concerning personal security (the habeas corpus) permitted the Constitutional Court to go back on its former stand in order to correct it.

Another question related to "rights and liberties during a state of siege" is the following : are the effects of the declaration of the state of siege produced directly and immediately at the level of rights and liberties ? The answer is certainly negative, for the enforcement of the system of the state of siege does not cause immediate and automatic restriction and suspension of liberties. Citizens generally have the

right to exercise their rights and liberties as before until the martial law commander decides otherwise and informs the public about it through general communiqués and instructions. It is time to specify that the measures taken by the commander should be limited and proportional to the demands of the situation and should be related to the cause of the declaration of the state of siege in question. The first of these principles, that is, the one relating to the "proportionality of measures taken" forms a part of general legal principles and is, besides, specifically provided for in the European Convention on Human Rights (article 15/1) of which Turkey is a signatory.

Review of its Legal Conformity

When we speak of "legal review" during a state of siege, there are three fundamental issues to consider.

Firstly, it must be verified whether or not the decisions taken by the martial law commander are in line with the law. This issue would appear to be resolved if one restricts oneself to the letter of the constitution since according to the wording of article 114 (amended) : "The jurisdictional channels are open against all the processes and actions of the administration". It must, however, be admitted that the original text of the same article was more geared towards the imposition of legal control over the processes of the authorities of the state of siege. It stipulated, indeed, that "under no circumstances can instruments or actions of the administration ever remain outside the supervision of the legal authorities". But that is not the only problem, for the ambiguity of the articles of the law on the state of siege empowering the military commander to take prohibitive and restrictive actions is so great that it makes any effort by the Council of State to review almost illusionary (67).

It is important furthermore that the basic legislative foundation for the implementation of the state of siege be checked for its conformity with the constitution.

This legislation comprises notably the law on the state of siege, the law on the organisation and procedure of military courts, as well as those on the status of judges. We have just cited in this article a certain number of judgments given by the Constitutional Court, whose work in this area deserves appreciation. However, the efficiency of a concrete review of constitutionality is compromised in certain instances cited above because of attempts to commit "constitutional fraud" on the part of the legislature.

Finally, we are face to face with the problem of the review of the legality and constitutionality of the act of declaring the state of siege. In the Turkish constitutional system the courts responsible for reviewing the constitutionality of the laws and the legality of administrative processes are the Constitutional Court and the Council of State. The issue of knowing to which court will belong the power to verify and validate a state of siege thus depends above all on the response to the following question : what is the juridical nature of the process by which a state of siege is declared ?

The juridical nature of this process is quite ambiguous. No one considers that this is an administrative process since it is the ministerial council that takes the decision. For them the court that is

competent to decide the validity of the process in question is the Council of State. Others claim to the contrary, that the process for declaring the state of siege, which is administrative in nature to begin with, subsequently becomes converted into a legislative instrument due to the parliamentary approbation which is given immediately afterwards. The logical consequences of the latter affirmation is thus to consider the Constitutional Court as the competent authority in this case. The decision of control on universities is clearly of administrative nature : according to article 114 of the constitution, the Council of State is thus responsible for reviewing the constitutionality of the decision.

In the absence of a constitutional clause governing the subject, it became the responsibility of jurisprudence to resolve the problem and make up this deficiency in the positive law. The two Supreme Courts raised the question without, for all that, being able to produce a positive answer. Indeed, they relinquished the matters before them on different grounds. The Council of State, which found itself incompetent to examine the validity of the declaration of the 1970 state of siege, based its decision on the notion that the process in question had been converted into a legislative instrument after its approbation by GNAT (68). As to the Constitutional Court, it decided that the examination of the validity of this process could not be its responsibility since the instrument of parliamentary approbation was neither in the formal nor material sense a "law" but a "resolution" (69).

It therefore follows that in Turkish law, there is no means available to dispute the validity of the declaration of a state of siege, due on one hand to the lack of specific constitutional clauses, and on the other to a conflict arising from denial of judicial responsibility which has cropped up between the two superior courts. Here again, the system is seriously flawed.

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APPENDIX

Since this article was written, new developments have occurred whose impact on states of emergency is of particular importance : on 12 September 1980, military armed forces seized power and the National Security Council (NSC) was established as the new political power under the presidency of General Kenan Evren. Consequently, the parliament and the government established by the 1961 constitution were dissolved; legislative and constituant powers were transferred to the NSC.

Shortly after, the NSC adopted three laws legalising the situation. According to the Law of 27 October 1980, laws, decisions and announcements adopted by the NSC shall be considered as amendments to the constitution in case of conflict or contradiction with this latter text. Besides, no legal action may be instituted against any decision of the Council.

The second stage of this transitorial régime was the formation of a 160-member National Consultative Council (mid-1981) which took up its duties on 23 October 1981, with the principal task of drafting a new constitution.

Legislation regarding states of exception has been amended, with the main result that :

- the jurisdiction of the martial law authorities has been extended to controlling and preventive functions by a Law of 19 September 1980. These authorities may thus, for example :

  -- prohibit the diffusion and the communication of printed matter or even order the seizure of such products, and prevent the running of printing houses which contributed to their printing;

  -- prohibit strikes and lock-outs, trade union activities, public meetings and demonstrations as well as associations' activities;

  -- suspend teaching in secondary schools or in universities, etc.

- the controlling authorities are now responsible to the Chief of Staff (1) instead of the Prime Minister, as was the case under the previous legislation;

- military justice has seen its field of competence extended at the expense of civil justice. Not only had the National Security Council to set up military tribunals following the proclamation of the state of emergency in the whole country, but the new legislation increases the Courts' legal competence and territorial

(1) Law of 14 November 1980 (No. 2342)

jurisdiction by adding a new list of crimes (such as "all crimes against the Republic, the National Security Council, national security", etc.). Furthermore, the Military Court of Cassation is competent for judging the so-called "délits d'opinion" as prescribed in articles 141 and 142 of the Turkish Penal Code.

Finally, criminal procedure (civilian and military) has been amended by several Acts :

- Law of 19 September 1980, according to which the controlling authorities will be competent for deciding if the case must be tried by a civilian or military court; penalty of imprisonment issued by military tribunals may not be suspended or converted into pecuniary penalty. The right of appeal is denied to persons sentenced by martial law courts to terms of less than three years' imprisonment;

- Law of 14 November 1980 provides, among other things, for the establishment of one-judge military tribunals, which are competent for judging offences whose penalties do not exceed 5 years' imprisonment. Furthermore, the duration of the adjournment has been reduced (from 30 to 15 days, and to 30 days for mass trials);

- Law of 7 January 1981, amends the Code of Criminal Procedure and facilitates the continuation of the trial in the absence of the accused by modifying the procedure of objection. Law of 21 January 1981 brings this change into the field of military justice.

One of the major consequences of the state of emergency proclaimed on 12 September 1981, is an increased infringement of fundamental rights and freedoms.

Freedom of expression is abolished by a phenomenon of "self-censorship" in the press and by a marked tendency to increase the penalties against the authors of "délits d'opinion" (such as communist propaganda) even if they were committed before 12 September.

Besides, the length of temporary arrest threatens the inviolability of the human being. Combined with the impossibility for the detainee to communicate with the defence lawyer or to appeal against the decisions of detention issued by the martial law authorities, it may encourage the police officers to use any means to obtain a "confession" : pressure, maltreatment or even torture. Although the National Security Council strongly condemns torture and tends to examine any allegation of such practice, it cannot prevent cases of death following "altercations with the police forces". The figures available up to now are all the more frightening in that it is impossible to check whether all these deaths were due to a "use of force which is no more than absolutely necessary".

Capital punishment is increasingly demanded by the military prosecutor, particularly for members and organisers of major trade unions (DISK and MISK) who have been arrested on a massive scale since the activities of the trade unions were suspended, their premises shut down and their administration transferred to an administrator.

In brief, and as the International Commission of Jurists has written in a document submitted to the Council of Europe (2), the new Turkish legislation in the field of penal military justice has shortcomings such as : the establishment of new military tribunals after the commission of crimes and identification of authors, the absorption of civil justice by military justice, the competence of military courts for judging "délits d'opinion", the augmentation of penalties by amendments to the Penal Code and grave restrictions of the rights of the accused. All these new provisions have been adopted in flagrant violation of articles 6 and 13 of the European Convention on Human Rights.

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(2) CONSEIL DE L'EUROPE, Assemblée parlementaire, Commission des questions politiques : Situation en Turquie, Les développements depuis l'intervention militaire du 12 septembre 1980, Document présenté par la Commission internationale de juristes, Strasbourg, le 21 avril 1981.

NOTES AND REFERENCES

(1) Communiqués Nos. 19 and 27 of the C.N.U. (Official Gazette, 30 May 1960 - 10515)

(2) Report subsequently published in the Official Gazette (1 and 2 July 1960 - 10540 and 10541)

(3) From this law (No. 1 of 12 June 1960 - Official Gazette, 14 June 1960 - 10525) briefly entitled "Provisional Turkish Constitution" in judicial language, the adjective "provisional" was to be later removed by Law No. 55 of 12 August 1960 (Official Gazette, 16 August 1960 - 10579)

(4) Law No. 157 of 13 December 1960 (Official Gazette, 16 December 1960 - 10682)

(5) Law No. 81 of 12 September 1960 (Official Gazette, 16 September 1960 - 10605)

(6) Law No. 15 of 16 July 1960 (Official Gazette, 11 July 1960 - 10548)

(7) Law No. 45 of 8 August 1960 (Official Gazette, 11 August 1960 - 10576)

(8) Cf. Maurice Garçon, Thesis to be consulted on the legitimacy of the legal institutions of the Turkish revolution, 1960

(9) Law No. 62 of 18 August 1960 (Official Gazette, 22 August 1960 - 10584)

(10) Law No. 6 of June 1960 (Official Gazette, 30 June 1960 - 10539)

(11) Law No. 25 of 5 July 1960 (Official Gazette, 20 July 1960 - 10556)

(12) Law No. 52 of 11 August 1960 (Official Gazette, 16 August 1960 - 10579)

(13) R. Arik, I. Türk and D. Baykal : Legislative Movement in Turkey, Ankara 1960, p. 9

(14) CNU communiqués Nos. 3 and 12 (Official Gazette, 30 May 1960 - 10515) and Government Declaration No. 1 (31 May 1960 - 10516)

(15) Press reports of 13 January 1961 and 1 April 1961

(16) Press reports of 30 September 1960

(17) Law No. 42 of 2 August 1960 (Official Gazette, 5 August 1960 - 10570)

(18) Law No. 114 of 27 October 1960 (Official Gazette, 28 October 1960 - 10641)

(19) Law No. 84 of 20 September 1960 (Official Gazette, 22 September 1960 - 10610)

(20) Law No. 105 of 19 October 1960 (Official Gazette, 25 October 1960 - 10638)

(21) For publications in Western European languages on the 27 May Revolution and on the 1961 Constitution, see : H. N. Kubali, "Les traits dominants de la constitution de la seconde république turkue" in Revue Internationale de Droit Comparé, 1965, No. 4; M. Kapani, "An outline of the new Turkish Constitution", in Parliamentary Affairs, Vol. XV No. 1; I. H. Ozay, "La costitutzione della seconda repubblica Turka" in Rivista Trimestrale de Diritto Pubblico, 1978, No. 3; and the collective work cited above (see note 3) published by the Institute of Public Administration for Turkey and the Middle East

(22) For concrete examples, see Turkish press reports of 28 October 1971, 7 November 1972, 12 December 1972, 14 May 1972, 7 October 1972, and 3 April 1972

(23) On this last point, see "Turkish Universities Fall Silent", published in INDEX on Censorship, 2/1974, pp. 39 - 49

(24) For original and revised texts of the constitution, cf. Annales de la Faculté de Droit d'Istanbul, Vol. XIV, No. 20, 1964 (T. Orman, trans.) and Annales Vol. XXI, No. 37, 1973 (E. Tezic, trans.)

(25) See especially "The Rule of Law in Turkey and the European Convention on Human Rights; A Staff Study", in The Review, ICJ, No. 10, June 1973 and The Review, Nos. 5, 9 and 12. For the European Council debates see Minutes of the 24th and 25th ordinary sessions of the consultative assembly held on 22 Janaury 1973 and 14 May 1973. Among the reports published by legal observers, one can cite those of : Mr. Lafue Veron, "Political trials and Repression in Turkey" (AIJD, 1971); Mr. Noll, "Missions of a Legal Observer to Turkey" (ICJ, March 1973); Messrs. Hunter/ Sir. O. Williams, "Amnesty International Mission in Turkey" (AI, December 1972); and Mr. Evenson, "The Violation of Human Rights in Turkey (August 1972)

For the defence of the 12 March régime, see : N. Erim, "The Turkish Experience in the Light of Recent Developments", The Middle East Journal, Summer 1972, and especially E. Hirsch, Menschenrechte und Grund Freuheiten im Ausnalimezustand, Duncker & Humblot, Berlin, 1974

(26) The Law of 22 October 1971, No. 1488

(27) Official Gazette, 12 September 1955

(28) CNU Declaration No. 19 (Official Gazette, 30 May 1960 - 10515)

(29) Article 1 of the Law on the State of Siege of 13 May 1971, No. 1402 (Official Gazette, 15 May 1971 - 13837). For the French translation of the original text of this law, cf. Annales de la Faculté de Droit d'Istanbul, Vol. XXI, No. 37, 1973 (S. Akyol, trans.)

(30) The National Security Council, made up of the President of the Republic, the president of the Ministerial Council, the Chief of Staff, Ministers designated by law as well as Commanders of the armed forces, is a body which makes recommendations to the Council of Ministers for decisions of the latter on matters of national security (article 111 of the Constitution)

(31) Article 2 of the Law of 11 December 1962, No. 129

(32) Law No. 1488 of 22 September 1971, amending the Constitution

(33) Indeed, it is quite possible for the government to declare a state of siege for a period of less than 2 months. For example, that of 1974 had been declared for 1 month, but was subsequently renewed several times (Official Gazette, 20 August 1974)

(34) The state of siege declared in the Province of Anatolia on 15 August 1974 was lifted by a 19 August 1974 GNAT resolution (No. 300, Official Gazette, 20 August 1974 - 14382). Similarly, the state of siege declared in several provinces of Eastern Anatolia on 26 March 1975 following events in Iraq, was abolished by a GNAT resolution, No. 354 of 28 March 1975, (Official Gazette, 29 March 1975)

(35) Article 26.

(36) Decision of the Council of Ministers, No. 4/6325, of 17 December 1955 and GNAT Resolution No. 1950 of 19 December 1955 (Official Gazette, 17 and 20 December 1933)

(37) See above note 34

(38) Articles 5, 8, 9 and 11 of the Law on the State of Siege

(39) Bilgen, The State of Siege (in Turkish), Istanbul, 1976, pp. 15 - 16

(40) Articles 3, 5/4 and 6 of the Law on the State of Siege

(41) The original text confirms this principle more clearly : "No person can appear before any authority other than that to whose natural justice he is subject. No exceptional jurisdiction preventing the indidivual from being taken before the authority to whose natural justice he is subject can be established".

(42) Judgment of 15 - 16 February 1972, No. 1971/31, 1972/5 (in Revue des Arrêts de la Cour Constitutionelle (in Turkish), No. 10, pp. 178 - 179. Along the same lines, Decision of

the Military Court of Cassation, Section 4, of 15 December 1970, No. 1970/556, 1970/598

(43) On this issue, see ICJ Press Release of 14 February 1973

(44) Law No. 1728 of 15 May 1973 (Official Gazette, 20 May 1973 - 14540)

(45) Articles 13 and 15 of the Law on the State of Siege amended by Law No. 1728

(46) Provision was not made for these exceptions in the original text of the law. This inadequacy resulted in the quashing decision by the Constitutional Court (Decision of 15 - 16 February 1972, already cited). Later on, the legislator amended article 21 by Law No. 1728 to incorporate the exceptions

(47) 15 and 16 February 1972, Decision already cited (Revue No. 10, p. 109)

(48) Amendment effected by Law No. 1699 of 15 May 1973 (Official Gazette, 20 May 1973)

(49) Provisional article 2 amended by Law No. 1728 of 15 May 1973 (Official Gazette, 20 May 1973 - 14540)

(50) Judgment of 15 April 1975, No. 1973/19, 1975/87 (Revue No. 13, pp. 448 - 451)

(51) Article 2 of the Law on the Organisation and Procedure of Military Courts of 25 October 1973, No. 353 (Official Gazette, 26 October 1963 - 11545)

(52) Article 138 amended by Law No. 1699 of 15 March 1973 (Official Gazette, March 1973) and cancelled by the decision of the Constitutional Court on 15 April 1975, No. 1973/19, 1975/87 (Revue No. 13, pp. 447 - 448)

(53) Decision of 15 to 16 February 1972 (Revue No. 10, p. 181)

(54) Article 1 of Law No. 553, Article 11 of Law No. 1402

(55) Cf. Turkish press reports of 16 May 1972

(56) Article 12 of the Law on the Status of Military Judges (no. 357)

(57) In the judgment of 15 - 16 February 1972, 6 judges out of 15 declared that the Martial Law Courts were not independent and voted for the cancellation of article 11 of Law No. 1402. But the majority ruled that the court could not make a pronouncement on the matter, given the fact that the status of military courts was governed by another law which was not the object of a request for cancellation during these proceedings (Revue No. 10)

(58) Decisions of 10 January 1974, No. 1972/49, 1974/1 (Revue No. 12, pp. 26 - 28), of 12 December 1975, No. 1975/159, 1975/218 (Revue No. 13, pp. 685 - 690), of 16 June 1977, No. 1977/16, 1977/86 (Revue No. 15, p. 420)

(59) Decision of 15 April 1975, already cited in note 50. (Revue No. 13, pp. 447 - 448)

(60) See, for example, the judgment of the Military Court of Istanbul (No. 1), File No. 1971/26 (Report, pp. 77 - 78)

(61) Article 143 of Law No. 353 amended by Law No. 1596

(62) Article 40 of Law No. 353 amended by Law No. 1596

(63) Article 143, already cited

(64) Article 153 of Law No. 353 amended by Law No. 1596

(65) Decision of 15 - 16 February 1972, cited above (Revue No. 10, p 667).

(66) Article 30, amended by Law No. 1488, of 22 September 1971. This article was subsequently revised a second time and the period of detention was changed to 15 days in the event of a state of siege. (Law No. 1699 of 15 March 1973) (Official Gazette, 20 March 1973)

(67) P. Bilgen, op.cit. pp. 21 - 22

(68) Decision of 3 July 1970, No. 1970/389, 1970/442

(69) Decision of 17 November 1970, No. 1970/44, 1970/42 (Revue No. 8, pp. 443 - 447). Let us repeat that in Turkish law, the constitutionality of the difference between parliamentary laws and resolutions is not a matter for review by the Constitutional Court, except in the case of a few exceptions specifically provided for in the Constitution.

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STATES OF EMERGENCY IN URUGUAY

CONTENTS

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I. INTRODUCTION

A state of emergency has existed in Uruguay for 14 years and has profoundly affected the whole of its society, for whom the situation was quite novel. Indeed, the country had enjoyed decades of firm institutional stability, with a political system that upheld democracy and the principles of representative government. Its constitutional régime established a balanced system of separation and coordination of the executive, legislative and judicial powers, each of which was responsible for one of the main functions of the state. This was the foundation of the rule of law, which had for long prevailed in Uruguay.

From a social and cultural standpoint, there was advanced social legislation, a high standard of living compared to the rest of the region, free education at all levels and a literacy rate of 95% of the population over the age of ten. There were no racial problems or communication difficulties among the 2.9 million inhabitants as Spanish is the only language spoken.

Domestic laws stipulated a number of mechanisms for the protection of human rights and fundamental freedoms as guaranteed by the constitution. Further, the provisions of various international treaties and legal instruments to which Uruguay is party, and which recognise the rights of the people to impose obligations on states, could be invoked before national courts with the same binding force as national law.

In the course of a few years, however, starting in the second half of the 1960's, the system of representative democracy was completely eroded, and the rule of law was no longer recognised. The government was forced to ask for the help of the armed forces in dealing with armed opposition, and human rights ceased to be protected and were gravely violated. This retrogressive process culminated in a military coup d'état in June 1973, which set up a régime describing itself as "military-civilian". It introduced an authoritarian and anti-juridical power structure, under which the main functions of the state were concentrated in the hands of an executive dominated by the armed forces.

The factors leading to the breakdown of the rule of law were initially economic, and later included terrorist attacks by armed guerillas. The principal factor was a severe economic crisis, due to a series of international and domestic causes, which the country's economic structures were inadequate to meet. Features of the crisis were stagnation of production, the slowing down of the economy, a drop in the prices of raw materials (meat, wool, hides) on the international market and increased concentration of wealth in the hands of a few, as a small sector derived high profits from financial and speculative activities. The purchasing power of wages and salaries fell with a consequent reduction in the standard of living and the consumption capacity of a part of the population. There was unemployment, rampant inflation (1), impoverishment of the majority middle-class, a shortage

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(1) Cost of living increase indices :

1967	122.1%	1971	39.4%	1977	51.7%
1968	64.1%	1972	94.7%	1978	46.0%
1969	14.2%	1974	107.2%	1979	83.1%
1970	20.7%	1976	51.4%	1980	42.8%

of decent housing and high cost of available housing, inadequate health care, reduced school attendance due to the need to earn a living, retrogression of social and labour legislation, and corruption and financial scandals in official circles. This was accompanied by several currency devaluations (2) and a startling increase in foreign debt. The external debt amounted almost to the value of total exports over three years.

These factors led to increased discontent, as witnessed by the strengthening of the trade union movement, which in 1964 combined its forces in a trade union congress, the Convencion Nacional de Trabajadores, as well as of the political opposition forces which demanded substantive solutions to the crisis, implying structural change.

Disillusionment at the failure of the government to adopt effective measures to meet this crisis led to the creation of armed guerilla groups using terrorist tactics and this in turn led to the emergence of extreme right-wing armed groups which carried out armed attacks on left-wing activists and militants.

The government reacted to the quantitative and qualitative increase in trade union and political demands and the continual harassment from armed opposition movements not by attempting to come to terms with the factors underlying the situation, but rather by restricting itself to combating their manifestations and consequences. Repression seemed to be their only response.

As the civilian police proved themselves unable to control the terrorist movements, the government decided in September 1971 to put the armed forces in charge of anti-subversive activities, and the police were placed under their orders. The armed forces proceeded to apply political repression not only to armed opposition groups, but also to political and trade union opponents in general. They were not deterred by considerations of human rights, nor did they respect the rules of the legal system. Once the armed forces were given emergency powers, they realised that they could arrogate total power to themselves and and began moving towards that goal. Their action was guided by the ideology of national security, so prevalent in other Latin American states.

They were supported by certain sectors of the economy which were concerned :

- to block the left-wing and progressive forces in general, insofar as they proposed structural changes affecting their interests;

- to institute a development model based on an extremely liberal conception of a market economy which would promote the concentration of capital and concommitantly of investment, without taking into account the social cost of the implementa-

(2) The parity of the national currency and the U.S. dollar moved from 240 pesos to one U.S. dollar in 1972, to 45,000 pesos to one U.S. dollar at the end of 1982. The nominal value of the peso was adjusted : 1,000 pesos are now equal to one new peso.

tion of this model;

- to promote foreign investment through the elimination of protectionist barriers and obstacles, thus permitting easy repatriation of capital and to eliminate the subsidies to national industry which enabled it to compete with foreign products.

Those who promoted these views also considered that future governments of the country should be subject to the tutelage of the armed forces, and that the latter should maintain control of, or at least have a decisive influence on, key areas of policy decision-making. The eventual attempt to enshrine this view in the constitution put to a referendum in November 1980 was rejected by the electorate.

The mechanism used to attain these objectives was that of the state of emergency. Its uncontrolled and abusive application annulled or rendered ineffective all the procedures established by law to protect human rights and fundamental freedoms. Furthermore, the exceptional powers provided for in the constitution in order to protect the nation and its democratic system were used in Uruguay to achieve political objectives which were counter to the interests of the nation and were incompatible with democracy - the result was a series of violations of :

- civil rights, such as the right to life, freedom from arbitrary arrest and detention, freedom from torture and ill-treatment, rights of defence and due process of law. Political opponents were fought with torture, murder, enforced disappearances and terror. There were also violations of the right to privacy, freedom of expression, assembly and association and trade union rights;

- political rights, which were suspended for the entire population in 1973 and which have supposedly been re-established, but only for a part of the population, and subject to severe limitations;

- economic and social rights, in regard to work, wages, health care, housing and the standard of living in general; and

- cultural rights, through repression in education and the restriction of various forms of artistic expression.

II. STATES OF EMERGENCY IN URUGUAYAN LAW

The Uruguayan Constitution of 1967 establishes two mechanisms to deal with exceptional situations threatening the life of the nation which cannot be resolved by recourse to the normal procedures established by the legal system. Those mechanisms are the "Prompt Security Measures" and the "Suspension of Individual Security".

Prompt Security Measures

Article 168, paragraph 17, of the constitution provides :

"The President of the Republic, acting with the minister or ministers concerned or with the Council of Ministers, shall have the following duties :

...

(17) To take prompt security measures in grave and unforeseen cases of foreign attack or internal disorder, to report within 24 hours to the General Assembly at a meeting of both Chambers or, where appropriate, to the Standing Commission on the action taken and the reasons therefor, and to abide by its decision.

With respect to persons, the prompt security measures authorise only their detention or transfer from one place in the territory to another, provided that they do not elect to leave it. This measure, like the others, shall be submitted within 24 hours after its adoption to the General Assembly at a meeting of both Chambers or, where appropriate, to the Standing Commission, whose decision shall be final.

Such persons shall not be detained on premises intended for the incarceration of criminals."

Prompt security measures are thus an emergency instrument which can be used to widen the field of action of the executive when it has to deal with exceptional situations, described as "grave and unforeseen cases of foreign attack or internal disorder", which cannot be dealt with by the normal machinery of the government. When these conditions exist, the executive may apply these measures, reporting within 24 hours on the action taken and the reasons for it to the national General Assembly or, if the Assembly is in annual recess, to the Standing Commission (3).

This widening of the powers of the executive does not empower the executive to legislate, to issue decree laws, as in other countries. It may only adopt specific administrative measures, generally of a police nature. It cannot adopt decrees on matters reserved for legislation, or decrees which are permanent in character and whose provisions continue to apply beyond the state of emergency. Every measure or group of measures adopted in a decree must be submitted to Parliament "... whose decision shall be final". This means that Parliament may set aside a specific measure, or some or all of them. It may also call to account the head of the executive (impeachment of the president) if he has acted in violation of the law or the constitution when decreeing prompt security measures.

It is essential that prompt security measures should be applied

(3) During the annual recess of Parliament, there is a Standing Commission consisting of 4 senators and 7 deputies.

under parliamentary control, as the legislative power is, as has been said in Uruguayan doctrine and jurisprudence, "the master of measures". It has the last word, and may decide whether they should be maintained or cease. The constitution seeks at all times to avoid combining in a single power of the state the power to make law and the power to apply it.

With regard to persons, the prompt security measures have precise limits. A person may be detained or transferred from one place in the territory to another, and may only be kept in detention if he does not prefer to leave the country. If he avails himself of this option, he cannot be kept in detention, and he must be given every facility to leave the country.

Again, every measure affecting persons must be communicated within 24 hours to the Parliament, which may set it aside or else raise no objections to maintaining it. A final constitutional provision for the safeguard of human rights is that administrative detention must not take place on premises intended for the incarceration of criminals.

In short, the Uruguayan Constitution establishes a series of limitations both on the declaration of a state of emergency and on its application, limitations which coincide with those set forth in international legal instruments, with those currently accepted by legal doctrine, and with those listed in resolution 5 (XXXI) of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities of 13 September 1978. The latter are :

- emergency measures must be officially declared by the executive power;

- their legal force must be subject to approval or rejection by the legislative power;

- their application is subject to control by the legislative power;

- they are temporary, inasmuch as they represent an emergency mechanism designed to deal with exceptional situations; and

- their legal effects are provisional and only remain in force as long as the exceptional situation lasts.

Suspension of Individual Security

Article 31 of the constitution provides :

"Individual security may not be suspended except with the consent of the General Assembly or, if it has been dissolved or is in recess, the Standing Commission, and in the extraordinary case of treason or conspiracy against the country, and even then only for the apprehension of the offenders, without prejudice to the provisions of article 168, paragraph 17."

The suspension of individual security (i.e. of some of the rights and guarantees established by the constitution and the law) is a more extreme measure than the prompt security measures, and for that reason cannot be taken by the executive alone. It requires the authorisation of the General Assembly or, if it has been dissolved or is in recess, the Standing Commission. In view of its exceptional nature and the implicit risk of misuse of power, the constitution limits its application to "the extraordinary case of treason or conspiracy against the country". Another precise limitation concerns the scope of the measure, inasmuch as the executive is empowered to suspend some guarantees "... only for the apprehension of the offenders", who as such must naturally be dealt with by the ordinary system of justice.

In other words, once this exceptional measure has been decreed, the executive may do nothing more than suspend the application of some guarantees and hold persons under administrative detention without bringing them before the courts for so long as the suspension lasts and providing that the person detained does not choose to leave the country. If the detainees have committed penal offences, they shall be brought to justice.

On every occasion when the executive requested the application of the measures (in August 1970 and April 1972), Parliament, on giving its consent, emphasised that only some constitutional and legal rights were suspended.

The State of Internal War

Uruguayan constitutional law provides for only two institutions to restore or maintain public order in emergencies, the prompt security measures and the suspension of individual security. In April 1972 a third was added, which is not provided for nor regulated by the constitution and for which there was no precedent - the State of Internal War.

The state of internal war has never existed under the Uruguayan Constitution. The constitution deals with "war" in cases of international conflict, warfare with foreign states or powers, or so-called international civil war (articles 6, 85 and 168). The absence of any provision for a state of internal war is not a gap in the constitution or an oversight on the part of the authors of the constitution. Its omission was deliberate.

III. CHRONOLOGICAL REVIEW OF EVENTS

A state of emergency in the form of prompt security measures was adopted for political reasons in November 1967. The circumstances were these. Six opposition political parties agreed to publish jointly a newspaper. In it they made a statement calling for changes in the country to meet the economic crisis and for the abolition of the 'privileges' of the oligarchy. The statement was very strongly worded. The government's answer was to close the newspaper permanently and to dissolve the six political parties. This was the first occasion on which political parties had been banned in Uruguay, and it was considered a very severe measure at the time. Some months later the Parliament adopted a resolution, in accordance with the provisions of the constitution, lifting the prompt security measures and re-establishing the rights of the six political parties.

On 28 June 1968, the executive again declared a state of emergency, which is still in force, at the same time imposing, under the prompt security measures, a freeze on prices and wages and creating a new body (COPRIN) to be responsible for authorising price increases of any type of product or service and for fixing wages. COPRIN was also to intervene as a mediator in collective labour disputes with the power to decide on the lawfulness or otherwise of a strike. These were matters which could only be regulated by law and not by executive decree, since they affected the general interest and replaced the machinery introduced by law to fix wages in the private sector. It was, therefore, an improper use of the power to impose a state of emergency. In December 1968, the existence of COPRIN was formalised by law. In practice, the effect of the controls imposed by this body was that price increases rose much faster than wages and the inflation continued.

July 1968. The police fired on students demonstrating against the state of emergency, causing, for the first time, the deaths of a number of students.

Also in 1968, in the face of an employers' lock-out and against the background of a serious banking crisis, widespread strikes broke out. The government retaliated with repression and dismissed 183 public and private bank employees, which led to a more serious strike, from May to September 1969.

In 1969, there was a strike by public employees in the electricity and telephone (UTE) sectors which in turn was repressed by dismissals. The armed forces intervened for the first time. The navy occupied generating plants, beat up striking workers and imprisoned some of them on an island in the Rio de Plata estuary. Shortly afterwards, the army in its turn arrested bank workers and workers in other occupations who were on strike. Abusing the state of emergency, the executive imposed military status on workers employed in banking, electricity and water services, the state enterprise manufacturing alcohol (ANCAP), the railways (AFE) and other occupations. It also imposed military status on the police. The army occupied places of work and union premises and some 5,000 persons were interned in military quarters from where they were taken every day to their places of work.

Also in 1969 there were strikes by cold-storage operators (April to August) as well as strikes (for two months) of draughtsmen, journalists and newspaper vendors in protest at the repeated closing of newspapers under the state of emergency.

During this period, the existence of armed left-wing organisations became publicly known, such as the Tupamaros National Liberation Movement (MLN-T), the Revolutionary Popular Organisation of the Thirty-three Uruguayans (OPR-33), the Workers' Revolutionary Front (FRT), the Armed Forces of the Eastern Revolution (FARO). The Tupamaros was the most important of these groups. The police first became aware of its existence in December 1966. However, it was not till August 1968 that the group took their first violent action and not till 1969 that they could be said to have become a guerilla organisation. They were responsible for armed propaganda activities, abduction of government officers and attacks on gunsmith shops and arsenals to obtain weapons, and on banking and financial establishments

to procure funds. The government mobilised the best police corps against them and those arrested were tried by the ordinary (civil) courts. Defence counsel denounced the first cases of torture of political prisoners.

The growth of the Tupamaros, a group previously largely ignored by the public, was certainly due to the repression instituted against workers, students and community groups by means of the prompt security measures adopted in June 1968.

It is commonly believed, as a result of official propaganda, that the prompt security measures were adopted to combat the Tupamaros. In fact, they were adopted for economic reasons and to combat the opposition by the unions and student bodies to certain economic practices current at that time.

In August 1970, the executive decreed the 'Suspension of Individual Security' for 40 days following the abduction and subsequent killing by the Tupamaros of a North-American police officer who was acting as counsellor to the Uruguayan police force.

During the same period, armed organisations of the extreme right were also emerging, such as the Uruguayan Youth at the Ready (JUP), which was to take a leading part in armed attacks on secondary schools and other educational institutions to punish student activists. Yet more serious were the activities of the death squads which carried out dynamite attacks on premises of left-wing groups and abducted and tortured to death several young people suspected of belonging to clandestine left-wing organisations. Evidence of the participation in these squads, of persons occupying senior posts in the government, the police and armed forces, and on the impunity with which they carried out these activities, was given before Parliament by four police officers who had left their ranks. However, no legal action or investigation was ever pursued against the persons accused; the investigation was closed at the police stage.

9 September 1971. Following a mass escape of political prisoners, organised largely by the Tupamaros, the government made the armed forces responsible for the fight against subversion. The Combined Forces General Staff was created, bringing the police and the armed forces under a single command.

Following a number of spectacular activities by armed left-wing groups, the army started progressively and systematically to apply torture to detainees. This started in early 1972 and since then torture and ill-treatment have been a systematic practice during the interrogation of political prisoners by members of the Combined Forces.

14 April 1972. Following fresh activity by the Tupamaros, the killing of three police officers and a member of the armed forces, who were members of a death squad, the reaction was such that President Bordaberry obtained from the General Assembly authorisation to declare a State of Internal War and the Suspension of Individual Security, measures which were to be added to the prompt security measures still in force. Political detainees, who by that time numbered several thousand, were made subject to military justice.

10 July 1972. Under threats of a coup d'état, Parliament approved law No. 14.068 on the "Security of the State and Internal Order", establishing the exclusive competence of the military courts to try political offences. This was done by transferring political offences from the Ordinary Penal Code to the Military Penal Code, including attacks on the 'moral strength' of the armed forces.

14 July 1972. When the Security Law No. 14.068 came into force, the State of Internal War was brought to an end. The Suspension of Individual Security remained in force until June 1973 and the Prompt Security Measures were maintained and are still in force.

At the end of 1972, the first crisis between the government and the armed forces occurred, from which the latter emerged victorious and continued to strengthen their position until they launched an "unofficial" coup d'état and forced the president to accept a "military guardianship" over the government. This guardianship became institutionalised with the creation of the National Security Council (COSENA). Although there was no constitutional provision for it, COSENA was created as an organ of state, forming part of the executive together with the president and the Council of Ministers. In practice, it became the most powerful institution in the state. It was composed of the head of state, four of his ministers, the commanders-in-chief of the army, navy and air force and the chief of the Combined Forces General Staff who acted as secretary. The powers of COSENA extended to all questions and matters which might affect or have any bearing on national security, the concept of which had, on the institution of the new organ, expanded considerably. Under the new concept, it dealt not only with what had been understood by national security up till then - territorial integrity, sovereignty, defence of the constitution and the laws - but also foreign relations, external trade and foreign investments, development policy, currency and exchange rates, cost of living, wages, employment and unemployment, education, and political and trade union activity. COSENA was the decisive application of the ideology of national security, on the basis of which the armed forces assumed a political role in the life of the nation. According to its supporters, it was the duty of the armed forces to assume exclusive responsibility for preserving national security (as defined by members of the Uruguayan armed forces), in the face of a non-conventional world war, provoked by alleged international Marxist aggression.

In March 1973, another organ was officially instituted, although it already existed in practice : the Board of Commanders-in-Chief, made up of the commanders of the three branches of the armed forces and to which was attributed the role of counselling organ to the executive.

27 June 1973. The situation culminated in a military coup d'état. With the coup, which had the support of the president, the government dissolved the Parliament, namely the Chambers of Senators and Representatives, as well as the departmental legislative bodies, censored the press and the media and prohibited them from attributing "dictatorial designs to the executive power" (Decree of 27 June 1973). The rights of assembly and association were suspended and the joint forces started to arrest political and trade union leaders. The ideological basis for this was expressed to be the state of necessity theory on the one hand and the national security theory on the other.

The people did not hesitate in their response, which reached a pitch unimagined by those responsible for the coup. It took two main forms : intense political activity and a general strike by the trade unions which paralysed the country for over two weeks.

It should be stressed that these measures were taken after the Tupamaros and other guerilla groups had been brought under control and after all terrorist activities had ceased. The last armed action by any guerilla group occurred at the beginning of 1973. In 1974, the military leaders themselves stated that violent subversion had been defeated in the country, and now it was the turn of 'non-violent subversion'. They repeated this statement again in 1976, after the widespread arrests and other repression of members of the communist party, saying that Marxist subversion and Marxist forces had been 'completely defeated'.

30 June 1973. The government decreed the dissolution of the National Convention of Workers (CNT), a trade union body including 90% of trade union members in the country, and the dissolution of a number of unions which were subsequently banned (Resolution 1102, adopted by virtue of the prompt security measures). At the same time, it prohibited the principal trade union rights, such as the rights of assembly, expression, union membership and the right to strike. It also ordered state agencies to dismiss strikers and made provision for employers in the private sector to dismiss strikers without the severance pay or compensation to which Uruguayan law entitled them.

28 November 1973. The executive decreed the dissolution and banning of 14 political parties, trade unions and student groups. Repression was intensified against those belonging to these banned groups and owing to the retroactive effect of this decree, they were condemned by military tribunals for their past membership which had been perfectly legal at the time. Even before this date, from June 1973, all political parties and groups had been made to go into de facto "recess", a term which implied the absolute prohibition of any political activity. Those who were involved in political activity were arrested - if they simply belonged to or were active in a party which was in recess, they were liable to be detained for an indefinite period under the prompt security measures, whereas if they belonged to or were active in a banned party, they might also be tried and sentenced by the military tribunals.

In December 1973, the Council of State began to function, at that time with 25 members directly appointed by the president. It had been created by decree No. 464/73 at the time of the coup d'état (27 June 1973) and had a dual purpose : to approve legislation and carry out all other functions of the legislature and to draft a new constitution. Later, on the basis of Institutional Act No. 11 of August 1981, the membership of the Council of State was raised to 35, and all of them were again directly appointed by the president.

June 1974. An Economic and Social Council was set up as an advisory body to the government on economic and social policy and consisted of the president, two of his ministers and the commanders-in-chief of the three armed forces.

29 December 1975. Law 14.493 on "Adjudication and punishment of the crime of lèse-nation", approved by the Council of State,

authorised the military courts to hear all cases concerning political crimes, and was made retroactive to apply to those detained prior to April 1972 and to all cases commenced as civil proceedings on the date of enactment.

12 June 1976. A new coup d'état deposed President Bordaberry who had thus far collaborated with the armed forces, but who had lost their confidence. The military chiefs immediately appointed a new president, who approved Institutional Acts Nos. 1 and 2 on the day he took office.

Institutional Acts. This new category of constitutional legislation, previously unknown in Uruguayan law, came into being by a so-called constitutional decree, signed by the head of state and the Ministers of the Interior and of Defence, on the advice of the junta of commanders-in-chief. Under it, the executive assumed the power to amend the constitution without following the appropriate procedure established in the constitution, and without submitting the amendment to the electorate for approval by plebiscite as required by the constitution. This procedure stripped the constitution of its value and importance as basic legislation, enabling it to be amended by means of mere executive decrees requiring still fewer formalities than did even the approval of ordinary laws.

The Institutional Acts (Inst.Acts) were based specifically on the national security ideology; all of them read : "The Executive Power, in exercise of the powers vested in it by the institutionalisation of the revolutionary process, Decrees ...". They are clear examples of abuse of power on the part of the executive, which does not itself have the power to change the constitution of the state, the system of the separation of powers or individual and collective rights. Twelve Institutional Acts have been approved up to the time of writing.

Inst.Act No. 1 (12 June 1976) suspended the general elections which were to have taken place in November 1976. Inst.Act No. 2 (also 12 June 1976) established a body to elect authorities, known as the Council of the Nation, composed of 35 members of the Council of State and all active generals (and equivalent ranks in the navy and air force), amounting to 28. A quorum was established so that no important decision could ever be taken without the consent of the military members. The duties of the Council were to appoint the president, the members of the Supreme Court of Justice, the Electoral Court and the Administrative Tribunal. It also made appointments to all offices which were to have been filled by popular election, such as departmental intendants and members of departmental legislative bodies. It also took over powers formerly attributed to the Senate to pass political judgment on any grave offences committed by the president, ministers of state, and other high authorities. The new body was more important than the three State Powers.

1 September 1976. Inst.Act Nos. 3 and 4 were approved. Inst.Act No. 3 put an end to the autonomy of the departmental governments recognised under the constitution. (The country is divided into 19 departments, each of which had an executive and a legislative body with powers to deal with departmental affairs.)

Inst.Act No. 4 concerned the prohibition of political activity and the punishments to be applied to those carrying out such activities or who had carried out such activities in the past. For the first time in an official document it was stated that all activity by political parties or groups was suspended. Political banning and sanctions were established for seven categories of persons, affecting in total over 10,000 people. All political activity was prohibited for a period of 15 years for :

- all those included in the 1966 and 1971 lists of election candidates belonging to Marxist and pro-Marxist parties which had been declared illegal (including the Socialist and the Communist parties) and those parties which had been electorally associated with them (e.g. the Christian Democrat Party);

- those who had seats in the Chambers of Senators or Representatives from March 1967. The only exceptions were for those holding political office at the date of introduction of the Institutional Act;

- all presidential candidates in the 1966 and 1971 elections, of any party;

- all persons against whom penal proceedings for lèse-nation (political proceedings) had commenced, regardless of whether the proceedings resulted in acquittal; and

- executive office holders of all parties.

Anybody disregarding these prohibitions was liable to sanctions. Those who were retired could be deprived of up to one-third of their pension; those who were employed by the state could be dismissed, and those who were members of banned parties could be imprisoned in conformity with the State Security Act.

Sanctions applied by virtue of Inst.Act No. 4 could not be opposed in court; no appeal was possible. Lastly, an Interpretive Commission was established with powers "to waive proscriptions", which has so far rehabilitated some 200 citizens, most of whom were supporters of the régime or not opposed to it.

20 October 1976. Inst.Act No. 5 was a curious mixture which asserted the existence of human rights whilst declaring that their protection "must be regulated in function of internal security", thereby implying that security was a priority and that human rights were subsequent and subordinate to it.

It also provided that Uruguay would only agree to the surveillance of human rights if this was carried out by professional and permanent international tribunals, or by states signatory to international treaties and in virtue of those treaties. It would not accept denunciations from persons "in an individual capacity or private national or international bodies".

19 January 1977. Inst.Act No. 6 aimed at placing under the direct control of the executive all matters related to electoral proceedings. It amended the law relating to the constitution of the

Electoral Court which was previously a democratically elected body, dismissing all nine of its members and replacing them by three members appointed directly by the executive (article 2). It had previously been composed of members appointed by the Legislative General Assembly and by representatives of the political parties. It also affected the Departmental Electoral Boards; their members, previously appointed by direct popular election, were to be appointed and removed from office by the executive.

February 1977. An Armed Forces Political Affairs Commission (COMASPO) was established to direct the political orientation of the armed forces.

27 June 1977. Inst.Act No. 7 was approved, doing away with the constitutional guarantees ensuring secure tenure of office for civil servants. From that date, the government and administration was in a position to dismiss civil servants arbitrarily.

The régime undertook a thorough and extensive political and ideological "purge", wiping the public administration clean of opponents. Thousands of civil servants were dismissed. The length of time a civil servant remained employed depended on the report the security services of the police and armed forces made on him. A personal record was established for each individual and a "personal history" certificate awarded to each civil servant or candidate. Whoever was awarded an "A" might be allowed to remain in his post or be accepted for it; whoever was awarded a "B" might be dismissed. However, these decisions were not binding and were subject to review by the official's superior. Anybody awarded a "C" would be instantly dismissed and could never hold an official appointment in the future.

The administrative act making provision for dismissal as a result of an individual's background could not be contested either in the administrative or other courts and there was no means of judicial appeal.

1 July 1977. Inst.Act No. 8 delivered the coup de grâce to the independence of the judiciary, already adversely affected since 1972. The term "Supreme" was removed from the title of the "Supreme Court of Justice" since, as explained in the long preamble to the Act, it was not considered appropriate to the new situation in which the judiciary was no longer a power of the state, having become subordinate to the executive in many aspects. This Act will be commented upon later, together with Inst.Act No. 12.

23 October 1979. Inst.Act. No. 9 considerably changed the social security system so that social services became centralised in a single body, directly under the Minister of Labour and Social Security. The Act went against a long-standing national policy of increasing participation in social security agencies by those sectors directly interested. They became reduced to simple beneficiaries of the system and no longer participated in its administration or control.

30 November 1980. A national plebiscite was held so that the electorate might vote for or against a new draft constitution proposed by the armed forces. Those citizens banned for political reasons

(i.e. under Inst.Act No. 4) were not allowed to vote.

On 1 November - 30 days before the plebiscite - the text of the draft constitution, prepared without any participation from the people, was published. The draft was undemocratic in conception, being based on the ideology of national security. It proposed to establish the executive as a superpower, conferring on it a clear supremacy over the other state powers, although it still remained subordinate to the armed forces.

In the draft constitution, several human rights were suppressed, mainly by the introduction of new forms of states of emergency with the possibility of suspending rights during the emergency. Lastly, it reaffirmed the validity of all the existing laws and other rules - including the Inst.Acts - approved since the coup d'état in 1973, and any which might be approved in the future until such time as parliament was restored. It proposed presidential elections with a single candidate who must have the approval of the armed forces. The aim of those who had drafted the text was to give legitimacy to the régime in power and give form to a system whereby the armed forces exercised a firm hold over the government.

When the plebiscite was held, it was the first opportunity for the people to express their opinion after seven years of military dictatorship - during which there had been no elections, no political or trade union activity of any kind and a climate of repression and abuse. The draft constitution was rejected by a large majority. The military leaders announced shortly before the election that a negative vote would be interpreted as a vote in favour of the status quo. By the electorate, however, it was generally interpreted as a vote for a return to representative democracy and to respect for human rights and fundamental freedoms.

March 1981. The military leaders announced that since the people had rejected its political plans and proposals, the Council of the Nation (Inst. Act No. 2) would directly appoint a new president in September 1981. The state of emergency would be maintained. In this way, the armed forces demonstrated that they would not accept the decision of the people and intended to remain in power.

12 May 1981. Law No. 15.137 on professional associations was approved to regulate trade union activity and the right to form trade unions. Because of the measures adopted against the workers unions in June 1973 and the permanent repression of unions, the case of Uruguay came up for discussion in the International Labour Organisation year after year. The ILO repeatedly stated that the government was not fulfilling the provisions of International Conventions Nos. 87 and 98 on trade union freedom and the right to form trade unions. As a result of the permanent protest on the part of the ILO and Uruguayan trade union members, a number of provisions contained in the original government draft were modified. Nonetheless, the law which was approved still contained very severe limitations to trade union rights, including the absence of recognition of the right to strike. The provisions were therefore still not in conformity with the ILO Conventions.

1 August 1981. Inst.Act No. 11 provided that the new president to be appointed by the Council of the Nation would remain in office until March 1985. It also modified Inst.Act No. 2 by providing that members of the Council of State (carrying out the functions of the legislature) were to be appointed directly by the president.

Late August 1981. It was announced that Lieutenant General Gregorio Alvarez had been appointed president and was to occupy that post as from 1 September. Alvarez, a former commander-in-chief of the army, was one of the military chiefs responsible for the events leading to the coup d'état and assumption of power.

10 November 1981. Inst.Act No. 12 derogated, repealed and replaced Inst.Act No. 8. It was put forward by the régime as a measure to re-establish the institutional hierarchy of the judiciary and safeguard its independence. It did not, however, restore it to the level guaranteed by the 1967 constitution.

The Act restored the security of the judges' tenure and expressly proclaimed their independence in the exercise of their judicial functions. Although this was a positive step, the independence and impartiality of the judges was to be dependent on the one hand on the organisational structure of the administration of justice, and on the other on the system of appointment, transfer, period in office, promotion and dismissal of the judges. In accordance with Inst.Act No. 12 (article 12), members of the Supreme Court of Justice (it had resumed its former name) are to be appointed and, as appropriate, dismissed by the Council of the Nation, which has to select one of the three candidates to be proposed by the president for any vacancy (under the 1967 constitution, the members of the Supreme Court were appointed and dismissed by Parliament). As has been seen, the armed forces were predominant in the Council of the Nation.

Other judges were to be appointed by a new body, the Higher Council of the Judicature, which was vested with the non-judicial functions previously belonging to the Supreme Court, including appointments, transfers, promotions and discipline of the judges and senior staff of courts and tribunals. The membership of the new body and, more fundamentally, the absence of freedoms in Uruguay was an indication that the independence of the judiciary could not be guaranteed under the new system. The remaining officers of the judiciary were to be appointed by the Minister of Justice and remained under his control. The power to appoint and dismiss members of the judiciary (including judges) belonged under the constitution exclusively to the Supreme Court. Moreover, under Inst.Act No. 12, officials concerned with the administration of justice lost the right to security of employment, a provision which complemented the provisions of Inst.Act No. 7 covering other sectors of state employment.

In accordance with Inst.Act No. 8, all judges had a "provisional" status and were subject to a probationary period of four years, during which time they might be dismissed without any reason being given. Shortly after the Act was approved, a number of judges were dismissed who, in cases involving political offences (before 1972), had questioned the combined forces' procedures in relation to detainees.

Inst.Act No. 12 also covered administrative justice, at the head of which was the Administrative Tribunal, whose members thereby

have to be appointed by the Council of the Nation. According to article 23 of the Act, administrative courts are no longer empowered to examine the legality or regularity of an act of the administration if the act is described by the administration as being a "political act of the government based on reasons of national security or public interest". One or other of these terms is employed in cases of dismissal of civil servants, so that no legal action can be brought in such cases.

The Act prohibited judges, attorneys and senior officials, under pain of immediate dismissal, from "forming part or being members of associations of civil servants" (article 30). Not only did this infringe the right of association guaranteed by the constitution, but it contravened international obligations signed by Uruguay, such as the Conventions of the International Labour Organisation.

Concerning military justice, Inst.Act No. 12 reaffirmed what had already been established in Inst.Act No. 8 by the modification of article 253 of the constitution. The military courts are to have exclusive competence to judge all crimes of lèse-nation, which is how political offences have come to be referred to. The legislating body (today the Council of State) is to be free to establish which acts it would consider as "military offences", without the need to respect any of the limitations for which provision was made in the Uruguayan legal system. Military courts are responsible to the Minister of Defence and are not part of the judiciary.

January 1981. The government announced that it was continuing to envisage a law to regulate the operations of political parties with a view to bringing an end to the "recess". A number of military leaders consulted by the press announced that for the time being there would be no further lifting of banning orders on citizens whose political rights had been suspended by virtue of Inst.Act No. 4. They also announced that parties which had been banned (i.e. the whole left-wing) would not be rehabilitated and that it would still be forbidden for them to engage in any political activity in the future.

In June 1982, the Organic Law on Political Parties was adopted, officially called 'Fundamental Law No. 2'. This laid down the conditions under which these political parties were enabled to be re-formed, and provided a most unusual procedure for the election of the controlling leaders of these parties.

The three parties were the centre National Party (popularly known as the Blanco party), the liberal Colorado party, and the Union Civica, a relatively insignificant party made up of the more conservative elements of the banned Christian Democrat party. None of the parties of the opposition Broad Front were permitted to re-form.

Under article 10 of the law, parties formed by persons who had participated in associations previously considered illegal were not authorised. As the government had dissolved 14 parties under the prompt security measures, this had the effect that none of the opposition parties of the Broad Front were able to re-form and no parties could be created by members of the former socialist or communist parties or of the National Confederation of Trade Unions (CNT) or of the Federation of University Students (FEUV). Also prohibited was any political party which "by its ideology, principles or denomination or methods of action, has shown direct or indirect links with foreign political parties,

institutions, organisations or states" (article 10). This served to exclude additionally Christian Democrats, Social Democrats, and Radicals.

Elections were held on 28 November 1982. Members of the electorate who had not been deprived of their vote could vote for their preferred candidates as delegates to a national convention of one of the three authorised parties. These conventions are to elect the party governing body which in turn will nominate the party's candidates for the national parliamentary and presidential elections to be held at the end of 1984.

It should be recalled that these 'internal elections' were held at a time when the prompt security measures were still in force, as well as Inst.Act No. 4, which had deprived 8,000 citizens of their political rights. In addition, former participants in any of the 14 banned organisations were unable to vote, as well as refugees abroad, who included the leader of the Blanco National Party. Moreover, no election propaganda, oral or written, was allowed to mention anyone whose political rights had been suspended.

In these conditions, 46% of the votes went to the National Party, 40% to the Colorado Party, and 1% to the Civic Union Party. The remaining 13% of votes were blank ballot papers cast in protest by supporters of banned parties. 85% of all the votes cast for the three permitted parties were cast in favour of candidates who were opposed to the military government and sought a return to democratic rule.

Thus, as in the case of the referendum on the draft constitution, the electorate showed overwhelmingly its desire to return to democracy and its opposition to military rule.

IV. ABUSE OF STATES OF EMERGENCY

Prompt Security Measures

This institution has existed under the Uruguayan constitution for some decades. In recent years, however, new motives have been invoked for its application, until the point has been reached where it is wholly distorted. The limitations established by national law and practice, limitations aimed at protecting human rights against possible misuse of power, have been exceeded.

As originally conceived, the measures could be applied only in exceptional situations, which the constitution defines as grave and unforeseen cases of internal disorder, extreme internal agitation of a revolutionary nature, or natural disasters such as floods, hurricanes and earthquakes. Essential requirements were that the situation should be unforeseen and could not have been dealt with by the normal machinery provided by the law.

Prompt security measures had previously been decreed on a few occasions, generally on the grounds of internal disorder caused by major strikes, lock-outs, natural disasters (floods) and even serious economic events such as the bankruptcy of private banking institutions. As has been seen, in November 1967 President Pacheco Areco used prompt security measures to dissolve and outlaw six left-wing parties and

political groups (including the Socialist Party). This decree was set aside by the Parliament at the beginning of 1968. However, in June of that year prompt security measures were again decreed in order to freeze prices and wages in the face of galloping inflation and to establish a new body, COPRIN, whose authorisation was required for any changes in prices and wages. Since then 14 years have passed and the state of emergency has remained in force without interruption. The emergency which should have been exceptional and transitory has become a permanent system and the government uses prompt security measures to deal with countless real or alleged problems facing it.

The authorities seem to have started from the mistaken assumption that they had only to invoke a state of emergency and the entire constitution lapsed. The cases in which it is lawful to adopt prompt security measures, the scope of their application and the limits which the executive should not exceed have already been examined. Since the prompt security measures were adopted in November 1967, they have been applied in circumstances that were perfectly foreseeable and that could have been dealt with by the normal machinery provided by the law. There have been clear excesses with regard to the matters which can be dealt with by prompt security measures, and in relation to the limits within which the emergency powers can be exercised.

Over the years, hundreds of prompt security measures have been adopted to deal with a very wide range of matters. Currency values and exchange rates were fixed, foreign trade regulated, prices and wages frozen; banks were taken over which had been fraudently stripped of their assets by their owners, who fled the country; legislation on housing construction and laws regulating the level of rents of dwellings and commercial premises were set aside. Always on the grounds of a state of emergency, state enterprises were taken over by the government and their management replaced; education at all levels came under government control, thus destroying the autonomy vouchsafed it by the constitution. Both state enterprises and public schools and universities which under the constitution enjoyed a semi-autonomous status remained under executive control long after the disorder invoked by the government had been overcome, and finally their directors were removed without being granted the protection established by the constitution and the law. Again, by means of the prompt security measures, the legislation on police pensions and retirement was revised, so as to improve the services provided for ex-policemen. In addition, a professional medical care association was taken over and its legitimate authorities replaced. Persons who had been elected members of governing bodies of civic associations were prevented from assuming office, because the police services considered that they had "negative backgrounds". These included the Uruguayan Association of Notaries and a number of sports clubs.

In the face of a major strike by public employees, the government, still by means of prompt security measures, "militarised" these employees, which involved giving them military status so that they were liable to severe penalties if they did not obey orders; the penalties were applied by military courts and were designed to force the strikers back to work. This violated the right to strike recognised by article 57 of the constitution and Convention No. 105 of the ILO on the abolition of forced labour, ratified by Uruguay. An extreme case was that of the bank workers, who were sentenced by military courts for having gone on strike.

The prompt security measures were also used to close down newspapers and publications and to censor the communication media in general (there were more than 130 decrees ordering the temporary or definitive closure of newspapers, magazines and radio broadcasting stations); to order the dissolution of the national trade union confederation and individual trade unions; to outlaw them, take over their premises and confiscate their property; to prohibit the right to strike; to prohibit meetings, cultural events such as film shows or plays, sporting and social events, and the activities of societies of foreign communities (as in the case of the Lithuanian Centre).

Again by using prompt security measures, at the end of 1973 the dissolution and outlawing of 14 political and student organisations was decreed, opening the way for the persecution of their militants, and their possible conviction by the military courts. However, even before the decree outlawing the political activities of some groups was adopted, all political parties had already been placed "in recess" since June 1973, which signified the absolute prohibition of political activities.

A frequent practice was to decree prompt security measures of a "preventive nature" in order to avoid any possible future disturbance; in so doing the government broke free of all limitations and it could be said that any problem might possibly in the future lead to "disturbance".

It is with respect to security of the person that the most serious violations occurred. In the case of detention carried out under prompt security measures, the executive did not reply to requests for information from magistrates in connection with habeas corpus proceedings, on the grounds that the assessment of a person's "dangerousness", which justified his arrest and administrative detention, fell exclusively within the competence of the executive and therefore could not be controlled or reviewed by the judiciary. In addition, it prevented any control by civil magistrates over the treatment of detainees. While the declaration of a state of emergency is a political act which belongs exclusively to the political power, so that there can be no judicial control over the emergency itself (which is the task of Parliament), this does not mean that the judiciary loses its powers to supervise the life, health, physical integrity and conditions of detention of detainees. It could not be supposed for a moment that persons deprived of their freedom by order of the executive could be left to their fate without any control aimed at protecting their basic rights.

Under the decree establishing the "state of internal war" (April 1972) the magistrates of the judiciary lost all jurisdiction to hear cases affecting state security, such jurisdiction being transferred to military judges. This opened the way for systematic torture, ill-treatment and excesses against detainees. However, these aspects will be analysed below, as they are not solely a consequence of the application of prompt security measures.

In Uruguay, it is impossible to know whether someone is being detained because the government considers that if he were free he would represent a danger for national security - although he has not committed any offence - or whether he is being investigated for the commission of a specific offence. There is an unlawful shift to and from the régime of administrative detention and judicial detention.

Persons detained administratively under the prompt security measures are brought, months later, before a military court which tries them, finds them guilty of an offence and sentences them to a term of imprisonment; persons freed by the military courts because they could not be found guilty of any specific offence, or because they had served their full sentence, continued to be detained subsequently, but now by virtue of the prompt security measures.

While the authors of the constitution granted the executive exceptional powers to deal with exceptional situations, it must use them within the bounds of the laws which are in force. The constitution authorises the temporary detention of a person who has not committed an offence and therefore cannot be tried or convicted, but this extraordinary power cannot authorise the executive to convict persons or apply penalties without the intervention of the judiciary and without any legal defence. Consequently, the practice in Uruguay of detaining persons for months and even years under the prompt security measures is an unlawful abuse of the power. As for those who continue to be detained even after having served their full judicial sentence, they are being punished twice for the same offence. A judicial conviction is followed and compounded by a non-judicial one of indefinite length.

It will be recalled that the constitution only authorises administrative detention or the transfer of a person from one place in the territory to another provided that the person does not choose to leave the country. Since the prompt security measures have been in force, and particularly since April 1972, detainees have not been allowed to exercise their constitutional right (under article 168, para 17(2)) to leave the country in order not to remain in prison. This constitutional right, as administered by the executive, has been transformed into a concession which is granted or denied by the military authorities without any explanation or reasons. There have been cases in which persons thus detained have had to wait a number of years in prison before being able to exercise this right.

The abuse of the prompt security measures has gradually created a kind of parallel constitution and parallel legislation, which have pride of place over the properly established constitution and legislation, thus distorting the legal system. People have become accustomed to the emergency régime to the point that it has become the "normal" machinery of government.

To recapitulate, states of emergency do not authorise the executive to legislate by decree. They only authorise it to adopt specific administrative measures of a police nature. Nevertheless, decrees have been issued which function as decree-laws, a category which does not exist in Uruguayan law, and countless legal relationships have been woven which subsequently condition future legislation. Such decree-laws, which govern matters within the purview of "normal" legislation and have little or nothing to do with "internal disturbance" have continued in force after the circumstances which gave rise to the emergency have been overcome. This is a further violation of the constitution.

On other occasions, the executive has adopted extraordinary measures based not on the prompt security measures but on the provisions of article 168(1) which states :

"The President of the Republic, acting with the minister or

ministers concerned or with the Council of Ministers, shall have the following duties :

1. The preservation of internal order and tranquillity, and external security."

This provision in no way authorises the President to adopt extraordinary measures, nor does it widen the powers granted to him under the constitution and legislation; it merely establishes his competence in the sphere of order and security, a responsibility which must be exercised within the limits established by the legal system.

One of the factors which facilitated the abuse of power was the absence of effective parliamentary control over the relevance of the prompt security measures, their maintenace, or the way in which they were applied. The parliamentary majorities tolerated a gradual but steady concentration of power in the hands of the executive, perhaps in the belief that they would thereby avoid a coup d'état and military escalation. When they wished to react it was already too late. During the government of Pacheco Areco (1967-72) Parliament on three occasions decided to set aside an important number of prompt security measures relating to rights of individuals, closures of press organs, state supervision of educational bodies, termination of administrative detention, etc. In the first case (August 1969), after a long and heated debate the General Assembly decided to lift the measures in question; the President reinstated them two hours later, disregarding the decision of Parliament. On another occasion, the Standing Commission took a similar decision (Parliament was in annual recess). The President ignored the decision, denying the competence of the Standing Commission. Article 168, paragraph 17, clearly shows that such powers are vested in the Standing Commission.

The repeated threats to dissolve Parliament made by the armed forces also contributed to the Parliament's failure to exercise its function of political control. With the illegal dissolution of Parliament following the coup d'état of June 1973, even the theoretical possibility of control disappeared.

Abuse of the suspension of individual security

Uruguayan history contains few examples of the application of this emergency instrument. The two occasions on which it was used in the period under review were in August 1970, for a period of 40 days, when the Tupamaros kidnapped and then murdered Dan Mitrione, a United States police official; and on 15 April 1972, as a result of the disorder created by guerilla operations by the Tupamaros. On the latter occasion, the suspension was renewed successively until 31 May 1973, thus remaining in force for a year and 45 days.

As has been stated, the constitution requires the prior consent of the legislature in order to bring this procedure into force and sets precise limits on the powers which it confers. Thus, it may be applied only "in the extraordinary case of treason or conspiracy against the country" and its sole objective or purpose is, as the constitution states, "the apprehension of the offenders" who must be brought to justice. The constitution does not authorise the trial and conviction of these offenders by special courts, such as military tribunals.

In practice, as applied from April 1972, it involved the suspension of nearly all the rights relating to legal security and integrity of the person, and this despite the fact that the final decree prolonging the suspension of individual security (decree 231 of 31 March 1973) established that the suspension was adopted "for the sole purposes of the struggle against subversion ..." and that the only rights suspended would be those established by articles 15, 16, 17 and 29 of the constitution (detention in the absence of flagrante delicto; time limits for bringing a detainee before a magistrate; habeas corpus; free communication of thought). The earlier decree of April 1972 also authorised the suspension of the rights in articles 11, 38 and 39 (inviolability of the domicile; right of assembly; right of association). All other provisions guaranteeing human rights were not covered by the suspension. With regard, for example, to article 17, which provides for the remedy of habeas corpus, magistrates and jurists officially consulted by members of Parliament at the time replied that the suspension should be understood as follows : the authority apprehending a person was not obliged to bring the detainee before a magistrate within 24 hours, nor to justify to him the cause of the detention, but if an application for habeas corpus was made the (civil) magistrate should be allowed to see the detainee, and while he was not empowered to decide the question of his release, he could supervise and, if appropriate, remedy the material conditions in which the detainee was held and the treatment he received. Again, the Governing Council of the Faculty of Law stated in a declaration of 9 July 1972 that the suspension of individual security "did not in itself exclude the other guarantees subsequent to apprehension".

These limitations were never respected. The government granted the armed forces and the police a free hand and the combined forces carried out widespread searches of private homes, and detained thousands of persons; the detainees were held incommunicado for many weeks and even months; the validity of habeas corpus was denied, just as it had been under the prompt security measures and information was not even given concerning the places where a detainee was held. Lawyers were unable to see their clients for long periods of time, or exercise the right of defence, or question the unlawfulness of the detention, and received no information from the authorities responsible for the detention. When Parliament appointed a Commission of Inquiry in 1972, consisting of senators and deputies, to examine the conditions in which detainees were held, following many complaints by families of torture and ill-treatment, the military authorities did not allow the Commission to enter the barracks on grounds of "military secrecy".

In other words, the application of the suspension of individual security went far beyond what is allowed under domestic law. There was no parliamentary control over the way in which the repression was carried out, nor was there any control by the judiciary.

The State of Internal War - Martial Law

On 15 April 1972, in the face of the guerilla operations referred to above, the executive requested the General Legislative Assembly not only to give its consent to the suspension of individual security, but at the same time to approve the declaration of a "state of internal war". Having obtained that approval, the executive declared such a state by decree No. 277/72 :

> "... for the sole purpose of authorising the necessary measures to repress the action of individuals or groups engaged by whatever means in conspiracy against the country, in accordance with the provisions of article 253 of the constitution".

The state of internal war was prolonged on 30 June 1972 (by decree 463/72) and finally came to an end on 14 July 1972, with the entry into force of the Act on State Security and Internal Order (Law No. 14.068).

As was pointed out earlier, a state of internal war is unknown in the Uruguayan constitutional system. The government sought to justify it by invoking article 168 (16) of the constitution and the Military Criminal Code. Article 168, paragraph 16, includes among the executive's powers :

> "To decree the severance of relations and, in accordance with a prior resolution of the General Assembly, to declare war if arbitration or other peaceful means have been of no avail in averting it".

When this article is analysed in conjunction with article 85(7), which provides that it shall be the responsibility of the General Assembly "... to declare war", it is quite clear that article 168 refers only to international war, to conflicts with foreign states or powers. As for the Military Criminal Code, it is the sole text which refers to a situation of "internal" war and, indeed, in this and other aspects violates the constitution (the Code was adopted in 1943 during a temporary unconstitutional régime in the country). In case of conflict between the constitution and a law, the constitution must prevail, as is expressly provided in the constitution. The Military Criminal Code is an ordinary law.

In addition, the fact that the state of internal war was approved by the General Assembly does not make it lawful. The Assembly is subject to the law and can only do what the law authorises it to do. In no case does it have the authority to modify either the constitution or the law, nor to alter the powers of the other organs of the state, by a mere administrative act granting authorisation to the executive.

The main effects of the state of internal war were :

- to place the Combined Forces, i.e. the armed forces and the police, on a war footing; they carried out widespread repression aimed initially at the groups waging armed combat and subsequently against any form of opposition to their methods and objectives;

- to prevent any parliamentary or judicial control over detainees and over the acts of the Combined Forces. The Act on State Security and Internal Order later sought to validate this situation, with a provision in article 37 to the effect that even the judiciary cannot collect evidence or information when "this might involve revealing military secrets", either directly or indirectly. In this way, the military ensured that no-one but themselves could investigate the actions of the army or of the

police force, which was given military status by a prompt security measure. In order to cater for any eventuality, article 37 was given retroactive effect to 9 September 1971, the date on which the Combined Forces were entrusted with carrying out the 'war on subversion';

- during the three months when the state of internal war was in force, more than 100 persons died in combat, the victims coming mainly from the ranks of the opposition but with some from the Combined Forces. There were also reports of murders of detainees, officially explained as being due to attempted escape or acts of resistance. At least 90 per cent of political detainees were tortured and about 50 died under torture. Detainees were also subjected to various forms of cruel, inhuman and degrading treatment. They were not charged or brought to trial and were denied access to lawyers. Any complaints of violation of human rights on the part of families of detainees and others were "investigated" exclusively by military judges and no case has been reported in which any of those responsible were brought to justice;

- another effect of the state of internal war was to prevent the dissemination through the press and other communication media of any news or comment on the actions of the security forces and on persons who had been arrested, all of which was classified as a "military secret";

- finally, the unconstitutional imposition of a form of martial law throughout the country.

Unconstitutionality of martial law - According to Decree No. 277/72, the state of internal war was declared for the sole purpose of "repressing" the actions of individuals or groups engaged in conspiracy against the country, a repression which was to be carried out "under the provisions of article 253 of the Constitution". This article, which was claimed as the basis for martial law, states :

> "Military jurisdiction is confined to military offences and to the case of a state of war.
>
> Ordinary offences committed by military personnel in time of peace, wherever they may have been committed, shall be subject to ordinary justice" (article 253 of the Constitution).

As this article was interpreted prior to 1972 Uruguayan doctrine and jurisprudence, military jurisdiction was limited to two situations :

(a) military offences were understood to be those acts which, without violating ordinary criminal legislation, violated a specifically military duty, such as desertion or insubordination. If the act was already established as an offence by ordinary criminal legislation, it fell within the purview of ordinary justice, whether committed by a soldier or a civilian. Parliament could not transform an essentially ordinary offence into a military one simply by declaring that it was so. Ordinary civilians could not be perpetrators of a military offence, nor could they be tried by military justice. Military justice was applicable

only to the armed forces and to those civilians voluntarily accepting a military status, such as the sanitary personnel of a military unit;

(b) in case of a state of war. During a situtation of international (and not internal) war, the scope of military jurisdiction was extended to cover :

- military personnel committing an ordinary offence;
- offences committed by civilians in the area of military operations, when it was impossible for the ordinary authorities to carry out their functions there. This was the sole case in which military jurisdiction could extend to a civilian.

The Supreme Court of Justice on various occasions reached the conclusions given at (a) and (b) above, when having to deal with cases of persons detained in 1970 and 1971 who were responsible for attacking a military unit and stealing weapons. The military courts claimed jurisdiction - the accused were civilians - and the dispute was settled by the Supreme Court of Justice in favour of the ordinary courts, after finding the articles of the Military Criminal Code ascribing competence to itself to be unconstitutional. This interpretation was effectively circumvented in 1974, when the Supreme Court, whose ordinary members were joined by two military judges, upheld by a majority decision the constitutionality of the act on State Security and Internal Order, which gave jurisdiction to the military courts to try civilians for certain offences. Prior to that, however, the state of internal war was wrongly applied to justify the trial by military courts of all persons, civilian and military, suspected of having committed political offences, interpreted as "offences against state security" or "offences against the state". The government maintained that as a situation of war existed, civilians too were subject to military law. Regrettably, the judiciary passively accepted this situation, with the exception of a few judges who were later dismissed. When Parliament, on 10 July 1972, under heavy military pressure and threats of a coup d'état, gave its sanction to Law No. 14,068 on State Security and Internal Order, this seemed to consolidate the existing situation. The method used by the Act was to transform political offences covered by the ordinary criminal code into military offences and include them in the Military Criminal Code, regardless of whether they were committed by military personnel or civilians. A further series of criminal provisions contained in the Code were also applied to civilians, such as article 68, which contains 23 potential offences under the title "Attack upon the moral strength of the army, navy and air force".

Yet another irregularity was that although Law No. 14,068 was passed without retroactive effect, nevertheless all those detained for alleged political offences between 15 April (declaration of the state of war) and 10 July 1972 (date of the Act), numbering several hundreds, were tried and convicted by military courts.

Continuing along this path, and despite the criticisms of the operation of military justice and constitutional objections put forward by defence counsel and professors of law, the Council of State, on 29 December 1975, approved Law No. 14.493 on the trial and punishment of offences against the state. This Act widened the field of military justice, which was given retroactive competence to try political

offences committed before 15 April 1972, as well as covering all on-going trials before the ordinary criminal courts in which a final decision had not yet been given.

On 1 July 1977 Institutional Act No. 8 was adopted which dealt a final blow to the independence of the judiciary. Under that decree, article 253 of the constitution was illegally modified, enabling the ordinary legislative power - today the Council of State - to establish what acts could be considered "military offences" without having to abide by any of the limitations established by the constitution and by legal doctrine. On 10 November 1981, Institutional Act No. 12 was adopted which, although derogating from Inst.Act No. 8, includes many of the provisions the latter contained, including those relating to military jurisdiction (article 14 of Inst.Act No. 12).

On 25 March 1980, the government adopted Law No. 14,997, which completed the process of transfer of jurisdiction to the military courts in the case of political offences. The Act changes the system whereby some prisoners may be released before they have served their full sentence; it gives the Supreme Military Court the power, hitherto belonging to the Supreme Court of Justice, to grant "early release" and "provisional release". The purpose of this provision was to reserve for the military authorities alone the possibility of ordering the release of political prisoners when, and in the numbers, they deemed politically desirable.

The extended application of martial law throughout the country - to date there have been some 5,000 military trials of political opponents - was accompanied by a serious distortion of the system of justice. The functioning of the military courts revealed numerous irregularities affecting the right to a just and fair trial and the free exercise of defence in a criminal case. Military sentences are extremely severe, often amounting to 45 years of deprivation of liberty.

The (civilian) defence counsel who defend the accused in military courts carry out their task with great difficulty and risk; for long periods they are deprived of the right to communicate with their clients; the secrecy of their conversations is not respected; evidence they request is sometimes not provided; judges and prosecutors draw upon classified reports prepared by the security services to which the defence does not have access.

Furthermore, counsel have themselves been threatened, detained, tortured (professional secrecy is not respected in their interrogation), and forced to leave the country solely for seeking to carry out the obligations imposed on them by their profession. As they are "awkward witnesses" of the actions of the Combined Forces and of the military judges themselves, everthing is done to exclude them from such trials. It has been estimated that 80 per cent of prisoners were and are defended by military officers appointed as defence counsel by the Supreme Military Court. They are not required to be, and seldom are, lawyers.

Some essential requirements are missing from military justice : independence, impartiality and professional training. It lacks independence because it is not part of the judicial power but rather part of the executive, through the Ministry of Defence, and has a structure similar to that of the military, with a rigid hierarchy and subordination to authority. It lacks impartiality, as the officers serving as judges

are directly involved in arresting, and very often in interrogating, those they subsequently judge. Such officers are given judicial powers as a temporary assignment; one day they may be in charge of a court and the next in charge of a military unit, or vice versa. It lacks professional training in that judges, prosecutors and defence counsel do not have to be lawyers or have any knowledge of the law. The only qualification required is that they be military officers, and military officers are trained for war and not to dispense justice. Finally, military codes are first and foremost instruments of internal discipline, and cannot function properly when applied outside the context for which they were created.

The effect of martial law is that the judiciary has been deprived of the powers granted to it by the constitution, and the principle of separation of powers on which the constitution is based has been overthrown. In addition to its administrative responsibilities, the executive has acquired the powers of legislating, of judging and executing its judgments.

V. CONCLUSIONS

As will be clear from what has been stated so far, there has been a close correlation between the application of states of emergency and the violation of human rights in Uruguay. Even though there were serious disturbances in the country - during 1968-1973 - the only legitimate way of coming to terms with this situation without placing the democratic system at risk, would have been to act within the legal framework established under domestic law (prompt security measures and suspension of individual security) and within the limits imposed by the constitution and national legislation. Once the government departed from the terms of the constitution and failed to respect the established limitations, a situation arose which had a negative impact on human rights.

The whole gamut of human rights, civil, political, economic, social and cultural, were ignored to the point of being totally denied. No doubt, however, the most serious and lasting factors, which have grave implications for the future or Uruguay, were the destruction of the rule of law and of the system of representative democracy as guaranteed by its legal framework and by a very long-standing tradition.

Of course, not all of this may be attributed to the state of emergency, but it is clear that it permitted a gradual side-stepping of fundamental rights and freedoms, to the point where the present situation came about. Gradually, the machinery established under national law for the protection of human rights ceased to be applied because of an emergency situation. At the same time, the process was established whereby the military little by little moved closer to the seat of power, and finally seized power illegally and achieved its objective of creating a new type of society and government. The states of emergency placed more and more powers and functions in their hands, to the extent where there was little resistance when the coup finally took place in 1973. From that point onwards, attempts were made to institutionalise the new régime, and this process gained momentum when, in the second coup in 1976, the armed forces overthrew President Bordaberry and appointed a new president without consulting the people. By the illegal adoption of 12 Institutional Acts, they changed completely

the constitution and form of government. The referendum of 30 November 1980, in which the people rejected the new draft constitution prepared by the armed forces and thus refused to legitimise the régime, constituted, however, a major set-back to the military's plans for institutionalisation.

The military chiefs continue to hold power, as they monopolise the main functions of the state and control the political scene in alliance with a small group of civilians who hold economic power. This state of affairs has been characterised by abuses and arbitrary action.

Human rights have ceased to be protected. In particular :

- there are serious limitations on the rights of freedom of assembly, association and expression. There is strict censorship of the media and criticism or opposition to the military leadership is subject to civil and penal sanctions;

- major trade union rights are still prohibited, including the right to strike, and a considerable proportion of the population is unable to exercise political rights as it is not allowed to participate in decision-making on matters of public interest either directly, or through freely elected representatives. It is also forbidden access to public office;

- the educational system is used to serve the régime's ideology; teachers and lecturers are still persecuted. In broader terms, the fields of arts, letters and scientific research have also been subjected to strict censorship and controls, which have led many of those engaged to flee the country;

- there has been a regression of economic and social rights; the purchasing power of wages has dropped by 50% over the past 10 years, as wages have been unable to keep pace with the constantly rising cost of living;

- there is no juridical security and people are subject to imprisonment without any charge being laid against them. Arrests are made without warrant and detainees are held 'incommunicado' for extended periods - often months - in places which are kept secret. In the case of detentions under the prompt security measures, there is no recourse to habeas corpus proceedings, nor is the detainee entitled to the services of a lawyer;

- when a person has served his term of imprisonment, however long, neither civilian or military justice may be invoked to obtain his release; in political cases, imprisonment is usually continued in the form of administrative detention under the emergency security measures;

- trials held before military courts do not respect the right to due process of law, and, after trial by procedures which fail to guarantee defence rights, suspects are usually sentenced to long prison terms;

- there is no effective protection against torture. It is a systematically applied tool of the régime. It is put to various uses with total impunity : to obtain information, confessions or accusations of third parties; to punish or destroy any spirit of protest or rebelliousness; to terrorise victims, their relatives, friends and the population at large. Despite the fact that this is a serious and widespread situation, none of the denunciations before military courts, which alone are authorised to handle such complaints, has led to the punishment of those responsible, nor to any revision of verdicts or sentences based on confessions extracted by torture;

- cruel, inhuman and degrading treatment is often part and parcel of living conditions in military prisons for both men and women. Since protection may be sought only from military judges in political cases, prisoners have no effective recourse for putting an end to such abuses;

- administrative courts (Court of Administrative Disputes) are no longer authorised to examine the legality or regularity of any measure adopted by the administration if this is described as "a political or governmental act, based on reasons of national security or public interest". Thus, for example, there is no legal recourse for a civil servant who is dismissed if the administration invokes article 23 of Inst.Act No. 12, even though the dismissal may have been the result of political persecution or effected in breach of the law;

- the separation of powers, so carefully regulated in the constitution as from 1830, has been abolished. The armed forces have assumed control of the executive. The executive has added to its specific powers of administration the power to legislate, and military courts have usurped the jurisdiction of the ordinary civilian courts of justice.

In the final analysis, an individual who is adversely affected by any act of the authorities is without protection in the face of an all-powerful government. If an injustice or an illegal act is committed by the security forces and is classified as bearing in any way on state security, there is no remedy available in Uruguay.

International and national law recognises that governments have the right and even the duty to defend state security for the benefit of their people. They therefore authorise governments to introduce states of emergency, suspending certain individual and collective rights for a limited period for the sole purpose of coping with the emergency. In order for a state of emergency to be accepted under international law, a series of requirements has to be fulfilled and given limitations respected. These are almost identical in various international legal instruments, such as the International Covenant on Civil and Political Rights (1966), the American Convention on Human Rights (1969) and the European Convention on the Safeguard of Human Rights and Fundamental Freedoms of 1950, known as the European Convention on Human Rights. These requirements and limitations are, inter alia, the existence of

exceptional circumstances which endanger the survival of the nation and official proclamation of the emergency. The government may then assume increased powers and suspend certain rights and guarantees for a short period, strictly to the extent of the exigencies of the situation. Other provisions are laid down to avoid the emergency becoming a permanent situation, to avoid citizens having to live with a restriction of their rights, and to prevent the use of the exceptional powers given to the government to alter the legal system in force and indeed the very nature of society. There are various national and international stipulations for controlling the use of these exceptional powers. Finally, certain essential rights are regulated and may not be suspended or breached under any circumstances whatever, even during states of emergency (e.g. the right to life, to be free from torture, etc.).

From the standpoint of international law, the International Covenant on Civil and Political Rights came into force for Uruguay on 23 March 1976, when the state of emergency had already been in effect for several years. However, the first notification by the government, under article 4 of the Covenant, that a state of emergency had been imposed and that certain rights and guarantees recognised by the Covenant had been suspended, was contained in its note verbale of 28 June 1979 to the Secretary-General of the United Nations for communication to the other states party to the said treaty. In addition to being overdue, this notification did not fulfil the provisions of article 4(3) as it did not specify the rights and guarantees which had been suspended, nor did it put forward any reasons to justify such measures. The note verbale simply stated that such reasons were "undisputably well known to all". On 29 January 1982, the Uruguayan authorities in their first report to the Human Rights Committee under article 40 of the Covenant (which should have been submitted in 1977) stated that in the face of terrorist aggression, the government adopted exceptional measures and restricted certain rights and guarantees. They did not specify concretely the rights which had been suspended nor the scope of this suspension, and referred merely to restrictions on political rights and the rights of assembly and association. With respect to the habeas corpus procedure for ending unlawful imprisonment, the government in the above-mentioned report stated that it was not applicable to detentions under the emergency security measures, as in such cases the imprisonment fell under the application of a constitutional régime and "is therefore legal under law" (page 15, Spanish text, U.N. document CCPR/C/Add.57). This interpretation in effect deprives detainees of any legal recourse against arbitrary or illegal arrest, if made by the executive invoking the state of emergency and if the arrest and consequent detention are carried out without intervention on the part of the courts of justice.

The Human Rights Committee, which operates by virtue of the Covenant, in giving its definitive opinions on a series of separate communications relating to Uruguay that had been submitted in the framework of the Optional Protocol to the Covenant, dismissed the state's claim to invoke the right of suspension referred to in article 4. The Committee considered that "the government /of Uruguay/ has not invoked any fact or cited any law which justifies such suspension" (Cases R.2/8, R.1/4, R.1/6, R.2/11, R.8/33, R.7/32, R.7/28). In the opinion of the Committee, the suspension of rights invoked by Uruguay was unacceptable, as compliance with the Covenant required more than mere fulfilment of the formal requirement of notifying other states parties officially, and certain substantive provisions had also to be fulfilled.

In the case in question, Uruguay had not indicated the nature or scope of the measures of suspension, nor "had it demonstrated that these measures were strictly necessary" (Case R.8/34).

In many individual cases, the Human Rights Committee ruled that the Uruguayan authorities had violated rights recognised under the Covenant which may not be suspended or breached under any circumstances, even in a state of emergency (e.g. torture, ill-treatment of detainees).

Uruguay overlooked the requirements for declaring and maintaining a state of emergency and blatantly ignored the limitations laid down by international law and the Uruguayan constitution for the protection of human rights. In proceeding as it did and allowing for sole executive exercise of exceptional powers, without any legislative or judicial control, it could and did lead to the destruction of the rule of law, with the inevitable consequence of denial of human rights and the establishment of a dictatorship.

The case of Uruguay is one of many examples showing the risks entailed in the disproportionate use and abuse of states of emergency.

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STATE OF EMERGENCY IN ZAIRE

(1960 - 1980)

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STATE OF EMERGENCY IN ZAIRE

1960 - 1980

I. INTRODUCTION

When Belgium decided in 1960 under the pressure of events to cede independence to the Congo (as Zaire was then called), the Belgian Parliament passed a Basic Law (loi fondamentale) which was promulgated by the King on 19 May 1960. This provided the framework for the independence of the new Republic of the Congo, proclaimed on 30 June 1960.

The recent history of Zaire may be divided into two main periods: that of the First Republic and that of the Second Republic; the former stretches from 30 June 1960 to 25 November 1965, and the latter from 25 November 1965 to date. Although this division is fundamentally a political one, we shall see that it is also quite relevant to the evolution of the notion of a state of emergency.

The first period was marked by a series of crises of the central government in the capital Leopoldville (now Kinshasa). Only days after the proclamation of independence the armed forces mutinied against their Belgian officers and a week later the province of Katanga in the Cooper Belt proclaimed its Secession under the leadership of Tshombe. The most far-reaching of the conflicts was that between the elected President of the Republic, Mr. Kasavubu, and the Prime Minister, Mr. Lumumba, who had won a resounding victory in the elections held shortly before independence. This conflict led to a military coup by the then Colonel Mobutu, which in turn led to the removal of the Prime Minister and his subsequent arrest and murder. The nomination of Mr. Joseph Ileo as Prime Minister and the creation of a nominated College of General Commissioners to replace the Parliament then took place under an emergency regime for which there was no foundation in the Basic Law.

Other attempts to establish a stable government met with failure. The last of the crises was a conflict between President Kasavubu and Tshombe. Kasavubu had nominated as Prime Minister Evariste Kimba who did not receive the approval of Parliament. This period saw the introduction of the new (and first) Constitution of the Republic. Intended as an act of conciliation and compromise, it entered into force in August 1964. Only three months later the regime collapsed under the seizure of power by the army, and it was replaced in June 1967 by the Constitution of the second republic.

Against this turbulent political background, an examination can be made of the various ways in which use was made of states of emergency.

II. THE FIRST REPUBLIC, 1960 - 1965

The Basic Law bequeathed by Belgium had two essential features - a classical parliamentary system, and a modified federalism.

The bicameral parliament followed closely the Belgian model, with an independent judicial power as the guardian of the constitution

and legality. The large and culturally diverse territory was divided into provinces (not federated states) on which were conferred powers of local self-government. Although the structures and powers attributed to the provinces were similar to those in an ordinary federal state, they were modified by a series of restrictions.

The Basic Law and various laws inherited from the colonial period conferred on the government the power to establish what was then called a state of exception (état d'exception) and a military regime (régime militaire).

On the one hand, the Loi fondamentale provided in its Article 187 that "... the Head of State may, for serious reasons of public security and upon the advice of the attorney-general, suspend, in a region and for a period which he determines, the repressive action of the courts and substitute for it that of military courts. The right of appeal cannot be suppressed". The same article also provided for a limited and conditional delegation of the same powers to the State Commissioner representing the central government in each province (1). On the other hand, a text of the colonial period dated 22 December 1888, could be considered as being still in force under Article 2 of the Loi fondamentale which provided that "the statutes, decrees and legislative ordinances, their measures of enforcement as well as all subsidiary legislation existing on 30 June 1960 remain in force as long as they have not been expressly abrogated" (2). The 1888 text, as amended in 1917 by a decree dated 8 November, was especially relevant as it organized the special military regime in regions where the authority had decided to substitute military courts to ordinary courts (3). It provides that in such regions military and civilians alike are subjected to military courts (Article 26). Yet the latter, unless decided otherwise, are competent only for serious offences, petty offences remaining within the jurisdiction of the ordinary courts (Article 28). There was no right of appeal from the judgments of the military courts when the parties were either members of the armed forces or natives of Congo or a neighbouring country. Sentences can be executed immediately (Article 29). This provision was in conflict with Article 187 of the Basic Law which expressly maintained the right of appeal (4). Finally, Articles 31, 32 and 33 of the decree provide for an aggravation of penalties for a variety of serious offences among which were:

- murder committed in the context of an insurrectional conduct;
- armed robbery;
- offences against public security;
- various offences dealing with military discipline.

In most cases, the punishment can be death (5).

On 9 August 1960, in view of the serious power crisis which had spread all over Congo, President Kasavubu decided to make use of his powers under Article 187 of the Loi fondamentale and established a military regime applicable throughout the whole country for a period of six months as from 16 August (6). This decision was accompanied by various measures restricting the freedom of the press and the freedoms of association and assembly (7). Practically speaking, the basic

decision meant that the décret of 1888 as amended in 1917 was applicable and that, all over the country, Congolese citizens and foreigners alike fell under the jurisdiction of military courts for all serious criminal matters. Simultaneously, many serious offences were punishable with either life imprisonment or death. No justification was given for this decision other than "the superior interest of the nation".

The arrêté concerning the freedom of the press entrusted the Minister of the Interior with the power to forbid the entry into the Republic of any newspaper or periodical and subjected the issue of all local publications to the preliminary approval of the Minister. It also forbade the introduction into the country, or the sale, distribution or exhibition of any printed material which was likely to effect adversely the normal respect due to the authority. The arrêté dealing with the freedom of association made the constitution of any association subject to an authorization of the Minister of the Interior. Furthermore, all associations were put under the constant watch (surveillance constante) of the Minister or his delegates who could attend meetings and consult all documents of the association or its directing bodies. Open air meetings of all kinds also had to be authorized by the Minister of the Interior.

Both arrêtés were based on a colonial text, the decree of 6 August 1922, which enabled the colonial executive authority, i.e. the Governor general, to take all police measures which he thought to be useful (8). It was assumed that the authority thus conferred upon the Governor had devolved upon the Prime Minister and Patrice Lumumba signed the two arrêtés. These measures were approved by some and criticized by others. It is difficult to assess their effectiveness. On 20 August 1960, the chief local newspaper in Kinshasa, Le Courrier d'Afrique, was suspended from publication and its Chief-Editor, G. Makoso, put in jail. Another journalist, Mr. Maningwendo, was also arrested. News agencies had either their offices closed or a serious warning addressed to their managers.

Yet it seems that the political crisis which less than three weeks later blew up between the Head of State and the Prime Minister, P. Lumumba, somewhat pushed into the background the possible problems resulting from the régime militaire. There is no mention of it in the various declarations which followed the military coup of 14 September 1960 and the establishment of the Collège des Commissaires généraux on 19 September. Thus it seems that the régime militaire came to its natural end six months after it had been set up by President Kasavubu, i.e. on 15 February 1961. But this does not mean that the situation was normal in the Republic.

The military coup of 14 September 1960 had resulted in a completely extra-constitutional order. Both the legislature and the government as organized by the Basic Law had disappeared, being suspended in principle until 31 December 1960 (9). The military intervention was justified by the constitutional impasse resulting from the dismissal by President Kasavubu of Prime Minister Lumumba and the appointment of another Prime Minister, J. Ileo. As the Army communiqué states: "In order to get the country out of a deadlock, the Congolese Army has decided to neutralize the Head of State, the two rival governments and the two legislative houses until 31 December 1960". On

29 September, President Kasavubu formalized the situation under a constitutional décret-loi which adjourned Parliament "until the accomplishment of the mission of the Council of the Commissaires généraux" (10) and conferred upon the latter the legislative power normally entrusted to the former. This decision was obviously unconstitutional; the décret-loi did not exist as a legitimate source of law and the Basic Law could not be amended in that way. The décret-loi merely provided an apparently legal façade for a factual situation which fortunately enough did not lead to abuses and was on the whole welcomed by all interested parties other than P. Lumumba, his party and his supporters. Yet the Commissaire général in charge of Justice, M. Lihau issued a statement in which he tried to justify the legality of the Collège under the theory of effectivity (11).

On 9 February 1961, part of the constitutional legality was re-established when a ministerial Cabinet, headed by J. Ileo, was appointed by President Kasavubu who simultaneously brought to an end the mission of the Collège des Commissaires généraux (12). The government was meant to be a provisional one until Parliament could reconvene and until then it would exercise both legislative and executive powers as the Collège did. The appointment of the Cabinet took place a few days before P. Lumumba was killed with two of his followers in Katanga; the troubles which followed all over the country led the government to ask the President for exceptional measures. They were taken under a décret-loi dated 25 February 1961 (13). This permitted searches under the sole authority of the Minister of the Interior or his delegate, and administrative detention either in a prison or at home upon a decision of the same Minister. A three-man Commission (one judge, one prosecutor and one security civil servant) was appointed to advise the Prime Minister on the suitability of the detention decision. This measure was justified by the "troubled times" and by reference to similar measures established by the Belgians during World War II against persons suspected of sympathy for the Germans and their partners (14). In fact, the décret-loi was intended much more as a means of avoiding arbitrary detentions than as a tool enabling them; this is clear from many statements made at the time (15). Anarchy had spread all over the country, to the extent that no citizen felt secure from arbitrary detention and the décret-loi was an attempt to regulate a situation of which the government had practically lost all control.

Some months later, another décret-loi, dated 7 July 1961, was passed in order to revitalize a colonial decree of 20 October 1959 (16). This provided for an état d'exception and was clearly adopted with possible troubles in the pre-independence period in mind. Its main features were:

- the substitution of military authorities for civil authorities in any region affected by the état d'exception;
- the power to search without warrant by day or night;
- the power to order administrative detention;
- the full control of associations, publications, meetings and circulation;
- an extension of the jurisdiction of the courts which normally tried only petty offences; and
- the power to sentence to a maximum of 3 years' imprisonment anyone opposing measures taken under the état d'exception.

With this décret-loi the government was adding another colonial text to its arsenal of measures allowing swift and efficient intervention in places where trouble could arise. One must not forget that the central government was still confronted with serious problems, especially with the secessionist provinces of Katanga and South Kasaï, as well as in Kivu where anarchy was rampant during the whole year. However, it does not appear that Prime Minister Adoula made much use of these powers.

The most important feature of 1961 was the re-establishment of a full constitutional framework when Parliament met at the University of Lovanium on 22 and 23 July (17). As a result of this meeting the provisional government of J. Ileo ceased to exist and was soon replaced by that of C. Adoula. Full legality under the Basic Law was re-established for the first time since September 1960. Yet states of emergency were still needed.

Late 1962, in September and October, a number of armed robberies - some with heavy casualties - plagued Kinshasa and this led the government to revive another text of the colonial period, the ordonnance-loi dated 16 December 1959 (18). The latter was meant to repeal and recast those parts of the 1888 decree on the régime militaire as amended in 1917 (19). But, as it was an ordonnance-loi, it had, under colonial principles, to be confirmed by a decree within six months; if not, it lapsed and this is what occurred on 15 June 1959, no decree of confirmation having been issued. This allowed the text of 1888, as amended in 1917, to remain in force, but it is obvious that the Congolese authorities preferred to refer to more recent texts. Accordingly, to deal with the robberies in the capital, they brought back to life (one may doubt if they had the power to do so) the text of 1959 establishing a military jurisdiction when a state of emergency was declared. This was implicitly done by an ordonnance of President Kasavubu establishing a régime militaire and an état d'exception in Léopoldville (20). The ordonnance does not say that the 1959 text is again in force, but it refers to it as a justification for the adoption of the ordinance. Strictly speaking, this was without any legal force as the 1959 text had lapsed before independence. However, no-one objected as to the validity of the ordonnance. The régime militaire and the état d'exception were subjected to heavy criticism from parliamentarians but to no avail (21). The military courts were quite active and sentenced a few robbers to death; some of them escaped hanging when the Court of Appeal quashed the sentence of the military tribunal because it had applied the régime militaire provisions retroactively to facts which had been committed before the régime had been established (22). The état d'exception, under the decree of 20 October 1959, was lifted on 30 November 1962, i.e. less than three weeks after it was established (23); the régime militaire lasted for the full six months for which it was intended, i.e. until 11 May 1963.

The establishment of an état d'exception in Léopoldville was not the only example of the use of this device by the government during that year. It was also used to bring under greater central control some of the new provinces which had been created in the country. A law of 9 March 1962 amended the Basic Law by providing (Article 7) that there were to be only six provinces (24). The creation of the new provincial administrations had not proved easy and, accordingly, an état d'exception was imposed in three of the former provinces (Kivu, Orientale and Equateur) (25).

These were not the only exceptional measures taken during the year 1962 and 1963 as a result of the troublesome conditions in which new provinces were created. On 19 March 1963, the état d'exception established in 1962 was abolished in the former Province Orientale, only to be reinstated at the same date in the new Province of Haut-Congo; this lasted until 8 September of the same year. The same measure was adopted in the new provinces of the Cuvette Centrale on 12 April 1963, of Maniema on 16 September, of Moyen-Congon for the district of Bumba on 6 November, of Sankuru on 8 July and of Kivu for the districts of Goma and Rutshuru on 6 November (26).

At the same time that Congo was facing various troubles at a local level, President Kasavubu lost patience at the passivity of Parliament in the drafting of a new Constitution. On 29 September 1963, he decided to dismiss Parliament until a new Constitution had been adopted, to establish (in violation of the Basic Law) a special commission for the drafting of the new Constitution and finally to rule through ordonnances-lois until the latter had been approved. This deprived the country of parliamentary representation for some two years (27). Simultaneously, in view of possible troubles and in order to have all the necessary authority during that period, the government decided:

- to establish for six months a régime militaire spécial and an état d'exception in Léopoldville;
- to expel from the capital anyone without regular papers;
- to forbid all activities of the four main opposition parties;
- to forbid night navigation on the river Congo around Léopoldville;
- to suspend publication of the newspapers "Présence Congolaise" and "Dipanda", as well as the distribution of the Belgian periodical, "Pourquoi Pas";
- to add new offences to the Penal Code; and
- to arrest various personalities (trade union leaders, journalists, etc...) (28).

The justification for these measures was the general political and social agitation in Léopoldville at the time which constituted a direct menace to the existing institutions. This was, indeed, the time when the opposition parties were gaining strength and had created in Brazzaville the Conseil national de Libération, while trade unions were launching general strikes followed by ten thousands of people in the capital.

Thus the year 1963 ended with central and provincial institutions alike being put under states of exception.

The year 1964 began under the worst conditions as the Mulele rebellion broke out in Kwilu during January. Accordingly and quite logically, an état d'exception was established in Kwilu (29). This first measure was not sufficient to deal with the rebellion and, accordingly, a law was adopted permitting the establishment of special military courts in regions where an état d'exception had been declared. Ordonnance-loi no. 49, dated 29 February 1964, enabled a special court martial to sit in place of the ordinary military courts under the

régime militaire, with the difference that sentences were immediately executed without any appeal or review (30). This increased the powers of the régime militaire which, as we have seen, was not entitled to suppress the right of appeal which was protected by Article 187 of the Basic Law. Obviously, the ordonnance-loi of 1964 was unconstitutional as it deprived the citizens of a constitutional protection. It is true that the Congolese government was then confronted with its most serious crisis since independence as its army was fleeing in front of the rebels; yet one may question the constitutionality of its decision. The new law was immediately applied to the Kwilu region by an ordonnance dated 2 March 1964 (31). No information is available as to the number of persons who were sentenced by the military courts.

In the meantime, the Constitutional Conference assembled in Luluabourg concluded its activities and the first Constitution of the Congo Republic came into force on 1 August 1964 (32). By then, rebels were active all over the country and this justified a new set of exceptional measures.

These were of two sorts. One the one hand, under the new Constitution, Article 97 gave the President the power to establish an état d'urgence and, if such was the case, to substitute, under Article 124, military courts for ordinary jurisdictions.

This exceptional power of the President was subjected to parliamentary control. Under Article 97, the President had to summon parliament if it was not in session when the état d'urgence was declared. In fact nothing of the sort took place in 1964 as parliament was on leave and was not summoned until late in 1965. Thus parliamentary control over the exceptional measures was never allowed to take place. The same is true of the control entrusted by Article 97 to the Constitutional Court which did not exist at the time. Etats d'urgence were decided upon on 14 October in the provinces of Kwango, Kwilu, North Katanga, i.e. those where rebels were the most active and constituted the greatest threat (33). At dawn on 24 November, Belgian paratroops landed in Stanleyville opening the way for the Congolese army and mercenaries who liberated the city during the day. On the same day, President Kasavubu issued a decree under his power to legislate while Parliament was suspended. Its purpose was to substitute military courts for the ordinary courts and to allow "a rapid and exemplary repressive action against all these who have committed criminal actions whether they belong to the rebellion or have taken advantage of the disorder created by the rebels in order to commit offences" (34). The decree was similar to previous texts in that it increased various penalties for serious offences and denied the right of appeal to anyone sentenced by the military courts. This was again in direct violation of Article 124 of the 1964 Constitution, which expressly provided that where military courts are substituted for ordinary courts and tribunals, rights of defence and of appeal cannot be suppressed (35). Another decree, dated 28 November, gave the Minister of the Interior the power to dissolve all associations, groups and political parties which did not "respect the principles of national sovereignty, democracy and the laws of the Republic" (36). Oddly enough, the region of Stanleyville did not come under these measures. There, repression was simply continuing and scores of "rebels" were executed in public once their collusion with the rebellion had been summarily established (37).

The fight against the rebels was carried on during the year 1965 and this justified the establishment of other états d'urgence in various provinces like Haut-Congo, Kibali-Ituri, Uélé, Cuvette Centrale and Maniema (38). In these, as in others under the Constitution of 1964, committees were established to supervise the application of the état d'urgence by the armed forces. They were created by a decree dated 14 October 1964, which was issued under Article 101 of the Constitution (39). In the same year, on 25 November 1965, the Army seized power in its second coup since independence, ending the First Republic. In summarising the period 1960 - 1965, it may be said that:

- the legal measures providing for states of exception were clearly a heritage from the colonial period;
- they certainly were needed in view of the successive crises which the young Republic had to meet;
- the seriousness of these crises, combined with their accompanying violence (e.g. in November 1964 in Stanleyville), led to an over-vigorous reaction by the armed forces and of the military courts entrusted with the repression;
- wherever special measures were taken they seem to have been due to the existing situation in the regions concerned rather than to a wish to eliminate political opponents under the guise of emergency measures. Nevertheless, it is also clear that the executive frequently dissolved the Parliament quite illegally and, as a result, removed a constitutional check on its activities;
- in many cases (for example, in the capital in 1962), exceptional penalties were applied ex post facto to offences committed before the emergency had been declared. This was the result partly of a desire to retaliate against either criminals or rebels who were considered "obviously" guilty, and partly of a lack of perception of legal principles such as non-retroactivity of criminal laws; and
- finally, many of the measures adopted were clearly unconstitutional. This unconstitutionality was rather a sign of the times than an exception during these eventful five years.

III. THE SECOND REPUBLIC, 1965 - 1980

On 24 November 1965 a 'régime d'exception' was established by the Army High Command which seized power in the night (40). It is, however, not very clear what was meant exactly by these words, which were unknown to the 1964 Constitution which, as we have seen, spoke only of an état d'urgence. Simultaneously, General Mobutu was to exercise all the powers of the President of the Republic (41). He does not seem to have made any use of his powers to declare an état d'urgence in 1965 but used them extensively during the fight against the rebels in 1966. On the other hand, in March 1966 he brought to an end an état d'urgence which had been declared prior to the military coup in a region of Sud-Kasaï (42). The same was done in 1966 and 1968 for the états d'urgence which existed in Cuvette Centrale, Haut-Congo, Kibali-Ituri, Maniema and Uélé (43). But serious problems had not yet been encountered.

The first was that of the so-called Whitsun Plot (44). It involved members of the armed forces (who were however left in the background, their identities not being disclosed) and four prominent politicians, all of them former ministers, J. Anany, E. Bamba, E. Kimba and A. Mahamba. The day after the conspiracy (if conspiracy there ever was) was discovered, an ordonnance-loi (45) made by General Mobutu under his special powers, established an exceptional military court. It was composed of three high-ranking officers appointed by him, defined its own procedure and there was no right of appeal or review of its decisions. The trial took place on 31 May, lasted an hour and a half, and after five minutes of deliberation the sentence was pronounced: death for all four accused. It was carried out on the morning of 2 June. It is obvious that the military court was "exceptional" in many respects: it was established after the facts, its procedure was quite summary, the accused were not defended by a lawyer, the President often interrupted the accused, stating that the court was there to work fast and efficiently and not to listen to speeches, and finally there was no recourse against its decisions. The trial was conducted in the open with a huge agitated and shouting crowd encircling the tribunal. Finally, the lack of appeal was in direct violation of Article 124 of the 1964 Constitution which was still in force. This was the only occasion when the military regime adopted emergency procedures before the adoption of the 1967 Constitution (46). Yet the same court, before it was disbanded, sentenced on 18 June a former Minister, C. Kamitatu, to five years' imprisonment as an accomplice in the Whitsun Plot. Unlike the other accused, Kamitatu was tried in secret, the press and the public being excluded from the courtroom. He was also deprived of counsel and of course had no right of appeal.

The fact that the President did not take advantage of his powers concerning a possible state of emergency does not mean that the situation was normal. As we have seen, the Second Republic was, for a considerable time, characterized by a totally new concept: that of the régime d'exception. Under the latter, President Mobutu:

- conferred on himself of 30 November 1965, the power to decide by ordonnances-lois all matters which were normally voted by Parliament (47);
- received on 7 March 1966 the full power of legislating in all matters (48);
- restored the legislative power of Parliament on 21 October 1966 (49), but did not lose his own powers to legislate if need arose; and
- dismissed Parliament in June 1967, after the new Constitution had been adopted, and did not reconvene it until late 1970 (50).

Thus, during the first five years of the new regime, Parliament was as absent from the legislative scene as it had been during the First Republic. Moreover, systematic attacks were made against an institution of which the members were considered as "dead-weights" by the Head of State.

Article 54 of the 1967 Constitution provided for a state of emergency (état d'urgence) which can be established by the President of the Republic after having consulted the Bureau of the National

Assembly; it cannot last for more than six months. Under it, the President is free to take all measures justified by the circumstances, including, under Article 58, the substitution of military courts for ordinary courts. Yet, under the same article, he cannot alter the rights of defence and appeal. Since no elections were held in Congo before the end of 1970, the President was free to act at his will for some three years. In the 1975 revision of the Constitution (51) the President had the same powers, but under it he was not required to consult the Bureau of Parliament and was completely free to declare an état d'urgence (Article 42) and to establish military courts where he thought it necessary (Article 21). The 1978 revision of the Constitution (52) has somewhat modified these provisions. On the one hand, Article 48 requires that the President consults the Bureau politique of the Mouvement populaire de la Révolution before establishing the état d'urgence. On the other hand, Article 49 states that, under the état d'urgence, the President may:

- take all measures justified by the circumstances and among others:
  - restrict the use of individual liberties;
  - substitute military courts for ordinary courts.

Yet, as in all previous texts, he cannot alter or suspend the rights of defence and appeal.

From 1966 onwards, if one peruses the Official Gazette of Congo and, later, of Zaire, one finds no reference to the establishment of an état d'urgence or to a substitution of military courts for ordinary courts. Even when events were at their worst for the Republic, as during the Shaba wars, no état d'urgence was ever formally declared in the region. However, one finds scattered and indirect references to an état d'urgence in texts like the ordonnance of 17 May 1978, which appointed General Singa as Head of the First Military Region and declared that "during the whole period of military operations, the commander of the Military Region shall be entrusted alone with all powers vested in the Regional Commissioner" (53). This is clearly an application of the état d'urgence which substitutes military authorities for civil authorities. Yet nothing is said about military courts. This does not mean that since 1966 the country was left without special courts.

On 28 September 1972, a State Security Court (Cour de Sûreté de l'état) was established (54). This text was amended by an ordonnance-loi dated 14 August 1974, and finally inserted in the Code de l'Organisation et de la Compétence judiciaires by a law dated 21 June 1976 (55), which abrogated all previous texts dealing with the State Security Court. This is clearly an exceptional court as its existence is not provided for in Article 59 of the 1967 Constitution, which says that "courts and tribunals altogether include a Supreme Court of Justice, Courts of Appeal, military courts and tribunals" (56). At present, the organization of the State Security Court is as follows:

- its seat is composed of three judges selected from the regular judges of the court;
- there are public prosecutors specially attached to the Court;
- it has exclusive jurisdiction for some ten categories of offences, among which are offences against State security

as detailed in title VIII of the Penal Code; against the Head of State as regulated by ordonnance-loi no. 300, dated 16 December 1963, and insults to the same as defined by the Penal Code, Articles 74 and 76; offences assimilated to rebellion, armed robbery and murder when connected with theft; offences against the regulations protecting minerals and all offences connected with them;

- there is no appeal against the decisions of the Court, but the matter may be brought to the Supreme Court for violation of forms or of the law itself.

The State Security Court is accordingly the one which has, since 1972, handled all "plots" against the Republic and its government.

Apart from the état d'urgence or the régime militaire, occasional measures have also been taken against specific organisations, as, for example, in 1971 (57), against the Rose-Croix, the freemasons, the templars, and the Cao Dài members; the justification for this was stated to be that they were a nuisance to public order. The measure was rescinded insofar as freemasons were concerned in 1972 (58). These restrictions to the freedom of association were imposed under Article 18 of the 1967 Constitution then in force which provided that: "Groups of which the aim or the activity would be contrary to the law or directed against public order are prohibited" (59). This, of course, reduces considerably the protection guaranteed by the first paragraph of Article 18.

The government of Zaire has ratified both the International Covenants on human rights, that is the Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, and it is one of the rare African countries to have ratified the Optional Protocol to the latter covenant, recognising the right of individual petition. Some elements of these covenants are to be found in the new Constitution of Zaire. At the end of 1979 a symposium on human rights was held at Lubumbashi.

When regard is had to the reality of human rights observance in Zaire, all these gestures are to be seen as little more than window-dressing.

Political prisoners have no legal protection. In the interrogation centres of the political police (known as the National Documentation Centre - CND) and in other military and police camps, political prisoners are often beaten, tortured and live in appallingly crowded conditions. At times the authorities announce to the families of prisoners who have died in detention that they died in hospital. Usually, however, such deaths are not announced, the families being informed neither of the arrest nor the death of the persons concerned. Prisoners awaiting trial almost always remain without any contact with persons outside, and are unable to get in touch with lawyers or inform their families of their whereabouts.

In law, the CND are entitled to hold suspects for only five days, but the legal procedures for arrest and detention are seldom respected. Suspects arrested either by the CND or by other security

forces, such as the ordinary police or the disciplinary police of the Youth of the Popular Revolutionary Movement, simply remain in administrative detention as long as the security forces decide, without being able to communicate with anyone outside or to lodge an objection to their detention. This constitutes a serious violation of Article 15 of the Constitution in force, as well as of Zaire's international obligations under the International Covenant on Civil and Political Rights.

Arbitrary arrests are frequent and it is often difficult to tell who has been arrested for political reasons and who for suspected common law offences (60).

Since General Mobutu seized power there have been a series of trials against persons accused of plotting his downfall. Many of them have been condemned to death or summarily executed without any right of appeal. During the 1960's executions were often in public. In May 1974, forty-eight prisoners condemned to death were, shortly before their execution, brought before a large crowd in Kinshasa stadium in the presence of General Mobutu. In recent years executions have not usually been in public, but in January 1978 fourteen of those held responsible for disturbances in the region of Kwila were publicly hanged at Idiofa.

Hundreds have been executed summarily without trial, for example after the Shaba war in May 1978. In 1979, Amnesty International received reports of mass executions of 'criminals' near the port of Matadi in the province of Bas-Zaire.

Looking back over the 15 years of the Second Republic, one may reach the following conclusions:

- the decline of the parliamentary institution is obvious and even clearer than during the First Republic. It was to culminate in Article 44 of the 1975 Constitution (63 of the 1978 Constitution) which provide that the décisions d'Etat adopted by the Bureau politique of the single party, of the Mouvement populaire de la Révolution would be binding on all citizens and on Parliament, who would only put them in the formal mould of a legislative document;
- power is over-centralized at the level of the Head of State and one may without hesitation speak of an absolute monarchy in which the ruler's will is practically without limits;
- in this context, constitutional provisions and forms tend to lose their strength and efficiency - one may even question whether they still have any sense;
- in this context also, a state of emergency is not an absolute need and, as one has seen, it was practically never used or, at least, publicized;
- indeed, with the end of the rebellions, which was a reality by the end of 1966, order had been restored within the Republic. Thus there was really no need to declare emergency measures in the course of the recent years; the only situation where they were needed were the two Shaba wars of 1977 and 1979. In these cases, the government was confronted with open warfare and it could not be said that exceptional measures were not justified;

- the Cour de Sûreté de l'Etat has had many occasions to sit since it was established, and it seems that its proceedings have never been challenged for irregularities;
- the military regime in Zaire is widely believed to have been accompanied by grave violations of human rights, such as the existence of detention camps where conditions of the detainees are inhuman, regular practices of torture by the secret police, brutalities, not to mention outright killings, by the armed forces when called in order to re-establish order in some part or another of the country; and
- these violations of human rights may have been worse during the periods of tension which have led to states of emergency of one kind or another, but they are due not so much to an abuse of emergency powers as to the normal powers of a dictatorial regime which is not subject to any effective check by an independent legislature or judiciary.

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N O T E S

1 Moniteur congolais, 1960, p. 1535.

2 Ibidem.

3 Bulletin officiel de l'Etat indépendant du Congo, 1889, p. 14 et Bulletin officiel du Congo belge, 1917, p. 392.

4 Moniteur congolais, 1960, p. 1535.

5 Bulletin officiel du Congo belge, 1917, p. 392.

6 This text was not published in the official Gazette. It can be found in GERARD-LIBOIS J. and VERHAEGEN B., Congo 1960, p. 702.

7 The text dealing with the press was only published in idem, 1968, p. 960 (and p. 968 for subsidiary legislation adopted under that text), while that on meetings and associations is in idem, 1960, p. 2493.

8 Bulletin officiel du Congo belge, 1922, p. 818.

9 The Army proclamation of 14 September 1960 is published in J. GERARD-LIBOIS and B. VERHAEGEN, Congo 1960, Bruxelles, C.R.I.S.P. M.d., p. 869, which provides for that and subsequent years until 1967 the best and most detailed background reading to the political history of Congo. After that year, no synthesis is available but that established under the responsibility of VANDERLINDEN J., under the title Du Congo belge au Zaïre, Bruxelles, C.R.I.S.P., 1980.

10 Moniteur congolais, 1960, p. 2535.

11 Congo 1960, pp. 876-877.

12 Moniteur congolais, 1961, p. 39.

13 Idem, p. 66.

14 Bulletin administratif du Congo belge, 1940, p. 427.

15 B. VERHAEGEN, Congo 1961, pp. 123-124, where speeches by Prime Minister Adoula are reproduced.

16 Moniteur congolais, 1961, p. 474 et Bulletin officiel du Congo belge, 1959, p. 2412.

17 Congo 1961, p. 398.

18 Bulletin administratif du Congo belge, 1959, p. 3269.

19 Supra, note 3.

20 This text was not published in the Official Gazette. It can be found in Congo 1962, p. 82.

21 Congo 1962, p. 85.

22 This decision has not been published.

23 Moniteur congolais, 1962, p. 279.

24 Congo 1962, p. 193.

25 Moniteur congolais, 1962, pp. 141 and 292, 219 and 278.

26 Moniteur congolais, 1963, pp. 76, 204 and 465; 82 and 207; 467; 491; 205,

27 The relevant legislation (ordonnances nos.226 and 227) are in Moniteur congolais, 1963, pp. 422 and 423.

28 Congo 1963, pp. 130-149, when all relevant documents are published. See also, Moniteur congolais, 1963, p. 483; 1964, pp. 21, 135, 136, 174, 175 and 2.

29 Moniteur congolais, 1964, p. 168.

30 Idem, p. 201.

31 Idem, p. 203.

32 Idem, special issue dated 1 August 1964.

33 Idem, pp. 613, 614 and 615.

34 Idem, 1965, p. 15.

35 Idem, 1964, special issue dated 1 August 1964, p. 21.

36 Idem, 1965, p. 16.

37 Congo 1964, p. 532.

38 Moniteur congolais, pp. 834, 327 and 1040.

39 Idem, 1964, p. 611.

40 Congo 1965, pp. 409.

41 The declaration read before Parliament and which refers to this new situation can be found in Congo 1965, p. 413. There is no reference to it in the Army proclamation establishing the new regime and published in a special undated issue of the official gazette. As for the attribution of all presidential powers to General Mobutu it results from the latter proclamation.

42 Moniteur congolais, 1966, p. 172.

43 Moniteur congolais, 1968, pp. 835, 133 and 376, all these ordonnances being retroactive ones.

44 Congo 1966, p. 431.

45 Moniteur congolais, 1966, p. 489.

46 Idem, 1967, p. 564.

47 Idem, 1965, special undated issue already cited above in note 41.

48 Idem, 1966, p. 158.

49 Idem, 1967, p. 1.

50 Congo 1967, p. 129.

51 Journal officiel de la République du Zaïre, 1975, special issue.

52 Idem, 1978, special issue.

53 Idem, 1978, p. 39 of no. 12 dated 15 June.

54 This text was not published.

55 Idem, 1975, p. 185, and 1976, p. 696.

56 See above, note 45.

57 Moniteur congolais, 1971, p. 780.

58 Journal officiel de la République du Zaïre, 1972, p. 360.

59 See above, note 46.

60 A recent authoritative account of the institutionalised corruption and brutalities of the regime will be found in Mobutu ou l'incarnation du mal Zaïrois by Nguza Karl I Bond (Rex Collings, London 1982). Nguza is a former Minister of External Affairs (1972-74, 1976-77, 1978-80), Secretary-General of the single party (1974-76) and Prime Minister (1980-81). Charged with treason in 1977-78, he was himself detained for some 12 months, during which he was tortured. He was sentenced to death, the sentence being commuted to life imprisonment. Subsequently released, under an amnesty, he was appointed Prime Minister. He resigned during a visit to Belgium, stating that if he had not done so, he would have been returned to prison.

QUESTIONNAIRES ON STATES OF EXCEPTION AND ADMINISTRATIVE DETENTION

In 1978, two questionnaires, one on States of Exception and another on Administrative Detention, were sent to 158 countries. Replies were received from 34 countries. Of these, 29 (1) were received from Government departments, usually the Ministry of Justice or a Law officer. The remaining 5 were (2) from individuals and non-governmental organisations.

Summary of the replies on States of Exception

The generic term state of exception is used here to describe the suspension of or departure from legal normality under such titles as state of emergency, state of exception or state of siege.

The questionnaire on states of exception, of which a copy will be found in the Appendix, dealt with four major areas. The first dealt with the declaration of states of exception, covering such questions as whether the constitution provided for the states of exception, whether there was separate legislation on the subject and questions relating to the definition of states of exception and procedures for its proclamation and duration.

The second area covered was the effects of states of exception, in particular effects on the executive legislature and judiciary, the possibility of challenging its validity, and non-derogable rights and enforcement of fundamental rights during a state of exception.

The third series of questions related to past and present states of exception and their effects. There was also a question on whether notice of a state of exception was given to international or regional organisations.

The fourth major area dealt with the suspension or abrogation of the constitution under a state of exception.

Declaration and Procedure

Of the 34 countries, 20 (3) have constitutional provisions for declaring a state of exception, five (4) have separate legislation in

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(1) Antigua, Argentina, Austria, Belgium, Belize, Cape Verde, Cyprus, Denmark, Federal Republic of Germany, Fiji, Finland, France, Gabarone, Gambia, Israel, Liechtenstein, Luxembourg, Malaysia, Morocco, Netherlands, New Zealand, Papua New Guinea, Seychelles, Singapore, Sweden, Thailand, United Kingdom, United States of America, Western Samoa.

(2) Colombia, India, Nepal, Portugal, Turkey. India's reply was sent by a lawyer nominated for the purpose by the then Attorney-General.

(3) Argentina, Austria, Belize, Colombia, Cyprus, Fiji, Finland, Gabarone, Gambia, India, Malaysia, Morocco, Nepal, Netherlands, Portugal, Seychelles, Sweden, Turkey, United States of America, Western Samoa.

(4) Antigua, France, Papua New Guinea, Singapore, Thailand.

addition to constitutional provisions, and six (5) have no constitutional provisions but have legislation dealing with states of exception. Three countries (6) have no provisions either in their constitution or in their legislation.

None of the replies gave a definition of the conditions or circumstances which constitute a state of exception, other than to refer to the formal grounds for proclaiming one. Of these, two (7) referred to a 'public emergency' and 'a state of siege or public emergency' and nine (8) referred to a 'state of war'. Other replies gave a variety of descriptions, which will hereafter be referred to as 'internal disorder'. These included 'internal crisis' or 'public disorder' (9), 'disruption in the supply of essentials to the public' or 'civil crisis' (10), 'financial or economic crisis' (11), 'threat to the republic or democratic functioning' (12), 'threat to national security' (13), 'state of siege' and 'state of emergency'.

Only two countries (14) stated that they distinguish between 'states of siege' and 'states of emergency'. For them a state of siege relates to external aggression or war. A state of emergency relates to a situation of internal disorder.

In eleven countries (15) the proclamation of a state of exception is made by the President (with or without the advice of the Cabinet). Parliament proclaims it in two countries (16). In five countries (17) the proclamation is made by the Crown on the advice of the Cabinet. In one country (18) a military commander has the power to proclaim emergency in the area of his command. In five countries (19) the Prime Minister or the Council of Ministers have the power to proclaim a state of exception.

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(5) Cape Verde, Federal Republic of Germany, Israel, Liechtenstein, New Zealand, United Kingdom.

(6) Belgium, Denmark, Luxembourg.

(7) Belize, Portugal.

(8) Argentina, Cyprus, Fiji, Finland, India, Morocco, Netherlands, Sweden, United States of America.

(9) Antigua, Argentina, Finland, India, Nepal, Thailand.

(10) Finland, United Kingdom.

(11) Finland, India, Singapore, Western Samoa.

(12) Cyprus, Federal Republic of Germany, Morocco.

(13) Singapore, Thailand, Western Samoa.

(14) Colombia, France.

(15) Antigua, Argentina, Finland, France, Gabarone, Gambia, India, Portugal, Seychelles, Singapore, Western Samoa.

(16) Federal Republic of Germany, Sweden.

(17) Malaysia, Morocco, Nepal, Netherlands, United Kingdom.

(18) Thailand.

(19) Cyprus, Israel, Papua New Guinea, Thailand, Turkey.

In nine countries (20) the proclamation has to be submitted to the Parliament for approval.

Regarding the role of the courts, in only one country (21) does the Supreme Court have to rule on the validity of the proclamation.

On the duration of a state of exception, in eleven countries (22) the duration is unlimited until revoked by the Government or the Parliament. In four countries (23) it is for an unlimited duration after an initial approval of the Parliament. Consequently, in 15 of the 31 countries, a state of exception is unlimited in duration, a very high proportion. In ten countries (24) Parliament has to approve the proclamation within a certain period of time. This time period ranges from 48 hours (25) to 60 days (26). Of these ten, in three countries (27) it has to be extended by Parliament every six months to remain in force.

Effects of States of Exception

On the effects of states of exception, particularly on the powers of the executive, legislature and the judiciary, only three countries (28) stated that there is no change in the separation of powers. In 18 countries (29) the powers of the executive are enlarged. The increase of power varies greatly from one country to another. In two countries (30) the King assumes the powers of the legislature in addition to those of the executive. The replies from only five countries (31) refer to changes in the powers of the legislature, of these five, two (32) stated that during a state of exception the legislature could make laws contrary to the Constitution.

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(20) Cyprus, France, Gabarone, India, Netherlands, Papua New Guinea, Turkey, United Kingdom, Western Samoa.

(21) Colombia.

(22) Argentina, Colombia, Fiji, Malaysia, Morocco, Nepal, Netherlands, Seychelles, Singapore, Thailand, Turkey.

(23) Gambia, India, Papua New Guinea, Portugal.

(24) Antigua, Cyprus, France, Gabarone, Gambia, India, Papua New Guinea, Portugal, United Kingdom, Western Samoa.

(25) Cyprus.

(26) India.

(27) Antigua, Cyprus, Gabarone.

(28) France, Gabarone, Netherlands.

(29) Antigua, Argentina, Belize, Colombia, Federal Republic of Germany, Fiji, Finland, Gambia, India, Israel, Malaysia, Papua New Guinea, Seychelles, Singapore, Thailand, Turkey, United Kingdom, Western Samoa.

(30) Morocco, Nepal.

(31) Belize, Federal Republic of Germany, Fiji, Malaysia, Singapore.

(32) Malaysia, Singapore.

With regard to the powers of the courts, seven countries (33) referred to their curtailment. Of these, five stated (34) that the jurisdiction of military courts is extended to cover civilians.

None of the countries has a procedure for enabling the citizen to challenge the validity of a proclamation of states of exception.

As regards fundamental rights that may not be derogated from even during a state of exception, ten countries (35) stated that all rights may be the subject of derogation. In one country (36) only habeas corpus is suspended; all the other rights remain unaffected. All the other countries referred to some right or rights which cannot be derogated from and four (37) included the right to life as one of them. Only one country (38) enumerated all the non-derogable rights mentioned in article 4 of the International Covenant on Civil and Political Rights. Only one country (39) has provision for including in the proclamation itself the rights that are to be derogated, and the right to life cannot be one of them. In all but three of the countries (40) proceedings may be taken before the courts in case of violations of fundamental rights stated in the constitution.

Past and Present States of Exception

At the time the replies were sent, states of exception were in force in six of the countries (41), and of these the proclamation has since been revoked in one country (42). In the last 20 years, eight other countries (43) had proclaimed states of exception. Only one country (44) said that it had given notice to an international organisation, namely the Council of Europe.

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(33) Antigua, Colombia, Federal Republic of Germany, Malaysia, Nepal, Thailand, Turkey.

(34) Antigua, Colombia, Federal Republic of Germany, Thailand, Turkey.

(35) Colombia, Federal Republic of Germany, Gabarone, Malaysia, Morocco, Nepal, Papua New Guinea, Seychelles, Singapore, Turkey. In this, in Singapore, Muslim laws and customs are protected.

(36) United States of America.

(37) Cyprus, India, Netherlands, Portugal.

(38) Cyprus.

(39) Portugal.

(40) Morocco, Nepal, Thailand.

(41) Argentina, Colombia, Israel, Malaysia, Thailand, Turkey.

(42) Colombia.

(43) Antigua, Belize, India, Morocco, Nepal, Papua New Guinea, Portugal, United Kingdom.

(44) Turkey.

In no country had the validity of the proclamation of state of exception been examined by the courts.

The proclamation in one country (45) was due to natural calamity. One country (46) stated that of the three proclamations so far made, it was twice due to reasons of external war and once to internal disorder. In one country (47) the proclamations were due to trade union strikes. Another (48) country stated that its emergency was due to external threats and that a state of exception had remained in force since 1948. In the other countries (49) the reason given was internal disorder.

Suspension and abrogation of the Constitution

All the countries except one (50) have a written constitution. All the constitutions provide for fundamental rights in one form or another.

On the question of suspension in whole or in part or derogation of the constitution, in five countries (51) new constitutions were enacted during the emergency. One country (52) amended the constitution to delete the right to leave the country. In another (53) extensive amendments were made to the constitution during an emergency and after the emergency there were further modifications of these amendments.

In the replies of the seven countries (54) which had suspended or derogated from their constitutions, no details were given about their effects on civil and political rights.

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(45) Belize.

(46) India.

(47) United Kingdom.

(48) Israel.

(49) Antigua, Argentina, Colombia, Malaysia, Morocco, Nepal, Papua New Guinea, Portugal, Thailand, Turkey.

(50) United Kingdom.

(51) Morocco, Nepal, Portugal, Thailand, Turkey.

(52) Argentina.

(53) India.

(54) Argentina, India, Morocco, Nepal, Portugal, Thailand, Turkey.

Summary of the Replies on Administrative Detention

The questionnaire on administrative detention, of which a copy will be found in the Appendix, had twelve headings :

- constitutional provision or law or decree
- operations of the law or decree
- notice to detainee
- right to a lawyer
- public notice
- notice to relatives or friends
- interrogation
- judicial review
- review committee or tribunal
- parliamentary control
- procedures regarding detention
- conditions of detention

The questionnaire defined administrative detention as follows :

> "For the purposes of this questionnaire, administrative detention means the deprivation of a person's liberty, whether by order of the Head of State or of any executive authority, civil or military, for the purposes of safeguarding national security or public order, or other similar purposes, without that person being charged or brought to trial."

Replies were received from thirty-five countries. Thirty were replies by official government (1) departments, and five were from individuals (2) or non-governmental organisations.

Of the 35 countries, 19 did not have any provision (3) for administrative detention.

Of the countries which have legal provisions for administrative detention, 13 have (4) provision for it in their constitution. In seven of these (5) there are laws governing administrative detention in addition to the constitutional provision.

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(1) Antigua, Argentina, Austria, Belgium, Belize, Botswana, Cape Verde, Cyprus, Denmark, Federal Republic of Germany, Fiji, Finland, France, Gambia, Israel, Liechtenstein, Luxembourg, Malaysia, Morocco, Nauru, Netherlands, Norway, Papua New Guinea, Seychelles, Singapore, Sweden, Thailand, United Kingdom, United States of America, Western Samoa.

(2) Colombia, India, Nepal, Portugal, Republic of Korea.

(3) Antigua, Austria, Belgium, Belize, Cape Verde, Cyprus, Denmark, Federal Republic of Germany, Finland, France, Liechtenstein, Luxembourg, Morocco, Nauru, Netherlands, Norway, Portugal, Sweden, United States of America.

(4) Argentina, Botswana, Colombia, Fiji, Gambia, India, Malaysia, Nepal, Papua New Guinea, Seychelles, Singapore, Thailand, Western Samoa.

(5) Fiji, Gambia, India, Malaysia, Nepal, Singapore, Thailand. The Indian constitution only authorises making of laws for preventive detention.

In three countries (6) there is no constitutional provision, but it is governed by legislation.

In seven countries (7) a declaration of a state of exception is a precondition for implementing administrative detention. In nine countries (8), there is no need for proclamation of a state of exception. In 15 countries (9) the constitution provision of the relevant law providing for administrative detention remains in force indefinitely unless it is revoked by the Parliament. In one country (10) only the law dealing with administrative detention has to be reviewed by the Parliament every six months.

To the question whether ratification by Parliament was required for its introduction, six countries (11) did not give any specific answer, and five stated (12) that it was not necessary. In another five countries (13) Parliament's ratification is needed in one form or another.

The most common ground for preventive detention found in twelve countries (14), was a threat to public security or public order, or terrorism. The reply of two countries (15) was unclear. In one country (16), it was stated that the reasons for detention depended on the discretion of the detaining authorities. In another country (17), apart from reasons of security, detention was also authorised for prevention of smuggling and conservation of foreign exchange.

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(6) Israel, Republic of Korea, United Kingdom. Of this, U.K. does not have a written constitution and preventive detention law applies only to Northern Ireland.

(7) Argentina, Botswana, Fiji, Gambia, Papua New Guinea, Seychelles, Western Samoa.

(8) Colombia, India, Israel, Malaysia, Nepal, Republic of Korea, Singapore, Thailand, United Kingdom.

(9) Argentina, Botswana, Colombia, Fiji, Gambia, India, Israel, Malaysia, Nepal, Papua New Guinea, Republic of Korea, Seychelles, Singapore, Thailand, Western Samoa.

(10) United Kingdom.

(11) Fiji, Gambia, Israel, Papua New Guinea, Seychelles, United Kingdom.

(12) Colombia, Nepal, Singapore, Thailand, Western Samoa.

(13) Argentina, Botswana, India, Malaysia, Republic of Korea.

(14) Argentina, Colombia, Fiji, Gambia, Malaysia, Papua New Guinea, Republic of Korea, Seychelles, Singapore, Thailand, Western Samoa.

(15) Botswana, Israel.

(16) Nepal.

(17) India.

The authorities empowered to issue orders for administrative detention were the National Executive or Council of Ministers or an individual Minister in six countries (18), the Head of State in four countries (19), and the Secretary of the Home Department in two countries (20). In one country (21), Area Military Commanders have powers to authorise detention but with a provision that if the detention exceeds one month then only an advisory committee is authorised. Replies of two countries (22) were unclear on this point.

Three countries (23) had a specifically appointed committee responsible for issuing detention orders. One has a committee (24) consisting of the Prime Minister, Security Officials and Officials of the intelligence department. In another (25), the committee is appointed by the Parliament. The third country (26) has a Security Custody Committee consisting of the Vice Minister of Justice and five members selected from among judges, public prosecutors, judge advocates and lawyers. The Minister orders detention after a decision taken by the Security Custody Committee.

The implementation of the detention orders was generally done by security officials, who were either police or military officers.

On the question of administrative instructions relating to the exercise of powers of administrative detention, only one country (27) referred to any specific instructions.

With regard to the notice given to detainees, 12 countries (28) stated that they have provisions for providing a copy of the detention order, notice of the formal grounds of detention and notice of the facts and circumstances justifying the detention. Two countries (29) stated that only the formal grounds of detention are provided. In two countries (30) there is no provision for providing notice of detention to the detainee.

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(18) Argentina, Malaysia, Nepal, Republic of Korea, Singapore, Thailand.

(19) Colombia, Fiji, Gambia, Western Samoa.

(20) India, United Kingdom.

(21) Israel.

(22) Botswana, Seychelles.

(23) Israel, Papua New Guinea, Republic of Korea.

(24) Israel.

(25) Papua New Guinea.

(26) Republic of Korea.

(27) Malaysia, which has mentioned Internal Security Act, Advisory Board Rules, 1976.

(28) Botswana, Colombia, Fiji, India, Israel, Malaysia, Nepal, Papua New Guinea, Singapore, Thailand, United Kingdom, Western Samoa.

(29) Gambia, Seychelles.

(30) Argentina, Republic of Korea.

There was no clear cut answer to the question about persons responsible for preparing these notices.

In only one country (31) was there no procedure for the detainee to make representation against the order for the detention. In two countries (32) recourse was to a court. 12 countries (33) have either a committee or a tribunal to which the detainee can make representations and in one country (34) representations could be made only to the detaining authorities and not to a committee or tribunal. The period during which representations can be made by the detainee ranges from seven days to one month.

In nine countries (35) the detainees are informed upon arrest of their right to make representations. In one of these countries (36) the Supreme Court held a detention illegal when the detainee was not informed of his right to make representations. Three countries (37) have stated that they have no procedure for representations by the detainee. The replies of four countries (38) on this point were not clear.

On the right to a lawyer and related questions, ten countries (39) stated that the detainee has a right to consult a lawyer immediately. In two countries (40) the detainee can seek a lawyer only at the time of his representation to the tribunal. Two countries (41) stated that the detainee is entitled to consult a lawyer only if he is charged with an offence. Two countries (42) did not reply to this question.

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(31) Thailand.

(32) Colombia, Seychelles.

(33) Argentina, Botswana, Fiji, Gambia, India, Israel, Malaysia, Papua New Guinea, Republic of Korea, Singapore, United Kingdom, Western Samoa.

(34) Nepal.

(35) Fiji, Gambia, India, Israel, Malaysia, Papua New Guinea, Singapore, United Kingdom, Western Samoa.

(36) India.

(37) Argentina, Nepal, Thailand.

(38) Botswana, Colombia, Republic of Korea, Seychelles.

(39) Argentina, Botswana, Colombia, Fiji, India, Israel, Malaysia, Republic of Korea, Singapore, United Kingdom.

(40) Gambia, Papua New Guinea.

(41) Nepal, Thailand.

(42) Seychelles, Western Samoa.

Free legal assistance to a detainee who is not able to employ a lawyer exists in only four countries (43). The rest stated that they do not have any such provision.

Regarding the ability of a detainee to confer with his lawyer in private, ten countries (44) stated that the detainee can confer within sight but out of hearing of the security guards. Four countries (45) have answered in the negative.

Regarding the number of visits that may be made by a lawyer, five countries (46) do not impose any limit. Two stated (47) that it depends on the discretion of the authorities. One country (48) permits two visits of which the period is not mentioned. The replies of six countries (49) were unclear.

On the question whether a lawyer may be present at interrogation, all the countries answered in the negative.

Regarding public notification and notice to relatives and friends, the answers were as follows : ten countries (50) have no provision for publishing the detention orders in an official gazette or in the newspapers; in six countries (51) the detention orders must be published in the official gazette within fourteen days. Of these six, one country (52) has a procedure for publication at monthly intervals. Of the countries which have provision for publishing the detention orders in the gazette, only two have stated (53) that names of persons detained and the place of detention will be published. Only one country (54) out of the sixteen had provisions for publishing the names of persons released. On the question of publishing the name of the detainee, one country (55) had commented that it may be objected to by the detainee as infringing his privacy. This is not a very convincing reason in view of the dangers

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(43) Colombia, Fiji, India, United Kingdom.

(44) Argentina, Colombia, Fiji, Gambia, India, Israel, Malaysia, Papua New Guinea, Singapore, United Kingdom.

(45) Botswana, Nepal, Republic of Korea, Thailand.

(46) Fiji, Gambia, Israel, Singapore, United Kingdom.

(47) India, Thailand.

(48) Malaysia.

(49) Argentina, Botswana, Colombia, Nepal, Papua New Guinea, Republic of Korea.

(50) Colombia, India, Israel, Malaysia, Nepal, Republic of Korea, Singapore, Thailand, United Kingdom, Western Samoa.

(51) Argentina, Botswana, Fiji, Gambia, Papua New Guinea, Seychelles.

(52) Papua New Guinea.

(53) Argentina, Papua New Guinea.

(54) Argentina.

(55) United Kingdom.

involved in secret detention. Only five countries (56) stated that they have provision for informing relatives or friends of the detention. One of these (57) stated that the notification may be delayed for security reasons. In all these five countries, notification includes the place of detention. Only one country (58) specified the period (seven days) within which the relatives should be informed. No country stated that transfer to another place of detention was notified to families or friends.

To the question on guidelines or administrative instructions regarding interrogation procedures, four countries (59) did not provide any answer. Seven countries (60) stated that they do not have any guidelines. One country (61) stated that administrative detainees are not subjected to interrogation. Another (62) referred to the 'Judges Rules' (which relate to the circumstances in which a confession is admissible before a court of law). Of the three countries which have guidelines, one country (63) did not provide any details, the other two stated (64) that they are official secrets.

The absence of guidelines in some countries and the uninformative answers provided by others are disturbing in view of the well-known relationship between ill-treatment of detainees and interrogation procedures.

Judicial review of detention is stated to be available in all but three (65) of the countries, by way either of habeas corpus or amparo. In only three countries (66) can the courts enquire into the alleged facts and circumstances constituting the grounds for detention. In the rest of the countries, the courts can enquire only into procedural irregularities.

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(56) Colombia, Fiji, Israel, Papua New Guinea, United Kingdom.

(57) Israel.

(58) Papua New Guinea.

(59) Argentina, Botswana, Papua New Guinea, Western Samoa.

(60) Fiji, Gambia, India, Israel, Malaysia, Republic of Korea, Seychelles.

(61) Colombia.

(62) United Kingdom.

(63) Singapore.

(64) Nepal, Thailand.

(65) Malaysia, Nepal, Thailand.

(66) Fiji, Gambia, United Kingdom.

As to parliamentary control over the operation of administrative detention, in six countries (67) there is no such control. In four countries (68) there is indirect control, in that Members of Parliament can raise questions on detentions. In three countries (69), the administrative detention Act has to be periodically extended by the Parliament. In another country (70), Parliament reviews the state of exception under which the administrative detentions are made. Only one country (71) stated that the Parliament can release the detainees because in this country a committee consisting of Members of the Parliament is authorised to issue detention orders.

Ten countries (72) have an advisory review committee or tribunal, and four countries (73) have no such provision. In one country (74), a board is appointed if the detention exceeds one and a half years and only after that period does the board review the detention. In another country (75) the Secretary of State appoints an adviser who reviews the detention within fourteen days and after every six months. In all countries, the powers of the review body are purely advisory.

In five countries (76) the tribunal consists of persons qualified to be judges of the High Court and they are appointed by the Chief Justice. In four countries (77), it consists of advocates, barristers or solicitors. In only one country (78) is it headed by a judge.

In five countries (79) the detention has to be reviewed initially by the tribunal within a month. In three countries (80) it is within three months. In one country (81) it is within six months and another country (82) did not state any period.

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(67) Colombia, Malaysia, Nepal, Republic of Korea, Seychelles, Thailand.

(68) Fiji, India, Israel, Singapore. In India, the Act is passed by the legislature so there may be some control.

(69) Botswana, Gambia, United Kingdom.

(70) Argentina.

(71) Papua New Guinea.

(72) Botswana, Fiji, Gambia, India, Israel, Malaysia, Papua New Guinea, Seychelles, Singapore, Western Samoa.

(73) Argentina, Colombia, Republic of Korea, Thailand.

(74) Nepal.

(75) United Kingdom.

(76) India, Malaysia, Papua New Guinea, Singapore, Western Samoa.

(77) Botswana, Fiji, Gambia, Seychelles.

(78) Israel.

(79) Botswana, Fiji, Gambia, Papua New Guinea, Seychelles.

(80) India, Singapore, Western Samoa.

(81) Israel.

(82) Malaysia.

In five countries (83) the conclusions of the first review are reconsidered by the tribunal at six monthly intervals.

In all the countries which have a tribunal, the detainee is entitled to make oral or written representations and to be represented by a lawyer.

In two countries (84) the tribunal or the advisory body makes its own rules. No clear answer on this question was provided by the other countries.

On the procedures regarding detention and conditions of detention, the answers may be summarised as follows :

All countries stated that the police was the agency empowered to arrest administrative detainees, and in all countries there is provision for maintaining a record of the detainee's arrest and detention. In only three countries (85) are detention orders made before arrest. One country (86) stated that if there is no detention order, an arrested person cannot be held for more than 72 hours. Another country (87) stated that detention orders are made before or after arrest, varying from case to case.

In seven countries (88) an arrested person is initially held in an ordinary police station and later in a special camp or military camp or any place decided by the authorities.

Seven countries (89) stated that there is no provision for producing the detainee before a magistrate or a judicial officer to establish the legal validity of the detention.

All the countries except one (90) stated that the detainee is examined by a doctor and records are kept. Medical attention is usually given when the detainee is admitted to the prison or other place of detention and the replies do not indicate the exact time after arrest within which the doctor's examination takes place.

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(83) Botswana, Fiji, Papua New Guinea, Singapore, United Kingdom.

(84) India, United Kingdom.

(85) India, Israel, Nepal.

(86) United Kingdom.

(87) Argentina.

(88) Argentina, Gambia, Malaysia, Nepal, Republic of Korea, Singapore, Thailand.

(89) Argentina, India, Israel, Malaysia, Nepal, Singapore, Thailand.

(90) Thailand.

In most of the countries, transfer of the detainee from one place to another is done under the authority of the Minister.

In three countries (91) the normal prison ordinance is not applicable to detainees.

Six countries (92) have said that the Minister can modify the rules for detainees as to nature of confinement, correspondence, etc.

All the countries stated that they permit regular visits by the detainee's lawyer, family or friends. The frequency of such visits was not mentioned.

Similarly, all the countries stated that writing materials, newspapers and books are available to detainees, they are allowed to receive packages containing reading materials, periodical medical checks are made and records of them maintained, and other medical treatment is also available on request.

In only three countries (93) is there no provision for solitary confinement of detainees. In six countries (94) solitary confinement is given for prison offences. No details of rules governing solitary confinement have been given in the replies, save that in three countries (95) the maximum number of days for solitary confinement is 90 days, in another (96), 30 days, in one country (97), three days, and in another (98), only 48 hours.

In seven countries (99) there is provision for magistrates or qualified inspectors to inspect the place of administrative detention and for such persons to be able to interview the detainees.

In six countries (100) the International Committee of the Red Cross has been permitted to conduct periodic inspections.

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(91) Malaysia, Singapore, Thailand.

(92) India, Israel, Malaysia, Nepal, Singapore, Thailand.

(93) India, Singapore, United Kingdom.

(94) Argentina, Fiji, Gambia, Israel, Malaysia, Thailand.

(95) Fiji, Malaysia, Thailand.

(96) Argentina.

(97) Gambia.

(98) Israel.

(99) Fiji, Gambia, India, Malaysia, Republic of Korea, Singapore, United Kingdom.

(100) Argentina, Israel, Malaysia, Singapore, Thailand, United Kingdom.

APPENDIX

QUESTIONNAIRE ON STATES OF EXCEPTION

1. Declarations of States of Exception

1.1. Does your Constitution and/or legislation provide for any states of exception, such as state of emergency, state of siege, state of martial law, state of internal war, etc. ? (Please supply copies of relevant documents).

1.2. Is there a definition of the conditions or circumstances which constitute such a state of exception ?

1.3. If such states of exception are recognised, please describe the procedure by which they are declared, including the role of the courts and legislature, if any.

1.4. Is there any restriction on the duration of a state of exception ? If so, what is the procedure for renewal ?

2. Effects of States of Exception

2.1. What are the effects of states of exception on :

(a) the powers of the executive ?
(b) the powers of the legislature ?
(c) the powers of the judiciary, including the power to review legislation and decrees and the power to determine the legality of arrests and detentions (habeas corpus, amparo, etc.).

2.2. Is there any way the citizen can challenge the validity of a state of exception, and if so, by what procedure ?

2.3. What fundamental rights, if any, may not be derogated from even during a state of exception ?

2.4. What procedures are available to enforce such fundamental rights during a state of exception ?

3. Past/Present States of Exception

3.1. Is there any state of exception in force at present ?

3.2. Have any other states of exception been in effect in your country since 1960 ?

3.3. In relation to any such state of exception :

(a) what were the dates of declaration, renewal and expiration ?
(b) what circumstances were invoked in explanation of such states of exception ? (Please provide texts of official statements if relevant).

(c) what measures were taken pursuant to such states of exception ?
(d) did any court examine the validity of the declaration of exception, or any of the measures taken pursuant to it ? If so, what were the findings ? (Copies of or references to important judicial decisions would be greatly appreciated).
(e) was notice of derogation given to any international or regional organisation, as envisaged by, for example, article 4(3) of the International Covenant on Civil and Political Rights or article 15(3) of the European Convention on Human Rights ?

3.4. During any such state of exception, were any provisions of the Constitution amended ? If so, by what procedure ? (Texts of the amendments and any official explanatory memoranda would be appreciated).

4. Suspension or Abrogation of the Constitution

4.1. Does your country have a written Constitution ?

4.2. If so, what human rights and fundamental freedoms does it guarantee ? (If a copy of the Constitution is supplied, it will suffice to indicate the articles).

4.3. Has there been at any time since 1960 a suspension in whole or in part of the Constitution ? Alternatively, has there been in this period any substantial increase in the powers of the executive or suspension of the powers of the national legislature, regional government or the courts, other than under a declaration of exception ?

4.4. If so :

(a) what were the dates of such occurrences ?
(b) what were their effects ?
(c) what circumstances were invoked in explanation of such occurrences ?
(d) were they authorised by the previous law ? (If so, please cite the authority).
(e) have the courts examined the validity of these occurrences, and if so, what were the findings of the court ? (Copies of or references to important judicial decisions would be greatly appreciated).
(f) have these occurrences been submitted to a representative body or popular referendum for approval, and if so, with what result ?

4.5. In relation to any suspension or abrogation of the Constitution :

(a) what civil and political rights have been restricted ?
(b) what legal procedures remain available for the enforcement of such rights as continue ?

QUESTIONNAIRE ON ADMINISTRATIVE DETENTION

1. Constitution and the Law or Decree
2. Operation of the Law or Decree
3. Notice to Detainee
4. Right to a Lawyer
5. Public Notice
6. Notice to Relatives or Friends
7. Interrogation
8. Judicial Review
9. Review Committee or Tribunal
10. Parliamentary Control
11. Procedures Regarding Detention
12. Conditions of Detention

Definition

For the purposes of this questionnaire, administrative detention means the deprivation of a person's liberty, whether by order of the Head of State or of any executive authority, civil or military, for the purposes of safeguarding national security or public order, or other similar purposes, without that person being charged or brought to trial.

1. Constitution and the Law or Decree

1.1. Does the Constitution and/or legislation contain provisions which permit or prohibit administrative detention ? (Please supply copies of relevant document(s)).

1.2. If the Constitution and/or legislation permits administrative detention, is a declaration of a state of exception or some legal step needed before it can be implemented ?

1.3. Is there at present in force a law or decree which authorises administrative detention ? If so, is it of limited duration ? (Please supply copy of law or decree, reference and date of enactment).

1.4. If by decree, does it require ratification by Parliament ? Is there a requirement of Parliamentary consent for renewal or extension of the decree ?

1.5. Have any other measures been in force since 1960 authorising administrative detention ? When and under what circumstances was it introduced, and when and under what circumstances was it revoked ?

2. Operation of the Law or Decree

2.1. On what grounds may a person be administratively detained ? (Unless this information already supplied).

2.2. Who is authorised to issue orders for administrative detention ? On whose recommendation does he act ?

2.3. If by a committee, which government departments are represented on the committee ?

2.4. Who is responsible for implementing the detention order ?

2.5. Are there any administrative instructions relating to the exercise of powers of administrative detention ? (Please supply copies of relevant documents if possible).

3. Notice to Detainee

3.1. Is the detained person entitled to receive :

(a) a copy of the detention order ?
(b) notice of the formal grounds of detention ?
(c) notice of the facts and circumstances justifying the detention order ?

If so, within what period following arrest ?

3.2. Who prepares these notices ?

3.3. Is the detainee entitled to make representations ? If so, to whom and within what period following initial detention ? If to a tribunal, what is its composition ?

3.4. Is the detainee informed of this right, and if so, when ?

4. Right to a Lawyer

4.1. At what stage and how soon after arrest or after the detention order may a detainee consult a lawyer ?

4.2. If he has no lawyer, what (if any) steps are taken to furnish him with one ?

4.3. Are the detainee and his lawyer permitted to confer in private ? (i.e., not within hearing, direct or indirect, of police, security guards or institutional officials).

4.4. What is the limit, if any, on the number and duration of visits by the lawyer ?

4.5. May the detainee's lawyer be present at interrogations ?

5. Public Notice

5.1. Is the issue of detention orders published in an official gazette and/or newspaper of general circulation ? Within what period following the issue of the order ?

5.2. Are particulars, such as names of persons, grounds for detention, date, circumstances, place, duration or detention, included in this notice ? (Please specify).

5.3. Are the names of persons who are released from detention published ?

6. Notice to Relatives or Friends

6.1. Is there a requirement that a relative or close friend be notified if a person is detained ? Does the detainee select the person to be notified ? Where are these requirements set forth ?

6.2. Does the notification include information about where the detainee is held ?

6.3. Is there any, and if so what, period within which the relative or friend must be notified ?

6.4. In the event of the transfer of the detainee from one place of detention to another, is his family notified ? Within what period following the transfer ?

7. Interrogation

7.1. Are there any guidelines or administrative instructions regarding interrogation procedures ? (Please supply copies if possible).

7.2. What inspection or other procedures are enforced to protect the detainee against ill-treatment during interrogation ?

7.3. Are records maintained of the :

(a) date and duration of the interrogation sessions ?
(b) names of interrogators present ?
(c) names of the guards present during interrogations ?

8. Judicial Review

8.1. By what procedure (if any) can a detainee or his representative challenge the validity of his detention before an ordinary court ?

8.2. Is the court able to enquire into the alleged facts and circumstances constituting the grounds for the detention ?

8.3. Are there available any decisions of courts relating to the exercise of powers of administrative detention ? (If so, please supply, if possible, copies of the decisions or summaries, or case references).

9. Review Committee or Tribunal

9.1. Is the detainee entitled to have the detention order reviewed by a tribunal or committee ? (If so, please supply copy of legislation - if any - establishing this right).

9.2. What is the composition of the tribunal or committee which reviews the detention order, and by whom are they appointed ? Is it a permanent body or appointed for the specific case ?

9.3. How much time elapses from the date of initial detention until the committee or tribunal reviews the order ?

9.4. Is the detainee entitled :

(a) to make representations, oral and/or written (and if so which) to the review tribunal or committee ?
(b) to be represented by a lawyer before the tribunal or committee ?

9.5. Does the committee or tribunal determine its own rules ? If not, who makes them ?

9.6. Is the function of the committee or tribunal advisory only ? If the committee has additional powers, please explain. To whom does it report or make recommendations ?

9.7. In how many cases within the last five years :

(a) has the review tribunal or committee recommended the release of a detainee ?
(b) has a detainee been released following such a recommendation ?

9.8. After what interval (if any) is the detainee entitled to a reconsideration of his case by the tribunal or the committee ?

9.9. Are the reports of the committee or tribunal made public and, if so, how ?

9.10. Is there a procedure by which the detainee can challenge the proceedings of the review committee or tribunal in an ordinary court ? (Please desribe).

10. Parliamentary Control

10.1. What (if any) parliamentary control is there of the operation of administrative detention ?

11. Procedures Regarding Detention

11.1. Which agencies are empowered to arrest administrative detainees ? Is a record of a detainee's arrest and detention maintained by the agency ?

11.2. Are detention orders made before or after arrest ? If after, within what period after arrest ?

11.3. Is an arrested person initially detained in :

(a) an ordinary police station ?
(b) an ordinary prison ?
(c) a military unit ?
(d) some other, and if so what, premises ?

11.4. Is the detainee later transferred to another and, if so, what place for interrogation and under whose control ?

11.5. In what place, and under whose control, is the detainee held for the remainder of his detention; in :

(a) an ordinary prison ?
(b) a special camp or other place of detention ?

If so, under whose control ?

11.6. Is the detainee brought before a magistrate or other judicial officer to establish the legal validity of the detention ? If so, within what period of time following the arrest ?

11.7. Is the detainee examined by a doctor ? If so, at what stage and within what period following the arrest ? Is a record of the detainee's physical and mental condition made and signed by the doctor ?

11.8. By whose authority can an administrative detainee be transferred from one place of detention to another ?

12. Conditions of Detention

12.1. Is the prison ordinance applicable to convicted prisoners also applicable to detainees ? If not, what rules or regulations govern the conditions of detention ?

12.2. May the Minister or prison officials modify the rules for detainees as to nature of confinement, correspondence, visitors, etc. ? If so, please describe the common modifications for detainees.

12.3. Is the detainee permitted regular visits from :

(a) his lawyer ?
(b) his family and friends ?

If so, how frequently ?

12.4. Which of the following is available to the detainee ?

(a) writing materials
(b) newspapers and periodicals
(c) books
(d) radio

and at what stage and after what period following his arrest ?

12.5. May the detainee receive packages containing reading materials ? How often ?

12.6. Is medical treatment available to the detainee on request ? Are records kept of requests for medical treatment ?

12.7. Is a periodic medical check-up provided ? Are records of medical checks maintained ?

12.8. What rules (if any) govern the solitary confinement of administrative detainees ?

12.9. Is there a limit to the time for which an administrative detainee may be held in solitary confinement ?

12.10. Are places of administrative detention inspected by magistrates or qualified inspectors ? If so, by whom, and at what intervals ?

12.11. Are these persons allowed to interview detainees, and if so, do they interview them alone ?

12.12. To whom do the inspectors submit their findings ?

12.13. Are periodic inspections by the International Committee of the Red Cross (ICRC) permitted ?

OBSERVATIONS AND CONCLUSIONS

CONTENTS

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I. GENERAL OBSERVATIONS AND CONCLUSIONS

States of emergency are encountered with surprising frequency throughout the world. The chapters on states of emergency in India, Malaysia and Thailand might have been followed by chapters on states of emergency in Bangladesh, Pakistan, The Philippines, Singapore, South Korea, Sri Lanka and Taiwan. In Africa, states of emergency have been reported recently in Kenya, Liberia, Madagascar, Namibia, Sierra Leone, Somalia, The Sudan, Zambia, Zimbabwe and parts of South Africa, in addition to Ghana and Zaire; in the Middle East in Egypt, Israel, Iran, Jordan, Oman and North Yemen, as well as Syria. The frequent recourse to states of emergency in Latin America is well-known, to the point where it is sometimes mistakenly thought of as a peculiarly Latin American problem (1). The chapter on Eastern Europe makes a special contribution to the literature on this subject, being the first published summary of contemporary law and experience and historical roots of emergency powers in this region, which until recently had often been thought of as somehow exempt from this phenomenon.

In short, the problem is of global importance. One study, published in 1978, stated that at that time at least 30 of the 150 states which compose the community of nations were under a state of emergency (2). It is probably no exaggeration to say that at any given time in recent history a considerable part of humanity has been living under a state of emergency.

The author of the chapter on Turkey has made a valuable contribution to this subject in distinguishing between states of exception and régimes of exception on one hand, and between "transitional régimes of exception with democratic goals" and "transitional régimes of exception with authoritarian goals" on the other (3).

States of exception are defined as "extraordinary modes of governing provided for by the laws of the country and subject to such laws for their declaration and implementation", while régimes of exception are defined as "de facto situations of a purely political nature", that is, declarations of a state of exception accompanying "interventions (in government) which cannot be justified in terms of the constitution or previously established laws" (4).

These definitions draw attention to another aspect of the problem which is sometimes overlooked : recourse to a state of emergency corresponds to a certain respect for legalism, or at least the desire to demonstrate such respect.

On the one hand, a situation not dissimilar to a state of emergency in terms of the extent to which human rights are restricted may exist where the government simply assumes the repressive powers it considers necessary without regard for legal or constitutional formalities. These situations may be described as de facto states of emergency (5).

On the other hand, a state of emergency need not entail gross or excessive violations of human rights. The state of emergency is the counterpart in international law of self-defence in penal law. That it may be necessary to suspend respect for certain human rights in order to prevent the nation from falling into chaos is universally admitted. However, the very concept of necessity, when respected, prevents excessive infringements of rights, just as the codification, in

accordance with the principle of necessity and proportionality, of a list of non-derogable rights serves to prevent gross violations of human rights. The problem, then, is to prevent abuse of states of emergency, and the formal declaration of an emergency is a step in this direction.

A second distinction, between régimes of transition having democratic goals and régimes of transition having authoritarian goals, is especially important, for it draws attention to a fundamental principle set forth in the penultimate article of the Universal Declaration of Human Rights, the principle that all restrictions on human rights, including emergency measures, must be compatible with the requirements of a democratic society. Closely related is the principle that nothing in the text may be used by a state to infer "the right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms" set forth in the declaration (6).

Without these principles and this distinction, determining the legitimacy of a state of emergency would remain a near-arithmetical comparison of the threat to the public order on the one hand and the repressive capacity of the law enforcement agencies on the other. These principles move the issue of legitimacy to another level by permitting the question "what is the public order which is being defended ?"

In the Greek case, the European Commission on Human Rights addressed the question whether public disturbances after the military coup justified the suspension of human rights (7). This hints at a much larger question : if the right to rebellion exists, in international or national law, would it not be anomalous, in situations where the right obtains, for the law of human rights to concede to a state the right to take exceptional measures - that is to deny certain human rights - in order to defeat a legitimate rebellion ? The solution of this problem is facilitated by recognising that the problem of rebellion is addressed on three different levels by three distinct branches of international law. The question of the methods employed by both sides is the particular competence of humanitarian law, which addresses the legitimacy of the modalities of the struggle but not the legitimacy of the struggle itself nor the legitimacy of the parties. The legitimacy of the struggle itself and the right of the government and liberation movement to international recognition are political questions addressed both by the political organs of international organisations and bilaterally between the parties concerned and other states. The legitimacy of a state's recourse to exceptional measures to defend its existence is a distinct question within the competence of human rights bodies. A human rights body is not competent to find that rebellion in a given situation is legitimate or that a government, by reason of its human rights policies, is illegitimate. It can, however, find that by adopting the purpose of establishing an undemocratic state or of eliminating certain rights it has forfeited its right to self-defence, or more precisely, it cannot claim justification for its actions under the law of human rights. Note that the constituionality of a régime is immaterial in the international law of human rights; whether the régime tends to restore a democratic system of government or to eliminate democracy or certain rights is, in contrast, eminently important in the international law of human rights.

In the Greek case, the decision of the European Commission did not rest on these grounds. The Commission expressly rejected, however, the government's argument that its suspension of human rights was so linked to the sovereign decision to overthrow a certain form of government ('create a revolution') that it was necessarily beyond the competence of the Commission. Not only did the Commission reject the argument, it evaluated the claim of a right to derogate and found that the right did not obtain (8).

This leads to another point, the disturbing tendency observed in many of the preceding chapters for a state of emergency to become perpetual or to effect far-reaching authoritarian changes in the ordinary legal norms. In the chapter on Zaire, the author states that after an early period when emergencies were declared in response to genuine national crises, formal emergency measures were abandoned but other methods of control developed to the point that "one may without hesitation speak of an absolute monarchy in which the ruler's will is practically without limits" (9). Syria has been under a continuous series of emergencies since the end of Ottoman rule in 1920. As was noted in that chapter, the Martial Law Decree of 1962, still in effect, "in a sense may be considered the basic law of the country, not only because its provisions override those of the constitution, but also in that it has been a constant in a period when the country has known a succession of constitutions" (10). In Malaysia, there was first a drastic weakening of constitutional safeguards on emergency powers; secondly, four declarations of emergency during the last 18 years, none of which has been revoked; and thirdly, a series of ordinary laws permitting prolonged detention, imposing drastic sentences for security offences, restricting freedom of movement, freedom of association and expression, trade union rights, due process rights and political rights.(11) In Uruguay, after a brief period of reliance on emergency measures provided for in the constitution, an "institutionalisation" (12) of the state of emergency began with the establishment, by wholly unconstitutional processes, of new legal norms which restricted human rights and increased the powers of the executive to an extent far greater than under the constitutional state of emergency (13).

Various explanations for this phenomenon have been offered. The author of the chapter on Uruguay observes that "people have become accustomed to the emergency régime to the point that it has become the normal machinery of government" (14).

Several authors have also noted that, where the state of emergency was imposed during social unrest resulting from grave deterioration of the economic situation, the governments' decision to treat the symptoms without treating the disease tends to perpetuate the crisis (15). As is stated in the chapter on Peru:

> "It is the acute social conflicts that arisé and will inevitably continue to arise in societies founded on deep-seated disparities that are at the root of various situations of exception ...
>
> The civil or military groups which rule in this type of society have a tendency to use states of exception as a means of perpetuating situations that are inherently volatile and explosive." (16)

In some cases, as in Thailand, excessive use of emergency powers may be explained in part by the persistance of ancient absolutist moral values and political habits (17). In others, as several authors have indicated, it is due to the emergence of a modern authoritarian political doctrine, the doctrine of national security (18). This doctrine, whose effects can be seen in the chapters on Greece, Turkey and the four Latin American countries, can be summarised in the following terms (19) :

1. The world is divided into two blocs, the East and West, whose values and interests are irreconcilably opposed.

2. The conflict between them is not only military, but also "a struggle against the ideology, culture and traditions of the adversary" (20).

3. The conflict occurs not only internationally but also intranationally.

4. The duty of the military authorities to defend the nation therefore extends to the combat against any quasi-military, ideological, cultural or other manifestations of this enemy within the country, making whatever sacrifices in the rights of citizens or alterations in the structure of government this may require.

Lest this seem exaggerated, the chapter on Argentina contains a number of quotations reminding us how seriously the idea of internal war has been taken by the military authorities of Argentina (21).

Not only does this doctrine explain the frequent military coups and suppression of human rights, but the concepts of the internal enemy and of cultural, ideological and psychological warfare in particular, also explain the reluctance to permit a return to elections, civilian government and political and ideological pluralism. The U.N. Special Rapporteur on states of emergency refers to governments which have expressly adapted the purpose of transition towards so-called 'new forms of democracy', including "gradual", "limited" and "authoritarian" democracy (22). The concept of a régime of transition towards democracy recognises that in extreme situations a certain lapse of time may be necessary to prepare the ground for elected government. However, apart from delay in permitting a return to elected government, what characterises these "new forms of democracy" is the purpose of confining the political process within narrow ideological parameters, thus limiting participation to a select part of the population. This, of course, is incompatible with the very essence of democracy.

These régimes also illustrate the close link between the two above-mentioned limitations on states of emergency, that they must be compatible with a democratic society and not "aimed at the destruction" of any human rights, for in pursuit of the transition to an authoritarian society and the intranational cultural and ideological warfare, they adopt measures and policies having the express purpose of denying the right of every person, without discrimination, to enjoy freedom of opinion, of association, and of participation in public affairs.

A final, general observation concerns the frequency with which military governments are responsible for prolonged states of emergency or the use of a state of emergency to effect a transition towards an undemocratic society. In some cases the military intervention is abrupt, as in the 1967 coup in Greece; in Uruguay it has been seen how the armed forces progressively assumed control of the higher organs of government; in Colombia indirect control over the decisions of the elected government was exercised by threat of direct intervention (23).

It has also been seen how abuse of states of emergency is more frequently due to disregard for constitutional and legal safeguards than inadequacies in the law. A programme for the prevention of abuse of states of emergencies, therefore, cannot be limited to the search for flawless legal formulas. The real potential causes of abuse must be confronted.

Therefore, in regions of the world where authoritarian governments constitute a more substantial and immediate threat to the nation than armed conflict with a foreign enemy, governments not already held hostage by a military 'state within the state' should consider the possibility of eliminating this potential threat to democracy, as has been done in Costa Rica. In nations where this is not a present possibility, because of external threats or because the armed forces already have the political strength to veto such a proposal, the recruitment, training, leadership and organisation of the armed forces should be studied with a view to adopting practical measures to reduce the risk of military intervention. In the field of training, for example, one essential step would seem to be to adopt appropriate measures to inculcate appreciation of constitutionalism, democracy and human rights and to eliminate the influence of anti-democratic doctrines such as the doctrine of national security.

II. EFFECTS OF STATES OF EMERGENCY ON ECONOMIC, SOCIAL, CULTURAL AND POLITICAL RIGHTS

Some writers have emphasised the effects of states of emergency on individual rights, particularly the right to be free from arbitrary deprivation of freedom and the right to a fair trial (24). This tends to create a somewhat false image of states of emergency, for one of their most fundamental characteristics is precisely the breadth of their impact on a society. They typically affect trade union rights, freedom of opinion, freedom of expression, freedom of association, the right of access to information and ideas, the right to an education, the right to participate in public affairs ... not only individual rights but also collective rights and rights of peoples, such as the right to development and the right to self-determination. What follows is a brief description of the effects of states of emergency, or their abuse, on some of these rights.

Trade Union Rights

Strikes by organised labour, or general strikes in which trade unions typically play a leading rôle, are not infrequently among the causes of states of emergency. In the preceding chapters we have the examples of the 1961 dock and rail workers' strike and the 1978 wave of strikes in Ghana, the 1969 public employees' strikes in Uruguay and the 1976 strike in the public health care system in

Colombia (25). However, restrictions on trade union rights are among the most common attributes of states of exception even when such strikes are not among the stated causes of the emergency. In Argentina, the state of emergency resulted in very broad suspension of trade union rights even though terrorism and the alleged incompetence of the elected government were the reasons given for the 1976 military intervention.

The preceding chapters show that restrictions of trade union rights take many forms : the legal dissolution of trade unions, the prohibition of strikes, interference with the right of union members to elect the officers of the union, interference with a union's right to affiliate with international trade union organisations, and retroactive criminialisation of trade union activities. Workers in certain industries may be inducted into the armed forces or participation in trade union activities made a security offence, with the result that participation in prohibited activity becomes subject to prosecution in special courts, frequently with enhanced punishments. Such activity may also be punished by summary dismissal and deprivation of the usual social benefits. In addition, trade union activists are often singled out as one of the first categories of persons to be subjected to administrative detention during a state of emergency.

The result of these measures is that a large part of the population may be effectively denied the right to defend its economic interest, as well as the right to organise for and demand the social and political conditions necessary for effective trade unionism.

It has also been observed that restriction of trade union rights deprives the society of a key mechanism for resolving social and economic conflicts and promoting development. In the ILO publication Freedom of Association and Economic Development, Professor G. Caire states :

> "The role of trade unionism is to serve as a channel for worker discontent by highlighting its social significance, that is to say by encouraging its collective, open and rational expression ... It is questionable whether (restrictions on the right to strike) are really effective in achieving the desired objective and whether strike action does not in fact serve as a means of regulating conflict" (26)

Professor Caire also quotes the ICFTU publication Economic Development and Free Trade Unions, which notes :

> "Trade unions, provided they are given a full part in development efforts on a voluntary basis, can be the most important social institution for promoting mass participation, whereas un-organised, illiterate and ill-informed workers contribute very little to the development of their societies" (27)

Freedom of Expression, Freedom of Information, The Right to Education and Cultural Rights

The effect of states of emergency on the complex of inter-related rights suggested by title varies significantly from one state of emergency to another. While Colombia continued to enjoy a relatively free and vital press during its long state of emergency and the state of emergency in Northern Ireland has scarcely affected these rights, other chapters amply demonstrate how destructive of these rights a state of emergency - or its abuse - can be.

In most states of emergency censorship is introduced. The way it is applied, however, varies greatly with the nature of the emergency itself and the attitude of the government. In some cases only statements or printed material likely to exacerbate the problems which led to the state of emergency - revolutionary literature, for example - are prohibited. In others criticism of the state of emergency itself is prohibited. In still others, there is a near total ban on criticism of the government and critical comment on social or political problems (28). If such rules are applied systematically, the vitality and relevance of radio, television and the press, to which vast numbers of persons look for "access to information and ideas" and even as a form of access to culture, may suffer serious damage.

Censorship, however, is only one of the perils posed by states of emergencies to this complex of rights. Newspapers, magazines and publishing houses may be closed or expropriated. They may suffer such irreversible setbacks, including financial losses from temporary closures, denial of newsprint, seizure or destruction of property or arrest, exile or assassination of staff, that it becomes impossible to operate. Smaller institutions are more likely to succumb to such pressures, so that the media tend to become more monopolised and less diverse (29).

Another indirect consequence of severe censorship is that it becomes increasingly difficult for government officials themselves to be adequately informed about the extent of abuse of authority, the gravity of social problems and other matters which cannot be freely reported.

Purges of the curricula and staff of schools and universities are common during states of emergencies, especially those of long duration (30). In extreme cases, the educational system is brought under the direct control of the armed forces, with given schools and universities being entrusted to the tutelage of an officer whose sole qualification, more often than not, is loyalty to the government.

Intolerance in the liberal arts may also result from states of exception. As with other forms of censorship, its effects vary significantly from one state of emergency to another. In some cases only literature or artistic works, including theatre and music which express opinions or a philosophy closely linked with the problem which led to the state of exception are affected. In other cases, it may extend to all works by authors or artists simply associated publicly with social or cultural positions which have fallen into disfavour, or works which treat themes - such as repression, poverty or resistance to authority - which have become uncomfortable for the government, even if written in a completely different context. This type of censorship may also be extended to the social sciences, such as history, economics,

education, political science, psychology and sociology. The more extended forms of censorship are encouraged by the concept of the international and internal socio-cultural war which is part of the Doctrine of National Security, but it occurs in other contexts as well. The Argentine military government, to give but one example, banned, inter alia, the works of two of Latin America's Nobel Laureates, the poet Pablo Neruda and the novelist Gabriel Garcia Marquez, the works of Freud and the Swiss psychologist Jean Piaget, as well as certain encyclopedias (31).

The consequences of this intolerance or distrust of cultural pluralism are two-fold. In the first place, it deprives the population of access to elements of their own national cultural legacy and international authors whose works form part of the common cultural heritage of mankind. In addition, the lack of access to such works and the atmosphere of cultural obscurantism handicaps the creative efforts of living artists and writers, thus further impoverishing the national culture. This intolerance, cultural conformism and narrow cultural nationalism, may also have adverse effects for the right of minorities to their own culture, religion and language (32).

Political Rights and Self-Determination

Suspension or restriction of political rights, as the preceding chapters show, is frequently one of the first consequences of a state of emergency. It takes various forms.

One is the prohibition of political activities. This may involve no more than a ban on public meetings or demonstrations, which perhaps even are limited to specific places and dates. In other cases it takes the form of a broader ban on activities, including the banning of political newspapers and speeches, the 'suspension' of all activities of political parties or the dissolution of such parties, the prohibition of the advocacy of specified ideas or simply a categorical ban in terms of all political activity.

Such measures may affect not only political parties or organisations but also 'popular organisations', that is, groups which do not adhere to any particular political ideology but are created to defend the interests of specific sectors of the society such as youth, women, the rural poor or residents of a certain area.

One would expect that with the suspension of rights for some time the threat to the nation would be eliminated or brought under control, permitting the resumption of political activity. However, in some countries the restriction of political parties and activities is increased rather than diminished with the passage of time. The restrictions are often enforced by measures so harsh - including retroactive criminalisation, the imposition of exceptionally heavy sentences of imprisonment, lengthy detention without charge and even systematic torture of political prisoners - that one can only conclude that the goal is not to overcome a particular crisis but rather to eliminate permanently the political opposition. This particular abuse of states of emergency is linked with the use of a state of emergency as a régime of transition towards an undemocratic society, and the purpose of eliminating the political opposition is sometimes openly admitted.

In addition to interference with the activities of political parties and 'popular organisations', the infringement of political rights frequently involves denial of "the right to take part in public affairs ... through fully elected representatives" and "the right to vote and be elected at genuine periodic elections" (33).

Three patterns can be observed. The most common, and most drastic, is the coup d'état in which the elected leadership of the executive branch is dismissed, the elected legislature suspended or dismissed and, typically, elections are postponed indefinitely or to some distant date.

In other cases, the right to participate in public affairs through elected representatives is affected by using emergency powers against selected members of the national legislature or local officials. In India, for example, the legislature remained in session during the state of emergency but more than twenty members of the parliamentary opposition were detained without charges. The elections were also twice postponed (34).

Apart from the problem of fraudulent elections, which is not particularly related to states of emergency, the state of emergency which serves as a transition towards an authoritarian society does frequently involve the holding of elections which are not free and genuine. Uruguay provides illustrations of how an election may be so conditioned that it does not permit a genuine determination of the will of the electors. The 1980 draft constitution, which was not adopted, envisaged a presidential election with a single candidate who would need to receive the approval of the armed forces prior to the election (35). The draft constitution having been rejected in a national referendum, elections for members of the controlling bodies of the parties were held in 1982. Only three parties were allowed to present candidates in this election. Citizens deprived of their political rights by Institutional Act No. 4 (about 8,000) could not participate. Also, any person having been a candidate in either of the immediate past elections (1966 and 1971) was precluded from presenting his candidature, regardless of his political affiliation, and the candidates were prohibited from making any criticism of the ruling military government (36).

Although the plain refusal to permit elections which disenfranchises the entire people is the most common violation of the right to vote; suspension of the political rights of categories of persons by emergency decrees has also occurred (37).

A distinct political right recognised by international human rights instruments is the right of access to public service. This right is often infringed, again in prolonged states of emergency, by purges of the public administration pursuant to emergency decrees as well as political discrimination in hiring and advancement. In Greece, for example, a political purge affected not only the staff of various ministries and public offices, but also the police and military, the judiciary, professors in public universities, teachers in public schools and even the administration of the Greek Orthodox Church (38).

The Universal Declaration states in article 21, "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections ...". It has been

argued that prolonged suspension of elected government and denial of political rights constitutes a rupture between the governors and the governed so profound that it is comparable to the domination of a people by a foreign power and violates the right to self-determination, a right so high in the hierarchy of legal norms that it is considered jus cogens (39). In a recent paper, Dr. Salvatore Senese expressed this argument in the following terms :

> "But there is an even more radical contradiction of democratic principles ... since the Doctrine of National Security attempts to set the supreme goals of political life independent of and in opposition to all that individuals ... think on the subject. The imperatives of security and development are imposed from outside the social body. They are presented as the result of scientific observation /and given/ a veneer of inevitability ... The people are, therefore, dispossessed of the right to create and fashion the patterns of their existence and to choose the path of their common destiny. Sovereignty is no longer limited to the people, their will, to ... the participation of all. Consequently, the political power no longer draws its legitimacy from the people's sovereignty ...
>
> In such circumstances, the individual as a historical and natural entity and as a depository of inviolable rights is effaced. In the same way, the principle of the political freedom of citizens as a means of ... self-determination is effaced. These two concepts underlie the entire system of human rights recognised by the international community." (40)

Although Dr. Senese's analysis is based on a study of the Doctrine of National Security, his observations are equally valid for régimes in other areas of the world in which implementation of an official ideology has priority over the right of the people freely to choose and determine the economic, social, cultural and political system under which it will live.

The Right to Development

The content and implications of the right to development, whose existence was recognised by the UN General Assembly in 1979, is the subject of considerable debate (41). It seems likely to remain so for some time. An early conception of development, now largely discredited, focused almost exclusively on economic growth. More recently, the 'basic needs model' has broadened the concept of development to include improvement of other socio-economic indicators such as literacy, life expectancy, infant mortality and employment (42). Still others contend that the concept of development includes fulfilment of spiritual as well as material needs, the provision of full opportunity for participation and recognition of the human being as the subject rather than the simple object of the development process (43).

More than ordinary caution is indicated in approaching this complex topic. However, given the not infrequent attempts to justify suspension of human rights by reference to an economic crisis or the exigencies of development, the greater error would be not to try to reach some tentative conclusions about the implications of states of emergency for this right.

In Uruguay, during 10 years of emergency rule the purchasing power of wages has fallen 50%, the value of the currency internationally has fallen from 240 to 45,000 pesos to the dollar (44). There also exists an important study, undertaken by the New York Academy of Sciences, together with the American Medical Association, the American College of Physicians, the American Association for the Advancement of Science and the National Academy of Sciences, on the effects of the state of emergency on the medical profession in Uruguay (45). As we have seen, adequate health care services is one element of development.

Within the first three months after the armed forces assumed control of the national university, according to this study, 61 members of the Faculty of Medicine were dismissed and 35 arrested for security offences. A total of 54 cases of imprisonment of medical doctors was verified.

The teaching of social medicine, ethics and psychoanalytical techniques were forbidden, and the departments of social medicine, biophysics and forensic medicine eliminated. The neurology department was reduced from 7 full-time positions to 2. Advancement and the granting of contracts were politicised, resulting in a lowering of academic standards. Funds previously provided to the Faculty of Medicine and its hospital were diverted to the Armed Forces Hospital, and grants from international agencies allowed to lapse. All new research proposals required the approval of the military authorities.

Medical libraries have been forced to curtail subscription to foreign medical journals, and the quality of national medical publications has deteriorated. The annual medical congresses have been stopped by the military authorities, and travel to international meetings restricted. Many of the most experienced clinicians and researchers have been forced into exile.

The study concludes that these developments must inevitably result in "the lessening of the skills of the medical practitioner and ultimately in the deterioration of the quality of the medical care available" (46).

The chapter on Argentina gives some indication of the effects of the prolonged state of emergency on education, another element of development (47). Additional details are given in two studies published in Index on Censorship in 1978, Time of Silence by Nissa Torrents, and Clearing the Teaching Area by N. Caist r (48). They report that, as the result of the military 'intervention' in the Argentine universities, 10,000 books were confiscated from teachers and students in one university, in another 17 teachers were charged with 'plotting to implant Marxist ideology' as a result of their academic activities, and 50% of the staff were dismissed for security reasons in a third.

Financial support for public education was reduced, and the real wages of teachers fell drastically. There was a corresponding increase in teacher resignations, leading to the closure of many primary schools, particularly in rural areas (49).

In Uruguay, scientific research was also affected. Among the thousands of persons arrested, dismissed, exiled or 'disappeared' under the state of emergency were 8 members of the Atomic Energy Commission, approximately 100 members of the National Council for Technological and

Scientific Research, and 600 from other institutes such as the National Research Institute for Agriculture and Cattle Breeding (50). In sum, the loss of academic freedom, substitution of political for professional criteria in advancement and hiring, the purges, arrests and what the author of the chapter on Argentina refers to as general 'legal insecurity' has led to a wave of exiles - a new type of 'brain drain' generated by abuse of emergency powers. Valuable technicians, researchers and skilled professionals are lost.

The use of a short-lived state of emergency in response to a grave and sudden economic crisis, or to permit implementation of specific, urgently-needed reforms, cannot be evaluated here. Even by the narrow definition of development as economic growth, however, prolonged states of emergency have not been shown to be effective. If we take a broader view of this right and assume that development means assuring that the basic needs of the entire population are met, or participation in decision-making and the fulfilment of the non-material needs of the individual, the failure of states of emergency becomes even more evident.

III. THE RIGHT TO DUE PROCESS AND THE RIGHTS OF DETAINED OR IMPRISONED PERSONS

The effects of states of emergency on these rights has been the subject of much concern, owing, inter alia, to the frequency with which states of emergency are accompanied by infringements of these rights, the grave consequences of denial of these rights for the individual concerned, their close relation to violations of other rights such as political or trade union rights, and the frequency with which denial of these rights is associated with gross violations such as the torture or murder of prisoners. That a person should be convicted without a fair chance to defend his innocence, or deprived of his freedom without being charged with a crime, shocks the conscience and seems the epitome of injustice. The following is a brief summary of the dangers of the abuse of the right to a fair trial during states of emergency and some suggestions which may help to prevent such abuse.

Due Process

The right of a person tried for criminal offences to due process of law or to a fair trial is not in fact one right but rather a complex of rights, or at least a right having many distinct elements. An examination of the definition given this right by the international human rights instruments permits the identification of at least 20 distinct rights :

1. The right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him. ICCPR, article 14.3(a) (51).

2. The right to defend himself in person or through legal assistance of his own choosing. Article 14.3(d).

3. The right to be informed of the right to counsel. Article 14.3(d).

4. The right of an indigent defendant to have free legal assistance "in any case where the interests of justice so require". Article 14.3(d).

5. The right to have adequate time and facilities for the preparation of his defence and to communicate with counsel. Article 14.3(b).

6. The right to be present at trial. Article 14.3(d).

7. The right to be tried "without undue delay". Article 14.3(c).

8. The right to be presumed innocent until proved guilty according to law. (Article 14.2.

9. The right not to be compelled to testify against himself or to confess guilt. Article 14.3(g).

10. The right to a fair hearing in a tribunal which is "competent, independent, impartial" and "established by law". Article 14.1.

11. A qualified right to a public trial. Article 14.1.

12. The right to examine, or have examined, the witnesses against him. Article 14.3(e).

13. The right to obtain the attendance and examination of defence witnesses under the same conditions as prosecution witnesses. Article 14.3(e).

14. The right to equality before the court. Article 14.1.

15. The right to the free assistance of an interpreter, if necessary. Article 14.3(f).

16. The right not to be tried or punished again for an offence for which he has already been finally convicted or acquitted. Article 14.7.

17. The right to a published judgment. Article 14.1.

18. The right, if convicted, to appeal the conviction or sentence to a higher tribunal. Article 14.5.

19. The right not to be charged with a crime on the basis of an act or omission which did not constitute an offence when committed. Article 15.

20. The right of a person unjustly convicted to compensation. Article 14.6.

Violations of almost all these rights are common during states of exception, as the preceding chapters show. In Northern Ireland, for example, confessions which have been coerced may be admitted into evidence provided only that they are not the product of torture or ill-treatment (52). In Turkey, military courts in which security

offences are tried during states of emergency lack essential guarantees of independence and impartiality (53). The lack of independence of such courts is also analysed in the chapter on Uruguay (54), and the author of the chapter on Thailand concludes that there is certainly some executive interference and some degree of influence on the judiciary in the martial law courts of that country (55).

In Turkey and Northern Ireland, a person may be convicted on evidence given by a witness who is not identified and does not appear during the trial, but whose testimony is summarised for the court by a law enforcement officer (56).

Other elements of due process often suspended under a state of emergency include the right to be informed promptly of the charges, the right to counsel of one's choice, the right to have adequate time for the preparation of the defence, the right to be tried without delay, the right to a public trial, the right to appeal, the right not to be retried after a final judgment, and non-retroactivity of penal laws.

The most exhaustive catalogue of violations of due process in a given country during a state of emergency is to be found in the series of decisions concerning Uruguay issued by the Human Rights Committee, where the Committee finds violations of the principle of non-retroactivity of penal laws, the right to counsel of one's choice, the right to communicate with counsel, the right to be promptly informed of the charges, the right to have adequate time and facilities for the preparation of the defence, the right to trial without delay, the right not to be forced to incriminate oneself, the right to a public trial, and the right to a public judgment (57).

The question of derogation from these rights has long been the subject of controversy. When the derogation provisions of the International Covenant were being drafted, France argued that the right to due process as a whole should be non-derogable (58). This view did not prevail and, with the exception of the principle of non-retroactivity set forth in a separate article, the entire complex of rights was made derogable, leaving the door open to abuse. Although in theory the principle of 'strict necessity' should minimise the effect of emergency powers on the rights of persons on trial, the weakness of international review mechanisms deprives this theoretical limitation of much of its force.

What is needed much more than a retrospective examination of the necessity for particular measures in particular circumstances is a preventive approach, clearly indicating in advance of a state of emergency which elements of the right to a fair trial should be considered essential and non-derogable.

Some progress in this direction has already been made in international law (59). On various occasions the Inter-American Commission of Human Rights has stated that the right to due process may not be derogated from during states of emergency, despite the fact that the corresponding provisions of the American Convention are not classified as non-derogable by the Convention (60). In

addition, humanitarian law provides that even in times of armed conflict within a nation, civilians tried on criminal charges related to the conflict are entitled to respect for fundamental elements of due process. Specifically, article 6 of Protocol II to the Geneva Conventions of 1949 concerning the protection of victims of non-international armed conflicts provides that such persons are entitled to the following :

1. The right to be informed promptly and in detail of the charges. Article 6.2(a).

2. The right to "all the rights and means of defence necessary". Article 6.2(a).

3. The right to be present at trial. Article 6.2(e).

4. The presumption of innocence. Article 6.2(d).

5. The right not to be forced to give incriminating evidence or to confess. Article 6.2(f).

6. The right to a tribunal "which offers the essential guarantees of independence and impartiality". Article 6.2.

7. The right to appeal. Article 6.3.

8. The principle of non-retroactivity of penal laws. Article 6.2(c).

As Dr. Jiménez de Arechaga, former President of the Inter-American Commission of Human Rights, has suggested, guarantees that are considered non-derogable in time of war must a fortiori be considered non-derogable in times of lesser threats to the nation (61). That Protocol II makes these particular rights applicable to an armed conflict occurring within the national territory and to "penal offences committed in relation with the armed conflict" (Protocol I provides a somewhat more complete list of due process guarantees for civilians charged with crimes during an international armed conflict) is compelling proof that infringements of these rights during states of emergency can not be "strictly required by the exigencies of the situation". This should be formally recognised by competent authorities, both national and international, in establishing standards related to the possible effects of future states of emergency. It is a hopeful sign that no restriction of due process has yet been upheld by either the Human Rights Committee or European Commission on Human Rights on the ground that it was 'strictly required'. What is required, however, is a preventive approach, and national and international human rights authorities should formally recognise that at least the due process rights contained in article 6 of Protocol II are a priori non-derogable.

Leaving aside, for the sake of brevity, the right to a public judgment, right to a free translator, the right to compensation for unlawful conviction and the general principle of equality before the courts, we find that according to the standards of Protocol II a significant number of rights might still be suspended : the right to a public trial, the right to a trial without undue delay, the right to examine prosecution witnesses, the right to obtain the attendance and examination of defence witnesses, the right not to be retried after a final judgment, the right to a lawyer of one's choice, and the right to free legal assistance if necessary.

It is submitted that, by virtue of general principles regarding derogation, all but the first three of these rights should also be considered a priori or at least presumptively non-derogable.

With regard to the right to a lawyer of one's choice, the only known justification for suspending this right is the fear that some lawyers will smuggle contraband to imprisoned clients or carry messages which represent a danger to security. To the extent that this is a legitimate concern, it would seem to be fairly easily controlled by other measures. At the limit, a list of lawyers not permitted to visit prisoners charged with security offences could be established, a drastic measure to be sure, but considerably less drastic than requiring such defendants to accept assignment of a military lawyer as counsel. It is worth recalling that the appointment of military counsel, the usual consequence of suspension of this right, has been criticised on three grounds. First, military lawyers are usually unqualified and inexperienced; secondly, they cannot be relied upon to provide the vigourous, independent defence which every defendant deserves; and, thirdly, their appointment serves to eliminate what the author on Uruguay refers to as the "awkward witness" (62) of abuses occurring either before or during trial, thus facilitating further violations of the rights of the defendant, including physical abuse and torture.

The reasons why the right to free legal assistance when necessary should be considered non-derogable can be stated briefly. Firstly, it is unlikely that the state's ability to finance legal assistance will be directly affected by a threat to the life of the nation; secondly, where the right to legal assistance obtains, it is unthinkable that discrimination on the basis of ability to pay should be permitted because of a state of emergency, when the importance of legal assistance is enhanced by increased penalties and lessened safeguards against wrongful convictions.

In Protocol II, as well as in the human rights treaties (63), the right to examine prosecution witnesses and to obtain the attendance and examination of defence witnesses are set forth in a single provision. As we have seen, the right to examine prosecution witnesses is sometimes derogated from because of a justifiable fear that terrorist organisations may take revenge against witnesses, or that this possibility will intimidate potential witnesses and prevent them from giving testimony. However, there is no plausible reason for suspending the right of a defendant to obtain the attendance and examination of witnesses on his behalf. Similarly, no convincing explanation has ever been advanced for derogating, during a state of emergency, from the right of a person finally acquitted or convicted not to be tried or punished again for the same offence.

With respect to the requirement of Protocol II that courts enjoy "essential guarantees of independence and impartiality", it is submitted that this be interpreted as requiring that courts be structurally or organisationally independent from the other branches of government. This would bar the creation of ad hoc special courts, such as that described in the chapter on Zaire (64), which never have any justification other than political expediency, and the more common phenomenon of trial of civilians by military or martial law courts.

The trial of civilians in military courts, it is submitted, is never 'strictly required' so long as civilian courts remain functioning (65). The reasons invoked for transferring jurisdiction from civilian to military courts are never of sufficient gravity to preclude less onerous alternatives; while the preceding chapters have demonstrated that military trials are always accompanied by the infringement of a host of defence rights. The experience of Northern Ireland proves that even where there is a high level of terrorist activity, with proper precautions civilian courts can continue to exercise jurisdiction over security offences.

It is to be hoped that before long the international community will be able to agree that the entire complex of due process rights should be considered non-derogable. Until then it is suggested that derogation from due process rights during a state of emergency should be limited essentially to three types of measures, assuming, of course, that they are shown to be 'strictly required' in the particular situation :

1. Suspension of the right to a public trial.

2. Permitting larger delay than normal in proceeding to trial.

3. Admitting the testimony of prosecution witnesses who do not appear in the trial, while making all possible efforts to permit the defence to test the veracity of such testimony and preserving the right to examine all witnesses who do appear.

The Rights of Persons Subject to Any Form of Detention or Imprisonment

As the preceding chapters show, administrative detention, i.e. detention without criminal charge, is one of the most frequent measures taken pursuant to states of emergency. The number of persons detained is often in the thousands or tens of thousands. The official figure for persons detained during the 1981-82 emergency in Poland is 6,300; at the beginning of the 1967 emergency in Greece, 7,000 persons were detained in Athens alone; Amnesty International estimates that 77,000 persons were detained during the 1975-77 emergency in India, and it is reported that 35,000 persons were detained during the August-October 1982 emergency in Peru (66).

Depriving an individual of his freedom without evidence of criminal conduct and without the prospect of a trial in which his guilt or innocence will eventually be established, is in itself a serious denial of human rights, justifiable only in extreme circumstances. When it cannot be avoided, care must be taken to avoid all unnecessary prejudice to other rights of the detained person, including, inter alia, the right of access to a lawyer, the right to visits by members of one's family, the right to medical care and adequate nutrition, the right to physical integrity and the right to be treated "with humanity and with respect for the inherent dignity of the human person" (67).

Unfortunately, experience has demonstrated the tendency for even graver infringements of human rights to follow when, as so often occurs, this essentially preventive temporary measure is transformed into a system of prolonged incarceration which is entirely administrative, i.e. beyond the control of the courts. The installation of such a system constitutes a major element of what several authors have described as a dual or two-track legal system, where full or reasonably full guarantees are maintained on one side, but a separate system exists, to be used at the discretion of the executive, which duplicates the purpose of the first but differs from it in that it is devoid of guarantees. The Inter-American Commission has remarked that the use of prolonged detention may be the equivalent to punishment without the slightest semblance of due process, without even the formality of a sentence (68).

Detention is also deliberately used in some cases to circumvent or frustrate the functioning of the courts, as for example when an individual is made the subject of a detention order at the expiration of a sentence of imprisonment or when an application for habeas corpus relief has been granted (69).

In addition to legislation which permits detention for an indefinite period or a period which is unconscionably long, the principal factor implicated in abuse of detention powers is the suspension of the right to challenge the legality of detention in a court of law. Other factors include denial of access to a lawyer, failure to assure free legal services to indigent detainees, distributing the power to order detention too broadly among low-ranking officials, and suspending the individual right of action against officials guilty of wilful violations of his rights.

In addition to prolonged detention per se, two other abuses associated with detention warrant mention. One is extra-legal detention in clandestine prisons or jails, the other is torture and inhuman treatment. Insofar as legally authorised detention is concerned, the principal conditions which facilitate or encourage ill-treatment and torture are non-publication of the names of persons detained, denial of access to a court or to a lawyer, denial of visits by family members and laws which give immunity to security officials or provide that charges against them be held in military or martial law courts. An additional factor which comes into play when a person is facing or may eventually face criminal charges, is changes in the law of evidence which encourage greater reliance on confessions or limit the defendant's right to contest evidence collected during the investigatory stage of proceedings.

Efforts to prevent torture and mistreatment during legally authorised detention should include three principal components. First, the detainee or arrested person should have as much contact as possible with 'the outside world'. In particular, visits by his lawyer and family should be facilitated. Second, no legal incentives to torture should be created. Strict legal accountability of all officials involved in detention and interrogation should be maintained and the law of evidence should not create additional incentives to obtain confessions. Third, practical administrative measures reinforcing the supervision and accountability of persons involved in detention and interrogation should be adopted.

The methods adopted in Northern Ireland after public exposure of several cases of torture or inhuman treatment are instructive (70). They included : the policy that a woman officer should always be present when female detainees are being interviewed; placing one way windows in the doors of all interrogation rooms; giving ranking officers the duty and authority to interrupt any interrogation they observe which seems excessive; requiring a medical check each time a security prisoner or detainee is transferred from one place of detention to another. Other noteworthy elements of this programme for the prevention of mistreatment include fixing a limit on the hours in which interrogation may take place and the number of persons who may participate, requiring that officers who interrogate be rotated between that duty and general assignments, and education of persons having interrogation duties about their legal responsibilities. Two recommendations made by the Inter-American Commission in distinct contexts also are worth repeating here : one is that a centralised register of all persons detained be maintained, and the other is that all persons participating in interrogation be properly identified (71).

Significantly, the European Commission based its finding that administrative detention as practiced in Northern Ireland was justified under the state of emergency not only on evidence of the need for detention, but also on the measures adopted to prevent abuses from occurring during detention (72). Perhaps even more significantly, a pattern of physical abuse of security prisoners in 1977 was brought to light and stopped because of the action of doctors responsible for providing the mandatory medical checks of prisoners (73).

Unauthorised detention, being illegal by definition, is more difficult to control. Indeed, it seems in some cases to be motivated by the purpose of avoiding legal scrutiny of the grounds of detention and treatment given detainees, as well as the desire to avoid responsibility before national and world public opinion for the fate of persons so detained. In short, the very purpose of such detention is to violate the rights of detainees with absolute impunity.

In some cases, however, extra-legal detention is transformed into legal detention. After a period of time of clandestine incommunicado detention in the hands of unidentified authorities, during which time the person is invariably tortured or abused, the detainee is mysteriously transferred to the custody of acknowledged law enforcement authorities, brought before a judge and the detention is publicly reported. When this occurs, it does provide an opportunity for legal intervention and the law enforcement authorities who receive the person into their custody, or judges who take cognisance of the situation, commit a grave breach of duty if they turn a blind eye to this abhorrent practice. The full rigour of the law should be applied in any cases of extra-legal detention which come to light.

A final comment on this subject is that, whether in authorised or extra-legal detention, the most acute violations of human rights, such as the torture and 'disappearance' of detainees, are clearly encouraged by the idea that the individual is not simply a criminal - much less a suspect enjoying the presumption of innocence - but an implacable enemy. Equating the political or ideological opponent with an enemy not entitled to respect for the "inherent dignity of the human person", but whose only entitlement is to a combat without quarter, is perhaps the most destructive legacy of the doctrine of national security.

IV. SAFEGUARDS IN DOMESTIC LAW AGAINST ABUSE OF EMERGENCY POWERS

Constitutional Safeguards

States of emergency are almost always provided for in constitutions, in terms which spell out, with varying degrees of specificity, the circumstances in which they may be declared, the procedure for so doing, and their effects. As we have seen, violation of these constitutional restrictions are regrettably common. While violation of the constitution is per se of no significance in international law, such violations often result in the infringement of internationally recognised human rights.

Notwithstanding the frequency with which they are violated, constitutional restrictions on states of emergency serve two purposes. Real emergencies do occur, and many governments resort to emergency powers in good faith. To the extent that this is so, it is essential that the proper occasions for invoking emergency powers and their maximum scope be fully debated and decided in advance of rather than during a crisis. Since nothing less than the balance of power between the branches of government and the web of rights and duties between the governors and governed is at stake, it is only appropriate that these rules be given the highest position in the hierarchy of domestic legal norms.

Secondly, where governments come into power that are not disposed to respect limits on their authority, these constitutional provisions provide objective criteria by which the conduct of such a government can be judged. They represent a freely determined national consensus on the degree of dissent which may be tolerated, the values which are so fundamental that they may in no circumstances be violated, and on the limits to the power of a legitimate government.

In both of these functions - serving as guidelines and legal constraints for governments respectful of the rule of law and as a basis for criticism of lawless governments - constitutional provisions complement the norms established in international law, which are, of course, minimum standards. Constitutional norms often surpass international ones, for example, in limiting the effects of a state of emergency. Thus the Peruvian constitution of 1980 precludes the exile of citizens and the trial of civilians in military courts; the Malaysian constitution provides that states of emergency may not affect constitutional provisions concerning language or citizenship, and the Argentine and Uruguayan constitutions recognise a detainee's "right of option" to choose exile over detention (74).

Although constitutional provisions should be tailored to the form of government, legal tradition, social and cultural values and historical experience of each nation, certain basic principles can be recommended :

1. The effects of states of emergency on the rights of citizens and the powers of the various branches of government should be clearly spelled out. The vagueness of Eastern European constitutions in this respect is one of the major weaknesses in the efforts made thus far in the development of "socialist legality" (75). The Malaysian constitution, providing that emergency legislation can be inconsistent with any provision of the constitution except those concerning religion,

citizenship and language is another example of a constitution wholly inadequate in this regard (76).

It is suggested that, as a minimum, constitutions should specify that emergency measures may not affect those rights recognised as non-derogable in international law. The advisability of placing additional limits on the effects of states of emergencies, either to preclude derogations of rights which are considered derogable in international law or to protect rights not recognised in international law, such as the right to a jury or the right to a court which includes lay assessors, should be studied by each country in order to give effect to its values and legal traditions.

2. The constitution should enumerate and define the situations which justify departure from the normal legal order. Various types of emergencies should be distinguished : an economic crisis may not call for the same emergency powers as civil disorders.

It is particularly important, as the author of the chapter on Colombia advised, to distinguish between war with a foreign enemy and domestic disturbances. In an internal disturbance, he states "there is no enemy to destroy, but an order to restore" (77). As this observation suggests, the security problems posed by war or the threat of war and those posed by domestic disturbances are quite distinct and the law should take into account these differences. The legal powers needed to face various types of emergencies are different, and much of the value of defining the effects of states of emergency in advance is lost if all threats to the nation are accorded identical treatment.

As the training and preparation of the armed forces is essentially for warfare rather than law enforcement, their use in situations falling short of armed conflict increases the risk of excesses (78). They are also, as we have seen, more likely than ordinary police forces to escape from civilian control.

As is shown in the chapter on Greece, the psychological attitude of those charged with defending national security may be even more important than their legal powers in explaining human rights violations (79). Distinguishing between war and lesser threats to the public order also helps avoid the creation of a war mentality, which inevitably undermines respect for the humanity of the 'enemy' and for the rule of law.

3. The procedure for declaring a state of emergency should be constitutionally defined, giving primary responsibility to the legislature. As we have seen, there is a tendency to use states of emergency for political purposes, e.g. to repress a part of the population, to impose policies which do not enjoy popular support, or to defend an unpopular government's hold on power. For this reason, the ultimate decision to impose an emergency must be entrusted to the body which normally best represents the interests of all segments of the national community, the legislature. In many constitutions, this is accomplished by providing that the president may declare a state of emergency which will cease to have effect if not ratified by the legislature within a defined period of time. In some countries he can declare a state of emergency only if the legislature is not in session. Given the consequences of the decision to impose a state of emergency, it is often thought that it should not be taken unless there is a broad consensus in favour of it, and for this reason approval by an enhanced majority of the legislature is required.

4. The duration of states of emergency should be specified. With rare exceptions, threats to the life of the nation are inherently of limited duration. It is universally admitted that, to justify departure from the normal legal order, a threat must have an appreciable degree of immediacy and substance. The UN Sub-Commission's Special Rapporteur refers to this as "the principle of the exceptional danger" and explains that it requires, first, that the danger be "present or at least imminent", and second, that it be "so substantial that the measures and restrictions /on rights/ normally authorised ... manifestly are no longer adequate to maintain the public order" (80).

Review of the need for emergency measures must thus occur at regular intervals. The legislature should play a principal rôle in this review, for the same reasons that it should play the decisive rôle in the original decision. The best method for assuring this is to provide that no declaration of emergency shall have legal force for longer than a fixed period of time, which should not exceed six months.

Failure to review the need for emergency measures may encourage, as the author of the chapter on Northern Ireland described it, use of emergency measures after they are no longer strictly required because rule by emergency measures is more "convenient" than respect for the rights of individuals and the normal processes of law (81). Even if emergency measures fall into disuse with the passage of time, as sometimes occurs, the fact that a declaration of emergency formally remains in effect gives the executive discretion to resort to emergency powers at any time without complying with the normal formalities.

Constitutional safeguards concerning the effects of states of emergency on the judiciary and on the legislature will now be discussed.

The Judiciary

Even in times of peace, the power of the judiciary varies greatly from one country to another, particularly with respect to the power to determine the constitutionality of laws. In all societies, however, it assumes an important rôle in protecting the rights of citizens.

Restrictions on the jurisdiction of the ordinary courts almost invariably accompany states of emergency. Where emergency powers are employed in good faith to confront a real emergency, restriction of the powers of the courts renders more difficult the task of detecting abuses of emergency powers and eliminating unnecessary restrictions of rights. As was stated in the chapter on Northern Ireland, "If wider powers are granted to the executive and the police, then these powers should be subject to, if anything, stricter control to ensure that they are used only for the purpose for which they were introduced" (82).

In other countries one has the distinct impression that the jurisdiction of the courts is restricted for the very purpose of preventing judicial 'interference' in illegal practices. Judicial review during a state of emergency is essential to the concept of a state of emergency as the substitution of an exceptional state of law for the normal state of law, rather than as the substitution of the rule of law by lawless government. It is also essential to prevent the accumulative concentration of powers of government in one branch, the executive, which in the process acquires practically unlimited discretionary powers.

It is axiomatic that, for the protection of human rights, the greatest possible degree of judicial control should be striven for. However, it is widely thought that the executive and legislature, the political branches of government, are entitled to discretion in determining the existence and gravity of a threat to the nation, i.e. the need for a state of emergency, and the necessity for recourse to specific emergency measures. Whether judicial review of these two decisions is advisable is, therefore, another issue which must be decided in the light of the legal traditions of each country. There are, however, a number of recommendations which are universally applicable and which, if applied, would be of great utility in moderating the effects of states of emergency. They are as follows :

1. Normal judicial remedies should remain in effect for all rights which are not limited by the state of emergency. One of the distinct advantages of the American Convention on Human Rights is that it requires that, during a state of emergency, the "judicial guarantees essential for the protection of" (83) non-derogable rights may not be suspended. The Inter-American Commission has often drawn attention to the importance of this principle, especially to the importance of preserving effective judicial remedies for the protection of the right to life and physical integrity of prisoners and detainees. The principle should not be limited to non-derogable rights, but should apply to all rights which, in any given emergency, remain in force or are only partially curtailed by measures adopted pursuant to the state of emergency.

2. The ordinary civilian judiciary should retain jurisdiction to review individual cases of detention in order to ensure that the stated grounds are within the purposes of the emergency legislation authorising detention orders, that proper procedures have been followed and to ensure that the conditions of detention comply with the law. The importance of this point has been recognised by various international bodies. In its 1974 Annual Report, the Inter-American Commission recommended :

> "That the necessary rules be issued in all the States ... aimed at specifying the scope of the writs of habeas corpus or amparo with respect to persons detained in the exercise of special powers, exceptional powers or state of siege, prescribing that the interposition of one of these remedies to a judge obligates the arresting authority in all cases to bring the detainee before the judge, to deliver to the judge a copy of the arrest order, to inform him specifically where the person is being detained, and to show the documentation proving the correctness of the detention and inform the judge immediately of any transfer to another place." (84)

The Freedom of Association Committee of the International Labour Organisation goes even further, recommending that the courts retain jurisdiction to examine the merits of the detention :

> "The requirement of due process would not appear to be fulfilled if under the national law the effect of a state of siege is that a court to which application is made for habeas corpus cannot make and does not make an examination of the merits of the case." (85)

Although security reasons are often invoked to justify non-disclosure of the factual basis for detention, this is not a reason to deny the courts jurisdiction over the factual issue. In appropriate cases, the exceptional procedure of an in camera ex parte review of the facts purportedly justifying detention could be resorted to.

3. The ordinary courts should retain jurisdiction over charges of abuse of power by security forces, since entrusting jurisdiction over such offences to military or security courts has proven ineffective in preventing such abuse, and may even amount to a de facto grant of immunity which encourages human rights violations.

The anecdote in the chapter on Greece of a complaint concerning death under torture which lingered in the drawer of a military prosecutor until after the fall of the military government typifies this phenomenon (86). Another illustration can be found in a decision of the Human Rights Committee concerning the killing of seven persons by police during the search of a house (87). A complaint having been made by relatives of the deceased, criminal proceedings against the police were begun in the same military court which had authorised the search. The preliminary investigation was entrusted to the head of the police unit which had conducted the operation, that is, the direct supervisor of the men who committed the killings. The Inspector-General of Police, in his capacity as judge of the military court, ordered the proceedings discontinued on the ground that the killings were justified. The ruling was overturned on appeal and the case ordered to trial A trial was conducted - presided by the Inspector-General - and all 11 defendants acquitted, on the same ground.

Where the ordinary courts make findings of torture or ill-treatment it is essential that these be given full publicity. On recent occasions in Zimbabwe an order has been issued forbidding publication 'on security grounds', e.g. Guardian newspaper 9 and 10 July 1982. There is nothing more likely to ensure repetition of torture practices than the knowledge by the offenders that an official veil of secrecy will be drawn over their crimes. The Zimbabwe government has also approved retrospective legislation indemnifying members of the security forces from prosecution in cases where they believed action was warranted in preserving state security. The legislation covers the prison service as well as the army and police (Times newspaper, 14 August 1982). Such legislation is almost an invitation to torture.

4. The civilian judiciary should retain jurisdiction over trials of civilians charged with security offences, for the reasons explained in the preceding section on Due Process.

5. The right to appeal criminal convictions should be retained. When trial courts function under exceptional pressures and defendants face more serious penalties, the need for appellate jurisdiction is reinforced. The appellate level not only offers the hope of correcting individual injustices, but more importantly serves to defeat and correct faulty practices at the trial level. Knowledge that decisions are immune from appeal favours laxity in the administration of justice.

6. The independence of the judiciary must be preserved, for a subservient judiciary cannot be relied upon to accomplish the difficult task of protecting human rights and the rule of law during an emergency. As has been seen in preceding chapters, restrictions on the independence of the judiciary most frequently take the form of purges of the judiciary (88), although actual restructuring of the judicial branch also has occurred in some cases (89). Other ways of undermining judicial independence is to post recalcitrant judges to remote areas, as was done in Chile, or simply to suspend security of tenure, as in Argentina. The use of emergency measures in these ways should be expressly prohibited in the constitution.

Although "excessive deference to the executive" and "unwarranted self-restraint in the face of abuse of human rights" has characterised judicial behaviour in many states of emergency (90), the judiciary has played a courageous and useful rôle in other cases. The Zamorano habeas corpus decision in Argentina, the decision of the Supreme Administrative Tribunal in Greece, holding the purge of the judiciary illegal, and the refusal of Polish courts to apply post-war emergency statutes to the 1956 workers' protests are but a few examples (91). Providing additional guarantees of their independence and jurisdiction will surely encourage more courts to follow in this tradition.

The Legislature and Other Institutional Safeguards

More important than any list of formal restrictions on the power of the executive during an emergency is to maintain governmental and social institutions able to counterbalance its powers. The most important governmental institutions are obviously the legislature and an independent judiciary; non-governmental institutions whose rôle is important include the free press, trade unions, professional organisations, popular organisations and the churches. With rare exceptions, the most systematic abuses of human rights occur when all institutions able to bring pressure to bear on the executive to respect the formal limits of its power have been eliminated.

A pattern which is unfortunately familiar is one in which the executive has assumed all legislative authority, purged and intimidated the judiciary, forbidden all criticism, banned or assumed control of professional organisations and trade unions - in short, has eliminated most or all of the mechanisms of government by consent.

In contrast, even where the emergency is not of short duration, the preservation of vital institutional counterweights has helped limit the adverse effects of emergencies. In Northern Ireland, the combined effect of parliamentary debate and questioning of ministers, freedom of the press and the activity of non-governmental organisations and interest groups has encouraged continuing review of government policies and their effects. Abuses have been publicly debated and safeguards designed to prevent their recurrence have been introduced. A 1978 report by Amnesty International, for example, led to the appointment of a government commission on interrogation practices and the adoption of a comprehensive set of safeguards against torture and mistreatment (92). Similarly, in Colombia actions by human rights organisations, professional organisations, groups of parliamentarians and freedom of the press resulted in repeated denunciation of torture and other abuses, and contributed in some degree to the 1982 decision to lift the state of emergency (93).

Two concrete recommendations may be made, the first with respect to the legislature. There is no convincing evidence that the existence of an elected legislature is incompatible with a legitimate state of emergency. Nations have retained a legislature even in times of civil or international war (94). In the rare cases where dismissal or suspension of a particular legislature or national assembly may be warranted, it should be restored with the briefest possible delay under conditions which ensure that it is freely chosen and representative of the entire nation.

Secondly, during a state of emergency, priority should be given to preserving the viability of institutions such as the free press, trade unions, professional organisations and popular organisations. Whatever particular restrictions on rights may be warranted, their cumulative effect should be weighed carefully against their propensity to undermine these legally recognised institutions, whose existence is necessary to prevent the executive from acquiring, whether inadvertently or by design, a de facto monopoly on power. A formal legal norm to this effect should be adopted, declaring that the government's right to suspend or restrict legal rights under a state of emergency is in turn limited by the duty not to take any action which will threaten the continued existence of a free press, trade unions, and so on.

Other Limitations on Emergency Powers

Two further recommendations may be made. The first is based on the exceedingly important principle announced by the European Commission on Human Rights in Ireland v. The United Kingdom : the validity of emergency measures depends not only on the existence of a legitimate emergency and the need for the measures in question, but also on the efforts made to ensure that the measures employed will not be abused (95). The principle should be established in domestic law that whenever a measure suspending or derogating a legal right is introduced, a deliberate effort should be made to identify and implement safeguards which would help to prevent its abuse or compensate its adverse effects. When security prisoners are detained or arrested, for example, the safeguards described in Part III above should be implemented to prevent torture or mistreatment. If there are compelling reasons for suspending the defendant's right to cross-examine adverse witnesses, a procedure for testing the credibility of the witness by in camera questioning by the judge could be adopted. If censorship is required, a board of independent personalities could be created to review its effects on freedom of the press, academic and artistic freedom.

The second and final recommendation concerns the termination of a state of emergency. The termination of a state of emergency should automatically lead to full restoration of suspended rights and freedoms. In addition, as soon as feasible after a state of emergency a review should be made of continuing consequences of the emergency measures with a view to identifying and correcting or compensating continuing injustices. Examples would include a systematic review of sentences imposed by courts where full constitutional guarantees were not in effect or a review of the possibility of reinstating persons who lost posts on political grounds.

V. SAFEGUARDS IN INTERNATIONAL LAW AGAINST ABUSE OF STATES OF EMERGENCY

International public opinion and the international human rights fora which constitute an essential element of the same, function as a sort of court of last appeal with respect to gross violations of human rights. Where states of emergency have subjugated or swept away the essential safeguards of the rule of law and guarantees of a democratic form of society, particularly the independent judiciary and elected legislature, recourse to the court of international opinion may be the only remedy available. The question which arises, then, is whether international human rights fora are capable of providing an effective remedy. More concretely, for purposes of this study, the question which arises is to what extent have international fora been successful in controlling states of emergency and what suggestions can be derived from the experience of the countries included in this study with regard to improving international control and supervision.

This question must be approached with realism. With the exception of occasional paper or technical states of emergency, whether it is a democratic government faced with an armed insurrection or a military dictatorship dependent upon force rather than the consent of the governed for survival, the most powerful of motivations is at work. In addition, the enforcement of the international law on emergencies must be evaluated with an awareness of limitations inherent in the present stage of development of the international legal system, including a general preference for conciliation or political rather than juridical methods for settling disputes, a general lack of effective ways of applying sanctions and a general shortage of material resources.

A second explanatory remark is also in order : it is not possible within the confines of this chapter to consider in any detail the jurisprudence of the relevant international bodies. To pursue the analogy with domestic courts, we will not seek to examine here whether the decisions of the international tribunal are 'correct' or even whether the law has been correctly applied, but rather whether there has been effective access to the court and the extent to which the process of adjudication has helped to vindicate the rights of those concerned. Specifically, four criteria will be employed - the promptness of the review, the extent to which the relevant norms of international law were applied, the extent to which the factual situation was documented, and any evidence of effective pressure on the government to improve protection of human rights, or compensate past abuses.

International Norms Concerning States of Emergency

Before attempting to evaluate the effectiveness of international mechanisms, the relevant international norms should be summarised briefly. The primary international human rights instruments that expressly recognise the right of states to derogate from their obligations to protect human rights during times of emergency are the European Convention on Human Rights, which entered into force in 1953, the International Covenant on Civil and Political Rights, which entered into force in 1976, and the American Convention on Human Rights, which entered into force in 1978 (96).

These three treaties define the right to derogate in similar terms. The common elements are :

1. that the emergency be one which "threatens the life of the nation" (97);

2. that the measures which derogate from the state's obligations "be strictly required by the exigencies of the situation" (98);

3. that specified rights not be derogated from (99);

4. that derogations not be inconsistent with any other obligation under international law (100); and

5. that prompt reports regarding derogations be made (101).

All three of these treaties also contain the principle, whose significance for the right to derogation was commented upon in Part I of this chapter, that nothing in the treaty "may be interpreted as implying for any State ... any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognised /therein/ or at their limitation to a greater extent than is provided for" in the treaty (102).

Two of them, the American Convention and International Covenant, also prohibit certain forms of discrimination in emergency measures (103).

In most respects, the common principles provide adequate guidance to governments concerning their obligation to respect human rights in emergency situations. The term "public emergency which threatens the life of the nation" adequately conveys the exceptional nature of circumstances which are required in order to justify derogation (104). The term "strictly required by the exigencies of the situation" conveys clearly the obligation to weigh carefully the need for each emergency measure adopted and to abandon emergency measures and restore full respect for human rights as soon as possible (105).

One recommendation might be made, however, with respect to these substantive norms. The instruments classify as derogable a number of rights which reason suggests should not be derogated from even in time of emergency. One of these is the duty of states to prohibit propaganda for war and "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" (106). There can surely be no type of national emergency in which advocacy of national, racial or religious hatred should be permitted. Indeed, the importance of prohibiting this type of propaganda is enhanced in times of emergency, as history is replete with emergencies marked by discrimination, if not actual violence, against racial, religious and national minorities. Classificiation of the prohibition of war propaganda would also seem appropriate given the prohibition of war in the UN Charter (107).

States of emergency also sometimes result in restrictions on the rights of religious, cultural or linguistic minorities (108). In retrospect, these restrictions inevitably appear excessive, the product

of xenophobic fears. It may be that additional regulation of these rights would be necessary in rare instances, but derogation from the obligation to respect these rights does not seem to be warranted.

As the preceding chapters make exceedingly clear, it would be desirable to make non-derogable the principle that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Similarly, as explained in detail in Part III of this chapter, it is important to clarify that a large part at least of the due process rights should not be derogated from under any circumstances.

While it is understandable that freedom of expression be considered derogable, there can be no valid reason for derogating from the right to hold opinions without interference. It is sometimes argued that there can be no infringement of the right to hold opinions unless the opinion is first expressed. However, the better view is that when an affirmative effort is made to discover the individual's beliefs, to classify persons on the basis of their 'reliability' or personal history, as for example occurred for tens of thousands of persons in Uruguay (109), then what is at stake is the right to opinion. Similarly, although emergencies may require interference with the privacy of one's home or correspondence, it is difficult to conceive of reasons which might warrant arbitrary or unlawful attacks on one's honour or reputation. Yet, as we have seen in the chapter on Colombia, such attacks do occur during states of emergency (110).

The relative weakness of international mechanisms, as we have said, highlights the importance of establishing clear prospective guidelines as to what rights may be affected by a state of emergency rather than relying on retrospective review of the necessity of measures employed. Consideration should be given to establishing more comprehensive guidelines as to those rights from which derogation should never be permitted.

Such guidelines could take one of several forms : protocols to existing human rights treaties, a body of principles adopted by the UN or regional organisations, or an advisory statement or set of legal presumptions adopted by the bodies which supervise implementation of the present human rights treaties, the Human Rights Committee and European and American Human Rights Commissions.

Three principle considerations should be born in mind in drafting more comprehensive guidelines : the need to establish the non-derogability of the rights mentioned in the immediately preceding paragraphs; the need to establish clear guidelines for the protection of due process rights in times of emergency; and the desirability of recognising in the UN and European systems the non-derogability of all rights recognised as non-derogable in the American Convention, notably the rights of the child, the rights of the family, the right to nationality and the right to participate in government.

Modalities of International Control

In approaching this question, it will also be useful to bear in mind the four basic ways in which international norms regarding states of emergency may be applied : namely, through inter-state complaints, through individual complaints, through the general supervisory

powers of bodies entrusted with reviewing the implementation of treaty obligations, and through what may be described as political processes in bodies of more general competence. Inter-state complaints are governed by article 24 of the European Convention, article 45 of the American Convention and article 41 of the International Covenant, and the right of individual petition is provided for in article 25 of the European Convention, article 44 of the American Convention and the Optional Protocol to the International Covenant.

The general supervisory powers of the Human Rights Committee consist of periodic review of reports submitted by States Parties on the measures adopted which give effect to rights recognised in the Covenant on the progress made in the enjoyment of those rights and on "factors and difficulties, if any, affecting the implementation of the Covenant" (111). Such reports are normally due every five years, but the Committee also has the right to request supplementary reports "whenever it deems appropriate" (112), a power which might be employed when a State Party declares a state of emergency which might involve derogation from the Covenant. In the Inter-American system, the Inter-American Commission on Human Rights undertakes comprehensive studies of the human rights situation in specific countries whenever information received from any reliable source indicates the need for such a study. Technically, although the Inter-American Commission is one of the two bodies entrusted with supervising implementation of the American Convention, the general supervisory powers used in the preparation of these "country reports" are derived not from the Convention but from the Statute of the Commission and the OAS Charter. However, the Commission's exercise of this function has more in common with the Human Rights Committee's general supervisory function under the Covenant than with the political processes described below. There is no such general supervisory function in the European system; the Commission and Court can act only after receipt of an inter-state or individual petition.

The fourth basic type of international control is the general supervisory control over human rights questions exercised by bodies not expressly entrusted with the responsibility of reviewing the observance of human rights treaties by States Parties. Examples include the investigations into human rights violations in Chile, Israel and South Africa authorised by the UN General Assembly, the procedure for investigating gross and systematic human rights established by ECOSOC Resolution 1503, or the debates on the human rights situation in Turkey which have been conducted in the European Parliament. For the sake of brevity, this type of control will not be considered here.

Successful Attempts at International Control

COLOMBIA :

Of the twelve countries included in the present study, it may be said that efforts to apply international norms regarding states of emergency have met with a degree of success in five cases : Argentina, Colombia, Greece, Northern Ireland and Uruguay.

The efforts of the Human Rights Committee to encourage compliance with obligations under the International Covenant have been relatively successful - within very considerable limits which will be described below - in the cases of Colombia and Uruguay.

Prompt and thorough review of the state of siege in Colombia was prevented initially by the government's reluctance to cooperate fully with the Human Rights Committee by providing timely and detailed information as required by articles 4.3 and 41 of the International Covenant. Although the state of siege was declared in October 1976, notice of derogation was not made until July 1980 (113). Its' "state report", due in March 1977, was submitted in November 1979 (114). Neither was as comprehensive as the Covenant requires. The notice of derogation referred only to measures affecting freedom of expression and assembly, although the actual effects of the state of siege were much broader (115). The relevant portion of the state report, inter alia, makes no attempt to present evidence of or even explain the existence in 1979 of a threat to the life of the nation nor the necessity for particular emergency measures.

Nevertheless, the Committee's records of its July 1980 meetings with the representative of Colombia reveal an awareness that a series of states of exception had been in effect for thirty years, and a series of questions were put to the government's representative about a broad range of matters actually affected by the state of emergency, such as the expansion of military jurisdiction, the suspension of habeas corpus, the due process rights of criminal defendants, the independence of the judiciary, and the availability of an effective remedy for persons whose rights have been violated by public officials.

The representative of the government made a number of important pledges to the Committee, including a promise that the state of siege would be lifted "soon", that the government would submit a law of amnesty to the legislature and that unspecified reforms in the judicial system would be undertaken. This undertaking is unique in the history of the Human Rights Committee, and probably unique in the history of international human rights.

The Committee's efficiency in exploring factual and legal issues related to the emergency was undoubtedly due in large part to individual communications pending at the time. Indeed, the disturbing information contained in one of them about a law giving security foces wide latitude in the use of lethal force apparently contributed to the Committee's decision to give priority to its consideration of Colombia's report, once it was received.

One also suspects that the final decision of the individual complaints was delayed in order to give the government sufficient opportunity to carry out these pledges and obviate the need for a condemnation by the Committee in the sensitive individual cases. Only after the passage of nearly two years without fulfilment of these promises did the Committee issue decisions in two of the four pending communications. In one, the Committee found a violation of the right to life, a non-derogable right, and took the unusual step of making a direct recommendation that the relevant law be amended (116). In the other case, where a violation was found of the right to appeal against criminal convictions, the Committee decided that the government had not submitted sufficient factual information to permit the Committee to make an independent evaluation of the existence of a "threat to the life of the nation" (117).

During these two years efforts were made to fulfil the promises made to the Committee. In July 1980, the same month the government representatives met with the Committee, a proposed law of amnesty was submitted to the legislature. The president made a public promise that, if the amnesty was a success, "the next step would be lifting the state of siege and in consequence return to complete normalcy" (118). However, the law made exception for certain categories of politically motivated offences and the implementation of the amnesty was conditioned upon the surrender of arms, within the space of four months, by those involved in armed groups. The conditions were not accepted by the groups in question and the amnesty law failed at that time to achieve its purpose.

In June 1982, following discussions with the leaders of the principal opposition guerrilla force, the state of siege was lifted (119) abrogating inter alia the two decrees judged inconsistent with the Covenant and fulfilling, albeit after considerable delay, the promise made to the Committee in 1980. Some months later, in November 1982, an unconditional law of amnesty was presented to the legislature and adopted (120). With regard to the pledge to undertake judicial reforms, the lifting of the state of siege ended the trial of civilians in military courts, thus eliminating with a single stroke many of the abuses complained of (121).

In April 1980, the government of Colombia invited the Inter-American Commission on Human Rights to undertake a mission in loco and investigate the human rights situqtion prevailing in the country. The invitation was unique in that it was motivated in part by a prior investigation by Amnesty International, which denounced the practice of torture in Colombia, and also in part by the demands of a guerrilla group which demanded the Commission's investigation of certain human rights problems as a condition for releasing a group of hostages (122).

An extensive report on the human rights situation was published by the Commission in June 1981. In it, the Commission is more cautious than usual in drawing legal conclusions (123) and unusually reticent in publishing the factual details of allegations of grave violations of human rights (114). Nevertheless, the Commission did include, inter alia, that there had been violations of the right to life and practices of torture, and that government investigations of these criminal acts had been inadequate.

It is seldom possible to determine with any certainty the reasons which cause a government to modify or abrogate a state of emergency, or the relative importance of the factors which enter into its decision. In the case of Colombia, the freedom of the press, the existence of an elected government and legislature and an independent judiciary, the freedom of action enjoyed by human rights activists and, of course, the existence of considerable public opposition to the state of siege were factors of primary importance. However, the distinction between international and domestic factors can be overemphasised; international pressures do not exist in isolation from domestic social and political processes and may play a considerable rôle in contributing to or reinforcing domestic pressures for according greater respect to human rights. This would seem to have been the case in Colombia, where the report of Amnesty International, the activities of the Inter-American Commission and the decisions of the Human Rights Committee received considerable publicity. As for the government's sensitivity to international opinion per se, there is abundant evidence of it,

ranging from the government's mention of Amnesty International's report as a factor in deciding to invite the Inter-American Commission, to the repeated references in the government's communications with the Inter-American Commission and the Human Rights Committee to Colombia's reputation as a democratic country respectful of human rights and to the promises made before the Human Rights Committee. Thus, despite the government's initial reluctance to be forthcoming with international bodies regarding the state of siege, the slowness of the deliberations of the international bodies and their failure to resolve more than a few specific issues regarding the legality of emergency measures in international law - despite these academic objections the Colombian case must be considered a successful instance of international review, first because of the substantial pressure which was generated for major changes in policy, and second because the changes actually occurred.

URUGUAY :

The review of the state of emergency in Uruguay by the competent international fora can also be considered a qualified success to the extent that it made known in an authoritative way the facts concering Uruguay's violations of international law. However, its effect upon the government appears to have been negligible.

The Inter-American Commission adopted its first report on human rights in Uruguay under the state of emergency in early 1978, after more than four years of serious human rights violations. Subsequent reports were published in 1979, 1980 and 1982. The reports are not as comprehensive as others the Commission has published, as Uruguay has never given permission to conduct an on site investigation. Although the inclusion of a miniature 'country report' of fifteen to twenty pages in the Inter-American Commission's annual report to the OAS General Assembly does not have the same impact on public opinion as the publication of a report like that on Argentina or Colombia, this may be compensated to a degree by the repeated attention to human rights violations in the country year after year. Similarly, what the Commission's decisions lack in terms of comprehensiveness and judicial rigour is compensated, in part, by its clear and detailed description of some aspects of the human rights situation and the candour of its analysis. In 1980, for example, it recommended that the government "amend or repeal the laws of exception which, as has been pointed out in this report, often place serious limitations on human rights in Uruguay and in some cases have led to manifest abuses, as for example the limitations on the right of freedom of association and assembly, politically motivated cancellation of retirement privileges and refusal to issue passports to certain Uruguayans" (125). Note that in this paragraph, the Commission qualifies as "manifest abuses" the effects of the state of emergency on certain rights which are derogable in international law. The Commission has also criticised notably torture and violations of the right to life, kidnapping of citizens abroad and the absence of representative democracy.

The Human Rights Committee has also had many occasions to review the Uruguayan state of emergency and its effects on human rights, both in considering individual communications and in considering Uruguay's "state report" under article 40 of the International Covenant. To be sure, serious obstacles have been encountered in the Committee's efforts to promote compliance with the norms of the Covenant. With respect to individual communications, the government's replies have been

tardy and have not contained as a general rule evidentiary material requested by the Committee, such as court records pertaining to imprisoned persons. More importantly, the government has never, as far as is known, complied with the Committee's recommendations (126) where a final decision adverse to it has been reached, although in one case the matter complained of was resolved before reaching a decision on the merits (127).

With regard to the general supervisory powers of the Committee, Uruguay's report under article 40, due in 1977, was not received until 1982 and contained little information about the effect of the state of emergency on human rights (128). No notice of derogation was made until 1979, and even then it did not contain the information required by article 4(3) of the Covenant (129). Most importantly, the state of emergency has remained in force and the protection afforded fundamental rights has not improved appreciably (130).

In what sense, then, have the Committee's activities been productive ? From its first decision under the Optional Protocol in 1979 to April 1982, the Committee has published some twenty decisions in individual cases concerning Uruguay. Every case decided thus far has been related to the state of emergency. With its habitual careful legal analysis, the Committee has found violations of a wide variety of rights, including the prohibition of torture and inhuman treatment, freedom of opinion, expression and association, the rights to a passport, the righ to take part in public affairs and vote in elections, the prisoner's right to have visits by his family, the prohibition of retroactive application of penal laws, the right of an arrested person to be brought promptly before a judge, the right to challenge the legality of imprisonment, the right to counsel of one's choice, the right to communicate with counsel, the right to be promptly informed of the charges, the right to adequate time and facilities in the preparation of a criminal defence, the right not to be forced to incriminate one's self, the right to a trial without undue delay, the right to be present at trial, the right to a public trial, the right to a public judgment and the right to be released from prison when the term of imprisonment has been served or when a court has ordered one's release.

Important as the Committee's pronouncement of these legal conclusions is, it should not obscure the independent value of the subsidiary function of fact-finding. The Committee's decisions on Uruguay, by reason of their faithful description of factual allegations and direct approach to factual issues, constitute a rich and irreplacable source of information on the repressive practices prevailing in that country. Since international methods for enforcing compliance with human rights norms remain in an acute stage of underdevelopment, the fact-finding function assumes additional importance, especially when the facts are set out in such detail with a clear resolution of the issues.

When Uruguay's report under article 40 was finally made in early 1982, the Committee decided to consider it immediately at its next session. The records of these meetings show that the Committee was well informed about laws and practices related to the state of emergency, and confronted the government representatives squarely with questions on all the most important international legal issues :

the justification for a state of emergency per se, the necessity for specific emergency measures, violations of non-derogable rights and non-compliance with notice of derogation requirement (131). This dialogue presumably constitutes a degree of pressure for the lifting of the emergency and improved protection of human rights, just as Uruguay's participation in these meetings and the procedure concerning individual complaints - as well as the failed constitutional referendum of 1980 - are evidence of a degree of sensitivity to international pressure.

Despite the shortcomings described above, it may be said that the Committee, in its review of the state of emergency in Uruguay, has been as effective as an international tribunal can be in the circumstances, i.e. given the absence in international law of effective enforcement machinery, the lack of substantial commitment on the part of the government to the protection of human rights and the lack of domestic opposition capable of forcing a drastic change in human rights policy. However, one suggestion as to how the Committee's effectiveness might be improved will be made below.

Apart from the efforts of the Inter-American Commission and Human Rights Committee, the state of emergency in Uruguay has been discussed on many occasions by the ILO and the pressure resulting from ILO procedures has been responsible for some modifications of a draft law on trade union rights (132).

ARGENTINA :

Like Colombia and Uruguay, the human rights situation in Argentina was reviewed by the Inter-American Commission on Human Rights. As in the case of Colombia, this review took the form of a voluminous 'country report' based on an on-site investigation by a committee of persons serving in their individual capacities. Applying the same criteria employed above - the promptness of the review, the extent of documentation of the factual situation, the extent to which relevant international legal norms are applied and evidence of effective pressure for change - one might conclude that this review should be considered only relatively effective.

Although there was a state of siege in effect prior to 1976 and human rights violations were reported during that period (133) the appropriate point of reference for judging the promptness of international review should be the March 1976 military coup which resulted in drastic transformation of the legal, social and political situation. The Commission, in its Fourty-third Session (January - February 1978), decided to make an in-depth investigation of the human rights situation in Argentina. Permission of the government to realise an on-site investigation was received in December 1978, the on-site visit occurred in September 1979 and the report was adopted in April 1980. However, the conclusions of the committee which made the on-site investigations were, it is understood, communicated to the Military Junta before the committee left Argentina. This is slow in comparison with the reaction of the international community to the 1973 emergency in Chile - where the Inter-American Commission's initial report was completed within one year of the event and the UN's initial investigation within two years - and it is certainly slow viewed from the perspective of the vast numbers of persons suffering serious and often irreparable violations of their fundamental rights. Unfortunately, it

cannot be considered slow from the perspective of the normal response time of international bodies, as the other cases included in this study illustrate.

It is suggested that the time within which the Inter-American Commission replied to the Chilean emergency, i.e. approximately six months before deciding to undertake an investigation and a further six months to complete an initial report, should be adopted as a standard by all international bodies exercising this type of supervisory function, at the least where repeated denunciations of violations of torture, the right to life or other non-derogable rights have been received.

The Commission's success in applying international norms governing the protection of human rights in time of emergencies must be viewed in the light of Argentina's failure to ratify or accede to either the American Convention or the International Covenant, which contain precise standards on the matter. Thus the principles set forth in these instruments (and others) are applicable only to the extent they are considered customary international law.

The question of what norms are applicable is addressed rather obliquely in sub-chapter I. E of the report on Argentina, entitled "Human Rights, Subversion and Terrorism". In it, the Commission seems to adopt two principles which correspond roughly to two of the most fundamental norms recognised in the relevant international instruments : the principle that derogation is justified only in specified circumstances of exceptional nature, and the principle that certain rights may never be derogated from. The first principle is expressed in these terms : "In the life of any nation, threats to the public order or the personal safety of its inhabitants, by persons or groups that use violence, can reach such proportions that it becomes necessary temporarily to suspend the exercise of certain human rights".

The second principle is expressed in the following terms : "However, it is equally clear that certain non-derogable rights can never be suspended, as is the case among others of the right to life, the right to personal safety or the right to due process". It is interesting to note the inclusion of due process as a non-derogable right, as it is not so designated by the three principal international human rights treaties, i.e. the American and European Conventions and the International Covenant.

Not mentioned in the Commission's discussions of the principles concerning derogation from human rights obligations are the principle of strict necessity and the principle of non-discrimination, nor certain general principles set forth in the Universal Declaration and particularly relevant to states of emergency, namely, that all restrictions on human rights must be established by law, consistent with the requirements of a democratic form of society, and not "aimed at the destruction" of any recognised human right.

More important for assessing the effectiveness of the Commission's review of the state of siege in Argentina is the extent to which the actions of the government are actually measured, implicitly or explicitly, against international norms.

The most striking omission is the failure to apply the first principle spelled out by the Commission itself, that is, that (1) temporary suspension of the exercise of certain rights may be justified by (2) a threat to the public order or the personal safety of the inhabitants (3) by persons or groups using violence (4) if the threat reaches certain unspecified "proportions". Rather than apply this four-part test of legitimacy, the Commission notes noncommitally in Chapter I. E that it "has come to have an adequate understanding of the violence and social unrest that devastated Argentina during the years immediately prior to the government takeover by the current authorities, as well as of the sporadic terrorist acts that still appear to persist". A footnote lists a number of terrorist incidents, only three of which, involving a total of five deaths, occurred after the year in which the coup took place. The formal conclusions do not address the legitimacy of the state of emergency per se and the recommendations do no more than suggest deferentially that the government "consider the possibility of lifting the state of siege, in view of the fact that, according to repeated statements by the Argentine government, the reasons for which it was imposed no longer exist" (134).

With respect to derogable rights, the Commission does examine the effect of the state of siege on a number of such rights, but does not apply the principle of "strict necessity" (135) nor does it in fact examine the necessity for any of the restrictions discussed in the report. While the criticisms of restrictions on personal liberty are fairly harsh, and rightfully so, the Commission's comments on the restrictions imposed on other derogable rights are unduly mild (136).

Religious discrimination is also examined, the Commission concluding that the government had no direct responsibility for anti-Semitic incidents, but suggesting that the government did have an obligation to take more affirmative steps to prevent and punish such discrimination.

The Commission's final omission in the application of international norms concerns norms applicable to all restrictions on human rights, including those resulting from states of emergency, that is, the principle of legality, of compatibility with democracy and the illegitimacy of acts "aimed at the destruction ... of human rights" (137).

Although the unconstitutionality of the entire state of siege, the complete incompatibility of the present form of government with principles of democratic government, the lack of plans to restore elected government, even on conditions dictated by the Commanders of the armed forces, and the government's avowed intention of permanently eliminating from the nation certain ideologies and political formations are obviously incompatible with these fundamental principles, the Commission avoids discussion of the significance in international law of these basic characteristics of the present régime.

The single most outstanding aspect of the report, however, is its extensive description of violations of certain non-derogable rights, particularly deaths, disappearances and torture. Since the illegitimacy in international law of any violation of these rights is self-evident, the distinction between establishing violations of these rights and discussing the relevant principle is immaterial. The Commission's description of violations of these rights, including reproduction in

extenso of moving personal testimony and frank discussion of government responsibility, the magnitude of the problem and the unavailability of judicial remedies alone marks the Commission's report as an important accomplishment. The accomplishment is that much more impressive in that the government concerned is one of the most influential in the Organisation of American States.

The Commission's report on Argentina, like that on Uruguay, gives a very full and authoritative account of the violation of human rights occurring in the country, but with one exception it appears to have had little or no effect upon the general situationof human rights violations in the country(38).The exception, however, is one of outstanding importance and probably constitutes the greatest success yet achieved anywhere in the intended protection of human rights.

The exception relates to the practice of 'disappearances', a euphenism for illegal kidnapping by or with the connivance of the security forces, leading in most cases to torture and execution. For some years prior to the Commission's report, disappearances had been occurring at a rate of well over 1,000 per year. Numerous international non-governmental reports had described these disappearances and attributed them to the security forces and to paramilitary organisations working in league with the security forces. The government dismissed these reports as 'Marxist" propaganda. The reports did, however, serve to stimulate international interest which led to the investigation and report by the Inter-American Commission on Human Rights. When this report made the same findings, with detailed documentation, the government could no longer dismiss them. The effect was immediate and in the year following the presentation of the findings to the government, i.e. in 1980, the number of disappearances dropped to under 60, and thereafter continued to dwindle until the practice appears now to have ceased.

Superficial conclusions may be drawn from this case. Among these are that :

- reports by inter-governmental human rights bodies are likely to carry more weight than those of non-governmental organisations;

- non-governmental reports can be of greatest effect when they stimulate investigation and reports by inter-governmental bodies;

- inter-governmental bodies are likely to be most effective when they are composed of persons appointed and serving in their personal capacity;

- it is not necessary for inter-governmental bodies to be constituted by or to operate under the terms of an international convention. Indeed, there can be advantages in the greater flexibility and simplicity of procedures established in a less formal manner.

GREECE :

Two states of emergency considered by the European Commission on Human Rights, Greece and Northern Ireland, must also be considered successful examples of the application of international norms. The jurisprudence of the European Commission and Court on these and other cases where the right of derogation has been invoked has been analysed exhaustively elsewhere and will only be described briefly here.

The Greek case may well be considered the high-water mark of international jurisprudence concerning states of emergency, first because it is the only time that a judicial or quasi-judicial international tribunal applying the provisions of a human rights treaty has made a finding that the emergency purportedly justifying derogation from the treaty did not in fact exist (139); secondly, because it constitutes the only time an international body has come close to applying an effective sanction against a government violating human rights under pretext of a state of emergency.

As stated above, the complaint alleged violations of both derogable and non-derogable rights. In determining whether violations on the former might be justified by virtue of the state of emergency, the Commission relied on the test announced previously in the Lawless case :

> "the natural and customary meaning of the words 'other public emergency threatening the life of the nation' is sufficiently clear; they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed" (140)

Although the same basic test was employed, new elements were added. First, the Commission stressed that the government had the burden of proving the existence of the right to derogate. Second, it relied upon evidence of the efficiency of the police in making arrests as evidence that there was no present or imminent threat to the life of the nation, thus lending its support to the oft expressed view that an emergency must be employed as a last resort, i.e. when no less drastic measures are available or sufficiently effective to cope with the specific danger threatening the society.

The relative speed with which the international community intervened is another positive aspect of this case. The initial complaint by four European governments was made in September 1967, five months after the coup. After hearing numerous witnesses, conducting an on-site investigation and conducting a series of discussions aimed at producing a 'friendly settlement', the Commission produced a comprehensive report in November 1969, just over two years after being seized of the complaint. The Council of Ministers' meeting to consider sanctions, which resulted in Greece's self-imposed exclusion from the European Community, took place the following month.

Although the effect of international pressure on human rights policies is seldom clear and uncontroverted, it does seem reasonable to believe that Greece's isolation from the European Community was an important starting point for the mounting pressures which eventually led to the military's decision five years later to surrender power to civilian government and permit a return to democracy and full respect for human rights.

NORTHERN IRELAND :

The emergency in Northern Ireland has come before the European Commission by virtue of one inter-state complaint and more than three hundred individual complaints (141). Consideration of most of the individual cases was suspended pending resolution of the inter-state case. The decision of the Commission in Ireland v. The United Kingdom was announced in February 1976, after more than four years of deliberations and attempts to reach a friendly settlement. The judgment of the Court came two years later, in January 1978.

Although the existence of an emergency threatening the life of the nation was not made an issue by the complainant government, the Commission examined the issue and made its own finding of fact that such an emergency did exist. As in the Greek case, it examined in great detail the chronology of events, including statistics regarding acts of violence at distinct periods of the emergency, the political, social and even psychological dimensions of the emergency and the rôle played at each stage of the crisis by all the parties involved : the governments of Northern Ireland and of the United Kingdom, the Protestant and Catholic communities of Northern Ireland and the various para-military organisations. Observing that "the violence was ... of extraordinary dimensions" and "there has been nothing precisely comparable in the history of the Convention" (142), it concluded that the existence of a threat to the life of the nation was proved. The Court, without substantive discussion of the issue, agreed.

Passing by the issue of whether certain emergency measures were "strictly required", the Commission again inquired, as it had in the Greek case, whether ordinary methods for maintaining public order were ineffectual. For example, it concluded that detaining individuals for purposes of interrogation was necessary because of (1) the acute lack of intelligence about the Irish Republican Army, (2) the lack of cooperation by the population, and (3) the physical danger to the security forces in conducting interrogations in the street or other public place.

Of particular importance is the Commission's statement in this case that, even where there is a proven need for emergency measures, "obligations under the Convention do not entirely disappear" and the limitation of certain rights "may require safeguards against the possible abuse, or excessive use, of emergency measures" (143).

Apart from these contributions to jurisprudence on states of emergency, the overall effects of the case on rights of persons living under the emergency can be evaluated positively. During the course of proceedings, compensation had been awarded to nearly all the victims of inhuman treatment and the government had made a formal undertaking never again to resort to the "five techniques". In fact, there had been a large public outcry against the five techniques as soon as their use was disclosed in 1972, and the emergency had never restricted the individual's right to seek compensation for violations of his physical integrity. It is perhaps not insignificant, however, that of all the cases of physical abuse in the interstate complaint, compensation was awarded in the vast majority without a judicial award of damages.

Changes in the treatment accorded imprisoned members of paramilitary organisations as a result of a more recent individual complaint has also been described in the Chapter on Northern Ireland above (144).

As in other cases, it is not possible to say with certainty the extent to which international supervision has encouraged or influenced the government in its efforts - which are quite evident in this case - to refine continually the emergency measures, to find ways of preventing their abuse and to compensate their victims. The government's cooperation with the international authorities suggests that, in this case, its influence was considerable.

Failures of International Control

We shall now proceed to examine those cases where attempts to induce compliance with international norms on states of emergencies have been entirely or relatively unsuccessful, to attempt to identify the reasons for the failure of international control and to extract a series of recommendations for combating abuses of states of emergency on the international level.

The most fundamental failure is the total absence of international consideration of states of emergencies in four of the countries included in this report - Ghana, India, Malaysia and Thailand - for the simple reason that they were not parties to any of the basic human rights treaties at the pertinent times. The point is too obvious to be belaboured, but in formulating a comprehensive programme for preventing abuses of states of emergency, the importance of promoting universal ratification of these treaties should not be overlooked. It is not fortuitous that such a large percentage of the countries included in this study remain outside the scope of these human rights treaties and the mechanisms created to promote their implementation. Numerous other examples come to mind of instances where states of emergency have eluded international control for this reason, for instance, Brazil, Bangladesh, Egypt, Israel, Pakistan, the Philippines, Somalia, South Korea, Spain, Sudan and Zimbabwe.

In other cases, the issue has not been presented to the competent international body even though one of the human rights treaties has been ratified. None of the numerous states of emergency declared in Turkey during the 1960's and 1970's was even brought before the European Commission, even though Turkey was a party to the European Convention (145). Turkey could never have enjoyed this immunity from international scrutiny had it accepted the right of individual petition. Similarly, the state of emergency in Poland has not received the attention of the Human Rights Committee even though Poland ratified the International Covenant in 1977. Not having accepted the right of individual petition under the Optional Protocol, it appears that Poland's invocation of the right to derogate will not be examined until its next periodic report is due in 1984. Although obviously not designed for this particular purpose, acceptance of the right of individual petition greatly enhances the probability of relatively prompt and thorough review of a state of emergency by the competent international authority.

A related reason for the failure of international review is ignorance of and failure to use the right of individual complaint. Of the countries included in this study, Colombia, Peru, Uruguay and Zaire recognise the right of individual petition under the Optional Protocol.

Uruguayans have made extensive use of this right, submitting nearly half of all the complaints received by the Committee (146), with the results described above. In contrast, very few communications have been received with respect to the other three countries. Although the Covenant and right of individual petition entered into effect for Colombia in 1976, only four communications were received in the following five years (147). Only one communication has been declared admissible with respect to Zaire, and at the time of writing it has not proceeded to a final decision (148). No communications have been received with respect to Peru (149). This suggests that another element of a programme for prevention of abuse of states of emergency is effective education of the population, particularly lawyers and human rights advocates, concerning applicable international norms and the mechanisms available for challenging violations.

The drafters of the International Covenant believed that the obligation to report publicly recourse to emergency powers would be an effective deterrent to unwarranted recourse to them (150). This view has not been borne out by experience, for two reasons. First, none of the human rights treaties provide for any substantive action by the competent international body upon receipt of notice of derogation. The Human Rights Committee has taken the lead in discussing the need to define an appropriate rôle for itself upon being informed of receipt of a notice of derogation (151). These discussions have focused on the idea of calling for a supplementary report on efforts made, progress realised and difficulties encountered in implementing the Covenant, in part based on the idea that declaring a state of emergency may mean that information previously reported to the Committee no longer obtains, in part because of the drastic changes in the human rights situation which may accompany a state of emergency. Mme Nicole Questiaux, the UN Sub-Commission's special rapporteur on states of emergency, has recommended that the powers of the depository be expanded to permit them to "seek additional information and explanations which would be transmitted to the States Parties and to the specialist bodies so that the international surveillance authorities have sufficient material on which to reach a decision" (152). While examining the conformity of emergency measures with the requirements of internatinal law is a task which can be better performed, where possible, in the examination of individual or inter-state complaints, it would be useful for the competent body upon learning of notice of derogation to require full and, if necessary, periodic reports on the circumstances necessitating derogation, the exact measures taken and their effect on the enjoyment of human rights and the prospects for a return to full respect for the state's obligations under the relevant treaty.

Secondly, the notice of derogation requirement is often disregarded. During the first five years that the Covenant was in force, for example, at least fifteen States Parties, including Colombia, Peru and Uruguay, failed to give timely notice of states of emergency (153). Thus it is incumbent upon the competent international bodies, not only to solicit information upon receipt of notice of derogation, but also when it appears that a state party is disregarding the notice requirement. Information regarding states of emergency is available from a variety of sources, including the Official Gazette of the state party itself, published reports of inter-governmental bodies such as the ILO, press reports and reports of non-governmental human rights organisations. It is worth recalling that more than one State Party has attempted to excuse non-compliance with this treaty obligation by saying that its state of emergency was 'a matter of public record'.

This leads to consideration of another problem, difficulty in obtaining information sufficiently detailed and complete to permit meaningful review of a state's compliance with international norms. The problem is peculiar to the Human Rights Committee's exercise of its general supervisory powers. It does not arise in the European context because the Commission has no such function, acting as it does only upon receipt of an individual or inter-state complaint. The Inter-American Commission is deluged with more information than it can process efficiently, since it receives and acts upon information from any credible individual or organisation with no requirement that they be or represent an actual victim of a human rights violation.

Reports concerning Colombia, Northern Ireland, Syria and Uruguay came before the Human Rights Committee while states of emergency were in effect. The Committee's relative success in its encounter with the representatives of Colombia and Uruguay was in large part due to information obtained by the Committee in its handling of individual cases. Its consideration of the reports concerning Syria and Northern Ireland reveal how lack of information about the situation actually prevailing in a country can weaken efforts to encourage respect for the relevant provisions of the Covenant. The Human Rights Committee's report reveals only three questions addressed to the representative of the United Kingdom on the subject of the emergency in Northern Ireland : one concerning the application of emergency measures outside Northern Ireland itself, one concerning "the judicial considerations that had influenced the decision to make the derogations", and one asking whether the United Kingdom was considering lifting the emergency measures.

The poverty of the questioning on this subject is surprising. The notice of derogation only refers in general terms to possible derogations from specified articles of the Covenant and there is no disruption of the emergency measures themselves. Although the notice refers to seven specific articles which correspond to a very large part of the totality of rights one expects to enjoy in a democratic society, no information was sought on the exact nature of the emergency measures nor on their actual effects on the enjoyment of the rights in question. Without knowing the measures taken, of course, there can be no inquiry into the requirement that they be "strictly required". Similarly, there was no substantive exchange of views between the Committee and the State Party on the existence of a threat to the life of the nation. Major limitations on the right to derogate, therefore, were simply overlooked by the Committee.

Why should the Committee's failure to show more vigour in questioning the State Party about this emergency be attributed to lack of information ? There are three possible explanations : the existence of a 'double standard' or a reluctance to scrutinise closely the actions of a country enjoying a generally positive image with regard to human rights practices; an unspoken desire to defer to the judgment of the competent regional human rights body; and the lack of information sufficient to permit and encourage the posing of appropriate questions.

The first hypothesis must be discarded, not only because it would be completely inappropriate to impute such motives to the Committee without convincing evidence, but also because the Committee's willingness to ask probing questions on other matters and the diverse political and ideological allegiances of the Committee members renders the hypothesis improbable in the extreme. The second hypothesis is also

difficult to reconcile with the facts. The main European case on the Northern Ireland situation, Ireland v. The United Kingdom, concerned allegations of political-religious discrimination in the application of emergency measures, of torture and inhuman treatment and of violations of personal liberty and the right to a fair trial by reason of detention without tiral, all occurring during the period 1971 to 1975. The state of emergency which the Committee could have inquired into in 1978 was substantially different from that prevailing in 1971-1975. In particular, the government had shifted from a policy of detention without trial to a policy of prosecution in special courts. Moreover, the criticism which some aspects of the European Court's decision has received, in the dissents of some members of the Court and academically, suggests that a thorough acquaintance of the decisions of the regional body might have stimulated the Human Rights Committee to ask more rather than fewer questions regarding the state of emergency in Northern Ireland. In sum, while a certain deference to the United Kingdom's reputation for human rights and its cooperation with the regional human rights system cannot be precluded, the facts suggest that greater awareness of the then prevailing situation in Northern Ireland and the details of litigation before the European authorities would have encouraged the Committee to play a more active rôle in promoting compliance with the relevant international norms.

The Committee's examination of Syria also highlights the importance of this factor. At the Committee's first meeting with the State Party in 1977 only general questions were asked as to the existence of any derogations, their nature and effects of a public emergency in Syrian law. At Syria's second appearance in 1979, its representative, apparently in response to the questions posed in 1977, made a thoroughly confusing statement on the existence of a state of emergency in Syria (154). This provoked even more questions from the Committee, including a request for an explanation of "the exact nature of the state of emergency, if any existed" (155) and questions on the jurisdiction and procedures of security or military courts, the protection given to the rights of the accused and the application of the death penalty. Apart from a general reply describing Decree No. 51 of 22 December 1962 (156), the representative simply informed the Committee that "he would transmit its request for further clarifications to the government" (157). No further communications from the government have been received.

Thus, on the two occasions on which Syria appeared before the Committee, the Committee did not get beyond inquiring whether a state of emergency existed, and, if so, what were its effects. Lack of information prevented any questions from being posed about the conformity of specific emergency measures to the requirements of the Covenant, or even about the existence of a "threat to the life of the nation". Under existing guidelines on the periodicity of reports, Syria will not be scheduled to reappear before the Committee for a period of five years.

The question again arises, to what extent can the failure to establish a genuine dialogue with the State Party be attributed to simple lack of information about the situation prevailing there ? In fairness, the Committee's inefficiency in this case must be attributed in large part to essential shortcomings in its working methods; including its failure to pronounce itself clearly and unequivocably

when it believes a question has not received a satisfactory answer, the lack of a procedure to follow up unanswered questions, its failure to develop a procedure for indicating when it believes that a State Party has not complied with its obligation under article 40 to provide information sufficient to permit the Committee to fulfil the functions ascribed to it by the Covenant and its failure to develop a procedure or criteria for determining when information should be requested apart from the periodic five year reports.

These shortcomings originate in the fact that the Covenant itself presumes compliance by the State Parties with the reporting requirement, the Covenant is silent as to the appropriate course of action in the event of non-receipt of a state report or receipt of a patently inadequate report and no provision is made for receiving information from sources other than the State Parties. Initially, this led some members of the Committee to take the view that the dialogue between the Committee and State Parties must be based exclusively on information provided by the State Party and that compliance with requests for additional information was entirely within the discretion of the State Party. The experience of non-provision of reports or providing wholly inadequate or misleading reports has been so dramatic (158) that this view has been abandoned. There is now a consensus that the Committee can take cognisance of information from other UN bodies which supplements or even contradicts information provided by the State Party (159) and - what might at first glance seem obvious - that Committee members can take into account any information in their possession regardless of its source. Similarly, while maintaining a preference for informal pressure and voluntary compliance, the Committee is graduallly proceeding to address the procedural shortcomings whose impact on the Committe's efficiency were so evident in the Syrian case.

Apart from the resolution of these procedural problems, however, it is clear that the dialogue between the Committee and Syria would have been more efficient if the Committee members had entered upon it with knowledge that a state of emergency existed and a basic understanding of its legal effects.

The Human Rights Committee's review of the state of emergency in Uruguay has been described as a qualified success. However, if the Committee has successfully handled its quasi-judicial function of deciding the legal and factual issues presented in individual cases, there has been a near total failure to secure implementation of its recommendations (160). A variety of steps seem to be open to the Committee with respect to this problem. One would be to make additional efforts to publicise a State Party's refusal or failure to take appropriate steps to remedy, compensate and prevent the recurrence of a particular human rights violation in accordance with the Committee's findings regarding the state's duties under the Covenant (161).

Similarly, the Committee could take steps to bring non-compliance with its decisions and recommendations to the attention of the other States Parties and/or to the attention of the UN General Assembly or Human Rights Commission. A precedent for these types of efforts to induce compliance with the Covenant already exists. Each year a list of States Parties who have not provided the report required by article 40 is established, together with mention of the dates of reminders sent. The list is discussed in public, normally at each of the Committee's three annual sessions, is mentioned in the press

releases, figures prominently in the Committee's annual report to the General Assembly and is sent separately to the annual meeting of States Parties.

It would be particularly appropriate to take these additional steps in cases of non-compliance with a series of decisions in individual cases, as in the case of Uruguay, which indicate a pattern of gross and systematic violations of human rights, a matter of special concern to the international community.

The problem of non-compliance with decisions of the competent international authorities or of creating effective sanctions has not arisen in the European system except in the Greek case, when the government withdrew from the Convention when it knew that it was about to be condemned and probably sanctioned.

Summary of Recommendations

VI.

Recommendations for Implementation at the National Level

1. The constitution should clearly state and limit the effects of states of emergencies on legal rights and on the powers of the branches of government. As a minimum the constitution should specify that the rights recognised as non-derogable in international law may not be affected by a state of emergency.

2. The constitution should enumerate and define the situations which justify departure from the normal legal order, preferably distinguishing between various types of emergencies.

3. The constitution should define the procedure for declaring a state of emergency; if the executive has the authority to declare an emergency, legislative approval with in a defined period of time should be required, preferably by an enhanced majority.

4. The constitution should specify that no state of emergency have legal force beyond a fixed period of time, which should not exceed 6 months. Every declaration of emergency should specify the duration of the emergency.

5. Normal judicial remedies should remain available during an emergency for all rights which are not suspended by virtue of the state of emergency.

6. The ordinary courts should have jurisdiction over charges of abuse of power and human rights violations by security forces.

7. The civilian judiciary should retain jurisdiction over trials of civilians charged with security offences.

8. The use of emergency powers to remove judges, to alter the structure of the judicial branch or otherwise restrict the independence of the judiciary should be expressly prohibited in the constitution.

9. The national legislature should not be dissolved during a state of emergency, or if dissolution of a particular legislature is warranted, it

should be replaced within the briefest possible time by a legislature elected under conditions which ensure that it is freely chosen and representative of the entire nation.

10. The right to take emergency measures should be limited by the duty not to take measures which threaten the viability of a free press, independent trade unions, professional organisations and popular organisations.

11. Whenever adoption of a measure suspending or derogating from a legal right is introduced, efforts should be made to identify and implement safeguards against its abuse.

12. The termination of a state of emergency should automatically lead to the full restoration of suspended rights and freedoms, and a review of continuing consequences of emergency measures should be made as soon as possible in order to identify and correct or compensate continuing injustices.

13. The recruitment, leadership, organisation and training of the armed forces and security authorities should be studied with a view to taking practical measures to reduce the risk of abuse of states of emergency.

14. Special safeguards should be adopted for the protection of administrative detainees or persons who have been arrested with a view to prosecution for alleged security offences.

15. The following due process rights, as a minimum, should be respected in criminal proceedings during states of emergencies:

- the right to be informed promptly and in detail of the charges,
- the right to have adequate time and facilities for the preparation of one's defence, including the right to communicate with counsel,
- the right to a lawyer of one's choice,
- the right of an indigent defendant to have free legal counsel when charged with a serious offence,
- the right to be present at the trial,
- the presumption of innocence,

- the right not to be compelled to testify against oneself or to make a confession,
- the right to an independent and impartial tribunal,
- the right to appeal,
- the right to obtain the attendance and examination of defence witnesses,
- the right not to be tried or punished again for an offence for which one has been finally convicted or acquitted,
- the principle of non-retroactivity of penal laws.

16. Administrative detention should not be resorted to other than under states of emergency. Accordingly the constitution or legislation should provide that a formal proclamation of a state of emergency is a precondition for the use of administrative detention.

17. The introduction of administrative detention should require authorisation by a democratically elected parliament and the need for its continuance should be reviewed periodically by the parliament at intervals of not more than six months.

18. When a state of emergency is terminated, the authority to detain administratively should cease automatically and administrative detainees should be released.

19. The permissible grounds for detaining a person administratively should be clearly stated in the constitution or legislation.

20. Resort should be had to administrative detention only when absolutely necessary to protect national security or public order. Persons suspected of economic or other crimes should be dealt with in accordance with the ordinary laws of criminal procedure, and not be subjected to administrative detention.

21. A detention order, containing the grounds of detention together with a statement of the facts and circumstances justifying it, should be issued before arrest or, at latest, within 24 hours of arrest, and the detainee should be provided immediately with a copy of the order.

22. The civilian judiciary should retain jurisdiction during a state of emergency to review individual cases of detention at least (i) to ensure that

the stated grounds for detention are valid and sufficient (ii) to ensure that proper procedures have been complied with and (iii) to ensure that the conditions of detention are lawful.

23. A detainee should be able to consult in private with a lawyer of his choice immediately after arrest and at any time thereafter.

24. An order for administrative detention should lapse unless within one month of its issue it is confirmed by an independent and impartial tribunal or committee presided over by a judge of a superior court.

25. The detainee should have a right of representation in proceedings before any court, tribunal or committee.

26. Regular visits by his family or friends should be permitted.

27. All persons involved in detention and interrogation should be held strictly accountable for the physical wellbeing of persons in their charge. Specific guidelines or administrative instructions regarding interrogation procedures should be issued to all concerned and these should be made public.

28. The law of evidence should not be altered so as to give additional incenties to obtaining confessions.

29. A detainee should be examined by a doctor soon after arrest and his physical and mental condition should be recorded and signed by the doctor. Thereafter periodical medical examinations should be provided and records should be maintained.

30. Women officers should always be present during the interrogation of women prisoners or detainees.

31. All persons participating in interrogation should be properly identified.

32. Rules should be established limiting the hours during which interrogation may occur, and records should be kept of all periods of interrogation with the names of all persons present.

33. Interrogation should be subject to direct supervision by superior officers, and should occur in conditions which permit this control to be exercised.

34. A central registry of all persons detained should be maintained.

35. Administrative detainees should be entitled to the most favourable conditions of detention and treatment consistent with security and in any event not less favourable than those afforded to convicted prisoners.

36. Names of detainees, with the date of the order, should be published in an official gazette, and the names of persons released should be similarly published, with the date of release.

37. Regular visits to places of detention by independent authorities and by international bodies such as the International Committee of the Red Cross should be permitted.

Recommendations for Implementation at the International Level

38. Consideration should be given to establishing a comprehensive list of rights from which derogation should never be permitted, including

- the due process rights mentioned in Recommendation 10 above;
- the prohibition of propaganda for war and advocacy of national, racial or religious hatred;
- the rights of religious, linguistic or cultural minorities;
- the right of all persons deprived of their liberty to be treated with humanity and respect;
- freedom of opinion;
- freedom from arbitrary attacks on a person's honour and reputation;
- rights classified as non-derogable in the American Convention: the rights of the child, the rights of the family, the right to nationality and the right to participate in government.

39. Universal ratification of the human rights treaties containing norms governing the protection of human rights under states of emergencies should be encouraged, together with acceptance of the right of individual petition.

40. Effective education concerning applicable international norms and the mechanisms available for challenging their violation should be available, in particular to lawyers and human rights organisations, in countries where international norms are in force.

41. When notice of a state of emergency is received pursuant to the terms of a human rights treaty, the competent international body should require full reports on the circumstances requiring derogation, the precise measures taken, their effects on the enjoyment of human rights, and the prospects for a return to full respect for the state's obligations under the treaty.

42. International authorities should make appropriate efforts to determine when the obligation to give notice of a state of emergency is being disregarded and to encourage compliance with this requirement.

43. The UN Secretariat should take appropriate steps to enable the Human Rights Committee to be better informed about the legal situation prevailing in States Parties to the International Covenant e.g. by preparing a bibliography or synopsis of relevant information published by governmental, intergovernmental, academic and non-governmental sources.

44. The Human Rights Committee should take steps to bring non-compliance with its decisions and recommendations to the attention of the States Parties to the International Covenant, the UN General Assembly and its relevant subsidiary bodies, as well as any series of its decisions which appears to indicate a pattern of gross and systematic violations of human rights.

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NOTES

(1) Latin Americans sometimes complain that the attention given to states of emergency and human rights problems in general in Latin America is disproportionate. The complaint is well-founded, not in the sense that the scope and gravity of problems in Latin America are exaggerated, but in the sense that situations of comparable gravity in other parts of the world frequently do not receive the attention they merit. An effort has been made to redress this disequilibrium in this study.

That Latin American emergencies are better known can probably be attributed to greater governmental commitment to human rights - it is the only region of the third world having a functioning inter-governmental regional human rights body and the ratification of the basic UN human rights treaties is proportionately higher than in any other region - and above all to the large number of efficient non-governmental human rights bodies in the region.

(2) D. O'Donnell, "States of Exception", 21 ICJ Review, December 1978, p. 52.

(3) Turkey. pp. 311 - 312, 315 and 317. This seems rather more useful than the UN Special Rapporteur's four-part classification into "non-notified", "de facto", "permanent" and "complex" states of emergency. See Study of the implications for human rights of ... states of siege or emergency, UN document E/CN.4/Sub.2/1982/15, July 1982.

(4) Ibid.

(5) For a brief discussion of the meaning of this term, see D. O'Donnell, States of Siege or Emergency and Their Effects on Human Rights : Observations and Recommendations of the ICJ, UN document E/CN4/Sub.2/NGO 93, August 1981, note 1, p. 25. The present chapter is based in part on this document.

(6) Universal Declaration, article 30; ICCPR, article 5.1; European Convention, article 17; compare American Convention, article 29(a).

(7) The Greek Case, 1969, Yearbook European Commission on Human Rights, p. 75 (Report of the Commission).

(8) Ibid. at p. 100.

(9) Zaire, p. 384.

(10) Syria, p. 280.

(11) Malaysia, pp. 190 - 200.

(12) For a further description of this concept and its implications in Uruguay, see Colloquium on the Policy of Institutionalisation of the State of Exception and its Rejection by the Uruguayan People, Secretariat International des Juristes pour l'Amnestie en Uruguay, 33, rue Godot-de-Mauroy, 75009 Paris.

(13) Uruguay, p. 349 et seq.

(14) Uruguay, p. 358. The author of the chapter on Northern Ireland also concludes that "expediency rather than strict necessity has dictated policy" concerning emergency powers.

(15) Poland, p.89 and Uruguay, p.340.

(16) Peru, pp. 274 - 275.

(17) Thailand, pp. 307 - 308.

(18) Argentina, p.4; Colombia, pp.59-61; Uruguay, p. 352; Peru, p.266.

(19) Senese, "The State of National Security in Uruguay, International Law and the Right of Peoples to Self-Determination" in Colloquium on the Institutionalisation (note 12, supra); see also Colombia, pp.59-61; Uruguay, pp. 347.

(20) Senese, Supra, p. 34 (English version).

(21) Argentina, pp. 5 - 6.

(22) Study ..... (supra, note (3), para. 129 and 131.

(23) Greece, p.136; Uruguay, pp. 359 - 365; Colombia, p.59-61

(24) See, for example, Study on the Consequences (supra note (3)); a broader view is taken however in Part III of Mrs. Erica-Irene Daes' Study of the Individual's Duty to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights, entitled "The Protection of Human Rights in Time of Public Emergency", UN document E/CN.4/Sub.2/432/Add.7, August 1980.

(25) Ghana, pp. 105 and 125; Uruguay, p. 345; Colombia, p. 57.

(26) Imprimeries Réunis, Lausanne, 1977, p. 132.

(27) Ibid., note at p. 131.

(28) See, for example, India, p.180; Uruguay, pp.357.

(29) See, for example, Thailand, p.307. See also N. Torrents, "Time of Silence" in Index on Censorship, vol. 7, no. 3, May - June 1978, regarding the closure of publishing houses in Argentina.

(30) Ibid, see also Greece, p. 146, pp.423 - 424 infra.

(31) Argentina, p. 25. See also, N. Caistar, "Clearing the Teaching Area", Index on Censorship, vol. 7, no. 3, May - June 1978.

(32) See, for example, Uruguay, p. 357.

(33) ICCPR, article 25(a) and (b); American Convention, article 23.1(a) and (b); compare Universal Declaration, article 21(1) and (3); European Convention, Protocol I, article 3.

(34) India, p. 181.

(35) Uruguay, p. 352.

(36) In Uruquay, four candidates from the National Party and one from the Colorado, were arrested and tried by military tribunals in November 1982, for having criticised the government.

(37) Uruguay, p. 350.

(38) Greece, pp. 145 - 146.

(39) See H. Gross Espiel, Implementation of U.N. Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination, UN Document, E/CN.4/Sub.2/405 of 20 June 1978, paras. 67 - 80.

(40) Senese, supra, p. 36 (English version).

(41) G. A. Resolution 34/46 (1979).

(42) See, for example, Meeting Basic Needs : Strategies for Eliminating Mass Poverty and Unemployment, ILO, 1977; Measuring Basic Needs Performance, ILO, 1979.

(43) See, for example, Keba Mbaye, "Chairman's Opening Remarks" and Philip Alston, "Development and the Rule of Law : Prevention versus Cure as a Human Rights Strategy" in Development, Human Rights and The Rule of Law, International Commission of Jurists, Pergamon Press, London, 1981.

(44) Uruguay, p. 340 (footnote (2)).

(45) Described by R. Goldstein, M.D., in "The Situation of the Medical Profession" in Colloquium on the Institutionalisation, supra note 12.

(46) Ibid. p. 77 (English version).

(47) Argentina, p. 25.

(48) See notes (29) and (31), supra.

(49) Caiston, supra, at 22 ; see also The Question of Human Rights in Chile, E/CN.4/Sub.2/1362, January 1980, paras. 110 - 121 regarding the deterioration of education in Chile during 6 years of emergency rule, affecting in particular low-income sectors of the society.

(50) Torrents, supra at 28, see also E. Stover, Scientists and Human Rights in Argentina Since 1976, American Association for the Advancement of Science, Washington, 1981.

(51) Reference here is made to the relevant articles of the International Covenant on Civil and Political Rights. It should be noted that the due process rights recognised in the American and European Conventions are less comprehensive. The American Convention, inter alia, does not require the provision of free legal assistance to indigent defendants (see article 8.2(e)), does not recognise the right to a public trial or the right to be present at trial (although the right to an interpreter recognised in article 8.2(a) is stated in terms which assume the presence of the defendant at trial), does not mention the right to equality before the court and (in article 8.2(f)) defines the right to examine adverse witnesses and obtain the appearance of defence witnesses in terms more restrictive than those of the International Covenant. The European Convention is silent as to the right to be present at trial (although here again it might be inferred from the right to an interpreter recognised in article 6.3(3), the right not to be compelled to testify against oneself or to confess guilt, the right to equality before the court, the right to appeal, the right not to be retried after a final judgment, and the right of a person unjustly convicted to compensation.

Due process rights are not described in detail in the Universal Declaration (see articles 10 and 11).

(52) Northern Ireland, p. 235.

(53) Turkey, pp. 324 - 325.

(54) Uruguay, pp. 364 - 365.

(55) Thailand, p. 305.

(56) Turkey, p. 325.

(57) These decisions appear in the Annual Reports of the Human Rights Committee for the years 1979 to 1982.

(58) See Joan Hartmann, "Derogations from Human Rights Treaties in Public Emergencies", in Harvard International Law Journal, vol. 22, no. 1, Winter 1981, note 45, p. 9, citing UN document E/CN.4/324 (1949).

(59) The author of this chapter would like to thank Robert Goldman, Director of the Department of International Law of the American University, for drawing his attention to this development.

(60) See p. 448 infra; see also The Inter-American Commission of Human Rights : 10 Years of Activity, 1971 - 1981, OAS Secretariat, Washington, 1982, p. 324 (Spanish edition), citing the IAHCR's 1978 Report on the Situation of Human Rights in Uruguay.

(61) Final Recapitulation of the General Rapporteur of the Inter-American Seminar on State Security, Human Rights and Humanitarian Law, forthcoming publication of the Inter-American Institute of Human Rights, San José, Costa Rica.

(62) Uruguay, p. 364.

(63) In this chapter, this refers to the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights. The other principal international human rights treaty, the International Covenant on Economic, Cultural and Social Rights, does not contain a provision permitting derogation in times of emergency, nor does the other principal regional human rights treaty, the African Charter on Human and Peoples' Rights, which has not yet entered into force.

Also excluded from the scope of this chapter are non-general human rights treaties, i.e. those concerned with the rights of workers, refugees, those prohibiting discrimination, etc. A number of ILO conventions contain derogation clauses, but those most often infringed during states of emergency, Conventions Nos. 87 and 98 concerning freedom of association, the right to organise and collective bargaining, do not.

It is worth noting that when a treaty does not contain a derogation clause, the stricter principle of impossibility of performance may be applied. The ILO commission charged with investigating violations of Conventions Nos. 87 and 98 in Greece during the 1967 - 1974 emergency did apply this principle and found that the government was not entitled to derogate from its obligations under the conventions (see ILO Official Bulletin - Special Supplement - Vol. LIV, no. 2, 1971, pp. 24 - 26). Hartman (supra, note 58) argues that the principle is inappropriate for use with respect to derogation from human rights treaties in times of emergencies because of the requirement that the contingency justifying suspension of the legal obligation must be unforseeable (op. cit. at 12).

In States of Siege or Emergency (supra note (5)), the author has a different approach, arguing that the principles concerning derogation which are common to the three above-mentioned human rights treaties constitute an emerging rule of customary international law (op. cit. at 18).

(64) Zaire, p. 382.

(65) The UN Special Rapporteur on states of emergency recommends that the principle of non-retroactivity apply, in addition to the scope of criminalized behaviour and the length of sentences, to laws governing criminal procedure and jurisdiction. This would have the effect, inter alia, of precluding retroactive transfer of jurisdiction over certain crimes from civilian to military courts, which has been a serious problem during states of emergency. It would not prohibit prospective transfers of jurisdiction to military courts, however. Surprisingly, the Special Rapporteur recommends that only three of the due process rights be considered non-derogable : the right to a lawyer of one's choice, the right to a "minimum" of communication with

counsel, and the right to a public trial, in the limited sense that the defendant's family and international observers always be permitted to attend a trial even if the general public is excluded (Study, supra note (3), at p. 45).

(66) Poland, p. 87, Greece, p. 142. Amnesty International Annual Report 1978, p. 160. Associated Press, 21 October 1982.

(67) ICCPR, article 10.1; American Convention, article 5.2.

(68) See, for example, Report on the Situation of Human Rights in Argentina, 1980, conclusion 1(b).

(69) Argentina, p. 11, Uruguay, p. 357.

(70) Northern Ireland, pp. 231 - 232.

(71) Report on ... Argentina (supra note (68)), Recommendation 3 concerning the establishment of a registry; Report on the Situation of Human Rights in Colombia, 1981, Recommendation 6(c) concerning interrogation. Reprinted in The IACHR : 10 Years (supra, note (60)).

(72) See p. 452, infra.

(73) Northern Ireland, p. 230.

(74) Argentina, p. 14, Uruguay, p. 358, Peru, p. 269, Malaysia, p. 202.

(75) Eastern Europe, p. 89.

(76) Malaysia, p. 202.

(77) Colombia, p. 48.

(78) Ibid.

(79) Greece, p. 139.

(80) Study ..., supra note (3), para. 55(1) and (2).

(81) Northern Ireland, p. 244.

(82) Northern Ireland, p. 245.

(83) Article 27.2.

(84) 1974 Annual Report, p. 37 (English version).

(85) Digest of Decisions of the ILO Freedom of Association Committee (2nd Edition), 1976, p. 164.

(86) Greece, p. 139.

(87) Views of the Human Rights Committee Concerning Communication No. R.11/45, UN document CCPR/C/DR(XV)/R.11/45, 31 March 1982, reprinted in the 1982 Report of the Human Rights Committee, UN document A/37.

(88) See, for example, Greece, pp. 145 - 146.

(89) Uruguay, p. 351 and pp. 353 - 354.

(90) Northern Ireland, p. 235; see also Malaysia, p. 207, Ghana, pp. 104 and 107, India, pp. 187 - 188.

(91) Argentina, pp. 12 - 14; Greece, p. 146; Poland, p. 86.

(92) Northern Ireland, p. 230.

(93) After general elections in May 1982, the new government, trying to eliminate violence and looking for national unity, approved a political amnesty and lifted the state of emergency.

(94) One example is Vietnam, where legislatures functioned in both North and South Vietnam during the war between the two countries. After unification in 1976, the legislature also continued to function during the Vietnamese invasion of Kampuchea in 1978 and the Chinese invasion of Vietnam in 1979.

(95) See p. 452, infra.

(96) See note (63), supra.

(97) ICCPR, article 4.1; European Convention, article 15.1. Note, however, that the American Convention uses the terminology "In time of war, public danger or other emergency that threatens the independence or security of a State Party ..." (article 27.1, emphasis added).

(98) ICCPR, Article 4.1; European Convention, article 15.1; American Convention, article 27.1.

(99) ICCPR, article 4.2; European Convention, article 15.2; American Convention, article 27.2.

(100) ICCPR, article 4.1; European Convention, article 15.1; American Convention, article 27.1.

(101) ICCPR, article 4.3; European Convention, article 15.3; American Convention, article 27.3.

(102) See note (6), supra.

(103) ICCPR, article 4.1; American Convention, article 27.1, In both instruments, however, the types of discrimination prohibited in times of emergency are considerably less than the types of discrimination prohibited in normal times : not mentioned in the non-discrimination clause of the derogation provisions are discrimination on the basis of political or other opinion, national origin, property, birth or "other status". Note also

that while the American Convention prohibits emergency measures which discriminate "on the grounds of race" etc., the International Covenant refers only to emergency measures which discriminate "solely on the ground of race", etc. (emphasis added).

(104) But see note (97) supra, concerning the text of the American Convention. A comparison between this term and other terms considered and rejected by the drafters of the International Covenant is to be found in States of Siege or Emergency (supra, note (5)) at p. 18.

(105) The ILO has also emphasised as a general principle of international law, outside the context of conventions containing derogation clauses, that emergency measures must be terminated immediately upon the cessation of the circumstances which justified their imposition. See, for example, the case of Turkey, 214 Report of the Committee on Freedom of Association, para. 571, stating that emergency measures "restricting the free exercise of trade union rights should be limited in time and scope to the immediate period of emergency"; the 1968 Forced Labour Survey, paras. 39, 54, 92, 95, 102 and 136; the 1979 Forced Labour Survey, paras. 36, 66, 126 and 134; and the Greek case (supra, note (63)), para. 110, stating "it must also be shown that the action sought to be justified under the plea /of impossibility/ is limited, both in extent and in time, to what is immediately necessary". (The author of this chapter would like to thank Mr. K. T. Sampson for drawing his attention to these decisions).

(106) ICCPR, article 20.

(107) It is for this reason that, unlike the American and European Conventions, derogation article of the International Covenant does not refer to "war or other public emergency" threatening the life of the nation. See UN document A/2929 (1955), para. 39.

(108) See the IACHR's Report on Argentina (supra, note (68)) concerning discrimination against Jehovah's Witnesses and Jews during the state of emergency.

(109) Uruguay, p. 351.

(110) Colombia, pp 63 -64.

(111) ICCPR, article 40.1 and article 40.2.

(112) Decision on Periodicity, 1981 Report of the Human Rights Committee, UN document, A/36/40, p. 104 (English version).

(113) UN document CCPR/C/2/Add.4.

(114) UN document CCPR/C/1/Add.50.

(115) See Chapter on Colombia, supra.

(116) Communication No. R/11/45 (note (87), supra). The law in question, Decree Law No. 0070 of 20 January 1978, is further described in Colombia, p. 53. The two decisions of the Committee are commented upon in "The Human Rights Committee", ICJ Review, No. 28, June 1982, p. 47.

(117) Communication No. R/15/64, 1982 Report (supra, note (87)).

(118) Report on Colombia (supra, note (71)), p. 53, (Spanish edition).

(119) "El Tiempo", Bogota's newspaper - June 1982.

(120) "El Tiempo", 14 October 1982.

(121) Colombia, p. 67 - 68.

(122) Report on Colombia (supra, note (71)), p. 1 and note 4, p. 15 (Spanish edition).

(123) In the sub-chapter entitled The State of Siege, for example, the Commission publishes the views of various governmental and non-governmental authorities, but refrains from taking any position of its own. The Conclusions do not address the legality of the state of siege per se, and the Recommendations call upon the government to "lift the state of siege as soon as circumstances permit and comply with the provisions of article 27 of the American Convention ...". Note the apparent contradiction between the two elements of this recommendation which on the one hand suggests that article 27 was not then being complied with, and, on the other hand, implicitly accepts that it was not possible to lift the state of siege forthwith.

(124) Compare, for example, the Commission's sanatized description of the killing of 7 persons by police in Chapter II.D(d) with the Human Rights Committee's description of the same incident in decision no. R/11/45 (supra, note (87)), or compare the brief, antiseptic descriptions of torture allegations in para. 4 of Chapter IV.D with the graphic descriptions of Chapter V.D of the Commission's Report on Argentina (note (68) supra).

(125) 1979 - 1980 Annual Report on the IACHR, Chapter V.C. Recommendation C., p. 135 (English version).

(126) The legal nature of these "recommendations" - the word is used for the sake of convenience and is not entirely appropriate - merits brief comment. When the Committee finds that there has been a violation of an individual's rights under the Covenant, its decision usually concludes with language similar to the following : "Accordingly, the Committee is of the view that the State Party is under an obligation pursuant to article 2(3) of the Covenant to provide /X/ with effective remedies, including her immediate release /from prison/, permission to leave the country and compensation for the violations which she has suffered ..." (Communication No. R/13/56, para. 12, reprinted in the 1981 Report of the Committee, UN document,

A/36/40, p. 188 of the English version). The Committee is not a court and cannot issue orders binding on state parties. It does have a similar power, however : the power to reach a formal, unappealable conclusion that a State Party has an obligation under international law to take specified steps to remedy and compensate the violation and to prevent its recurrence. That its conclusions are denominated 'final views' does not alter their character. It is because of this authority, as well as for the guarantees of independence it enjoys and the characteristics of the procedures it applies in individual and inter-state cases, that the Committee is considered a quasi-judicial body.

(127) The Waksman Case, No. R/7/31, 1980, Report of the Human Rights Committee, UN document A/35/40, p. 120 (English version).

(128) UN document CCPR/C/1/Add.57, 3 February 1982.

(129) See, for example, the Lanza case, No. R/2/8, 1980, Report (supra, note (127)), para. 15.

(130) 1979 - 1980 Annual Report (supra, note (125)), Chapter V.C., Conclusions, para. 2.

(131) UN document CCPR/C/SR.357, 9 April 1982, Summary Records 14 and 15th Sessions (NY, March and Geneva, July 1982).

(132) Uruguay, p. 352).

(133) See, for example, the Review of the International Commission of Jurists, No. 14 (June 1975), p. 1.

(134) Report on Argentina (note (68), supra), Recommendation 4.

(135) See p. 440, supra.

(136) The Commission concludes, for example, that "the complete exercise of the freedom of opinion, expression and information has been limited, in different ways, by the enactment of emergency laws that have contributed to creating a climate of uncertainty and fear among those responsible for the communications media" and that "labour rights have been affected by the norms which have been declared in this area and by their application, which has had a particular impact on the right of trade union association, due to military interference, and the promulgation of laws which injure the rights of the working class ..." (Conclusions 2(a) and (b)).

(137) See p. 414, supra.

(138) Here, in contrast with Colombia, one notes the barren ground on which the Commission's efforts have fallen : an unelected government, no legislature, a highly polarised political and social situation with little middle ground, a nation with a considerable part of its intelligencia in exile, greatly curtailed freedom of expression and assembly, etc.

(139) An ILO Commission of Inquiry (see note (105), supra) also concluded that there was no state of emergency in Greece "such as would justify temporary non-compliance with" Conventions Nos. 87 and 98. It did so by applying customary international law.

(140) The Lawless case (Merits), Yearbook European Convention on Human Rights, pp. 472 - 474.

(141) Stock-taking on the European Convention on Human Rights, Council of Europe, 1979, p. 87.

(142) Ireland v. The United Kingdom (Report of the Commission), Publications E.C.H.R., Series B, p. 117.

(143) Ibid. p. 119.

(144) Northern Ireland, pp. 236 and 244.

(145) An inter-state complaint concerning the September 1980 state of emergency was made in July 1982, however.

(146) 1981 Report (note (12), supra), para. 400.4.

(147) Ibid.

(148) Ibid.

(149) Ibid.

(150) See the view of René Cassin, representative of France in the Committee charged with drafting the Covenant in UN document E/CN.4/SR127, 14 June 1949.

(151) The Committee itself does not receive notices of derogation. They are received by the UN Secretariat, which is obliged by the Covenant to inform the other States Parties. In practice, the texts of such notifications are published approximately once a year (UN document CCPR/C/2 and addenda).

(152) Study ... (note (3), supra), Recommendation (A)4.

(153) It should be noted that a State Party which "avails itself of the right of derogation" is obliged to make such a report; strictly speaking, a State Party which proclaims a state of emergency is not bound by the requirement unless the emergency involves measures which derogate from the obligations set forth in the Covenant. However, it is more in keeping with the purpose of Art. 4(3) for the State Party to report the declaration of emergency and measures adopted under it

without prejudice to the ultimate question of whether the emergency measures constitute derogations.

Among the State Parties which had a state of emergency during a time while the Covenant was in effect for that country without giving notice to the other States Parties are : Central African Republic for a state of siege proclaimed in July 1981; Chile for a state of siege in effect when the Covenant entered into force in March 1976 (reported in August 1976) and more recent unreported proclamations of emergency; Colombia, for a state of siege declared 1976 (reported in 1980); Ecuador, for a state of emergency declared in January 1981; El Salvador for the state of siege declared 9 March 1980; Iran, for martial law proclaimed in the main cities on 8 September 1978; Jamaica, for an emergency declared on 17 June 1976; Jordan, for an emergency declared in 1973 and still in effect upon the entry into force of the Covenant; Mauritius, for a state of emergency declared in 1971 and still in effect upon the entry into force of the Covenant; Peru, for the states of emergency of July 1978 and January 1979; Syria, for a state of emergency in effect when the Covenant entered into force; Tanzania, for the state of emergency in effect in Zanzibar when the Covenant entered into force; Tunisia, for the state of emergency of February 1978; the United Kingdom, for the 7 day state of emergency in the dependant territory of Bermuda in December 1977; Uruguay, for the state of emergency in effect when the Covenant entered into force in 1976 (reported in 1979).

It should also be noted that reporting a state of emergency does not necessarily satisfy the obligation of the State Party under article 4(3), which requires notice of "the provisions from which it has derogated and of the reasons" for derogation. On various occasions, the Committee has observed that notifications received have been inadequate in this regard.

(154) His statement was summarised as follows :

"... he pointed out that his country was entitled, like any other State Party which may face danger and threats to its national security, as Syria did due to the continued occupation of parts of its territory by Israel, to derogate from some of its obligations under the Covenant in accordance with article 4 thereof, to the extent strictly required by the exigencies of the situation. Citing a declaration by the President of the Syrian Arab Republic before the National Council, the representative stressed that no state of emergency existed in his country and that martial law was not applied any more except when the security of the State was in danger. He finally stated that the two reports submitted by the Syrian Arab Republic should be viewed in their proper perspective, that is to say, in the context of the conflict in the Middle East which was threatening the life of the nation and that, owing to the fact that part of the Syrian territory was under foreign occupation, his Government could not implement the provisions of the Covenant, particularly article 40 thereof, since it was unable to secure and protect the rights and freedoms of the inhabitants of its occupied territories. (1979 Report of the Human Rights Committee, UN document 4/34/40, para. 287).

(155) Ibid., para. 293.

(156) Syia, p. 281.

(157) 1979 Report (note (152), supra), paras. 295 and 299.

(158) Peru's first report, for example, was scarcely more than two pages (UN document, CCPR/C/6/Add.1). Uruguay's report was received 5 years late (pp. 446 supra.)

(159) See, for example, the Committee's consideration of the report of Chile (1979 Report, note 152, supra, paras. 72-73).

(160) See pp. 446 - 447, supra.

(161) See note 126, supra.

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