

*FOR THE RULE
OF LAW*

***Bulletin
of the
International
Commission
of Jurists***

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THE INVASION OF CZECHOSLOVAKIA *

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

TO SAVE SUCCEEDING GENERATIONS FROM THE SCOURGE OF WAR,
WHICH TWICE IN OUR LIFETIME HAS BROUGHT UNTOLD SORROW
TO MANKIND, AND

TO REAFFIRM FAITH IN FUNDAMENTAL HUMAN RIGHTS, IN THE
DIGNITY AND WORTH OF THE HUMAN PERSON, IN THE EQUAL
RIGHTS OF MEN AND WOMEN AND OF NATIONS LARGE AND
SMALL.

Thus the Nations of the world at the end of World War II solemnly bound themselves to the provisions of the Charter of the United Nations. Article 2 of the Charter provides:

1. The Organisation is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

The action of the USSR, East Germany, Poland, Bulgaria and Hungary in invading the sovereign State of Czechoslovakia is a clear and indefensible violation of the Charter of the United Nations, and of international law. It is a ruthless attempt to impose by brute military force political, economic and military control on a free sovereign people.

* This is the text of a press release issued by the International Commission of Jurists on 21st August 1968, the day when Czechoslovakia was invaded by forces of the USSR, Bulgaria, East Germany, Hungary and Poland.

It is ironical and cynical that only a few months ago, these same States solemnly adhered to the U.N. International Covenant on Civil and Political Rights, which by Article 1 provides:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

No-one who believes in the Rule of Law can fail to condemn this gross and obvious violation of international law and obligations.

No ideological or political allegiance can preclude the forthright condemnation of this act of naked aggression by all who believe in the Rule of Law, international order, peaceful co-existence and democracy. This is an issue on which no-one can remain silent. It is a choice between foreign aggression and dictatorship on the one hand and democracy and peaceful co-existence on the other.

HUMAN RIGHTS, THE LAWS OF WAR AND ARMED CONFLICTS

At the United Nations International Conference on Human Rights at Teheran this year (21st April-13th May) a Resolution of the utmost importance was adopted by the unanimous vote of 67 states, with two states abstaining. This resolution, entitled 'Human Rights in Armed Conflicts', made three specific proposals which, when implemented, will give a real meaning to the laws of war, at present almost completely out-dated by scientific and technological developments in the means of human destruction. Specifically, the Resolution

1. Calls for a study to be made by the Secretary General of the United Nations on the steps that could be taken to secure the better application of existing humanitarian international conventions, and on the need for additional conventions or a revision of those already existing to ensure the better protection of civilians, prisoners and combatants in all armed conflicts, as well as the prohibition and limitation of the use of certain methods and means of warfare;

2. Requests that the Secretary General, having consulted the International Committee of the Red Cross, should draw the attention of States to the existing rules of international law on armed conflicts and should urge them, pending the adoption of new rules, to ensure that in all armed conflicts the inhabitants and belligerents are protected in accordance with 'the principles of the law of nations derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience';¹

¹ The words in quotations are taken from the Preamble of the Hague Convention No. IV of 18 October 1907. This is known as the *Martens Clause*, after its author Professor F.F. de Martens. The same words are also quoted in each of the four Geneva Conventions of 1949 (First Convention Art. 63; Second Convention Art. 62; Third Convention Art. 142; Fourth Convention Art. 158).

3. Calls on those states which are not already parties to the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925 and the Geneva Conventions of 1949 to become so.

The history behind these proposals is the history of the growing alarm among those close to the phenomena of increasing brutality and violence and of armed conflicts in steady escalation since the end of the Second World War. Today, wars do not exist in the classical sense; armed conflicts have taken their place. Today, the laws of war, even if they were fully respected, are so hopelessly inadequate as to be an anachronism. Added weight is given to the problem by the increase in violence and unrest so evident in the world at present. The International Commission of Jurists has stressed that violence is contagious; it is probable that the cruelty in conflicts being witnessed daily on television screens and in newspaper reports is an important factor in the growing disenchantment and unrest of youth in every part of the world. The violence and brutality of the armed conflicts that disgrace our age are steadily eroding the ethical and moral standards of humanity.¹

Bodies such as the International Committee of the Red Cross (I.C.R.C.), the Friends World Committee for Consultation, Amnesty International and the International Commission of Jurists are daily, in their work, more aware of the hopelessness of humanising international disputes in the circumstances that exist at present. They have called constantly for a reappraisal of the Conventions that do exist to regulate behaviour between belligerents, as well as for a better application of existing conventions and for additional conventions to protect civilian populations, prisoners of war and combatants against undue misery and suffering arising out of armed conflicts.

It is undoubtedly due in large measure to the consistent pressure from these organisations and from other bodies representative of public opinion as well as from individuals all over the world that a resolution dealing with the protection of human rights in armed conflicts was finally adopted at the first International Conference to be held on Human Rights by the United Nations.

¹ Statement of the Commission and Report of the Secretary General. See *Bulletin* No. 28; also *Bulletins* Nos 21 and 34.

The 'Laws of War'

The laws of war are presently contained in the Hague Conventions of 1899 and their revisions of 1907, the Geneva Protocol of 1925, and the humanitarian Geneva Conventions of 1949 dealing with the protection of the sick and wounded, the civilian populations and prisoners of war.

Relations between belligerents in the conduct of operations, methods of warfare and the use of weapons, are governed by the Hague Conventions and the Geneva Protocol. Article 22 in both the Hague Conventions relating to the laws and customs of war on land (1899 II, 1907 IV) provides that 'the right of belligerents to adopt means of injuring the enemy is not unlimited'. Another common article (*Article 23*) especially forbids the use of poison or poisoned weapons, the treacherous killings of individuals, the killing or wounding of an enemy who has surrendered or who has no longer any means of defence, and the use of arms or materials calculated to cause unnecessary suffering. Article 25 (1907 IV) prohibits attack or bombardment by whatever means of undefended towns, villages, dwellings or buildings. Naval bombardment of such places or of ports which are undefended is also forbidden by Article 1 of the 1907 Convention (IX) concerning the Naval Forces in time of war. Pillaging is forbidden even of towns taken by assault (*Articles 28, 47, 1899 II, 1907 IV, Article 7, 1907 IX*). Belligerents are forbidden to force the inhabitants of an occupied territory to furnish information about the army of another belligerent (*Article 44, 1907 IV*). No general penalty, pecuniary or otherwise, may be inflicted on the population for acts of individuals for which the general population cannot be regarded as jointly and severally responsible (*Article 50, 1899 II, 1907 IV*).

A Declaration adopted by the 1899 Hague Conference had forbidden the use of projectiles, 'the only object of which is the diffusion of asphyxiating or deleterious gases' and 'the use of bullets which expand or flatten easily in the human body'. The 1925 Geneva Protocol gave partial form to this Declaration by forbidding the use in war of 'asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices'. The prohibition took cognisance of scientific developments by extending its terms to the use of bacteriological methods of warfare. As recently as 5th December 1966, the General Assembly of the United Nations further recognised the general applicability of the Protocol by inviting (Res. 2162 (XXI)) all states to conform

strictly with its principles and objectives and by condemning any violations. The resolution also invited all states to adhere to the Geneva Protocol.

It must be recalled that although the provisions relating to the conduct of operations such as those enumerated above cannot be considered as comprehensive in forbidding inhumane methods of waging warfare, the Hague Conferences were convened mainly to deal with the limitation of armaments and the pacific settlement of disputes. Their provisions relating to methods of warfare are declaratory, not amendatory, of Customary International Law. All states, therefore, whether or not they took part in the Conference or ratified the Conventions must be considered bound by the principles which were involved. Failure to ratify can merely be regarded as the rejection of a codified text, and not as a rejection of the principles of International Law. Moreover, both the 1899 and the 1907 Conventions contain a clause which draws attention to the awareness on the part of the participants to the lacunae in the codified texts and to the general applicability of the principles of humane behaviour by stating that:

Until a more complete code of the laws of war can be drawn up the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of *the principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience.*¹

The Geneva Protocol recognizes that certain practices, having been condemned 'by the general opinion of the civilised world', are contrary to International Law, and that the prohibitions contained in the Protocol are to be universally accepted as a part of International Law, 'binding alike the conscience and the practice of nations'. By the same token, a declaration of war is not an essential precondition for the obligation to apply the Conventions. The mere existence of an armed conflict brings into operation the applicability of regulations concerning warlike behaviour.

Respect for the Individual

Treatment of individuals in time of war or armed conflict has been the subject of several international conventions since 1864.

¹ The *Martens Clause*. See footnote on p. 3 (above).

In 1949, mainly at the instigation of the International Committee of the Red Cross, they were revised, and the Geneva Conventions of 1949 now constitute the most thorough codification of the rules for the protection of the human person in armed conflicts. The four Conventions, which deal with treatment of the sick and wounded, prisoners of war and the civilian populations, are based on the principle that persons placed *hors de combat* and those taking no active part in the hostilities should not be killed and should in all circumstances receive humane treatment.

The Wounded and Sick upon Land

The First Convention declares that all persons, either civil or military, who may be considered as forming part of the armed forces, including organised resistance movements, who are wounded or sick must be respected and protected in all circumstances without discrimination. They must not be tortured, murdered or subjected to experimentation (*Articles 12 & 13*). Medical units, hospitals and aircraft and medical or auxiliary personnel must be protected (*Articles 19-26 & 36*). The wounded and sick of a belligerent who fall into enemy hands must be treated as prisoners of war (*Article 14*).

The Wounded and Sick at Sea

The Second Convention applies the same protection to members of the armed forces and others at sea who are wounded, sick or shipwrecked, and also protects military hospital ships (*Articles 12, 13, 16 & 22*). It forbids bombardment or attack from the sea of establishments ashore which fall under the protection of the First Convention (*Article 23*).

Prisoners of War

The Third Convention deals with the treatment of prisoners of war, who must at all times be humanely treated (*Article 13*). Measures of reprisal are prohibited (*Article 13*) and they are entitled in all circumstances to respect for their persons and their honour (*Article 14*). They may not be tortured or coerced in any way to give information (*Article 17*). They may not be deprived of their property (*Article 18*). Proper attention must be paid to their health and safety (*Articles 20, 22, 23 & 25-30*). Disciplinary sanctions are strictly limited by the Convention (*Articles 82 &*

88-98). Judicial proceedings may only be brought according to the rule of law as elaborated in the Convention (*Articles 82-88 & 99-108*). A death sentence may only be carried out if the provisions of the Convention have been observed and the sentence has been pronounced by the same courts and according to the same procedure as in the case of members of the armed forces of the Detaining Power (*Articles 100-102*).

The Civilian Population

The Fourth Convention aims at protecting the civilian populations of countries in conflict and at alleviating the sufferings caused by war. The wounded and sick, the infirm and pregnant mothers are the object of particular protection (*Article 16*). Evacuation of civilians and the protection of hospitals and hospital staff are labelled as a principal concern for the parties to the conflict. (*Articles 17-20*). Collective penalties, pillage and reprisals, the taking of hostages, corporal punishment or torture are prohibited (*Articles 32-34*). Provisions for the treatment of civilians when under the control of an occupying force are similar to those applicable to prisoners of war.

General Provisions

All four Conventions give special status to the International Committee of the Red Cross, whose personnel must be protected and must be allowed to carry out their humane activities with the cooperation of the parties to the conflict and free from any interference.

Although the Conventions strictly apply to wars of an international nature, Article 3 of all four Conventions stipulates that a minimum of humanitarian provisions apply in all 'armed conflicts' even those which are not of an international nature. Moreover the High Contracting Parties have undertaken not only to respect the Conventions themselves, but 'to ensure their respect in all circumstances' (*Article 1* in each of the Conventions).

Implementation

Regarding Implementation of the Conventions the parties are placed under strict obligations by the Conventions themselves. Under Articles 47 (I), 48 (II), 127 (III), and 144 (IV) they have undertaken to disseminate the text of the Conventions as widely

as possible 'in time of peace as in time of war' so that the principles may become known to the entire population, in particular the armed forces and medical personnel. Under Articles 45 (I) and 46 (II) each Party to a conflict is bound to ensure the execution of the provisions of the Conventions and to deal with unforeseen cases in conformity with the general principles of the Conventions. The Parties have further bound themselves (*Articles 49 (I), 50 (II), 129 (III) & 146 (IV)*) to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of the grave breaches defined in the Conventions, such as wilful killing, torture or inhuman treatment. Denunciation of the Conventions in no way impairs the obligations which the parties to a conflict remain bound to fulfil 'by virtue of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience'.¹ (*Articles 63 (I), 62 (II), 142 (III) & 158 (IV)*).

Unfortunately, the pledge to diffuse the texts of the Conventions has not so far been sufficiently honoured by many states. Although some states do instruct their military forces in their provisions, diffusion to other sections of the population depends mainly on the I.C.R.C. and National Red Cross Societies. The *ad hoc* legislation which should be adopted in time of peace to implement the specific obligations on each signatory State, such as the sanctioning of infringements of the Conventions, is not often seriously undertaken. Moreover, nowadays most armed conflicts are termed 'non-international', although they are nearly always backed by some outside power. Such a power supplying arms or military advisers could at least ensure a minimum of humanitarian behaviour by stipulating that the Geneva Conventions must be respected.

The International Commission of Jurists has already suggested that, whenever an armed conflict breaks out, diffusion of the Conventions should be undertaken immediately by the Secretary General of the United Nations or some other U.N. authority such as UNESCO. The provisions of the 'law of nations', as elaborated by the Hague and Geneva Conventions as well as the provisions of the Universal Declaration of Human Rights should be brought without fail to the notice of the belligerents and their

¹ The *Martens Clause*. See footnote on p. 3 (above).

supporters. Equally, the armed forces involved, through the direct agency of the U.N., could be furnished with the texts of the Conventions printed in their own language and distributed on a mass scale.

Need for Revision

Again, it is important to recall that the specific provisions regulating the laws of war or the treatment of individuals in no way detract from the basic humanitarian rules of Customary International Law which apply in all circumstances and between all parties. This factor is exemplified by the constant use in both the Hague and Geneva Conventions of the *Martens Clause*, which recalls the principles for humane conduct that exist independently of codified texts, being derived from usage and from universally accepted precepts. The Geneva Protocol also recognises these general principles. Similarly, the 'Nuremberg Principles', formulated by the International Law Commission in 1950 at the request of the General Assembly of the United Nations, which had unanimously recognised 'the principles of international law recognised by the Charter of the Nuremberg Tribunal', affirmed that crimes against peace, war crimes and crimes against humanity are punishable as crimes under international law. War crimes are defined by the Commission as 'violations of the laws or customs of war'.

However, it is clear that there is an urgent need for a reappraisal of the specific rules applicable in armed conflicts. The Hague Conventions, signed when aviation bombing was unknown, recognised a distinction between the zone of hostilities and the rear, the latter areas being sheltered from hostile action. Bombardments in the Conventions meant 'bombardments of occupation', not bombardments of destruction such as have been current practice since aviation. The Geneva Protocol was drawn up before the discovery of atomic power, and today the damage which indiscriminate use of such energy could cause is out of all proportion to military requirements. There is of course the view that no use of nuclear weapons can be justified, and that the total prohibition of such weapons in warfare should form a separate convention or part of a non-proliferation treaty.

The Geneva Conventions should also be reconsidered in the light of recent practices in warfare which often make civilians and

non-combatants the chief object of attack. The optional provisions in the Conventions to declare certain zones neutralised should be made obligatory. All the provisions should be extended to non-international conflicts. It is time also that the categories of those entitled to prisoner of war treatment be widened to include those who, although not complying with all the conditions of the Third Convention, do constitute organized resistance movements seeking to realise the decisions of the U.N. in regard to racialist colonial regimes.

But whether or not the Conventions are outdated, how many signatory states actually apply, and ensure the application of the provisions which do exist? One hundred and nineteen states (by May 1968) have adhered to the Geneva Conventions. To that number may be added four states that are considered as being bound by the adherence of the ruling power before the independence of those states, no declaration of renunciation having been received. One state, although not adhering formally, has declared that it will observe the provisions of the Conventions. The universality of the obligations undertaken by these states cannot be disputed, yet every day they are being violated.

The XXth International Conference of the Red Cross held in Vienna in 1965 laid down the principles which must be upheld in regard to the protection of civilian populations against the dangers of indiscriminate warfare, and made important recommendations concerning implementation and dissemination of the Geneva Conventions; these unfortunately have been virtually ignored.¹ On the 19th May 1967 the I.C.R.C. wrote to all governments emphasising the need for more up to date and comprehensive international safeguards; they pointed out that 'as a result of technical developments in weapons and warfare, given also the nature of armed conflicts which have arisen in our times, civilian populations are increasingly exposed to the dangers and consequences of hostilities'. This appeal evoked practically no replies. On the 9th February 1968 the I.C.R.C. issued a statement which said:

The International Committee of the Red Cross reminds belligerents that in all circumstances they are bound to observe the elementary and universally recognised rules of humanity. These rules demand that the lives of combatants who have been captured shall be spared, that the wounded, the sick and those giving them medical care shall be respected, that the civilian population shall not be subject to attack from the air

¹ See *Journal* Vol. VII, No. 1 of the ICJ.

and lastly, that summary executions, maltreatment or reprisals shall be prohibited. ¹

In January 1968 the Geneva Conference of Non-Governmental Organisations on Human Rights expressed alarm at the 'intensified violence and brutality of our times' and demanded an untiring effort from everyone, primarily from those having responsibilities in the political, scientific, spiritual and educational fields. It urged compliance with the Geneva Conventions by all involved in a conflict, whether international or internal, as imperative, and stressed the necessity for a new codification of the rules relating to the use of weapons as a protection for the civilian populations. ²

The Montreal Assembly for Human Rights in March 1968 drew attention to the Red Cross statement of February and stressed that 'it is the duty of States which are parties to one or more of the Geneva Red Cross Conventions of 1949, singly and collectively, to use their best endeavour in armed conflicts of any kind "to ensure the respect in all circumstances" of the provisions of the Conventions'. ³

Until there is an international machinery to pronounce judgment on and to punish crimes against humanity, it is essential to broaden the scope of the existing rules for humanitarian behaviour in armed conflicts and to ensure their application. The resolution adopted by the Human Rights Conference at Teheran is the first step in this direction.

The International Commission of Jurists sincerely hopes that the measures specified in this resolution will be implemented without delay; the initiatives that it calls for could be placed in no better hands than those of the two world bodies which must be considered the guardians of the humanitarian rules governing armed conflicts, the United Nations and the International Committee of the Red Cross. The Commission acclaims the persistent efforts of the I.C.R.C. to bring about the implementation, diffusion and application of the Geneva and Hague Conventions. Lastly, it calls for general support for the measures envisaged in the resolution, not only from lawyers, but also from all who are concerned about the increasing dehumanisation of relations between peoples.

¹ See *Bulletin* 34.

² See *Bulletin* 33.

³ See *Journal* Vol. IX, No. 1 of the ICJ.

ARGENTINA

SUBJECTION OF THE JUDICIARY

The Rule of Law in Argentina was dealt a severe blow on 24th June 1968, when the Executive abused its power of *intervention*¹ in order to reorganise the Judiciary in the Province of Santa Fe.² Its action has had extremely grave results, as both the function of the courts and public confidence have been undermined. Even the most persistent critics of the military regime that took over the Executive and the Legislature in 1966 considered that the respect shown up to now for the Judiciary was to some extent a safeguard of individual rights that might be encroached upon by possible abuses of power. The unhesitating intervention of the authorities unfortunately has destroyed that confidence. The judges who may be appointed while this situation lasts will necessarily be government officials. This state of affairs is a far cry from an independent Judiciary, which is essential for the effective operation of the Rule of Law and the protection of fundamental human rights.

The Facts

Commemorative acts had been planned for 13th and 14th June by the Regional Committee for University Reform in two private meeting places in Rosario, capital of the Province of Santa Fe. When the meetings were prohibited by the police, the organizers sought and were granted *amparo* by two competent courts, which authorized the meetings to be held. That the law was correctly applied can be seen from the reasons given in one of the judgments:

A petition for *amparo* may be filed against any decision, act or omission of a provincial, municipal or communal administrative authority

¹ In exceptional circumstances, which are strictly defined, the Constitution permits the federal government to declare an *intervention* in a province, under which it is able temporarily to take over the administration through especially appointed federal officers.

² A province in Argentina is equivalent to a state of a federation.

or of private persons or bodies holding public office that threatens, restricts or impedes in a manifestly unlawful manner the exercise of a right directly granted to individuals by the National or Provincial Constitution, provided that recourse to the ordinary remedies is not possible without serious and irreparable damage and provided that there are no specific remedies of a similar nature available by virtue of laws or regulations (Article 17 of the Provincial Constitution).

In connection with the other requirement, i.e. the manifest unlawfulness of the contested decision prohibiting the performance of an act, Article 13 of the Provincial Constitution provides that 'the inhabitants of the Province may meet freely in a peaceful manner even in premises open to the public'. Meetings open to the public are subject solely to the obligation of giving previous notice to—and not, as it is alleged, of obtaining permission from—the authorities, who are entitled to prohibit them 'only on reasonable grounds of public interest or law and order'.

Other considerations follow which make clear that there existed no circumstances likely to endanger law and order. The judgment concludes:

Moreover, the fact that the Executive had not declared a state of emergency, as provided for in Article 23 of the National Constitution, demonstrates the absence of clearly abnormal circumstances likely to endanger national law and order and warrant a state of emergency and the suspension of constitutional guarantees in order to protect the integrity of the Republic. Consequently, the rights and guarantees established in the National Constitution remain in force.

From the foregoing considerations it follows that the petition is well founded and that the prohibition by the chief of police conflicts with the rights and guarantees laid down in the Constitution and is therefore an unlawful restriction of the right of assembly. (Judgment of Dr. Armando O. Fávrega, labour judge, Second Jurisdiction of Rosario).

On appeal by the representative of the Province, the decisions of the judges of first instance were upheld by the Court of Appeal.

On the two days in question the judges went personally to the meeting places, which were closed off by a cordon of police, to inform the authorities of their decision that the meetings could be held and to see to it that the order was carried out. They identified themselves as judges and advised the police officials of their duty to obey court orders—not only to execute them but to enforce them. The police replied that the meetings would not be held in any case because they were prohibited by 'orders from superiors'. On both occasions the judges were accompanied by a group of persons including many lawyers and professors and

students of law. Immediately after the brief conversation with the judges, the police brutally charged the gathering with horses and weapons, wounding several persons. One of the judges was also physically assaulted.

An extraordinary session was held by the Supreme Court of Justice of the Province on 17th June. Without analysing the judges' decisions, the Supreme Court ruled that ' the execution of court orders is obviously imperative, however right or wrong the decisions or proceedings of the judges may be. It is therefore the duty of this Court to defend *ex officio* and as representative of the Judiciary (Article 92 of the Provincial Constitution) the overriding authority of orders issued by judges since, even assuming, as an extreme case, that the order runs counter to law, the judges are responsible elsewhere for their decisions and, as is clearly established by existing law, neither the scope nor the expediency, much less the lawfulness, of their decisions can be contested... '

On 24th June, the Executive decreed Law No. 17,782 declaring an *intervention*¹ in the Province of Santa Fe ' for the sole purpose of reorganizing the Judiciary '. An administrator was appointed with ' powers to remove and replace the judges and court officials of the Province in accordance with the instructions to be issued by the *Ministry of the Interior* '. The day after the law was published, all the members of the Supreme Court of the Province resigned.

Conclusion

These grave events speak for themselves. The military regime, backing up its police in revolt against the Judiciary, did not hesitate to resort to typically dictatorial methods in order to prevent firm court decisions from being carried out. There is legal machinery available to a party who considers that his rights have been infringed by a court as well as constitutional and legal procedures for examining, reviewing and, if necessary, sanctioning the conduct of judges who may have improperly discharged their functions. Instead of availing itself of these remedies, the Executive chose to use its all-embracing powers to reorganize a Judiciary all too aware of its responsibilities and intent on fulfilling its obligations.

¹ See footnote 1 on p. 13 above.

These facts are confirmed by the message accompanying Law No. 17,782, in which the Executive analyses what it considers to be the powers of the Judiciary in relation to its own. Its conclusion is that the decisions of the judges and of the Provincial Supreme Court had an 'obvious political significance', which 'shows the immediate need for reorganizing the Judiciary of that Province by using the exceptional measures provided for in Article 6 of the Constitution'. In this connection, the Bar Association of Buenos Aires issued a public statement containing among others, the following consideration: 'It is regrettable that the ministerial report preceding the *intervention* decreed with respect to the Judiciary of Santa Fe should attempt to justify that action by arguments that are clearly mere legal expedients. In particular, Article 6 of the Constitution is wholly inapplicable to the case, since any errors that might be ascribed to those judges lack the gravity that would warrant resorting to the special measures laid down by Article 6 for the sole purpose of "safeguarding the republican form of government". Nor is the action taken consistent with the letter and spirit of the statements made by the present authorities on assuming power, to the effect that they undertook "to restore the rule of true justice, in a Republic where the exercise of individual obligations, rights and liberties shall be fully effective".'

The *intervention* of the Executive has given rise to many protests in the Argentine press and in statements by bar and other legal associations.

In conclusion, it is fitting to quote a passage from the press release issued on 25th June by the *Asociación Jurídica por el Imperio del Derecho* (Rosario, Argentina), local section of the International Commission of Jurists, since it sums up the attitude and concern of many lawyers in the Province of Santa Fe:

The right of peaceful assembly and the right to freedom of opinion and expression are among the fundamental rights that this nation, since its birth, has adopted as inalienable and that constitute the very basis of civilized nations (Articles 19 and 20 of the Universal Declaration of Human Rights).

The subjection of the Judiciary of the Province because it granted *amparo* and affirmed the overriding authority of court decisions, giving precedence to constitutional rights over any arbitrary decision of the Executive, is a serious violation of the Rule of Law which this Association defends and which is the basic objective of the International Commission of Jurists.

The nature of the *intervention* decreed reveals its intent to intimidate the judges and to destroy the independence of the Judiciary.

In the face of the obvious attempt to distort the key problem of this situation, it must be stressed once again that it is the bounden duty of the Judiciary to apply the law—not only private law but public law as well, especially when the distinct powers of enactment and of enforcement have been assumed by one person alone. For it is then that the tremendous concentration of power in a single and discretionary will demands, as a minimum counterpart, that the mission of the courts should be strengthened. There can now be no question that the Judiciary is the last stronghold where law and freedom are defended against the excesses of authority committed by authority itself. The law is the backbone of every civilized nation and it is for the courts to keep it strong and intact in order to prevent anarchy, impede despotism and achieve the high values on which it is based. Law or arbitrary action, freedom or oppression: these are the antinomies whose death struggle takes place in the courtroom. If the public authorities support arbitrary action and oppression, there is no safeguard or power to protect the individual against the State or against other men. Every injustice becomes possible and imminent.

THE EXTERMINATION OF INDIANS IN BRAZIL

The world was shocked to hear, last March, reports that genocide was being committed against tribes of Indians in the Amazon area and other inland regions of Brazil.

All reports were vague as to the number of Indians alleged to have been exterminated and the period of time over which the genocide was said to have taken place. Some publications gave a sensationally large figure, and in some cases it was stated that the whole process had lasted only a few months.

In view of the tremendous gravity of these reports, the serious concern which they have caused throughout the world and the genuine indignation aroused in all spheres in Brazil, it is imperative to treat the matter seriously and to avoid making accusations on an inadequate basis. This article gives a brief survey of the problem, which is a human rights problem involving in particular the most fundamental right of all—the right to life. An article of this nature cannot cover the entire situation, but it will give the reader more material than the bare press accounts, and thus place him in a better position to make his own appraisal.

Background

From the outset, the Spanish and Portuguese colonies in America produced leading figures in the political, intellectual and religious worlds who were genuinely concerned with integrating the natives into the imported European civilisation. But there were others whose only object was to exploit, if not to exterminate, them.

At that time, America was peopled by many Indian tribes, some of them so advanced in civilisation as not only to compel the admiration of the newly arrived Europeans but also to teach them things hitherto unknown to them. They were at any rate strong peoples, in every sense of the word, and many of them were well-organized warrior tribes who attempted, with every

right, to repel the invaders who were beginning to conquer them and colonize their lands.

There then followed the first of the well-known Wars of the Conquistadores, in which the technical superiority of the Europeans (who introduced horses and were protected by armour) made great inroads on their opponents' numbers in every encounter. The Indians' life began to be difficult: their civilisations—many of them already decadent—were destroyed; the population was dramatically decimated, and their principal concern soon came to be the protection of their lives, to which end many fell back on the most inaccessible regions of America. The result was that, when the nations of America gained independence towards the beginning of the nineteenth century, the number of Indians was already noticeably less than it had once been; and those who were still at a primitive level were to be found far from inhabited centres, in many cases neglected by the recently independent countries, which were giving priority to their own political organisation. Indian tribes also continued to dwindle because of the numerous diseases brought in by the Europeans, against which they had no natural immunity. The resulting debilitation of the race increased the gravity of the various forms of sickness, which often became epidemics.

In the case of Brazil, at the end of the last century and the beginning of the twentieth, concern for the Indian population became very real. This was largely due to the activities of a great Brazilian soldier, General Candido Rondon, whose extensive exploration of the vast, unknown interior of Brazil brought the living conditions of the Indians to the notice of the authorities. He carried on a large-scale campaign of assistance and protection for the Indians culminating in the establishment, in 1911,¹ of the Federal Bureau for the Protection of Indians (*Servicio Federal de Proteccion de Indios*—SPI), the Xingu National Reserve and the National Protection of Indians Board.

These bodies were by law given certain objectives — many of them idealistic. These objectives included:²

The establishment of permanent contacts and friendly relations with backward or hostile tribes;

¹ Decree No. 9,214 of 15th December 1911.

² Decree No. 10,652 of 10th October 1942, Article 12, amended by Decrees No. 12,318 of 27th April 1943 and No. 17,684 of 26th January 1945.

The legal protection of the internal organisations of the tribes, their independence, customs, language and institutions;

The exercise, in accordance with the legal provisions in force, of the trusteeship vested in the State to safeguard them from oppression and exploitation;

The promotion of mutual respect between the Indians and the rest of the population;

The prevention of violence against the Indians and their families and the prosecution and punishment of those committing offences against them;

The guaranteeing of the Indians' effective possession of the land occupied by them, by using all legal and police means available to prevent the civilised population from invading or attacking such areas and by informing the authorities of any occurrences of this kind;

The demarcation of the boundaries of land belonging to the Indians, in accordance with Article 154 of the Constitution;

The maintenance of schools for Indians.

The decree also laid down a further series of obligations of the Federal Bureau, all relating to protection, medical care and other responsibilities, which unfortunately were never, or only superficially, enforced and then almost always in regard to Indians found in areas near the main centres of population.

As soon as Rondon and his first enthusiastic collaborators had gone, corruption crept into the Bureau. Its agencies in such easily accessible States as Sao Paulo, Parana, Rio Grande do Sul operated smoothly, but in the Amazon and Matto Grosso regions the story was very different. There it was necessary to organize costly expeditions along the rivers and to cover great distances through unknown regions on foot. Few were prepared to plunge into the forest and risk all the dangers that such an undertaking involved. In many cases it was necessary to hire adventurers who knew the area well and hope that they would carry out the mission entrusted to them in accordance with the high principles of the Bureau. In this way, economic interests and easy profits began to vitiate the work of the Bureau and many of its officials discovered that hands were laid not only upon the land constitutionally set apart for the Indians, but also upon the manpower of the Indians, who were used practically as slaves.

This situation continued until 1964, when a Parliamentary Commission was set up to investigate irregularities in the Bureau; it made formal charges against 134 officials. The Commission,

according to its Chairman,¹ was subjected to every kind of pressure. The deplorable situation which the investigation uncovered was set forth in a report weighing more than two hundred-weight and which, according to the *Jornal do Brasil*,² weighed even more: 'Tons of shame'. It showed that tribes had been exterminated through the inoculation of smallpox, and by explosives thrown from aeroplanes; that reserve land had been sold on the pretext that it was 'not occupied by Indians' (for they had been exterminated), and that forced labour was being practised on private estates (*fazendas*), where the Indians were subjected to corporal punishment and were receiving no care whatsoever. The list of abuses is too long to enumerate.

The investigation showed not only that a large number of unscrupulous officials of the Bureau were guilty of criminal offences but that the Federal and State authorities had been grossly negligent in enforcing the law: this requires that the land reserved for the Indians shall be preserved as part of the national heritage and contains regulations as to the surveying of such land, under which the surveyor is bound to ascertain the presence of Indians and respect the areas occupied by them. If this provision had been properly respected, some States of the Union, whose authorities are presumed to have some knowledge of the population in the territories that they govern, could never have granted title deeds in respect of certain areas. Brazil is an enormous country; the fifth largest in the world, it comprises immense uninhabited areas, inaccessible and unexplored. But this cannot excuse the authorities for disregarding such important factors of administration, especially when human lives are involved.

The Federal Government, unanimously supported by a horrified public opinion, has shown great determination in intervening in this matter. The whole world is awaiting Brazil's solution to this tragic situation. The Minister of the Interior, General Albuquerque Lima, has stated publicly that he intends to carry the investigation to the utmost limits and has promised to ensure that the guilty are brought to justice and duly punished. He published a statement, on 28th March of this year, the main points of which are:

¹ Statement made by Mr Juder Fuguereido Correia, Chairman of the Investigating Commission. *Jornal do Brasil*, Rio de Janeiro, 23rd March 1968.

² *Jornal do Brasil*, editorial, 17-18th March 1968.

1. At the conclusion of the administrative investigation, its findings will be duly published in accordance with the law, the right of the accused to defend themselves being respected. The Administration has no other purpose than to establish the facts, and to declare responsible those who have acted in violation of the laws and regulations relating to Indians and their tribal communities and have embezzled public funds allocated for the protection of Indians.

2. In addition to the appropriate administrative sanctions, the Administration will ensure that acts which constitute offences are brought to the notice of the judicial authorities.

3. The need for the present investigation is the result of decades of neglect in the administrative service responsible for the protection of Indians, which was leading to the neglect and ruin of the native populations. But it is also due in part to the investments made in native areas by groups interested in the possession and exploitation of the land, thus giving rise to an unequal battle. Many of the facts reported are of long date.

4. The investigation has now reached its final stage.

5. The Government intends to sift the available information thoroughly, and to that end will set up sub-commissions to examine evidence of a specific or regional nature. This measure will, however, not affect the course of the investigation.

6. On the initiative of the Ministry of the Interior a National Indian Fund is being set up; this will be a new body which will be free from past errors. Its specific aims will be to ensure respect for the Indians and their tribal institutions, and to guarantee their permanent possession of all land inhabited by them and their exclusive enjoyment of its natural resources.

The statement of the Ministry is sufficiently clear and frank not to require further explanation. However some comment should be made on a specific point: the statement draws attention to a problem which is closely connected with the deaths and abuses suffered by Indians and which, it can be assumed, will also be thoroughly investigated. This is the problem arising from the fact that Brazilian and foreign financial groups have invested in the purchase of land which was by law inalienable. The press has dwelt on the enormous pressure brought to bear by these groups, not only on the Investigating Commission, but on high political circles in Brazil, to such a degree as to cause concern for the very outcome of the investigation.

Great firmness is required to counter the tactics and intimidation employed by these groups; it is essential to do so, for the Government is committed before the country and the world to solving every aspect of the problem.

At this stage very little can be done in the way of substantive reparation. Vigorous action however, is needed to expiate to some small extent the tremendous moral guilt arising from the failure to protect defenceless lives. In addition, action must also be taken to ensure that such a situation can never recur. This is fundamental.

It should be noted that the financial investments referred to above were effected through the destruction of human lives; in the circumstances there can be no court anywhere in the world that would uphold them. This consideration must apply should the Government of Brazil find a legal formula to take over the whole of the illegally acquired property, naturally without compensation.

The New Regime

The Constitution of Brazil, promulgated in 1967, provides by Article 4, paragraph IV, that 'the land occupied by Indians' is the property of the Union. Article 186, states that 'Indians shall be guaranteed the permanent ownership of the lands that they inhabit and the exclusive enjoyment of the natural resources and all the amenities to be found thereon'.

On 5th December 1967, the National Congress passed an Act, (No. 5,371) authorizing the Federal Government by Decree No. 62,196 of 31st January 1968 to establish a 'National Indian Fund', to be administered by representatives of the Ministers of the Interior, the Navy, the Army and the Air Force, the National Investigation Council, the Brazilian Forest Development Institute, the Foundation of the Special Service of Public Health and the Brazilian Anthropological Association.

The Federal Bureau for the Protection of Indians, the Xingu National Reserve and the National Protection of Indians Board were dissolved and their assets incorporated in those of the Fund.

Among the objectives laid down by the Act, the Fund is required to provide assistance of various kinds, such as educational facilities and medical and dental care; above all it is to work towards the progressive integration of the Indians into the Brazilian community.

These are new provisions, new institutions, built on a foundation of genuine concern, awareness and firm resolutions; they must now be given reality by concrete action.

It is to be hoped that this International Year for Human Rights, in which these deplorable occurrences came to light, will also see their end. It is hoped that the new National Indian Fund will begin its activities with sufficient resources, qualified personnel and a true vocation for a mission of this nature, so that the surviving Indians of Brazil will see better days, that their children will be integrated once and for all into the Brazilian community and that perhaps the pointless death of their unfortunate predecessors will have served at least this purpose.

PUBLIC TRIAL RALLIES IN PEOPLE'S CHINA

On 16th May 1966 the Circular of the Central Committee of the Chinese Communist Party (*Peking Review* No. 21, 1967) launched what is called the 'great proletarian cultural revolution'. Two years later the Chinese mass media, among them the *Peking Review* (No. 21, 24th May 1968) hailed the Circular as an epoch-making document which introduced a revolutionary mass movement on an unprecedentedly large scale. Chairman Mao's words were quoted: 'There is no construction without destruction... Put destruction first, and in the process you have construction.'

The organizational units of this movement are the revolutionary committees, which are expected to replace all other forms of State organs provided for by the 1954 Constitution. In the words of the 16th May 1966 Circular: 'The revolutionary committee should exercise unified leadership, eliminate duplication in the administrative structure, follow the policy of "better troops and simpler administration" and organize a revolutionized leading group which links itself with the masses.'

The Army is organizing such revolutionary committees all over the country. According to the *Peking Review*, they unite the basic forces of the cultural revolution: the revolutionary masses, the People's Liberation Army, which constitutes the staunch pillar of the movement, and the revolutionary cadres, who constitute its core. This new 'three-in-one' revolutionary committee will, it is stated, strengthen the dictatorship of the proletariat and assure the victory of the movement.

Opponents of this movement were described in the *Peking Review* in the following terms:

Facing their last days but unreconciled to their doom, they are frantically opposing the revolutionary mass movement and are trying in vain to negate the tremendous victories of the great proletarian cultural revolution. But the law of history is inexorable and operates independently of their will. No matter what criminal conspiracies and sabotage they may undertake, and no matter how much they stir up the evil Right deviationist trend of trying to reverse correct decisions, they

will end up crushed by the revolutionary mass movement. (*Peking Review*, No 21, 1968, p. 11.)

The most spectacular means adopted to crush the opponents of the movement are public trial rallies, which have been held again in China since August 1967. Reports of at least thirty-three such rallies have been carried by the New China News Agency and Chinese provincial radio stations, as reported by the BBC.

The rallies are organized by local revolutionary committees, local public security and legal departments, and by the Army acting either directly or by virtue of its control over the revolutionary committees and local public security organs.

Large numbers of people—as many as 250,000 were reported in one case—have attended the trials, which have taken place all over the country. Shanghai appears to have witnessed the largest number—six—since August 1967: five have been held in Harbin, four each in the provinces of Canton, Kwantung and Inner Mongolia. In Peking and Canton the rallies were televised.

The first televised public trial in Peking took place on 28th January 1968. It was reported by an AFP correspondent, presumably on his own viewing of the trial as relayed by television.

The trial was staged against eleven accused. The chairman started with a speech composed of familiar slogans of the cultural revolution, praised the thoughts of Mao Tse-tung and denounced crimes against the revolution. The accused were shown, their heads shaved, wearing signs giving their names and listing their offences. Each defendant was surrounded by three policemen, one on each side pulling him by the arms, with the third behind forcing his head down. This spectacle continued for about an hour while the charges were read. One of the defendants was accused of murder for vengeance, though the motive was not given, another of complicity in murder, a third of distributing counter-revolutionary tracts and articles. The reading of the charges was punctuated by the noisy response of the crowd voicing indignation at the crimes. The indictments and final pleas suggested that three of the accused were political offenders, while the others were charged with common-law crimes. When the verdict of guilty was read out, the crowd voiced satisfaction and shouted slogans while the policemen lined up the convicted men. When the crowd was silent again, the chairman read out the exemplary punishments. Two of the accused were condemned to

death and immediate execution; the death sentence of two others was suspended for two years; another was sentenced to life imprisonment; six others received prison sentences ranging from seven to two years. While the Chairman read out the prison sentences, the accused were lifted off the ground by the police and carried away as more slogans were shouted. Those condemned to death were moved to face the crowd, forced onto their knees and to bow their heads, then violently shaken by the police. They were finally taken away under a thunderous roll of verbal hate from the crowd. The execution itself was not televised. The trial ended with a final reading of slogans and quotations from Chairman Mao, while the cameras closed in to fix on his giant portrait that dominated the stadium where the rally was held.

In every detail, the correspondent added, from the crowd's behaviour to the look of the prisoners, nothing appeared to have been spontaneous or left to chance. Indeed, Communist China has developed a tradition in such public trials. They were the practice in the years around the take-over after 1949. In April 1951, *Current Affairs Journal*, a Peking publication, discussed the techniques of staging such rallies and manipulating public emotion. 'The masses can be stimulated right from the beginning,' the article read, 'then slacken somewhat to allow time for ideological fermentation.' In the course of talks beforehand 'active elements' are encouraged to make accusations at the trial. 'Finally the masses have to become tense again so that the feeling of indignation can last until the end of the meeting and for ever.' The procedure of trial by public rally was again used during 1955, and reintroduced, as already indicated, in 1967. Some months ago a Red Guard newspaper reported Chairman Mao as saying that such trial rallies are an excellent method of education.

At these trials there appears to be no legal safeguards nor defence counsel; the sentences are determined beforehand, though demands for punishment of the offenders must be shown to come from the masses attending the trial.

The public trial rally system is designed both to remove undesirable elements from society and to warn other criminals and 'counter-revolutionaries' of the punishment awaiting them. Some of those executed or sentenced to imprisonment in the course of the latest series of trial rallies have clearly been criminals, others have been guilty of ideological errors. The

offences with which defendants have been charged are very varied: murder, assault, rape, robbery, looting, arson, theft, blackmail, fraud, speculation and ill-defined 'counter-revolutionary activities'. Such political offenders were described as 'incorrigible capitalists, unreformed former landlords, rich peasants, bad elements, rightists who carried out sabotage and trouble-making' (*Radio Harbin*, 3rd March 1968). All have been accused of opposition to the cultural revolution.

From reports available it is known that the number of those sentenced to death and executed immediately during the period from August 1967 to May 1968 is about 70. At least 70 further sentences of death have been pronounced but suspended for periods of about two years, during which the offender was to do forced labour pending further observation of his case. The number of 'counter-revolutionaries' and criminals brought before trial rallies since August 1967 is at least 550 according to cautious estimates.

Public trial rallies appear to form part of the policy known as 'the mass line in judicial work', which has been strongly emphasized in the People's Republic of China since 1958.¹ In order to carry out this policy, the courts have been brought directly to the people, judicial procedure has been simplified and justice has been administered on the spot. The following slogan adopted by the judicial personnel of Hopei province early in 1958 can be considered characteristic of this drive:

When cases come up at daytime, they shall be disposed of during the day; when cases come up at night, they shall be dealt with under the lamplight, and if they cannot be settled in one day then work shall be carried on continuously.

In this context special emphasis was laid on the 'integration of court trials with mass debate'. The final outcome of this trend seems to be the present public trial rallies, dealt with above.

It is a common concern of all legal systems to simplify judicial procedure, and make it speedy and efficient. These efforts must not, however, defeat the basic aim of the administration of justice, which is to assure a fair and impartial trial for everybody. The universally accepted standards of criminal procedure were summed up in Articles 10 and 11 of the Universal Declaration of Human Rights, which provide:

¹ This was indicated by Professor Shao Chuan Leng in his article in the *Journal of the ICJ* (Vol. VI. No. 1, Summer 1965).

Article 10 Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11 (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

It is becoming more and more generally accepted by international lawyers that the provisions of the Universal Declaration have become part of customary international law. They were restated in Article 14 of the International Covenant on Civil and Political Rights of 1966, which sets out, in addition to the above rules, the minimum guarantees of a fair trial.

These public trial rallies openly defy all these standards. Even if one were to argue that China must be considered as being in a state of public emergency, justifying certain derogations from the provisions of the International Covenant, such an argument would inevitably meet with the objection that (save for a period of comparative calm between 1954 and 1957, after the adoption of the Constitution of 1954¹) the state of emergency has continued virtually uninterrupted for the last twenty years, and this appears to be not a transitory phase in the introduction of the present social system but an integral element of that system. In any event, even if derogations from the internationally accepted standards could be considered justifiable in the circumstances, it would still emerge that the policy of public trial rallies falls short even of the reduced standards which the International Covenant requires to be applied as a bare minimum during public emergencies.

¹ For a comment on the extent of the implementation of this Constitution 10 years after its introduction, see *Bulletin* of the ICJ No. 20, September 1964.

FUNDAMENTAL RIGHTS AND THE PANCHAYAT SYSTEM IN NEPAL

Nepal is a kingdom situated between two great republics. To its north is the People's Republic of China and to its south lies the Democratic Republic of India. The territory of Nepal covers an area of about fifty-six thousand square miles and has a population of approximately ten million.

For centuries Nepal has been a mediaeval state ruled by the despotic Ranas who looked upon it as their private estate. King Mahendra, the present ruler, has however taken bold steps to transform the country into a modern 20th century state. The transformation has not been easy and involved the trial of more than one system of popular government. However, considerable credit is due to the King, who has shown himself to be a forward-looking ruler, for having achieved so much in so short a time.

The first experiment in popular government was the introduction of a parliamentary system, which had raised great hopes but, due to the lack of experience and political maturity of the political leaders, the experiment was doomed to failure. Political parties sprang up like mushrooms and tried to capture power by fair means or foul. Political leaders vied with each other and their only aim was to undo what their opponents had done. Ministries fell like ninepins and the resulting chaos and confusion jeopardized the country's sovereignty and indeed its very existence.

It was unfortunate that the eighteen months of experiment in parliamentary democracy proved abortive, mainly due to the failure of the leaders as well as of the people to grasp the basic principles underlying parliamentary democracy and their inability to apply these principles correctly. When it was clear that the parliamentary system had failed, the King banned all political parties. He did not however revert to autocratic rule but introduced the *Panchayat* System of government which he felt was the best possible step in the circumstances. This system was

designed to give the people a greater voice in the affairs of the country at all levels. It was introduced by the Constitution of 1962 and came into operation with the inauguration of the *National Panchayat* of 18th April 1963. It is, despite certain drawbacks, an interesting experiment which is working reasonably well and is intended to be a stepping-stone to a fuller and more democratic system of government.

In an interesting paper on *Nepal and the Rule of Law*, submitted to the International Commission of Jurists, Mr. S.P. Gyawali, Attorney-General of Nepal, states:

‘ From time immemorial Nepal has been an independent country and, accordingly, its legal system has developed independently. However, during its long and chequered history from ancient times down to the present day, there have been significant changes in the basic legal principles, legislative techniques, and processes of execution. Nepal has now entered the Rule of Law stage in its constitutional development after having passed through the stage of personal rule by monarchs and family oligarchy. ’

The Constitution of 1962

The Constitution of Nepal granted by the King in 1962, and laws made in conformity with the Constitution, reflect the present state of the Rule of Law in Nepal.

The preamble of the Constitution runs as follows:

WHEREAS it is desirable in the best interest and for all-round progress of the Kingdom of Nepal and of the Nepalese people to conduct the government of the country in consonance with the popular will;

AND WHEREAS we are firmly convinced that such arrangement is possible only through the partyless democratic Panchayat System rooted in the life of the people in general, and in keeping with the national genius and traditions, and as originating from the very base with the active cooperation of the whole people, and embodying the principles of decentralisation;

AND WHEREAS the happiness and prosperity of our beloved subjects have been always our only objective for the accomplishment of which we are solemnly resolved;

AND WHEREAS it is desirable for the said purpose to enact and promulgate a Constitution for the Kingdom of Nepal;

NOW THEREFORE, We, King Mahendra Bir Bikram Shah Deva, in exercise of the sovereign powers and prerogatives inherent in us according to the constitutional law, custom and usage of our country and which devolved on us from our august and revered forefathers, do hereby enact and promulgate this Constitution.

The Constitution thus visualizes a partyless democratic system known as the *Panchayat System*, the main features of which will be dealt with later in this article.

Fundamental Duties and Rights

Part 3 of the Constitution (Articles 9 to 17) is devoted to fundamental duties and rights. As the title itself indicates, the object of this Part is to confer important fundamental rights on the citizen while emphasizing at the same time his duties. In fact, the Part begins with Article 9 stating that the two fundamental duties of the citizen are (1) devotion to the Nation and loyalty to the State and (2) the exercising of his rights with due regard to law and without infringing upon the rights of others.

The other articles bestow upon the citizen the right to equal protection of the law without any form of discrimination in its application or in respect of appointments to the Public Service, the right to personal freedom and liberty, the right not to be exiled, the right not to be exploited, the right to practise one's religion, the right to property and the right to constitutional remedies.

Restrictions on the exercise of fundamental rights may be imposed by laws made for the 'public good'. Laws made for the public good are strictly limited to nine categories, the more important of which are the preservation of the security of the State, the maintenance of law and order, the maintenance of health, comfort, decency or morality, the protection of the interests of minors or women, the prevention of internal disturbance or external invasion, the prevention of contempt of court or contempt of the *Rashtriya Panchayat* (Parliament) and the prevention of attempts to subvert the Constitution.

It should be noted that the Constitution embodies most of the important fundamental rights and freedoms with the exception of the right to form political parties and associations. This right appears to have been expressly excluded from the Constitution inasmuch as the *Panchayat System* which the Constitution established embodied the principle of 'politics without political parties'.

The Panchayat System

The Constitution states that the aim of the *Panchayat System* is to promote the welfare of the people by creating a social order which is democratic, just, dynamic and free from exploitation and by bringing about harmony among the different classes and professions. The political objective of the system is stated to be the creation of such a social order by mobilising the national genius and resources and by making the representatives of the people participate to the maximum extent at all levels of the administration.

'*Panchayat*' means a local self-government unit. At the base of the *Panchayat System* is the Village Council or *Gaun Sabha*, which—under the Village Panchayat Act 1962—is constituted for each village or for a number of villages grouped together for the purpose by legal notification. It generally consists of all residents above the age of 21. Each Village Council elects an executive committee which is known as the *Gaun* or Village *Panchayat*. There are also similarly elected *Nagar* or City *Panchayats*. In every district there is a *Zilla Council* composed of representatives elected by the Village and City *Panchayats* of that district. Each *Zilla Council* elects an executive committee known as the *Zilla* or District *Panchayat*.

Each zone has an *Anchal Sabha* or Zonal Council which includes all the members of the *Zilla Panchayat* within that zone. There are 14 such *Anchal Sabhas*.

The System has 3,543 Village Councils and 15 City Councils with their corresponding *Panchayats* at the base and the *Rashtriya Panchayat* (National *Panchayat*), which may be equated to Parliament, at the apex.

The *Rashtriya Panchayat* consists of:

- (a) Members elected by the *Anchal Sabhas* or Zonal Councils;
- (b) Members elected by the following class and professional organizations: the Nepal Peasants' Organization, the Nepal Youth Organization, the Nepal Women's Organization, the Nepal Labour Organization and the Nepal Ex-Servicemen's Organization;
- (c) Members elected from among the graduates; and
- (d) Members nominated by the King being fifteen percent of the total number of members elected under sub-clauses (a), (b) and (c).

The constitution, powers and functions of the *Rashtriya Panchayat* are laid down in the Constitution itself; the organisation, powers and functions of the other *Panchayats* are defined by law.

One thus sees that the *Panchayat* System, introduced by the Constitution of 1962, does not provide for direct elections but for a system of indirect elections. Sovereignty vests in the King and all powers, whether legislative, executive or judicial, emanate from him. These powers are exercised through the organs established by or under the Constitution or other laws for the time being in force. The principal organs are the Judiciary, the *Panchayats* and the different branches of the Administration. There is no strict separation of powers, inasmuch as the different laws conferring powers on the *Panchayats* have conferred on them legislative, executive as well as quasi-judicial functions. However, an examination of a particular law enables one to distinguish whether the power or powers which it confers on the *Panchayat* pertain to the exercise of legislative, executive or judicial power.

The Supreme Court and the Judicial Service

The Supreme Court of Nepal consists of the Chief Justice, appointed by the King, and generally six other judges. The judges of the Supreme Court are appointed by the King after consultation with the Chief Justice. The remuneration and other conditions of service of a Supreme Court judge cannot be varied to his disadvantage during his term of office. A judge may be removed from office by the King only if a Commission consisting of a person or persons qualified to be a judge of the Supreme Court appointed by His Majesty, on his own accord or as a result of an address presented to him by the *Rashtriya Panchayat*, reports a finding that the judge in question has become unable to perform his duties through incapacity or misbehaviour.

The Supreme Court has both original and appellate jurisdiction and also the power to revise non-appealable cases decided by lower courts. It has also the power to issue directions and orders as well as writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* for the enforcement of fundamental rights as well as rights conferred by other laws where no other remedy is provided. The decisions of the Supreme Court are binding on all other courts.

The Constitution has also set up a Judicial Services Commission consisting of the Chief Justice, the Minister of Justice and the Chairman of the Public Service Commission. All appointments, transfers and promotion of officers of the minor judiciary are made on the recommendations of that Commission, and all punishment or departmental action against a judicial officer can only be imposed or taken upon its recommendation.

Judicial Review

Dealing with judicial review, Mr. Gyawali, the Attorney-General of Nepal, states in his paper:

‘Nothing in the Constitution affects the law relating to succession to the throne, and the King has the exclusive power of enacting, amending and repealing such law. All other enactments are made through the *Rashtriya Panchayat* and their judicial review is possible in appropriate circumstances under the ordinary or extraordinary jurisdiction, as the case may be, of the Supreme Court of Nepal. The validity of delegated or subordinate legislation may be questioned before other courts as well. But it must be pointed out that, of the legislation passed by the *Rashtriya Panchayat*, those enactments which are made for the public good cannot, through judicial review, be declared invalid on the ground that they impose restrictions on the exercise of fundamental rights. This may appear somewhat novel to those countries which have a tradition of determining by judicial decision as to what constitutes public good. But the principle adopted by the Constitution of Nepal that the best judges of public good are the people’s elected representatives themselves—that too, in a partyless legislature such as the *Rashtriya Panchayat* of Nepal—cannot be said to be devoid of substance. As for judicial review of the administration, apart from a few enactments under which administrative matters may not be questioned in a court of law, any administrative action under any enactment may be subjected to judicial review in Nepal and, even where judicial review on the merits is not possible under certain enactments, there is a procedure established for complaints of aggrieved persons to be heard by administrative authorities. If anyone is denied this legal right, the Supreme Court of Nepal may in appropriate cases restore the right under its extraordinary jurisdiction.’

The Legal Profession

The legal profession in the modern sense of the term is something new for Nepal, but during the last two decades the profession has steadily grown in importance and in strength. There are two categories of lawyers in Nepal namely, government and non-government lawyers. So far as professional conduct is concerned, there is in principle no difference between the two, except for the fact that government lawyers are expected to abide by the rules of conduct for government servants as well. The Executive has no control whatsoever over non-government lawyers.

Recent Trends

The *Panchayat* experiment in Nepal has worked much more successfully than the experiment in parliamentary democracy. There are two main reasons why the people in general were attracted by the *Panchayat* System. One is the decentralization of authority, a great inducement in a feudal country like Nepal, where authority had remained centralized for centuries. Under the parliamentary system only one representative was chosen from a population of 100,000, but under the *Panchayat* System there were about 100 leaders to represent the same population, though at different levels. The *Panchayat* idea brought high hopes to ambitious and politically-minded workers and village leaders who could never aspire to reach a central parliament.

The second reason was that the slogan of 'Building Democracy from the Bottom', with the greater participation by the people in the affairs of the Government which it involved, was an appealing one, not only to those who felt they could fit into one or another of the different tiers in the *Panchayat* System, but also to the villagers and small town dwellers, who felt that they were for the first time given a real voice in electing their own local representatives.

It has been interesting to observe how thoroughly Village *Panchayats* have been exercising the limited authority given to them. They have even introduced their local systems of taxation; and these taxes have been often used for useful purposes such as, for example, the building of roads, a task in which many villages have shown a keen interest. The District *Panchayats* and Village *Panchayats* are, however, now claiming more power and await

the further decentralization of administration that has been promised.

Recent years have witnessed many trends towards liberalization which augur well for the future of Nepal. In November 1964, King Mahendra virtually brought Nepal's old established feudalism to an end by putting his Royal Seal on the Land Reform Act, which had been passed by the National *Panchayat*. The Act, which was very drastic in its provisions, made the ownership of more than fifteen acres of land by one family illegal, and authorized the Government to take over excess land from a landowner and distribute it among the landless peasants. The King was the first to surrender his land for distribution.

One feature which marred the political scene in Nepal was the continued detention of certain former politicians who were imprisoned seven years ago when political parties were banned. They had been imprisoned because they and their followers boycotted the *Panchayat* System and were thought by the King to be a threat to the security of the State. A few of these political prisoners were released before 1966; and in the last six months of 1966, most of the remaining detainees were released, with the exception of the former Prime Minister, B.P. Koirala, and a handful of his closest allies. In 1967 and 1968 more detainees were released, though Mr. Koirala with a very few other followers continued to be under detention. There has now been an almost complete reconciliation between the Crown and the released politicians, who still command a considerable following, and are now offering their support to the King and to his pyramid system of representation.

Nepal has yet a long way to travel along the Rule of Law path, but her progress in so short a space of time has been impressive and as Mr. Gyawali points out, 'the Rule of Law in any country is a phenomenon which cannot be realized in a day, and there is no point of time when it can be asserted that it has reached the stage of perfection. Ruler and ruled alike have to strive for it incessantly with consciousness and alertness. This is what modern Nepal sets out to do'.

ICJ NEWS

GREECE

The situation in Greece remains alarming. In a large-scale purge of the Judiciary at the beginning of June, several senior judges—suspected of antipathy to the colonel's regime—were dismissed. The ICJ protested against this violation of the independence of the Judiciary and disregard of ordinary statutory safeguards of the judicial office, necessary to ensure the judges' independence.

A meeting of European Committees for the Restoration of Democracy in Greece, organized by the Swiss Committee, was held in Geneva on 29th and 30th June. Committees from fourteen different countries were represented; the ICJ and other international organisations were present as Observers. At the opening meeting Mr S. MacBride, Secretary-General of the ICJ, outlined the present position of human rights in Greece. He stressed the danger arising from the disregard of those principles of the Rule of Law governing the democratic processes, and deplored the pseudo-legal devices adopted since the *coup d'état* to camouflage violations of human rights.

A much-publicized political trial was held in Athens from 3rd to 8th July. The 21 defendants, consisting of five civilians, among whom was Professor Notaras, and sixteen members of the armed forces, were tried by Court Martial on charges of belonging to a resistance organization, 'Democratic Defence', and of conspiracy against the regime. The ICJ sent Mr Michael Ellman, a London solicitor and member of *JUSTICE* (the British National Section), as an Observer to the trial.

The prosecution based its case on Law 509 of 1947, which was passed to outlaw communism and the Communist Party in Greece. This law makes it an offence to put into practice ideologies whose object is the overthrow of the political or social system in force.

Four military judges sat with one civilian, Mr Justice Tendes, a member of the Court of Appeal, who acted as Chairman. It should be made clear that the essential rules of procedure were observed at the trial. The hearing was in public; the national and international press were present; the Greek public, although limited, was admitted, and no obstacles were placed in the way of foreign Observers, who had every opportunity of obtaining information and discussing the case with the judges, the prosecutor and the defence. Mr Justice Tendes was scrupulous to see that fairness prevailed, allowing the Defence full freedom to speak.

The correctness of the procedure at the trial, however, should not be allowed to obscure the fundamental irregularities surrounding it. Contrary to Greek Law, civilians were tried by a military court set up under an emergency law. It would seem that torture and intimidation were systematically resorted to in the police investigation. The accused were detained in secrecy and without

charge for several months under very hard conditions, having no access to a court or legal counsel. The Defence had no more than a fortnight to prepare its case, which is clearly insufficient. The indictment was couched in the vaguest of terms. The Prosecution admitted that the defendants were not communist either in allegiance or ideology, and adduced no real evidence that they had acted or conspired to overthrow the political and social system in force within the meaning of Law 509. As the Defence pointed out, there is a manifest distinction between the return to normal conditions and a change of government (the objectives of the defendants) and the forceful overthrow of the socio-political system. The weakness of the Prosecution's case is seen in the fact that it only demanded the conviction of four out of the twenty-one accused. The accused were simply being tried for the political opinions that they had expressed in various publications. Furthermore, all the acts that they were alleged to have committed took place in the period covered by the 1967 Amnesty Law; if this amnesty was intended to have any real legal force, the accused should have benefited from it. This point was in fact raised by the Defence but rejected without serious consideration.

When the formal correctness of the trial and the apparently moderate sentences are put in their proper context, it can be seen that they are a façade which one must penetrate to understand the true situation. The arrest, detention and ill-treatment of the accused, together with their trial and conviction (for which no reasons were given) are all illustrations of the abuse of power and arbitrary behaviour of the Greek authorities.

As part of a propaganda campaign, the authorities have announced that the emergency courts are soon to be abolished; this is to restore confidence in the regime at the approach of the constitutional referendum. At the same time, however, there have been new purges in the army and waves of arrests among the civilian population. Those arrested include several lawyers, among whom Mr Spiros Plaskassovitis, a judge of the *Conseil d'Etat*, and other well-known persons. The colonels are thus disposing of effective opposition. As was to be expected, the purpose of the draft constitution itself is to allow the Greek people their freedom on probation.

LATIN-AMERICA

The third Assembly of the Judicial Conference of the Americas was held from 19th to 21st June at San Juan de Porto Rico, under the chairmanship of Dr Luis Negron Fernandez, President of the Supreme Court of Porto-Rico and Member of the International Commission of Jurists. One of the subjects discussed at the Conference was the 'Role of the Judiciary and the Legal Professions in the Protection of Human Rights'. The Working Committee which dealt with this question was presided over by Dr Negron Fernandez; the two main speakers were Mr Osvaldo Illanes Benitez, President of the Supreme Court of Chile, and Dr Fernando Fournier, both of whom are Members of the ICJ. Dr Fournier, who is also President of the Central-American Chapter of the ICJ (an association of jurists from Central American countries), advocated the establishment of an Inter-American Human Rights Court to ensure the effectiveness of existing implementation machinery in the field of human rights.

APARTHEID

The Secretary-General of the ICJ, Mr S. MacBride, took part in an informatory meeting organized in Geneva on 28th May by the Swiss Anti-Apartheid Movement. In his statement he outlined the legal aberrations and injustices which vitiated the South African laws passed to enforce *apartheid*.

On 28th June the Secretary-General and members of the Secretariat had a working session with members of the UN Special Committee on Apartheid at the *Palais des Nations*. Discussions centred on the report of the ICJ Observer at the Pretoria trial and on co-ordinating the activities of UN organs with those of Non-Governmental Organizations in order to strengthen action against *apartheid*. At a Reception given by the ICJ the next day, the members of the Special Committee met personalities from the Geneva and foreign communities interested in the question of *apartheid*.

The Secretariat also had several working sessions, from 26th July to 2nd August, in Geneva, with the Experts of the *ad hoc* Working Group appointed by the UN Human Rights Commission to investigate conditions in prisons and the situation with regard to trade union rights in Southern Africa.

The ICJ has just published a special booklet, entitled: 'The Erosion of the Rule of Law in South Africa', which examines South African statutes and court decisions and contains the Report of the ICJ observer at the Pretoria trial, Mr R. Falk, Professor of Law at Princeton University (U.S.A.).

CONFERENCES AND MEETINGS

The ICJ was represented at various international conferences. These included the International Seminar on Human Rights, organized by the World Assembly of Youth (WAY) at Bad Godesberg (Germany), from 19th-26th May, where Mr L. G. Weeramantry, Senior Legal Officer at the Secretariat, acted as adviser and was one of the principal lecturers; a Colloquium at Varenna (Italy) on the Protection of Human Dignity, organized from 25th to 27th June by the Pessaro International Centre (attended by the Executive Secretary of the ICJ, Dr V. M. Kabes); a UN Seminar on Freedom of Association in London, from 18th June to 1st July (attended by Mr D. Devlin); the Annual General Meeting of Amnesty International from 23rd to 25th August at Stockholm, which discussed in particular the organization of a world campaign for the 'Prisoner of Conscience Week' to take place from 17th to 23rd November; the Conference of the International Peace Bureau, held at Stuttgart (Germany) from 26th to 30th August, which was devoted this year to the study of conscientious objection and the 'Right to Refuse Military Service and Obedience to certain Orders'; the summer session of ECOSOC and that of the UN International Law Commission at Geneva (followed by several members of the Secretariat); and the 52nd session of the International Labour Conference from 5th to 25th June in Geneva (attended by Mr D. Marchand). This was the first time that the ICJ was officially represented at the Conference by an accredited Observer since its inclusion on the Special List of the ILO.

VISITS OF THE SECRETARY-GENERAL ABROAD

The Vatican invited Mr S. MacBride to participate in the work of the Pontifical Commission, 'Justice and Peace' (Rome, 12th to 15th June). He took the chair at the meeting of the Study Committee on Human Rights (13th June), in which representatives of the Church were joined by lay experts and Observers from the World Council of Churches. The Secretary-General was subsequently invited to New York by UNITAR, where he gave a lecture on the implementation of the Universal Declaration of Human Rights (4th July). Afterwards, he attended the discussions of the International Bar Association's Assembly, held this year at Dublin (8th July).

From 17th to 24th July, the Secretary-General went to Beirut (Lebanon) to discuss the problem of Arab refugees in the Middle East at UNRWA Headquarters; he then went to Jordan to examine the problem on the spot. The aim of this mission was purely humanitarian.

The Secretary-General also visited Romania at the invitation of the Association of Romanian Jurists (28th July to 1st August).

HUMAN RIGHTS YEAR

The ICJ has been one of the main promoters of the International Conference of Non-Governmental Organizations on Human Rights, to be held from 15th to 20th September in Paris, at UNESCO. This meeting follows on from the Governmental Conference at Teheran. Participants will include people from various walks of life with varied interests and ideologies, and also numerous world experts on human rights questions. The primary purpose of the Conference will be to establish the great possibilities and priorities for the coming decade and to agree on the strategy to be adopted in the various spheres in order to bring about the full observance of the Universal Declaration and the promotion of human rights.

The ICJ is organizing a large meeting of European Jurists on 26th and 27th October in Strasbourg, at which all the European National Sections of the Commission will participate. The subject of this Conference will be 'The Essential Legal Elements to Ensure the Protection of the Individual'. Its main task will be to abstract from existing remedies or remedial institutions in Europe (such as *habeas corpus* in Britain, the French *Conseil d'Etat*, the Scandinavian Ombudsman and the Procurator in socialist countries) those elements that are essential in any legal system to assure the individual effective protection against abuse of power by the Executive and its authorities.

NATIONAL SECTIONS

The National Section in Costa-Rica and the Local Section at Rosario (Argentina) have made their particular contribution to Human Rights Year.

On the initiative of the Costa-Rican Section, the Bar Association has had the Universal Declaration printed in large numbers and distributed free of charge. Mrs Angela Acuna de Chacon, member of the Section and of the Inter-American Commission on Human Rights, has edited and published an

The International Commission of Jurists is a non-governmental organization which has Consultative Status with the United Nations, UNESCO and the Council of Europe. It is also on the International Labour Organisation's Special List of NGOs. The Commission seeks to foster understanding of and respect for the Rule of Law. The Members of the Commission are:

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Sir LESLIE MUNRO	Former Secretary-General of the International Commission of Jurists; former President of the General Assembly of the United Nations; former Ambassador of New Zealand to the United Nations and United States
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THE RT. HON. LORD SHAWCROSS	Former Attorney-General of England
SEBASTIAN SOLER	Attorney-at-law; Professor of Law; former Attorney-General of Argentina
PURSHOTTAM TRIKAMDAS	Senior Advocate of the Supreme Court of India; sometime Secretary to Mahatma Gandhi
H. B. TYABJI	Barrister-at-Law, Karachi, Pakistan; former Judge of the Chief Court of the Sind
TERJE WOLD	Chief Justice of the Supreme Court of Norway

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The second part (Vol. IX, No. 1) is now available. In addition to the Human Rights articles and the Digest of Cases, this volume contains the Jamaica Conclusions on Civil and Political Rights, the Montreal Statement of the Assembly for Human Rights and an article on the Judicature of New Zealand.

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