

For the Rule of Law**THE REVIEW****INTERNATIONAL COMMISSION OF JURISTS****HUMAN RIGHTS IN THE WORLD**

BRAZIL	1	PARAGUAY	11
COLOMBIA	3	RHODESIA/ZIMBABWE	14
MALAYSIA	6		

COMMENTARIES

UN COMMISSION ON HUMAN RIGHTS	18
ILO APPLICATION PROCEDURES: CZECHOSLOVAK CASE	26

ARTICLES

HOW TO ENFORCE THE TORTURE CONVENTION: A DRAFT OPTIONAL PROTOCOL	Niall MacDermot	31
DEVELOPING LAW OF ABORIGINAL RIGHTS	Gordon Bennett	37
POLITICAL DISCRIMINATION IN SOVIET LAW	Ger P. van der Berg	47

JUDICIAL APPLICATION OF THE RULE OF LAW

PRISONERS AWAITING TRIAL IN INDIA	60
-----------------------------------	----

ICJ NEWS

WARSAW CONFERENCE ON RIGHTS OF THE CHILD	63
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Human Rights in the World

Brazil

The government of Brazil has taken two important steps towards a return to the Rule of Law, which has been seriously undermined since the 1964 military coup. They are the repeal of Institutional Act No. 5 of December 1968, and the reform of the National Security Decree issued in September 1969.

Institutional Act No. 5 was repealed by Constitutional Amendment No. 11 of October 1978, which took effect on January 1, 1979. I.A. No. 5 was the foundation of the whole system of exception in Brazil, gave the President almost absolute powers, enabling him to act above other State powers and above the Constitution, and transformed the emergency into a permanent situation.

Among other powers conferred on the President was the power to dissolve the National Congress and all other State and Provincial legislative bodies, to legislate by decree, to assume direct rule over the States, to suspend constitutional guarantees, to dismiss public officials, to declare a State of Siege, to confiscate property, to suspend the political rights of any citizen for 10 years and to deprive parliamentarians of their office. All measures taken under this state of exception were exempt from parliamentary or judicial control. I.A. No. 5 also excluded the right of habeas corpus for persons arrested for political offences.

During the period of 10 years when I.A. No. 5 was in effect, the government dissolved and suspended the Congress on several occasions; it deprived from office more than 20 opposition parliamentarians and suspended for 10 years the political rights of 4,582 citizens. As from January 1979, Constitutional Amendment No. 11 abrogates I.A. No. 5 as well as other emergency measures. It abolishes the death penalty (except in case of external war), life imprisonment and deportation for political reasons, and fully restores the right of habeas corpus.

On the negative side, it incorporates in the Constitution several provisions concerning emergency measures, state of siege and state of emergency, which, although subject to the approval of the Congress, could again confer dictatorial powers on the President.

For example, the President may, after consulting with the National Security Council, declare a state of siege. Thereafter, with the consent of Congress, he may take measures for: detention without trial; search and house arrest; suspension of freedom of assembly and association; taking control of professional associations and societies; censorship of the mails, press, telecommunications and public entertainments; use or occupation of property belonging to public utilities and suspension of their employees. A state of siege may last initially for 180 days, but may be extended indefinitely.

The reform of the National Security Decree of 1969 was effected by Law 6,620 of December 17, 1978. It too marks some progress, although, as will be seen, it is not very far-reaching. The new law virtually reiterates the former one, but omitting some of its worst consequences. It maintains the "national security" philosophy, which is deeply anti-democratic. Different sectors of Brazilian society, particularly lawyers and the Church, had been demanding a return to the Rule of Law. To that end, it was essential to abrogate emergency legislation and radically to amend the letter and spirit of the National Security Decree. Unfortunately, the draft of the new legislation was prepared by the Executive and presented to Congress while an election was in progress, using emergency procedures. Under these procedures, the legislation was automatically enacted after 10 days since Congress had not considered it within that time (art. 51, para. 2 of the Constitution). This prevented the views of the various lawyers organisations and political groups who advocated a more radical change in the 1969 law from being taken into consideration.

Although the new law abolishes the death penalty for crimes against National Security, in accordance with the Constitutional Amendment, and decreases prison terms for other crimes, it leaves unaltered a number of disturbing provisions. Among these are:

- the concept of "adverse psychological war" carried out by means of propaganda (art. 3), a provision which severely curtails freedom of expression and information;
- offences such as "to divulge, through the mass media, any false or tendentious news or any true fact that has been mutilated or deformed, in order to disaffect or try to disaffect the people against the constituted authorities" (art. 14), or the even more vague offence of "subversive propaganda" (art. 42);
- the powers given to the Minister of Justice to confiscate books, magazines, journals, publications, films, photos, tapes and anything which may endanger National Security (art. 50);
- the provisions impairing the right to strike of state or para-statal public service employees, or those employed by mixed public and private enterprises (art. 35);
- the offence of being a member of political organisations or parties that were dissolved by the authorities, or that "carry out activities that are detrimental or dangerous to National Security" (art. 40); and
- the continued exclusive jurisdiction of military courts to try these offences and the possibility of incommunicado detention of suspects for up to 8 days (art. 53).

It is also provided that action taken under the emergency legislation, cannot be judicially impugned.

As an example of the use of this law, eleven journalists are, at the time of writing, being tried by military courts for having published stories on corruption and on torture of political prisoners.

"O Estado de São Paulo", Brazil's leading newspaper, is now threatened with prosecution for having published verbatim a document said to have been prepared by the Information Centre of the Army. This document examines the increasing influence of independent publica-

tions, and suggests ways to curb what the Army calls their nefarious activities. Among the suggestions were: compelling periodic publication of financial statements; financial audits by the Ministry of Finance and the Federal Police; cancelling the licence to publish when the publication has failed to pay its taxes; enlarging the employment of graduates in journalism in the traditional press; adoption of a summary procedure for cases against the press.

It is most unfortunate that the views of the lawyers organisations were not taken into account. They had demanded a substantial change in the legislation enacted during the past 10 years, a revision of the labour law in order to allow the enjoyment of trade union rights and the restoration of full political rights. It would have been preferable if the opinion had prevailed of General Rodrigo Octavio, a member of the Supreme Military Tribunal, who in October 1978 declared that "we have once and for all to put an end to the psychosis of permanent subversion, which lends support to the theory of permanent arbitrariness . . . The security of the State cannot be based on the insecurity of its citizens."¹

It may seem to many readers that there is relatively little change in substance in these reforms, but those more familiar with the Brazilian scene will recognise that the abolition of Institutional Act No. 5 and other emergency legislation constitutes a notable advance towards the restoration of democracy and bears promise that more progressive policies will prevail.

Colombia

Colombia is one of the few countries in Latin America to have an elected government under a democratic constitution. In one respect this constitution is without parallel, namely in its provision for ensuring the independence of the judiciary. This independence is complete. The appointment, posting, promotion and, if necessary, retirement of judges is entirely under the control of the judiciary itself, without interference from either the executive or the legislature. The judiciary can and does show its independence by striking down legislation which it finds to be unconstitutional.

Nevertheless, recent events give cause for concern and have even led some to fear for the future of Colombia's democratic institutions. In order to set these in their context, it is necessary to look back briefly over the country's recent political history.

From 1949 to 1957 Colombia lived under a stage of siege marked by ten years of civil war ("la violencia") between the liberal and conservative parties. An estimated 300,000 people were killed during this period by a politicised police force, guerrillas and armed factions of both parties. From 1953 to 1957 a populist, repressive dictatorship by General Gustavo Rojas Pinilla was in power. After his downfall, a plebiscite in 1957 approved an agreement between the liberals and conservatives to end the fighting and share power for 16 years. Since then elections have been held every four years.

¹ Le Monde, 31.10.78.

A state of siege has been in force intermittently since 1958. At first its powers were used cautiously since a clear distinction needed to be drawn between the abuses of the state of siege under General Rojas and its use under a democratic administration.

The National Front, as the two party agreement was called, had the effect of stifling political activity. Each party was assured its share of posts in the government and civil service. The results were soon to be seen at election times as fewer and fewer people went to the polls. The country began to experience serious economic problems leading to increasing labour and student protests. Freedom of movement, demonstrations, and the right to strike were frequently restricted or suspended. Hundreds of state of siege decrees were issued, including decrees on labour, fiscal and economic measures.

The state of siege usually applied only to a few areas at a time, especially those where guerrilla activity was considered significant. Sometimes it was declared in one city to deal with a specific situation, such as a strike at an oil refinery. In 1965 a new measure was enacted. Military tribunals (called Councils of War) were given jurisdiction over civilians for certain offences. This began a trend of increasing military participation in the judicial process.

The justification for this military intervention was the activities of guerrilla groups. At first active only in a few rural areas, the guerrillas have never numbered more than a few hundred, and they lack wide popular support from a now largely urbanised population. The army has assumed total control over areas where the guerrillas operate, to the point of having military officers appointed as mayors, restricting movement by the local inhabitants, and even rationing food for civilians owing to their alleged support of the guerrillas. The guerrillas have from time to time seized small towns and villages, killing senior officials or kidnapping rich landowners.

During the last five years urban guerrillas have appeared. The M-19 and other urban guerrillas groups have claimed responsibility for kidnappings, bombings, robberies and other serious crimes.

Shortly after the inauguration of President Julio César Turbay in August 1978, a so-called Security Statute (Decree 1923 of 6 September 1978) was issued by the government under the powers of the state of siege. Under this decree:

- new offences have been created and the maximum punishment for others increased;
- the civilian jurisdiction of the military courts has been increased;
- the police, army, navy and air force commanders have been given power to arrest and detain for up to one year persons suspected of one of seven rather vaguely defined offences relating to public order. Three of these were later declared unconstitutional by the Supreme Court, including one relating to "subversive propaganda";
- a summary procedure has been instituted for a number of offences subject to trial by military courts. There is a provision for the review of a sentence by the officer who gave it, but there is no right of appeal to a higher tribunal;

— radio and television stations are debarred from broadcasting any news or commentaries relating to public order or to strikes.

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

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

Among those to have made these complaints were 34 students who said they were tortured shortly after their arrest in September 1978. The Procureur General ordered an official inquiry by a military judge who reported in March 1979 stating that the students had not been tortured. However, the medical report of examinations made by the coroner's office was later made public. This showed that many of the students had lesions which were consistent with the accounts given by them of their torture. Photographs of the lesions were subsequently published by a Colombian magazine. Few people were willing to accept the report of a military judge on this matter since all security suspects are arrested, held, interrogated, charged and tried or freed by the military authorities.

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

The restrictions on political freedom, the increasing powers of the military authorities and the allegations of torture were among the matters examined at a Human Rights Forum held in Bogotá at the end of March. The participants included leading members of all the political parties and groups and included four former Ministers as well as several Roman Catholic bishops. Over 4,000 persons attended the closing session. The Forum expressed the growing concern of many Colombians about the effective exercise of fundamental rights. A permanent National Commission for the Defence of Human Rights was formed.

The measures which have been taken to counter the threat to security caused by the operations of urban and rural guerrillas involve

derogations from many of the rights and freedoms proclaimed in the International Covenant on Civil and Political Rights to which Colombia is a party. Under article 4 of the Covenant a State Party is entitled to derogate from many, but not all, of these rights in a time of public emergency which threatens the life of the nation. Derogations are permissible only to the extent strictly required by the exigencies of the situation. Any State Party derogating under this provision from rights and freedoms is required to inform all other States Parties, through the UN Secretary General, of the provisions from which it has derogated and of the reasons by which it was actuated.

Although a state of siege was declared in October 1976, no communication has yet been made by the Colombian government under Article 4. Consequently, the government is in violation of its international obligations under the Covenant in respect of measures which derogate from its obligations under the Covenant. For example, the Security Statute, in removing the right of appeal for certain offences, is clearly inconsistent with Article 14(5) of the Covenant which provides that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to the law".

Moreover, if the allegations of torture are well-founded, there have been violations of at least one of the articles from which no derogation may be made, even in time of a declared emergency.

Malaysia

The conditions of preventive detention in Malaysia appear far from adequate, according to a critical report of the Malayan Bar Council. The Council, in a document sent to the Prime Minister and the Attorney General and Law Minister set out the conclusions of an investigation it has made into complaints from the families of detainees regarding the conditions under which their relatives have been detained under the Internal Security Act of 1960.

The Bar Council found that detainees are being treated as if they were criminals, although detention under the Act is a preventive and not a punitive measure. In its report, made public in March 1979, the Bar Council states that detainees have been subjected to solitary confinement, prolonged interrogation, restrictions of the right to counsel, limitations on access to reading material, as well as inadequate medical care.

It is relevant to examine the findings of the Malayan Bar Council in the light of the Draft Body of Principles for the Protection of all persons under any form of detention or imprisonment. In 1975 the U.N. General Assembly requested the Commission on Human Rights to formulate a body of principles for the protection of all persons under detention or punishment. The present draft has been approved by the U.N. Commission on Human Rights and is to be submitted with the comments of governments to the next General Assembly for adoption.

The Bar Council's concerns have centred on the following issues:

Solitary confinement

Persons held under section 73 of the Internal Security Act are invariably kept in solitary confinement. Section 73 authorises any police officer to arrest and detain without warrant pending enquiries any person whose detention would be justified under section 8 or who has otherwise acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia. Section 8 empowers the Minister of Home Affairs to issue preventive detention orders to prevent any person from acting in any manner prejudicial to the security of Malaysia. Detention may not last more than two years.

Recently, solitary confinement in undisclosed detention centres has been extended to persons detained under Section 8. It is known that solitary confinement can last for as long as 24 hours a day. Citing the psychiatric consequences of solitary confinement and its punitive nature, the Bar Council has urged the government to discontinue this practice.

As to the actual treatment of persons held under section 73, the Bar Council observes that they are held in cells designed to isolate them completely from the outside world. They cannot see anything outside their cells and are normally deprived of their watches, causing them to lose all sense of time. Cells are small, dark, poorly lit, badly ventilated, at times dirty or infested with bugs, mosquitoes or mice. Proper bedding is not available, nor are the means for the detainees to keep themselves clean. Complaints about the food being inedible and lacking in nutrition and the absence of exercise or recreation facilities have been frequent.

The Bar Council finds the above conditions incompatible with the status of detainees who are not convicted criminals. In fact, such treatment would not be acceptable even for convicted criminals.

In this regard, it is worth noting that the Draft Body of Principles states as one of its principles that detained persons shall, save in exceptional circumstances, be segregated from imprisoned persons and be accorded a treatment that is commensurate to their status as unconvicted persons (art. 7). To hold detainees in solitary confinement is to treat them worse than convicted criminals and to equate them with prisoners in punishment cells.

Prolonged interrogation

There have been complaints that some detainees have been subjected to round-the-clock interrogation. As a result, they have been deprived of sleep for long hours. In the case of one detainee, it is alleged that he was interrogated for four consecutive nights and subjected to verbal abuse and physical violence.

The Bar Council has urged the government to restrict interrogations to three hours per day and in any case to forbid them after 10 p.m. and to allow detainees at least eight hours of sleep every day.

The Draft Body of Principles states that the duration of and intervals between interrogations as well as the names of officials conducting them shall be recorded. The detainee and his counsel shall have access to these records (art. 20). This obligation to keep records is designed to ensure

that the conditions of detention are subject to the effective control of a judicial or other competent, impartial and independent authority (art. 3). It also serves to give practical meaning to the "effective remedy" provision of the International Covenant on Civil and Political Rights (art. 2(3)).

The Right to Counsel

Serious infringements of this fundamental right are reported in Malaysia. Complainants have said that persons held under section 73 have been permitted to see their counsel only after a considerable time has elapsed. Communications with lawyers has been made difficult by a recent ruling from the Superintendent of Camps stating that consultations on the person's detention or on the conditions of detention are not "legal matters" and thus fall outside the ambit of a lawyer-client relationship. As a result lawyers are denied permission to visit their clients. In some cases, not even communications by letter have been permitted.

An additional breach is the recording of conversations between a detainee and his lawyer. An officer always attends all meetings for the purpose of recording the conversation.

The Federal Constitution of Malaysia permits administrative detention provided that the person is informed of the grounds for his detention and is allowed to make representations against the order (art. 151). In the absence of an uninhibited right to seek and communicate with counsel the right to make representations against a detention order becomes a dead letter. Under the Emergency (Public Order and Prevention of Crime) (Detained Persons) Rules, 1970 a detainee is entitled to two consultations with his lawyer for the purpose of preparing written representations. Consultations must take place during normal working hours and within sight, but not within hearing, of an officer. This privacy provision conforms with a similar one contained in the Draft Body of Principles (art. 16(3)) but is systematically disregarded in practice, according to the Malayan Bar Council.

Moreover, additional consultations are allowed only with the written consent of the Attorney General and if granted must take place in the sight and hearing of an officer (and of an interpreter if the officer does not understand the language spoken) (rule 102).

The Draft Body of Principles attaches special importance to the right to counsel. A person should be able to communicate with a lawyer of his choice within the shortest possible period after arrest (art. 15(3)). Ample opportunities for consultation, and uncensored prompt written communication with counsel, as well as the guarantee that communications shall be deemed privileged are also included in the Draft (art. 16). The right to counsel may not be suspended or restricted, save in exceptional circumstances as specified by law and when considered indispensable to maintain security and good order.

Medical cases

Regulations prescribe that a medical officer shall attend at the place

of detention daily. In practice, the situation is much different. At the Taiping Detention Camp detainees could see the doctor only after being seen by the hospital assistant. The doctor visited once a week for a few hours.

The camp housed 169 detainees. This was in 1974, when an inquiry was made into the death of a detainee. At Taiping detainees can see the doctor directly, but at the Batu Gajah Detention Camp they still have to be seen first by an unqualified hospital assistant. The doctor now visits twice a week at Taiping but the camp's population has increased to 650. In calling for the appointment of a resident doctor at each camp, the Malayan Bar Council points out that at least four detainees are known to have committed suicide.

Another complaint refers to the refusal of the authorities to allow a detainee, at his own expense, to see his personal physician. The Draft Body of Principles includes this right, subject only to reasonable conditions to ensure security (art. 22).

Reading material, visits, handcuffing

In at least two cases, it is reported that detainees were not only held in solitary confinement but were also deprived of all reading and writing material. The Bar Council sees no justification for depriving detainees of books or publications which legally circulate in the country. It also urges that the vetting of books be expedited.

The introduction of a glass panel to separate the detainee from his visitor, besides causing friction with the camp staff, introduces an unnecessary restriction on the detained person's right to communicate with the outside world, and in particular to be visited by and to correspond with members of his family (art. 17).

Handcuffing is another bitter issue in detention camps. When taken out of the camps, detainees are invariably handcuffed.

Not even when hospitalised are detainees free from this rule. In 1976 two detainees refused to attend their father's funeral when the camp officials insisted on handcuffing them.

This practice is seen by the Bar Council as unnecessary degrading treatment.

Punishment of detainees

Regulations give camp superintendents wide powers to maintain order and discipline. They can deprive a detainee of his privileges, such as writing or receiving letters or seeing visitors, or they can confine him in a "punishment cell" on a "punishment diet". Complainants allege that such powers have been abused.

A Board of Inspection appointed by the Minister of Home Affairs is supposed to visit a place of detention at least once a month to hear complaints. So far, detainees tend to distrust the board. This has led the Bar Council to suggest that a magistrate, a doctor and a lawyer sit on the board. Regular visits by a competent authority distinct from the authority in charge of the administration of the place of detention are envisaged in the Draft Body of Principles (art. 25).

The Bar and the Government

It is to be hoped that the action taken by the Malayan Bar Council in bringing to public attention the conditions of detention will be followed by bar associations in other countries where such conditions prevail.

In examining the role of the lawyer in a developing country, and in particular in the South East Asian and Pacific Region, the 1965 Bangkok Conference organised by the International Commission of Jurists concluded that:

"The lawyer has a deep moral obligation to uphold and advance the Rule of Law in whatever sphere he may be engaged or in which he has influence, and he should fulfil that obligation even if it brings him into disfavour with authority or is contrary to current political pressures".

The Malayan Bar Council's action in this case has been exemplary.

It is to be hoped that this action by the Malayan Bar Council will not lead to any reprisals against its members. Relations between the government and the Bar Council have been strained for some time. Following the introduction of the Essential (Security Cases) (Amendment) Regulations of 1975 (which were criticised in ICJ Review No. 16 of June 1976), the Bar Council resolved in October 1977 that members of the Bar be advised not to appear in future in trials under these regulations as they are "oppressive and against the rule of law". The government's response to this was to introduce the Legal Profession (Amendment) Act, 1977, which was passed by the House of Representatives on January 10, 1978. Under this Act the Attorney-General has been given power by Order to disqualify from membership of the Bar Council any Malaysian lawyers who are members of either House of Parliament or of any local authority, or who hold office in any trade union or political party, or in any other organisation, body or group of persons which has objectives or carries on activities "which can be construed as being political in nature, character or effect". No such order may be "reviewed or called into question in any court".

The decision of the Bar Council to advise their members not to take cases under the Essential (Security Cases) Regulations may be open to criticism. Whilst they have every reason to protest against the regulations, it might have been better to advise their members to continue to give their services to assist those who have the misfortune to be prosecuted under them. Be that as it may, the Council's action cannot possibly serve as a justification for the extraordinary and unprecedented Legal Profession (Amendment) Act. In every democracy members of the legal profession can and should play an important role in defence of human rights. It is only natural that leading members of their professional organisations will also pursue these objectives by taking an active part in political parties and associations and in parliament. To threaten the Bar Council in this way with the elimination of any members who take part in political activities is an action aimed at the independence of the legal profession, which is recognised to be one of the first safeguards of a democracy.

It is all the more to the credit of the Bar Council that, in face of such a threat, they should have published their report on prison conditions in Malaysia.

Paraguay

International pressures, both governmental and non-governmental, have led to some relaxation of the repression in Paraguay, in particular by the release of nearly all the 2,000 political prisoners who were being held for long periods without trial, or who continued to be held in detention after serving their sentences. In spite of the existence of some opposition parties, and the periodic holding of elections, the basically undemocratic character of the regime, however, remains unchanged.

General Alfredo Stroessner seized power in May 1954 by a coup d'état, and since then continued as President of the Republic under a state of siege with the support of the armed forces. He has been in power longer than any other head of State in Latin America. Under the Constitution, re-election was possible only once, for a five year term. However, to permit him to remain in power, the constitution was amended from time to time and finally, in 1977, a Constituent Assembly made up exclusively of members of the government party (Partido Colorado) repealed art. 173 prohibiting successive re-elections. As the elections are held under a state of siege they are subject to restrictions on basic freedoms, and the organisation of the election and counting of votes remains exclusively in the hands of the government and its supporters.

Under Art. 79 of the Constitution a state of siege may be proclaimed by the President in case of international conflict or war, foreign invasion, domestic disturbance, or a grave threat of any of these occurrences. According to the Constitution, the state of siege must be for a limited time and must not impair the normal operation of the three branches of government. With the exception of an interval of one year (1946-47), Paraguay has been under a state of siege continuously since 1929, being renewed by decree every three months. The only exception is that it is lifted for 24 hours on polling days.

As the emergency has become a permanent feature of the regime, the provisions for the protection of human rights cease to be effective. The powers of the state of siege are used by the government to limit or deny the basic rights of its opponents. The President is authorised to detain or banish to another part of the country any person whom he suspects of participating in any act which, in his view, constitutes a grave threat of war, foreign invasion or domestic disturbance. He may also prohibit public meetings and demonstrations. These powers have been used to imprison political opponents indefinitely (in some cases for 18 years) without their being brought before a court. The Government has also outlawed public meetings, dissolved associations, trade unions, political parties, censored the press and, in short, subjected basic rights to its good will. The more recent state of siege decrees apply only to the capital, Asunción, but persons arrested in other areas and brought to the capital are then subjected to its provisions. The Supreme Court in 1975 accepted this remarkable extension of the powers of detention.

The legislature is composed of a Chamber of Senators and one of Deputies. Their control by the government party is ensured by the

Constitution which provides that two-thirds of the seats in both chambers shall be assigned to the party which wins the Presidential election. There are four permitted opposition parties, the Radical Liberal, Febrerista Revolutionary (which in spite of its name is a right wing party), Livalal (named after its founder, Carlos Levi) and Christian Democratic parties. The Communist Party (outlawed in 1947 after the civil war) and the Mopoco (Movimiento Popular Colorado), which broke away from the governmental party to become an active opposition group, are banned but operate clandestinely.

The judiciary is also controlled by the government. Not only are the judges appointed and subject to removal by the executive, but like all public servants (including the teachers), they must be members of the Colorado Party as a condition of appointment.

As stated in the most recent report on Paraguay of the Inter-American Commission on Human Rights (OEA/Ser.L/V/II.43, doc. 13, 31 January 1978), "individuals detained by virtue of the state of siege do not enjoy the right to due process of law". Powers under the state of siege have been used to make amparo and habeas corpus (Arts. 77 and 78 of the Constitution) and other guarantees against abuse of power totally inoperative. The judges have consistently refused to intervene in these cases on the grounds that the judiciary should not review the way in which the executive exercises its powers under the state of siege. Usually detainees are not assisted by counsel. In the rare cases where they are tried and have a lawyer to defend them, the lawyer is liable to intimidation and harassment. For example, the Supreme Court has withdrawn the licences of defence lawyers to practice, on grounds of disrespect to the judiciary, when they have protested at the court's refusal to order a medical examination of their clients who have been tortured. Suspects are frequently held in prison for long periods of time, even years, without being charged or tried, and if tried and sentenced, they are kept in prison long after the end of their sentence.

In addition to the state of siege, the legal foundations of the repression are found in law 294 ("Defence of Democracy") of October 1955 and law 209 ("Defence of Public Peace and Freedom of Persons") of September 1970. Both are used to suppress not only the activities of subversive organisations and marxist or communist parties, but also any other group which may be formed in opposition to the regime. Membership in banned political parties is an offence, as is adherence to their ideology, even if this does not lead to any overt actions. These prohibitions are incompatible with the American Declaration of the Rights and Duties of Man which has been accepted by Paraguay. These two laws are also used as a means of controlling the media by defining as an offence the printing, distribution and introduction into the country of publications or films concerning banned ideologies.

For a long time Paraguay was renowned for its high number of political prisoners and the conditions under which they were held. Due to the activities of human rights organisations, both internally and abroad, considerable progress has been made on this front. Within Paraguay, lawyers, relatives of prisoners, the Paraguayan Commission for the Defence of Human Rights, the Church

Committee for Emergency Aid and the prisoners themselves, (through hunger strikes) have been active. Internationally, the Inter-American Commission on Human Rights made its excellent report on Paraguay in 1978, and several non-governmental organisations have sent missions to Paraguay and widely published the information which they gained. Political prisoners have been gradually released over the last two years to the point where it is believed that there are now only 6 still in prison. In January 1977 three communist party leaders were freed who had been sentenced in 1958 and 1959 to 1 and 2 years in prison. After serving their time they were held in police stations for a further 17 years, nominally under the state of siege powers, but before they could possibly have committed any act which constituted a threat to security.

Some progress has also been made regarding control of the press. Newspapers and magazines enjoy somewhat greater freedom than in the past, despite the threats to freedom of expression contained in laws 294 and 209.

However the authoritarian character of the regime remains unchanged. Serious violations continue, such as the prohibition of political parties, government control over trade unions, and the repression and suppression of the rights of peasant and Indian groups. For example, peasants, who are mainly assimilated Indians and make up 63% of the population, have formed Agrarian Leagues, a project to create cooperatives and social centres preserving native traditions. They aim at overcoming their primitive conditions resulting from government policies or inaction. These leagues were supported and financed by the Paraguayan Catholic Church and many of the priests engaged in this work have been harassed, imprisoned or forced to leave the country.

Although there have been fewer detentions in recent years, torture and ill-treatment of political suspects continues. Torture has been denounced by the Paraguayan Conference of Bishops in pastoral letters of 1976 and 1978 and by the Inter-American Commission on Human Rights report of January 1978 which stated: "The use of physical and psychological duress and of every form of cruelty in order to extract confessions or to intimidate and humiliate detainees is a constant and continuing practice in Paraguay".

Economic and social rights have been denied to a majority of the urban and rural population. This is the effect of a rigid and extreme neo-liberal economic policy, which has meant progress for a small sector of society, whilst the poverty of the majority has increased. Finally, it must be added that 20% of the population has lived abroad for many years, either as political or economic refugees.

The Elections in Southern Rhodesia/Zimbabwe

In April 1979 elections were held in Southern Rhodesia/Zimbabwe on a basis of universal suffrage, from which resulted a Legislative Assembly and a ministerial cabinet each with a majority of black members. It is claimed by the authorities that 64% of the electorate voted. The interim constitution under which the elections were held, and the elections themselves, have been denounced by the Patriotic Front as fraudulent. In this they are supported by black African opinion, and both the interim constitution and the elections have been denounced by the UN Security Council.

Many members of the public in western countries, particularly in the United Kingdom and the United States are perplexed about these elections, especially when confronted with arguments that the new constitution and the elections comply with the six principles elaborated some 15 years ago by British conservative and labour governments as conditions for recognition of the Rhodesian government¹. A resolution of the US Senate has urged President Carter to lift the sanctions imposed in consequence of United Nations resolutions. A team of observers commissioned by Mrs Thatcher has reported that the conduct of the April elections was fair and, as far as possible having regard to the guerrilla war, free. They also expressed the surprising opinion that the vote amounted to an approval of the proposed new constitution, although this question was never put to the voters and non-one was able to campaign against it. At the time of writing, neither the US or British governments have reached any decision on the issue of recognition or suspension of sanctions.

On April 13, 1979, Senators George McGovern, Edward Kennedy and 10 other US Senators requested the International Commission of Jurists to submit to them its views on, inter alia, the questions

- whether the interim constitution provided for “majority rule” within the meaning of the UN sanctions resolutions, and
- whether that constitution and the electoral laws, regulations and procedures permit a free and fair election in which
 - (a) all population and political groups are permitted to participate freely?
 - (b) equal representation is accorded to all citizens regardless of race, ethnic background, or political affiliation?
 - (c) equal voting rights are provided for all citizens regardless of race, ethnic background or political affiliation, on the principle of one citizen, one vote?

¹ In 1963/64 the British government, with the conservative party in power, set forth five principles as the basis for granting independence: namely that there would be unimpeded progress to majority rule; no retrogressive amendments to the Constitution to retard African advancement; immediate improvement in the political representation of Africans; an end to racial discrimination; and a basis of independence acceptable to the people of Rhodesia as a whole. In 1966, the Prime Minister of the Labour government, Harold Wilson, added a sixth principle: that, regardless of race, there would be no oppression of majority by minority or minority by majority.

A memorandum prepared by the International Commission of Jurists answered those questions as follows:

"In our view it cannot be said that the Constitution provides equal representation or equal voting rights regardless of race. Significantly, the Constitution was submitted for approval only to the white electorate.

The system of representation is based on race and is unequal. 28 of the 100 seats in the House of Assembly are reserved for the white electorate, even though whites constitute well under 5% of the population. Consequently, 28 white members represent a population of about 250,000 whites (approx. 1 member per 8,900), whereas 72 non-white members elected on a common roll represent well over 5 million non-whites (approx. 1 member per 700,000). In this respect a white vote is equal to over 75 black votes.

Representation in the Senate or Upper House contains three blocks, each of 10 members. 10 are appointed by the white members of the Assembly, 10 by the non-white members and 10 represent tribal chiefs, 5 from each of the two main tribal areas. This not only contains the same unequal racial division, but also entrenches and perpetuates the tribal divisions of the past. A comparable racial division is to be found in the Executive Branch. Six of the twenty cabinet seats are to be reserved for the white minority.

Apart from these unequal and racist features of the electoral system, there are provisions in the Constitution which will ensure the continuation of the white race's ascendancy for at least the next five years. The crucial functions of the armed forces, police, judiciary and civil services are to be controlled by four Commissions. The Commissions are so constituted that for a long time to come they will be white controlled, and will be seen as mechanisms to preserve the racial status quo. For example, to serve on the Police Service Commission a majority must have served for 5 years as at least an assistant commissioner. No black can meet this qualification. Other Commissions are to comprise senior civil servants or have other qualifications which in practice will ensure (and are designed to ensure) white control.

Effective land reform, in the sense of redistributing land in favour of the black majority, will be impossible in practical terms. 50% of cultivatable land is held by the tiny white minority. None of this land can be expropriated for redistribution unless

- it is proved that it has not been used for agricultural purposes for a continuous period of 5 years, and
- compensation is paid promptly on terms that the compensation can be freely transferred out of the country irrespective of exchange control regulations.

Consequently the unequal division of the land on racial lines will continue even though the legislation on which it was based has been repealed.

Two-thirds of the provisions in the Constitution are entrenched so that they cannot be amended without the approval of 78% of the House

of Assembly. At least 6 white members would, therefore, have to agree an amendment, an unlikely event in relation to any amendment which affected the interests of the white minority.

We do not have sufficient information upon which to judge whether the voting procedures were free and fair. There are conflicting reports on this. As over 90% of the country was subject to martial law, there were obvious restrictions on freedom. The government would claim that all populations and all political groups were permitted to participate freely, and invitations to participate were made to the national liberation forces based in neighbouring countries. This was done, of course, in the knowledge that the constitutional provisions were considered unacceptable by these forces. It should be stated, however, that leaders of the 'internal wings' of these liberation movements, who are not, and are not accused of, using terrorism or violence, have been arrested and detained without trial, and were not free to take part in the election campaign or to urge people to support their boycott of the election.

In view of the foregoing, we do not consider that the Constitution provides for "majority rule" within the meaning of the relevant UN resolutions. The "majority" was not elected on the principle of one citizen, one vote, but on a basis of weighted voting. More important, as has been shown, the Constitution is so devised as to ensure a continuing ascendancy by the white minority on all essential matters, while providing a limited form of majority rule in less essential matters".

Since the memorandum was prepared, the International Commission of Jurists has received a 22 page report prepared by Professor Claire Palley, the leading expert on Rhodesian Constitutional Law. Unlike most of the "official" observers, she has attended previous elections in Southern Rhodesia and is familiar with the electoral laws, and she was also present for four weeks during the election campaign and not merely at the time of polling.

In her report Professor Palley describes in detail the measures taken to induce Africans to vote and to prevent any campaign being mounted against the interim settlement so as to persuade people either to abstain from voting or to spoil their ballot papers. These measures included the recent administrative detention without trial of some 500 leaders of the internal wings of the Patriotic Front (which are themselves banned organisations) in addition to another 700 persons held in camps or prisons throughout the country; the control of the press and publications under emergency legislation; and the massive pressures to vote in the elections brought to bear upon Africans either by their employers, or by officials of the government service, or by the auxiliaries. These latter are a recently formed armed militia numbering about 7,000 tenuously under the supervision of Mr Smith's security forces, 90% drawn from the private armies of Bishop Muzorewa and Rev Sithole with members remaining loyal to their own political leaders, and with about 10% of ex-guerrillas from the Mugabe ranks (according to a security forces spokesman). She also illustrates in detail the massive intimidation practiced by all parties in the elections.

There was no registration of the estimated 2,800,000 African electors. Accordingly any African was free to vote in any constituency. Parties

were able, by hiring buses (a practice disallowed in previous elections), to drive their supporters to marginal constituencies where they were lacking support. The African parties, and in particular Bishop Muzorewa's, which had previously been impecunious, appeared to have a plentiful supply of funds.

The electoral laws were altered to permit the 250,000 alien immigrant workers to vote, who thus constituted 9% of the electorate. These voters were peculiarly subject to threats of dismissal by their employers, who drove them to the polls. If dismissed they would be immediately repatriated. By contrast 250,000 Rhodesian Africans living in exile (a figure which excludes the Patriotic Front forces) were unable to vote.²

Professor Palley quotes examples of widespread electoral practices which constituted offences such as bribery or treating under the electoral laws. These laws were strictly enforced in previous elections, but were ignored on this occasion by the election authorities.

Professor Palley's report concludes as follows:—

"The 1979 Constitution certainly does not meet the criterion, laid down by successive British governments, of ensuring unimpeded progress to majority rule. Nor is it acceptable to the people of Rhodesia as a whole. If the criteria for recognition have now been abandoned and all that matters is that the election should have been reasonably free and fair in the circumstances prevailing in Rhodesia and although taking place under a sham majority rule Constitution, the answer to demands for recognition must in view of all the evidence above surely be, if impartially answered, that the election was neither fair nor free by any electoral standards applicable in Western democracies or even according to those prevailing in elections preceding the grant of independence to developing African or Asian States. Apart from the wide scale intimidation and undue influence applied by the Transitional Government, by employers and by the Bishop's and the Reverend Sithole's parties and by the banned parties through their armies, and through corrupt electoral practices, the point must be made that no alternative choice was made available to the African people. The only ideology and set of proposals in this election was a "support the Settlement" one. The African population was not given the opportunity to understand all the issues in this election, being given no alternative to Mr Smith's Internal Settlement".

² According to a statistical study by the Catholic Institute for International Relations, London, if the European and foreign born potential voters are removed from the total poll, the number of local born Africans who voted would amount to 50.87% of African electorate, and Bishop Muzorewa's proportion would be under 38%. The true figures are probably lower than this as there is no register of African voters and the official estimates of the electorate are based on projections from the 1969 population census. Previous estimates of this kind have proved substantial underestimates.

Commentaries

UN Commission on Human Rights

The thirty-fifth session of the Commission on Human Rights was held in Geneva from 12 February to 16 March, 1979. Progress was made on a number of issues but consideration of many others was not completed. Notable features of this session were the length of time spent in private meetings considering alleged situations of gross violations of human rights, and the more active role played by observers from States which are not members of the Commission.

An open-ended working group met for a week before the session to consider two important items, the programme and methods of work of the Commission, and the draft Convention against Torture.

The Commission's Work Programme

On the first item the working group was unable to complete its deliberations on all the interesting proposals made at the previous session, including the renewed proposal for a UN Commissioner on Human Rights (see ICJ Review No. 20, p. 29). However, there was a broad measure of agreement on certain proposals. A resolution adopted by the Commission without a vote asked the ECOSOC to approve the following suggestions (which it has since done):

- the Commission may assist in the coordination of activities concerning human rights in the UN system, and may, at its 1981 session, set up a working group to make proposals to this end;
- membership of the Commission is to be increased from 32 to 43 members, in accordance with the principle of equitable geographic distribution;
- regular meetings of the Commission are to be held for six weeks, instead of the present five weeks, with one additional week for meetings of working groups;
- the Sub-Commission's session is to be extended from 3 to 4 weeks;
- the principle is accepted that there may be special sessions to complete unfinished business, including the drafting of human rights instruments, as well as specially convened meetings of the bureau between sessions "in exceptional circumstances". The criteria for deciding in what circumstances such meetings should be convened have not yet been decided;
- the ECOSOC was asked to request the Secretary-General to examine the question of the staffing and other resources of the human rights sector.

It is to be hoped that the increased time at the disposal of the Commission will make possible a greater output and will not all be taken up by longer debates due to the increased membership.

The Right to Development

The promotional work of the Commission began with discussion of the right to development. The Commission had before it a most interesting paper prepared by the Secretariat on "The international dimensions of the right to development . . .". There was a general consensus to support the promotion of the right to development and search for means for its implementation, though some participants felt that such a right was not yet defined, and the Australian delegate even expressed doubts as to its legal existence.

Two resolutions were adopted on the right to development. In the first, following the study on the international dimensions of the right, the Commission decided to proceed to a study of the regional and national dimensions of this right. This decision is of some importance, since it involves scrutiny of what is sometimes regarded as a purely domestic matter. In the second resolution, the Commission expressed "its concern that qualitative and human rights conditions are being imposed in bilateral and multilateral trade policies with the intention and effect of perpetuating the existing structure of world trade". This paragraph was voted on separately to enable most of the western countries to express their disagreement. This resolution also recommended the holding of a seminar in 1980 on "the effect of the existing unjust international economic order on the economies of the developing countries and the obstacle that this represents for the implementation of human rights and fundamental freedoms, particularly the right to enjoy adequate standards of living".

Draft Convention against Torture

The pre-sessional working group on torture examined the Swedish draft in the light of the comments made by governments, and continued to meet during the session of the Commission. Subject to certain reservations, it approved four articles, one relating to the definition, and the other three to general provisions on the prohibition and prevention of torture. Consideration of a paragraph adding that torture is "an aggravated form of cruel, inhuman or degrading treatment or punishment" was postponed. In the light of the decision of the European Court of Human Rights in *Ireland v. United Kingdom*, some felt that there is a danger that such a paragraph could lead to an unduly restrictive interpretation of the definition of torture. The general view appeared to be that while the question of cruel, inhuman or degrading treatment should not be ignored in the convention, it was a concept of too general a nature to be included in the articles dealing with criminal offences.

The time available to the official working group was very limited. An unofficial group reached agreement on the redrafting of twelve more articles, which were then circulated by the Swedish delegate (under reference E/CN.4/WG.1/WP1 of 19 February 1979). The official working group is to meet again next year for one week prior to the session, and this should enable further progress to be made.

Convention on the Rights of the Child

The Commission began its consideration of a Polish draft Convention on the Rights of the Child. This seeks to transform the provisions of the 1959 declaration into a legally binding instrument. The time allotted to the working group enabled it to consider only the preamble. Many delegations expressed the view that the general terms of the declaration were ill-suited to a Convention, and urged that thought be given to more specific measures for the protection of the rights of the child.

Draft Declaration on Religious Intolerance

This was considered by another working group. For the first time since the Commission started work on it in 1975, three articles were agreed and later adopted by the Commission.

Draft Declaration on Minority Rights

The Yugoslav delegate undertook to revise his draft declaration on the rights of minorities on the basis of comments made by several delegations within another working group. Meanwhile, the Sub-Commission has been asked to comment upon this draft declaration.

Protection of Detainees and Prisoners

The Draft Body of Principles for the Protection of Persons in All Forms of Detention or Imprisonment was unanimously approved and the Economic and Social Council has since agreed to circulate it to all governments requesting them to submit their comments upon it to the Secretary-General before the next meeting of the General Assembly. There is, therefore, a good prospect that this important document, whose contents were summarised in ICJ Review No. 21 (at p. 21), will be approved by the end of the year.

Rights of Non-Citizens

The Draft Declaration on the Rights of Non-Citizens prepared by Baroness Elles of the United Kingdom, was also approved without a vote and submitted to the ECOSOC for transmission to the General Assembly.

Violations of human rights

Violations of human rights were debated at length during plenary meetings, some open, others in private. Inevitably the discussions on these subjects were more politicised, and the decisions reached were more influenced by political considerations.

Palestine

Once again the question of the violation of human rights in the occupied arab territories was examined conjointly with the right to self-determination. The discussions were prolonged, and led to the

adoption of a resolution condemning Israeli practices and calling for the application of the fourth Geneva Convention, in somewhat similar terms to those of previous years. The Commission also decided to send a telegram to the government of Israël, urging it to cease "systematic torture and repression". A rule calling for a 24 hour delay before a vote was taken (which would enable a reply to the accusations to be made) was waived.

A study by Mr Aureliu Cristescu, special rapporteur of the Sub-Commission on the historical and current development of the right to self-determination was discussed. The report expressed the idea that the right to self-determination is a basic right, necessary for the exercise of all other human rights, and some representatives drew the conclusion that it has the character of "ius cogens". Two resolutions were adopted, one reaffirming the inalienable right of the Palestinian people to self-determination, the other reiterating the Commission's support for the struggle of the peoples under colonial or alien domination or foreign occupation, in particular the peoples of Namibia, Zimbabwe and South Africa.

South Africa

"An intensification both of political repression and of the grand design of apartheid" is how the working group of experts on Southern Africa described, in the introduction to its report, the situation in this region. In view of the hardening of the situation, the Commission decided to increase its anti-apartheid action. It asked the Sub-Commission to continue its preparation of a provisional list, submitted this year for the first time, naming persons whose activities constitute assistance to colonial and racist regimes in South Africa. In another resolution, it made a fresh appeal to all states to ratify or accede to the Convention against Apartheid and requested the Secretary-General to invite State parties to make suggestions for the establishment of the international criminal tribunal provided for in the Convention. It will be interesting to see whether this gives a new impulse to the movement for the establishment of an international criminal tribunal.

The Commission also expressed its appreciation of the decision of the new government of Iran to sever relations and stop its oil supplies to South Africa.

A recommendation of the working group of experts was adopted proposing that "ECOSOC should request the General Assembly... to arrange for a study to be made of the South African government's legitimacy in view of its policy of apartheid and in particular its systematic refusal to apply the principles of the Charter of the United Nations and of international law concerning friendly relations and cooperation among States in accordance with the Charter of the United Nations, and then to draw from that study all appropriate conclusions of law and fact". This proposal to study the legitimacy of a government is one of the most significant decisions of the 1979 session of the Commission. It is the first time that a UN body has raised such an issue. Although the wording of the resolution presents it as a

consequence of South Africa's refusal to apply the principles of the Charter, it is precisely its consistency with the Charter which was called into question by some delegations. According to the US representative (who voted against the resolution together with France and the Federal Republic of Germany, with some other countries abstaining) such a proposal "would weaken the principle of non interference in domestic affairs" in article 2(7) of the Charter. Beyond this legal issue there is also a political question. Some representatives considered that "serious and unpredictable results could follow", perhaps fearing that, after South Africa, this questioning of the legitimacy of a government, which is a novel concept under international law, might be applied with disturbing consequences to other countries.

Chile

The Commission's working group on Chile, another country whose human rights situation is regularly examined by the Commission, was last year allowed for the first time to investigate within the country. Its report, while welcoming this cooperation by the Chilean government and noting certain improvement in the situation, nevertheless condemned the continuation of serious violations of human rights, though on a reduced scale. These included arrests for political reasons, disappearance of persons, ill-treatment and torture, and denial of the rights and repression of the Mapuche indians. The Commission was shocked by the discovery in December 1978 in a disused mine at Lonquén of the bodies of persons arrested some years ago by the security authorities. More detailed information on this atrocity was supplied in a document submitted by the International Commission of Jurists.

The Secretary-General of the ICJ also made an oral intervention analysing the draft Constitution prepared by the Ortuza Commission appointed by General Pinochet. He showed that, in spite of the supposed guarantees of human rights, the provisions relating to the National Security Council, the Constitutional Tribunal and the Supreme Court, and the provisions concerning states of exception ensured that the present ruling élite in Chile would, under this Constitution, be able to "carry on in the way the military regime has been carrying on in Chile" since 1973. He also referred to the question of disappeared persons in Chile, stressing that this problem existed in at least 5 other Latin-American countries.

For the future, the Commission decided to replace its *ad hoc* working group on Chile by a Special Rapporteur and to appoint two experts to study the question of the fate of disappeared persons on Chile. This later decision raised some objections in particular from the Australian delegate, who argued that the question of disappeared persons should be dealt with more generally and not limited to disappearances in Chile.

Gross Violations

The Commission devoted an exceptional number of meetings under

the Resolution 1503 confidential procedure to the consideration of communications alleging "a consistent pattern of gross violations of human rights". Last year the Commission had announced the names of the countries in respect of which it had decided to take some action under the confidential procedure. It did this in order to prevent public debate on these countries during the public part of the discussion of this agenda item.

It has for long been recognised that any government represented on the Commission is free to initiate a public discussion on any particular situation. Thus, the United Kingdom had in the previous year raised publicly the situation in Democratic Kampuchea, and this year Cuba initiated public debates on Nicaragua and Guatemala. The issue which had not been resolved finally was whether, or at what stage, cases which had come to the attention of the Commission under the confidential communication procedure could be referred to in the public session. The matter came to a head in 1977 when the United Kingdom delegate, dissatisfied with the action taken by the Commission under the confidential procedure in relation to Uganda, sought to raise the question again in public session. He was frustrated in this by a decision of the Commission to go again into private session. It was this incident which led to the decision in 1978 to announce the list of countries on which some action was being taken under Resolution 1503.

This in turn led to a fresh difficulty. In a number of cases, countries selected in this way under the confidential procedure have simply replied by a bare denial to the Commission's request for comments upon the allegations in the communications. Thus they have refused all cooperation with the Commission. This has made it virtually impossible for the Commission to proceed further by way of enquiry or investigation. When this has happened, the confidentiality rule has served only to protect the government concerned from public exposure.

This year the Commission broke fresh ground by deciding, when this position arose in the case of Equatorial Guinea, to announce that the situation in this country could now be discussed in public as a result of the refusal of that government to cooperate with the Commission. The importance of this decision, apart from its relevance to the particular situation, is that the Commission has now armed itself with an important means of persuading governments to cooperate more constructively with the Commission, thereby strengthening the procedure.

The Commission's Chairman again announced nine cases which were under consideration under the confidential procedure. These were the other eight countries announced in the previous year (Bolivia, Ethiopia, Indonesia, Malawi, Paraguay, South Korea, Uganda and Uruguay), together with one new case, Burma. The action taken in these nine cases has not been announced. The impression gained by observers, however, is that it has not been very strong. It seems that at one stage the members were minded to take stronger action in some of the cases, but then the application of the principle of "equitable treatment" (meaning that similar cases should be treated in a similar

way and with an equitable regional balance) led them to change their decision. They felt that they could not take stronger action in relation to these cases than that which they took in other equally serious cases but in respect to which, largely for political reasons, they were unable to agree upon any strong action. In this way, the demand that "double standards" should not be applied has led to a weakening of the Commission's action in defence of human rights.

During the public discussions a non-governmental organisation described the situation in *Equatorial Guinea* referring to the existence of concentration camps, mass killings and torture, among other human rights violations. This situation was condemned by a number of delegations and a decision was taken to authorise the Chairman to appoint a special rapporteur to make a "thorough study" of the situation and report to the next meeting of the Commission.

Several other situations were raised publicly. It was agreed that the debate on *Cyprus* should be postponed till the following year. The situation in *Nicaragua* was raised by Cuba and Venezuela. The resolution adopted by the Commission, which was qualified by the Nicaraguan representative as a "legal monstrosity", condemned the violation of human rights and fundamental freedoms by the authorities of this country and requested the Secretary-General to submit a report on this situation at the next session.

The proposal to send a telegram to the government of *Guatemala* led to a discussion, initiated by Colombia and supported particularly by Austria and the United States, on the necessity to establish criteria for deciding when to send an immediate telegram to a country. However, this question remained unresolved. After the representative of Guatemala had assured the commission that its government was "acting with all due diligence" with regard to the situation which had concerned the Commission i.e. the assassination of Dr A. Fuentes Mohr, the Commission adopted, without voting, a telegram submitted by Colombia and Peru. This noted with satisfaction the intention of the government of Guatemala to act on this matter and expressed a wish to receive information on this subject before the next session.

Two other draft resolutions were submitted by the protagonists of the *Western Sahara* question. This gave the opportunity to numerous delegations and some NGOs to express their concern and indignation on the alleged violation of the right to self-determination of the Saharaoui people. Reference was also made to allegations of practices of the Moroccan forces, including torture, disappearance of persons, and maltreatment of prisoners and of the civilian population. None of these resolutions were voted upon, as the opposing parties agreed to withdraw them on the understanding that the question would be discussed at the next session.

At its previous session the Commission had requested the Sub-Commission to consider the documentation submitted to the Secretariat with reference to *Democratic Kampuchea* and to report upon it to the Commission. As a result, the Chairman of the Sub-Commission, Mr Abdelwahab Bouhdiba, in a remarkable speech presented a comprehensive and unambiguous report about the

terrible violations of human rights which had occurred under the Pol Pot regime. He enumerated the violations which had clearly been established in the vast documentation received from governments and non-governmental organisations, including the International Commission of Jurists. These comprised, inter alia, forcible mass deportations from the towns without regard to age or physical condition, forced labour, important limitations on freedom of movement, torture, and the "elimination" of various categories of persons. A somewhat unusual situation then arose. The government under accusation had been ousted by the vietnamese invasion, but was still the government recognised by all but four of the governments represented on the Commission. Among these four was the government of the USSR, which had opposed the UK resolution the previous year demanding an enquiry into the situation in Democratic Kampuchea. Meanwhile, the punitive expedition by China against Vietnam had commenced. The prospective debate on this subject had led to the first appearance at the Commission of an observer from the People's Republic of China. A number of countries, in particular the western group, were anxious to debate the Sub-Commission's report, but this was strongly opposed by the USSR and a number of other countries. Eventually, with 10 votes against and 2 abstentions, the Commission decided not to consider the matter until the following year. Apart from the merits, this was a disappointing decision, as the Sub-Commission's admirable report had opened up a new and useful procedure for dealing with situations of gross violations of human rights.

Disappearances

Perhaps the most disappointing feature of this session was the Commission's failure to take action, other than with regard to Chile, in relation to what is currently one of the worst and most widespread violations of human rights, namely the phenomenon of "disappeared persons". These are persons who have to all appearances been arrested by the security authorities of their country, who then disappear without trace, the security authorities denying that they have ever arrested them. In some cases the corpses of these people are subsequently discovered. As the Secretary-General of the ICJ pointed out to the Commission there are now at least six Latin-American countries where there are substantial numbers of disappeared persons. In the case of Argentina, a list has been submitted to the Commission of over 4,000 documented cases, and there are believed to be many more. In spite of the General Assembly's request to the Commission (in its resolution 33/173 of 20 December 1978) to consider the question with a view to making recommendations for the investigation and prevention of such occurrences, the Canadian delegation were unable to find sufficient support for a proposal to appoint a special rapporteur on this subject.

Fortunately the matter has since been considered by the ECOSOC, which has decided to request the Sub-Commission to consider the subject with a view to sending general recommendations to the

Commission on Human Rights at its next session. The Commission in turn has been asked to consider the matter with priority.

The Implementation of ILO Conventions: The Czechoslovak Case

The International Labour Office (ILO) has developed procedures for the implementation of the ILO Conventions which are among the most effective available in the sphere of the international implementation of human rights. *One of the reasons for their greater effectiveness lies in the tripartite structure of the organisation, in which the employers' and trade union representatives participate at all levels on an equal basis with governments.*

Committee of Experts

This article is concerned with the various complaints procedures, but mention should be made first of the Committee of Experts for the Application of Conventions and Recommendations. This Committee, which is composed of independent experts of high legal quality, examines the reports of States Parties to the ILO Conventions on the legislative and other measures they have taken to fulfil their obligations under the Conventions. It also examines judicial decisions, comments from employers' and workers' organisations, information given in Conference Committee discussions and reports of on-the-spot visits to member states. The reports of this Committee, which are published and debated by a tripartite Committee of the ILO Conference, comment on the performance of governments in a strictly legal and politically impartial manner.

Complaints Procedures

There are three procedures for examining allegations of specific violations of the provisions of the Conventions. These are based on "representations" or complaints.

First, there is the so-called "representation procedure" under article 24 of the ILO Constitution. This procedure, which relates to the application of ILO Conventions by countries which have ratified them, will be described later in more detail with specific reference to the case raised by the International Confederation of Free Trade Unions against Czechoslovakia.

Secondly there is a complaints procedure under article 26 of the ILO Constitution, which also concerns the application of Conventions by states which have ratified them. Under this procedure any member state which considers that another member state which has ratified an ILO Convention is not complying with it in a satisfactory manner, can make a complaint to the ILO against that state; complaints may also be presented by delegates to the International Labour Conference, including workers' and employers' delegates. The ILO Governing Body

may decide to communicate the complaint to the government of the state concerned, and if it does not receive a satisfactory answer to it, may set up a Commission of Inquiry to study the question raised in the complaint and make a report upon it with recommendations. Whenever any question arises of appointing a Commission of Inquiry or of making public a complaint and the government's reply, if any, the government concerned has the right to be represented at the discussion of the matter before a decision is taken. Instead of setting up a commission of Inquiry, the Governing Body may decide to seek a solution to the matter by direct contact with the government concerned through an on-the-spot visit by an independent expert.

Thirdly, there is a procedure for complaints of violations of trade union rights. Unlike the previous procedure, these complaints can be made not only by governments but also by employers' or workers' organisations if they consider that a government is not complying with an ILO Convention in a satisfactory manner. This procedure also differs from the previous one in that it does not matter whether the government against which the complaint is made has ratified the Convention in question. This procedure derives from decisions adopted by consensus by the ILO and the Economic and Social Council of the United Nations in 1950.

The Governing Body of the ILO can refer these complaints either to the Fact-Finding and Conciliation Commission on Freedom of Association with the consent of the government concerned, or to the Committee on Freedom of Association. This latter Committee is composed of nine members representing equally governments, employers and workers with an independent chairman, and is empowered to examine complaints and to report to the Governing Body with recommendations. Its reports are generally published in ILO official bulletins. This Committee is at present examining a complaint relating to violations of trade union rights in the USSR. It also has under examination a complaint concerning the non-observance by Argentina of Convention No. 87 on Freedom of Association and Protection of the Right to Organise.

"Representation" procedure

The first procedure mentioned above, the representation procedure, will now be examined in more detail. This procedure is based on two provisions of the ILO Constitution, articles 24 and 25, and on the standing orders concerning the procedure for the Discussion of Representations, adopted by the Governing Body on 8 April 1932, as amended on 5 February 1938.

Under Article 24, any workers' or employers' association may make a representation to the ILO if it considers that a Member State has failed to secure the effective observance within its jurisdiction of any ILO Convention to which it is a party.

The representation is first referred by the Governing Body to an *ad hoc* Committee composed of 3 of its members, one from the governmental group, one from the employers' group and one from the workers' group, but excluding any representative of the state concerned

or of the professional organisation which made the representation. This Committee submits a report to the Governing Body with recommendations as to the action to be taken.

Under powers delegated to it by the Governing Body, the Committee first considers whether the representation is receivable in form. If it is, they then examine the substance of the representation. If they consider it not well-founded they may declare the matter closed. On the other hand, if they consider the representation merits attention, they may transmit it to the government concerned, with or without an express invitation to reply to it by a written statement. The Committee may also ask the association which has made the representation to provide further information about it.

If, after considering the report of the Committee, the Governing Body considers that the government has not replied "within a reasonable time" or that its reply is unsatisfactory, it may decide to make the representation public. In either case, however, it must invite the government concerned to send a representative to take part in the discussion on this question (but without the right to vote).

The Czechoslovak case

On 27 January 1977 a representation was submitted to the ILO by the International Confederation of Free Trade Unions (ICFTU). It alleged the non-observance by Czechoslovakia of Convention No. 111 on Discrimination (Employment and Occupation), 1958. This Convention was ratified by Czechoslovakia with effect from 21 January 1965. The representation alleged that the government had persistently failed to carry out its obligations under the 1958 Convention and was violating other fundamental human rights, including the right to work. Numerous workers were named who were alleged to have been discriminated against in their work, or to have suffered from measures of repression, including improper dismissals, particularly in the case of the authors or signatories to the Charter 77 Manifesto which sought to inform the public about violations of human rights in Czechoslovakia. In its representation the ICFTU asked the Governing Body to appoint a commission of inquiry to investigate this situation which it described as grave. For a little over a year, the first part of the procedure followed its course. The representation was first communicated by the Director of the ILO to the Governing Body, which appointed an *ad hoc* Committee to study it and report on the measures to be taken. The Committee was composed of Mr Hector Griffin of Venezuela (governmental member and Chairman), and Messrs G. Polites and H. Maier as respectively employers' and workers' members. At its first meeting the Committee took three decisions: it declared the request receivable; it invited the authors of the representation to supply further information and it invited the Czechoslovak government to forward a written statement by 30 September 1977.

The ICFTU, in reply, submitted to the Committee a document describing the situation with impressive detail, including supporting evidence, such as copies of letters of dismissal and an enumeration of measures taken against the signatories and supporters of the Charter 77

Manifesto. One month after the date indicated the Czechoslovak government replied only in order to tell the Committee that the problem raised in the representation was still being examined. The Committee decided to extend the time limit for the reply until 15 January 1978, but it was not until 6 February 1978 that the further reply of the government reached the ILO. This rejected all the accusations and qualified as ill-founded the submission of the representation and the application by the ILO of the special procedures provided for in articles 24 and 25 of the constitution. In a final attempt to exhaust all possible procedures before making its report, the Committee drew the attention of the Czechoslovak government to the excessively vague character of its reply and invited it again to submit supplementary observations. However, the government replied that it found its previous observations clear and exhaustive enough and indicated that it did not have anything to add.

In its report to the Governing Body, the Committee said that it considered the statement of the Czechoslovak government to be too general in its terms, and that it did not constitute an adequate response to the specific allegations in the representation concerning dismissals, with or without previous notice, and other measures affecting employment. The government's reply was, as a result, not regarded as satisfactory by the Committee, which accordingly recommended the Governing Body:

- that it decide to open the discussion on the application of article 25 (publication of the representation and of the statement made by the government in reply to it), and
- that it invite the government to send a representative to take part in the discussion.

The discussion took place in November 1978. Following this meeting, the Governing Body decided to make the matter public under article 25. Consequently, the representation made by the ICFTU, together with the reply of the Czechoslovak government and the report of the Committee to the Governing Body, was published in the ILO Official Bulletin (Vol. LXI, 1978, Serial A, No. 3).

This is not the first time that the report of an *ad hoc* Committee containing the representation and the statement of the government concerned has been published. For example, in 1972, a representation made by the General Confederation of Italian Agriculture concerning the non-observance of the Employment Service Convention (No. 88), and the Italian government's reply, were made public. However, the publication did not result from a formal decision of the Governing Body under article 25 in the course of the procedure. It took place only after the case had been declared closed by reason of the notice of denunciation of the Convention in question given by the Italian government.

The Czechoslovak case is, therefore, without precedent. It is the first time that a representation and reply and the Committee's report has been published as a result of a formal decision by the Governing Body in the course of the procedure. The case is, however, far from being closed, since the Governing Body decided at the November 1978 session to refer the matter for further examination to the Committee of Experts for the

Application of Conventions and Recommendations mentioned at the beginning of this article, which is a permanent organ. This Committee met in March 1979 and made comments on the matter which will be submitted to the next ILO Conference in June 1979. The Czechoslovak government justifies the dismissal of the Charter 77 signatories by reference to sections 46 and 53 of their Labour Code, which permit dismissals where a worker proves incompetent to perform his work or where his retention would endanger the safety of the State or the performance of the tasks of the organisation which employs him. The Committee of Experts' comments were as follows:— "the Committee referring to its previous observations, recalls that the measures authorised by the Convention in connection with the security of the State or the requirements of certain jobs should not be applied in such a way as to conflict with the basic protection provided by the Convention against discrimination in respect of employment on the grounds of political opinion. The Committee therefore asks the Government to indicate the measures taken or contemplated to ensure that all sanctions previously imposed for reasons incompatible with this protection be duly reconsidered in the light of the provisions of the Convention. The Committee also hopes that the Government will take all suitable measures to guarantee more effectively that the provisions of national laws in this field may not be applied for reasons that would be incompatible with the protection laid down by the Convention in respect of the elimination of discrimination on the basis of political opinion". The Experts have asked the Czechoslovak Government to supply full particulars to the Conference at its June 1979 session, when the question will be discussed by the tripartite Conference Committee on the Application of Conventions and Recommendations.

HOW TO ENFORCE THE TORTURE CONVENTION: A DRAFT OPTIONAL PROTOCOL

by
Niall MacDermot*

In 1977 the General Assembly asked the UN Commission on Human Rights to prepare a draft Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.

At the 1978 meeting of the Commission the Swedish Government introduced a draft Convention. This draft, together with another prepared by the International Association of Penal Law, was considered by a Working Group of the Commission at its 1978 and 1979 meetings. The discussions in the Working Group have been constructive and it appears that all countries represented on the Commission are genuinely concerned to reach agreement upon a draft. Unfortunately, owing to pressure of other business, the time allotted to the working group has been very restricted, with the result that the working group has, as yet, been able to consider only 4 articles of the Draft Convention. However, the working group is due to meet for one week immediately before the 1980 meeting of the Commission. It is to be hoped that substantial progress may then be made and that agreement may be reached at least upon the remaining substantive proposals for the prevention and repression of torture. The articles dealing with enforcement of the Convention may possibly not be reached until 1981.

The enforcement or, to use the United Nations term, the implementation provisions are the crux of the Convention. As is well known, governments have shown themselves generally reluctant to adopt effective measures for the international implementation of human rights covenants and conventions, and such procedures as exist have often been rendered even less effective by delaying tactics and obstruction on the part of the governments concerned. Both the Swedish government and the International Association of Penal Law have, believing it to be the realistic course, proposed reporting, communications or enquiry procedures which largely follow the procedures to be found in existing conventions.

The International Commission of Jurists believes that if there is one subject or which agreement might be reached for a more effective means of implementation, it should be that of torture. Accordingly, it has put

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forward a proposal for a Draft Optional Protocol to the Convention against Torture. This is based on proposals first made by a Swiss lawyer, M. Jean-Jacques Gautier. It is, in brief, that those states which are prepared to agree to the procedure would set up a Committee of experts who would be authorised to send delegates on a regular basis and on special occasions as required, to any place of detention in territory under the jurisdiction of those states. The Committee would then report confidentially to the government concerned.

The implementation proposals contained in the Swedish Government's Draft Convention, the International Association of Penal Law's Draft Convention, and the draft Optional Protocol of the International Commission of Jurists will now be compared.

The Swedish proposals

The Swedish government's draft convention proposes three methods of implementation.

First it proposes in Article 16 a system of *reports* to be submitted by the States Parties to the Human Rights Committee established by the international Covenant on Civil and Political Rights. These reports would set out the measures taken to suppress and punish torture. States Parties are to supply them "when so requested" by the Committee, and the Committee is to consider them in accordance with the procedures set out in the Covenant and its Rules of Procedure. This means that the committee shall study them, and then transmit them to the States Parties with such general comments as it considers appropriate. It may also transmit them to the Economic and Social Council of the United Nations. The Committee, when examining these reports, would question a representative of the State Party concerned, and may ask for additional information.

The second proposal, in Article 17, would entitle the Human Rights Committee, if it receives information that torture is being *systematically* practiced in a country, to designate one or more of its members to carry out an *inquiry* and report urgently to the Committee. The way in which this inquiry is to be conducted is left open, save that it is proposed that the inquiry "may include a visit to the State concerned, provided that the government . . . gives its consent". There is no requirement that the government should afford any particular facilities to the members of the inquiry, such as to permit them to visit places of detention or to speak alone to prisoners, or their lawyers or families. Experience shows that to obtain a government's consent to an inquiry of this kind tends to be a protracted procedure.

The third proposal, in Articles 18-20, is that the Human Rights Committee established under the International Covenant on Civil and Political Rights should be able to receive communications alleging that a State Party is not complying with its obligations under the Convention, providing that the State Party concerned has made a formal declaration agreeing to submit itself to the procedure of the relevant type of communication. Communications may be of two types, namely those coming from other States Parties who have agreed to

submit themselves to this procedure, or those from individuals claiming to be victims of torture.

These communications are to be dealt with under the procedures of the Human Rights Committee. These involve a prolonged examination. First the Committee has to examine whether the communication is admissible, which may involve further inquiries on such matters as whether all domestic remedies have been exhausted.

Communications from other States Parties are subjected to a complicated procedure with several stages, including attempts to settle the matter by good offices and by an *ad hoc* Conciliation Commission.

Communications from individuals would be dealt with in accordance with the procedures laid down in the Optional protocol to the Covenant on Civil and Political Rights and in the Human Rights Committee's rules of procedure. The State Party concerned is given 6 months within which to comment on the complaint. These comments are then referred back to the complainant for his comments. When the Committee has obtained the information it requires, or at least such as it is able to obtain, it considers the matter in closed meetings and then forwards its "views" to the State Party and to the individual complainant. The Committee has no power to impose any sanction or order compensation to be paid if they find the complaint well-founded. These procedures would be likely to last at least one year and probably up to two years or more.

Finally, the Swedish draft proposes that the Human Rights Committee should include in its annual report to the General Assembly a summary of its activities under these various procedures. It seems improbable that these would describe particular cases.

A question has already been raised by a number of governments as to whether it is legally possible for the Human Rights Committee established under one international treaty, namely the International Covenant on Civil and Political Rights, to be used as the means of implementation of a quite different treaty, namely the proposed Convention against Torture, which will presumably have different States Parties. The Human Rights Committee is not a United Nations organ. It was created by and is an organ of the States Parties of the International Covenant. This is so, even though it is serviced by the staff of the Human Rights Division of the UN Secretariat and its expenses (somewhat illogically) fall upon the general budget of the United Nations. This has already been the subject of a protest by one State which is not a party to the International Covenant, namely Argentina.

The Legal Adviser to the United Nations takes the view that the consent of every State Party to the International Covenant on Civil and Political Rights will be required to enable the Human Rights Committee to be used in this way.

Apart from the legal problems arising from attempting to make this Committee serve two sets of masters, there must be some doubt about the ability of the Human Rights Committee to deal with sufficient alacrity with allegations of torture under the Convention, since it is already heavily overloaded with other work under the Covenant.

The arguments in favour of using the Human Rights Committee for this purpose, if it can be done, are that it would avoid having to create

another special organ, and that it would avoid any possible conflict of jurisdiction of jurisprudence between the implementation of the Convention against Torture and the implementation of Article 7 of the Covenant on Civil and Political Rights, which contains a general prohibition of torture.

There would, of course, be some advantage in using the same organ if it is possible to do so, but if it results in a requirement for additional sessions for the Human Rights Committee, the financial saving might not be very great. If the Convention against Torture had its own Committee, elected by its own members, concerned solely with torture questions and not with the other provisions of the Covenant, it would, one would hope, be able to deal with communications more speedily.

The question of overlapping jurisdiction does not, it is submitted, present any insuperable problem, and could be resolved in the same way as is now done with communications to the Human Rights Committee under the Covenant on Civil and Political Rights and communications to the UN Commission on Human Rights under its procedures. The question of conflicting jurisprudence hardly arises as neither body is a court pronouncing legal judgments.

The IAPL proposals

The draft Convention against Torture of the International Association of Penal Law also proposes a system of States Parties reports to be submitted to the Human Rights Committee under the Covenant, but provides that the Committee should appoint five of its members who are nationals of States Parties to the Convention against Torture to consider these reports. There is no provision for any inquiry or communications procedure.

The Draft Optional Protocol

The draft Optional Protocol published by the International Commission of Jurists (together with the Swiss Committee against Torture) proposes that the States Parties to the Protocol shall meet annually in an Assembly

- to elect an international Committee of individual experts,
- to receive and consider the Committee's annual reports, and
- to approve the budget.

The expenses of administering this Protocol would fall on the States Parties to the Protocol and not on the budget of the United Nations. The Protocol would, therefore, be entirely under the control of its States Parties.

The Committee, with the assistance of its staff, would arrange regular visits by delegates to places of detention of all kinds, including interrogation centres, and, in addition, any *ad hoc* visits which appeared urgently necessary. The States Parties to the Protocol would undertake to give these delegates full facilities to carry out their mission, including access without notice to any place of detention and the right to talk alone with detainees or their lawyers or families.

The Committee and their delegates would be able to act upon information from any source in deciding which place to choose for these

visits. The function of the delegates would be to verify that persons detained are being treated in conformity with the provisions of the Convention. If the Convention contains a general obligation to prevent other forms of cruel, inhuman or degrading treatment or punishment, the delegates would be concerned with the general conditions of detention and not solely with the question of torture.

The delegates would be entitled to make urgent representations to the government concerned, but would normally report first to the Committee, which would in turn communicate confidentially to the government concerned its findings and its recommendations, if any. Only in the event of an unresolved disagreement with the government concerned would the Committee be able to publish its findings or recommendations.

These proposals, as will be readily apparent, are based upon the experience of the International Committee of the Red Cross (ICRC) over many years in carrying out its programme of visits to prisons in some 80 countries, made under voluntary agreements with the countries concerned and not under any convention. The differences between this proposal and the present ICRC practice would be that the States Parties would accept the obligation

- to permit visits at all times, and not merely on specially agreed occasions;
- to permit visits to all places of detention, including interrogation centres, and not only to prisons, as is usual in the case of ICRC visits; and
- to accept the right of the Committee to make public any findings or recommendations which the government did not feel able to accept.

There can be little doubt that these visits, where they were allowed, would prove an effective means of preventing systematic practices of torture. On the rare occasions when the ICRC has been permitted to visit all places of detention, including interrogation centres and police stations (e.g. Greece in 1971 and Iran in 1977/8), the visits have had a marked effect in reducing torture practices.

The sponsors of this proposal consider that its great advantage is that it does not involve any public attack or accusation being made against the government concerned. Consequently, the government is not thrown upon the defensive and has no incentive to impose delays, but rather has an incentive to cooperate under a confidential procedure in remedying any abuses which may exist. Also, it enables swift action to be taken without requiring lengthy legal procedures to be followed, both at the national and international level.

Among those who have considered these proposals, including a number of governments, there has been little or no questioning of the merits of the proposal. Some have feared that consideration of the draft Optional Protocol would unduly delay agreement on the Convention. Others have doubted whether more than a handful of governments would agree to submit to these procedures, and none in countries where torture practices are believed to exist.

One of the few doubts expressed about the efficacy of the procedure has been whether the Committee would be able effectively to check

interrogation centres where torture occurs, as these are places which are usually kept secret. Experience shows, however, that it is not long before the existence and location of such centres becomes known and, as stated, the Committee would be able to act upon information from any source. Everything, of course, depends upon the good faith of the government concerned. No system of implementation will be effective against a government which is determined to vitiate it. If, for example, visits by delegates in such cases were delayed until all the victims and torture equipment had been removed from the interrogation centre, the delegates would be frustrated in ascertaining the facts. But in such a case, the obstruction would be obvious, and if it continued the Committee would be able to expose the obstruction they had met with, leading to the obvious conclusion that the torture complaints were true.

The objection that agreement on the Convention would be delayed is one which could be overcome if agreement could be reached to submit the Convention and the Optional Protocol to the General Assembly in two stages.

The objection that few governments would ratify is one which, perhaps unconsciously, pays tribute to the likely effectiveness of the procedure, and suggests that the procedures in the Swedish and IAPL drafts are less likely to embarrass a country which practices torture. Nevertheless, it is a curious argument to put forward against a proposal that is based on a practice which has been voluntarily adopted by some 80 countries, namely the prison visits of the International Committee of the Red Cross. This lends strong support to the view that the procedure would be less embarrassing to governments, as well as being more effective, and shows that there is no sound basis for the assumption that few State Parties to the Convention would be willing to ratify the Option Protocol.

However, even if the assumption proved correct that relatively few countries would be willing to ratify the protocol in the early stages, this is not a sufficient reason against its adoption. There have been other Conventions, such as the Geneva Conventions on humanitarian law, which at first had relatively few ratifications, but later became almost universally accepted. It is believed that once the procedures of the Optional Protocol had been established and shown to be effective, many more States would adhere to it in time. From the soundings so far made of governments, there is reason to believe that a majority of the initial ratifications might well come from countries of the Third World.

It may be accepted that those countries which as a matter of government policy practice torture would also be unlikely to ratify the Convention. The Protocol could have a useful deterrent effect in cases where a government which had ratified it was succeeded by a more repressive regime which was tempted to torture its suspects. It would be very difficult for such a government to denounce the Protocol*, and if it did, this would be a clear indication of its intention to resort to this hideous practice.

*A pamphlet containing the text of the Draft Optional Protocol is available from the ICJ; see outside back cover.

THE DEVELOPING LAW OF ABORIGINAL RIGHTS

by
Gordon Bennett*

Introduction

The plight of aboriginal peoples in the contemporary world is a more widespread problem than is sometimes supposed. The radicalism of native organisations in North America has focused new attention on the issue, and an aboriginal movement is fast gathering momentum in Australia. But the encroachments of industrial society on non-literate tribal groups has been a feature of European colonisation almost everywhere, and also occurs in less obvious contexts. Cheek by jowl with the indigenous populations in China, Japan and India there live tribal or semi-tribal peoples whose lands and traditions are increasingly threatened by the majority culture. In Africa one tribal group often exercises a dominant influence over others, as for example do the Tswana over the Bushmen in Botswana. And the appalling problems which now confront the Amazonian Indians are also faced, albeit in less dramatic form, by nomadic tribes in the Middle East, Siberia and South East Asia.

The impact of modern civilisation upon "simple" societies is therefore a world-wide phenomenon, producing social and economic consequences which have been well charted by social scientists and others. In its wake, however, it has also created a host of legal problems which have received less methodical treatment. In many countries native reserves are now established by statute, but the law remains curiously imprecise as to the rights of aboriginal peoples in both reserved and unreserved land. The status of their treaties is obscure, as is the constitutional position of the tribes themselves. Save for the United States, where the Supreme Court early evolved a concept of Indian title and limited sovereignty, most jurisdictions have been slow to develop a coherent doctrine of aboriginal rights.

National Precedents

As a result, attempts to enforce those rights through the courts have often proved futile. The first Australian litigation came in 1971 with *Milirrpum v Nabalco Pty.* (1971) 17 F.L.R. 141, when the grant of

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mineral leases over aboriginal lands in the Gove Peninsula was challenged in the Supreme Court of the Northern Territory. The plaintiff aborigines contended that they had occupied their lands since time immemorial, and that this gave them a legal "interest in land" within the meaning of the Lands Acquisition Act 1955-1966. Their interest had not been determined under the terms of the Act before the leases were granted, and the leases themselves were therefore void. In rejecting this argument Blackburn J. reviewed almost all the American, Indian, Canadian and New Zealand authorities: a massive survey which led him to conclude that the doctrine of communal native title did not form, and had never formed, part of the law of Australia. On the contrary, the Court followed the feudal concept that the basis of all land titles is a grant from the Crown, and held that since the aboriginal plaintiffs could not point to such a grant they had no "interest in land" and their claim must fail. *Nabalco* has since been cited in other jurisdictions for the startling proposition that not only did the civilised nations acquire sovereignty by their "discovery" of lands already peopled by indigenous inhabitants, but the right of those inhabitants to continue in possession of their ancestral homes must receive executive or legislative recognition before it can be admitted to exist.

Aboriginal aspirations have fared little better in the Canadian courts. A Royal Proclamation of 1763 reserved "for the use of the several Nations or Tribes of Indians with whom we are connected" all the lands not included within the limits of Quebec, East and West Florida, or the territory of the Hudson's Bay Company; but the title to Indian lands outside these (still controversial) boundaries remains unclear. Although several provincial courts have upheld a possessory title independent of the Royal Proclamation, it was only in 1973 that the matter came before the Supreme Court of Canada in *Calder v Attorney General of British Columbia* (1973) 34 D.L.R. (3d) 145. There the Nishga nation sought a declaration that they enjoyed a native title to the Nass River Valley in British Columbia. Three Justices held that the Common Law did indeed recognise aboriginal title, which was not dependent on treaty or legislation but flowed from the fact of immemorial possession *per se*. Three of their brethren, however, ruled that the Royal Proclamation was the exclusive source of Indian rights and had never applied to British Columbia. Ironically, it was left to the seventh member of the bench to dismiss the claim on the technical ground that the court had no jurisdiction to grant the declaration sought without a fiat of the Lieutenant-Governor of the Province.

Perhaps the most celebrated decision in recent years has been *Tito v Waddell* (No. 2) (1977) 2 W.L.R. 496. The case concerned Ocean Island, a small landfall in the Pacific whose inhabitants were called Banabans. Phosphate was discovered there in 1900, and in the same year the island became a British settlement. During the decades that followed, the island was so devastated by mining operations that the Banabans were eventually forced to leave. The evidence showed that the Banabans had little or no knowledge of the value of phosphate or of the effect of inflation; and that in the negotiation of the royalty agreements they received scant assistance from British officialdom. They sought a declaration in the English Chancery Division that the Crown was the

trustee for royalties obtained from the mines, and that in breach of trust it had obtained insufficient revenue from them by selling the phosphates at much lower than market prices.

Megarry V.C. found that there had indeed been grave breaches of the governmental obligations owed to the Banabans. Even counsel for the Crown conceded that one of the Ordinances under which royalties were fixed was "quite fearful", and the Vice-Chancellor could not "see how the omission to encourage the Banabans to get proper advice and assistance and to make haste slowly . . . (in the negotiation of new royalties) can possibly be called good government or the proper discharge of the duties of trusteeship". As a matter of law, however, he distinguished between "lower" trusts which are enforceable through the courts and "higher" trusts which are not; and since in his view the Pacific Island ordinances imposed only a "higher" trust on the Crown, he found himself "powerless to give the plaintiffs any relief in these matters".

Status of Aboriginal Peoples in International Law

Frustrated in their efforts to obtain redress through their municipal courts, aboriginal claimants have turned increasingly to the international community for assistance. Symptomatic of this development was the NGO Conference on Discrimination Against Indigenous Populations in the Americas, which met in Geneva in 1977. The Conference produced a Declaration of Principles, which sought recognition for indigenous peoples as nations under international law provided they had "a permanent population, a defined territory, a government, and the ability to enter into relations with other states". Peoples which cannot meet these criteria should nevertheless "be accorded such degree of independence as they may desire in accordance with international law", and their treaties and agreements should enjoy the same legal force as treaties entered into by other states.

All this, of course, is a far cry from classical international law, which denied legal personality in any form to tribal groups. In the *Cayuga Indians Case* (1926) 6 R.I.A.A. 173 at p. 179, the British and American Claims Tribunal held that an Indian tribe was not a subject of international law and was a legal unit only in so far as it was recognised as such by domestic law. Two years later the disputed sovereignty of the Island of Palmas led to another international arbitration (*Palmas Island Arbitration* (1928) 2 R.I.A.A. 831 at p. 856), in which Arbitrator Max Huber accepted as a matter of course that contracts entered into by the East India company with native chieftains on the island "are not, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties". And the Permanent Court of International Justice adopted a similar view in the *Status of Eastern Greenland Case* (1933) P.C.I.J. Rep. Ser. A/B No. 53 at p. 47, regarding as *terra nullius* any territory inhabited by "backward" peoples whose political organisations did not correspond to Western norms. From this it followed that such territories vested automatically in the first civilised power which chose to occupy them, regardless of the wishes or resistance of the indigenous population.

The International Court of Justice, however, has taken a less doctrinaire position. In its *Advisory Opinion on Western Sahara* (I.C.J. Rep. 1975, p. 6 at p. 39), the Court was asked to advise whether Western Sahara was a "territory belonging to no one (*terra nullius*) at the time of its colonization by Spain in 1884". Answering in the negative, the Court observed that "whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organisation were not regarded as *terra nullius*. It shows that, in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through "occupation" of *terra nullius* by original title but through agreements concluded with local rulers . . . (These agreements), whether or not considered as an actual "cession" of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*".

The Court declined to pronounce directly upon the legal character of agreements between states and aboriginal tribes, but it is difficult to see how such agreements can be denied all effect in international law if at one and the same time they constitute "derivative roots of title". Aboriginal claimants can also take encouragement from a Separate Opinion delivered by the Vice President of the Court, Judge Fouad Ammoun, in which he adopted the reasoning advanced centuries ago by the first proponent of native rights, Francisco de Vitoria. In *De Indis et de Iure Belli Reflectionis* (1557), Vitoria contended that in international law "... the aboriginals undoubtedly had true dominion in both public and private matters, just like Christians, and neither their princes nor private persons could be despoiled of their property on the ground of their not being the owners". The doctrine of *res nullius* was conveniently invoked to defeat such arguments, but in Judge Ammoun's view that doctrine "employed at all periods, to the brink of the twentieth century, to justify conquest and colonization, now stands condemned. It is well known that in the sixteenth century Francisco de Vitoria protested against the application to the American Indians, in order to deprive them of their lands, of the concept of *res nullius*. This approach by the eminent Spanish jurist and canonist, which was adopted by Vattel in the nineteenth century, was hardly echoed at all at the Berlin Conference of 1885. It is however the concept which should be adopted today." (I.C.J. Rep. 1975, pp. 86-87).

If Judge Ammoun can persuade his judicial brethren to a similar conclusion, some remarkable results might follow. Since international law recognises "occupation" as a method of acquiring territory only when that territory is *terra nullius*, states laying claim to aboriginal lands would necessarily have to support their claim on some other basis. Few difficulties would arise where the state can show formal annexation or cession, or where the indigenous population has been conquered by force of arms; but what of aboriginal forest dwellers, for example, whose lands have rarely been the subject of a treaty of cession or the target of military invasion? If such lands are not to be regarded as *terra nullius*, do they not remain in law the exclusive domain of their original inhabitants?

As long as indigenous communities are classified as the objects rather

than the subjects of international law, however, they will be unable to vindicate through the courts any rights they may enjoy under that law. Although a tribe may occupy tracts of land larger by far than the territory of many mini-states, and may exercise a substantial degree of social and economic independence, it will have no *locus standi* before international tribunals. Few lawyers would argue that aboriginal "nations" should be granted full sovereignty, but in some instances their unique position may justify their recognition as lesser personalities in international law, possessed of legal rights which they are entitled to enforce against the state within whose borders they live.

A juridical basis for this proposition is found in Article 1(1) of the U.N. Civil and Political Rights Covenant, which declares that "All peoples have the right of self-determination. By virtue of that right they fully determine their political status and fully pursue their economic, social and cultural development". What does "peoples" mean in this context? In the Third Committee debates on Article 1, one school of thought attributed the widest possible scope to the right of self-determination, urging that it should always be available "to prevent weak peoples being dominated by strong peoples". But this approach met with stout resistance. Canada, for example, mindful no doubt of Indian aspirations at home, indignantly remarked that "it would be a serious matter indeed if, through a decision of the United Nations, member countries were placed in a position of being morally and perhaps even legally bound to grant to those minority groups the right to determine their own institutions without consideration for the wishes of the community as a whole". (Record of the General Assembly, Fifth Session, Third Committee, 310th Meeting, pp: 457, 469.) Ultimately it was the latter view which won the day, and in the immediate post-war era it became generally accepted that the principle of self-determination could be invoked only for the liberation of colonial peoples in non-metropolitan territories.

Over the last decade or so, however, this narrow construction of Article 1 has been significantly eroded. The right of self-determination has become an integral part of customary international law, and to an increasing extent has been accorded not only to peoples under colonial domination but also to those within the Afro-Asian nations, the Middle East and the Americas. The political status of the territory inhabited by subject peoples is no longer regarded as relevant, as appears from Judge Dillard's observation in the *Western Sahara* case that it "seemed hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people". (I.C.J. Rep. p. 114).

The United Nations Contribution

Despite these developments, for most indigenous peoples the achievement of self-determination remains a distant goal. In the shorter term they must rely upon more conventional remedies within the United Nations and its Specialised Agencies. Even here, however, the

difficulties are considerable, as is amply illustrated by the restrictive interpretation placed upon Chapter XI of the U.N. Charter.

Member States are thereby required to transmit regular reports to the Secretary-General on the economic, social and educational conditions in their non-self-governing territories. These reports have occasionally formed the basis of critical Resolutions of the General Assembly, and it is widely accepted that the persistent violation by a Member of its obligations under Chapter XI would render it liable in law to expulsion from the Organisation. Of more practical importance, Chapter XI enables the United Nations to consider matters which might otherwise be regarded as of exclusively domestic concern under Article 2(7) of the Charter. But what are "non-self-governing territories" in this context? In the early nineteen fifties, Belgium pointed to the "primitive" communities living within the frontiers of many States and argued that their need for the protection offered by the Charter was indistinguishable from that of colonial peoples. It therefore attacked as arbitrary and discriminatory the view that Chapter XI applied only to colonies and protectorates¹. The Belgian thesis encountered vigorous opposition from developing countries, however, which in 1960 secured the adoption of General Assembly Resolution 1541. This stipulates that "there is an obligation to transmit information in respect of a territory which is geographically separate . . . from the country administering it", and was clearly intended to exclude from the scope of Chapter XI indigenous peoples in independent countries. In fact the language in which the Resolution is expressed was ill suited to its purpose, for there are many island communities which, although not normally described as colonial peoples, are "geographically separate" from the administering country. The tribal populations of West Irian, for example, are separate from the rest of Indonesia, as are the Andaman Islanders from India. In practical terms Resolution 1541 has nevertheless had the desired effect, and no further attempts have been made to invoke Chapter XI on behalf of aboriginal peoples.

An alternative basis for U.N. involvement, however, came with the entry into force of the Human Rights Covenants in 1976. In particular the Civil and Political Rights Covenant proclaims immunity from cruel and degrading punishment (Article 7) and from slavery and forced labour (Article 8), the right of the individual to be informed in a language which he understands of any criminal charge against him (Article 1(4)), and his right to be free from arbitrary interference with his privacy (Article 1(7)). The right of peaceful assembly (Article 21) and the right of freedom of association (Article 22) must apply as much to tribal assemblies and associations as to other groups. These are all safeguards of which aboriginal peoples stand sorely in need. And Article 18 of the same Covenant, which declares that "No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice", may well prohibit missionary activities among indigenous peoples involving the offer of material rewards in

¹ The so-called "Belgian thesis" is most fully expounded in *Text of Replies to the Ad Hoc Committee on Factors*, (8th May 1953), U.N. Docum. A/AC 67/2, pp. 3 to 31.

return for the renunciation of tribal beliefs and the acceptance of Christianity.

But as a vehicle for aboriginal protection, the International Bill of Rights contains serious flaws. Neither Covenant was drafted with an eye to aboriginal communities, and both contain provisions derived from Western values having little significance for tribal cultures. Moreover the International Covenant on Economic, Social and Cultural Rights refers almost exclusively to the rights of the individual as opposed to the group, and in the Covenant on Civil and Political Rights, only Articles 1 and 27 are addressed to minority rights. The latter stipulates that persons belonging to ethnic minorities "shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". Although Article 27 is a useful adjunct to the right of self-determination contained in Article 1, the negative terms in which it is couched suggest that States assume no positive duty to encourage and protect minorities in the maintenance of their separate identity. This emphasis on individual rather than collective rights is deliberate, but it is inappropriate to aboriginal peoples whose lives are organised almost exclusively on a communal basis.

Recently there has been a growing awareness within the United Nations of the need to formulate new standards specifically directed to indigenous peoples. In 1969 the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities commissioned a special study of racial discrimination, and in his interim report the Rapporteur observed, with masterly understatement, that "neither the U.N. or any of the agencies concerned appears as yet to have dealt effectively with the component of racial discrimination which is almost invariably an important factor affecting the treatment of indigenous peoples" (E/CN. 4/Sub. 2/302 at p. 119). As a result there is now under way a major "Study of the Problem of Discrimination Against Indigenous Populations", the final draft of which is due to be submitted to the Sub-Commission this coming August. In time this initiative may lead to an Indigenous Peoples Convention; but the U.N. bureaucracy is not renowned for its speed, and once completed the draft instrument may remain in the pipeline for several years. Meanwhile, the only instrument directly regulating the conduct of States towards their aboriginal populations is an International Labour Convention which has languished in relative obscurity since its adoption in 1957.

The ILO Tribal and Indigenous Populations Convention

Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, to give it its full title, has been ratified by twenty six countries, the bulk of them from Central and South America. It applies to tribal or semi-tribal populations which either (a) live in less advanced social and economic conditions than those reached by other sections of the national community, their status being regulated wholly or partially by their own customs or traditions; or (b) are "regarded as indigenous on account of their descent from the populations which

inhabited the country ... at the time of conquest of colonisation ... and live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong". (Article 1).

The Convention has a wide scope. It prohibits the use of force and coercion against indigenous peoples, and requires the adoption where necessary of special measures to protect their institutions, personal liberties, property and labour. They are permitted to retain their own laws and customs where these are "not incompatible" with the national legal system, and the Convention stipulates that indigenous methods of social control are to be employed as far as possible for dealing with crimes committed by group members. Provision is also made for recruitment policies and conditions of employment, and for equality of educational opportunity and vocational training. Supplementary measures are contained in I.L.O. Recommendation 104, which came into force at the same time as the Convention itself and bears the same title.

Most importantly, Article 11 of the Convention states that the "right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised". The *travaux préparatoires* indicate the drafter's intention that indigenous people should thereby be guaranteed a full proprietary status on their ancestral land that the term "land" is generic, and includes rivers, lakes and forests. Although Article 11 does not affect the ownership of mineral deposits, Article 4 of the Recommendation provides that indigenous peoples "should receive the same treatment as other members of the national population in relation to the ownership of underground wealth or to preference rights in the development of such wealth." Finally, Articles 12 and 13 of the Convention respectively prohibit the removal of indigenous peoples from their habitual territories except in defined circumstances, and require ratifying states to prevent outsiders from taking advantage of indigenous customs or ignorance to acquire native lands.

These provisions mark a significant advance in the recognition of aboriginal rights, but their generality seriously limits their effectiveness. It is by no means clear, for example, whether nomadic groups which constantly shift camp can be said to "traditionally occupy" any particular site for the purpose of Article 11. Indigenous peoples are entitled to compensation if they are removed from their habitual territories, but no indication is given as to how that compensation is to be assessed or in what form it should be paid. The Convention is also silent on rights of access to sacred shrines and burial places outside reserved lands, on the right of frontier tribes to cross international borders, and on the right of aboriginal parents to raise their children according to traditional beliefs should they wish to do so. Moreover its basic premise, that the integration of indigenous communities into the majority culture is both desirable and inevitable, has now lost much of the support it enjoyed when the Convention was first adopted.

The practical impact of Convention 107 has probably been minimal. Some States have been able to frustrate its implementation altogether;

El Salvador, for example, has repeatedly denied that the definition contained in Article 1 applies to any of its peoples, although some twenty per cent of its population are in fact indigenous, including small groups of unintegrated Natwa, Quiche and Cakchequel Indians. Malawi has also refused to concede the Convention's applicability to any section of its indigenous population, as at one time did Ghana. Countries which admittedly contain aboriginal peoples as defined by Article 1 are required to submit biannual reports to an I.L.O. Committee of Experts, but often these reports glibly recite national legislation as proof of compliance with the Convention, without indicating how far the practical implementation of that legislation has been achieved. Although the Committee is entitled to ask for supplementary information, such requests have met with an uneven response. Brazil, for instance, has provided the Committee with detailed accounts of its indigenous policy, while neighbouring Columbia continues to ignore requests which the Committee has been making since 1972 for information about allegations of mistreatment of the Planos Indians. If the Committee is not satisfied that a ratifying State has performed its obligations under the Convention, it may make an observation to that effect in its own report to the annual I.L.O. Conference; to date, however, the Committee has made only twenty eight observations on eleven different countries.

Hence, more than twenty years after its adoption, there is little evidence that States have been either stimulated or inhibited in their dealings with indigenous peoples by their ratification of Convention 107. This may be partly the result of the vague terminology in which the Convention is expressed, but there are other factors at play. The Committee of Experts lacks anthropological expertise, and the emphasis it has traditionally placed on *de jure* rather than *de facto* compliance with Conventions does not meet the needs of 107. The tripartite structure of the I.L.O., designed as it was to ensure the effective representation of employers and employees, ensures that aboriginal rights enjoy a low priority on the Conference agenda. Above all, Convention 107 raises issues falling wholly outside the normal experience of the I.L.O., with a resulting indifference to its progress which is reflected in the dissolution of the Committee on Indigenous Labour in 1958 and of the Panel of Consultants on Indigenous and Tribal Populations in 1967. For all practical purposes Convention 107 is now moribund.

Conclusion

The discovery of mineral wealth, expanding communications, and the advances of industrial technology have already combined to deprive most aboriginal communities of the autonomy they once enjoyed. It would be idle to pretend that this process can be halted, still less reversed, by the enactment of laws; political and economic considerations are the real determinants of the fate of native peoples. But the invasion of tribal land, hitherto almost invariably a lawless phenomenon, can be subjected to legal restraints, and the intervention of indigenous and non-indigenous societies controlled within a legal framework.

Although this is primarily a task for national legislatures and courts, the problem is of much wider concern and the legitimate subject of international regulation. In the absence of such regulation the future well-being of aboriginal peoples is seriously at risk, for national authorities are apt to ignore the demands of ethnic minorities which lack political influence and are the object of widespread prejudice among other sections of society. The almost invariable participation of the international funding system in large scale development projects in the Third World, which often pose a major threat to indigenous communities, further highlights the need for international control.

It remains to be seen whether the international community will rise to the occasion. On a regional level, the Inter-American Commission on Human Rights has recognised that "special protection for indigenous populations constitutes a sacred commitment" of all members of the Organisation of American States, but the Commission has yet to take any positive measures on their behalf. In the Northern Hemisphere, the European Convention on Human Rights could prove a potent weapon in the hands of Norway's Lapps or the Greenland Eskimos. Within the International Labour Organisation the revival of the Committee of Experts on Indigenous Labour, or better still the creation of a new agency concerned exclusively with aboriginal rights, could breathe new life into Convention 107.

The primary responsibility for aboriginal welfare, however, should not be permitted to remain indefinitely with the I.L.O., which was never intended for such a task. Until a new Indigenous Peoples Convention is enacted, the U.N. Sub-Commission on the Prevention of Discrimination and the Protection of Minorities should step into the breach. In recent sessions the Sub-Commission has discussed various aspects of the indigenous problem, and its growing interest in the subject should be enhanced by its receipt of the special Study on Discrimination against Indigenous Populations, now in the final stages of preparation. If the Sub-Commission can progress from its conventional role, in which it merely instigates programmes and collates general information, to the supervision of legislation and the positive enforcement of human rights, it might yet become an effective forum for the ventilation of aboriginal grievances.

THE RIGHT TO WORK AND POLITICAL DISCRIMINATION IN SOVIET LABOUR LAW

by
Dr Ger P. van den Berg *

Introduction

In its Convention No. 111 on Discrimination in Employment and Occupation, to which the Soviet Union has been a party¹, since 1961 the International Labour Organisation defined the following limits for permissible discrimination on political opinion:—

“Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination” (art. 1).

“Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice” (art. 4).

The ILO Committee of Experts on the Application of Conventions and Recommendations declared in its 1963 report that Convention No. 111 refers to an individual's activities and not his intentions. Therefore, any measure taken against a person for the sole reason that he belongs to a group is deemed to be discriminatory. Such broad terms as “lack of loyalty”, actions against “the public interest”, or “anti-democratic behaviour” were held to be incompatible with the wording of the Convention. The Committee also declared also that the “competent body”, mentioned in the Convention should be “independent of governmental authorities... a mere right to appeal to the administrative or governmental authority hierarchically above the authority that took the measure is not enough. [...] The body should] be in a position to ascertain the reasons underlying the measures taken and give the appellant facilities for fully presenting his case”.²

When requested by the Committee to report on the practical safeguards, and their application, in respect of discrimination in employment on the grounds of political opinion, the Soviet government reported in 1973 that “during the period under review, there have been no cases of discrimination in the field of employment on the ground of political beliefs”.³

In the USSR nearly every employee is employed by an institution, organisation, or enterprise (hereinafter referred to as an *organisation*) subject to the direct control of state organisations set up for this purpose. Hence, it can be said that all employees are employed by the state although Soviet administrative law does not use the concept of state service in this wide sense. The question of discrimination in employment cannot be analysed fruitfully by using western doctrines, such as those which arose in discussions about the *Berufsverbote* in the German Federal Republic. The question of the legality of *Berufsverbote* was raised because of the dilemma as to whether a democratic state may exclude from its public service persons with a political ideology which is deemed to be dangerous to the state. The Soviet Union is a one-party state, and this is written into its Constitution. Moreover, this party has a specific ideology, and the party has defined the aims of state policy based on this ideology. In the Soviet Union, the question is not whether a specific policy is undemocratic or not, or whether it is discriminatory or not, but rather whether or not that policy serves to achieve the goals established by the party.

For this reason, the question of political discrimination in the Soviet Union is not a question which can easily be studied in the framework of the principles of a democratic society; the question has to be seen in the light of the specific purpose of the state as an instrument, in the hands of the Party, to build a communist society. For them there is no dilemma. As Brezhnev stated at the XXVth Party Congress: "democratic means for us that which serves the interest of the people, the interests of the building of communism. We repudiate anything that runs counter to these interests, and nobody can convince us that this should not be the correct approach"⁴.

Anti-discriminatory Provisions in Constitutional Law and Labour Law

Like the 1936 Constitution, the 1977 Constitution of the USSR proclaims that "citizens of the USSR have the right to work, that is, to guaranteed employment [. . .], including the right to choose a profession, occupation, and work in accordance with their vocation, ability, professional training, and education, taking into account the needs of society" (art. 40).

This does not mean that the right to work has to be considered as a subjective right, giving an enforceable claim against the state or economic organisations. Nevertheless, the constitutional proclamation of this right is more than the proclamation of a full employment policy. The right to work serves as a standard for legislative acts or internal rules in organisations, affecting the employment policy of these organisations.

According to the labour laws, "the unfounded refusal to employ [a person] shall be prohibited [and] any infringement whatsoever, whether direct or indirect, of rights or the establishment of direct or

indirect advantages in employment according to sex, race, nationality, or attitude towards religion shall not be permitted" (art. 9 of the 1970 Principles of Labour Legislation of the USSR and the Union Republics, hereinafter referred to as "the Principles of Labour Legislation", and art. 16 of the 1971 RSFSR Labour Code).

An applicant who has been refused employment does not have a legal remedy against an organisation refusing him. He may take action by complaining to the administrative higher agencies, the trade unions, the procuracy, the press, etc., but then he is wholly dependent on the opinion of these agencies about the case. However, the unfounded refusal to engage a prospective employee is a violation of labour laws and may entail disciplinary, and even criminal liability, when the motive of the refusal is e.g. "the attitude towards religion" of the applicant⁵. The same holds for refusals based on social origin, criminal conviction of a relative, past criminal sentences, etc. unless otherwise provided for in a special law. The writer does not know of any criminal case related to one of these discriminatory motives other than in relation to pregnant women. Labour law is silent on discrimination based on political convictions *stricto sensu*, but this silence alone is not sufficient to conclude that political discrimination is considered permissible in law.

The question of politically motivated discrimination as such is not posed officially within the Soviet Union. Begichev, a Soviet scholar who published studies on "the labour law capacities of the citizen", is rather vague on this question. According to him, a refusal to engage a person is unfounded if no grounds for the refusal are mentioned, or if the motives are connected neither with the professional qualities of the applicant, nor with "the interests of the collective or the employees"⁶. This standard, applied to a dissident, would give him little chance. Is it in the collective's interest to have a "dissident" in its rank?

Article 34 of the 1977 Constitution contains another standard for testing Soviet labour law. This article proclaims the principle of equality: "Citizens of the USSR are equal before the law regardless of origin, social and property status, race or nationality, sex, education, language, attitude towards religion, type and character of occupation, place of residence, or other circumstances. The equality of citizens of the USSR is ensured in all fields of economic, political, social and cultural life."

Politically motivated discrimination is not mentioned in this article of the Constitution and in this respect it does not add anything to the anti-discriminatory provisions of labour laws. Of course, a court could include political convictions under the "other circumstances" mentioned in article 34 of the Constitution, but such an interpretation of this article is not very likely. The so-called Leninist principle of "selecting personnel on professional and political qualities" forms, as all Soviet writers on this subject will agree, the basis of employment policy. A constitutional standard which could invalidate political standards would be highly dangerous for the regime. Therefore, political conviction has deliberately been omitted as a constitutional standard, notwithstanding the international obligations of the Soviet Union to take measures to ensure that this form of discrimination does not occur.

Some Aspects of Soviet Labour Law

Present day labour law, as laid down in the Principles of Labour Legislation and in the RSFSR Labour Code, differs only slightly in essence from the labour law introduced in the beginning of the 1920's. Therefore, the practice as it developed before the 1970's is of more than historical importance.

Though the constitutional right to work restricts the arbitrariness of the employer in hiring personnel, the starting point of employment policy is the employer's freedom to select personnel according to the qualifications of the applicants. Pre-employment testing is only rarely used. Rules on security checks have not been published (and probably do not exist) in the Soviet Union⁷. As such checks are conducted by or at the initiative of the relevant agency of the Party, such rules are not legal rules. From a formal point of view, the employer has to derive all information from the employee's workbook, which the applicant must present to his prospective employer. In spite of its imperfections, the workbook is a useful indicator for discriminatory practices as it lists, for example, criminal sentences entailing deprivation of freedom and information concerning the rewards and incentives received by the bearer of the book.

An employer may not, as a rule, dismiss an employee other than on the basis of one of the grounds enumerated in the Labour Code. Two grounds are of special importance: dismissal of an employee who is unfit for his job, and disciplinary dismissal. Article 33 of the RSFSR Labour Code permits dismissal on grounds of "the established non-correspondence of the [...] employee with the position occupied or the work performed as a consequence of insufficient qualifications or a state of health which hinders the continuation of the work; . . . systematic non-fulfillment by the [...] employee, without good reasons, of the responsibilities placed on him by the contract of employment or internal work regulations, if measures of disciplinary or social sanction have previously been taken against the [...] employee".

It will be noted that being unfit for a job as a ground for dismissal is restricted to specific objective circumstances. The state of being unfit does not encompass the personal attitude of the employee towards his duties or similar personal circumstances. Legally, an employee's personal attitude can be a basis for dismissal only on disciplinary grounds. Even so, "incorrect behaviour of an employee which has no connection with his labour duties (e.g. violations of public order, wilful occupation of an apartment, non-fulfillment of social tasks) may not be considered as grounds for dismissing him".⁸

Soviet labour law has been cautious in enacting such grounds for dismissal as having "endangered the safety of the state". The 1971 Labour Code links dismissal only with an inflicted criminal penalty "which excludes the possibility of prolonging the employment" (art. 29). Therefore, criminal activity as such may not serve as grounds for dismissal.

Other rules, such as the necessity for the consent of the trade union committee to the dismissal, and the readily available procedures for seeking reinstatement at work, ordinarily provide the Soviet employee with the necessary guarantees inherent in the right to work.

General labour law excludes the possibility of dismissing an employee for his political or religious convictions. According to court practice, the recorded grounds for dismissal have to be the real motive for the dismissal. This makes it difficult for the employer to seek spurious reasons for dismissing somebody he wants to get rid of.

Employees Not Fully Protected by Labour Law or Not Protected at All

Soviet labour law does not cover all persons engaged by organisations to perform work for a fixed remuneration. *Kolkhoz* members are not deemed to be employees because of the particular property relations and structure of a *kolkhoz*. Servicemen in the Armed Forces, in agencies of the *KGB* (the Committee of State Security), or in similar organisations are held not to be employees, as is the case in many countries. A special category composed of persons working in the Ministry of Internal Affairs such as policemen, prison personnel, and the like, also do not come under the labour laws. Under an Edict of the Praesidium of the USSR Supreme Soviet of 8 June 1973, all recruits to the police force must be "dedicated to the Socialist Fatherland and the cause of communism".

Persons in the categories mentioned above are deprived of the right to bring an action against their employer in an ordinary or other court or in another body independent of the governmental authorities.

As far as can be seen, all other persons engaged in the state sector are held to be employees. Nevertheless, for some categories in certain branches of employment, e.g. in the communication systems of the country, disciplinary statutes have been enacted. These statutes protect, formally, employees against politically motivated discrimination. However, employees coming under one of the relevant disciplinary statutes cannot bring an action before a court or other competent and independent body against the infliction of a disciplinary penalty (including dismissal) mentioned in the statute (art. 94 of the Principles of Labour Legislation; art. 220, RSFSR Labour Code).

It follows that Soviet law does not provide for legal rules or other measures to prevent politically motivated discrimination (and other forms of discrimination) in these spheres of employment. However, it may be argued that some of them are directly connected with the implementation of government policy, which is a permissible ground of discrimination under the ILO Convention. Even so, political opinions may not be taken into account under the Convention in employment where no provision has been made for any recourse other than to the higher authorities of the employing organisation.

The legal position of employees in religious organisations has been subject to many changes in policy. Their legal status, which is defined by a Decree of the USSR Council of Ministers of 23 May 1956, and subsequent rules enacted by the trade unions, varies considerably with the strength of the atheist policy of the Party. According to the legislation now in force, only office cleaners, watchmen, yardkeepers, and stokers fall under the labour laws and the social security systems (provided that they do not also occupy a position related to the religious activities of the church). These employees have to register their contract

of employment with the relevant trade union. A similar rule applies to domestic personnel. However, if the trade union refuses registration, the person concerned does not acquire the status of an employee. In this way some dissidents have been prevented from finding "shelter" from the anti-parasite laws.

Labour law itself does not contain any rules which discriminate between members of the Party and "ordinary" citizens. However, the employment of Party members is significantly affected by their membership, especially in relation to freedom to choose a place of work. An Instruction of the Central Committee of the CPSU of 11 December 1972, provides that a Party member must change his place of work upon the order of the authorities, and can change his place of work at his own request only with the consent of his employer.

Recruitment Procedures

According to ILO Convention No. 111, every person should have equal access to the employment of his choice in accordance with his capacities.

The basic rule for the recruitment of personnel in the USSR is that all key positions in political, economic, and other spheres of public life are filled by members of the Party, or at least under its supervision. This rule dates from the first year after the revolution. This Party monopoly — known as the Party *nomenklatura* — is not the subject of any formal regulation issued by the state, but it has a legal counterpart in the rules governing dismissals. Employees who are employed in key positions or in politically sensitive jobs are not protected by the Labour Code nor by the courts in cases of dismissal. They may complain to higher authorities but that does not give them a real possibility of presenting their case. However, the *nomenklatura* system is not restricted to high level employees who perform work with a policy-making or managerial character. It encompasses all positions, including lower level, which give the employee any authority within the organisation⁹. Every employee who has one or more other employees under him comes under the Party monopoly, i.e. his appointment in that position has to be approved by a Party agency.

The interference of the Party in recruitment policy shows that political criteria may be used in recruiting personnel. According to article 2 of the Party Statute, every Party member has the duty to "implement undeviatingly the Party's policy with regard to the proper selection of personnel according to their political and professional qualities. [He should] be uncompromising whenever the Leninist principles of the selection and education of cadres are infringed". The General Statute on USSR Ministries of 1967 states that the ministry's duty is to create "conditions for promoting politically mature specialists in positions of responsibility".

Party influence on appointments is not restricted to the *nomenklatura* system. According to articles 67 and 68 of the Party Statute, Party groups shall be formed in all state and social collegial bodies "which have at least three Party members", to ensure Party influence in the body. These Party groups are subordinate to the appropriate Party

bodies and "must strictly and unswervingly abide by the decision of the leading Party bodies".

However, only exceptionally is this Party influence laid down in legal rules. A well-known example of this can be found in the recruitment procedures for university staff. Competitive selection of university staff has existed since the first year of the revolution. The relevant rules have frequently been modified. Those in force at present were enacted in 1973. They contain political requirements for candidates to positions in the professorial and teaching staff of higher educational institutions. Article 2 of the 1973 instruction provides that candidates must be "capable of providing preparation for highly qualified specialists in agreement with the requirements of science and technology, in a spirit of high ideology and of dedication to communism"¹⁰.

Certificates of Assessment

Rules providing for a system of certificates of assessment of employees (in Russian: *attestatsiia*) in certain higher posts have been introduced in the last decade. Under this system, certificates are issued by Commissions which assess an employee's performance with a view to recommending his promotion or transfer in appropriate cases. At first this applied only to scientific personnel in research institutes who had not been appointed by competitive selection. Later, the system was extended to all higher positions in the economy, and to teachers in grammar schools, secondary schools, and in schools for advanced training. Later still, it was introduced more generally. A Decree of the Soviet government of 26 July 1973 applied it to "leading employees, engineering-technical workers, and other specialists of enterprises and organisations of industry, construction, agriculture, transport, and communications".

At first the system did not contain political criteria. However, the 1973 Decree recommended that governmental agencies of the USSR and the union republics introduce assessment of various categories of employees "to improve the efficiency of their work and their responsibility for the entrusted affairs, to raise their professional qualification and ideological-political level".

Political considerations enter into this system in two ways. First, as has been seen, political criteria are expressly mentioned, and as they are not objectively measurable, Party membership and participation in political work is liable to play a preponderant role. Second, the Party is represented on the assessment commissions. When applying the political criteria, the point of view of the Party representative is formally not decisive; nevertheless, the stress on the political aspects of assessment is likely to make the Party's vote a decisive one.

This assessment is in practice a decision by the assessment commission as to whether the person concerned is fit for the position he occupies, though formally it is only a recommendation to the employer to promote or transfer the employee, or to dismiss him in cases where transfer to other work with the consent of the employee is impossible. Appeals against the employer's decision are considered either by the courts (in the case of specialists under the 1973 Decree, unless they fall within the Party *nomenklatura*, and teachers in special secondary

education), or by a higher authority. In the latter case, the employee's legal position is very weak.

A common procedure seems to be that the employer, or a representative of the Party committee of the organisation, warns the employee beforehand that he will not pass the assessment, and then presses him to request his own dismissal. This can be seen from accounts in the Soviet press and other publications.

Granting of Academic Degrees and Titles

Related to this system is a procedure for the granting and deprivation of academic degrees and titles. A central place in this procedure is occupied by the High Assessment Commission (HAC), which is responsible to the USSR Council of Ministers. Degrees are usually only granted after the defence of a thesis. The Statute on the Procedure for Granting Academic Degrees and Conferring Academic Titles of 29 December 1975 states that the thesis must, *inter alia*, answer "the requirements posed by the struggle for the development and purity of Marxist-Leninist theory, an argumentative criticism of bourgeois-ideology [. . .], the formation of a Marxist-Leninist world-outlook among workers" (art. 30). Degrees may be granted only to a person who has "mastered Marxist-Leninist theory, who manifests himself positively in [. . .] public activities, keeps up with the norms of communist morality, and who is guided in his activities by the principles of Soviet patriotism and proletarian internationalism" (art. 24)¹¹.

Thus it is clear that moral and political criteria play a significant role in the awarding of academic degrees. Moreover, decisions to award degrees are not taken by a purely academic body but by councils and committees in which the government (through the HAC), the Party and the trade unions have an important voice.

People may also be deprived of their academic degrees and titles on political grounds. Under article 104 of the 1975 Statute, the competent council "may take a decision to send to the HAC of the USSR a petition to deprive scientific and scientific-pedagogical employees of academic degrees and titles [. . .] in cases of the commission of amoral, anti-patriotic, and other misdeeds, not compatible with the title of Soviet scholar"¹¹.

Law of Dismissal and Politically Motivated Discrimination

The RSFSR Labour Code of 1922 did not contain any rule which made it possible for the authorities or the employer to dismiss an employee on political grounds. However, article 49 stated: "every contract of employment may also be terminated on the demand of the trade union". While the employer could lodge an appeal against this "demand", the employee could only ask the higher trade union bodies to reverse the decision. The demand of the trade union itself was considered to be the grounds for the subsequent dismissal; therefore, a union can demand dismissal on grounds not enumerated in the Code.

The trade unions have used this power mainly to demand the dismissal of a member of the managerial staff, but in some instances, they have also used it against rank and file employees. However,

according to article 20 of the Principles of Labour Law, the relevant articles of the labour codes of the Republics, and a decision of the State Committee for Labour and Wages and the Central Council of the Trade Unions of 23 June 1971, the trade union may only resort to this right in order to terminate a contract of employment of a "leading employee" (the director, a chief specialist, a leader of a section, or their deputies), and then only in cases of violation of the labour laws or of "bureaucratic" behaviour. Thus this trade union power can, at least legally, no longer be used against rank-and-file dissidents. Nevertheless, these union powers remain as a politically convenient means for the Party to deal with politically unreliable managers.

Other means are available, however, to get rid of 'unwanted elements'. In a ruling of 1924 the RSFSR Supreme Court held that summary dismissal by the state security agencies was possible in the case of employees of the Voronezh Railways¹². However, this ruling was not followed by others (at least none have been published). The authorities favoured another solution for cases involving security risks: they simply deprived certain employees of all court protection.

After the consolidation of the Party *nomenklatura* system in 1926, the RSFSR Supreme Court ruled that "taking into account the special nature of the work of employees of state institutions and state enterprises whose work requires not only a specific training but also a particular confidence in the person, and of persons having the salary of responsible political employees, complaints of the enumerated persons concerning unfair dismissal can only be considered in administrative procedure"¹³. This court decision was adopted in 1928 as the basis for the 1928 rules for the settlement of labour disputes, under which an employee mentioned in a special list cannot go to court to challenge (in particular) his dismissal. In 1940 the USSR Supreme Court extended this to the higher teaching staff of the universities.

Although the special list has been the subject of much criticism in the USSR, it was extended in 1974. The weak position of higher personnel is made more acute by the fact that Soviet law does not provide them with procedural guarantees. There are no rules that an employee of this kind who demands reinstatement shall be heard; there are even no rules as to how, and especially by whom, the "dispute" is to be considered. The only enacted rules are that the dispute has to be considered within 10 days and that the decision has to be communicated to the employee immediately.

On the basis of an instruction enacted in 1930, a teacher could be dismissed for unsuitability when e.g. he had participated in religious services or had committed "anti-pedagogical" acts (use of force, insobriety, etc.). This instruction was abrogated in 1947, and the general law of dismissal became applicable. However, only ten years later the courts made it possible to dismiss a teacher for "immoral behaviour", and this ground for dismissal was included in the 1970 Principles of Labour Legislation.

The teaching staff of universities can also be dismissed when they are not re-elected at the end of their term, or when they do not submit an application for re-election, or when they are declared to be unfit for the position occupied by the university, or faculty council, or by the rector

or head of the institution. The re-election of university employees appointed after a competition has to take place every 5 years. The decision, taken by the faculty council or university council, is made on the basis of a report of a commission on which the Party is represented. The candidate has to submit a statement on, *inter alia*, the results of his ideological-political training. In deciding on re-election, the ideological-educational work of the candidate has to be taken into account.

Criminal Law

All the above rules for the application of political criteria in connection with employment are rules of labour law or administrative law. In addition, Soviet criminal law provides for two penalties which directly affect a person's employment or "labour law capacity".

The Criminal Codes provide for the penalty of deprivation of the right to occupy a certain position for a term up to 5 years, and the penalty of dismissal from office (art. 29 RSFSR Criminal Code). These penalties may be imposed upon conviction in a criminal case if the court is of the opinion that the accused is unfit to occupy a specific position due to the nature of his crime, provided that the criminal behaviour is directly connected with his work.

At the end of the 1970's, the judges of the Supreme Courts of the RSFSR and the USSR declared unofficially that orders for dismissal on the grounds of being unfit should be made only in very serious cases, because such a dismissal "not only deprives the person of the possibility of working in his organisation, but also in his chosen speciality", i.e. his profession¹⁴. For these reasons the courts are called upon to consider whether the non-performance of the duties has not been caused by other circumstances, e.g. by undisciplinary conduct.

The employee's profession and the fact of his dismissal as being unfit are entered in his workbook. He has to present this book to all future employers. Hence, it is difficult or impossible for him to get another job in his former profession. Accordingly, in their efforts to use the labour law against dissidents the security authorities have concentrated on the provisions concerning "being unfit" and on the related provisions concerning "immoral behaviour".

As indicated above, pressure is frequently brought to bear against dissident employees and other 'unwanted elements' to resign from their employment. According to court decisions in non-political cases, where pressure of this kind occurs, the employee's petition for dismissal is not regarded as a voluntary one. Consequently, the employer cannot lawfully dismiss the employee on the basis of such a petition. The principle developed by the courts is that the employee's petition must be an expression of his "real will". In political cases, these rules are not strictly applied, and pressure from the employer or the Party or other agencies is very common, as is clear from reports in the *Chronicle of Current Events*.

Another legal ground frequently used to dismiss unwanted employees is dismissal for redundancy. In political cases the courts will

not scrutinise these cases in the same way as in non-political cases, and there is less chance of getting these cases reviewed on appeal.

Conclusions

The general body of Soviet labour law, as it affects the ordinary rank and file employee, is generally in harmony with ILO Convention No. 111 on Discrimination in Employment and Occupation. The employee is protected by a number of guarantees which are stronger than those in many other countries, at least from a formal point of view.

However, Soviet courts and lawmakers had already decided in the 1920's to reject the principle of equality. They placed higher personnel in a special position which made them, by statute, wholly dependent upon their employer, the higher authorities, and especially upon the Party. This discriminatory policy was established, *inter alia*, for political reasons. Through the special laws introduced in that period, politically motivated job discrimination became possible without any remedy at law. The present policy of the Soviet Union is based on the same lines, but the number of positions falling under these special provisions has grown over the past years.

Soviet law did not, and does not, formally extend the requirement of political loyalty to all employed persons. Rather, it has specified all those positions where political opinion may be used as a basis of employment. But, in listing these positions, the Soviet lawmakers have not used the standard in the ILO Convention, i.e. persons involved "in the implementation of government policy". The director of a restaurant, a foreman, a film director, a radio commentator, an Intourist interpreter, and many others who come within the Party *nomenklatura*, are not, in the writer's view, involved "in the implementation of government policy". Neither are teachers, university staff, and research fellows.

Moreover, the special procedures which apply to these employees and others conflict with the requirement for an independent "competent body" which should hear appeals against the permissible forms of political discrimination in accordance with Article 4 of Convention No. 111.

Before 1971 the lawmakers did not feel the need to include a specific legal basis for the use of political criteria in employment, other than that already implicit in the *nomenklatura* system.

Since 1971, discrimination clauses have begun to appear in statutes concerning procedures for competitive selection and for certificates of assessment. Some writers have noted a growing tendency towards "legality" (*zakonnost*) in the Soviet Union. If legality means only that there should be a legal basis for an action by the administrative authorities or the employer, then this paper does not challenge the hypothesis of a tendency towards legality. In his paper on the "Soviet Law of Job Security", Zigurds L. Zile came to the conclusion that as "a result of incremental improvements of the last decades", employees seem to be "better off than they were twenty or so years ago". In Zile's view, the courts are, "in the spirit of the written law, favouring employees over management in disputes affecting job security"¹⁵.

However, on the basis of the matters analysed in this paper, there should be added: "unless politics play a role".

The place of non-communist specialists in a workers' state has been a delicate question from the first years after the 1917-Revolution. Obviously, present day Soviet politicians are of the opinion that their country has sufficient politically reliable trained personnel to enable them to conduct a policy of excluding all specialists who are not completely loyal from positions corresponding to their qualifications. All specialists should, as is stressed in decrees of the Central Committee of the CPSU and the USSR Council of Ministers, be "active bearers of the Party policy"¹⁶. Notwithstanding the adherence of the Soviet Union to the ILO, an international organisation whose policy is directed against politically motivated discrimination in employment, and notwithstanding the ratification by the Soviet Union of its Convention No. 111 on Discrimination in Employment and Occupation, the USSR has in the past 10 years refined its legal framework so as to rid its organisations of specialists who do not agree with all aspects of Party and government policy.

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¹ *Vedomosti Verkhovnogo Soveta SSSR* 1961 No. 44 item 448.

² *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 47th session of the International Labour Conference, 1963, Report III (part IV), Geneva 1963, 193-194; N. Valticos, *Droit International du Travail, Traite de Droit du Travail*, Vol. 8, Paris 1970, 293-294.

³ *Report of the Committee of Experts*, 1971, 184; 1973, 180.

⁴ *XXV s"ezd Kommunisticheskoi Partii Sovetskogo Soiuza, Stenograficheskii Otchet*, Moscow 1976, Vol. 2, 111.

⁵ Art. 142 RSFSR Criminal Code; Resolution of the Presidium of the RSFSR Supreme Soviet of 18 March 1966, *Vedomosti Verkhovnogo Soveta RSFSR* 1966 No. 12 item 221.

⁶ B. K. Begichev, *Trudovaia Sposobnost' Sovetskikh Grazhdan*, Moscow 1972, 231.

⁷ See E. N. Korshunova's review of E. Astrakhan, S. Karinskii, A. Stavtseva, *Rol' Sovetskogo Trudovogo Prava v Planovom Obespechenii Narodnogo Khoziaistva Kadrami*, Moscow 1955, in *Sovetskoe Gosudarstvo i Pravo* 1956 No. 8, 143. The whole procedure for hiring an employee takes one or two weeks, *Trudovoe Pravo i Povyshenie Effektivnosti Obshchestvennogo Proizvodstva*, Moscow 1972, 27.

⁸ *Kommentarii k Zakonodatel'stvu o Trude*, Moscow 1975, 77, 470.

⁹ See Annex No. 1, List No. 1 of the Statute on the Procedure for the Settlement of Labour Disputes, enacted by Edict of the Presidium of the USSR Supreme Soviet of 20 May 1974, *Vedomosti Verkhovnogo Soveta SSSR* 1974 No. 22 item 325.

¹⁰ An English translation of the instruction may be found in *Soviet Statutes and Decisions* Vol. 15 1978 No. 1, 52.

¹¹ *Ibid*, 1976 No. 3 item 14.

¹² *Voprosy Truda* 1925 No. 2, 171-172.

¹³ Resolution of the RSFSR Supreme Court of 7 February 1927, *Sudebnaia Praktika RSFSR* 1927 No. 3, 1.

¹⁴ *Biulleten' Verkhovnogo Suda RSFSR* 1977 No. 8, 12; V. M. Zharkov, "Uvolnenie iz-za Nesootvetstviia Zanimaemoi Dolzhnosti", *Sovetskoe Gosudarstvo i Pravo* 1979 No. 2, 121.

¹⁵ Z. L. Zile, "Soviet Law of Job Security since Stalin: Controlling the Individual Employee's Choice in a Non-Market Economy", in *Soviet Law after Stalin*, Part I, *The Citizen and the State in Contemporary Soviet Law*, (D. D. Barry, G. Ginsburgs, & P. B. Maggs, eds.), No. 20 (I) *Law in Eastern Europe*, (F. J. M. Feldbrugge, ed.), Leyden 1977, 290-291.

¹⁶ Decree of the Central Committee of the CPSU and the USSR Council of Ministers on 18 July 1972, *Sobranie Postanovlenii Pravitel'stva SSSR* 1972 No. 14 item 73.

JUDICIAL APPLICATION OF THE RULE OF LAW

*Habeas corpus: release of prisoners held in prolonged detention
awaiting trial: duty of State to provide legal aid.*

Hussainara Khatoon and Others v. Home Secretary, State of Bihar,
Patna.

Judgment delivered by the Supreme Court of India (P. N. Bhagwati
J. and D. A. Desai J.), New Delhi, 9 February 1979, on a habeas corpus
petition.

The following extracts from the judgment indicate the nature of the
petition and the decision:—

“We find from the lists of undertrial prisoners filed before us on behalf of the State of Bihar that the undertrial prisoners whose names are set out in the chart filed by Mrs. Hingorani today have been in jail for periods longer than the maximum term for which they could have been sentenced, if convicted. This discloses a shocking state of affairs and betrays complete lack of concern for human values. It exposes the callousness of our legal and judicial system which can remain unmoved by such enormous misery and suffering resulting from totally unjustified deprivation of personal liberty. It is indeed difficult for us to understand how the State Government could possibly remain oblivious to the continued incarceration of those undertrial prisoners for years without even their trial having commenced. The judiciary in the State of Bihar also cannot escape its share of blame because it could not have been unaware of the fact that thousands of undertrial prisoners are languishing in jail awaiting trial which never seems to commence. . . . We, therefore, direct that these undertrial prisoners should be released forthwith as continuance of their detention is clearly illegal and in violation of their fundamental right under Article 21 of the Constitution.

Then there are several undertrial prisoners who are charged with offences which are bailable but who are still in jail presumably because no application for bail has been made on their behalf or being too poor they are unable to furnish bail. It is not uncommon to find that undertrial prisoners who are produced before the Magistrates are unaware of their right to obtain release on bail, and, on account of their poverty, they are unable to engage a lawyer who would apprise them of their right to apply for bail and help them to secure release on bail by making a proper application to the Magistrate in that behalf. Sometimes the Magistrates also refuse to release the undertrial prisoners produced before them on their personal bond but insist on monetary bail with sureties, which by reason of their poverty the undertrial prisoners are unable to furnish and which, therefore, effectively shuts out for them any possibility of release from pretrial detention. This unfortunate situation cries aloud for introduction of an adequate and comprehensive legal service programme, but so far, these cries do not seem to have evoked any response. We do not think it is possible to reach the benefits of the legal process to the poor, to protect them against injustice and to secure to them their constitutional and statutory rights unless there is a nation wide legal service programme to provide free legal services to them. It is now well

settled, . . . that when Article 21 provides that no person shall be deprived of his life or liberty except in accordance with the procedure established by law, it is not enough that there should be some semblance of procedure provided by law, but the procedure under which a person may be deprived of his life or liberty should be 'reasonable, fair and just'. Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, fair and just'. It is an essential ingredient of reasonable, fair and just procedure to a prisoner who is to seek his liberation through the court's process that he should have legal services available to him.

There are also various undertrial prisoners who have been in jail for periods exceeding one-half of the maximum punishment that could be awarded to them if convicted, for the offences with which they are charged. . . .

There is no reason why these undertrial prisoners should be allowed to continue to languish in jail, merely because the State is not in a position to try them within a reasonable period of time. It is possible that some of them on trial may be acquitted of the offences charged against them and in that event, they would have spent several years in jail for offences which they are ultimately found not to have committed. What faith would these people have in our system of administration of justice? . . . We would direct that on the next remand dates when they are produced before the Magistrates or the Sessions Courts, the State government should provide them a lawyer at its own cost for the purpose of making an application for bail and opposing remand. . . . The State Government will comply with this direction as far as possible within a period of six weeks from today and submit report of compliance to the High Court of Patna. We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. . . .

The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure, but, as pointed out by the Court in *Rhem v. Malolm* (377 F. Supp. 995): "The law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty". . . .

The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the *qui vive*, to enforce the fundamental right of the accused to speedy trial by issuing necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial."

Finally, the court called for detailed particulars of the location of courts of magistrates and courts of sessions in the State of Bihar together with the total number of cases pending in each of these courts on 31 December 1978, with a year by year breakdown and an explanation why cases pending for more than 6 months had not been disposed of.

The reaction of the State of Bihar was to release 10,000 of the prisoners awaiting trial.

A number of other similar petitions were filed in the Supreme Court. On 4 May 1977 the Supreme Court, on a petition filed against the State of Meghalaya, directed state governments to release tens of thousands of other prisoners who had been held in custody for more than six months without being charged or brought to trial. For relatively new prisoners the Court directed that investigations be completed and charges laid within 60 days, and ordered sessions courts to ensure that cases be disposed of within six months.

ICJ News

Commission Members

The election was announced on 22 February 1979 of three new members of the Commission:—

Mr Andres Aguilar Mawdsley of Venezuela, one of the most distinguished Latin-American jurists, is a former president of the Inter-American Commission on Human Rights, a former Minister of Justice and a former Ambassador of his country to the United Nations in Geneva. He has been a professor of law since 1958 at the Central University.

Mr François-Xavier Mbouyom of Cameroon is a Doctor of Law at the University of Paris. He has been a member of the judiciary since 1960 and Procureur-général of the Supreme Court of the United Republic of Cameroon since 1972.

Don Joaquin Ruiz-Gimenez of Spain is a leading member of the Christian Democratic movement and President of the National Commission for Justice and Peace. He has been a professor of law successively at the Universities of Seville, Salamanca and Madrid. He is a former Ambassador to the Holy See and former Minister of National Education and Member of the Cortes. He retired from the latter in 1965 following disagreement with a restrictive law on associations.

Joseph T. Thorson, P.C., Q.C.

The death of Joseph Thorson of Canada, the first President of the International Commission of Jurists, is announced with deep regret. A man of outstanding integrity, courage and force of character, he made a notable contribution to the development of the ICJ and to its policies in the formative years.

Warsaw Conference of the Legal Protection of the Rights of the Child

A European conference on the Legal Protection of the Rights of the Child was held in Warsaw on 16-19 January, 1979, organised by the International Commission of Jurists, the International Association of Democratic Lawyers and the Polish Association of Jurists. This was the first conference in Europe organised by the ICJ jointly with lawyers from the Eastern countries. It proved to be an interesting and fruitful meeting, with a wide measure of agreement in spite of ideological differences.

The Polish Association of Jurists, as the host organisation, generously provided conference premises in the Palace of Culture and Science, interpretation in four languages (Polish, Russian, French and English), and a most interesting series of visits for the participants, including one to the new Children's Hospital built as a memorial to the 13 million children killed in the Second World War, of whom over 2 million came from Poland.

Apart from numerous Polish jurists, some 50 participants came from abroad, approximately half from the socialist countries of Eastern Europe (Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Rumania, USSR and Yugoslavia) and half from Western Europe (Austria, Belgium, France, German Federal Republic, Ireland, Italy, Netherlands, Norway, Sweden, Switzerland and the United Kingdom), as well as representatives of the UN Secretariat for the International Year of the Child, the UN Division of Human Rights and the UN High Commissioner for Refugees. Many of the participants were jurists of considerable eminence with experience and expertise in the field of family law.

Professor Adam Lopatka, President of the Polish Association of Jurists and Polish delegate to the UN Commission on Human Rights, presided at the

opening session and the Polish Minister of Justice, M. Jerzy Bafia, attended both the opening and closing sessions of the Conference, as well as hosting a reception to the participants.

Working Papers were prepared by the three General Rapporteurs for the three Commissions of the Conference as follows:—

- (i) The Evolution of the Concept of the Rights of the Child, by Maître Roland Weyl (France, IADL);
- (ii) The Responsibility of the Family and of Society towards the Child, by Dr Olive Stone (UK and Canada, ICJ);
- (iii) State Organs Empowered to take Decisions about Children, by Dr Marta Katona Soltez (Presidente de Chambre, Supreme Court of Hungary).

Several other very informative papers were prepared by participants describing the legislation and practice concerning the rights of the child in their own countries. At the Closing Plenary Session, reports were received from the three Commissions, and a statement of principles concerning the legal protection of the rights of the child was approved. This statement is as follows:—

Statement of Principles on the Legal Protection of the Rights of the Child

The participants agreed unanimously upon the following principles:—

1. The State has an important responsibility to secure the Rights of the Child through support to the family in need, and thus to ensure that the child will grow up happily from its birth.
2. To this end, the State should set out clearly what is required of parents to ensure the welfare of the child in society, and also how the State and organisations and individuals in society propose to assist parents in the upbringing of their children.
3. At the same time, both the state and parents should respect the right of the child to be consulted about its welfare whenever the child is in a position to express such opinions.

In the particular areas of the child's development which are the subject of education, health and recreation, the following more detailed conclusions were reached:—

Education

4. The duty to provide the means of education (including the training of teachers in adequate numbers) falls in the first place on the State.
5. In deciding on the content and form of programmes of education, the State, parents, teachers and the children themselves, and their representative organisations, all have an important role. How the responsibility for those decisions is distributed must depend in part on the institutional and social structures and traditions of different countries, but there are dangers in placing too great a degree of responsibility on any one of the four parties to the exclusion of the others. Therefore, even where the law places that responsibility on a single organ, that organ should ensure that all the other parties are able to participate in the making of the decisions.
6. So far as possible, both parents and children should benefit from improvements in methods of education by having a choice of those best suited to enable the child to develop its abilities to the full.
7. Although it is desirable to provide special educational facilities for children who are exceptional either in their talents or in their handicaps, it is important that their education should, so far as possible, be integrated with that of other children.
8. Where it has not yet been realized both in law and in fact, priority should be given, within the available resources, to equating education for girls and women

with that of boys and men, in all fields and at all levels, including mathematics, science, engineering, economics, medicine (including all its specialities), and administration, as well as the arts, humanities and sports.

Health

9. The obligation to provide adequate health care for all children falls primarily upon the State.

10. As a child becomes older and more responsible, its own views on the events which will shape its future become increasingly important. Even before it reaches the age of legal majority, it should be able to participate in any major decisions about its physical and mental health. In order that its participation should be both free and informed, the child should have access to full information and independent advice, and procedures should be made available for the resolution of differences between the views of the child and those of its parents.

11. The primary responsibility for preventing a child from pursuing activities harmful to itself (such as drinking alcohol, smoking tobacco, or taking other drugs) falls upon the parents, both by education and by example. Although the State can reinforce this protection by suitable legislation and education, there is an age (not later than the age of legal majority) after which a person has the sole moral responsibility to make decisions on these matters, and accept the consequences which the laws of his country impose.

Recreation

12. The obligation to provide means for the recreation of children falls primarily on the State.

13. As their age increases, the choice by children of different forms of recreation should increase also. Older children should not be forced to engage in forms of recreation which they do not wish to pursue: at the same time, they should be free to pursue forms of recreation which they enjoy and which do not harm others.

Child labour

14. Further, as child labour is damaging for the development of the child in its education, its health and its recreation, we demand the end of child labour everywhere and we call for all nations to implement the provisions of Convention No. 138 of the International Labour Organisation.

Accordingly, the Conference concluded that:—

15. A distinction should be drawn between the way of dealing with rights concerning children whose age entails their absolute legal incapacity, and those for whom, by reason of their greater maturity, the law can provide forms of partial legal capacity, especially in the choice of their studies, their profession and, if necessary, their residence, which will prepare them by stages for the exercise of their full legal capacity on attaining majority.

16. Protection of the child should, in the case of interventions by public authorities, be accompanied by legal procedures which ensure judicial control, full discussion and rights of appeal, so as to ensure that the concept of the 'interests of the child' shall be applied in the most objective way taking into account the complex realities of specific situations.

17. In their relations with families and individuals concerning children, State institutions and social organisations should avoid as far as possible making the child an object of dispute and should act in a spirit of the widest possible cooperation, as indeed should individuals, and particularly the parents, in their relations with each other.

18. Particular importance attaches to Principle 7 of the UN Declaration on the Rights of the Child, since the interests of the child include the right to be

prepared by an adequate education so as to be able to face the complex problems of his or her future adult life, including all that this implies in terms of the duties, efforts and constraints inherent in social life.

19. The children of refugees and child refugees should be treated in the same way as other children and enjoy the same protection, both in their country of asylum and abroad.

20. The same principle should be applied to the children of migrant workers.

21. It follows also that equality of opportunity should be effectively guaranteed to children by the provision of the necessary material and cultural means. This should be done both by public facilities placed by the community and the State at the disposal of the children and the adults responsible for them (by reason of their importance for the multilateral development of the child), as well as through social security and welfare benefits which ensure to the families the material and cultural conditions of life to enable them to fulfil their role under truly favourable conditions. The satisfaction of these needs should become an integral part of the development plan of each country.

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Published by the International Commission of Jurists and the Swiss Committee
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Le Développement et les Droits de L'homme

Edited by the International Commission of Jurists and published as a special issue of the
"Revue Sénégalaise de Droit", 255 pp.

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A report of an international seminar convened by the International Commission of Jurists and the Association Sénégalaise d'Etudes et de Recherches Juridiques and held in Dakar in September 1978. The 48 participants included senior government officials, judges, lawyers, sociologists, economists, trade unionists and churchmen from 12 francophone African countries. The report includes the keynote address by the President of the ICJ, Mr Kéba Mbaye, the working papers, a summary of the discussions, and the forceful conclusions and recommendations. Appendices contain the text of the International Bill of Human Rights. The working papers and discussions deal with 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, of women and of the child, ombudsman institutions, and the independence of the judiciary.

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