

For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

HUMAN RIGHTS IN THE WORLD

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THE INTERNATIONAL COMMISSION OF JURISTS

It was to realise the lawyer's faith in justice and human liberty under the Rule of Law that the International Commission of Jurists was founded.

The Commission has carried out its task on the basis that lawyers have a challenging and essential role to play in the rapidly changing ecology of mankind. It has also worked on the assumption that lawyers on the whole are alive to their responsibilities to the society in which they live and to humanity in general.

The Commission is strictly non-political. The independence and impartiality which have characterised its work for over twenty years have won the respect of lawyers, international organisations and the international community.

The purpose of THE REVIEW is to focus attention on the problems in regard to which lawyers can make their contribution to society in their respective areas of influence and to provide them with the necessary information and data.

In its condemnation of violations of the Rule of Law and of laws and actions running counter to the principles of the Universal Declaration of Human Rights and in the support that it gives to the gradual implementation of the Law of Human Rights in national systems and in the international legal order, THE REVIEW seeks to echo the voice of every member of the legal professions in his search for a just society and a peaceful world.

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Human Rights in the World

Equatorial Guinea

Four years ago Review No. 13 described grievous human rights violations and the complete absence of the Rule of Law in Equatorial Guinea. This small African country, situated in the Gulf of Guinea, between Cameroun, Gabon and Nigeria, was formerly a Spanish colony. Upon independence in 1968, Mr Macias Nguema was elected President under a western style democratic Constitution.

Within a month, the new President assumed dictatorial power and has retained it since. He has appointed himself President for Life, Major General of the Armed Forces, Grand Maestro of Popular Education, Science and Traditional Culture, President of the Unique National Worker's Party, The Only Miracle of Equatorial Guinea and has assumed the portfolios of Defence, Foreign Affairs and Trade. He is probably the only modern African leader to have made use of primitive tribal beliefs and cults for political ends.

He is utterly ruthless in liquidating his political opponents. Countless members of the pre-independence intelligentsia have disappeared, been tortured, executed without trial or are now in exile. More than two-thirds of the members of the independence Assembly have disappeared and ten of the twelve independence Cabinet members are now dead.

Information available during the past four years has demonstrated that little has improved for the citizens of this nation. Their lives are governed by economic dislocation, resulting in a disastrous decline in production, massive unemployment and meagre diets. Arbitrary and tyrannical enforcement of authority, frequently marked by torture and extra-judicial execution, is the norm. These are the principal factors which have lead to an exodus of tens of thousands of the nation's population of something over 400,000 into the neighbouring countries of Africa and to Europe.

The International Commission of Jurists has assisted refugees from Equatorial Guinea in the preparation of a communication describing the violations of human rights in their country, which was submitted to the United Nations' Secretary-General under ECOSOC Resolution 1503, with a view to transmission to the U.N. Commission on Human Rights. In February 1978, the President of the Commission announced that Equatorial Guinea was one of nine countries on which it had decided to take action under that Resolution.

Recent action by non-governmental organisations and by governments has helped to keep this issue before public opinion. Amnesty International recently forwarded a communication to the Chairman and Secretary-General of the Organisation of African Unity detailing a "succession of arbitrary arrests, death from torture and summary execution." The EEC recently determined that no economic aid to Equatorial Guinea would be forthcoming in light of its human rights situation. President Carter promised prominent exiles that the

U.S. government would bear in mind the human rights record of the regime in any further dealings with that country.

It is to be hoped that these pressures will continue until the present regime is either damaged or moved to return to respect for the Rule of the Law and fundamental human rights. The following paragraphs give an indication of some of the principle features of the regime.

Torture, Execution and the Failure of the Rule of Law

Vaguely defined Presidential decrees forbid many actions by individuals which are in some instances internationally recognised rights. Law No. 1 of October 18, 1971 has made many offences punishable by death. Individuals can be detained for giving aid to missionaries, failing to attend national manifestations of praise and joy, or merely for being "descontento." Such wide sweeping prohibitions leave nearly everyone subject to "criminal" proceedings.

There is a complete breakdown of judicial process. Accusations and allegations are forwarded from the local Chief of Security to the District Militia Delegate. The militia is formed by youth from the *Juventud en marcha con Macias* (Youth on the March with Macias). The Security Chief tends to be a young student militant who encourages youngsters in the village to inform on anybody: family, neighbours and others. The Militia Delegate then has to forward these reports to the President. The reports are brief, telegram style accusations. There is no judicial or other procedure to verify whether the accusations are true or false. Normally, they lead to a Presidential order for punishment, which can be a severe jail sentence or worse. There is no appeal from a Presidential order. If there is no response from the President, the Security Chief will contact the President directly in order to be certain that the accusation has not been forgotten. An abundance of reports will lead to promotion for the Security Chief, as in the case of Antonio Seguro, a semi-illiterate militant from Ebebeyin.

Although trials of supposed plotters against President Macias occur less frequently than in the early days of his reign, recent reports show that the practice of torture and arbitrary execution of political prisoners continues. Execution, no longer by shooting or garroting, is carried out by forcing the prisoner to kneel on the floor of the execution room and then smashing his skull with iron bars. The prison hospital usually attributes death to natural causes.

Prisoners in solitary confinement are held in cells 160 cms by 60 cms, with no windows, no light and scant ventilation. Prisoners are kept naked, or given only underpants, and must stand all day without touching the walls. They are let out only for interrogations or "ceremonies" involving degradation and punishment. Those taken to interrogation are made to run a gauntlet between officers who beat them. The interrogation is conducted while the prisoner is lying on his stomach, arms tied behind him and his feet pulled up to and tied to his elbows. He is beaten while being questioned, which on routine occasions lasts fifteen or thirty minutes. The short periods of interrogation are necessitated by the large number of prisoners at Blackbich, the state prison.

Recent refugee reports give a glimpse of the more advanced forms of torture used at Blackbich prison: *El Balanceo*; the prisoner is hung upside down from tied or shackled feet, then swung around and beaten. *La Colgadura*; the same, except that the prisoner is hoisted by a rope tied to manacles around his wrists. Prisoners quickly pass out from the excruciating pain of these tortures. *Las Tablillas*; planks of wood are pressed against the sides of the calf, ankle and the under part of the foot and progressively tightened by ropes. The constriction makes the least movement painful and this is aggravated because the prisoner is then beaten or is sometimes forced to wear these planks in his cell for several days. *Los Gilletes*; metal fetters are tightened around the wrists as hard as possible, so that there is no circulation in the hands. Intense pain is enhanced by pulling or striking the manacles. This torture is allowed to go on for days and often results in permanent disfigurement. *El Rombo*; both elbows are forced behind the prisoner's back until they meet and are then tied in that position. Then wrists are bound in front of his body. The prisoner is kept in this state until he collapses, at which time he is beaten until he revives. This form of torture usually lasts three or four hours a day, and wrists and elbows are subsequently left permanently scarred and injured.

Many other forms of degrading punishment are also meted out, and many prisoners die from the torture. According to reports, many go insane or become suicidal. While torture and execution in public are rare, the people of Equatorial Guinea are aware that they occur and live in fear of being reported by the Security Chief and thus becoming the subject of similar abuse.

Economic dislocation

At the time of independence, Equatorial Guinea had one of the highest per capita incomes in Africa and one of the most developed political and economic infrastructures. The economy is now a shambles and the infrastructure, both human and physical, is devastated.

Decree Law No. 6, March 18, 1975 suppressed private education, prohibiting the Catholic Church from engaging in the education of the citizens of the country. The Church had been the primary source of schools and, even though the President has assumed personal responsibility for the education of the youth, the school system now hardly functions. The President's fixation about the Church prompted him to make illegal the providing of any assistance to missionaries or clergy and has resulted in the banishment of two bishops, the death of a Vicar and the detention of other priests. Earlier this year the remaining Spanish priests in Equatorial Guinea were expelled, not before a ransom for their release had been paid by the Spanish government.

Equatorial Guinea is rich in natural resources. Off its shores are bountiful supplies of fish and shellfish. Its soil and climate will grow nearly anything and it has mineral, timber and other exploitable resources. Its once thriving cocoa industry, formerly one of the best in the world, is now producing less than 25% of the pre-independence product. The timber industry is failing, although some French interests remain active.

The President granted the Soviet Union a monopoly for exploiting fish and shellfish in territorial waters. This monopoly, combined with a prohibition on approaching the shores or using boats, has all but eliminated from the diet what was once a regular protein source. Other items which were regularly a part of the diet are now either too expensive or unavailable.

As a result of these food shortages and the complete breakdown of the system of health care, malnutrition and disease are advancing throughout the population.

Forced Labour

In order to cultivate and harvest the cocoa crop the nation's plantations traditionally relied on migrant labourers from neighbouring African countries; first Liberia and then Nigeria. Under the Macias regime, life for the workers steadily worsened. There were reports in 1970 and 1971 that 95 Nigerians were killed in Fernando Po for demanding their arrears in wages. Things became so bad, that in 1975 the Nigerian government evacuated 10,000 nationals by plane and many thousands more by ship.

This evacuation left the plantations without workers to harvest the crops. The response to this situation was to resort to compulsory labour. In January 1976, the Congress of the Unique National Workers Party (PUNT), the only legal party and one in which membership by all is compulsory, passed a resolution calling for a system of compulsory labour. This was "regularised" by Presidential decree in March, making it mandatory for all citizens over the age of 15 years to render manual labour in government plantations and mines.

In 1977, 25,000 persons were "recruited" under this scheme, with some 15,000 dependants. These workers are not paid a salary. The sole remuneration is that each worker receives twenty kilos of rice, four litres of palm oil, and four kilos of fish per month. No account is taken of the number of dependants a worker may have to support. So, while these rations are above the minimum provided by the World Food Programme for individuals in relief camps, it is clearly insufficient for even a small family.

The workday for such workers is the daylight period, year round. This is usually twelve hours. In addition to the strenuous labour, the work conditions include beatings, withholding of food rations, molestation of women of all ages, random brutality and occasional killing. There is no medical care, freedom to communicate with relatives or freedom to return home.

Refugees

As noted above, many thousands have fled Equatorial Guinea since independence. Some estimates suggest that the refugees number as many as 100,000, or nearly 25% of the population.

Refugees express a variety of reasons for leaving, but the prevailing terror, economic necessity or a combination of the two account for nearly all refugees from Equatorial Guinea. Although most members of the intelligentsia alive today are in exile, the refugee community repre-

sents a broad cross section of the country and includes farmers, farm workers, fishermen, architects, teachers and government servants.

Even in exile, citizens are not free of the reach of President Macias. Agents provocateurs operate in neighbouring countries, stealing and causing mayhem in an attempt to create hostility against the refugees. It is calculated that this will result in the *refoulement* of the refugees by the host countries. Thus, with all of their other problems, the refugees live with the fear that they will be returned to the country from which they fled, ending up behind the grim walls of Blackbich or some similar institution.

It is not known what action the UN Commission on Human Rights is taking in respect of the communications under the confidential Resolution 1503. It is possible that at the present stage, it does not go beyond asking the government to comment upon the allegations made against them. In any event, it is encouraging for the people of this small African country that the world community, through the United Nations, has been awakened to show its concern about their plight, though for many of them this awakening comes too late.

Guyana

"The existing Constitution is the standard Westminster type of Constitution. It is not a Constitution which is suitable for a developing country such as ours, which is seeking to reconstruct its society and its economy on the basis of socialism. We need a socialist type of Constitution". This is the first paragraph of Referendum Fact Sheet No. 3, issued by the ruling People's National Congress (PNC) in preparation for the so-called "referendum to abolish referenda", which was held on July 10, 1978.

The purpose of the referendum, as it now appears, was to enable the government party, the PNC, to maintain itself in power until it had changed the Constitution without any further reference to the electorate.

Under the Independence Constitution there are two procedures for amending it. Most provisions could be amended by a Bill supported by a two-thirds majority in Parliament. However, under Article 73(a) of the Constitution, 16 key provisions dealing inter alia with the Presidency, the composition and duration of Parliament, the holding of elections and article 73 itself, required only a simple majority in the Assembly but on the other hand also required a majority in a national referendum.

The government enjoyed a two-thirds majority in the National Assembly, but under the Constitution, the Assembly was due to be dissolved by July 25, and fresh elections had to be held by October 25, 1978. It was by no means certain that the government would again have a two-thirds majority. This obstacle could be overcome if the government could obtain a simple majority in a Referendum for an amendment abolishing the special Article 73(a) procedure. It would then be able to alter the Constitution first by prolonging the life of the parliament, and then by another amendment converting it into a Constituent Assembly. The PNC could then introduce a new

Constitution without having to submit it first to the scrutiny and approval of the electorate.

The government disclosed its intentions only by stages. The first stage was the publication on March 13, 1978, of a Constitution (Amendment) Bill abolishing the special procedure for amending the 16 key provisions in the Constitution, including the referendum procedure. This was passed by the Assembly on April 10.

The opposition party, the PPP, led by Dr Cheddi Jagan, vehemently opposed the amendment submitted in the Referendum. It was supported in this by the Guyana Council of Churches and by the leading professional groups, including the lawyers, doctors and architects.

Many feared that the government's real objective was to maintain themselves in power by far-reaching alterations in the Constitutions, in which the electorate would have no say, possibly going so far as the establishment of a one-party state. They argued that the referendum requirement had been inserted in the independence Constitution to make it difficult for one of the racial groups to dominate the others. At the time of independence the two main groups, those of African and those of Indian descent, were approximately equal, but owing to their higher birth-rate the Indian population now outnumber the Africans by approximately 50% to 40%. The government has drawn its main support from the African group and the opposition from the Indians.

When challenged by the opposition, the government admitted that it intended to pass legislation postponing the General Election "for a few months", and to prolong the life of the parliament converting it into a Constituent Assembly to introduce a new Constitution. This Constituent Assembly would have the power to attach to itself permanent advisory delegations, representing such organisations as the trade unions, churches and the Association of Local Authorities. The Assembly would have the power and facilities to move around the country and to receive memoranda from any citizen or group of citizens.

Although the Prime Minister and leader of the PNC, Mr Burnham, had indicated as far back as 1974 the government's intention to propose a complete revision of the Constitution, it was only at the end of May 1978, some six weeks before the referendum, that the General Council of the PNC published its Guidelines for a new Constitution for the Co-operative Republic of Guyana". These include the following:

- a change to a "presidential system" where a directly-elected executive President will have the power to nominate a Cabinet, headed by the first Vice-President, and to exercise a right of veto over legislation passed by the National Assembly. (This veto power could be overridden by the National Assembly passing the Bill again with a special majority);
- a description of the state as an "indivisible, secular, democratic sovereign state in the course of transition from capitalism to socialism" and inclusion of a set of "guiding principles and objectives" which all governmental and non-governmental groups and persons, including the judiciary, should "follow";
- the fundamental rights and freedoms of a civil and political nature

contained in the existing Constitution would be preserved, but several new rights would be added in the socio-economic sphere such as the right to work, leisure, welfare for old age and disability, medical care, housing and free education "from nursery to university";

- the duties of every citizen are also to be written into the Constitution, such as the duty to work, to defend the country and to protect public property.
- Other principles which will be expressed in the new Constitution are the equality of men and women, equality of children born out of wedlock and those born in wedlock, the tolerance of private enterprise to the extent that it satisfies social needs, and the principle that the ownership of land should go to those who work it.
- Many existing institutions would continue, such as: the leader of the opposition (renamed "minority leader"), the Ombudsman, the Director of Public Prosecutions, the Elections Commission, the Courts, the Judicial Service Commission and the Public and Police Service Commissions.
- The composition of Parliament would be modified so as to include in it a local government element. To the existing 53 directly elected members would be added another 12 elected by regional and local councils.
- Most provisions of the Constitution would be amendable by a two-thirds majority in parliament, but a referendum would still be necessary for a few major provisions.

The fears that the referendum would not be conducted fairly were not relieved by the government's announcement that the official symbol for a "yes" vote would be a house, and for a "no" vote a mouse. Nor were they relieved by several violent attacks on people who opposed the Constitution (Amendment) Bill. These included the national poet, Martin Carter, who was beaten up by thugs outside the Parliament Buildings.

The daily newspaper, the Chronicle, controlled by the government, published none of the many criticisms of the referendum and of the Constitution (Amendment) Bill. Both the Guyana Council of Churches and the Lawyers' Committee tried to publish statements against the Bill as paid advertisements in the Chronicle but these were refused. The Prime Minister, when questioned on this, said that as a matter of policy, paid advertisements would not be accepted because it would give an advantage to those with well-lined pockets.

The referendum was held on July 10 and three days later the official announcement came that the Bill had been carried with 97.4% of the votes, only 2% having voted against. The official figures gave a turn-out of 71.4% but the opposition, who had called for a boycott of the referendum, claimed that the maximum possible turn-out could not have been more than 14%.

In a 25-page report, issued on September 22, the Committee of Concerned Citizens criticised heavily the conduct of the referendum. The Committee had set up a monitoring system which covered 18 of the 38 Polling Districts (273,056 voters out of an electorate of 609,255). The conclusion of the detailed report is "that the official

results of the Referendum have no possible basis in the reality of July 10. They are massively fraudulent". The report contains detailed evidence to support this charge.

At least three-quarters of the lawyers in Guyana signed a memorandum stating objections to the Constitution (Amendment) Bill, and some lawyers took an active part in the groups opposing the Referendum. A delegation of lawyers was received by the Attorney-General and Minister of Justice. The animosity aroused by the lawyers' involvement in the debate can be seen from the words of the Minister for Economic Development who said, speaking about the constitutional changes: "We are about to make another change in this society . . . It will destroy and remove for ever the right of a few lawyers to exploit people, to charge them with what they like, to use the power of the law not to advance the power of the people but to enrich themselves. . ."

Shortly after the referendum the Bar was surprised to learn of the introduction of an Administration of Justice Bill, which also involves an Amendment of the Constitution. The Bill seeks to reduce the number of cases in which the accused has the choice to be tried by jury by increasing the jurisdiction of the Magistrates to try indictable offences. It also seeks to facilitate the temporary transfer of judges to and from the Court of Appeal.

The Bar Association, in a special session held on September 20, adopted a Resolution deploring the lack of consultation before publication of the Bill. The Secretary of the Bar Association had asked for a meeting with the Attorney-General and Minister of Justice, but this was refused. The deterioration in relations with the Bar must be saddening for the Attorney-General and Minister of Justice who in 1974 wrote: "However desirable it may be for laymen to be involved, it is certain that no worthwhile programme of law reform can proceed without the sustained support of the legal profession".¹

The precise terms of the new Constitution must now be awaited. The timetable is that the Constituent Assembly is to have completed its work in "it is hoped, not more than eighteen months". The new Constitution will then be enacted by the extended National Assembly, presumably without difficulty as the government is assured of the necessary two-thirds majority. Three months after the promulgation of the Constitution a general election will be held.

It is regrettable that the government should have resorted to the devices described above in order to secure the adoption of its new Constitution. It is perhaps ironic that it has done so by adopting one of the powers of the "unsuitable" Westminster type of Constitution, namely the power of Parliament to prolong its own life. This, however, is a power which has not been used at Westminster since the 17th century, save in time of war.

¹ M. Shahabudeen, "The Role of the Lawyer in Developing Guyana", Ministry of Information, Georgetown, 1974.

Sri Lanka

New Government, New Constitution

The Review, Nos. 14 and 17, carried earlier articles concerning the human rights situation in Sri Lanka. In the July 1977 election, the United National Party, led by Mr Jayawardene, achieved an overwhelming majority, with more than five-sixths of the seats in the National Assembly, replacing the Sri Lanka Freedom Party government of Mrs Bandaranaike.

The new government, in fulfilment of its electoral promises, adopted a new Constitution last year. Among other changes it provides for Members of Parliament to be elected by proportional representation, rather than by districts. Also, the President is to be popularly elected, rather than appointed by the Prime Minister. He, rather than the Prime Minister, becomes head of the government.

New Constitution and Human Rights

The new Constitution proclaims and extends protection to a number of internationally recognised civil and political rights. Articles 10, 11 and 12 provide for freedom of thought, freedom from torture, equality before the law and non-discriminatory treatment generally. Article 13 guarantees the right to be informed of the grounds for arrest at an appearance before a magistrate, establishes the presumption of innocence and prohibits the retroactive application of criminal law. Article 14 guarantees freedom of expression and speech, peaceful assembly, association, the right to organise trade unions and the right to religious association. The right to residence and movement are preserved, as well as the right to return.

Article 14 also protects the right to cultural heritage and the use of one's mother tongue. Article 19 provides that both Sinhala and Tamil are national languages. The elevation of this to the Constitutional plane is an important advance for the nation's significant Tamil minority.

Importantly, Article 17 provides for relief in the Supreme Court with respect to the "infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter." In addition, Article 156 provides that the Parliament shall establish a Parliamentary Commissioner for Administration (Ombudsman). This person shall hold office during good behaviour and will have the duty and authority to investigate and report upon complaints or allegations of the infringement of fundamental rights and other injustices by public officials. Thus, the citizen has two avenues for redressing such violations; both are positive additions to Sri Lanka Constitutional law.

Regretably, Articles 15 and 16 permit, in the interest of "national security", derogations from the presumption of innocence and the prohibition against retroactive application of criminal law. It is difficult to imagine a situation which would justify these derogations. Others of these rights may be derogated from in the interest of "racial and religious harmony", the "national economy", "public order and the protection of public health and morality", for the purpose of "securing

due recognition and respect for the rights and freedoms of others", or of "meeting the just requirements of the general welfare of democratic society."¹

These rights are further limited by Article 16, which provides for the continued validity of "all existing written law and unwritten law, not withstanding any inconsistency with the preceding provisions of the Chapter." It also provides that punishment assigned under a law promulgated prior to the adoption of the Constitution shall not be a contravention of the Chapter (which contains, *inter alia*, the proscription against cruel, inhuman or degrading treatment or punishment).

This reservation is not required to ensure a smooth legal transition, since a general provision for this purpose is to be found in the Transitional Provisions Chapter. In addition, there is no indication that this is a temporary measure, calculated only to provide the government with sufficient time to bring current laws into concurrence with the Constitution in an orderly fashion.

The new Constitution is more difficult to amend, any amendment requiring a two-thirds vote in Parliament and a majority vote at a national referendum. On its face, this change does not make amendment impossible but, under the new proportional representation system, it is unlikely that any future government will enjoy the necessary two-thirds majority. Had proportional representation been in effect prior to the last election, the UNP would not have had the votes to secure passage of its new Constitution.

The new Constitution formalises the procedure for declaring a state of emergency, *i.e.*, allowing regulations to be promulgated under the Public Security Ordinance. Article 155 provides that no section of the Constitution may be overridden by any regulation passed under the Ordinance. However, the Constitution permits derogation on grounds of public security from the provisions guaranteeing the rights of equality before law and non-discriminatory treatment generally, the rights to be free from arbitrary arrest; to be held only on judicial order; to be presumed innocent and not to be subject to retroactive criminal sanctions; and freedom of speech, publication, assembly, association, religious worship, cultural expression, and movement. Any proclamation of a state of emergency by the President must be approved by Parliament within fourteen days, or such reasonable time as is necessary to reassemble Parliament, and it automatically lapses unless approved by Parliament. Once approved, the Proclamation is valid for only 90 days and must thereafter be reissued and reapproved. If the state of emergency has been in effect for six continuous months, a more stringent Parliamentary majority is required to extend it again.

This two-stage procedure for invoking the Public Security Ordinance is a valuable check on abuse of power and makes a notable addition to the Constitution.

¹ This presents more than theoretical problems. For example, the "Criminal Procedure (Special Provisions) Law," No. 15 of 1978, provides that a person may be detained with no possibility of bail "on an allegation that he has committed" one of a number of scheduled crimes (*e.g.*, destruction of property by 'offensive weapons', murder, crimes against the state, or conspiracy to commit one of these crimes). Those detained for lesser offences such as robbery, attempted robbery, lurking by night, or attempt and conspiracy to commit any of these or other crimes may be granted bail only in exceptional circumstances.

Independence of the Judiciary

Several Articles of the new Constitution affect the Judiciary, designed to protect it against political influence and pressures. The previous Judicial Services Advisory Board and the Judicial Service Disciplinary Board are now consolidated into one Judicial Service Commission. This Commission makes recommendations to the President regarding the appointment, transfer, discipline and dismissal of judges. The members of the Commission are the Chief Justice and two members of the Supreme Court appointed by the President for five years. The scope of the Commission's power extends to scheduled public officers working in the judicial branch. The court system is restructured and there are now two appellate courts, the Supreme Court and a Court of Appeal, and several courts of first instance, including a High Court.

There is one disturbing provision affecting the security of tenure, and consequently the independence, of the Judiciary. Article 163, to be found in the Transitional Provisions Chapter, terminates the tenure of all judges of the previous Supreme Court and High Court holding office on the day before the promulgation of the Constitution. While a number of judges have been reappointed to either the new Supreme Court, Court of Appeal or High Court, eight former Supreme Court Justices and five former High Court Judges have been removed from the bench with no cause stated.

Under Sri Lanka law, these judges are not allowed to practice as attorneys-at-law without the permission of the President. It is understood that in one case already such permission has been refused. Thus, these former judges may be forced out of the profession they have been engaged in their whole lives.

The idea of judicial independence demands that judges be removed only on cause presented, and not for reasons of convenience after a change of government. It is no justification that a similar procedure was adopted by Mrs Bandaranaike's government at the introduction of the 1972 constitution. A procedure of this kind impedes the independence of the Judiciary and can only tend to weaken the judicial process.

The previous government did, at least, reappoint all the judges who were under the new retirement age. This time, a total of thirteen judges have not been reappointed, including eight from the Supreme Court and five from the High Court. None of these judges have reached the retirement age.

Special Commissions, Legislative Imposition of Civic Disabilities

Under the "Special Presidential Commissions of Inquiry Law," No. 7 of 1978, the President is authorised to appoint a judge or judges to constitute Commissions of Inquiry, whose purpose will be to inquire into alleged abuses by members of the previous administration. There are a number of objectionable features to this law.

The Commissions have the power of summons and subpoena and can invoke the aid of the Supreme Court in punishing contempt. Yet, they are not bound by the rules of evidence, and may admit evidence which would be otherwise inadmissible in a court. They are empowered

to exclude both press and public from any of their proceedings.

They are empowered to find any person guilty of "any act of political victimisation, misuse or abuse of power, corruption or any fraudulent act, in relation to any court or tribunal or any public body, or in relation to the administration of any law or the administration of justice." When a Commission makes its findings, it refers them to the President, who is obliged to publish the report in the *Gazette*. This report is "final and conclusive, and shall not be called in question in any court."

Many individuals have been required to appear before such a Commission, notwithstanding the availability of the criminal courts for the prosecution of those against whom allegations of misconduct have been levelled. These persons have not enjoyed the benefit of trial, and they are not even entitled to legal representation before the Commissions unless and until formal charges are made against them. Persons have been attacked by state counsel in speeches widely reported in the press, without any right to legal representation. There is no appeal of issues of law or fact.

Sentencing under this procedure is carried out by Parliament, by passing legislation imposing disabilities on persons who have been condemned by the Commission. Thus, the party previously in the opposition is now passing sentence on those who recently held the reins of power. Over thirty Ministers, Deputy-Ministers, Mayors and other public figures have been the object of such bills imposing civic disabilities. They have lost the right to vote or run for office for up to seven years. They have been prohibited for life from holding a position in the judicial or government service and from working for government owned or partially owned corporations. That these individuals can be deprived of their civil rights and, in some instances, their very livelihood, without trial or judicial process is to be deeply regretted.

The fact that legislation is required to impose these disabilities indicates that, at least in part, this is a form of retroactive penal legislation. It is hard to reconcile these procedures with the rights and guarantees proclaimed in the Constitution.

Zaire

Zaire, formerly the Belgian Congo, gained its independence in 1960. The country was ill-prepared for independence and a particularly turbulent era followed. Intense competition for power developed between contending forces. After five years of rule by various governments, the Commander-in-Chief of the armed forces, General Joseph Mobutu, acceded to power in a bloodless coup. He was formally elected President in November 1970.

Many of Zaire's present problems stem from two sources: the catastrophic economic state of the country and the recent struggles in the southern Shaba province. Zaire produces 6 per cent of the world's copper supplies and 50 per cent of its cobalt, in addition to diamonds, tin, zinc, silver, platinum and uranium. As the sale of copper constituted 80 per cent of the country's foreign earnings, the world-wide fall in the copper price had disastrous effects. It contributed largely to the fact that the country was on the verge of bankruptcy last year.

There was also a marked decline in agriculture, other sectors of mining and in manufacturing and commerce. At the same time, the cost of imports, particularly oil, had increased. This resulted in an exhaustion of the country's foreign reserves and severe hardships for the Zairian people. According to unofficial figures published in Kinshasa in February 1976 the price index had increased by 45 per cent, and the currency had depreciated by approximately 42.1 per cent.

The social and economic problems for the majority of the population are also a consequence of Zaire's development policies, which have concentrated on developing the country's mineral wealth at the expense of continued under-development in the rural sector. This policy, accompanied by widespread corruption, has led to the enrichment of a minority, while failing to improve the life of the vast majority of Zairians who live in rural areas. Increasing amounts of food imports were required for a country once self-sufficient in agricultural crops.

In seeking to cope with these problems the government has become more and more authoritarian and repressive in its efforts to stifle criticism and to deal with the real or imagined plots against the government. There have, indeed, been attempts to overthrow the regime, as is shown by the two recent Shaba conflicts, which have themselves aggravated the country's economic problems. The second invasion of the southern Shaba province (formerly Katanga) in May 1978 occurred fourteen months after the earlier conflict. Rebel invasion forces attempted to gain control of this strategic copper mining area and to topple the government. They entered the town of Kolwezi and terrorised the town's population, killing at least 200 inhabitants, including many French and Belgian nationals. At the request of the Zaire government, France and Belgium sent military and economic aid.

Following the first Shaba invasion, a number of arbitrary arrests and convictions were reported. These included seven foreign journalists arrested during the Shaba fighting who were accused of illegal entry and espionage in the province. They were released after one month's detention.

The Zairian Foreign Minister Nguza Karl I-Bond was arrested and

charged with high treason for allegedly withholding advance notice of the invasion from the President. Chief Mwant-Yav, the spiritual leader of the Lunda tribe and an uncle of Mr Nguza was also arrested. The spiritual leader allegedly knew of the plot to "conceal" the invasion and possessed incriminating documents, including correspondence with the leader of the Katangese invaders.

A Brussels lawyer, Jules Wolf, retained by the foreign minister was refused entry into Zaire and was not permitted to defend the accused. A Belgian television crew sent to cover the trial was also refused entry. Mr Nguza pleaded not guilty to all charges. At the end of his three-day trial, he was condemned to death by the State Security Court. The court found him guilty of undermining Zaire's external security, failing to reveal his knowledge of the impending rebel invasion in Shaba, and offending the head of State. A few days later, however, President Mobutu commuted the death sentence to life imprisonment. The President emphasised that his decision was a personal one, implying that it was independent of appeals made by the US government and the Council of Ministers of the European Communities to spare Mr Nguza's life.

Another period of mass arrests and mass trials occurred a few months earlier. Many political prisoners currently remain in detention. The Zaire News Agency announced that on March 7, 1978, 91 alleged plotters were on trial before a military court in Kinshasa for the crimes of direct incitement to a military plot, or complicity in the plot, and theft of arms. Of the defendants, 67 were members of Zaire's Army and 24 were civilians. They included five persons tried in absentia, four of these leaders of MARC, an exile group in Brussels. President Mobutu denied publicly there had been an attempted coup d'état, saying instead the plotters had planned a sabotage campaign on a major pipeline, a hydro-electric plant and the killing of several of his relatives.

When the defendants were tried in court, General Likulia, the Auditor-General of the Army, acting as a military prosecutor demanded the death penalty for 28 of the 91 defendants. On March 16, the court imposed the death sentence on 19 of the accused — 10 members of the army as well as four civilians and five persons tried in absentia. Fifty-seven other defendants were sentenced to imprisonment for from one to twenty years, and 15 were formally acquitted. President Mobutu announced on March 17, that 13 of those condemned to death had been shot at dawn by firing squads. He added that he hoped these executions would not be used to intensify human rights appeals from abroad intended to prevent Zaire punishing criminals who showed no respect for the lives of others.

Political activity in Zaire was somewhat greater in 1977 than in earlier years. Many elections were held. In August 1977 the sole legal trade union organisation, the National Union of Zairian Workers, held its first elections since its creation in 1967. Three national elections were held in October 1977 for urban councils, legislative councils and a party assembly. All candidates had to be supporters of the nation's political party, the MPR. However, for the first time voters were able to choose from among five or six different candidates. As sole candidate, the President was re-elected for a further seven-year term.

Political expression in Zaire, however, is still circumscribed. The right of assembly for political purposes is prohibited unless exercised under the authority of the government political party (the only legal party). The radio, television and press are government controlled. The universities are also controlled by the State.

Freedom of movement in the form of foreign travel and emigration is severely restricted. Individuals cannot leave the country if the government does not wish them to. However, restrictions on freedom of travel within the country, initiated in the early 1970s, have apparently been lifted. Freedom of religion was also hampered in the 1971-75 period, primarily resulting from a government effort to create a greater sense of nationalism among the country's 260 ethnic groups. These restrictions have also been lifted, although the government continues to monitor religious activities.

In response to the country's grave social and economic conditions, the Plenary Assembly of the Bishops of Zaire in August 1978 issued "A Call to Recovery of the Nation". They pointed to many sources of the "malaise zairoise", including corruption, injustice, public immorality, irresponsibility and ignorance, scarcity of food products and pharmaceutical products, juvenile delinquency, outbreaks of violence and natural calamities such as droughts and epidemics.

The bishops maintained that the institutions of the country can no longer effectively fulfil their mission to protect and defend personal and property rights. The individual's only recourse, they criticised, is to corruption and bribery to defend his rights. In a series of revealing rhetorical questions the bishops asked: (1) Can we affirm that the army and the police are effectively carrying out their functions and only their functions of defending national territory, assuring public order and the security of persons and property? (2) Can we hold that the principal organs of the State, the legislative, judicial and executive organs, are succeeding in infusing values of peace, justice, work and democracy? (3) Finally, can we say that respect of the person and human life, the just and equitable distribution of national revenue, the judicious dispensation of awards and sanctions, the exercise of the freedom of expression and freedom of religion, in brief, a public healthy morality has succeeded in encouraging good and discouraging evil, in augmenting the work spirit and in consolidating the bonds of national solidarity?

The bishops charged that because Zaire has the "misfortune" to have a rich economic potential, this makes the country an object of covetousness on the part of certain foreign powers which are more attracted to exploiting the country's resources than with the lot of the Zaire people. The religious leaders maintain that they are firmly attached to the principle of Zaire solving its internal political problems without foreign intervention.

They conclude that the present situation calls for profound reforms in order to achieve the required recovery of the nation. Superficial reforms, they maintain, would only paper over the cracks.

Commentaries

Human Rights Committee

The 18-member Human Rights Committee held its *Fourth Session* in New York from 10 July to 2 August 1978 and its *Fifth Session* in Geneva from 23 October to 3 November 1978.¹ Although the Covenant requires the Committee to meet only twice per year, the Fifth Session was the third held this year. At the Fifth Session the Committee determined that its workload required it to hold an additional meeting each year for the foreseeable future.

At present, 52 nations have become States Parties to the International Covenant on Civil and Political Rights and 20 have ratified the Optional Protocol.

In September, States Parties to the Covenant elected nine experts to the Committee for four-year terms commencing 1 January 1979. They join the remaining nine members whose terms do not expire until the end of 1980: Sir Vincent Evans of the United Kingdom, Mr Manouchehr Ganji of Iran, Mr Vladimir Hanga of Romania, Mr Haissam Kelani of the Syrian Arab Republic, Mr Luben G. Koulishev of Bulgaria, Mr Andreas V. Mavrommatis of Cyprus, Mr Anatoly P. Movchan of the U.S.S.R., Mr Walter S. Tarnopolsky of Canada and Mr Diego Uribe Vargas of Colombia. Five current members were re-elected: Mr Bernhard Graefrath of the German Democratic Republic, Mr Rajsoomer Lallah of Mauritius, Mr Torkel Opsahl of Norway, Mr Julio Prado Vallejo of Ecuador and Mr Christian Tomuschat of the Federal Republic of Germany. Four new members were elected: Mr Nejib Bouziri of Tunisia, Mr Abdoulaye Dieye of Senegal, Mr Dejan Janca of Yugoslavia and Mr Waleed H. Sadi of Jordan.

During its Fourth and Fifth Sessions the Committee devoted most of its time to the examination of periodic Reports by States Parties and the examination of "communications" by individuals alleging violations of their rights under the Covenant by a Party to the Optional Protocol. Other matters discussed by the Committee included "co-operation" with Specialised Agencies, overdue States Reports, future meetings of the Committee and the finalisation of its Annual Report to the General Assembly.

It determined that in the future it will adopt its Annual Report at its summer session, which would allow time for the Report to be presented to ECOSOC, which under the Covenant has the responsibility for forwarding it to the General Assembly. Because the Committee was adopting this year's Report at an additional session, ECOSOC allowed it to submit the Report directly to the General Assembly.

Deadlines for States Reports

Several countries have failed to meet the deadlines established for submission of their Reports under Article 40(1)(a) of the Covenant. As

¹ Commentaries on the first three sessions appeared in Review Nos. 19 and 20.

of the Fifth Session, the following 12 States Reports due in 1977 had not been received: Canada, Colombia, Costa Rica, Iraq, Jamaica, Kenya, Lebanon, Mali, Mongolia, Rwanda, the United Republic of Tanzania and Uruguay. At its Fourth Session, the Committee agreed that a third reminder should be sent to these States Parties, including a reference to the incentive in ECOSOC Resolution 1978-20 exempting States Parties to the Covenant from the requirement of submitting reports on similar matters to ECOSOC.

Examination of States Reports

Of the 26 "initial" Reports received thus far, the Committee has examined 21, utilising its established procedure of having a representative of the State Party introduce its Report, listen to and then respond to questions and comments put by Committee members. The Committee has also considered one of the five supplementary, or "second-round", Reports submitted by States Parties which had previously been examined by the Committee.

At its Fourth Session, the Committee examined the Reports of the Federal Republic of Germany, Iran, Jordan, Madagascar, Norway and Yugoslavia. Although most members of the Committee expressed satisfaction with the quality of these Reports, they did express some criticism in regard to their depth and format. Some members felt that the Iranian Report was "less than complete." The Report of the Federal Republic of Germany was criticised for including a "great deal of general discussion which [was] basically irrelevant and did not correspond to reality." In anticipation of some of the comments, the Jordanian representative apologised for the brevity of his government's Report and said supplementary material would be forthcoming.

At its Fifth Session, the Committee examined the Reports of the Byelorussian S.S.R., Mauritius and the U.S.S.R. It also examined the supplementary Report of Ecuador, the first State party to undergo a second-round examination. It was agreed to postpone again the examination of the Report of Chile, in part because the committee wanted to await the report of the U.N. *Ad Hoc* Working Group which had recently visited Chile. All of these Reports, each of which followed the general guidelines regarding the form and contents of Reports (CCPR/C/5), were praised by Committee members for their thoroughness, organisation and clarity.

Several members commented on the significance of the appearance before the Committee of a high level delegation from the U.S.S.R. In the opinion of many members and observers, the U.S.S.R.'s willingness to co-operate with the Committee was a significant and positive act which aided the Committee's development. The examination of one of the major powers on its Human Rights record received extensive press attention.

There is an evident pattern emerging in the questioning of States Parties. For example, Committee members consistently have expressed concern with the status of the Covenant in domestic law: *i.e.*, does it have the force of law; if not, has legislation been adopted to give it practical effect, and may a defendant or plaintiff invoke its provisions in a judicial or administrative proceeding. Also, members consistently

have asked numerous questions regarding the legal rights accorded to individuals charged with criminal offences or who have been somehow deprived of their liberty. For States which continue to practise capital punishment, questions have been put regarding the nature of offences for which the death penalty can be sought, the frequency of its imposition and the prospects for a partial or complete abolition. Other questions frequently asked concern the rights of children, efforts to ensure sexual equality, implementation of provisions regarding freedom of expression, thought, religion and assembly and efforts to reduce infant mortality.

Several members have suggested that the Committee should put questions to States Parties concerning the relationship between their efforts to promote and ensure economic, social and cultural rights and their ability to respect and ensure the civil and political rights set out in the Covenant.

In addition, some of the more specific questions asked on the substance of the reports reveal the thoroughness of the analysis of those Reports by Committee members. For example, the Federal Republic of Germany was asked to give more information on the role of states in the federation ("Länder") and the principles of the *Berufsverbot*. Madagascar was asked to describe the role of its Special Courts. Jordan was asked to comment on the difficulties encountered in implementing the provisions of the Covenant given the absence of its Parliament. Iran was asked the function of its Imperial Inspectorate, its Public Security Committee, its military tribunals, etc. The U.S.S.R. was asked how the doctrine of "socialist realism" limited the implementation of guaranteed rights and about the rights of psychiatric patients, the practical effect of emigration policies and the role of Peoples Control Committees in the protection of Human Rights. Mauritius was asked about the effect on the rights of married women of its two differing statutes governing the state of marriage.

Representatives of States Parties usually chose to answer orally the questions put by Committee members, but frequently the right was exercised to answer more complex questions at a later time and in writing. Jordan and the Libyan Arab Jamahiraya, the latter at the Third Session, chose to answer all questions in writing and at a later date. As of the Fifth Session no answer had been received by either of these two States Parties. While recognising the significance of the States Parties' willingness to submit their human rights record to examination, some observers have felt that not all questions have been answered in a thorough, precise or forthcoming manner. A few members have expressed the belief that the questioning of States Parties during the second-round examination will result in a more satisfactory response to some of these concerns.

The Committee utilised a slightly different procedure in its second-round examination of Ecuador. A Committee member would pose a question on one topic and other members then would ask questions on related topics. Under this procedure, a representative of a State could choose to reply immediately following such a group of questions, at the end of all the questioning or later and in writing. The representative of Ecuador chose the first method. He answered all questions put to him

in a straightforward and forthcoming manner. While several Committee members reserved their position on the use of this new procedure, it appeared to promote an expeditious and thorough examination of the main concerns of Committee members.

It apparently has become the practice of the Committee members to refrain from taking part in the questioning of and commenting on the Report of their State. The only time this practice was not observed was during the Fourth Session, when the member from Iran attempted to "clarify" what he believed were "misunderstandings and misconceptions" about Human Rights in Iran. The three members of the Committee whose countries were examined at the Fifth Session pointedly respected the "good practice" of refraining from participation in the discussion of their respective countries' Reports.

Co-operation with Specialised Agencies

At its Fourth Session, the Committee followed up its earlier discussion of co-operation with Specialised Agencies such as UNESCO and ILO. In addition to the question of the transmission of relevant articles of States Reports to the Specialised Agencies under Article 40(3), the Committee discussed its relationship with UNESCO regarding the new procedures adopted by UNESCO to receive communications of Human Rights violations. (See, ICJ Review No. 20, p. 36)

After an explanation of these new communications procedures by the representative of UNESCO, the Committee discussed the effect of these procedures on the Committee's assigned function to receive communications under the Optional Protocol. Some members of the Committee expressed the view that UNESCO is not a body of international investigation or settlement within the meaning of Article 5(2)(a).

The Committee did agree that those portions of the States Reports concerned with Articles 22 and 24 of the Covenant should be transmitted to UNESCO by the Human Rights Division secretariat. UNESCO also expressed an interest in receiving those portions of the States Reports concerned with Articles 18, 19 and 27. No agreement was reached on how Specialised Agencies may comment on those portions of the States Reports within their competence. The Committee decided to postpone further consideration of the Committee's future relationship with the Specialised Agencies until more information was obtained on UNESCO's interest in Articles 18, 19 and 27.

By its Fifth Session, the Committee had received a letter from the ILO expressing its willingness to provide to the Committee, upon request, material on any matters before it. No further information was received from UNESCO and the decision was made to postpone further discussion on the matter until the next session.

Confidential Communications

In closed meetings at both sessions the Committee considered communications submitted under the Optional Protocol. Forty communications have been submitted to the Committee by or on behalf of individuals who claim to be victims of violations of rights set forth in

the Covenant. These communications relate to Canada, Denmark, Finland, Mauritius, Norway, Uruguay and Zaire. Seven have been declared inadmissible as not fulfilling one or more of the conditions for admissibility laid down in Articles 1, 2, 3 and 5(2) of the Optional Protocol. Seven have been declared admissible and "consideration of the merits of the claims of these communications will be under consideration in the forthcoming sessions." Twenty-five are still before the Committee pending final decisions as to their admissibility (two communications have been merged for joint consideration). Under Rule 91 of its provisional rules of procedure, the Committee has decided, in a number of these cases, to transmit the communication to the State Party concerned, requesting information and observations relevant to the question of admissibility. In some cases the Committee has decided to request additional information from the authors.

A number of important procedural and substantive issues have been the subject of decision. *First*, the rule regarding the ability of a person to submit a communication on behalf of an alleged victim was further refined to require that the author of the communication show a "sufficient link" with the alleged victim. The Committee has declined to consider communications where the authors have failed to establish any link between themselves and the alleged victims. *Second*, a complaint of violations occurring before the date on which the Covenant and Protocol became binding on a State Party will not be considered, but reference to such violations may be considered where the author alleges that the violations continued after the critical date. *Third*, Article 5(2)(a) of the Optional Protocol, precluding the Committee from considering any communication "unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement" only relates to procedures undertaken by inter-state or intergovernmental organisations on the basis of inter-state or inter-governmental agreements or arrangements and not, for example, to those undertaken by non-government organisations. In addition, the Committee recognised that some proceedings of the Inter-American Commission on Human Rights constitute such a procedure but that proceedings under ECOSOC Resolution 1503 (XLVIII) do not, as the latter concern a consistent pattern of gross violations of Human Rights and not an individual complaint. It further determined that it is not precluded from considering a communication which had been submitted to such a procedure if it had been withdrawn or is no longer being examined at the time the Committee reaches a decision on its admissibility. *Fourth*, the Committee decided to base its work as respects Article 5(2)(a) of the Optional Protocol on the English, French, Russian and Chinese language versions which preclude the Committee from considering a communication from any individual until it has determined that the complaint *is not being examined* under another procedure. It determined that the discrepancy in the Spanish version, which uses language meaning *has not been examined*, resulted from an editorial oversight in the preparation of the final version of the Spanish text. *Fifth*, if a State Party disputes the contention of the author of a communication that all available domestic remedies have been exhausted

(Article 5(2)(b)), it will be required to give details of the effective remedies available to the alleged victim in the particular circumstances of his case. General descriptions of rights to accused persons under law and of the domestic remedies designed to protect and safeguard those rights will be deemed insufficient. *Sixth*, in order to expedite the consideration of communications, the Committee determined that a Working Group of the Committee may ask a State Party or the author of a communication to provide further information relative to the communication without submitting its decision to the Committee.

The Committee steadily and surely developed a pattern of operation and a set of procedures and precedents during its first two years. It has been serious and responsible in the conduct of its business and has demonstrated its willingness to work longer hours and more weeks than are minimally required under the Covenant. The co-operative and respectful working relationships between Committee members and their willingness to avoid partisanship have enhanced the quality of the Committee's early decisions and have secured a solid foundation for the Committee's future work.

Report of the Sub-Commission

The United Nations' Sub-Commission on the Prevention of Discrimination and Protection of Minorities held its 31st Session in Geneva from 28 August to 15 September 1978. The Session was chaired by Mr Abdelwahab Bouhdiba (Tunisia).

During its three week session the Sub-Commission reached every item on its 19 point agenda with the exception of 'scientific and technological developments and human rights.' It received a number of reports of long standing studies and ultimately adopted more than twenty resolutions. Some of the highlights of the Session are set out below.

Draft Principles for the Protection of All Persons Detained.

Of particular significance was the consideration and adoption of Draft Principles covering the treatment of individuals subject to any form of detention. This document will be presented to the Commission on Human Rights at its next meeting. It is especially significant to note that the Principles were adopted by consensus in both the Working Group which developed them and the Sub-Commission. This bodes well for its eventual adoption by the General Assembly.

Three non-governmental organisations, the International Commission of Jurists, Amnesty International and the International Federation of Women Lawyers were able to take an active part in the Working Group.

The Draft Principles represent a cogent, articulate and workable set of minimum standards for protecting persons in all forms of detention or imprisonment, including those detained under emergency or other special powers. If adopted this Body of Principles will serve as a useful complement to the projected Convention Against Torture, in that it specifies the measures which will need to be taken to discharge the obligations of States Parties under the Convention. Some of its key provisions follow.

Detention must be ordered by or be under the effective control of a judicial or "other authority under the law," whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence. (No. 3) No person shall be subjected to torture, cruel, inhuman or degrading treatment or punishment. (No. 5) States shall prohibit by law any act contrary to the rights and duties of the Principles. (No. 6) Arresting authorities should be different from investigating authorities and both should be under the control of a judicial or other authority. (No. 8) Places of detention shall be under the supervision of an authority distinct from the one administering the place of detention. (No. 24)

A detainee shall have the right to be heard by a judicial or other authority, to have counsel, and free counsel if he cannot afford his own, to receive a copy of the detention order, to be informed at the time of arrest of the reasons for it, to be informed of his rights, to receive adequate medical attention, to have no evidence obtained in contravention of these principles to be admitted against him. (Nos. 9, 10, 11, 12, 15, 16, 21, 22, 23)

Family contact shall be allowed and the family shall have the right to know the location of the detainee. As far as possible, minimum support to the dependent members of the detainee's family shall be maintained. (Nos. 14, 17, 18, 26)

A detained person, his counsel, family member or a "citizen with reliable knowledge of the case" shall be entitled to take proceedings before a judicial or other authority to prove that he has been the subject of torture or other prescribed treatment or to challenge the authority, lawfulness, or necessity of his continued detention. (No. 28) Whenever a detainee dies while in custody or shortly after release, there shall be an investigation by a judicial or other authority, on its own motion or by motion of the family or a citizen who has reliable knowledge of the case. (No. 30) The family or the detainee will have the right to compensation for harm done. (No. 31)

The detainee will enjoy the presumption of innocence, a speedy appearance before a judicial or other authority, trial within a reasonable time and access to release on bail. (Nos. 32, 33, 34, 35)

Detention and States of Emergency

During its consideration of detention, the Sub-Commission also received an oral report by Mme. Questiaux (France), one of two Co-Rapporteurs appointed last year to study the impact on human rights of "states of emergency." Mme. Questiaux suggested that the study be limited to the specific problems confronted by detained persons under a state of emergency. She set out how the situation of detainees would afford the Special Rapporteur a "laboratory" in which to conduct the study. She also urged the Sub-Commission to maintain the question of states of emergency on its annual agenda. When a State declares a state of emergency, she contended, it should not be allowed to utilise the claimed emergency as a shield to prevent scrutiny of its human rights policy. Rather, the act of declaring a state of emergency should bring the State in for greater scrutiny by the appropriate international inter-governmental or regional bodies.

Finally, she advanced four hypotheses against which to test the legitimacy of a state of emergency and its compatibility with human rights: It should be declared by a competent authority so as to ensure recognition that it was an abnormal situation; it should be under the effective control of a responsible authority, so as to ensure that the need to maintain or terminate the state of emergency would be weighed against proper criteria; it should be temporary, "obliging the authorities merely to suspend, rather than to amend profoundly, the state of the law;" the scope of action should be limited and should abrogate only those rights which were necessary to protect the nation and never those which were internationally recognised as being non-derogable.

A point of special concern for the study would be whether or not the minimum non-derogable rights were respected under states of emergencies and if not why not. Information on this concern would lead to consideration of the possible need for an instrument clarifying such rights, perhaps expanding on them. Finally, the report would attempt to ascertain whether or not the "multiplications of states of emergency and the drafting of increasingly complex texts" regarding states of emergency had led to a situation where the "legal norm was no longer clear and the difference between the rule and the exception was no longer evident."

Many members warmly praised Mme. Questiaux' presentation and the Sub-Commission decided to request authority for the Secretariat to assist her in continuing the study.

Effects on Human Rights of Economic Aids to Chile

The Sub-Commission received and considered a four volume study on "The Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile", prepared by M. Antonio Cassesse (Italy). During his presentation of the study, he noted the work of the Special Working Group on Chile, particularly its recent visit to Chile, and the Chilean government's unwillingness to co-operate with his own efforts. He stressed that this limited his ability to secure information from the "two best sources" *i.e.*, direct investigation and interviews.

His study analysed "the impact on human rights which the various forms of foreign economic assistance have, or are likely to have, if considered in the light of the general socio-economic context of Chile ... [primarily by] ... determining the possible interplay between each specific form of economic assistance and the general policy, as well as the specific measures, adopted by the Chilean authorities in the area covered by that form of foreign assistance." This mode of analysis provoked considerable controversy in the Sub-Commission. Messrs Carter (U.S.) and Nettle (Austria) interpreted this approach as a general attack on free market economies. Mme. Warzazi (Morocco) expressed her unwillingness even to discuss the report, given the Chilean government's refusal to co-operate. Sr. Holguín Holguín (Colombia) expressed his opinion that analysis of the human rights aspect of economic assistance should not be undertaken unless the nation receiving such assistance were the subject of U.N. sanctions. Mr Khalifa (Egypt) echoed this opinion by distinguishing the circumstances in Chile from those in South Africa. Messrs Bahnev (Bulgaria) and

Smirnov (U.S.S.R.) approved of the form of analysis utilised by the Special Rapporteur and the conclusions to which he had come.

In response, Mr Cassese (Italy) defended his mode of analysis, asserting that he neither intended nor undertook to attack any particular economic system. Rather, he insisted, he was offering a new formula for analysing the impact of economic assistance on human rights: *i.e.*, if there were a consistent pattern of gross violations of civil and political human rights, the U.N. and the Sub-Commission would be competent to analyse government economic policy as it affected economic and social human rights. This analysis, in turn would justify an analysis of the impact on human rights of economic assistance.

The report was referred to the Commission, without recommendation or resolution.

Democratic Kampuchea

In march 1978, the Commission on Human Rights asked the Secretary-General to transmit certain documents relating to alleged human rights violations in Democratic Kampuchea to that government and invite its comments. It also requested that the reply be transmitted to the Commission, with all available information about the situation, through the Sub-Commission. A substantial collection of documents submitted by governments and NGOs, including the International Commission of Jurists, were available to the Sub-Commission. The government of Democratic Kampuchea did not reply, but there was available to the Sub-Commission a copy of a letter from the government to the Secretary-General repudiating the allegations of human rights violations and attacking those who were bringing forward criticisms in this field.

Mr Ceausu (Rumania) urged the Sub-Commission to consider this matter under its agenda item No. 10, *i.e.*, as confidential communications under Resolution 1503, and generally attacked the allegations of violations as slander and calumny. Messrs Carter (U.S.) and Whitaker (U.K.) argued strenuously for positive action on the matter and urged that it should be considered publicly and not under the 1503 procedure.

After considering the matter publicly, the Sub-Commission adopted by vote a resolution requesting the Chairman or a member of the Sub-Commission chosen by the Chairman, to analyse the materials available and to present the material and this analysis to the Commission on Human Rights at its thirty-fifth meeting. It urged the Commission to give the matter its highest priority.

Self-Determination

The Sub-Commission also received the reports of two Special Rapporteurs on the topic of self-determination. The first was by Sr Héctor Gros Espiell (Uruguay), entitled "Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination." The second was by Mr Aureliu Cristescu (Rumania), entitled "The Historical and Current Development of the Right to Self-Determination on the Basis of the Charter of the United Nations and Other Instruments Adopted by United Nations Organs, with Particular Reference to the Promotion

and Protection of Human Rights and Fundamental Freedoms.”

Sr. Gros Espiell's report advanced several important theses, including those which argued that: self-determination had to be conceived of as a political, economic, social and cultural whole, real self-determination not being possible in the absence of one of the four components; liberation movements fighting for self-determination were acting within the bounds of international law and, furthermore, deserved the support of other nations; self-determination was both a collectively and individually held right and its realisation depended upon the enhancement and actualisation of other political, civil, economic, social and cultural rights; self-determination does not support the secession of minority groups, so long as such groups are full participants in the social, political, economic and cultural life of the nation; and territorial integrity is itself an important element in ensuring the effective realisation of self-determination for all peoples.

In the discussion, Mr Khalifa (Egypt) sharpened the relationship between human rights and self-determination by arguing that self-determination could not exist under any form of internal despotism, just as it could not exist under alien domination.

The report was praised widely and was forwarded to the Commission with the recommendations that it receive the widest possible distribution and that Sr. Gros Espiell be authorised to undertake the development of a preliminary draft of an international instrument to “systematise, codify and update” all the various matters relating to the right of peoples under alien domination to self-determination.

Mr Cristeseu's report was forwarded to the Commission, as well, with the recommendation that it receive the widest possible circulation. An additional resolution was passed calling upon all nations to assist peoples and countries which presently find themselves under alien domination and to observe their commitments under the Charter and relevant resolutions.

Role of the Sub-Commission in the Decade to Combat Racism

For the most part the discussion under this agenda item was limited to the recent World Conference to Combat Racism and Racial Discrimination. The Sub-Commission asked to be allowed to constitute a working group to formulate “specific proposals for a work programme which may be undertaken by the Sub-Commission for the effective implementation” of the Programme and Declaration of that Conference.

Genocide

The Sub-Commission referred to the Commission of Human Rights the final report of Mr Nicodème Ruhashyankiko (Ruanda) on the “Study of the Question of the Prevention and Punishment of the Crime of Genocide.”

The report traces the development of the concept of genocide and the Convention on the Prevention and Punishment of the Crime of Genocide and its application. In his concluding paragraphs, he recommended that the Commission on Human Rights should consider

setting up *ad hoc* committees to inquire into allegations of genocide "brought to the Commission's attention by a Member State or international organisation and supported by sufficient *prima facie* evidence." He further recommended that States should take action to prohibit and eradicate nazism and all similar contemporary ideologies; that the Commission should accelerate the drafting of a declaration against all forms of religious intolerance and that the 1948 Convention should not be broadly interpreted, but a new instrument developed where it is believed the earlier Convention is lacking or has been overshadowed by the passage of time.

Other Substantive Items

The Sub-Commission considered the preliminary report and list of institutions, individuals, and representatives of states who were providing military, economic or political assistance to South Africa, prepared by Mr Ahmed M. Khalifa (Egypt). It asked the Commission to consider the list and forward it to Member States for comment and asked the Special Rapporteur to present a definitive version to the Sub-Commission at its next session.

The Working Group on Slavery presented its bi-annual report, which was extensive. The Sub-Commission asked for authority to entrust Mr Whitaker (U.K.) with the further extension and updating of the *Report on Slavery*, published by the U.N. It also requested the Working Group on Slavery to follow with interest and co-operate in all relevant U.N. studies regarding prostitution and the traffic in persons; that UNESCO gather evidence concerning the sale of children and make it available to the Working Group; that the Secretary-General and relevant U.N. agencies look into the questions of exploitation of child labour and debt bondage; and that the Working Group consider the question of *apartheid* and colonialism as collective forms of slavery as a matter of highest priority.

The Sub-Commission deferred for a year consideration of two reports: one on indigenous peoples being prepared by Sr. Martinez Cobo (Ecuador) and another on the rights and duties of citizens being prepared by Mrs Daes (Greece).

The Sub-Commission considered the report and draft declaration on the rights of non-citizens prepared by Baroness Elles (U.K.), and requested her to present it to the next meeting of the Commission on Human Rights in the light of suggestions made during the discussion.

The Sub-Commission sent a telegram to the government of South Africa asking "for the release of the recently arrested members of the family of the late Steve Biko and a new and impartial investigation into his death." It rejected a resolution by Mme. Questiaux (France) asking "the Argentine Government, in a spirit of humanity, to endeavour to give news about the persons" who have disappeared in Argentine and whose names have been brought to the attention of the members of the Sub-Commission.

Procedural Matters

Considerable concern was expressed in the Sub-Commission when *Le Monde* of 13 September carried a reported account of the votes and

discussion in the confidential proceedings under Res. 1503. The Sub-Commission adopted two resolutions in consequence. The first requests the competent U.N. bodies to amend the rules of procedure of the Sub-Commission so as clearly to provide for the use of secret balloting during Res. 1503 proceedings. The Sub-Commission was divided as to whether it was already empowered to vote by secret ballot if it so chose. The second called upon the Secretary-General to conduct a thorough investigation into the breach of confidentiality and to devise a method for preventing such breaches from occurring in the future.

On a different procedural problem, Mr El Khani (Syria) presented, on behalf of several co-sponsors, a resolution requesting the relevant bodies to allow the Sub-Commission to meet for two three-week periods each year, one each in New York and Geneva. This motion passed, after some debate, and reflects the frustration the Sub-Commission members experienced in attempting to examine the documents with which they had been presented.

Future Work

In addition to those noted above, the Sub-Commission will consider two new items next session: a proposal by Sr. Ferrero (Peru) to study the relationship between human rights and the New International Economic Order; and a Secretary-General's preliminary study regarding "such measures as have hitherto been taken and the conditions regarded as essential to ensure and secure the independence of the judiciary," proposed by Mr Jayawardene (Sri Lanka).

The Inter-American Convention on Human Rights

On 11 July, 1978, the American Convention on Human Rights, also called the Pact of San José of 1969, came into force. By October, 12 States had ratified or adhered to this Convention, namely Colombia, Costa Rica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Panama, Peru, the Dominican Republic and Venezuela. More adherances are expected in the next few months.

The American Convention on Human Rights is perhaps the most complete of the human rights conventions at the regional or United Nations level. It represents an unquestionable advance over the regional instruments in effect in this continent for, until now, the only regional text agreed by American States was the American Declaration of the Rights and Duties of Man, approved in Bogota in 1948, a few months before the Universal Declaration. The text, being a declaration and not a treaty, was not regarded by States as having binding force. Now the 12 States mentioned above will be legally bound, when necessary, to adapt their laws and norms of international law to the provisions of the Convention, and to respect the rights and freedoms expressed therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without discrimination for any reason.

Without attempting to give an exhaustive enumeration or an analysis of these rights and freedoms, a few of the most important may be cited e.g. the right to life is protected, the application of the death penalty is limited to the most serious crimes pursuant to a final judgement rendered by a competent court. And in no case should capital punishment be inflicted for political offences or related common law crimes, or for crimes to which it does not already apply. It shall not be re-established in those States which have abolished it (Article 4). Also guaranteed is the right to physical, mental and moral integrity. No one shall be subjected to torture or to cruel, inhuman or degrading punishment (Article 5). Also prohibited is any form of slavery or involuntary servitude, forced labour or imprisonment for debt (Article 6). The Convention recognises the right to personal liberty and security, prohibits arbitrary arrest or imprisonment, proclaims the right of a detainee to be brought without delay before a judge, and the right to judicial recourse against any arbitrary detention (Article 7).

Articles 8 to 10 regulate the guarantee of a fair and equitable hearing, including the right to be tried by a competent, independent and impartial tribunal, previously established by law, the right to be presumed innocent, and to be assisted by legal counsel of one's choice, to communicate with him in private and the right not to have retroactive legislation applied to him, or to be subject to a more severe penalty than the one provided by law at the time of an offence. Article 25 completes this protection with the establishment of the right to "simple and prompt" judicial recourse for acts which violate his fundamental rights, whether they be recognised by the Constitution, by law or by the Convention.

Also protected is the right to privacy (Article 11. The Spanish text says honour and dignity), to freedom of conscience and religion (Article 12), freedom of thought and expression, including the right to seek, receive and impart information and ideas of all kinds, without prior censorship and subject to any subsequent penalties under laws, against defamation or for protection of national security, public order, health or morals or prohibiting propaganda for war or advocacy of national, racial or religious hatred constituting incitements to violence (Article 13).

The right of reply is recognised (Article 14). Also recognised are rights of assembly and association whether for ideological, religious, political, trade union, or cultural purposes. The only limitation on the exercise of these rights is that they "shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others." (Article 15 and 16). Articles 17 and 19 protect the family and the child. Article 20 contains the right to a nationality, and expressly prohibits the arbitrary deprivation of a nationality. The right to private property is also recognised, while allowing for the possibility under the law of subordinating such use to the interests of society (Article 21).

Every person lawfully in the territory of a State Party has the right to move about or reside in it. Anyone may leave any country freely, including his own, may not be expelled from the State of which he is a

national or deprived of the right to enter it, and may "seek and be granted asylum" in a foreign territory in case of political persecution. The principle of "*non refoulement*" is reaffirmed (Article 22).

The basic political rights are guaranteed by Article 23, namely the right to participate in government, to take part in the conduct of public affairs, to vote and to be elected, and the right to periodic elections. The State Parties undertake equally to adopt legislative or other measures with a view to achieving progressively the full realisation of the economic, social and cultural rights included in the provisions of the Charter of the Organisation of American States.

Article 27 contains an important limitation, similar to those contained in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights. This limitation is the power which State Parties have to suspend the application of the obligations incurred under the Convention, in "time of war, public danger, or other emergency that threatens the independence or security of a State." This exception is subject to precise limitations:

- the suspension of rights must be to the extent and for the period of time strictly limited to the exigencies of the situation;
- the provisions or acts which are adopted under the suspension may not entail discrimination;
- certain of the rights (including the right to life) are non-derogable, i.e., can in no case be suspended;
- any State availing itself of the right of suspension shall immediately inform the other State Parties.

In order to assure the effective accomplishment of the enumerated rights, Part II entitled the "Means of Protection" establishes two bodies: a) the Inter-American Commission of Human Rights and b) the Inter-American Court of Human Rights.

The Commission

The Inter-American Commission shall be composed of seven members who shall be elected in a personal capacity by the General Assembly of the Organisation. They serve in a personal capacity and do not represent their respective Governments, but rather all the member countries of the Organisation of American States.

To make this principle of non-representation more meaningful, it is provided that each State member of the Organisation of American States (whether party or not to the Convention) may propose up to three candidates, and when three are proposed, at least one shall be a national of a State other than the proposing State. No two nationals of the same State may be members of the Commission.

The functions of the Commission are in general to "promote respect for and defence of human rights", to prepare studies or reports, to make recommendations to Governments, to receive and examine communications concerning the violation of the rights and fundamental freedoms set forth in the Convention, and to submit an annual report to the General Assembly of the OAS (Article 41).

Two proceedings are established by which the Commission can receive communications containing complaints of violations of the Convention. Under the first (Article 45) any State Party which has

agreed to the subject of this procedure may present to the Commission a 'communication' alleging that another State Party which has accepted the procedure has violated rights contained in the Convention. Under the second, "any person or group of persons, or any non-governmental entity legally recognised" has the right to lodge a 'petition' with the Commission complaining of a violation of the Convention (Article 44). No prior declaration by the State concerned is required to bring this procedure into force. This unrestricted right of access to an international forum when satisfaction cannot be obtained at the national level is the unique feature of this Convention. The equivalent right of individual petition in the European Convention, in the International Covenant on the Elimination of all Forms of Racial Discrimination, and in the Optional Protocol to the International Covenant on Civil and Political Rights are all subject to specific acceptance by the State Party concerned of this right.

The Commission shall seek information from Governments about admissible petitions or communications. If a friendly settlement of the issues is not reached the Commission will send a report to the States concerned (which they may not make public) with any proposals and recommendations it thinks fit. If after three months the matter has not been settled or submitted by the Commission or the State concerned to the Court and its jurisdiction settled, the Commission may make a report containing recommendations, prescribing a period within which the State is to "take the measures which are incumbent upon it to remedy the situation (Articles 50 and 51).

The seven judges of the Court are elected in an individual capacity by an absolute majority vote of the States Parties to the Convention from a panel of candidates proposed by those States. Only States Parties or the Commission can submit a case to the Court; the Court can only hear a case if it has been considered by the Commission. The State concerned must have recognised the jurisdiction of the Court either generally or specifically for the particular case. If the Court finds there has been a violation it may rule that the breach be remedied and fair compensation paid. It may in case of extreme gravity and urgency "adopt such provisional measures as it deems pertinent" to avoid irreparable damage to persons.

Judgments of the Court shall be final and not subject to appeal and will be transmitted to all the States Parties of the Convention. In their turn, the States undertake to comply with the decisions of the Court. The Court will make an annual report to the OAS General Assembly on its work, specifying the cases in which a State has not complied with its judgments.

Member States of the OAS may consult the Court about the interpretation of the Convention or of other treaties concerning the protection of human rights in the American States, or about the compatibility of the donative laws with such instruments. It is to be hoped that the States Parties to the Convention will make the necessary declaration recognising the competence of the Court. The Court will have its seat in San José, Costa Rica, which was the first country to ratify the Convention. It is hoped that the States Parties to the Convention will make the necessary declaration recognising the competence of the Court.

OMBUDSMEN AND HUMAN RIGHTS COMMISSIONS

by
Sir Guy Powles *

In recent times there has been a great growth in the number of agencies established to protect the rights of citizens and to relieve their grievances. The most important of these agencies are the various Ombudsman and Human Rights institutions.

In the last ten years there has occurred what has been described as an explosion of Ombudsmen. There are now at least forty national, state and provincial Ombudsmen and 24 specialised or local and regional Ombudsmen. Of these 40 national or state offices, there are 9 in developing countries. There are no Ombudsman organisations in the international fields, either worldwide or regional.

The international Human Rights institutions have developed in a somewhat different pattern, stemming from the Universal Declaration. There has been quite a heavy emphasis in growth in the international and inter-governmental field. First, there are the United Nations bodies — the Commission on Human Rights, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, the Committee on the Elimination of Racial Discrimination, and the Human Rights Committee under the Covenant on Civil and Political Rights. Then the I.L.O. has a committee on the application of I.L.O. conventions, and UNESCO has a committee with power to consider "communications". Regionally the best known and most effective are the Commission and Court under the European Convention on Human Rights, and there is a Human Rights Commission of the Organisation of American States, and a Commission and Court under the Inter-American Convention on Human Rights which is just coming into force. In the private field on the international front there are the International Commission of Jurists, Amnesty International, and the World Council of Churches and other non-governmental organisations, which are concerned with the protection of human rights, and with the endeavour to call the attention of the people of the world to the constant infringements of human rights which are taking place the world over.

Human Rights Commissions in the domestic field are not so common, and there are also a few Equal Rights Tribunals, and a few Race Relations Offices. Human rights enforcement organisations on

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the domestic level are much less frequent in the Third World.

This article is confined to a discussion of the domestic level, and here we find marked similarity in the functions and operations of all the Ombudsmen, and a very close similarity in the functions and operations of all the Human Rights Commissions.

The main function of the Ombudsman is to investigate complaints that someone has been aggrieved by an administrative act of a government agency. An Ombudsman may also undertake investigations on his own motion. He operates in the public sector.

The Human Rights Commissions administer the anti-discrimination laws. They receive, investigate and endeavour to relieve complaints, but they are also charged with the duty of the surveillance of the administration of these laws. They operate in the private sector as well as in the public sector, and they have an important statutory educational function, which at present the Ombudsmen do not have. The procedure of both types of organisations is investigatory. They have power to call for documents and to summon witnesses. The Human Rights Commissions are usually required by their enabling statutes to move towards conciliation whereas Ombudsmen do not have such a statutory obligation, although this in fact is what they do.

Both Ombudsmen and Human Rights Commissions are appointed by the Head of State, or his Deputy "in council". Ombudsmen are generally appointed on the nomination of the Legislature. No such provision exists in the case of Human Rights Commissions, which are appointed by the normal method used in the various jurisdictions for the appointment of senior officials of the government. The specific appointment of many ombudsmen on the nomination of their Legislatures give them a peculiar quality, and it is common nowadays to refer to such ombudsmen as "Legislative Ombudsmen".

As far as enforcement is concerned, the Ombudsman has a direct power to report to the Legislature and to the Prime Minister, and to make his reports public. This power of direct access to the public in reporting, is of considerable value. Nevertheless, the Ombudsman has no enforcement power. To give him such would be to depart from the peculiar and valuable characteristics of the institution.

Human Rights Commissions, if they are unable to resolve a matter by conciliation, are required to take the matter to a special tribunal which may be set up specifically for the purposes of the inquiry in question, or which may be a standing tribunal which in some cases has other jurisdiction as well. The Human Rights Commission in some jurisdictions presents its case to the tribunal; in other jurisdictions the tribunal itself undertakes a *de novo* investigation of the whole matter. In any case, the proceedings before the tribunal are adversarial. They are, in effect, proceedings before a court, and the tribunal, after hearing the evidence in the proper way, may make a binding order, and also has power to order the payment of compensation in money to an aggrieved person. In general, the Human Rights Commissions do not make public reports in specific cases.

Canada is a useful field for the study of the co-existence of Ombudsmen and Human Rights Commissions because both these bodies now exist widely throughout the country. Ombudsmen and

Human Rights Commissions co-exist in all ten provinces except Prince Edward Island, where there is no Ombudsman, and British Columbia, where although the legislation has been passed, the Ombudsman has not yet been appointed. At the federal level, a Federal Human Rights Commission has just been appointed under legislation passed in 1977, and there is an Ombudsman Bill before the House to appoint a Federal Ombudsman but this Bill has not yet progressed to legislation. Some of the Ombudsmen in Canada have been appointed before the Human Rights Commissions in their particular province, and some after, but all the appointees, whether Human Rights Commissions or Ombudsmen, have been appointed within the last ten years, with the exception of Ontario, which was the first in the field with a Human Rights Commission (1962) and was the last to appoint an Ombudsman (1975).

The Legislative Ombudsmen in the Canadian Provinces follow the general pattern in other parts of the world, and they are empowered to determine whether an administrative act is contrary to law, is unreasonable, unjust, oppressive, or improperly discriminatory, or was based wholly or partly on a mistake of law or fact, or was wrong.

Human Rights Commissions, on the other hand, are concerned with the administration of the anti-discrimination laws of the jurisdiction concerned. In most cases, these anti-discrimination laws appear in the first part of the Human Rights Commissions' statutes in the form of something in the nature of a Bill of Rights. The Canadian Human Rights Act, which was passed by the House of Commons in Ottawa, lists the specific grounds upon which discrimination is prohibited. These are: race, national or ethnic origin, colour, religion, age, sex, marital status, physical handicap, and a conviction for which a pardon has been granted. Most Provincial Human Rights Acts have these same prohibited grounds of discrimination (except the last one), but Newfoundland, Prince Edward Island, and Quebec, add political opinion as a ground of improper discrimination, and Quebec goes further and adds social condition. Again taking the Federal Act as an example, it is prescribed that the Human Rights Commission is to have specific duties relating to complaints regarding discriminatory practices, is generally responsible for the administration of the rest of the Act, and, in particular, is to develop and conduct information programmes to foster the public understanding of the Act, to sponsor research programmes relating to its duties and functions under the Act, and to maintain close liaison with similar bodies or authorities in the provinces, in order to foster common policies and practices. All the Provincial Commissions have similar functions, save, of course, the last one.

Because the jurisdiction of the Human Rights Commissions extends to discriminatory matters in all fields, both public and private, there is inevitably some overlapping of jurisdiction between the Human Rights Commissions and the Ombudsmen. This occurs in general in matters of employment in the state services, and in matters in which the various governments are involved, such as housing, purchase of property, and environmental control.

It would be expected that with this overlapping of jurisdiction some

difficulties and possibly some confusion would arise, and yet in actual practice throughout the whole of Canada, this does not seem to have been the case. All institutions, both Ombudsmen and Human Rights Commissions, report that they have no formal arrangements between themselves for co-operation, but that in fact considerable co-operation exists on a mutual and case by case basis. In general, the understanding is that any complaints against government agencies alleging discrimination within the meaning of the Human Rights legislation would be referred to and dealt with by the Human Rights Commission. There is generally speaking a good working relationship between the intake officers in the respective staffs. One province reports a particularly good rapport between the two institutions which is helped by having offices in the same building. Another province reports education of the public in the work of each office. The very experienced chairman of another Human Rights Commission said he doubted whether the public knew well enough that either of the offices existed. He felt that as far as discrimination was concerned there were probably one hundred times more cases than came to his Commission by complaint. One Ombudsman stated his view that the Ombudsman/Human Rights Commission relationship is a smooth one, based upon consultation, co-operation and mutual respect. He honestly could not think of any way in which that relationship might be improved.

In all cases except Quebec, the Ombudsmen's powers extend to enable them to investigate complaints against the Human Rights Commissions arising out of matters of administration. Several investigations of this kind have taken place in various provinces throughout Canada. This was not felt in any way to destroy the essential harmony that existed in the working relationships between the two organisations. In one province the Ombudsman thought that perhaps the Human Rights Commission was not well informed about the full scope of the functions and authorities of the Ombudsman, whereas in another province the Human Rights Commission thought that there was a tendency on the part of the Ombudsman to go over or repeat some aspects of an investigation that the Human Rights Commission had already undertaken. These seem to be somewhat minor matters.

The duties of Human Rights Commissions in the field of education have already been mentioned. It is significant that throughout Canada the Human Rights Commissions spend an important proportion of their budget on education and publicity, but the extent to which they do this varies widely province to province. Quebec, Ontario, New Brunswick and Alberta, for example, have relatively high educational expenditures, up to 20% and over, of the budget; whereas at the other end of the scale, Manitoba, because of fiscal restraint, is now down to 5%. Alberta has a particularly well developed programme, including special teacher and student publications for schools. It is no statutory duty of Ombudsmen to carry out any educational programme at all, and there is no specific allocation in their respective budgets for this. Nevertheless, the offices do find that they have to take steps to acquaint the public as much as possible with their very existence. Most Ombudsmen's Offices in Canada issue small brochures and pamphlets,

but these can hardly be regarded as public education.

There are in the Western World a number of other organisations set up by governments to receive complaints from the public in various special fields in which these governments are concerned, and to take steps to investigate and where possible relieve these complaints or at least solace the aggrieved citizen. Space forbids a wide discussion. Suffice it to say that in Canada examples of these occur in respect of police matters, correctional institution matters, the official language legislation, consumer affairs, housing, rent, and so on. In spite, therefore, of the not inconsiderable amount of education being carried on by the Human Rights Commissions, there is over the whole Canadian picture a possibility of confusion on the part of the public. While these respective institutions and organisations may work reasonably well together, the unfortunate citizen who has a complaint may find that he has lodged it with the wrong authority. Generally, that institution will refer him to the right one. It does seem, however, that more work and study need to be given to the interests of the actual citizen himself with reference to these various complaint relieving bodies. If this means more education, more publicity, for Ombudsmen as well as for Human Rights Commissions, as it should, then there will be more complaints received. There are both in the Ombudsman field and in the Human Rights field far more matters of complaint than those that ever become lodged with the organisation concerned. Indeed, one very senior and experienced Ombudsman (not in Canada) estimated that in his jurisdiction he received probably not very much more than one percent of the total number of complaints which did exist and which ought, he felt, to be investigated and, if possible, relieved by some authority.

Ombudsmen and Human Rights Commissions and other complaint relieving authorities are here to stay. These institutions may be expected steadily to increase the scope of their operations and indeed, public demand will compel them to do so. Some thought must therefore be given to the convenience of the public, perhaps to the establishment of some easily accessible combined office or bureau where a citizen could lodge any complaint he had, regardless of its nature or against which particular authority it was directed. This office or bureau would then send it to the right quarter. It is clear also, that as time goes on, more formal arrangements will need to be made for co-ordination. If the Ombudsman Bill now before the House of Commons in Ottawa ever proceeds towards the Statute Book one may well find the tendency here to aggregate under one roof, as it were, a number of what have hitherto been regarded as special complaint areas. The Privacy Commissioner and the Correctional Commissioner are likely to be so included.

The Federal Canadian Ombudsman Bill raises an interesting statutory finger, pointing perhaps to future developments, when it states that the Federal Ombudsman shall, in carrying out any of his duties, make use of the services and facilities of the Federal Canadian Human Rights Commission wherever the Ombudsman and the Chief Commissioner considers it feasible for the Ombudsman to do so. The Canadian Human Rights Commission is proposed to be named in the

schedule of the Canadian Ombudsman Act, so that a similar type of administrative supervision can be exercised as is exercised in most of the Canadian provinces.

It would be useful now to add a footnote about New Zealand, which in 1962 was the first English speaking country to adopt the institution of Ombudsman, and is in 1978 only now just putting Human Rights Commission legislation into effect. The Act was passed last year and provides that the prohibited grounds of discrimination are to be "by reason of the colour, race, ethnic or national origins, sex, marital status, or religious or ethical beliefs of a person, or of the colour, race or ethnic or national origins of any relative or associate of that person." A new scheme has been adopted to effect a more formal tie between the Ombudsman and the Human Rights Commission. It is provided that one of the members of the five man Commission shall be an Ombudsman, who is to be nominated for this position by the Chief Ombudsman (there are three Ombudsmen in New Zealand). This formal tie at the top will be supplemented by fairly close association at the working level, and it will be interesting to know if the device of joint offices will be used. In the "current economic climate" the Human Rights Commission may, regrettably, operate in a somewhat low key.

More consideration needs to be given to the convenience of the public, otherwise the plethora of complaint relieving institutions in the West may fail to be adequately effective.

THE OMBUDSMAN INSTITUTION

by
Niall MacDermot *

The twentieth century has seen an enormous growth in the responsibilities of the state, covering almost all aspects of economic and social as well as political and cultural life. This has necessitated the devolution of power to the officials of an ever-growing public service in many matters which intimately affect the daily lives of ordinary citizens. Their entitlement to land, housing, employment, health and welfare benefits and other social services, their obligations to pay taxes and social contributions, and many other important matters are in the hands of those belonging to what is often disparagingly called "the bureaucracy".

On occasions unreasonable decisions are made, causing a sense of injustice. They may be the result of bias, improper influence, graft, abuse of power or merely incompetence, neglect, idleness or other causes amounting to what is sometimes termed 'maladministration'.

There are, of course, many safeguards provided by law to give protection against improper administrative action. Sometimes there is a right of appeal to a higher administrative authority, or to an administrative tribunal or to the ordinary courts. At times these procedures are simple, speedy and effective, but as often as not they are protracted and costly. They will often involve making written complaints and filling up forms and following procedures which confuse and intimidate the ordinary citizen. Sometimes, the very procedures by which the citizen can assert his rights are too complex for, say, an illiterate peasant in a rural area. The well-known short story of Ousmane Goundiam, *Le Mandat*, illustrates the labyrinth of confusion, ending in injustice, which may result from bureaucratic procedures. The question then becomes one of how to make the administration more human and more responsive to the needs of those it is intended to serve.

On other occasions the complainant feels that a decision against him is unjust but lacks the means to probe into the matter to find out whether he has been the victim of an arbitrary or improper decision. Even if he goes to a lawyer, the lawyer may advise him that without some proof of irregularity he has no remedy. What the complainant needs is the help of someone who has greater power than a lawyer to investigate his complaint, if it seems to merit investigation, and to try to

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negotiate a remedy for him.

If these feelings of injustice are left without remedy, if there is no-one to whom the citizen can turn in these circumstances, the gap between the government and the governed, between the state and the citizen is likely to grow, with a build-up of sullen resentment of authority which is detrimental to progress and development in the society.

It is to meet this need that many countries have in the last 30 years adopted 'Ombudsman' institutions. Of Swedish origin early in the nineteenth century, the Ombudsman system has been adapted in recent years to the needs and traditions of the many countries which have adopted it. The essential features and functions are, however, the same. The Ombudsman is an independent and non-partisan officer (or Committee of officers), often provided for in the constitution, who supervises the administration. He deals with specific complaints from the public against administrative injustice and 'maladministration'. He has the power to investigate, report upon and make recommendations about individual cases and administrative procedures. He is not a judge or tribunal and has no power to make orders or to reverse administrative action. He seeks solutions to problems by a process of investigation and conciliation. His authority and influence derives from the fact that he is appointed by and reports to one of the principal organs of state, usually either the parliament or the President. This ensures both the confidence of the complainant in the Ombudsman and the respect of the civil service. At first officials tend to regard the Ombudsman with hostility and suspicion, but in time they come to realise that he can also be an important protection for them against unfair, ill-founded, or malicious attacks.

The African states with Ombudsman institutions have all, in accordance with African traditions, established a collegiate body, a Commission rather than a single officer, to perform this function. The Tanzanian Permanent Commission of Enquiry and the Zambian Commission for Investigations (headed by an Investigator-General) are responsible directly to the head of state, the Nigerian Public Complaints Commission to the Supreme Council and the Sudanese People's Assembly Committee for Administrative Control to the parliament.

The Ombudsman is sometimes regarded as a mainly anglo-saxon institution and as one which is not needed in civil law countries enjoying a developed system of 'droit administratif'. It is true that the Ombudsman system has spread more rapidly in common law countries. Nevertheless it had its origin in one civil law country and has been adopted in many others including, since 1973, the country which has done most to develop the modern civil law system, France, where he is called Le Médiateur.

Although some matters may be referred to an Ombudsman in common law countries which would be dealt with under administrative law in a civil law country, the great majority of complaints considered by Ombudsmen are matters which, for one reason or another, would go without recourse if there were no Ombudsman to receive a complaint from the person aggrieved.

Among the countries which have adopted the Ombudsman system are numerous developing countries, including the black african

countries Tanzania, Zambia, Sudan and Nigeria. The need for such a system is perhaps even greater in a developing country due, among other reasons, to the relative shortage of advocates, the illiteracy and poverty of much of the population, the immense changes involved in the process of development, and the heavy demands made upon the personnel of a rapidly expanded civil service (*fonction publique*) which has not always been able to receive sufficient training. The institution has been found particularly valuable in one-party democracies, where it has enabled citizens' grievances to be enquired into by a sympathetic and understanding organ of state, instead of being left to fester and to create a sense of disillusionment about the ruling party and government.

Apart from Sweden, France and the four African countries already mentioned, the Ombudsman institution is to be found, either at central government or at local government level, in countries such as Austria, Denmark, Norway, Great Britain, the Fed. Rep. of Germany, Switzerland, Isle of Maurice, Fiji, Papua New Guinea, Japan, India, Pakistan, the Philippines, Australia, New Zealand, Israel, Trinidad & Tobago, Jamaica, Venezuela, Canada and the United States.

Some aspects of the Ombudsman institution will now be considered in more detail.

The complaint

A complaint may be made by any aggrieved person. It may be made in writing, or the complainant may appear for an informal interview. Usually no fee is required, and technical limitations are few. There is a general requirement that the complaint be made within one year of the notification of the decision complained of, although some Ombudsmen have a discretion to consider older grievances.

Most countries, including the Scandinavian group, New Zealand, Tanzania and Zambia allow direct access by the public to the Ombudsman. In Great Britain, France and the Sudan, complaints must be submitted through a member of parliament, who is supposed to act as a filter and forward only those complaints which properly fall within the Ombudsman's province. In practice, parliamentarians tend to forward them all, leaving it to the Ombudsman to give the unwelcome explanation if he cannot assist in a particular case.

The Ombudsman usually has a complete discretion as to which cases he will investigate. He will obviously not enquire into ones which are not within his jurisdiction or which appear frivolous or misconceived or without foundation. If he considers that the complainant has an available remedy at law before an administrative tribunal or the ordinary courts, and that it is preferable that he pursue that remedy, he may so advise him and decline to act himself.

The Ombudsman's jurisdiction

The Ombudsman's jurisdiction is generally sweeping in scope. In Sweden, the Constitution says simply that the Ombudsman, as a representative of the Parliament and pursuant to its instruction, should "supervise the observance of laws and statutes" as they may be applied "by the courts and by public officials and employees". The french

Médiateur is authorised to receive "dans les conditions fixées par la... loi, les réclamations concernant, dans leurs relations avec les administrés, le fonctionnement des administrations de l'Etat, des collectivités publiques territoriales, des établissements publics et de tout autre organisme investi d'une mission de service public". The Danish act says that "The Parliamentary Commissioner shall keep himself informed as to whether any person comprised by his jurisdiction pursues unlawful ends, takes arbitrary or unreasonable decisions or otherwise commits mistakes or acts of negligence in the discharge of his or her duties". Tanzania's Permanent Commission has jurisdiction not only over the central and local government, but also over practically all statutory bodies, as well as the party and party affiliates. Decisions of the President or matters of government or party policy are, as in other countries, outside the scope of the Commission's jurisdiction. In Nigeria complaints can be made against government departments, functionaries, employers and employees, public and private sector individuals, state governments and local government authorities. In Sudan the law is more specific. The People's Assembly Committee is competent to investigate any complaint alleging that an administration decision is tainted with "(a) nepotism, corruption, bias; (b) failure to observe sound administrative bases; (c) negligence in carrying out duty; (d) misuse of discretion; (e) incompetence; (f) loss of documents and papers; (g) tardiness and delay; (h) unjust segregation [discrimination]; (i) any similar matter".

Judicial decisions or proceedings instituted before a court are generally exempt from the Ombudsman's jurisdiction although some countries, such as Sweden, Finland and Tanzania do allow the Ombudsman to investigate complaints against the judiciary, whether relating to judicial conduct or administrative problems relating to the court system.

The powers of the Ombudsman

In most countries the Ombudsman has full powers to investigate complaints. He may see the official files and documents and may question the officials concerned with the decision complained of. In some countries, such as Zambia, he has the same powers as a judge of the higher courts to order the preservation of documents or other evidence.

An exception to this general rule was found in the French law of 1973 which at first did not give the Médiateur full and free access to all documents and officials. The law provided merely that Ministers and public authorities should facilitate the task of the Médiateur. The Minister and authorities concerned appeared to have an unfettered discretion to refuse documents or to refuse to authorise civil servants to attend interviews or answer questions. The Minister could also limit the directives given to the corps de contrôle, which the Médiateur, via the Minister, may ask to carry out enquiries and checks. In 1976 the law of 1973 was amended so as to impose an obligation on the Ministers and other authorities to give the Médiateur all relevant information with certain narrow and specified exceptions.

In most countries the only ground on which a Minister can refuse

information to the Ombudsman is where he considers that it would be prejudicial to national security or defence. The need to safeguard security is obvious, but this restraint is a significant curb on the Ombudsman's powers of investigation, and could be subject to abuse. The British Act has introduced an ingenious provision to reconcile the need for secrecy with full disclosure to the Ombudsman. The Ombudsman himself is entitled to all information relevant to his enquiry, but the Minister may impose a prohibition on his disclosing in his report any matters whose disclosure would, in the opinion of the Minister, "be prejudicial to the safety of the State or otherwise contrary to the public interest".

As stated, the Ombudsman has no powers of enforcement. In most cases he arrives at an agreement with the department or organisation on the action (if any) to be taken about the particular complaint. This will often include an agreement about an alteration or improvement in administrative procedures to avoid a repetition of the error. In cases where there is disagreement, the Ombudsman will report the matter to the President, or parliament or other authority to which he is responsible, for any appropriate decision or action.

Confidentiality

Confidentiality is observed by most Ombudsman institutions.

Anonymous complaints will usually be ignored, but the identity of the complainant will not be disclosed without his consent. The relevant law usually provides that every enquiry be conducted in private, and in most cases reports to the President or parliament do not disclose the identity either of the complainant or of the official complained against.

Confidentiality has the advantages that members of the public may make complaints without fear of reprisals, and public servants can learn from their errors without being victimised and the administration thereby improved.

An exception to this confidentiality rule is found in some countries, such as Sweden and Finland, which attach an overriding importance to the public's 'right to know'. Indeed, it is understood that in Sweden at the completion of a case the Ombudsman's file is usually open to inspection by the press.

Popularisation of the Ombudsman

Confidentiality and anonymity do not imply secrecy about the Ombudsman's activities.

It is an important part of the Ombudsman's task to keep the public informed through the press and radio about his duties and activities. This will in itself stimulate more references of complaints to the Ombudsman.

The reports of the Ombudsman, either on individual cases of general significance, or his annual reports, summarising and commenting upon the cases he has handled, will be an important means of publicity. The comments of the press on these reports can serve a useful educational purpose, and encourage trust and confidence in the Ombudsman's office.

In Tanzania and Zambia members of the Ombudsman Commissions have toured the rural areas in order to hold public meetings in villages and explain the work of their Commission. They then hold private sessions in which complaints are received. Subsequently the complaints are investigated with further visits as necessary, following notification to the appropriate authorities.

In its first year, members of the Tanzanian Commission visited 14 regions, 53 districts and addressed over 64,000 persons; in the second year, 7 regions, 10 districts and 21,000 persons. In predominantly rural countries, the importance of such tours cannot be over-emphasised if the Ombudsman is to reach the people and not be an institution at the disposal only of a relatively small and favoured urban population. These 'safaris' continue in Tanzania and Zambia to the extent permitted by limited staff and funds.

The Advantages of the Ombudsman Institution

For the ordinary citizen the Ombudsman represents an opportunity within his reach to air his grievances against authority, and to have them sympathetically enquired into on his behalf. Where his complaint is justified, he can obtain a rectification of the decision. At worst he will receive an explanation of the reasons for the decision which may remove or lessen his resentment. In sum, the work of the Ombudsman humanises his perception of the government and officials who rule over him.

For the civil service the institution can, as has been said, be a protection against unwarranted and unjust accusations. In other cases if complaint results in remedial action, officials have an opportunity to reconsider and improve their methods of work in a way which will not lead to victimisation of individuals or disparagement of the service.

For the higher authorities to whom the Ombudsman reports, the institution provides a direct link between them and the people, and gives them an insight into the reactions of ordinary people to the administration, as well as enhancing the confidence of the people in the government's care and concern for the effects of their policies at all levels of society. The reports of the Ombudsman can reveal defects which lead to improved procedures and, where necessary, to remedial legislation. Indeed, this aspect of the work of an Ombudsman is one which might well be expanded. One of the suggestions put forward when this institution was examined at the 1976 Dar-es-Salaam seminar on 'Human Rights in a One-Party State' was that the Ombudsman's office might periodically examine the administrative procedures of different departments and their internal departmental rules, and make recommendations for rendering them more fair. "They should be concerned with the manner of implementation of government policy, not with the policy itself. In this way they would have an educative effect in highlighting the problem of development administration and the rule of law, meaning substantive and procedural social justice". This proposal is a logical extension of the functions of Ombudsman institutions, and one which could be of particular value in developing countries.

EVOLUTION OF THE CONCEPT OF THE RIGHTS OF THE CHILD IN THE WESTERN WORLD

by D. Kelly Weisberg *

The General Assembly of the United Nations has proclaimed 1979 to be the International Year of the Child. It is also the twentieth anniversary of the United Nations' Declaration of the Rights of the Child. The concept of the rights of the child is of relatively recent origin. This modern notion that a child is entitled to special protection, opportunities and facilities emanates from two historical sources. First, it reflects the culmination of the evolution of the concept of childhood. Second, it springs from the development in the nineteenth and twentieth centuries of the juristic concept of the child as a legal person entitled to the protection of law. A discussion follows of these two sources, although necessarily by means of broad brush strokes to describe practices encompassing numerous centuries and diverse Western countries.

Evolution of the Concept of Childhood

Recognition of childhood, as a separate stage of life, is a modern development. The humanitarian attitude that children are vulnerable, dependent, and distinct from adults, emerged only in the eighteenth century. This is not to say that parents did not love their children in the past. Undoubtedly, there were many loving and tender parents. Nonetheless, barbaric practices towards children were pervasive in all social classes throughout history. And, the general tenor of public opinion held that such policies were acceptable. Public opinion against cruelty toward children was not aroused until the late eighteenth and nineteenth centuries.

Children have long constituted an invisible force in history. The absence of any reference to children throughout early historical records caused one historian to note:

"There is something mysterious about the silence of all these multitudes of babes in arms, toddlers and adolescents, in the statements men made at the time about their own experience. . . It is in fact an effort of mind to remember all the time that children were always present in such numbers in the traditional world, nearly half the whole community living in a condition of semi-oblivation."¹

The salient reason for this silence was that children historically occupied an insignificant position in social life. As Tucker notes: "Children were at the bottom of the social scale. That children were human beings with human needs seldom entered their [adults'] minds. . ."² Adults attached a low value to both children and child-rearing. Children died in vast numbers. In many historical epochs infant mortality was as high as 75%. Children were regarded as easily replaceable. As a corollary to the low social status of children, child-

rearing constituted a menial activity. Child care was not generally regarded as a pleasurable or positive experience, but rather "an obnoxious task which might well be passed on to someone else."³

Historical data reveal that not only were children regarded as insignificant, they were also maltreated. Judged by contemporary standards, attitudes and practices toward children showed heartlessness and cruelty. Children were killed, abandoned, beaten, terrorised and sexually abused from earliest times.

Infanticide of both legitimate and illegitimate children was a regular practice of antiquity. Children were thrown into rivers, flung into gutters and dung-heaps and exposed on hills and roadsides. Even as late as the 1890s, dead infants were still a common sight in London streets.⁴ The primary victims of infanticide were female children and the illegitimate.

Although an early law of 374 A.D. in Rome declared the killing of an infant to be murder, legal reality differed from social reality. The killing of legitimate children diminished only during the Middle Ages. Illegitimate children, according to deMause, continued to be slaughtered until the nineteenth century.

Child sacrifice constituted another historical social practice.⁵ Mutilating children was also practiced. Especially pervasive was the policy of mutilating children to increase their profits in begging. Children were also used as political hostages and as security for debts, both practices found as early as Babylonian times.

Sale of children is another longstanding practice. Child sale was legal in Babylonian times. Although laws in ancient Athens restricted the right of parents to sell children and the Catholic Church endeavoured for centuries to eradicate the practice, child sale has continued into the modern era. In Russia, for example, sale of children was not outlawed until the nineteenth century.

Physical abuse, in the form of beating children, was a pervasive feature of childrearing. According to popular beliefs, beating was both a method of showing affection and forcing a child to learn. Corporal punishment typically began as soon as infants were removed from swaddling clothes. The eighteenth century finally witnessed a major decrease in the practice. In the nineteenth century whipping children became outmoded in both Europe and America. However, beating children as a disciplinary measure still has vestiges in many homes and schools today.

In addition, children have suffered other forms of abuse. Infants were frozen by various customs, including baptism by lengthy dippings in ice-water. They were also subject to "hardening" practices, such as rolling in the snow, dippings in plunge-baths, pricking the soles of their feet, and steam-baths.

Sexual abuse of children, as defined by contemporary standards, was also widely practiced throughout antiquity to modern times. Children in ancient Greece and Rome were sexually abused by older men. Boy brothels flourished in every city. Children, especially of the lower classes, were sold to concubinage from earliest times. Playing publicly with children's genitalia was still common among the upper classes in the seventeenth century, as evidenced by Héroard's account of Louis

XIII's childhood. Indeed, sexual abuse of children occurs in striking proportions in the contemporary world.⁶

The contemporary attitude that a child has worth, with a concomitant concern for her/his physical welfare and happiness, finally took root in the eighteenth and nineteenth centuries in Western Europe. Before that time, children were undifferentiated from adults. They lived, played and worked in the adult world, and were even viewed as having adult sexual appetites. There was no recognition of the special state of childhood, or of life cycle stages.

The evolution of the concept of childhood had occurred gradually over centuries. Instead of a precarious existence fraught with obstacles, childhood became a valued social status. Several factors contributed to this modern concept, including the influence of Christianity, the writings of Rousseau, the replacement of apprenticeship by the growth of schools, and the increasing privacy of the family.⁷

By the beginning of the nineteenth century, a remarkable transformation was evident in parent-child relations. Children's welfare became a legitimate and paramount concern. Bringing up children became a process of socialisation, lacking the previous emphasis on breaking children's wills and bodies. This trend continued into the twentieth century. Today the idea has finally taken hold that children are objects worthy of considerable time and attention by those responsible for them. Adults manifest a special awareness of childhood as a prolonged dependent state in which children are in need of their protection. The social reality of childhood has evolved so that children are now viewed as important beings in their own right.

Children as Juristic Persons

The evolution of the social status of children was an essential precondition of the development of the modern legal notion that children are juristic persons, having rights as well as duties. Legal reality corresponded for centuries to the social reality of childhood. Prior to the nineteenth century, the prevailing jurisprudential emphasis was on the child as property. Thus, children could be sold, abandoned, abused and mutilated with impunity.

However, the child, unlike real or personal property, constituted a form of human chattel owing duties to its master. A child had duties toward parents, especially duties to provide services and wages and duties of obedience and subservience. The child's failure to perform these duties resulted in the imposition of serious sanctions — so severe that in some historical periods they amounted to capital offences.⁸

Historically, in many Western legal systems, the child as a legal person was subsumed in the father. The Roman *patria potestas* epitomised this doctrine of the child as paternal property. In Roman legal development, from the time of the Twelve Tables to post-classical times, the father had virtually unlimited powers over the child, including the right to kill or abandon the child, as well as the right to sell it into slavery. As long as the male head of the family was alive, the child of whatever age remained a dependant, without any recourse to the law for the purpose of calling the family head to account for his actions.

This notion persisted well into the modern era. Thus, the *puissance paternelle* of the French Civil Code gave the father unchecked authority over a child's person and property for the first twenty-one years of the child's life. In addition to having the absolute right to consent to or refuse the child's emancipation, marriage or enlistment, the father had the right to control the child's mode of life and education. The father's rights were enforceable in court upon his application for an order of detention of a disobedient child. This means of enforcement was modified gradually in the nineteenth century. One law restricted the sanction to cases in which the father had the right to be "gravely dissatisfied" with the child's conduct, and limited detention to one year for children under sixteen. A 1945 ordinance finally abandoned this type of punitive imprisonment.⁹

Parental rights over children were exclusively paternal rights. Both French and German legislation reflected this concept of paternal authority. The French epitomised it by the aforementioned *puissance paternelle*, and it is also apparent in the German Code of 1896, which gives the husband the right to decide all matters of matrimonial life. Mothers had no rights to the custody of minors or the administration of minors' property. Women themselves were long regarded, juristically speaking, as little better than children.

The nineteenth century witnessed a series of developments which transformed the legal status of the child. This transformation was due to several causes, primarily to social legislation following industrialisation and to the emergence of women's rights. For the first time many Western legal systems restricted parental authority in a comprehensive way — limiting the powers of the father and imposing duties on parents and sanctions for their violations.

Two important changes which affected the legal status of the child were the introduction of child labour laws and compulsory education. The movement toward increasing family privacy and the new solicitude manifested toward children was reflected in the genuine concern with child welfare by legislation in the post-industrial era of the nineteenth century. Child labour regulations began to restrict the number of hours per day during which minors could be employed and to regulate their working conditions. The English Factories Act of 1833, providing for salaried inspectors to enforce labour regulations, dates from this period of social concern about the exploitation of children.

Compulsory education laws provided new educational opportunities for children. In addition, by legitimating state intervention in the family, these laws made children a subject of public responsibility. The resultant changes in the status of children can be seen by the end of the nineteenth century through a comparison of some provisions of the French Civil Code of 1804 and the German Civil Code of 1896. The French Code does not specifically mention any parental duties toward the child (CC Art. 203), only those arising from marriage rather than parenthood. However, the German Civil Code (§1627) at the end of the nineteenth century expressly provided that both parents had to exercise their parental powers for the well-being of the child. The German Code also provided for sanctions for parental failures to exercise parental duties, whereas earlier French legislation does not. Thus, "by the end of

the nineteenth century, if not in the beginning, the benevolent exercise of parental power had become an articulate and explicit requirement.¹⁰

It is no accident that the nineteenth century which gave woman her rights also witnessed the child achieving a more secure legal status. As women's position in the family gradually altered, the doctrine of paternal authority was weakened, thereby weakening also the notion of the child as paternal property.

In English law, for example, married women's rights regarding custody gradually altered. With the Infant's Custody Act of 1839, the Court of Chancery was given the power to award custody to the mother until the child reached the age of seven. The mother's rights were further expanded with the Custody of Infants Acts, 1873, and the Guardianship of Infants Act, 1886. In the past half-century, an even greater measure of equality for women was reached with the Guardianship of Infants Act, 1925, and the more recent Guardianship Act, 1973. The latter provides that the mother shall have the same rights and authority as the law allows to the father.

During the nineteenth century in France and Germany, the woman similarly improved her legal position in the family, with the concomitant beneficial result for the child of the diminution of the father's dominion over the child's person and property. In France, under the Civil Code of 1804, the father alone exercised parental power. This situation altered over the next century, and by 23 July 1942, the mother had the right to be consulted in parental matters, although the father had the final voice. Equality was finally achieved on 4 June 1970 when the law held that the spouses together during the marriage exercise their authority over the children. The historic principle, "The husband is the head of the family" was replaced by "The spouses together assume the moral and material direction of the family." In addition, the former concept of *puissance-paternelle* was renamed "Du l'autorité parentale" signifying a landmark in the modification of the type of control to which children were subject.¹¹

German law followed a similar development. Traditionally, German parental power was vested only in the father. The German Civil Code of 1896 emphasised the predominance of the husband in decision-making. Article 1354 gave the husband the right to "decide all matters of matrimonial life." However, the father's power was significantly attenuated by the West German Constitution of 1949 proclaiming the principle of equality of the sexes, and by the Equality Law of 18 June 1957 which was passed to implement the Constitution.¹² Although some provisions still gave the husband preeminence in matters of parental authority, these provisions have been declared unconstitutional. With the equality of women came the erosion of the father's traditional powers in decision-making regarding children. Both parents now are regarded as having a common duty for the protection of the child.

Other nineteenth century reforms improving the status of children occurred in the fields of juvenile justice and child abuse. At the end of the nineteenth century, criminal justice reformers urged the establishment of special procedures and courts for minors. Thus, separate court systems for adults and juveniles were established in the United States from the year 1899, and followed in other European countries.

The nineteenth century also witnessed the development of sanctions for parental cruelty and neglect. Such sanctions protected minors by decreeing that parents incurred criminal liability for cruelty to a child. In England this was accomplished by section 37 of the Poor Relief Act, 1868 (31 + 32 Vict., c. 122), against "cruelty and unnecessary suffering." The concern with child abuse in America dates from the same era, including legislation passed following the Mary Ellen *cause célèbre* in 1874 in New York.

Subsequent nineteenth century legislative reforms provided for the deprivation of parental rights in extreme cases of maltreatment. In previous historical epochs, as has been noted, parents, especially the father, had virtually unlimited powers to chastise a child. In the post-industrialisation era, however, sanctions began to be imposed for parental cruelty to children. One such early regulation was an English statute of 1889 establishing the principle that society could prevent abuse by interfering with parental rights. (Prevention of Cruelty to, and Protection of Children Act, 1889).

These two nineteenth century revolutionary concepts of parental criminal liability and deprivation of parental rights are now firmly established in modern European family legislation. Parental criminal liability is assured in Germany under the Criminal Code s223b (*Misshandlung Abhängiger*), in France by the offence of *abandon de famille* (P.C. art. 357), and in England by the Children's and Young Persons' Act, 1969. Deprivation or termination of parental rights is also a universally recognised principle. In modern German law (C.C. s1666, par. I), where the well-being of the child is endangered by abuse, the guardianship court is able to order accommodation of the child outside the home. Under Italian law (C.C. art. 330) a tribunal similarly may terminate parental authority, and the French law of 4 June 1970 (C.C. art. 378 and 378-1) invests a court with powers to decree loss of parental authority for acts of neglect if one or both parent(s) has been convicted of a crime against the child.

The legal status of children has continued to improve. Indeed, the field of the rights of children is perhaps the most rapidly changing area of family law. Major legislative advances are evident in the past decade. Some recent reforms in the Anglo-American legal systems include: improving the position of children born out of wedlock; reducing the age of majority; permitting young people under a certain age to give valid consent to surgical, medical or dental treatment, and to seek contraceptives and to undergo abortions without their parents' consent; increasing protection against abuse and neglect; increasing rights for handicapped and institutionalised children; and improving the legal rights of students.¹³ Legislation has also resulted in improved administrative and judicial machinery for the protection of children's rights. Legal protections for children also currently extend to the international level, including, for example, the International Labour Organisation's Child Labour Convention regulating world-wide working conditions for juveniles.

UN Declaration of the Rights of the Child

One important international document giving support to the concept

that minors have rights is the UN Declaration of the Rights of the Child. The UN Declaration proclaims general principles of child welfare and thus stresses the rights of children in developing countries as well. In many developing countries today, the social reality of children mirrors historic practices and policies. One such practice is child labour. It has been estimated by the International Labour Organisation that 52 million children under fifteen-years-old work.¹⁴ Child sale is still being practiced, as is mutilation, including female circumcision in some African rural areas. Children are also subject to malnutrition and high infant mortality rates. For example, Guatemala has an infant mortality rate of 84.7 per 1,000 and 81.2 per cent of its children suffer from malnutrition.¹⁵ Sexual abuse is still common, as is maltreatment, especially for institutionalised and handicapped children.

The UN Declaration, which has universal application to these social conditions, has its roots in the post-World War I era, when economic and social factors contributed to dismal conditions for children in war-torn Europe. A former Declaration, adopted in 1924 by the Fifth Assembly of the League of Nations, reflected a predominant concern with the rights of children afflicted by the devastation of war.¹⁶ It emphasised children's material needs, proclaiming that children "must have" means requisite for their normal development, including food for the hungry, nursing for the sick, help for the handicapped, shelter and succour for the orphan and the waif.

The new UN Declaration of the Rights of the Child, reflecting an emphasis that the special needs of children are valid in times of peace as well as war, was proclaimed two decades later. This Declaration took into account social security legislation and also the need to protect children without discrimination. It includes several additional elements, taking into account numerous factors leading to discrimination, especially sex and socio-economic status. It also emphasises that the concept of child care begins early, as early as the pre-natal stage. Other new concepts are manifest, such as ensuring for the child the right to a name and nationality, as well as the right to leisure and recreation. The Declaration also, for the first time, mentions the problem of implementation of these rights by calling on parents, other adults, organisations and local and national authorities to strive to observe these rights by legislative and other measures.

The UN Declaration is an international document with great potential for improving the social and legal status of children in the world. Nevertheless, two primary difficulties are presented by it. The first concerns the binding effect of the document. The Declaration is merely a proclamation of general principles. Most authorities believe that for children to have legally protected rights in international law, the document must be in the form of a convention, becoming binding upon state signatories upon ratification.

Although a binding convention has greater legal force, the danger felt by some is that a convention which was ratified by relatively few states would tend to weaken the persuasive moral force of the Declaration. The economic and social conditions of many countries might make it difficult for them to accept as legal obligations some of the principles concerning the rights of children. However, in 1978 the

Polish government introduced a draft of an International Convention on the Rights of the Child in the UN Commission on Human Rights and this Draft Convention has been circulated to governments for their comments.¹⁷

The other problem presented by the Declaration, or for that matter also by a Convention, concerns the critical question of implementation. The method suggested in the Polish Draft Convention is similar to the implementation policy adopted by the ILO Convention on Child Labour — the sending of “periodic reports.” It has been proposed that reports from countries be solicited after one and then every five years. Such a method, however, suffers from the defect that countries may merely assert that progress is being made by pointing to the existence of applicable legislation, without investigating whether legal reality differs from social reality. Other possible implementation means include a communication procedure under which individuals or organisations and states could make complaints about violations of children’s rights, and the sending of teams to selected countries to inquire into children’s social and legal status. Some combination of these methods might also be adopted.

The legal status of children, especially in the Western world, has undergone a radical transformation since the days when children were discarded as readily as used property. Today, in many parts of the world, children are valued social beings, imbued with legally protected rights. Parents have duties to protect children during their prolonged dependent state. Children have rights, even against those responsible for their care, in case of abuse and neglect. Dramatic progress has been made in the past decade. Nonetheless, it must be remembered that the social reality of childhood in many parts of the world is still that of a precarious existence fraught with obstacles. It can only be hoped that the International Year of the Child will increase public awareness of these problems and that the social and legal status of the world’s children will continue to improve so that the rights of the UN Declaration may be universally realised.

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¹ Peter Laslett, *The World We Have Lost* (New York: 1965), p. 104.

² M. J. Tucker, “The Child as Beginning and End: Fifteenth and Sixteenth Century English Childhood,” in Lloyd deMause, ed., *The History of Childhood* (New York: Psychohistory Press, 1974), p. 231.

³ David Hunt, *Parents and Children in History: The Psychology of Family Life in Early Modern France* (New York: Basic Books, 1970), p. 102.

⁴ Lloyd deMause, “The Evolution of Childhood,” in deMause, *op. cit.*, p. 29.

⁵ deMause notes that children were sacrificed by such diverse peoples as the Irish Celts, the Gauls, Scandinavians, Egyptians, Phoenicians, Moabites, Ammonites, and in certain periods, the Israelites. deMause, *op. cit.*, p. 27.

⁶ For example, the annual number of female victims of sexual abuse between the ages of four and thirteen in the United States has been estimated at 500,000. John Gagnon, “Female Child Victims of Sex Offences,” *Social Problems*, v. 13 (1965).

⁷ See Philippe Ariès, *Centuries of Childhood: A Social History of Family Life* (New York: Random House, 1962).

⁸ One example of this is the rebellious son law in colonial Massachusetts proclaiming filial disobedience to be a capital offence. See generally Edwin Power, *Crime and Punishment in Colonial Massachusetts* (Boston: Beacon Press, 1966).

⁹ See Mary Ann Glendon, "Power and Authority in the Family: New Legal Patterns as Reflections of Changing Ideologies," in *Amer. Journal of Comp. Law*, v. 23 (1975).

¹⁰ Stoljar, "Children, Parents and Guardians," in *Int. Ency. of Comp. Law*, v. 4, p. 14-15.

¹¹ See generally Colombet, "Commentaire de la loi du 4 juin 1970," *D. Chron.* 1, (1971).

¹² Grundgesetz (1949); Gleichberechtigungsgesetz of 18 June 1957, BGB1, I.609. See also Markovits, "Marriage and the State: A Comparative Look at East and West German Family Law," 24 *Stan. L. Rev.* 116 (1971).

¹³ See generally on American law, Robert Mnookin, *The Child and the Law* (Boston: Little, Brown & Co., 1978), and on English reforms see Olive M. Stone, *Family Law* (London: Macmillan Press, 1977).

¹⁴ ILO Bureau of Statistics and Special Studies. Forty million of these children are unremunerated for their labour in family-owned or operated (primarily agricultural) enterprises.

¹⁵ Report, Newsletter of the International Year of the Child Secretariat, Number 1, August 1977, p. 3.

¹⁶ For a study of the evolution of the UN Declaration through its three drafts, see Eliska Chanlett and G. M. Morier, "Declaration of the Rights of the Child," *Int. Child Welfare Rev.*, v. 22, 1968.

¹⁷ Draft Convention on the Rights of the Child submitted by Poland on 7 February 1978, Annex to Commission on Human Rights Resolution 20 (XXXIV).

STATES OF EXCEPTION

by
Daniel O'Donnell *

I. Introduction

The phenomenon, States of Exception — including what various legal systems refer to as states of emergency, internal war, crisis or martial law — is of paramount importance in the protection of human rights. Article 4 of the International Covenant on Civil and Political Rights permits states parties to derogate from 18 articles — more than two-thirds of the freedoms incorporated in the Covenant — in times of officially proclaimed public emergencies. Similar provisions exist in Articles 15 of the European Convention on Human Rights and 27 of the American Convention on Human Rights. In normal circumstances most civil and political rights are already subject to limitations in the interest of national security and 'ordre public' — but complete derogation from these principles in times of public emergency emphasises the sweeping impact these emergencies have on the individual's enjoyment of his rights.

States of exception tend to play a similar role in states which are not parties to these international instruments. Whether to meet constitutional requirements or to minimise public opposition (both domestic and international), states of exception are often invoked to justify restrictions on civil and political rights which exceed restrictions normally considered acceptable or necessary, restrictions which affect broad complexes of human rights, and even restrictions which fundamentally alter the very nature of the society.

A brief catalogue of measures most frequently taken pursuant to states of exception illustrates the importance of this subject: the elimination of elections or all constitutionally guaranteed rights; elimination of elections and dismissal of legislative bodies; banning of trade unions, political parties, religious, cultural and professional organisations; banning of public meetings and manifestations (frequently phrased "all meetings of more than five persons"); detention without trial, without charge and without stated reasons, often incommunicado and for indefinite or renewable periods; creation of new crimes such as criticising the government or its laws, frequently bearing heavy penalties including death; government closure of or seizure of the media; submission to civilians to military courts; etc. Certain of these measures, such as detention incommunicado, the power of low ranking officers to order detention and curbing the freedom of the press, effectively eliminate the mechanisms by which public officials are held accountable. A climate of impunity is created which, coupled with the sense of urgency to vanquish the forces believed to be threatening the nation, leads to even greater violations of the rights of citizens, violations not formally authorised by the state but against which the enfeebled legal structure offers no effective protection. It is in these situations that murder, torture, extortion and corruption become daily occurrences.

The right to derogate has not been widely invoked in international forums. Under the European Convention of Human Rights, it has been claimed by Greece, Ireland, Turkey, and the United Kingdom. Under the International Covenant, it has been asserted only by Chile and the United Kingdom. This by no means indicates that countries resort infrequently to emergency powers. In recent times large parts of the world's population have lived under regimes of exception, often for lengthy periods.¹ If the doctrine has been seldom invoked, it is perhaps because the Covenant has only recently come into force.²

The large number of regimes of exception occurring in recent history suggests that, as more states become parties to the Covenant and as the procedures for supervising the Covenant become better established, the question of derogation will arise with increasing frequency. The Human Rights Committee is faced with this question in its regular examination of states' reports concerning implementation of the Covenant and in its consideration of individual complaints under the Optional Protocol. Various United Nations bodies are also faced with this question, both in their investigations of gross and systematic violations of human rights,³ and in the United Nations' role as the depository under Art. 4(3) of the Covenant of notices of derogation. Given the recent trend of "linking" various forms of economic assistance to human rights questions in the recipient country, it seems likely that various national and international agencies will find themselves more often faced with the question whether a regime of exception is justifiable. It is hoped that they will also let their judgment be guided by the principles set forth in the Covenant.

II. Limitations on States of Exception

It is incorrect to equate states of exception with violations of human rights. Governments have the right and indeed the duty, to protect the security of the state in the interests of the people. In certain circumstances when ordinary measures are inadequate to accomplish this, the right to employ exceptional measures arises. As already stated this right is recognised by the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights.

These instruments stipulate that this right is subject to several specific limitations, which vary somewhat in each instrument. The four limitations discussed at some length below are common to all three instruments.⁴ The wording used in the International Covenant for Civil and Political Rights will serve as the basis for an analysis of these limitations, but the principles embodied in these four limitations may well be considered to have universal validity.

In considering the limitations to measures a state may legitimately take in times of emergency, information available on current emergencies suggests that a disturbingly large number of states have seriously transgressed these limits. This emphasises not only the need for a serious study of states of exception,⁵ but also the need to consider how the international community might seek to enforce these limits, particularly with respect to states which have become states parties to the International Covenant on Civil and Political Rights.

A. "... Threatens the Life of the Nation"

The first requirement is that the public emergency be one which "threatens the life of the nation" (Art. 4(1)). This is one of the most difficult limitations to enforce, since it is so closely linked with state sovereignty and domestic jurisdiction. It is only with the greatest reluctance that a state's judgment in this area should be questioned. Yet this is a limitation imposed by the Covenant, and no such limit can be simply set aside and ignored. Moreover, this limitation is in fact the first limitation imposed, revealing the importance of the principle that lesser emergencies do not justify setting aside the rights set forth in the Covenant.

The circumstances which have been invoked by states to declare states of exception are varied, e.g. the assassination of a government leader (N. Yemen 1977), student demonstrations (Sierra Leone 1977), strikes in a crucial sector of the economy (Mauritius 1971), politically motivated murders and destruction of property, the existence of subversive organisations, attempted coups, civil disturbances and rioting, and border warfare or regional guerrilla activities. It is somewhat surprising that the most unambiguous threat to the life of a nation — widespread civil disturbances and the inability of civil authorities to maintain public order — is the least common reason for the states of exception currently in effect in the world today. One of the most common reasons is regional guerrilla activities and border warfare, both of which usually involve inter-state relations. This factor demonstrates a link between states of exception and threats to international peace, a link which again underlines the legitimacy of international concern with regimes of exception.

Two other frequent reasons for states of exception are politically motivated violence and/or the existence of subversive organisations. As these phenomena are widespread throughout the world, and as some states are able to counter them without resorting to states of emergency, there is a need to study carefully the reasons invoked by governments declaring emergencies on these grounds and develop guidelines indicating when states are justified in suspending civil and political rights in order to combat them. Some progress was made in this direction by *the Greek Case* (European Commission of Human Rights, 1969) which held that when an opposition movement has the intent to gain control of the government, but has not adopted violent tactics and is not actually capable of seizing control, there is no justification for taking emergency measures. The European Commission and Court do not seem to have developed more precise standards indicating what quantum of politically motivated violence constitutes a threat to the life of the nation, although it is self-evident that the actions of small groups of persons must be evaluated with respect to their effect, not their motivation.

It must be noted that, according to Art. 4(1), the threat must be a present one. Several countries which have states of exception, such as Argentina, Chile and Pakistan, have prolonged them even while admitting that the forces once posing a danger to the life of the nation have been effectively defeated. The prolongation may be explained in terms of repairing an administrative structure that has been badly

damaged (Pakistan) or remoulding the consciousness of the population. Some states, such as Chile and Argentina, have declared that the states of exception (or at least the suspension of political freedoms) will continue for years to come. This is an implicit recognition that the state of exception does not rest on the existence of a threat to the nation, since the existence of such a threat cannot be foreseen. Such a threat, because of the requirement that it be real and substantial rather than abstract, is essentially transitory. Because Art. 4(1) uses the present tense in the phrase "public emergency which threatens..." the government has a clear obligation to re-evaluate the existence of this threat at frequent intervals.

Special scrutiny should be given to all emergencies of long duration, since this gives rise to a presumption that the circumstances originally threatening the life of the nation no longer constitute a threat. In Singapore, for example, emergency regulations introduced during a state of emergency declared by Malaysia in 1964 (while the two states were in federation) as a result of the invasion of Malaysia by Indonesian paratroops, is considered to be still in effect by constitutional scholars.⁶

B. "... To the Extent Strictly Required"

Art. 4(1) also embodies the principle that emergency measures — those exceeding the restrictions or liberties normally permitted to protect national security and *ordre public* and which must be justified by a threat to the life of the nation — shall be permitted only "to the extent strictly required by the exigencies of the situation". Violations of this principle appear to be frequent.

Some states do take only narrow measures precisely fashioned to meet the needs of the situation and incorporating safeguards to prevent abuse. This tends to be the case — although exceptions exist — when elected legislatures continue to play their constitutionally appointed role of representing the interest of the population.

Other governments suspend all constitutionally guaranteed rights at the outset of the state of exception. The general denial of the right to seek judicial relief for violations of civil and political rights, even in the absence of regulations authorising infringements of these rights, must in all circumstances be considered unnecessary. In practice such a general suspension of rights is usually accompanied by a flood of regulations authorising transgressions of a wide spectrum of rights, some of which also violate the principle of strict necessity.

A third pattern is to leave the constitution theoretically in effect but to govern by decrees which, being immune from constitutional review, steadily encroach upon the individual's enjoyment of the rights granted by the constitution. When the electoral process has been eliminated there is little to restrain the government from simply adding one emergency measure to the next, resulting in increasing restrictions of rights even as the original emergency situation becomes more and more distant. This process leads to the proliferation of emergency measures more convenient than necessary.

It is possible to identify certain measures which, although widespread, are never strictly necessary. One of these is the practice of

holding detainees or prisoners incommunicado. In some circumstances it may be necessary to hold someone incommunicado for a matter of days in order to conceal the fact of his arrest from his associates. This does not justify holding persons incommunicado indefinitely or for long periods as has occurred in many states. The practice is particularly condemnable because the lack of communication with these persons permits them to be tortured with impunity. The fact that the government makes no public statement that an individual has been detained also permits the government to escape any responsibility for deaths which occur during detention, an occurrence which is regrettably common.

The practice of permitting no review of the legality of detention is likewise never strictly required by the exigencies of the situation. Administrative detention is one of the most common emergency measures. Some states adopting this measure have criteria for those who may be detained (e.g. they pose a danger to the security of the state) and procedures which permit the detainee to know the grounds for his detention and to offer arguments and evidence against his detention and which also provide for periodic review of the need to detain the individual. The legislation of such states offers examples of how such procedures can be implemented without endangering the legitimate requirements of the state. However, in a number of states, for example Argentina, Chile, Paraguay and Uruguay, such procedures are not followed with respect to persons detained pursuant to emergency regulations.

Emergency provisions affecting freedom of speech and political activity also often violate the principle of strict necessity. A Uruguayan measure of October 1976 provides penalties ranging from restrictions on the place of residence to forced labour in military camps. These penalties are imposed on those who, without necessarily being convicted of any crime, "disturb the effective development of preventive or executive action by the state against subversion" or repeatedly act in a manner which "could destroy the public confidence . . . in the restoration of the values of the nation" (inter alia). South Korean emergency decrees of January 1974 made criticising the constitution or advocating its revision punishable by 15 years imprisonment. It is submitted that such sweeping restrictions of freedom of speech can never be deemed strictly necessary.

Likewise it is difficult to see how the prohibition of all political parties and activity can be strictly required, as this would imply that democracy itself constituted a threat to the regime. It is a universally applicable principle, according to Art. 29(2) of the Universal Declaration of Human Rights, that human rights can be restricted only in the protection of a democratic society. Yet in 1977, four years after the inception of its state of exception, Chile extended a ban on political parties to encompass all parties. All political parties have also been banned in Uganda and Bangladesh.

Examples of emergency measures which violate the principle of strict necessity are numerous. A study of emergency measures with an analysis of their compatibility with the Covenant — perhaps analogous to the commentaries of the Red Cross on the Geneva Conventions on

the law of war — would serve a useful function. It would provide guidelines for nations when they find themselves faced with emergency situations and the need to select appropriate responses. One also hopes that the Human Rights Committee will in the course of its deliberations begin to develop a public jurisprudence on these questions.

C. Non-Derogable Provisions

Art. 4(2) of the Covenant sets forth several rights which cannot be subject to restriction by reasons of a public emergency. This requirement is also repeatedly violated. The violations are of two types: *de jure* and *de facto*. Among the non-derogable rights most often explicitly violated by law are the requirements that the death penalty be carried out only after a final decision by a competent court, Art. 4(2); the right to seek pardon or commutation of death sentences, Art. 4(4); the prohibition on imposing the death penalty on persons under the age of 18, Art. 8(5); conviction under retroactive laws, Art. 15; and restrictions on the freedom to adopt and practice a religion or belief of one's choice, Art. 18(1) and (2).

Thailand provided an exceptional example of *de jure* violation of the right to life. Article 21 of the Constitution gives the Prime Minister "the power to issue any order to take any action" where he "deems it necessary for the prevention or suppression of an act subverting the security of the Kingdom, the Throne, the national economy or State affairs or disturbing or threatening public order. . .". The power applies retroactively and any action taken under this new power is to "be considered lawful". Under this power a number of people have been summarily executed without trial.

Of equal if not greater importance are the *de facto* violations of non-derogable rights which occur systematically in some countries. The most important violations concern the right to life (Art. 6) and the right to be free from torture and inhuman treatment or punishment (Art. 7). In Uganda reliable witnesses have attested that executions without trial are carried out by security forces at the express order of the head of state. Summary executions by security forces have also been alleged to occur with some regularity in Democratic Kampuchea and Ethiopia.

In Argentina, Brazil and other countries, "death squads" and other groups of the extreme right, allegedly composed of present or former police officers, torture and murder with regularity. The governments take no effective action to curb the activities of these groups, fail to investigate the deaths attributed to them, and indeed frequently exonerate these groups from responsibility for their actions by publishing communiques attributing these deaths to other causes.

In other countries such as Chile and Uruguay restrictions imposed on derogable rights (such as detaining persons incommunicado and removing the power of the courts to inquire into conditions of detention) create what has been called "the preconditions for torture". Under these conditions murder and torture at the hands of security forces become widespread, although not officially sanctioned. The power of these security forces to operate in secrecy without judicial accountability, and their power to punish any public criticism, all contribute to the increasing incidence of these outrages. The

phenomenon by which extensive derogation from derogable rights almost inevitably leads to violations of non-derogable rights emphasises the need to give a very cautious interpretation to the right to derogate in particular to weigh the necessity for the measures which a state proposes to take against the danger of unleashing this uncontrolled government power.

D. "... aimed at the destruction of any of the rights and freedoms"

This fourth limitation on state behaviour with regard to states of exception is implicit in Article 5(1) of the Covenants, which states:

"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant."

A similar provision is found in Art. 30 of the Universal Declaration of Human Rights, suggesting that this principle is applicable to all states, whether or not they are a party to a human rights treaty:

"Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

With respect to individuals and groups, the meaning of Art. 5(1) seems clear: Groups advocating war or religious discrimination, for example, may not assert a right to freely propagate these views because they are inconsistent with certain articles of the Covenant. Art. 5(1) might also be considered to impose a "no improper intent" requirement on legislation or other ordinary governmental activities having an effect on civil and political rights. Almost all governmental activities do affect these rights, and the task of determining government's intent is a difficult one. To adopt this interpretation would be to open a field of inquiry in which the dangers probably outweigh the benefits.

While determining a state's purpose in imposing a regime of exception remains difficult, it is less so if one examines a whole complex or pattern of government activity. The magnitude of the legal and social changes which frequently result from a regime of exception and the greatly increased freedom to act which this vests in the government justifies, if it does not require, additional scrutiny to ensure that this freedom is not abused. The fact that Art. 5(1) follows in the Covenant directly after the provision recognising the right to derogate is perhaps not insignificant.

There is in fact precedent for making such an evaluation of the state's purpose. General Assembly Resolution 31/124 of 15 December 1976 calls upon the government of Chile "To cease using the state of siege or emergency for the purpose of violating human rights...". Although the Assembly arrived at the conclusion that Chile was acting with an improper purpose, no criterion were developed for indicating when such a purpose can be inferred. If this principle is to fulfil the important role assigned to it in identifying improper and illegal restrictions on human rights, it is essential that such criteria be evolved.

If a state is based on a system of apartheid or racial discrimination, emergency measures taken to defend this system aim at the destruction of the right to racial equality set forth in both the Covenant and the Universal Declaration. Such emergency measures are not legal according to international law, no matter how serious the threat to the government and how "necessary" the repressive measures are. An example would be the state of emergency which has existed in Rhodesia/Zimbabwe since the "Universal Declaration of Independence" in 1965, and the state of emergency existing in Namibia since 1972.

If a colonial system of government totally denies the right of self-determination, a right set forth in both the International Covenants on Human Rights, emergency measures taken in order to perpetuate such a system would be aimed at the destruction or improper limitation of this right. The principle of Art. 5 of the Civil and Political Covenant and Art. 30 of the Universal Declaration would not uphold the right of a government to take emergency measures in such circumstances.

A third improper purpose is the use of emergency measures to make permanent inroads into the civil and political rights of the people. As Dr Taslim Olawale Elias, then Attorney-General of Nigeria and now a member of the International Court of Justice, stated on the occasion of the International Commission of Jurists' Lagos Conference on the Rule of Law in 1961, "The danger arises, however, when the citizenry, whether by legislative or executive action or by abuse of the judicial process, are made to live as if in a perpetual state of emergency".

This is indicated when the formal state of emergency is extended indefinitely. An example is found in Taiwan, where the government of that island still considers itself to be the government of all of China. A state of siege declared in 1949 as a result of the "communist insurrection in the mainland provinces" remains in effect. It has been announced that it will continue in effect until the "insurrection" is defeated — raising the prospect of the people of Taiwan living forever under a state of siege. Other states of exception which have lasted for many years, such as Paraguay (since 1954) and South Korea (since 1961), might be considered as manifesting the improper purpose of permanently restricting civil and political rights.

The same intention is manifested by the indefinite suspension of the political process or the use of emergency powers to amend the constitution or create laws which permanently restrict human rights. With respect to the former, it must be recalled that not only is the right to participate in government through periodic free elections (Art. 25 of the Covenant) one of the rights which states may not destroy or restrict, but as a general principle all restrictions of rights must according to Art. 29(2) of the Universal Declaration be compatible with a "democratic society". With respect to the latter, nothing could be a clearer demonstration of the purpose to destroy or improperly restrict rights than to create measures in the nature of emergency measures but permanent in their effect.

This process of restructuring the constitutional and legal order with "Institutional Acts" or "Constitutional Acts" promulgated by the simple decree of the executive and unrecognised by the constitution —

yet purporting to amend the Constitution itself is familiar in countries such as Brazil, Uruguay and Chile.

* Mr O'Donnell prepared this article when working at the Secretariat of the ICJ under a Ford Foundation grant.

¹ The following incomplete list of recent regimes of exception suggest the magnitude and diversity of this phenomenon: Argentina, Bangladesh, Brazil, Canada, Chile, Greece, India, Iraq, Ireland, Israel, Malaysia, Mauritius, Nicaragua, Oman, Pakistan, Paraguay, Philippines, Republic of Korea, Sierra Leone, Sri Lanka, Syria, Taiwan, Thailand, Turkey, Union of South Africa, United Kingdom, and Uruguay.

² The Covenant entered into force on 23 March 1976 and has been ratified by 51 states (as of 13 Sept. 1978).

³ Chile's claim that the exceptional powers exercised by the government are justified by an emergency situation has been often considered by various UN bodies. See, e.g., GA/31/124 (1976).

⁴ Art. 4(1) of the Covenant contains additional limitations on the right to derogate, which are of lesser importance and will not be discussed here. They are the requirement that the emergency be officially proclaimed, that emergency measures not be inconsistent with a state's other obligations in international law, and that they do not discriminate solely on the basis of race, colour, sex, language, religion, or social origin. Note that this list of criteria is considerably less comprehensive than that set forth in Art. 2. Art. 4(3) requires any state party availing itself of the right of derogation to report this promptly. It does not expressly require that the declaration of a regime of exception *per se* be reported. Since no government should be given the responsibility to determine independently whether its emergency measures are consistent with the Covenant or constitute a derogation, and since the declaration of a state of exception already *permits* the state to derogate, it would be advisable to follow the European practice of reporting the emergency and the measures adopted without prejudice to the question whether the measures constitute a derogation or not. Although many states parties to the Covenant have experienced officially proclaimed states of exception since the Covenant came into effect, including Chile, Columbia, Jamaica, Madagascar, Mauritius, the Syrian Arab Republic, Tunisia, the United Kingdom, Uruguay and Zaire, only two of these have reported pursuant to Art. 4(3).

⁵ The UN Subcommission on the Prevention of Discrimination and Protection of Minorities has recently authorised a study on states of exception which is expected to clarify these questions.

⁶ Cf. S. Jayakumar, *Constitutional Law*, 1976, p. 48, pub. Malaya Law Review, Faculty of Law, Singapore.

JUDICIAL APPLICATION OF THE RULE OF LAW

R. L. Maharaj —v— The Attorney General of Trinidad and Tobago
(Judgment delivered by the Judicial Committee of the Privy Council, on 27
February, 1978)

Failure of due process distinguished from simple judicial error; Redress for
breach of constitutional right (Act of judge is an act of State)

The Constitution of Trinidad and Tobago states that: "... the People of Trinidad and Tobago... desire that their Constitution should... make provision for ensuring the protection... of fundamental human rights and freedoms". Chapter I, dealing with the recognition and protection of human rights and fundamental freedoms states:

"1. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, (a) The right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

"2. Subject to the provisions of sections 3, 4 and 5 of this Constitution no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms herein before recognised and declared and in particular no Act of Parliament shall: (a) authorise or effect the arbitrary detention, imprisonment or exile of any person".

R. L. Maharaj, a barrister, was committed to imprisonment for seven days on a charge of contempt in the face of the court by Maharaj J. of the High Court of Trinidad and Tobago, a conviction against which he successfully appealed to the Privy Council. His appeal was allowed and his conviction set aside on the grounds, firstly that, on a correct analysis of the facts, he had not in fact committed the contempt of which he was charged; and secondly, that he had been deprived of his liberty without due process of law. It was held that the failure of the trial judge to inform him of the specific nature of the contempt of Court with which he was charged contravened a constitutional right in respect of which he was entitled to protection under s.1(a) of the Constitution of Trinidad and Tobago. (See Maharaj —v— The Attorney-General of Trinidad and Tobago (1977), I.A.E.R. 411).

After the above findings, the Appellant claimed redress in the form of monetary compensation for the period that he had spent in prison. His claim was denied by the High Court of Trinidad and Tobago and, again, by a majority of the Court of Appeal of that country. He thereupon appealed to the Judicial Committee of the Privy Council which held (Lord Hailsham dissenting) that he was entitled to damages, and remitted the case to the High Court of Trinidad and Tobago for determination of the amount of compensation. The latter awarded him \$50,000 damages on October 9, 1978.

Three points of general interest to constitutional lawyers and human rights practitioners may be identified in the judgment of the Judicial Committee of the Privy Council:

1. Failure of due process distinguished from judicial error

The Privy Council distinguished between a mere judicial error and a failure of due process and held that while the State was not liable in damages for the former, it was so liable for the latter. With respect to an ordinary judicial error, the Privy Council stated that no human right or fundamental freedom is

contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law — even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by the Constitution, and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice.

2. "Redress" includes compensation for damages

S.6(1) of the constitution of Trinidad and Tobago provides that if any person alleges that any of his rights guaranteed under the constitution is being, or is likely to be contravened, he may apply to the High Court for "redress". The issue arose as to what was the nature of the "redress" to which the appellant was entitled. The Court held that not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as: "Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this". The order for payment of compensation when a right protected has been contravened was thus clearly a form of "redress" which a person is entitled to claim.

3. Act of Judge is an act of State

The Court pointed out that no change was involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under s.6(1) of the Constitution for what has been done by a judge is a claim against the State for what has been done in the exercise of the judicial power of the State. This is not vicarious liability; it is a liability in the public law of the State (not of the judge himself) which has been created by s.6(1) and (2) of the Constitution: "The order of Maharaj J. committing the appellant to prison was made by him in the exercise of the judicial powers of the State; the arrest and detention of the appellant pursuant to the judge's order was effected by the executive arm of the State. So if his detention amounted to a contravention of his rights under s.1(a), it was a contravention by the State against which he was entitled to protection". Therefore, although, in accordance with the common law rule, as consecrated in the legislation of Trinidad and Tobago, a judge is not personally liable for acts done in the course of his duties, the State is liable for a breach of constitution committed by him.

This is a very healthy development in constitutional law, which is highly welcome. If the doctrine of judicial immunity were to be used by Judges to violate the Constitution it could lead to serious abuses in countries where judges are subject to influence or pressure by the Executive.

ICJ News

Commission Members

Mr W. J. Ganshof van der Meersch, the distinguished Belgian jurist, has been elected an Honorary Member of the ICJ.

An outstanding scholar, advocate and judge, Mr Ganshof has served his country and international law with equal distinction. Formerly Professor of Constitutional Law, European Law and Comparative Law in the University of Brussels and the Inter-University Centre of Public Law, he is a Judge of the European Court of Human Rights and Procureur général émérite à la Cour de Cassation of Belgium.

Francophone African Seminar

On 7-12 September, 1978, the ICJ organised a third seminar in its series of Third world seminars. It was held in Dakar, Senegal, and was organised in co-operation with the Association sénégalaise d'études et de recherches juridiques (ASERJ), an affiliated organisation of the ICJ.

There were 48 participants including 40 africans from the following 12 countries: Benin, Cameroon, Congo, Ivory Coast, Mali, Mauritania, Niger, Rwanda, Senegal, Togo, Upper Volta and Zaïre.

The participants included senior government officials, judges, lawyers, sociologists, economists and churchmen from these countries, as well as representatives of the Organisation of African Unity, the UN Human Rights Division, the ILO, UNDP and UNESCO.

After an opening by the Minister of Justice of Senegal and a remarkable introductory speech by the President of the ICJ, Mr Kéba M'Baye, the participants discussed with great frankness in the private sessions of the six Commissions a number of important issues. These included the relationship between civil and political rights and economic, social and cultural rights, possible regional human rights organisations for Africa, the new international economic order, the participation of the people in development, the rights of minorities, the rights of women and of the child, the structure and training of the public service, ombudsman institutions, the independence of the judiciary and the role and duties of lawyers in the defence of human rights. The conclusions and recommendations of these Commissions, with some amendment, were accepted in the closing session as the conclusions and recommendations of the seminar.

It is hoped to publish in the new year a report on the seminar, including the opening speech by Mr Kéba M'Baye, the working papers, a summary of the discussions and the conclusions and recommendations.

The participants decided to establish a follow-up committee (comité de suivi) with a mandate to distribute the conclusions and recommendations of the seminar in the most appropriate manner. This committee hopes to be able to arrange for deputations to visit those heads of state and governments willing to receive them.

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The International Commission of Jurists is a non-governmental organisation devoted to promoting throughout the world the understanding and observance of the Rule of Law and the legal protection of human rights.

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Human Rights and Development

Edited by the International Commission of Jurists, Cedar Press, Barbados, May 1978,
208pp,

SwFr. 15, plus postage

A report of an international seminar on "Human Rights and their promotion in the Caribbean" convened by the ICJ and the Organisation of Commonwealth Caribbean Bar Associations and held in Barbados in September 1977. The 72 participants included governments ministers, senior officials, judges, advocates, law lecturers, teachers and churchmen from 16 countries in the Caribbean region. The report includes the working papers, a summary of the discussions and the Final Conclusions and Recommendations. In the Appendices the full text is published of the most important international instruments on human rights. The seminar gave equal focus to economic, social and cultural rights and civil and political rights. It discussed, inter alia, the importance for the region of the right to self-determination, the right to participate in public affairs, the rights to work and freely join trade unions, the equal treatment of children born out of wedlock, the status of women and the right to education and adequate medical care. The participants recommended the creation of a "regional co-ordinating organisation" for human rights and established a 'Continuation Committee' to seek to bring this about.

Human Rights in a One-Party State

Edited by the International Commission of Jurists, Search Press, London, January
1978, 130 pp,

Sw.Fr. 10, plus postage.

A report of an international seminar convened by the ICJ and held in Dar-es-Salaam in September 1976 on 'Human Rights, their Protection and the Rule of Law in a One-Party State'. The 37 participants included government ministers and senior officials, judges, advocates, law lecturers, teachers and churchmen from Sudan, Tanzania, Zambia, Botswana, Lesotho and Swaziland. The report includes summaries of the working papers and discussions on constitutional aspects, the organisation and role of the legal profession, preventive detention, ombudsman institutions, public participation, freedom of expression and association, and individual rights and collective rights. In his preface, Shridath Ramphal, Secretary-General of the Commonwealth says that the seminar performed a signal service "by exploring the reality that underlies the form [of the one party state], as well as by making suggestions conducive to the healthy evolution of those conventions of constraint on which, in the ultimate analysis, good government depends".

Bulletin No. 2 of the Centre for the Independence of Judges and Lawyers

Sw.Fr. 10, plus postage

The second Bulletin of the CIJL was published in September 1978 in English, and in December in Spanish and French. It describes the critical situation facing the judiciary and the legal profession in Uruguay and lists 51 lawyers who are, or have been, detained by the regime. Other articles and notes concern inter alia cases of the intimidation or harassment of judges and lawyers in Czechoslovakia, South Africa, Uganda, Argentina, Indonesia, Syria and the People's Democratic Republic of Yemen.

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