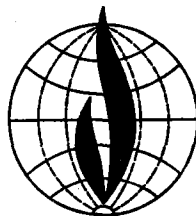


# THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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## *European Human Rights Prize*

The Council of Ministers of the 21 member Council of Europe, on the recommendation of the Consultative Assembly, has awarded the first European Human Rights Prize to the International Commission of Jurists. This is in recognition of its work for the promotion, understanding and observance of the rule of law and the legal protection of human rights throughout the world, and its action within the United Nations and the Council of Europe against torture.

The Commission is deeply honoured and very encouraged by this recognition of its work.

Less encouraging have been some of the developments in the last year. The US hostages in Iran have continued to be illegally held, while Iran has been resisting with courage and determination the destructive attack made on it by Irak. The illegal intervention by the USSR in Afghanistan has also continued throughout the year, with heavy consequences for détente and international relations. The new democracy in Bolivia was strangled at birth by yet another military coup, described in this issue. The new military régime in South Korea has also resulted in a massive and severe repression, symbolised by the death sentence passed on Kim Dae Jung, following a trial which has convinced no-one. The killing of over 2,000 persons by terrorists of left and right in Turkey has led to the anticipated military intervention, suspending, it is to be hoped temporarily, the democratic process, and resulting in some disturbing brutalities. The situation in Guatemala and El Salvador continues to deteriorate.

Against this background two events stand out, the continuance of the democratic institutions under the new Constitution of independent Zimbabwe, and the creation of free trade unions in Poland. In both countries the situation is tense and precarious, but fervent hopes for their success are shared by many outside as well as inside their frontiers.

# *Human Rights in the World*

## *Bolivia*

On 17 July 1980 the slow and difficult process of returning to a democratic and law-abiding system of government was brutally interrupted by the 189th coup d'état which has taken place in Bolivia, bringing the number of coups well beyond the number of years of independence the country has enjoyed, which totals 155.<sup>1</sup>

### *Background*

In 1978 the slow advance towards democracy began, towards a government elected by the people in accordance with the examples set by Bolivia's neighbours — Ecuador and Peru. Unhappily, the military in Bolivia look upon the government and the country as their property; they call elections and when these have been held, it is the military who decide whether the people have made a good or bad choice, and depending on this, whether or not they will respect the result of the elections. Lately, they have apparently decided that the people have always made the wrong choice.

After several years of repressive military government, during which systematic violations of human rights were noted, General

Hugo Bánzer Suárez,<sup>2</sup> who was President at the time, was supposed to call elections in response to the demands made by a tremendous mass movement which pressed for elections. This movement had been initiated by a hunger strike, begun by the wives of four miners, which had then spread rapidly throughout the country, eventually involving 1,500 hunger strikers. On 19 January 1978, the Bánzer government had to decree a total amnesty for political prisoners, allow exiles to return, reinstate the miners and other workers who had been dismissed as a result of the mass movement, cease to apply the repressive measures that were preventing the free operation of the trade unions, political parties and the press, and call elections.

This was the first of the three elections that have been held in the last three years to designate the President of the Republic and to appoint a Parliament. In all three the majority voted in favour of a democratic system and against the military regime. The election of 9 July 1978 had to be annulled because of flagrant fraud on the part of the government in its efforts to ensure the election of its candidate, General Juan Pereda. On 21 July, Pereda himself having been unable to prevent the annulment of

1) Bolivia has an area of 1,098,580 km<sup>2</sup>, and 5,800,000 inhabitants, more than 50 % of whom are Quéchua and Aymara indians.

2) Bánzer had come to power after overturning the government of General Juan José Torres in August 1971. Torres, who had left-wing sympathies, was assassinated in Buenos Aires in June 1976.

the elections, carried out a coup d'état and assumed the Presidency. On 24 November he was overthrown by General David Padilla, who also proclaimed himself President, but in response to popular pressure the coup d'état was represented as move for democratization.

Elections were called for the second time, and were held on 1 July 1979. In these, the centre-left opposition (Unión Democrática and Popular, UDP), headed by Hernán Siles Zuazo, obtained the most votes. Siles Zuazo had been one of the leaders of the nationalist revolution of 1952, and had subsequently been a Minister and later President of the Republic. As the winning party in the elections (UDP) did not have an absolute majority of the votes cast, it was the duty of Congress under the Bolivian Constitution to appoint the President. Finding it impossible to arrive at a political agreement, Congress did not appoint any of the candidates who had led the poll, but instead nominated one of its members (Walter Guevara) as interim President for one year until new elections were held. This solution was nevertheless unable to avert a further coup d'état, on 1 November 1979, in which Colonel Natusch Busch took power. The unions, the Church, the human rights associations, Parliament and the general public reacted by a general strike and other actions, which, after a few days, brought about the failure of the coup d'état. Congress then nominated Sra. Lidia Gueiler as interim President, who thus became the first woman in the history of Bolivia to assume the highest post in the land.

Sra. Gueiler honoured her promises. She took steps to pursue the restoration of democracy, which had begun in 1978, and called elections for 29 June 1980.

However, the restoration of democracy began to be threatened early in 1980. Military groups and extreme right-wing and

conservative civilians carried out a "destabilization" campaign, marked by personal threats, terrorist attacks, the spread of rumours and military statements condemning Parliamentary weakness and the political parties. All this created a state of confusion and uncertainty, which could be used to justify in the eyes of the public a new military intervention caused by the "failure of the politicians". Among the threatening statements were the words of General Luis García Meza, then Commander-in-Chief of the Armed Forces, who said in the course of a television interview on 19 June 1980: "The armed forces will not allow any more attacks to be made on any of its members or on the institution [of the armed forces] itself... as in the case of Sr. Marcelo Quiroga Santa Cruz who, without knowing anything about the matter, concerns himself with the economic life and organization of the armed forces as an institution... The armed forces, and I myself, as a man, will know how to put this fellow in his place." Quiroga Santa Cruz, Secretary-General of the Socialist Party (PS-1), Parliamentary Deputy, and presidential candidate in June 1980, was ruthlessly assassinated on the day of the 17 July coup d'état. As a Deputy, he had called for ex-President Bánzer to be put on trial for his personal responsibility for a large number of offences alleged against him. On the same day as General García Meza made his threatening statement, Bánzer said: "if violence and anarchy became widespread in the country, the armed forces will have to intervene and overthrow President Lidia Gueiler, because the country wants peace..."

The future authors of the coup d'état passed from threats to action. They carried out a number of acts of violence, which were attributed to "left-wing terrorists" by the information services of the armed forces. In the course of 1980, attacks with explosives were made on private homes, pol-

tical headquarters, union offices, the United States Consulate in the town of Santa Cruz, the Prefecture in the same town, injuring the Prefect, and on demonstrators. There were also isolated cases of assassination. Similar attacks were made on "nationalist", i.e. extreme right-wing, centres. Responsible leaders of opposition organisations claimed to have proof that the attacks were fomented if not actually carried out by members of the intelligence services in order to create a general climate of fear and uncertainty, so as to justify a military intervention.

In response to an appeal by the Bolivian Workers' Confederation (Central Obrera Boliviana - COB), a National Committee for the Defence of Democracy (CONADE) was set up, consisting of the majority of the unions, the democratic political parties of different ideological persuasions, and popular, religious and human rights organisations.

### *Elections and the Military Coup d'Etat*

On 29 June, elections were held and again were won by the UDP, which obtained 38 % of the votes, with Siles Zuazo as its presidential candidate. Before he could be formally invested by Congress (the date set was 6 August), but after political agreement had been reached with other parties which were ready to support his investiture, the military coup d'état of 17 July took place and the acting President was overthrown by General García Meza.

In preparation for the coup, attacks were launched on the offices of various trade union, political and popular organisations. Most of these were carried out by groups of armed civilians moving around in ambulances and jeeps. They were allowed to do whatever they wished by the soldiers,

who maintained an attitude of complete passivity. It is reported that known leaders of the far right, particularly the Bolivian Socialist Falange (Falange Socialista Boliviana - FSB) were active in these groups, together with ordinary criminals who had been released from prison and whose connections with the drug traffic are well-known in the country. The attacks included an assault on the Central Obrera Boliviana in La Paz, when a meeting of CONADE was being held to decide what position should be taken in view of the announcement of a military uprising in Trinidad, Department of Beni. All those present at the meeting were arrested, some of them were wounded, and the miners' leader, Gualberto Vega, was killed. Marcelo Quiroga Santa Cruz was also assassinated, after being wounded and, in the presence of several witnesses, taken away to an unknown place. Three days later the authorities announced that he had died "in combat", but would not permit the autopsy requested by his family. Among the detainees were Juan Lechín Oquendo, Secretary-General of COB and leader of the 1952 revolution, and Father Julio Tumiri, a priest and President of the Permanent Assembly on Human Rights. Another incident was the attack on the Quemado Palace, the seat of the government, where the same groups of civilians arrested the Ministers who were holding a Cabinet meeting, together with a number of officials. The Palace guard made no attempt to intervene. Other attacks were made on broadcasting stations such as "FIDES", directed by Jesuit priests, whose premises were completely destroyed, and Radio San Gabriel of the Catholic Church and on the premises of the periodical "Presencia".

In short, in one lightning foray, the supporters of the coup d'état deprived the political and trade union associations of their leaders, silenced the press and then pro-

ceeded to launch a military attack on the mining centres, which were the stronghold of the resistance. After the coup d'état, it was discovered that the uprising of the VI Army Corps in the Beni region had been merely a device to distract the attention of opponents of the coup and make them believe that a military uprising was taking place but limited to an area that was far from the capital.

On 18 July, under pressure President Lidia Gueiler signed a letter of resignation, and General Luis García Meza assumed the Presidency.

The military coup of July 1980 was the most violent of all those that have taken place in Bolivia, as it was accompanied and succeeded by ruthless and widespread repression, which was particularly severe in the mining areas. There is evidence of the participation of Argentine officials belonging to the Argentine security services in the preparation and execution of the coup d'état, and denunciations have been made to this effect. The military regime in Argentina no doubt hoped to strengthen its position in the South cone as a result, to weaken the Andean Pact system and isolate other processes for the restoration of civilian rule which are taking place in the countries of the region.

For all these reasons, the coup d'état has characteristics that differentiate it from the others which attempted to settle a power struggle or the question of the supremacy of one economic sector over another within the boundaries of the country. It has a regional dimension, as the Argentine intervention and the similarity of methods and objectives with authoritarian regimes in the South cone lead us to believe. In addition, many of the military officers implicated in the coup were acting to

protect their own interests and privileges, which were threatened by the advent of a democratic and popular government. This applies especially to those involved in smuggling and, in particular,<sup>1</sup> drug smuggling. Several of them had already been denounced in the Bolivian Parliament with a demand for a full investigation.

### *Post-Coup Institutions*

Once the pronunciamiento had become an established fact, a state of siege and curfew were decreed. The first announcement by the authors of the coup proclaimed "the whole country a military zone", thus enabling Martial Law to be instituted. Parliament was dissolved, and until it is re-established, government is to be by decree. In their proclamation of 20 July, the military made known their programme which is entitled "Participation of the armed forces in the present political process". Among the points made is the maintenance of the 1967 Constitution "in so far as it does not conflict with the aims, objectives and actions of the new government", the preparation of a statute for the political parties and the adoption of union and labour laws. The new Head of State declared that "electoral adventures are over".

At the end of September 1980, it was announced that government institutions would be reorganized, and a Governing Junta set up composed of the Commanders in Chief of the Army, the Navy and the Air Force. The Junta is to be the "Supreme Government"; it will command the armed forces and head the "process of national reconstruction". The statute which will regulate its functions invests the Junta with all political legislative and electoral powers, in-

1) Bolivia is one of the principal producers of cocaine. The illegal traffic in this drug is estimated at about 500 million dollars a year.

cluding designation of the Head of State. This system is to be maintained for three years, after which the Junta itself will evaluate the situation and decide whether to prolong it or not.

As far as the judicial power is concerned, all the members of the Supreme Court and all the Presidents and many members of the regional High Courts were removed from their posts as from 9 September, and jurists who had the confidence of the new authorities were appointed in their place.

### *Repression and Resistance*

A large number of assassinations by the armed forces and paramilitary groups took place. Many people were wounded, disappeared or were taken prisoner. Those who managed to escape are in hiding, have left the country or found refuge in the Apostolic Nunciature of La Paz, and eventually was permitted to leave for France on 4 October 1980.

Hardly had the coup d'état been announced, when the workers called for a general strike in accordance with a resolution adopted earlier by the COB. Economic activity was paralysed for some days. The new authorities, apart from carrying out a large-scale propaganda campaign stating that the situation was normal and that the acts of the military were motivated by the desire to put an end to anarchy and "close the doors to communism", forced the workers at gun point to go back to work.

On the national day, 6 August, 1980, Hernán Siles Zuazo announced the formation of "a government of National Unity in hiding", consisting of well-known persons from the centre and left. As the winning candidate in the presidential elections he has appealed for international recognition of his government.

The repression has been most savage and

widespread in the mining areas, the nerve centre of the resistance. Within a few days, troops using tanks, heavy weapons and aircraft, attacked localities such as Huanuni (on 19 July), Catavi and Siglo XX. After entering the settlements and mining camps firing their automatic weapons, ranger units, followed by paramilitary groups in civilian clothing, subjected the people to every kind of indignity and atrocity. In some places, the workers put up a fierce resistance, but were quickly overcome since they had no weapons apart from stones, old hunting rifles and dynamite cartridges of the type used in the mines.

The first concern of the new rulers was to destroy or silence the miners' broadcasting stations which had operated for many years in the mining centres. On this occasion it had been keeping the population informed of what was happening and calling on them to resist. Aircraft and explosives were used against them, and by 23 July, the miners' last broadcasting station was silenced.

An example of the unbridled repression was the massacre carried out by the army in the mining district of Caracoles. In the first few days of August, special troops of the Viacha and Oruro regiments attacked Caracoles with mortars, tanks and light planes, while the workers defended themselves with their rudimentary weapons. As soon as the troops gained control of the zone, leaving many of the miners and settlers dead or injured, they begun to pursue, kill or capture all those who had managed to escape towards the mountains. In the public square of Caracoles, a miner was tied up, and a dynamite cartridge put in his mouth. This was exploded, and his body blown to pieces before the eyes of the people, who were watching impotently. The troops systematically looted the humble homes of the miners, taking away domestic animals like hens, pigs and sheep,



smashing and destroying everything and even violating the women. A large number of men were taken away to an unknown destination.

In the towns and manufacturing centres, the repression assumed another form. The trade union and political organizations are the prime target, and a systematic and selective hunt for activists and militants has been instituted.

The political prisoners have been mainly concentrated in detention centres, one of which is in an area near La Paz, at a height of over 4,000 metres, and is consequently very cold, while another is in the Amazonic and tropical region of the Upper Beni, cut off from all communication with the rest of the country. It is reported that prison conditions are extremely harsh and the prisoners lack everything. Torture is applied savagely and on a wide scale; it is known that at first the prisoners were kept without food and water for long periods and slept without blankets in places where the temperature drops below zero. It is difficult to estimate the number of political prisoners at present, since it is always changing, but Church circles place it at over 2,000. The government has not stated whether they are to be tried or not, and if they are, whether it is to be by a civilian or military tribunal. Many are regarded as "disappearances," since the authorities have not published any lists of prisoners or replied to enquiries made by relatives and lawyers.

### *Freedom of Expression; The Universities; Security of the Persons*

Freedom of expression is virtually nonexistent. As far as the press is concerned, although there is no formal system of pre-censorship, sanctions are imposed in prac-

tice on journalists who venture to criticize the methods of the authorities or to report on clandestine activities. For the radio, on the other hand, there is pre-censorship. Radio stations must give the Ministry of Information in advance a written version of the texts they intend to broadcast. Numerous journalists have been persecuted and imprisoned. Colonel Luis Arce Gómez, one of the strong men of the regime, summoned the representatives of the national press to hear a threatening speech on what they were forbidden to publish and on the sanctions they would incur if they did so. Several foreign press correspondents were arrested and expelled from Bolivia. In reply to the international protests about the detention for several days of the correspondent of Agence France Presse and his subsequent expulsion from the country, the government accused him of maintaining "contacts with subversion, publishing biased information, installing a telex without official authorization and interviewing Sr. Siles Zuazo, a leader of the underground opposition..." As already mentioned the premises were invaded of the radio station, San Gabriel, of the periodical Presencia and of the radio station Fides, in this case with the destruction of its equipment, and the radio stations of the miners were destroyed.

Repression has been acute in the student centres, and the Universidad Mayor de San Andrés in La Paz is considered by the military to be a "hotbed of subversion". From the very first moment, the university precincts in the capital and other towns were invaded by troops and paramilitary forces, and the San Andrés University is under military control.

There is no legal security for citizens in general, and people are liable to be arrested at any time without respect for the legal regulations governing arrest which, in theory at least, are still in force. Every day private homes and the premises of organiza-

tions are searched illegally. One of the places searched has been the Bolivian Centre for Information and Documentation (Centro de Información y Documentación de Bolivia - CIDOB), where agents of the political police seized and destroyed documents and office supplies.

Several lawyers, particularly those who defended in political cases during the regime of General Bánzer, are now in prison or have had to leave the country. Added to this there is the dismissal of the senior members of the judiciary, already referred to.

The Permanent Assembly for Human Rights, an organization dedicated to the protection of human rights, which played an important part during the previous authoritarian regime and process of democratization, is powerless to act and its members are being persecuted. Its President, Father Julio Tumiri, was finally released at the beginning of October, after being ill-treated in custody.

Various development programmes and activities of non-governmental lay and ecclesiastical organizations have had to be suspended or have been absorbed into the State system, particularly those which helped the indigenous peasants to become aware of their rights.

The Minister of the Interior published a notice on 20 July ordering the papers of all foreigners, whether residents or in transit, to be checked on the grounds that "extremist elements, political activists and foreign guerrillas..." had entered the country to foment unrest and attacks. The situation is particularly difficult for persons who had sought refuge in Bolivia after fleeing from the repressive regimes in Argentina and Chile.

### *Labour Organizations*

The trade unions probably constitute

the sector that is hardest hit. Neither the right of association nor other trade union rights are respected. On 17 July, the new government banned all trade union and political activity, even before passing any laws to this effect. The statements made by the Generals, and the first governmental proclamation, refer to proposed new trade union and labour legislation, and to a statute for the political parties, with a view to "normalizing" these activities. The right to strike is also prohibited. At the end of July, a decree was enacted suspending all trade union officials, in other words, removing union officials at all levels (factory committees, unions, federations, confederations) from the posts to which they were elected.

The only trade union organisation now is the so-called Workers' Confederation - Central de Trabajadores - which does not represent the workers but follows the military line. During the Bánzer regime, Labour Co-ordinators had been appointed in place of the union leaders to look after the interests of the workers. These Co-ordinators disappeared in 1978, when the unions recovered their rights. They have now reappeared as officials of the Central de Trabajadores.

On 30 July, a government decree instituted the "Patriotic Service of the State" clearly inspired by an earlier decree enacted by Bánzer in 1974, which was subsequently abrogated. This decree obliges all citizens without exception to perform the work or tasks entrusted to them by the Supreme Government on pain of "punishment for contempt". The obligation must be complied with, whether the persons concerned are unemployed, or work in the public or private sector. It is a law designed to invalidate the right to strike. The penalties include imprisonment.

An illustration of the repressive nature of the government is the treatment of a

group of observers sent on a mission to Bolivia by the International Confederation of Free Trade Unions. The group arrived on 14 September 1980. They were denied all opportunity of talking to the imprisoned trade unionists, since the Minister of the Interior declared that they had been imprisoned for political activities and not because they were active union members. On 18 September, the six members of the group who were still in Bolivia – another four had already left – were arrested in their hotels by the police and taken to the Ministry of the Interior. There, they were threatened with torture. One of them, Alfredo Moncada, was brutally knocked about and all of them were put in cells. The group had taken the sum of 30,000 dollars with it in order to give financial assistance to the families of trade unionists who were dead, had been arrested or had disappeared, and this was known to the police. In the Ministry itself, two members of the mission were forced, at gun point, to sign cheques for the whole amount. At the same time, they were robbed of all the money and other possessions they had on them. The next day three of them were expelled from the country. The other three were held until 22 September, when they were sent to Argentina.

## *The Church*

On the day of the coup d'état and the next few days, some religious houses and churches such as that of Cristo Rey (Catholic) in La Paz were raided or attacked. Sev-

eral priests have been arrested and others, who are not Bolivian nationals, have been expelled.

The Churches<sup>1</sup> have reacted to the coup d'état and repression. As early as 25 July, the Permanent Episcopal Council of the Catholic Church issued a declaration deploring the break down of constitutional order, condemning the violence and bloodshed, regretting the announcement that the whole country had become a military zone, censuring the violations of human rights and disrespect for the law, and stating their support for Monseñor Jorge Manrique, Archbishop of La Paz, who made similar declarations. On 8 October 1980, the Episcopal Conference, meeting at Cochabamba, issued a Pastoral Letter in which it reiterated its position on these matters and condemned the assault on the rights and freedoms of the people in general and of the Churches in particular.

The Episcopal Conference, with the support of the Methodist Evangelical Church,<sup>2</sup> which has also taken a position of firm condemnation, has set up a committee to visit political prisoners, to hasten their release, to ensure their safety and to provide both them and their families with whatever religious and material assistance they may need.

## *Economic Data*

To complete the picture, it should be added that the Bolivian economy is in difficulties, and that this has made it heavily dependent on other countries. Seventy per-

1) The principal Church in Bolivia is the Roman Catholic Church, to which nearly 90 % of the population belongs. There are about 45,000 persons in the Protestant Churches.

2) Dr. Mortimer Arias, Bishop of the Methodist Evangelical Church and Secretary-General of the Confederation of Methodist Evangelical Churches in Latin America, was arrested on 26 August on his return from Brazil. Taken away in an ambulance by a group of armed men, in civilian clothing, he was held in custody until October, when he was released.

cent of the export earnings come from tin, so Bolivia is at the mercy of international fluctuations in the price of tin. The external debt has risen to 3,500 million dollars, and at the end of 1980 the government is scheduled to pay more than 300 million

dollars in debt servicing. Consequently, it is now trying to renegotiate the debt. In domestic terms, inflation continues, and the purchasing power of wages dropped by 36 % during the period 1971-1980.

## *Chile*

### *The New Constitution and Human Rights*

On 11 September 1980 (the seventh anniversary of the coup that brought the Chilean military junta to power), a referendum was held to approve a new Constitution. This had been prepared by a special commission appointed by the military junta, without any participation by representatives of other currents of opinion. This referendum was held under a state of emergency and the supervision of the voting and the count was completely in the hands of officials appointed by the government. As was stated in an ICJ press release prior to the referendum, the result was a foregone conclusion. No dictator has ever lost a referendum.

The new Constitution is divided into two parts: the ordinary or permanent provisions which will not come fully into force until 1997, and 29 transitory provisions which will be the most significant part in the interim. The following is an analysis of some of the provisions of the Constitution, both ordinary and transitory.

#### *Freedom of Association and Expression*

According to Art. 8 of the new Constitution, any act of a person or group of per-

sons is illegal if aimed at the propagation of doctrines that are directed against the family, advocate violence or a totalitarian conception of society, the state or the legal system, or are based on the class struggle. All organisations, political movements or political parties that, in their goals or the activities of their followers, tend to support the above objectives are unconstitutional.

These limitations on freedom of association and expression go beyond the restrictions allowed by Art. 19 of the Covenant on Civil and Political Rights to which Chile is a party and, due to their scope and unprecise wording, can be used arbitrarily against dissident groups. They are certainly aimed at outlawing certain political groups critical of the military junta but, in fact, this is not of great significance since, because as will be seen later, all political activities have also been banned for the time being.

Apart from other sanctions to be established by law, persons who commit or have committed any of the illegal acts described above will not be allowed to apply for a post in the public service, whether or not this be by popular election, for a period of ten years, to be increased to twenty if the

offence is repeated. Any such people who are already in the public service will automatically be dismissed after a decision on the matter has been passed by the Constitutional Tribunal. Obviously, this provision unfairly punishes persons who have expressed views that were permissible at the time or belonged to political parties that were allowed by the Chilean legal system. This clearly conflict with the prohibition of retrospective laws enunciated in Art. 19, No. 3, 7th paragraph, of the same Constitution.

Art. 19, No. 15, repeats the same idea. According to this provision, associations contrary to the moral, public order and the security of the state are prohibited.

Political parties are not allowed to intervene in activities which are not 'proper to them', but what activities are proper to them is not defined. Similarly, trade unions and their leaders are not allowed to engage in political activities. According to Art. 23, trade union leaders are not allowed to join political parties. Trade union leaders who intervene in political activities as well as political leaders who take part in the functioning of trade unions will be subject to criminal sanctions.

## ***Torture***

Art. 19, No. 1, prohibits the application of any 'illegitimate pressure'. This wording does not amount to a straight forward condemnation of torture and, in fact, suggests that there are some kinds of undefined 'legitimate' pressures.

Persons arrested in connection with terrorist activities do not have to be brought before a competent judge until ten days after their arrest or detention, without any effective legal protection during that period.

It is noteworthy that the Constitution provides no sanction against those who commit acts of torture, though it does

against those who exercise freedom of expression and association.

## ***States of Exception***

The Constitution contains a classification and whole graduation of states of exception. Thus, in case of war, the President of the Republic may declare a 'state of assembly'; in case of civil war or internal strife, a state of siege; in cases of serious disturbance of public order, damage or danger to national security – whether this is due to internal or external causes – a state of emergency. Finally, in case of public calamity (natural disasters or the like), the President may declare a state of catastrophe.

Many rights enshrined in the Constitution can be derogated from during states of exception. *Habeas corpus* is not available in cases of 'state of assembly' or state of siege. Moreover, the remedy of 'protection', aimed at maintaining the rule of law and respecting the rights of the individual by ensuring for him due protection, is not available in any state of exception.

Tribunals are not allowed – during 'states of assembly' and siege – to determine or discuss the merits of the situation under which derogations have been made from certain rights and freedoms guaranteed by the Constitution.

Measures adopted during states of exception which derogate from human rights protected by the Constitution will last for the duration of the emergency. However, orders for expulsion from the country, or prohibitions against returning to it, will continue to be in force even after the emergency has ceased, as long as they are not expressly withdrawn by the authority that decreed them. These orders and prohibitions are not subject to any form of judicial appeal or control.

## *Role of the Armed Forces*

The armed forces maintain a prominent role in the new Constitution. Thus, the Senate will be composed not only of members elected by people, but also of the commanders of the armed forces (and of the Carabineros military police) who are appointed by the National Security Council.

The National Security Council comprises the President of the Republic, the Presidents of the Senate and the Supreme Court, and the commanders in chief of each of the branches of the armed forces, and the Director General of 'Carabineros'.

The commanders of the armed forces will be appointed for a period of four years and, during that period, will enjoy security of tenure.

According to the Constitution, the armed forces are essential for national security and are the guarantors of the institutional order of the Republic (Art. 90 of the Constitution). This provision will enable the armed forces to intervene in the political process any time they consider that national security is endangered, or whenever they decide it is needed to assure the institutional order of the Republic.

## *Transitory Provisions*

The transitory provisions contained in the Constitution are the most important. They will be in force until 1997, granting special powers to the President of the Republic and the military junta. During this period, political activities are banned and President Pinochet will enjoy special and extraordinary powers in cases of internal strife.

According to the new Constitution, the President of the Republic will be elected for a period of eight years, not being entitled to re-election. However, the next pres-

idential period will start in March 1981 and, for that period, the President of the Republic will continue to be General Augusto Pinochet. Before that period has ended, in 1989, the military junta will decide who should be the President for the next period (1989 to 1997) and will propose that person to be confirmed by the citizenry. On this occasion, the prohibition against re-election will not be applicable (27th transitory provision), so General Pinochet may be re-appointed again.

In the unlikely event of the citizens rejecting the candidate proposed by the military junta for this second period (1989 to 1997), General Pinochet will continue in office for one more year (29th transitory provision). In such a case, ninety days before the expiration of his mandate, there would be elections for Parliament and President of the Republic.

## *Emergency Powers for General Pinochet*

In addition to all the ordinary powers granted to the President under states of exception, during the transitory period from 1981 to 1989, General Pinochet will enjoy extraordinary powers in case of internal disturbances aimed at disturbing the public order, or internal peace. In either case, pursuant to a declaration of the President, he will have for six months, renewable, the following powers:

- (a) to arrest and detain people for up to five days and, in case of terrorist activities, for up to 20 days;
- (b) to limit the right of assembly and freedom of information by control of the founding, editing and circulation of new publications;
- (c) to prohibit the entry into the national territory, or to expel from it, those

who propagate the doctrines mentioned in Art. 8 of the Constitution, those who are suspected or have reputation of being followers of those doctrines, and those who carry out acts contrary to the interests of Chile (whatever that may mean) or constitute a danger for internal peace; and

- (d) to decree internal exile of persons, for a period up to three months.

Persons affected by any of these measures will not have any judicial remedy (24th transitory provision, last paragraph). They can only request the reconsideration of the measure by the authority that decreed it.

It has not been contended that these powers are necessary to deal with an emergency; indeed, they have been granted to General Pinochet alone, in addition to the ordinary powers contained in the Constitution to deal with states of exception.

### *Powers of the Military Junta*

Until a Parliament is elected (1990), all references to the National Congress or either of its chambers are to be understood as relating to the military junta (21st transitory provision).

During this period, the military junta will have authority, *inter alia*,

- (a) to exercise the legislative power;
- (b) to amend the Constitution; and
- (c) to pass laws interpreting the Constitution.

The legislative power will enable the junta to pass even legislation which, according to the Constitution, requires a special quorum. Thus, once the Congress

comes into existence, it will be very difficult for it to change such laws.

Although the amendment of the Constitution by the military junta is subject to a referendum, the junta may resort to a much simpler procedure by passing laws that are supposed to *interpret* it. Thus, although the mechanisms established by the Constitution for its amendment are very complex and the requirements for amending the Constitution very hard to meet, this very straight-forward procedure will be available to the junta. In the end, the Constitution supposedly approved of by the people last September, might be very different from that which will come into force in 1997.

### *Prohibition of Political Activities*

In spite of what is said in the Constitution on behalf of freedom of expression, the fact remain that, according to Art. 19, No. 15, a special law, passed with a special quorum, will govern the founding, organisation and activities of political parties. Violating this law will be subject to legal sanctions. More important is the fact that election to Parliament will not take place until 1990 (28th transitory provision). In the meantime, according to the 10th transitory provision, and until the special law concerning political parties comes into force, it will be unlawful to carry out or to promote any political activity. Those who violate this provision will be subject to the punishments provided by law. These sanctions are without prejudice to the measures that can be taken by General Pinochet under states of exception, such as deportation, prohibition to return to the country, or internal exile.

## *Haiti*

In August 1979 three members of the intergovernmental Inter-American Commission on Human Rights, led by its Chairman, Mr Andrés Aguilar, visited Haiti to examine the situation of human rights. The conclusions to their report stated that numerous people had died in summary executions or during their stay in prison in 1975 and 1976 (since when there had been a notable improvement as regards the right to life); there had been many cases of torture during interrogation and imprisonment; numerous persons had been detained without trial or access to an attorney; legal safeguards were seriously restricted by the almost permanent 'state of siege'; the judiciary was not independent; freedom of inquiry, opinion, speech and dissemination of thought did not exist; the press was subject to prior censorship, closures, threats, assaults and incarcerations; freedom of association was extremely restricted, whether for trade unions or cultural, political or other types of association; citizens had been exiled and deprived of their nationality for their political ideas; there were no political parties and the people did not effectively participate in government affairs; and basic economic, social and cultural rights were almost non-existent, due to extreme poverty, illiteracy, poor hygiene, widespread unemployment, etc.

The report also points out that as President Jean-Claude Duvalier was declared President-for-life in succession to his father following a 1971 amendment to the Constitution, the people of Haiti, in whom the national sovereignty is nominally vested, have had no say in choosing the Chief Executive in the last 15 years.

The report was submitted to the government of Haiti, which has acceded to the American Convention on Human Rights

and appears anxious to improve its human rights image. As yet, however, there appears to have been little change.

On September 28, 1979, the government enacted a restrictive new press law that requires registration and approval of all persons by the government before they can work as journalists, prior government approval of publications before they can be circulated, and a number of generalised provisions making it a crime to insult the President-for-Life or his family. Following worldwide protest, this law was amended on March 31, 1980, but none of the provisions mentioned above were substantially modified. Despite numerous constitutional guarantees to the contrary, these Press Laws, and various State Security provisions including the Anti-Communist law, have resulted in a complete denial of basic freedoms of speech and press to Haitian citizens.

The Anti-Communist Law provides in part that persons who have made 'any declarations of belief in communism, verbal or written, public or private' or propagated 'communist or anarchist doctrines by conferences, speeches, conversations, by leaflets, posters and newspapers' will be charged with crimes against the state, tried by a military court and if convicted may be 'punished by the death penalty.'

On November 9, 1979, approximately 60 Tonton Macoutes (security force personnel), dressed in civilian clothes, violently disrupted the first public human rights meeting ever held in Haiti. The meeting, which was organized by the Haitian League for Human Rights, was held at a church-school run by the Pères Salesiens. As many as 50 of the participants at that meeting were beaten by the Haitian Security Forces, including representatives of the U.S.,



Franch, Canadian and West German embassies. The Haitian League has declined to hold any public meetings since this incident.

The re-arrest in October 1980 of Sylvio Claude, leader of the Haitian Christian Democratic Party, and several other party members, has once again belied government assurances of a new "liberalization" in Haiti (cf. ICJ Review No. 19, December 1977, pp. 3-5). In December 1978 President-for-Life Jean-Claude Duvalier announced that opposition candidates would be allowed to run in the February 1979 legislative elections. Prior to the election Claude's candidacy was declared illegal and the only other major candidate, Gregoire Eugene was forced to "voluntarily withdraw." Subsequent protests against the government's control of the elections resulted in the arrest of several human rights activists, including Joseph Maxi, an attorney and co-founder of the Haitian League for Human Rights, who was detained without charge, and Claude who was severely beaten and tortured with electric shocks. Claude also was held without charge for three months at the Casernes Dessalines, one of Haiti's worst prisons, until he was exiled to Colombia on May 5th. He returned to Haiti later that month and was immediately re-arrested, again without charge, and released a month later. On August 26, 1979, Government Security Force personnel in civilian clothes disrupted a meeting of Claude's newly formed Haitian Christian Democratic Party, and used this "unrest" as grounds for his re-arrest as well as that of a number of his supporters. On October 13, 1980, Sylvio Claude was arrested for the fourth time by Government Security Forces, this time at his home. According to some reports as many as thirty-nine other

persons were also arrested at the same time throughout Port-au-Prince. Despite international attention regarding his case, Claude has continuously been denied access to his attorneys from the Haitian League for Human Rights. It now appears that he may be charged with violating the recently revised Haitian press law. It is widely feared that Claude has been subjected to torture or physical abuse since his detention.

Commenting on the harassment of Haiti's only other major opposition political parties, the Report of the Inter-American Commission of Human Rights (IAHCR) states (at page 70) that:

"The Haitian Christian Democratic Party of June 27, founded by Gregoire Eugene, has since ceased active operations because of government harassment according to Eugene."

Similarly the Parti Démocratique ceased its operations when its leader René Dervine was exposed to significant government "pressure".

On July 28, 1980, following a closed trial, the Court of Port-au-Prince<sup>1</sup> announced a verdict of guilt against four Haitian citizens who had been imprisoned for more than 18 months without charge or access to lawyers or visitors. They were found guilty of general "crimes against the security of the state", and received sentences of nine years with hard labour instead of the death penalty requested by the government. It is reported that an examination of the official transcript of the proceedings indicates that the verdict is not supported by the evidence.

On October 17, 1980, Yvens Paul, a noted creole playwright and journalist was taken off a flight arriving from New York by Security Force Personnel. He was held incommunicado in an unknown location,

1) In March 1979 the State Security Tribunal mentioned in ICJ Review No. 19 of December 1977 was integrated into the normal judicial structure of the Port-au-Prince Court System.

was never charged with any crime and was denied access to any lawyer. A week later he was released without explanation, after being physically assaulted while in custody.

On October 30, 1980, two daughters of Sylvio Claude, Marie France Claude and her minor sister, were also arrested without warrant and without charge. To date, no lawyers from the Haitian League for Human Rights have been allowed access to them.

Little has been done to develop institutional structures, safeguards or remedies

that would help to prevent future violations of fundamental rights. In fact, formal emergency legislation and state security laws result in the suspension of the basic constitutional protections of the Haitian Constitution. A legislative declaration of "pleins pouvoirs" for the President-for-Life results in a formal suspension of constitutional rights during the 7-8 months per year when the legislature is not in session, and a "state of siege" or a suspension of individual guarantees often accomplishes the same thing for the rest of the year.

## *India*

### *Preventive Detention in India*

India is unusual among democratic countries in having a Constitution which sanctions imprisonment without trial and in freely exercising this power, with very brief intervals, ever since it became independent. The National Security Ordinance, 1980, promulgated by the President of India on September 23, 1980, follows precedent. Yet, in a sense, it marks a departure from recent trends towards renunciation of the power.

This explains why it has aroused strong criticism, abroad and in India, most notably by the Supreme Court Bar Association which has advocated that the Constitutional provision should be confined to emergency situations like war and insurrection.<sup>1</sup> The Ordinance is likely to be re-enacted as an Act of Parliament in identical terms.

The Ordinance follows the familiar pattern of such statutes, Central and State. It

confers the power to detain and provides the safeguards of requiring the grounds of detention to be given and providing for their examination by an Advisory Board.

Under section 3 of the Ordinance the Central or State government may make a detention order if satisfied that it is necessary with a view to

- preventing a person from acting in a manner prejudicial to the defence or security of India, or its relations with a foreign power, or the maintenance of public order or essential supplies and services;
- (with respect to a foreigner) regulating his continued presence in India, or expelling him from India.

Under section 8 the detained person (called in India the 'detenu') must be in-

1) *The Statesman*; October 21, 1980.

formed of the grounds for his detention within five days or (in exceptional circumstances and for reasons to be given in writing) within ten days, and afforded the 'earliest opportunity' to make representations to the government against the order. However, the authority is not required to disclose facts it 'considers to be against the public interest to disclose'.

Section 9 requires the government to set up an Advisory Board 'in accordance with the recommendations of the Chief Justice', consisting of a High Court Judge as Chairman and at least two other serving or retired High Court Judges.

S. 10 enjoins the Government to place before the Board within three weeks of the detention, the grounds and the representation, if any, from the detenu. The Board is empowered (s. 11) to call for further information, and is bound to hear the detenu in person if he so requests. Legal representation is explicitly barred (s. 10(4)). The Board is required to report within seven weeks from the detention. A finding that there is "no sufficient cause for the detention" is binding on the Government (s. 12 (2)). The Ordinance prescribes 12 months as the maximum period of detention (s.13).

These provisions are designed to conform to the constitutional safeguards embodied in Article 22(4) and (5) of the Constitution. However, the Constituent Assembly's debates when it adopted Article 22 show that its application has extended far beyond the kind of cases the draftsmen had in mind, namely, persons "who are determined to undermine the Constitution and the State."<sup>1</sup>

The Preventive Detention Act, 1950 was

enacted within a month of the coming into force of the Constitution. It was to "cease to have effect on the 1st day of the April 1951" (s. 1(3)) but was kept in force by successive enactments till 1970 when it could not be extended any longer since Prime Minister Indira Gandhi's ruling Congress Party lost its majority in the Lok Sabha. On her return to power after the general election of 1971, the law was re-enacted as the Maintenance of Internal Security Act, 1971, known as MISA. It continued in force till it was repealed by Parliament on the motion of the Janata Party Government in 1977.

Shortly after the proclamation of an emergency on June 25, 1975, MISA was amended by Act 39 of 1975 to debar courts from granting bail to detenus and, most importantly, by inserting s. 16A to dispense with the furnishing of grounds as well as the review by the Advisory Board.

The Third and Final Report of the Commission of Inquiry consisting of Mr. Justice J.C. Shah, a former Chief Justice of India, meticulously documented the excesses which were committed in the application of MISA. It concluded "The freedom of the executive from all restraints of judicial scrutiny led directly to the large scale abuse of authority and misuse of powers during the emergency."<sup>2</sup> There were even cases of detention orders in blank signed by District Magistrates.

The Janata Party came to power in the general election of March 1977 on a pledge to repeal the MISA, which it did. But it tried to secure the enactment of a law for preventive detention by the Code of Criminal Procedure (Amendment) Bill 1977. It

1) Constituent Assembly Debates; Vol. IX, p. 1536. Speech by Sir Alladi Krishnaswamy Ayyar, member of the Drafting Committee, on September 16, 1949.

2) Shah Commission of Inquiry; Third and Final Report; August 6, 1978; Cp. XIX; pp. 39-134; at p. 41.

was widely criticised in the press.<sup>1</sup> Thanks to a revolt by the Janata Party's back benchers the Bill was not proceeded with. MISA was repealed *simpliciter* and for once there was no Central law on preventive detention – by choice.

The Supreme Court has frequently expressed its distaste for preventive detention. As early as 1950 Mr. Justice Mahajan pointed out in the famous *Gopalan* Case that "preventive detention laws are repugnant to democratic constitutions and they cannot be found to exist in any of the democratic countries of the world."<sup>2</sup> In 1969 the Court characterised the legislation as "a negation of the rule of law, equality and liberty."<sup>3</sup> As recently as 1979 the Court said that it "viewed with disfavour detention without trial, whatever be the nature of offence. The detention of individuals without trial for any length of time, howsoever short, is wholly inconsistent with the basic ideas of our Government."<sup>4</sup>

From 1977 to 1979 laws authorising preventive detention continued in force in some of the States. Also, preventive detention of those suspected of smuggling or of exchange control offences was permitted under the Conservation of Foreign Exchange and Prevention of Smuggling Act of 1974. Other legislation, first passed in 1979 and replaced by an Act in 1980, permits preventive detention of persons who act in a manner prejudicial to the maintenance of essential supplies or commodities.

The Advisory Boards have not proved to

be a very effective safeguard. In a recent case the Supreme Court was constrained to remark, "We are rather surprised that in view of the self-destructive nature of the grounds, even the Advisory Board did not consider it fit to recommend the release of the detainee."<sup>5</sup> Prof. David H. Bayley has aptly observed that the members of the Board "must be more than quietly impartial; they must be positively predisposed to defend the rights of the detainees."<sup>6</sup> There is little evidence that the Boards have performed such a role.

The Supreme Court has over the years evolved an impressive case law on the proper appreciation of the grounds. The most comprehensive exposition was made in *Khudiram Das vs. State of West Bengal*.<sup>7</sup>

In that judgment the Court made it clear that the decisions of the detaining authority are subject to judicial review. The Court has proceeded on the basis that the 'subjective satisfaction' of the authority (of the existence of one or more of the grounds for detention specified in the legislation) is a condition precedent for the exercise of the power of detention. Among the reasons given in judicial decisions for saying that no subjective satisfaction has been arrived at, as required by statute, are the following:

- the authority has not applied its mind at all to the question.<sup>8</sup>
- the power is exercised dishonestly or for an improper purpose, or at the dictation

1) Vide A.G. Noorani's articles "Preventive Detention Revived" and "The Preventive Detention Bill" in *Indian Express* of November 23, 1977 and January 11, 1978.

2) *A.K. Gopalan vs. State of Madras*, All India Reporter (1950) S.C. 27.

3) *Sampat vs. State of Jammu & Kashmir* A.I.R. (1969) S.C. 1153 at 1157.

4) *Narendra Purshotam Umrao vs B.B. Gujral* (1979) 2 Supreme Court Cases 637 at p. 643.

5) *Smt. Kalawati Gupta vs. Union of India & Ors.* (1980) 3 S.C.C. 90 at 91.

6) *Preventive Detention in India*; Calcutta, 1962; p. 94.

7) A.I.R. 1975 550.

8) A.I.R. 1943 F C (Federal Court) 75 at p. 92.

of another body.<sup>1,2</sup>

- the authority has created rules of policy which disable it from applying its mind properly to the particular case.
- the decision is based on the application of a wrong test or misconstruction of a statute, or on materials 'which are not of rationally probative value'.<sup>3</sup>
- the authority has taken into account, even with the best intention, of an irrelevant factor.<sup>4</sup>
- the authority has not taken into account relevant matters which it is expressly or impliedly required to consider.
- the authority has failed to act according to the rules of reason and justice and according to law.<sup>5</sup>
- the authority has come to a conclusion to which no reasonable person could possibly come.<sup>6</sup>
- the grounds given by the authority are vague or obscure, and are not specific enough to enable the detenu to rejoin.<sup>7</sup>

The Court has upheld the right of protest and peaceful agitation. "Peaceful and lawful revolt, eschewing violence, is one of the well-known modes of seeking redress in this country."<sup>8</sup> Earlier, on November 12, 1974, the Court ruled "Peaceful protests and the voicing of a contrary opinion are

powerful wholesome weapons in the democratic repertoire. It is, therefore, unconstitutional to pick up a peaceful protestant and to put him behind the prison bars."<sup>9</sup>

Now that a new Act on preventive detention is likely to be passed, it is to be hoped that the Supreme Court will resume its important role of providing an effective check against abuse of the detaining power. It is suggested that it should consider protecting the rights of those detained in three major respects.

First, the scope of judicial review. The Supreme Court of Burma insisted on the test of "reasonable satisfaction" as far back as 1950.<sup>10</sup> Application of the test of "substantial evidence" would provide an important safeguard.

Secondly, uncritical acceptance of some English precedents whose soundness is more than doubtful should be resisted.<sup>11</sup> The Court would do well to sound a caveat and, indeed, to assert their irrelevance in India.

Thirdly, as far back as 1918 the Sedition Committee appointed by the Government of India, and headed by Mr. Justice S.A.T. Rowlatt of the King's Bench Division of the High Court in England, had in its Report strongly recommended (at p. 206) that "no interference with liberty must be penal in character. Nothing in the nature of

1) 1952 S C R 125; A.I.R. 1952 S C 16.

2) (1946) 2 All. E R 201.

3) A.I.R. 1950 F C 129.

4) A.I.R. 1964 S C 72.

5) (1891) A C 173 at p. 179.

6) A.I.R. 1974 S C 816.

7) *Mohammed Yusuf Rather vs. State of Jammu & Kashmir* (1979) 4 S.C.C. 370.

8) *Ibid*, at pp. 376 and 380.

9) *Ram Bahadur Rai vs. State of Bihar* (1975) 3 S.C.C. 710 at 718.

10) *Vide Journal of the International Commission of Jurists*; spring 1961; Vol. III No. 1; page 54 for an article by U.Hla Aung.

11) *Vide the critique of Ex parte Greene* (1942) A.C. 284 at 295 and recent cases by Mr. Anthony Lester, Q.C., in his article "Habeas Corpus in Immigration Cases" in (1980) 3 S.C.C.g (Journal Section).

conviction can be admitted without trial in strict legal form. If in the supreme interests of the community the liberty of individuals is taken away, *an asylum must be provided of a different order from jail*. This is of fundamental importance."

Detention laws generally empower the state to "regulate the place and conditions of detention." It is only by an executive order made under this provision that the detenu is lodged in a jail. But imprisonment is one of the forms of "punishments" prescribed by S.53 of the Indian Penal Code. Punishment without trial is patently violative of the Constitution (Art. 21). The Constitution permits "preventive detention", but, surely, not imprisonment *without trial*.

It would, it is suggested, be open to the courts to strike down as invalid executive orders which prescribe jails as places for lodging detenues, especially since the Supreme Court has ruled consistently that detention is not punishment and a detenu is not a convict.<sup>1</sup>

Perhaps it is time, after three decades of *experience*, for the Law Commission or some other body of experts to review the entire legislation and its working. When the 1950 Act was introduced, the Home Minister, Sardar Patel said: "It requires to be closely examined whether a better substitute of a more or less permanent nature based on specific principles can be brought in or not." Since then the Act has become permanent, with changes in nomenclature, but it has not been subjected to a careful review in the light of experience in India and elsewhere.<sup>2</sup>

One safeguard which appears imperative is legal representation before the Advisory Board.

Finally, Section 3(3) of the Ordinance which enables a District Magistrate or a Commissioner of Police to exercise the detaining power, under certain circumstances, should be deleted. The power of preventive detention should be exercised only by the Minister concerned.

## Iran

### *Islamic Revolutionary Tribunals' Rules of Procedure*

All those concerned to uphold the principles of the Rule of Law were deeply shocked by the procedures of the Islamic Revolutionary Tribunals set up after the overthrow of the regime of the Shah.

This concern was voiced by the International Commission of Jurists in a press re-

lease dated 12 March 1979 in the following terms:

"It appears that these are specially created ecclesiastical tribunals having no basis in law. The defendants are tried not according to any pre-existing legal provisions, but according to general principles of Islamic jus-

1) *Sampat vs. State of Jammu & Kashmir* A.I.R. 1969 SC 1153; Para 10.

2) Vide the Gardiner (1975) and Diplock (1972) Reports on Northern Ireland; Cmnd. 5847 and Cmnd. 5185, respectively.

tice derived from the Koran. Consequently they may be held guilty of offences for acts which did not constitute penal offences under national or international law at the time when they were committed, contrary to article 11 of the Universal Declaration of Human Rights.

In violation of the same article the defendant is denied "the guarantees necessary for his defence". There is no formal charge or indictment, no time is allowed for the preparation of the defence, and the defendant is not entitled to the services or even the advice of a lawyer.

There is no form of appeal from the decision of the tribunal, and a sentence of death is carried out within an hour or so without any opportunity for an appeal for clemency to be made or considered.

A summary trial and execution of this kind is contrary to all recognised principles of justice. Even in time of internal armed conflict, article 3 of the Geneva Conventions, to which Iran is a party, prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples". It may be added that the procedures of these tribunals also depart from the strict requirements of proof and safeguards for the defence which are a marked feature of Islamic systems of law.

It is deplorable that those who have overthrown a regime which they rightly criticised, as did the International Commission of Jurists, for denying a fair trial to their prisoners, should now try their suspects under such wholly arbitrary procedures."

Three months later, on 17 June 1979, the Council of the Revolution approved regulations governing these tribunals and their prosecuting authorities ('parquet').

These go some way to meet the world-wide criticisms, but there are still features which give rise to concern, and which appear to conflict with Iran's obligations under the International Covenant on Civil and Political Rights, to which it is a party.

### *Jurisdiction of the Tribunals*

Article 2 of the regulations states that the Tribunals have competence to try cases of:

- (i) murder and massacre under orders or aiding and abetting the same with the purpose of consolidating the Pahlavi regime and repressing the struggle of the Iranian people;
- (ii) torture and imprisonment under orders or aiding and abetting the same against persons who had fought (the Pahlavi regime);
- (iii) gross economic crimes, that is to say pillage of the public treasury or the 'lapidation' of the national wealth for the profit of foreigners;
- (iv) conspiracy against the Islamic Republic of Iran by armed action, assassination and destruction of institutions for the profit of foreigners;
- (v) armed attack, assault and battery, and manufacture and distribution of drugs.

Other crimes are to be tried by military courts or the ordinary civilian courts. In this connection it may be noted that the new Iranian Constitution makes no mention of the Islamic Revolutionary Tribunals, and confers jurisdiction on the ordinary courts to try cases of a political nature (Principle 168). The Constitution also contains the principle of non-retroactivity of crimes (Principle 169).

## *Prosecutors*

A special body of prosecutors, known as the prosecutors ('parquet') of the Islamic Revolution, have been created, with a prosecutor and investigating magistrates for each province (Ostan), under the general supervision of a prosecutor-general in Teheran. They are appointed by the Council of the Revolution, subject to the approval of the Imam, and are chosen from among the 'jurists and judges of the Islamic Revolution'.

## *Preliminary Proceedings*

The investigating magistrate has the normal powers to summon and examine witnesses, to grant bail in appropriate cases, to order sequestration of the property and monies of the accused ('taking into account the needs of his family').

As a general rule no arrest can be made, nor any entry into a home for purposes of sequestration, without the prior written authorisation of the prosecutor.

Where an arrest without warrant is authorised (e.g. danger of absconding) the prosecutor must be informed without delay.

There are special provisions for accused persons who are members of the armed forces or law enforcement bodies, or persons holding important political or administrative positions.

In such cases, the summons and arrest must be approved by a commission created by the Revolutionary Council, and the accused's superior officer must be informed in advance.

At the end of his investigations, the magistrate gives his opinion on the guilt or innocence of the accused to the prosecutor. Any difference of opinion between

them on this issue is resolved by the tribunal. The prosecutor draws up the indictment.

## *The Tribunals*

There is a Revolutionary Tribunal in each province, which may sit in several 'chambers'. Each tribunal is composed of three judges, a President, who is a judge of Islamic Law (qadi shara'), a judge with administrative responsibilities appointed by the President, and a judge 'who has the confidence of the people and who knows the needs of the Islamic Revolution', chosen by the Revolutionary Council or its delegate.

## *Procedure*

The indictment must be communicated in writing to the accused or his lawyer at least three days before the trial. The accused can appoint his lawyer. The trial is not to last more than a week, and at least 15 hours must be allowed to the accused and his lawyer to present his defence.

Witnesses and experts and the accused can be summoned by the tribunal and compelled to attend. Where the accused fails to appear, he can be tried in his absence. After the reading of the indictment and the hearing of the defence, the tribunal proceeds to 'any inquiry it considers necessary to establish the legal guilt of the accused'. Any gap in the evidence will be referred back to the prosecutor. When the evidence is complete the tribunal, 'after deliberation in conformity with the principles of Islam', gives its verdict. This may be a majority verdict if the President forms part of the majority. Otherwise, two Islamic judges must be added to the tribunal, and then the judgment of the tribunal is final.



It is expressly stated that the verdicts are not subject to appeal or review.

### *Penalties*

The penalties are those fixed by Islamic Law ('shara') and comprise execution, imprisonment, banishment and confiscation of illegally obtained property, after liquidation of the accused's debts. If the offender has no lawful property, the state must maintain those persons who are recognised by the tribunal as being his dependents.

Sentences of execution must be reported to the prosecutor ten days before they are carried out, and during this period the condemned person must be allowed to meet his family. Where possible the execution is to be carried out at the place of the crime.

The 'special places of detention' of the prosecuting authorities are to be under the supervision of the local prosecutor of the revolution.

### *Comment*

As will be seen these rules cover a number of important safeguards. There are,

however, several glaring omissions. There is no provision for the accused to be represented by a lawyer during the preliminary investigations, nor for his right to see and confer with his lawyer in private before the trial (though it may be that this is accorded in practice). The minimum time allowed for the preparation of the defence appears inadequate, and it is not clear whether there are any procedures for applying for an extension of time. The limitation of the maximum period of the trials to one week must be inadequate in some cases. Perhaps the most grave omission is the denial of any right of appeal or revision. This assumes that the tribunals are incapable of error, which experience in all countries shows to be an unwarranted assumption. Moreover, courts which are not subject to appeal or review tend to become lax in the strict application of the law. This provision is a clear violation of Iran's obligation under Article 14(5) of the International Covenant on Civil and Political Rights.

It is to be hoped that the work of the Revolutionary Tribunals will soon be terminated and all cases referred to the ordinary courts, which already have the necessary jurisdiction to try them under the new Iranian Constitution.

## *Zimbabwe*

On 28 July 1980 the Minister of Justice of independent Zimbabwe, Mr Simbi Mubako, a former lecturer in constitutional law, spoke to a group of young Zimbabweans at a seminar at Domboshawa Training Centre. The following excerpts from his speech demonstrate his government's com-

mitment to the legal protection of human rights.

"... It was been said that the only thing all the parties represented at the Lancaster House Conference were agreed upon from the outset was the name of the state —

Zimbabwe. This was not quite true. All the parties were agreed on the idea of a justiciable bill of rights guaranteed by the constitution.

True, the Rhodesian Front, through their spokesman, Bishop Abel Muzorewa, was more interested in protecting the property rights of white farmers, businessmen, and civil servants, while the patriotic front wanted more governmental discretion in paying compensation.

But on the other items of the bill of rights — there are 18 items altogether — there was virtual unanimity. Indeed, what I, as someone with a professional interest in constitutions, found most fascinating was the intensity and seriousness of the debates within the patriotic front parties Zanu and Zapu, on how to strengthen the bill of rights and promote civil liberties.

Bearing in mind that most of the delegates had suffered under the colonial regimes in this country some of the most atrocious deprivations of liberties, it was immensely refreshing that they were all opposed to entrusting any future government of Zimbabwe with the kind of dictatorial powers which their former oppressors had wielded...

... I must state openly that I am a strong supporter of human rights. I have been so as an academic, and out of government; I intend to remain so while I remain a minister of the government of Zimbabwe; and I am talking of individual human rights, not necessarily group rights.

The philosophy of African nationalism in this country has always been that you must give every individual person the vote, and respect his or her rights, and you have thereby given the groups the best possible protection. Even then, it may be asked what is the value of our bill of rights or any other, when they can be ignored?

The first advantage of a bill of rights is that it is a basic legal document which de-

finies and guarantees certain items of civil liberties which a particular society believes should be protected from encroachment by the state. It lays down minimum standards of protection for every person within the jurisdiction of a state. On the part of the state, the adoption of a bill of rights implies an acceptance of the idea of limited government, a rejection of absolute discretion, and a recognition that all persons are to be treated equally, and with respect, not only as a matter of good statesmanship, but as a matter of legal obligation.

If one believes that state power ought to be controlled, and that absolute power corrupts, it is not difficult to see that an effective bill of rights can be a very important bulwark against dictatorship.

A bill of rights is primarily a political document, a solemn covenant between the government and its people, comparable to the Magna Carta, 1213, and the English Bill of Rights, 1689; it is a simple acceptance of the concept of limited government, and the foundation of liberty and democracy. While it is possible to have a democracy without a bill of rights, the existence of an effective bill is the surest indication of the absence of tyranny.

No one claims that a bill of rights by itself can prevent the emergence of tyranny; all that can be said is that the work of a dictator is made much more difficult. As the report of the Minorities Commission on Nigeria put it: "A government determined to abandon democratic courses will find ways of violating them. But they (bills of rights) are of a great value in preventing a steady deterioration in standards of freedom, and the unobtrusive encroachment of a government on individuals."

By definition, law cannot guarantee against illegality — a bill of rights is unlikely to stop a determined dictator any more than a determined burglar will be stopped by the criminal law — but in both cases the

citizen is protected by the knowledge that the dictator and the burglar are acting illegally, and if caught, will be punished.

Secondly, a bill of rights may have a great educative value, both on the citizens and on the state. It becomes a common charter in understanding about people's rights. There can be no doubt that people in countries with bills of rights tend to be more conscious of their rights than those who have to rely on the common law, or individual statutes.

If we compare the United Kingdom position with the United States of America, we shall find that in the latter, civil liberties are a much more lively subject, not only among lawyers, but in the education system, in employment, housing, the army, and in pretty well every aspect of life.

The high degree of consciousness of human rights among americans is very largely attributable to the presence of a fairly effective bill of rights. In a young state emerging from decades of colonial suppression, the majority of the people will have acquired the habit of submissiveness to government officials, which may continue after independence is won by the educated elite.

A bill of rights which is taught in schools, and enforced by the courts, may be one way of restoring people's pride in themselves and creating a vigorous state of free people. The more people know and value their rights, the more difficult it will be for a tyrant to abolish them.

Education is a two way process. A bill of rights can educate the government as well as administrators. It sets a standard to guide the legislature, draftsmen, and the individual civil servant who deals with the public. In time, the whole state machinery gets into a habit of respecting people they administer, and that way the people's rights become more securely guaranteed...

... You young people should regard our constitution not so much as a protector of items of civil liberties, but as the best guarantor of your freedom to do good to your fellow country men and women. It gives us physical freedom, physical power, legal authority to govern ourselves. But what is more, it gives us, especially you young people, the opportunity to take the initiative, the opportunity to be creative for your own happiness, as well as that of the broad masses of Zimbabwe..."

# COMMENTARIES

## *UN Sub-Commission on Discrimination and Minorities*

The Sub-Commission on Prevention of Discrimination and Protection of Minorities met in Geneva from 18 August to 12 September, 1980, for its 33rd session. For the first time it met for a period of four instead of three weeks.

In his introductory statement, the Director of the Human Rights Division, Mr. Theodoor van Boven, stressed the fact that equality and non-discrimination still constitute the heart of human rights. Among the main obstacles to the effective realization of human rights, he mentioned the feeling of racial superiority, cultural arrogance, the existence of an unjust economic order, and the role of multinational corporations. Among the major tasks ahead, he pointed to the elimination of discrimination against women, and expressed his deepest concern for the continuing reports of involuntary disappearances. He also commented on the confidential procedures for the implementation of human rights and wondered whether, in the light of abuses of these procedures by certain countries, their assumptions were still valid.

### *The NIEO and the Promotion of Human Rights*

This item was introduced by the Special Rapporteur, Mr. Raul Ferrero (Peru), who reported on the UN seminar on the "Effects of the Existing Unjust International Economic Order on the Economies of Developing Countries and the Obstacle that

this Represents for the Implementation of Human Rights and Fundamental Freedoms", held in Geneva from 30 June to 11 July, 1980. Three topics were discussed at that seminar:

- a) The effects of the existing unjust international economic order on the economies of developing countries and the obstacle that this represents for the implementation of human rights and fundamental freedoms;
- b) The right to development as a human right, including the concept of equal opportunity, which was as much a prerogative of nations as of individuals within nations; and
- c) The search for formulas for international co-operation which would help in eliminating the existing unjust international economic order and permit the enjoyment of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.

During the discussion in the Sub-Commission attention was drawn to the widening of the gap between the affluence in the industrialized countries and the abject poverty in the least developed countries in recent years. The idea of a Fourth World was already emerging and the demand of the less developed countries for enjoyment of the right to be helped had become more articulate.

The representative of the ICJ argued that the establishment of a New Interna-

tional Economic Order (NIEO) implies not merely a transfer of resources and technology from the rich States of the north to wealthy elites in the south, but a system of more equal and just distribution of wealth and resources among peoples and within nations.

Some speakers found it difficult to establish links between the promotion of human rights and the NIEO. Economists tended to look in one direction and human rights activists in another. Till now development conferences had shown little concern for human rights.

Several speakers referred to arms expenditures as a major obstacle for the establishment of a NIEO. If only a fraction of the 1 billion dollars a day spent on armaments was given to peace, development and human rights, these problems could still be solved.

One of the members drew an analogy between *apartheid* and the unjust international economic order. While *apartheid* meant separate development, the idea of separate development was also at the heart of an unjust international economic order. In his view, *apartheid* and the existing unjust international economic order were both the legacy of colonialism and exploitation.

Others was stated that individual rights must never be stifled in the interest of collective rights, and that the argument of development had been stretched and abused far too loing in some countries to justify the restriction of civil and political rights. Although it was essential to stress the inter-relationship between the two, no violations of human rights should be justified by the non-establishment of the NIEO.

### ***Human Rights and Individual Duties***

The report which attracted most discussion was the final report submitted by Mrs.

Erica-Irene Daes on "The individual's duties to the community and the limitations on human rights and freedoms under Art. 29 of the Universal Declaration of Human Rights".

The Special Rapporteur divided her study into three parts: one on the duties of the individual; one on the limitations on certain human rights; and one on the protection of human rights in time of public emergency.

Throughout the study, Mrs. Daes maintained a balance between rights and duties. She asserted that "Man is the measure of all things" and, accordingly, she did not subordinate the enjoyment of human rights to the fulfilment of duties. She was concerned to provide precise definitions of and limitations to the restrictions of certain human rights, stating that those restrictions could never result in the complete annihilation of the rights to which they were applied. In this regard, the sub-title given by Mrs. Daes to her study is significant: "A contribution to the freedom of the individual under law".

At the outset, the report states that the duties and obligations of the individual were not mentioned in detail in the Universal Declaration of Human Rights "for the simple reason that the cardinal object of the Declaration is the protection of the rights of individuals in relation to the State. History has shown that there is a need for such protection, whereas there is no imperative necessity to safeguard the State against the individual". Many speakers supported the view that conflicts between the rights of the individual and other interests should always be resolved in favour of the individual.

Although some members expressed the view that sometimes the general welfare of the community or the need to accelerate economic development might justify imposing some limitations or restrictions

upon the enjoyment of human rights, the majority opinion appeared to be against this thesis.

Some speakers felt that neither the Marxist nor the Islamic view of human rights were sufficiently dealt with in the report.

The recommendation of the Rapporteur that human rights teaching and education should be developed at all levels was fully supported by many speakers, sometimes going into detail on matters such as what to teach, how to do it, and what might be the role of UNESCO in this field. The recommendation was endorsed in the resolution adopted.

Most speakers also endorsed the recommendation to prepare a study on the status of the individual in contemporary international law, believing that this study would constitute a major contribution to the evolution of the international law of human rights. Accordingly, the Sub-Commission asked for authority to appoint Mrs. Daes as Special Rapporteur to prepare a study on this subject. The resolution also requested authority for the Sub-Commission to elaborate a Draft Declaration confirming common United Nations principles and standards defining limitations and restrictions on the exercise of certain human rights, as recommended by Mrs. Daes study.

### *Human Rights Violations*

Under the item of gross violations of human rights in any part of the world, the situations in Afghanistan, Argentina, Chile, El Salvador, Guatemala, Haiti, Kampuchea, and South Korea were referred to by several speakers, but most attention was directed to the cases of South Africa, the Israeli occupied territories, and Bolivia.

In the course of the debate it was argued that the most serious examples of human

rights violations were: a) the suppression of the rights of the Palestinian people and the prevailing encroachments in the Arab territories occupied by Israel, the latest manifestation of which was the unilateral annexation of Jerusalem in flagrant violation of international law, a matter of deep concern to the entire world community; and b) the abhorrent policy of *apartheid* pursued by the government of South Africa on its own territory and in Namibia.

Concerning Bolivia, several members addressed themselves to the deterioration of the human rights situation in that country, at a time when substantial progress had been achieved and the country was in the way to inaugurate a newly elected President of the Republic. The Sub-Commission adopted a resolution making an urgent appeal to the government of Bolivia to respect the Universal Declaration of Human Rights and to take all necessary steps to restore and safeguard basic human rights and fundamental freedoms in Bolivia. The resolution requests Mrs. Halima Warzazi (Morocco), to make an analysis of the information received by the Secretary-General, and to present this analysis together with such recommendations as she deemed appropriate to the Commission on Human Rights at its next session.

Concerning Kampuchea, the Commission on Human Rights had requested a member of the Sub-Commission to review any further material that might become available on the situation in Kampuchea and the Sub-Commission had appointed Mr. Bouhdiba to carry out this task. In his oral review, he observed that the documentation available was contradictory, since it derived from various sources having conflicting interests.

The Pol Pot government of Kampuchea had made a series of allegations against Viet Nam, accusing it of mass executions, rape and subsequent execution of a large

number of girls, and the misappropriation and diversion to the Vietnamese army of humanitarian assistance intended for civilians and refugees. It is also alleged that famine is systematically fostered in order to disrupt production, with a view to maintaining a permanent state of insecurity obliging Cambodians to seek refuge abroad.

On the other hand, the documents submitted by the government of Viet Nam accused the Pol Pot regime of having committed genocide by killing 3 million Kampuchians during its rule. The Thai authorities were said to be guilty of giving refuge to Pol Pot, his friends and his troops, who use the territory of Thailand as a base for attacking Kampuchea and preventing its peaceful reconstruction.

Each party, according to the Special Rapporteur, accuses the other, and it is very likely that each one is justified in the allegations which it makes, as they tend to be confirmed by the information submitted by third States, international agencies, and non-governmental organizations.

The recommendations of the Special Rapporteur include: a) the implementation of the principle of self-determination; b) the return of refugees to their region of origin; c) humanitarian assistance to refugees and displaced persons, and d) assistance in the reconstruction of Kampuchea.

Several speakers referred with satisfaction to the welcome changes that had taken place with regard to the observance of human rights in a number of countries, notably Ecuador, Equatorial Guinea, Nicaragua, Peru and Zimbabwe.

Three important general resolutions were adopted under this item. The first one recommends the creation of a monitoring and information gathering service within the United Nations Division of Human Rights, in order to enable the Sub-Commission to prepare its report containing information on violations of human rights and

fundamental freedoms from all available sources; this resolution calls on the ECO-SOC to seek authorization for the establishment of such a service and funds and personnel for this purpose.

The second stated that, having considered allegations which may reveal a consistent pattern of violations of human rights, the Sub-Commission wishes to verify these situations by independent fact-finding before bringing them to the attention of the Commission on Human Rights. It therefore requests authority to make arrangements for one or more of the members of the Sub-Commission – subject to the consent of the governmental authorities concerned – to visit countries with a view to examining first-hand, and reporting to the Sub-Commission upon the human rights problems in any country which were the subject of discussions at this session, together with any other human rights problems of comparable magnitude which may come to their attention during their examination.

The third resolution recalls the provisions of paragraphs 4 and 5 of resolution 28 (XXXVI) of the Commission on Human Rights on the possibility of creating an inter-sessional role for the Commission's Bureau, and of possible emergency sessions of the Commission in order to consider reports of massive and flagrant violations of human rights of an urgent nature. The Sub-Commission decided to inform the Commission of its readiness to assist in responding to such reports and recommended that the Commission, in considering this matter, should give attention to ways and means by which the Sub-Commission, particularly having regard to the expert character of its composition, could contribute to the response of the United Nations to such reports. In an annex to the resolution, several ideas were suggested of possible roles for the Sub-Commission.

This year NGOs once again played an

important role in identifying countries where gross and massive human rights violations had taken place, and providing evidence of them.

A noteworthy contribution was made by a representative of the National Aboriginal Conference of Australia, denouncing what he called the repressive policies of the government of Australia towards aboriginal people and, particularly, the deprivation of the right to their own land in the interest of a multinational mining corporation — the Amax Petroleum Co. Contrary to usual practice he was allowed to make a lengthy statement exceeding the agreed time limit.

Another interesting development concerning NGOs took place when the Executive Secretary of the ICJ requested the floor after an intervention criticising the ICJ was made by the observer from Syria. Although the chairman ruled that there was not a normal right of reply for NGOs, the Sub-Commission decided, on the suggestion of Mr. Singhvi, that it could always invite the representative of an NGO to take the floor, which he did.

### *Rights of Mental Patients*

Following General Assembly resolution 33/53, of 14 December 1978, the Sub-Commission was requested to undertake, "as a matter of priority", the study of the question of the protection of those detained on the grounds of mental ill-health. At its previous session the Sub-Commission had requested the Secretary-General to prepare a report with a view to the formulation of guidelines regarding: a) the medical measures that may properly be employed in the treatment of persons detained on the ground of mental ill-health; and b) procedures for determining whether adequate grounds exist for detaining such persons and applying such medical measures.

In addition to this report from the Secretariat, the Sub-Commission had before it a Draft Body of Principles for the Protection of Persons Suffering from Mental Disorder, submitted by the International Association of Penal Law and the International Commission of Jurists, whose representative was asked to introduce the document.

During the debate it was noted that the Draft Body of Principles reflected considerable expertise of judicial, legal, psychiatric and social professionals in various parts of the world, and that it could be regarded as an excellent starting point for the Sub-Commission's own work in this field.

The Sub-Commission adopted, by acclamation, a resolution entrusting to Mrs. Erica-Irene Daes the task of studying available documents and the replies of governments and specialized agencies to a questionnaire to be sent by the Secretary-General, with a view to elaborating and submitting to the Sub-Commission at its thirty-fourth session: a) guidelines related to procedures for determining whether adequate grounds exist for detaining persons on the grounds of mental ill-health, and b) principles for the protection, in general, of persons suffering from mental disorder. The Sub-Commission also decided to establish at its thirty-fourth session a sessional working group to consider the Draft prepared by the Rapporteur, with a view to adopting it at that session.

### *Involuntary Disappearances*

The Sub-Commission expressed its deep concern and strong condemnation of the continued practice of "involuntary disappearances". It was observed that such "disappearances" were the work not only of private and para-military organizations, but of States themselves. Often kidnappers ap-



peared in uniform, with the full authority of the State. In some cases the government had decreed that persons missing for a certain number of years could automatically be declared dead, even against the wishes of the family; that was a transparent device to avoid investigation and accountability.

The idea of a limited international *habeas corpus* was suggested as a means of providing a remedy to this persistent situation. Nevertheless, in the opinion of some members, this idea still very vague and had to acquire both procedural and substantive content.

The decision to establish a working group on disappeared persons, adopted by the Commission on Human Rights at its last session (Resolution 20 (XXXVI)) was welcomed and it was decided to urge the Commission that the mandate of the Working Group should be renewed. The same resolution also urged the Secretary-General to continue to exercise his good offices, as requested by the General Assembly, in cases of enforced or involuntary disappearances of persons, paying particular attention to urgent cases where action is necessary to preserve the life or integrity of individuals.

### *States of Emergency*

Mme. Questiaux, Special Rapporteur for the study of the implications for human rights of recent developments concerning situations known as states of siege or emergency, announced that she would submit her final report during next year's session, and that this extra year would enable her to consider forthcoming further information.

During the debate, the view was expressed that, although States have the right to declare emergencies, it was a fact that states of emergency often lead to violation

of human rights. These states of emergency tend to become permanent in many countries or to be used in order to impose permanent limitations on democracy and fundamental rights, giving at the same time an air of legality to human rights violations.

During his intervention, the representative of the ICJ made reference to the already too prolonged duration of states of emergencies in Syria and South Korea, and the grave effects that this has had on the enjoyment of human rights in those countries. He also referred to the case of Argentina, and the international repercussions of her prolonged state of emergency in the light of the recent military coup in Bolivia and the evidence indicating Argentine involvement in this coup.

### *Independence and Impartiality of the Judiciary and Independence of Lawyers*

Mr. Singhvi (India) submitted his preliminary report on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers. He emphasized that the efficiency and credibility of the judicial system were based on the integrity, impartiality and independence of judges and juries, and that the independence and integrity of the legal profession were essential to the maintenance and safeguarding of human rights and fundamental freedoms. Nevertheless, the two concepts took different forms from one country to another.

During the debate, the view was expressed that the rights of society and individuals could be safeguarded only by judges who were fully conscious of their responsibilities and that, therefore, every effort should be made to educate and train them properly.

A resolution was adopted calling upon all States fully to respect and guarantee the right of all judges and lawyers freely and without interference to form or participate in professional organizations of their own. Another resolution suggested a UN seminar on this subject.

### ***Encouragement of Universal Acceptance of Human Rights Instruments***

This year, pursuant to resolution 1 B (XXXII) of the Sub-Commission, a sessional Working Group on the encouragement of universal acceptance of human rights instruments was established. The mandate of the Working Group was (a) to request governments through the Secretary-General to forward information on the circumstances which had so far not enabled them to ratify or to adhere to human rights instruments mentioned in the resolution, and (b) to invite representatives of governments for discussion with members of the Working Group with a view to providing further clarifications.

In face of a challenge which had been made by one Western country to the Sub-Commission's authority to request this information, most members of the Working Group expressed the opinion that it was fully competent to carry out its mandate and this was also confirmed by the opinion of the legal adviser of the United Nations.

During the debate some of the members of the Working Group observed that its task was not inquisitorial or adjudicatory; it was to assist States and to encourage and facilitate universal acceptance of human rights instruments.

The Working Group expressed its appreciation to the governments that had co-operated with the Sub-Commission by sup-

plying information and decided to consider at its next session the question of adding new instruments to those mentioned in the resolution, particularly the International Convention against the Taking of Hostages, and the Convention against all forms of Discrimination against Women, both adopted in 1979.

### ***Adverse Consequences for the Enjoyment of Human Rights of assistance given to the Racist Regimes in Southern Africa***

Pursuant to a resolution of the Commission on Human Rights, the Sub-Commission decided to mandate Mr. Ahmed Khalifa (Egypt) to continue to update each year the list of banks, transnational corporations and other organizations assisting the racist regimes in southern Africa, giving such details regarding enterprises listed as he might consider necessary and appropriate, including explanations or responses, if any, and to submit the updated report through the Sub-Commission to the Commission on Human Rights.

### ***Slavery and Slavery-like Practices***

The Working Group on Slavery had had before it, *inter alia*, the final report of the Secretary-General on *apartheid* as a collective form of slavery. Most of the information received by the Working Group had been supplied by non-governmental organizations whose role in assisting the Working Group was considered invaluable. The Sub-Commission adopted a seven-part-resolution that, *inter alia*, proposes to the Commission on Human Rights to consider establishing a Human Rights Assistance Fund to provide material support, including the ap-

pearance of witnesses before the Working Group on slavery, to those areas of human rights where it is most needed. The resolution strongly rejects the labour practices of the government of South Africa, which constitute a form of slavery, and expresses its conviction that military, economic, and other forms of collaboration with South Africa contribute to perpetuation of the slavery-like practices of *apartheid*, and expresses its support for a decision of the General Assembly to organize, in co-operation with the OAU, an international conference on sanctions against South Africa which is now scheduled for 1981.

### *Exploitation of Child Labour and Sale of Children*

The Sub-Commission heard a statement by Mr. Bouhdiba (Tunisia), who had been entrusted with the preparation of a report on the exploitation of child labour. It was felt that effective regulation could eliminate the worst forms of exploitation, such as work underground, work for excessively long hours, work for minimal wages, and work damaging to the health of the child. Child labour in Italy, Spain, Thailand, Malaysia, South Africa, and Colombia was discussed and, concerning the first four of these countries, the Sub-Commission requested the Secretary-General to bring the reports submitted to the Working Group to the attention of the Governments concerned for comment.

The Working Group had considered a report on the sale of children for adoption in Thailand. The Sub-Commission condemned

this practice of adoption based on financial considerations in disregard of the welfare of the children involved, and called for an immediate end to it. The resolution also requests the Secretary-General to bring the report on the sale of children in Thailand to the attention of its government for comment.

### *Rights of Minorities*

An open-ended Working Group on minorities considered a revised and consolidated text of the Draft Declaration on the rights of persons belonging to national, ethnic, religious, or linguistic minorities. During the discussion, one member urged that the Draft Declaration should protect individuals belonging to minority groups, and not simply the groups themselves. Some specific amendments were suggested, but it was the general feeling of the Working Group, as stated in its report, that the Draft Declaration should be redrafted and further elaborated. The report of the Working Group as well as the summary records of the discussion on this item will be submitted to the next session of the Commission on Human Rights.

Under this item, the Sub-Commission also adopted a resolution deploring the execution of seven members of the National Administrative Council of the Baha'i community of Iran, and requested the Secretary-General to transmit the concern of the Sub-Commission for the Baha'i community to the government of Iran, inviting it to grant full protection of fundamental rights to the Baha'i religious community.

## *Copenhagen Conference on UN Decade for Women*

The World Conference on the UN Decade for Women held in July at Copenhagen is a step forward in the struggle to evolve new legal, economic and social norms for the advancement of women. The Programme of Action adopted at the Conference after lengthy and frequently controversial debate arrived at a near global consensus. Its decisions and resolutions will continue to be a point of departure for the planners, politicians and policymakers for the next half of the Decade. The core theme of the Programme, spelt out in over 284 paragraphs, makes a simple demand on the part of half of humanity<sup>1</sup>. This demand seeks to change relationships of society towards women in such a way that they can also share more justly in the material, social and intellectual benefits in the main resources of mankind.

The Copenhagen Programme of Action surveys the current scene in an historical perspective and provides some links to the proximate causes and origins of inequalities in relation to women and society. The conceptual framework of the Programme seeks to relate developmental issues and the gap between the labour impact of women and their socio-economic rewards – a task left somewhat vague in the earlier Mexico Plans of Action. In 1975, while the Plan had linked women's issues to the three objectives of "equality, development and peace", the Copenhagen Programme focussed attention on analysing the crucial and significant questions of the position of women in society in relation to employment, health and

education. The Programme of Action at Copenhagen reformulated the questions in asking "where are we heading?". In answering this, the Programme devotes a substantial number of its pages to highlighting the emerging outlines of national programmes. It captures those elements, like islands in an endless ocean of research, which provide new social and economic indicators on measuring and quantifying this complex reality. There has been a dramatic change in the participation rates of women in the labour force in developed countries for which the labour market and the social infrastructure is wholly unprepared. In socialist countries, the problems are at another level. While there is an increase in health and welfare facilities for women workers, these institutions are not able to keep pace with such a large number of women particularly with young children. In the countries of the Third World, the problems have quite another shade coloured by prevalence of poverty. Here too, there are some significant changes in attitudes as the stage of industrialisation advances. Women are posing questions on wage rates, conditions of work and protective legislation.

The Programme contains a series of recommendations and resolutions that are forward looking and are like lamp posts in a long journey towards equality and development.

At the national level, in suggesting development strategies the Programme bases its assumptions on the joint responsibility of men and women for the welfare of the

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1) A more detailed report of the Programme and analysis of the resolutions and debates of the Conference, together with information on the U.N. Convention on the Elimination of Discrimination Against Women, will be feature in the semi-annual ILO Bulletin *Women at Work*, No. 2 (1980).

family. In a series of recommendations, it urges governments to establish machinery, eliminate discrimination in legislation and involve women in decision-making at all levels. Addressing itself to the international targets and strategies, the Programme considers that the perpetuation of global irregularities and economic dependence ultimately inhibits the full utilisation of material and human potential — which mainly affects women adversely.

During the Copenhagen Conference, the range of issues dealt with at the Plenary and Committee levels touched almost all aspects of the daily life of women, their work burden, their inadequate remuneration, their social security and finally the existing inequalities in almost all areas affecting their development — training, trade unions and technology. The essential point that emerges from the results and resolutions of the Conference concerns the underlying discrimination against women in all spheres of life. The type, the extent and degree of this discrimination varies according to whether or not women work at home or away from home and varies also between regions, cultures and stages of industrialisation. But irrespective of the place of their work and life, *de facto* and *de jure* discrimination fol-

lows women like a shadow seriously affecting their full potential as human beings.

In fact, analyses of the various points of discrimination at work, in family life and in decision-making structures are the major themes of the 48 resolutions adopted at the Conference. At present, there are some international standards relating to human rights (e.g. ILO Conventions and Recommendations) which incorporate norms and values implying more equitable relationships of women to the labour market, which aim at improving their economic and legal status. But, there remains an urgent need to transform existing relationships to create a new climate in social attitudes. Legislative measures can play a particular role in this transformation by laying down the foundation of a new system of values at the national level by which to quantify and evaluate women's economic and social contributions.

Thus, as we move towards the 1980's and the links between women's issues and developmental questions become clearer, women's issues will not only acquire a new visibility; women themselves will prepare to make their voice heard on their economic and legal rights as a part of the total social progress of humanity.

## *Human Rights Committee*

### *Agreement Reached on Authority to Comment on States' Reports*

During the four years of its existence the Human Rights Committee has been faced with an intractable problem concern-

ing the very definition of its powers and role. Article 40 of the Covenant on Civil and Political Rights provides that the Committee shall study the reports submitted to it by States Parties and "transmit its reports, and such general comments as it may

consider appropriate to the States Parties." One school of thought maintains that supervising implementation by States Parties of their obligations under the Covenant requires studying the report of each State to determine whether it reveals any misinterpretations of the rights set forth in the Covenant, insufficient efforts to eliminate obstacles to the full enjoyment of them, or of laws or practices which are irreconcilable with them, and making appropriate comments. The opposing school of thought holds that in ratifying the Covenant States accepted only an obligation to submit reports, that the dialogue which exists between the Committee and States Parties is voluntary in nature, and that formulating criticisms of States Parties does violence to both the dialogue and the agreement which the Covenant represents.

Thus for four years the Committee has not attempted to undertake the task of formulating general comments. Its time has not been wasted for the Committee has conducted exhaustive discussions of its mandate, gained considerable experience through the study of reports of thirty-six States Parties, and made significant progress in the development of efficient procedures and practices. At the Committee's 11th Session in Geneva in October 1980 there was strong sentiment that this issue should be resolved, and a compromise agreement was reached which will permit the Committee to begin this aspect of its work at its next session.

It was agreed that the content of the Committee's general comments could refer to questions related to the application and content of individual articles of the Covenant, the implementation of the obligations to submit reports and to guarantee the rights enumerated in the Covenant, and cooperation between States Parties with respect to the application and development of the Covenant. In formulating these

agreements the Committee would be guided by *inter alia* the need to draw the attention of States Parties to improvement of the reporting procedure and implementation of the Covenant, the stimulation of activities of both States Parties and intergovernmental organisations in the protection and promotion of human rights, and the need to promote cooperation between States Parties and to summarize the experience gained by the Committee in the examination of States reports.

The reference to recommendations concerning compliance with the reporting requirement of Article 40 are explained by the Committee's experience that in a significant number of cases States reports have been inadequate, have described situations no longer in effect or even, as in the case of Chile, have been misleading. Somewhat surprisingly the Committee has not yet begun to discuss measures to encourage compliance with the requirement that notice be given of states of emergency involving derogations from the Covenant, although experience has shown that a number of State Parties have complied with this requirement only belatedly or not at all.

The Committee's contribution to the dialogue between itself and the States Parties must at times be difficult to decipher. A State representative who comes to listen to the views and questions of the Committee, is confronted with the views of a number of individuals and is left with the unenviable task of trying to reconcile them or draw from them useful guidelines. One suggestion made was to appoint from among the Committee members a rapporteur who would, at the conclusion of each examination of a State report, formulate tentative conclusions representing the views of the Committee on the matters which had been considered. This would not be quasi-judicial in nature, but would bring to the State's attention matters which might be useful to it

in seeking to fulfil its obligation under the Covenant.

In the compromise which was reached this proposal was not adopted. It was agreed that at the end of each examination of a State report the Secretariat should compile at the Committee's request a 'systematic analysis' of the questions asked by its members and the responses received.

Another important point left unresolved by the Covenant concerns the periodicity of reports. It was decided that States reports should be submitted at three or four year intervals, depending on the work load of the Committee.

The agreement reached at the 11th Session, despite some shortcomings, is an important step forward. It is expressly stated to be a provisional agreement without prejudice to future deliberations on the scope of the Committee's mandate under Article 40, and several members expressed the view that the agreement was only acceptable as a first step in defining the role of the Committee. The fact that this difficult decision was adopted by consensus is a tribute to the seriousness and pragmatism which mark the work of the Committee.

### *Important Decisions Under the Optional Protocol*

During the three sessions held in 1980 final decisions were adopted on five communications under the Optional Protocol, four involving the rights of detainees and one the right to a passport. In each case the government concerned was Uruguay, which ratified the Protocol prior to the 1973 coup d'état.

All four communications regarding detainees contained allegations of torture or ill-treatment, as did the two cases decided by the Committee in 1979 (see ICJ Review No. 23). The decisions of these cases offer

some insight into the Committee's view on the burden of proof. In the first case decided in 1979 the government had not replied to the merits of the case. The Committee accepted the allegations of torture and found a violation of Article 7. In the second case, decided in 1979, the government denied in general terms these allegations. The Committee found the general denial insufficient and stated that it cannot find that there has *not* been a violation of Article 7. In this respect, it added "the State Party has failed to show that it has ensured to the person concerned the protection required by Article 2 of the Covenant". Six members joined in a separate opinion stating that in their opinion a violation of Article had been established.

Among the four such cases decided this year are one in which the alleged torture occurred before entry into force of the Covenant (R.1/6) and one in which medical evidence of torture was submitted (R.2/8). In the other two (R.1/4 and R.2/11) the Committee concluded that violations of Article 7 had occurred, basing its conclusions on facts which are "... uncontested except for denials of a general character..." It further states that where serious allegations of torture had been made and the victim had named individuals allegedly responsible, the State Party cannot rest on general denials but is obliged to conduct an investigation of these charges and bring to justice any person found responsible.

In each of these four cases it was alleged that the individuals concerned were punished for political reasons in violation of Article 19. In only two cases, however, were views adopted with regard to these allegations. The first (R.2/8) involved a former trade unionist and his wife convicted respectively of "subversive association" and "assisting a subversive association". The government admitted their detention and eventual conviction under these charges,

but submitted no evidence as to the nature of their activities.

The other case (R.2/11) is that of Mr. Alberto Grille who was arrested and interrogated regarding alleged membership of the Communist Party and the identity of members of the communist youth organisation. The government replied that he was detained by reason of his subversive activities on behalf of a clandestine element of the prohibited party, and for attempting to undermine the moral of the armed forces. The Committee concluded that without details of the alleged activities and copies of court proceedings, these replies did not permit the conclusion that arrest detention and trial were justified. In the Grille case a separate opinion was submitted by one member, who found that Mr. Grille did not provide sufficient information about his political views and activities to support his claim that his rights under Article 19 had been violated.

The manner in which the Committee has evaluated these allegations, in particular its jurisprudence regarding the burden of proof, have permitted it to take effective action on communications received without prejudicing the right of the State to refute unfounded charges. Nevertheless, the limitations inherent in deciding communications without facilities for hearing testimony or verifying factual allegations are evident.

Although Uruguay has been in a state of siege since 1968 no notice of derogation was made until July 1979, more than three years after the Covenant entered into force. Even this notice did not comply with the requirements of Article 4(3) of the Covenant, since it states neither the specific rights which are being derogated from nor the reasons for the state of emergency. In considering whether any of the *prima facie*

violations of derogable provisions of the Covenant might be justified, the Committee noted that derogation is only permitted "in strictly defined circumstances, and the government has not made any submissions of law or fact to justify such derogation (R.2/11, para 11)".

The fifth communication<sup>1</sup> concerned the issues of whether the right to a passport is protected by the Covenant, and whether the Covenant obliges States Parties to respect certain rights of citizens living outside its territory. It was submitted by Mr. Guillermo Waksman, a Uruguayan living abroad whose application for renewal of his passport was denied. Mr. Waksman is a journalist who, after writing articles criticising human rights violations in Uruguay, received threats which caused him to go into exile. The communication stated that he was within the jurisdiction of Uruguay with respect to the issuance of passports and refusal to provide a passport effectively denied the "freedom to leave any country" set forth in Article 12(2) and the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers" in Article 19(2). It also alleged that denial of his passport was in retaliation for Mr. Waksman's beliefs and expression of ideas, protected by Article 19.

After the declaration of admissibility and transmission of the communication to the government, the government provided him with a valid passport and so informed the Committee, who "noted with satisfaction that the State Party had taken appropriate steps to remedy the matter complained of and decided to declare the matter closed without determining whether a violation of the Covenant had occurred.

This is the first case in which a complainant has received effective relief by reason of the action of the Committee.

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1) A copy of this communication was received from its author.



# ARTICLES

## *Administrative Law: Civil and Common Law Systems Compared*

by  
Professor J.F. Garner\*

### *Introduction*

As Professor David has recently said,<sup>1</sup> in the matter of legal development, as compared with continental Europe, England and Wales has been a "lone runner". In no branch of jurisprudence is this more true than in Administrative law, a body of law virtually unrecognised in this country until the present century. This "lone-ness" has been due principally to the robustness of the common law, especially in the 16th and 17th centuries, which enabled it to resist the reception of Roman law. In consequence England knew no separation in principle between private law and public law and also no separate hierarchy of "ordinary" courts and administrative courts.

Continental Europe had, however, been nurtured in the Roman tradition and there had always been a sharp cleavage between public law and private law. The domination of Napoleon established separate administrative courts in all the dominions of his Empire, and although these were at first repudiated by such countries as Belgium and Italy on retaining their freedom, they were retained in other countries such as Germany and in Scandinavia. Italy came in line again after the Risorgimento in 1865, and even Belgium established a Conseil d'Etat on the French model in 1946, having appli-

ed the special principles of *Droit administratif* in the ordinary courts since independence in 1830. Throughout Europe the influence from an earlier age of Montesquieu's doctrine of the Separation of Powers has always been, and remains, very strong.

In this paper it is intended to explain the system of judicial review of the administration first in continental Europe, and then under the common law in England. France, by reason of its great historical influence, will be taken as the prototype for the Continent, principal variations in several countries being noted subsequently.

But first, it must be made clear that by "judicial review" is meant review by the Courts of acts of the administration, by way of annulling the administrative decision or otherwise impugning its validity, with or without ancillary relief by way of an order for payment of compensation. This paper is not concerned with other forms of redress of citizen grievances against the administration, such as petitions to the legislature or to the Head of State, or complaints to an Ombudsman.

### *Judicial Review in France*

In France the administrative courts (the local tribunal administratif, with a right of

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appeal to the *Conseil d'Etat*) have exclusive "common law" jurisdiction, in all matters where the administration, at central or local level, is a party, subject to certain exceptions, the more important of which are the following:

- a) cases involving the personal liberty of the citizen;
- b) traffic accidents;
- c) foreign affairs and matters involving the affairs of the National Assembly (together known as *actes de gouvernement*);
- d) matters where the administration is acting commercially as if it were a private citizen and is not operating as part of the government.<sup>2</sup>

Matters covered by (a), (b) and (d) above are justiciable before the ordinary courts and are governed by the ordinary civil law: matters falling within head (c) are not justiciable at all in any court, but in practice they are few. Subject to these, and a few less important exceptions, any administrative act, whatever its character,<sup>3</sup> is subject to scrutiny before the *tribunal administratif* or<sup>4</sup> the *Conseil d'Etat*, and this jurisdiction can be excluded only by a law of the National Assembly expressly so providing.<sup>5</sup>

The administrative courts are staffed by members of the administration — they are technically not judges and are not in law assured of the status of irremovability.<sup>6</sup> In practice, however, they are all legally qualified<sup>7</sup> and no member of the *Conseil d'Etat* has been removed from office on political grounds. When deciding cases brought before them, the administrative courts apply the two basic principles of legality and responsibility. The administration must observe the law, and the administration will be held responsible for its acts if it fails to observe the law.<sup>8</sup> *Droit administratif*, moreover, is not the subject of a code, unlike

the civil law, but has evolved almost in an English fashion from the decisions of the court. This general jurisdiction of the administrative courts may be invoked by anyone who can show that he has been adversely affected by an *acte administratif*, and that he has been denied relief on request, provided he brings his proceedings within a period (*délai*) of two months from that denial.

In order to give jurisdiction to the administrative court there must be an *acte administratif*. This may be a decision of a Minister or of a prefect or a mayor, or of a communal council, or it may be legislative in nature (but not a law of the National Assembly).

The doctrine of *legality* is widely applied by the court. So far as subordinate legislation is concerned, this must not offend against any inconsistent provision in legislation of a higher rank. Although French law knows nothing of the English *ultra vires* doctrine, each administrative body has common law powers to legislate within its own field of activity. Thus, the prefect has a duty to keep order within his *département*, and the mayor has a similar duty to keep order within his *commune*, and so the prefect and the mayor respectively can legislate within their competences, without being given any express power to do so. But an authority of a lower rank may not legislate in a manner contrary to some legislation issued by an authority of a higher rank. Therefore a mayor is subject to the dictates of his prefect while the prefect is subject to any regulations made by the Minister of the Interior.

The doctrine of *legality* goes much further than this, however. When examining the validity of an *acte administratif*, the administrative court will consider whether the "general principles of the law" (*les principes généraux du droit*) have been observed. These are unwritten principles, de-

duced in decisions of the courts from jurisprudential notions of natural justice and the Revolutionary ideas of liberty, equality and fraternity, enshrined in the Preamble of every French constitution since 1789, including that of 1958.

It is quite impossible to give a complete list of these general principles; new ones are being developed continually by the courts to meet the changing conditions of modern society. One writer has suggested there are 35 general principles; others would no doubt find more. Suffice it here to discuss a few of the more significant:

a) *Audi alteram partem*: the executive may not deprive a citizen of vested rights without first giving him an opportunity of arguing his case at a proper hearing. The Prefect of Police for Paris was therefore acting illegally when he cancelled the licence granted to Mme Trampier-Gravier to trade at a *tabac* in the Boulevard St. Germain, without giving her an opportunity to answer an allegation that she had, contrary to the terms of the licence, assigned the benefit of the licence to another person.<sup>9</sup> The hearing in such cases must be conducted by a person who was not personally involved in the original decision.<sup>10</sup>

b) There must be no interference with the liberty of the individual unless this can be clearly justified in the public interest. Therefore, although the Prefect of the Department of Alpes-Maritimes might have been able to justify an order prohibiting gypsy encampments on the beaches of Cannes, Nice or Antibes, in the interests of the tourist industry, an order banning gypsies from the entire Department was illegal.<sup>11</sup> Similarly, censorship of a film by a mayor of a commune could be upheld only if the banning of the film could be proved to have been justified in the interests of public order.<sup>12</sup>

c) All citizens are equal before the law

and therefore are entitled to equal treatment in the matter of economic and social rights. Therefore members of the Paris Conservatoire Orchestra could not be denied contracts to perform for Radio Diffusion Française (a public enterprise) simply because their orchestra was in dispute with the management of the Radio enterprise. They were entitled to consideration for employment in common with other qualified musicians.<sup>13</sup> Similarly, a mayor could not (without express statutory authority) prohibit the parking of lorries in specified streets in his commune without also prohibiting the parking of private cars in those streets.<sup>14</sup>

d) Every decision of the executive must be arrived at after full consideration of the disadvantages, as well as the advantages, that will accrue to the public as a consequence of the decision. This is the so-called doctrine of "proportionality". The administration must draw up a balance sheet (*bilan*) of the pros and cons involved in any decision of consequence to the public and to individuals. This principle has been prominent in recent decisions of the Conseil d'Etat, especially in several concerned with the compulsory purchase of land required for major public development.<sup>15</sup>

e) If the decision of the executive is not justified by reasons which the court can appreciate, the decision will be quashed for illegality. Consequently when the Minister of Education refused permission for five young men to sit the examinations for admission to L'Ecole Nationale d'Administration, and refused to give any reasons for his decision, the Conseil d'Etat declared the decision void for illegality.<sup>16</sup> This brings out an important limitation to the jurisdiction of the administrative courts. They are concerned with questions of legality, not of *opportunité*, or justifiable policy. If the Minister in the case referred to had said he was refusing the young men permission be-

cause [as has been alleged] they were communists, and in his opinion communists should not be admitted to the national administration, the Conseil d'Etat might not have interfered with the decision. But even then the court would have made sure that the Minister had got his facts right (i.e., that the young men actually were communists<sup>17</sup>). Thus, in *Imbach*<sup>18</sup> a decision of a Minister depriving the plaintiff of his passport because he had been a collaborator with the Nazis, was declared to be illegal by the Conseil d'Etat, not because the policy decision to deprive collaborators of their passports was unlawful, but because there was insufficient evidence to the effect that M. Imbach had been a collaborator.

f) Any provision in a regulation (other than in a law passed by the National Assembly) purporting to exclude the jurisdiction of the administrative courts to investigate the legality of executive decisions is itself illegal as a breach of the general principles of the law. This applied even to an order of General de Gaulle as President of the Republic at a time of emergency.<sup>19</sup>

g) Acts of the administration cannot have retrospective effect. Therefore when the Minister reduced, on an appeal to him, the amount of compensation awarded by a lower tribunal to the appellant, the Conseil d'Etat ordered the original, higher, sum to be restored by way of an award.<sup>20</sup>

Quite apart from the general principles, a decision of the administration may also be annulled if it amounts to a *détournement de pouvoir*. This principle, of some considerable standing in French jurisprudence,<sup>21</sup> may be summarised by saying that a discretionary power must be exercised within the terms in which it has been granted. In French terms the *but* or purpose aimed at by the administration must be one included within the *motif* or objective for which the power was conferred. Thus,

it was illegal for a mayor to close the cinemas in his commune after a certain hour each evening (allegedly to keep order in the commune), when it was shown that the true purpose of the order was to persuade local people to patronise his café.<sup>22</sup> It was also illegal for a mayor to ban vehicles along a certain road (allegedly in the interests of road traffic) when it was proved that the true purpose was to save the Commune the expense of repairing the road.<sup>23</sup> Both these cases are examples of *détournement de pouvoir*, in the first case where the power was wrongly used to obtain a private, entirely improper, advantage, and in the second case, where the advantage although perhaps in the public interest, was also improper in the eyes of the law. The first example is known as primary *détournement de pouvoir*, the latter as secondary.

Enough has been said to show how extensive is the jurisdiction of the administrative courts to examine the legality of an administrative act. Closely related to this general jurisdiction is their power to award compensation to a citizen who has suffered loss as a consequence of administrative action. This involves an application of the twin principle, that of *responsibility*.

This doctrine stems from the famous decision of the Conseil d'Etat in 1873 in the case of *Blanco*.<sup>24</sup> The administration must treat all citizens equally, and it acts at its peril. Therefore, if the administration causes injury to a citizen to a greater extent than that which is sustained by citizens generally, it must pay him compensation, whether the *acte administratif* involved was lawful or not. The administration are liable on the doctrine of risk, and *fault* does not necessarily have to be proved against them, as is the usual rule under the Civil Code. So, when a lunatic escaped from a state mental hospital and set fire to the plaintiff's haystack, the State had to pay compensation; by establishing the hospital, the

State had been responsible for the special loss caused to the plaintiff.<sup>25</sup> Similarly the State was held liable when an ammunition dump established in a residential area exploded (without proof of any negligence).<sup>26</sup> M. Covitéas had obtained an order from a civil court establishing his title to some 6,000 hectares of land in Tunisia (then part of France). When M. Covitéas went to take possession of his property he found the land occupied by considerable numbers of armed tribesmen. M. Covitéas asked the local Prefect to eject the tribesmen, but he refused, for the understandable reason that he did not wish to start a local war. M. Covitéas was then able to recover compensation for his loss, because he had not been able to obtain the normal services of the State to protect his property.<sup>27</sup> M. Marabout similarly recovered compensation when the Paris police were unable to secure a free passage from his garage through parked vehicles which were blocking the exit from the cul-de-sac where M. Marabout had his apartment.<sup>28</sup>

In yet another case the plaintiff had let a tenancy of an apartment to a young woman. She subsequently married a member of a diplomatic delegation to the French government in Paris. Because of the law of diplomatic immunity the plaintiff landlord found that he could not increase the rent of the apartment in accordance with the ordinary rent control provisions. Because of the inequitable manner (as compared with other landlords) in which the law had operated in his case, the plaintiff was able to recover compensation from the administration.<sup>29</sup> Regulations are as much *actes administratifs* as are executive acts, and so can equally become a justification for invoking the doctrine of responsibility. Liability based on risk rather than on fault is the price the administration pays for having the privilege of being free from supervision by the ordinary civil courts.

To summarise the position in France, the hierarchy of administrative Courts headed by the *Conseil d'Etat* and separate from the ordinary courts, exercises a general (*de droit commun*) and exclusive jurisdiction over administrative matters, with power to annul an administrative act, and to award compensation to a person aggrieved (having an *intérêt pour agir*). This jurisdiction is exercised by a simple, cheap procedure which is mostly written, but which has the serious disadvantage of being slow.<sup>30</sup>

### *Judicial Review in Other Civil Law Countries*

a) *West Germany*.— Judicial review in the Federal Republic resembles in many respects that in France, with the following special features:

1) There are five separate hierarchies of courts, each operating separately in the 10 *Länder* of the Federal Republic. These five jurisdictions are finance, social security, labour, administrative matters and the ordinary civil courts. This does not in practice lead to many difficulties, it being clear that social security, finance and labour matters will each be dealt with in their own courts, leaving other administrative matters for the administrative courts (*Verwaltungsgerichte*).

In each *Land* there are local courts and an appellate administrative court<sup>31</sup> with a Federal court of final appeal (*Bundesverwaltungsgerichtshof*) situated at Karlsruhe. In addition there is the federal constitutional court (*Bundesverfassungsgericht*) which decides on all questions of conflict and may pronounce on the constitutionality of legislation of a *Land* or of some action of the administration.

2) Before proceedings can be commenced in an administrative court, the prospec-

tive plaintiff must have sought a remedy from the next higher echelon in the administrative hierarchy by the informal procedure known as the *Widerspruch*.<sup>32</sup> Thus, if the administrative act complained of was at the level of the *Gemeinde* (local authority), a plaintiff must request a revision of the decision by the *Kreis* (or county). Only when that review proves to be unfavourable to him would he be entitled to commence proceedings before the court.

3) Observance of the general principles of the law will be insisted upon much as in the French courts, but they have not been as fully worked out by the German administrative courts. On the other hand, the plaintiff may be able to invoke principles (such as that of natural justice) appearing in the elaborate Federal Constitution of 1949 (the *Grundgesetz*) which are enforceable in the constitutional court (*Bundesverfassungsgericht*).

4) German law has worked out in more detail than the French, the theory of the "administrative act", which has been explained by the well known jurist Otto Mayer, as an expression of the will of the administration in relation to an individual. Legislation, whether primary or secondary, cannot therefore be an administrative act and is not subject to proceedings for annulment in the administrative courts. An administrative act may be null and void *ab initio*, in which event it may be ignored, or a declaration of nullity may be obtained in the ordinary courts. If on the other hand the act is only voidable because (for example) there has been some breach of the general principles of the law, it may be set aside by proceedings in the administrative courts.

5) An action for damages will lie against the administration in the civil courts on the same basis as the ordinary civil law, and the administration will be liable only if fault of some kind can be established. Claims in res-

pect of the expropriation or depreciation of the value of property also may be brought in the ordinary courts under provisions of the constitution (*Grundgesetz*). Where an illegal act has caused harm to the plaintiff (e.g., he has been improperly deprived of his pension) he may be able to recover compensation in the administrative courts as part of proceedings to annul the illegal act.

6) The German administrative courts have exclusively judicial functions; they have no consultative or administrative functions like the French Conseil d'Etat, and the members of the courts are judges, not administrators in any sense.

7) Cases of conflict of jurisdiction between the several hierarchies of courts are resolved by the federal constitutional court, but this court (unlike the French *Tribunal des Conflits*) is not concerned only with such questions of jurisdiction, as it may also be called upon to pronounce on the constitutionality of legislation at either Land or Federal level.

b) *Italy*.— Although the reformers of the Risorgimento, inspired by a strong liberal spirit, in 1865 set themselves against establishing any administrative court on the French model, by 1889 there had been second thoughts and the three administrative sections of the *Consiglio di Stato* were supplemented by a fourth litigation section. Since then this has followed the French pattern very closely with a few special features:

1) Conflicts between the administrative and the ordinary civil courts in matters of jurisdiction are determined by the supreme civil court, the *Corti di Cassazioni*, a factor which gives the civil courts an apparent superiority.

2) The plaintiff seeking a remedy by way of compensation may sue in the ad-

ministrative courts if he contends that his legitimate interests have been infringed, but if his legal *rights* are affected, he must sue in the ordinary courts. The result is similar to the German position. If a plaintiff is suing for compensation he will normally have to sue in the ordinary court, unless his compensation claim is part of an action for annulment, in which case he will sue in the administrative courts, provided he has sufficient standing.

3) The general principles of the law are not expressly applied in the same manner as in France, but the same *cas d'ouverture* can be seen in the Italian system, such as *incompetenza, eccesso di potere* and *violazione di legge*.

c) *Belgium*.— Again, very considerable similarities can be seen with the French system. On the foundation of the Belgian State in 1830, it was considered undesirable to establish a Conseil d'Etat as, to the liberals of Italy in 1865, such an institution smacked of despotism. However, the doctrine of the separation of powers was as influential as ever, causing the civil courts to develop separate principles to be applied when the defendant was an organ of the administration. These principles, equality before the law, natural justice, etc., were very similar to those of French *droit administratif*, and a separate Conseil d'Etat with three litigation sections and three consultative and administrative sections was eventually established in 1946. This court operates in a manner very similar to the French Conseil d'Etat, except that it sits in separate chambers for the French and the Flemish languages respectively. Claims for damages or compensation fall normally within the jurisdiction of the civil courts but if the damage caused by the act of the administration was direct, abnormal, physical and exceptional, the Conseil d'Etat may accept the proceedings. The court has juris-

diction to act in equity, so as to protect an interest not safeguarded by any other legal remedy.

The French general principles have not been fully applied in the Belgian court, but the latter recognises fully such *cas d'ouverture* as *violation de la loi, détournement de pouvoir*, and *audi alteram partem*. Conflicts of jurisdiction are resolved by the highest civil court, the *Cour de Cassation*.

d) *The Netherlands*.— Administrative law in the Netherlands is perhaps less like that of France than some other European countries, but it has obviously been very considerably influenced by French theories and practices. In the first place there is no one administrative court or series of courts having a general jurisdiction in administrative matters, but there are a number of different administrative organs, each having its own restricted statutory jurisdiction. Important among these are the Central Council for Appeal ("Centrale Raad van Beroep") for matters of social insurance as well as acts of the administration concerning the personal interest of civil servants, and the Appeal Tribunal on Economic Matters (College van Beroep voor het Bedrijfsleven).

Most relevant, however, is the Judicial Chamber of the Council of State ("Afdeling Rechtspraak van de Raad van State"), created by a law of 1975, known as Wet AROB.

The jurisdiction of this Chamber has a complementary character, which means that it has jurisdiction over acts of the administration not within the jurisdiction of other courts or of the 'Crown' (i.e. Ministers of the Crown).

The 'Crown', the municipal councils and the provincial deputations (tribunals formed of representatives of the provincial councils) have jurisdiction to determine disputes in any of the matters enumerated

in a large number of municipal and provincial statutes and special laws, with a right of appeal in some, but not all cases to the 'Crown', i.e. the relevant Minister.

The grounds on which proceedings may be brought before the Chamber are listed in the law of 1975 and have obviously been influenced by French traditions. Thus, a decision may be annulled in these proceedings if it was made without jurisdiction or without proper appreciation of the facts of the case, or if improper considerations had been taken into account, or if there had been a *détournement de pouvoir*. The French general principles are not expressly recognised, but a decision can also be annulled by the Crown if it is contrary to the principles of good administration. This means in particular that any decision of an administrative authority must have been prepared with proper care and in accordance with accepted procedural rules where appropriate. Good administration also necessarily involved a statement of the reasons justifying the decision. As in the French case of *Barel*<sup>38</sup> if the administration cannot justify its decision, the reviewing court is entitled to assume there were no reasons and, therefore, that the decision was a bad one.

### ***Judicial Review in the United Kingdom***

In spite of the title, this account will deal only with the law of England and Wales, but the law of Scotland, Northern Ireland and many Commonwealth countries (Canada and New Zealand in particular; in Australia there have been a number of significant statutory reforms) is very similar in principle.

As we have said above, there is no clear distinction in the U.K. between public law and private law and there is only one hier-

archy of courts. However, the courts have developed, especially in the last twenty years, a number of guiding principles when considering cases questioning the legality of acts of the administration (both central and local). It is therefore proposed to consider first the grounds for review and then to explain the remedies available to a citizen aggrieved by some act of the administration and concerned to obtain compensation.

#### ***A) Grounds for Review: Annulment***

These may be stated quite shortly in the Latin tag, *ultra vires*. In other words, the courts will be prepared to annul an act of the administration if it can be shown to be outside the powers granted by Parliament; Parliament is supreme and all power can be derived only from Parliament. If there is no statutory authorisation for an act of a local or central government authority, it must be invalid, as Birmingham Corporation found when they proposed to grant free travel to old age pensioners on their buses,<sup>34</sup> and as Fulham Corporation found when they started to operate a municipal laundry.<sup>35</sup> Any procedure laid down by Parliament must be followed to the letter, at the risk of invalidating action taken, as Stepney Corporation found when they omitted to inform the recipient of a notice served by them that he had a right of appeal.<sup>36</sup> The doctrine of Parliamentary sovereignty and the application of the principle of *ultra vires* is not, however, confined to a literal construction of the actual words used in the statute, although the process of interpretation may be the essential issue in many cases. In recent years the courts have, as a Victorian judge said, been prepared to "supply the omission of the legislature"<sup>37</sup> and imply into the statute a Parliamentary intention that cannot be seen on its face. Thus, the courts will assume that if some action of the administration affects an indi-



vidual's liberty, property or reputation, Parliament must have intended that the principles of natural justice must be observed before the decision is taken.<sup>38</sup>

There have been many cases explaining the meaning of natural justice in this context. It is commonly said to comprise the twin notions of *audi alteram partem* and *nemo iudex in sua causa potest*, or that every man is entitled to a fair trial before an unbiased judge. Such principles must be observed if a man is being deprived of his livelihood, for example if the licence of a stall-holder to sell goods in a market is being revoked,<sup>39</sup> or a police officer is dismissed<sup>40</sup> or if a citizen's house is to be condemned as unfit to live in,<sup>41</sup> or it is to be acquired compulsorily,<sup>42</sup> or, apparently, if an individual is deprived of his "right to work".<sup>43</sup> The twin principles themselves have been spelt out in considerable detail, to include a right to be informed of the case the "accused" has to meet,<sup>44</sup> a right to a proper hearing,<sup>45</sup> and a right to legal representation in some cases.<sup>6</sup> The "unbiased judge" must not have been concerned in the case at an earlier stage,<sup>47</sup> and he must not appear to have an interest in the subject matter of the proceedings.<sup>48</sup>

It has been said that natural justice must be observed when any administrative authority decides anything; this may be somewhat of an exaggeration, but recent court decisions have made it clear that a decision that may seriously affect a citizen in some manner, must have been arrived at "fairly." An immigration officer, for example, should have allowed a Pakistani youth a reasonable opportunity of proving his age,<sup>49</sup> and the Liverpool Corporation, having promised the taxi owners in that city that they would not increase the number of taxi licences, should have discussed the matter again with the owners before deciding to increase that number.<sup>50</sup>

Natural justice and "fairness" are con-

cerned with procedure; how the decision is reached, not the substance of the decision itself. Recently the courts have been prepared to go further and examine the nature of the decision itself. Thus, the administration must have taken all proper considerations into account (including the objective aimed at in the legislation),<sup>51</sup> and must ignore improper or irrelevant considerations. The Home Secretary had power, as he saw fit, under certain regulations, to revoke a television licence. Fees for the annual licences were substantially increased as from 1st April, 1975. In March 1975 Mr. Congreve purchased a new licence for his set at the old, lower, rate, then in force, although his existing licence did not expire until 31st March 1975. When the Home Secretary, purporting to exercise his statutory power, revoked the new licence, Mr. Congreve applied to the court for a declaration to the effect that the Home Secretary had acted illegally. Although the regulations imposed no restrictions on the Home Secretary's discretion, the court granted Mr. Congreve's application. In revoking the licence the Home Secretary had acted improperly. He had taken into account a loss of public revenue as a consequence of Mr. Congreve's action; this was an improper consideration, and therefore the action was not authorised by the regulations, (made under statutory authority) and was illegal.<sup>52</sup>

Power to impose such conditions as the local authority saw fit in a permission under town and country planning legislation to establish a caravan site, did not include power to impose conditions as to the rents to be charged for caravans brought to the site; this was not a "planning" matter.<sup>53</sup>

Administrative decisions must not be unreasonable, or, at least, not so unreasonable that no reasonable authority could have arrived at the decision in question.<sup>54</sup> It is unreasonable to assume that, because another party disagrees with one's own

view of a matter, therefore his view was unreasonable. Therefore when a Minister had power to give directions to an education authority which he considered was acting unreasonably, the Minister himself was acting unreasonably (and therefore unlawfully) when he gave directions to an authority to refrain from action with which he disagreed.<sup>55</sup>

Many of these decisions could be explained in French terms as being a *détournement de pouvoir*, or a breach of *les principes généraux* (and of the doctrine of proportionality in particular), but the English courts, acting empirically and by a process of inductive rather than deductive thought, have not rationalised their decisions in this way. There is no general principle of legality, only the basic idea of Parliamentary sovereignty. Nevertheless, some recent decisions even suggest that the courts may be prepared to disregard statutory expressions that are distasteful to them, in particular those purporting to exclude their jurisdiction to review the validity of administrative decisions.<sup>56</sup>

#### B) *Grounds for Review: Compensation*

In the preceding paragraph we have briefly considered the grounds on which the English courts will quash any alleged illegal act of the administration. If the plaintiff is claiming compensation, it will not be sufficient for him to show that the act in question was illegal and in consequence he has suffered some loss quantifiable in financial terms; he must be able to show that his claim was actionable in accordance with the ordinary law. Thus, if his property has been taken away unlawfully he must be able to establish the tort of conversion or trespass: if he has been dismissed from office without just cause, he must be able to show there has been a breach of contract.<sup>57</sup> If the act complained of was exercised under statutory authority (e.g., the operation

of the defendant's railway has caused noise and vibrations amounting to a nuisance at the plaintiff's factory,<sup>58</sup> no action will lie, provided the statute precisely covers the act in question.<sup>59</sup>

There is no general jurisdiction in the court to award damages where some act of the administration has caused harm to the plaintiff. Exceptionally it seems that there may be a tort of misfeasance in a public office; i.e., damages may be recoverable if a power vested in a public official is abused in some way to the harm of the plaintiff,<sup>60</sup> but the extent of this tort is by no means clear.

#### C) *The Remedies*

English law, as we have said, knows no separate principles of public law, but it does provide special remedies for a plaintiff seeking to question the legality of some act of the administration. These were historically divided into the "prerogative" remedies of *certiorari*,<sup>61</sup> *prohibition*,<sup>62</sup> and *mandamus*,<sup>63</sup> on the one hand, and actions for a declaration or an injunction on the other. But any of these remedies may now be obtained by the single High Court proceedings of an application for judicial review,<sup>64</sup> and a claim for damages may be joined with any of these remedies. In all cases, however, the proceedings must be justifiable in accordance with the grounds for review already explained.

In addition, the plaintiff must have a "sufficient interest" in the matter in issue to allow him to commence proceedings; the exact meaning of that expression is a matter of current controversy which will not be discussed here. There is also a short time limit of three months for proceedings in *certiorari*.

Proceedings for a fourth type of prerogative remedy, the writ of *habeas corpus* may be brought at any time when a matter involving the personal liberty of a citizen is

in issue; here all that has to be established by the plaintiff is that he is being detained against his will; the person (or administrative authority) so detaining him must then show to the satisfaction of the court that the detention was justified by law.

## Conclusion

In spite of the conceptional differences in this field between the civil law and the common law, in modern practice it seems that judicial review is available to an aggrieved citizen, in one type of court or another, on much the same grounds in the different countries here considered. This reflection is perhaps subject to the reservation that a plaintiff may find it more difficult to obtain compensation in respect of

some objectionable administrative action from the courts in a common law jurisdiction, than he would under the civil law. One advantage of the common law system is that in some circumstances the court acts *a priori*; for example, the validity of a planning decision or a compulsory purchase order can be called into question before it can be acted on by the administration; in the civil law, however, the administrative courts generally act *a posteriori*, which may at times amount to a denial of effective justice. However in some countries, such as Holland and Belgium, administrative procedures do at times provide for *a priori* action. The principal advantages claimed for a separate administrative system are those of having more specialised judges, more informal proceedings and lower costs.

## References

- (1) In his Tagore lectures, "English Law and French Law" (1980) at p. 9.
- (2) The distinction between those contracts that are governed by the ordinary law and those justiciable before the administrative courts is a highly technical one, and one of the unsatisfactory features of the French system: see Brown & Garner, *French Administrative Law*, 2nd edn., at p. 110 *et seq.*
- (3) Including any form of subordinate legislation, even regulations made by the President of the Republic in time of emergency under the 1958 Constitution: see Canal, C.E. 19 Oct. 1962, Rec. 552.
- (4) The *Conseil d'Etat* has original jurisdiction in a few important matters, such as applications to annul regulations, but generally the local courts (of which there are 26 throughout France) have original jurisdiction; they are the courts *de droit commun* in administrative matters. There is a general right of appeal, on law and fact, from the local courts to the *Conseil d'Etat*.
- (5) The outstanding example of this is Canal (f/n (3) *supra*), but see also D'Aillières, C.E., 7 Feb. 1947, Rec. 50.
- (6) As is the case with the judges of the civil courts, those entitled to *porter la robe*.
- (7) They will invariably have graduated in law, and subsequently had an intensive course at the National School of Administration (E.N.A.).
- (8) This was firmly established in the classic base of Blanco, T.C., 8 Feb. 1873, Rec. where it was said that because the administration was in a special situation, being tried in its own courts, it had special responsibilities, different from those governing the relations between citizens.
- (9) Trompier-Gravier (dame veuve), C.E., 5 May 1944, Rec. 129.
- (10) No man may be judge in his own cause: Treves, C.E., 4 March 1949.
- (11) Vicini, C.E., 20 Jan. 1965.

- (12) *Filma Lutétia*, C.E., 18 Dec. 1959, Rec. 693.
- (13) *Concerts du Conservatoire*, C.E., 9 March 1951, Rec. 151.
- (14) *Soc. des Grands Magasins Economiques*, C.E., 10 Feb. 1937.
- (15) See, in particular, *Ville Nouvelle Est*. C.E., 28 May 1971, Rec. 409, where the court considered whether the administration had properly weighed the disadvantages of destroying 100 habited houses, as against the advantages to be gained from building a new town on the site. The policy decision is for the administration, but the court will ensure that the decision has been arrived at properly and after due consideration of the facts. A motorway scheme was varied by the court, by applying this principle, in *Ste Marie de l'Assomption*, C.E., 20 Oct. 72, Rec. 657, and a proposal to construct a sports aerodrome was quashed in *Grassin*, C.E., 26 Oct. 1973, Rec. 598. The doctrine of proportionality probably had some influence in the English decision of *R. v Barnsley M.B.C. ex parte Hook* [1976] 3 All E.R. 452, where a decision to dismiss a market stall holder was quashed by the court on the ground (*inter alia*) that the punishment was not justified by his offence (of urinating in public and "answering back" to the market superintendent).
- (16) *Barel*, C.E., 28 May, 1954, Rec. 308.
- (17) Or at least that there were reasonable grounds on which the Minister could have so decided.
- (18) C.E., 14 May 1948.
- (19) *Canal*, C.E., 19 Oct. 1962, Rec. 552. The administrative courts have exclusive jurisdiction in administrative matters.
- (20) *Cachet*, C.E., 3 Nov. 1922, Rec. 790.
- (21) Historically, the general principles are a comparatively recent development, the leading case being *Barel*, as recent as 1954. *Détournement de pouvoir*, on the other hand, dates back at least to *Pari-set* in 1875, (C.E., 26 Nov. 1875, Rec. 934). *Détournement de pouvoir* is categorised by many French writers as a *cas d'ouverture* in itself (ground justifying the intervention of the court), whereas the general principles are dealt with under the comprehensive heading of *violation de la loi*, together with less significant grounds such as *vice de forme* (procedural *ultra vires*).
- (22) *Beaugé*, C.E., 4 July 1924, Rec. 641.
- (23) *Deffaut*, C.E., 16 June 1965.
- (24) Above, footnote 16.
- (25) *Feutry*, T.C., 29 Feb. 1908, Rec. 208.
- (26) *Regnault-Desroziers*, C.E., 28 Mar. 1919.
- (27) *Couitéas*, C.E., 20 Nov. 1923, Rec. 789.
- (28) *Marabout*, C.E., 20 Nov. 1972.
- (29) *Dame Burgat*, C.E., 29 Oct. 1976, Rec. 452.
- (30) As long as two years may elapse before the plaintiff obtains his decision, and this may in practice be too late, because the administrative act in question (the compulsory purchase order, the revocation of a licence, the dismissal of a civil servant, etc.) will be acted upon until it has been annulled. Another defect of administrative justice in France stems from the possible conflict between the respective jurisdictions of the civil and administrative courts. Conflicts, when they arise, have to be referred for resolution by the *Tribunal des Conflits* (a special court composed of judges taken from both jurisdictions). Conflicts are merci-fully comparatively rare, but when they arise, the litigation involved may be protracted over many years.
- (31) Details of procedure and substantive law may vary from *Land to Land*, as such matters are within the competence of the legislatures of the *Länder*.
- (32) This is much more formalised than in France, where the plaintiff before an administrative court need only show there has been a *décision préalable*, i.e., that the administration has considered the matter and ruled in some manner adverse to the plaintiff (for example, they have rejected his claim for compensation).
- (33) Above, F/N (16).
- (34) *Prescott v Birmingham Corpn.* [1954] 3 All E.R. 698.
- (35) *Att.-Gen. v Fulham Corpn.* [1921] 1 Ch. 440.

- (36) *Rayner v Stepney Corpn.* [1911] 2 Ch. 312.
- (37) Byles, J., in *Cooper v Wandsworth Board of Works* (1863) 14 C.B.N.S. 180.
- (38) *Ridge v Baldwin* [1964] A.C. 40, a decision of the House of Lords which marked a starting point for the courts to take a robust (or liberal) view of their powers to construe legislation widely.
- (39) *R. v Barnsley M.B.C., ex parte Hook* [1976] 3 All E.R. 452.
- (40) *Cooper v Wilson* [1937] 2 All E.R. 726; *Ridge v Baldwin*, *supra*.
- (41) *Cooper v Wandsworth Board of Works*, *supra*.
- (42) *Local Government Board v Arlidge* [1915] A.C. 120.
- (43) *Nagle v Feilden* [1966] 1 All E.R. 689.
- (44) *Kanda v Govt. of Malaya* [1962] A.C. 322.
- (45) Both sides must be treated equally; see, e.g., *R. v Housing Tribunal* [1920] 3 K.B. 334.
- (46) *Enderby Town Football Club v Football Association Ltd.* [1971] 1 All E.R. 215.
- (47) *R. v Altrincham Justices, ex parte Pannington* [1975] Q.B. 459.
- (48) *Dimes v Grand Junction Canal Co.* [1852] 3 H.L.C. 759.
- (49) *Re. K(H)* [1967] 1 All E.R. 226.
- (50) *Re. Liverpool Taxiowners Association Ltd.* [1972] 2 All E.R. 589.
- (51) *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All E.R. 694.
- (52) *Congreve v The Home Office* [1976] 1 Q.B. 629.
- (53) *Chertsey U.D.O. v Mixnam's Properties Ltd.* [1964] 2 All E.R. 627.
- (54) *Ross-Clunis v Pasadopoulos* [1958] 2 All E.R. 23.
- (55) *Secretary of State for Education and Science v Tameside M.B.C.* [1976] 3 All E.R. 665.
- (56) This point is discussed by Professor H.W.R. Wade in his 1980 Hamlyn Lectures, "Constitutional Fundamentals", Chapter 5.
- (57) Or possibly by a claim for compensation for unfair dismissal before an industrial tribunal.
- (58) *Hammersmith Rlwy Co. v Brand* [1869] L.R. L. 171.
- (59) If negligence can be established, the authority will be liable, unless this has been expressly excluded by the statute: *Metropolitan Asylums District v. Hill* (1881) 6 App. Cas. 193.
- (60) *David v Abdul Cader* [1963] 3 All E.R. 579.
- (61) An order from the High Court to bring before it the record of the court or administrative authority, so that the legality of the decision may be examined and quashed if found defective, for want of jurisdiction, breach of the principles of natural justice, etc.
- (62) An order of the High Court forbidding the lower court, etc., to act in a manner contrary to law.
- (63) An order of the High Court requiring the person or body to whom it is addressed to perform its public duty according to law.
- (64) Under R.S.C. Order 53, introduced in 1978.

# ***The International Code of Marketing for Breastmilk Substitutes: Consensus, Compromise and Conflict in the Infant Formula Controversy***

by

James E. Post and Edward Baer\*

## ***Introduction***

In May 1981, the World Health Assembly, the 155 member governing body of the United Nations' World Health Organization (WHO), is expected to adopt a resolution formalizing an International Code of Marketing of Breastmilk Substitutes. This action will cap over 10 years of often acrimonious conflict in which a group of health professionals, consumer advocates and their allies have sought to halt the aggressive promotion of powdered infant milk formulas, especially in developing countries of the world. While the code is far from complete, the process leading up to the decision by the World Health Assembly to proceed with its development raises some important questions about the role of international institutions in mediating conflict between transnational industries and consumer groups.

In this paper, we shall review the nature of the health and economic problems caused by the replacement of breast-feeding by bottlefeeding, examine the role of industry promotion within the multitude of forces fostering this trend, and summarize the

main themes and currents of the infant formula controversy. Then we shall examine more closely the role of the World Health Organization and UNICEF (United Nations Children's Fund) in the process of developing this international code of marketing, and discuss a number of particularly crucial issues raised by the code, and the code process. Finally, we shall draw some conclusions and make some predictions about this process, based on information at present available, and suggest the lines along which future analysis of this and analogous cases must proceed in order to understand the capacity — and limits — of such quasi-legal processes to encourage progress on what are commonly thought to be intractable social ills.

## ***"Breast Is Best, but..."***

For the last ten years or more, a growing number of health workers have been trying to attract attention to what has been called the "greatest change in human behavior in recorded history," the shift from breastfeeding to artificial feeding of young

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infants.<sup>1</sup> This trend, which took place in the Western world in the 1950's and 1960's in relatively acceptable conditions of sanitation, income, and literacy, is now spreading to the Third World long before the conditions required for safe bottlefeeding are possible for the vast majority of citizens in those nations. When bottlefeeding is practiced in the absence of clean water, safe sterilization facilities, sufficient income to purchase the proper amount of an expensive product, and the education needed to comprehend and follow complex mixing instructions each time the bottle is prepared, the result can be disastrous for the baby, the family, and the emerging nation.

While it is extraordinary difficult to estimate the magnitude of the problem, one of the world's leading experts on pediatric nutrition, Dr. Derrick Jelliffe, estimates that there occur some 10 million cases per year of infectious disease and infant malnutrition directly attributable to improper bottlefeeding. Virtually every study that has compared breastfed and bottlefed populations demonstrates clearcut advantages for the breastfed child for nutritional, biochemical, psychological, emotional, immunological, economic, and contraceptive reasons. Especially in poverty environments, breastmilk's ideal combination of proteins, calories, vitamins and minerals assures optimal nutrition, along with important antibodies that defend against the very infections that are the greatest killers of infants under one year of age. Even the manufacturers of infant formula products acknowledge that breastmilk is the perfect infant food. And since it requires no sterilization, preparation, or out-of-pocket expenditures, breastmilk has also been called the "original convenience food."

Not only has the decline of breastfeeding accelerated the rate of population growth (breastfeeding increases birth inter-

vals), but it has enormous financial implications for the economies of emerging nations. Mothers can produce adequate supplies of breastmilk with relatively small increases of nutritional intake and consequent expense. Infant formula products, in contrast, are quite expensive, with adequate supplies costing more than US\$100 during the six months an infant needs such nourishment. For many families, such expenditures may exceed 50 percent of household income; for the nation, it represents a use of scarce foreign exchange for importation of a product that is inferior to breastmilk. Furthermore, bottlefed infants get more seriously ill more frequently, thereby imposing high costs of medical treatment on the family and the community. While precise economic estimates of these social costs are lacking, analysis of available data makes clear the immense financial burden that widespread bottlefeeding places on a developing nation.

What causes this massive shift away from natural feeding, especially in light of the many advantages that it confers? Like any other form of human behavior, the infant feeding decision is complex and not easily explained at the individual or societal level. Nevertheless, the reasons most commonly cited are: urbanization; increasing female employment in jobs incompatible with breastfeeding; the widespread belief that "West is Best" when it comes to feeding babies; increasing number of women in contact with Western style health personnel and facilities that often discourage breastfeeding through hospital routines; replacement of the breast's nurturing function by its erotic role in society; and the general desire to emulate the habits of the upper classes. Finally, and inextricably linked with all of the above factors is the widespread marketing and promotion of infant formulas by the international infant food industry.

## *The Industry at Bay*

The sales of infant formula products in the Third World countries expanded greatly during the 1960's and 1970's. Declining birth rates in Western nations, coupled with available capital and the entrepreneurial drive to develop Third World marketing opportunities, significantly increased the active presence of infant formula sellers. Established food companies (e.g. Nestlé) were joined by Unigate, Morinaga, and Borden in the promotion of milk products for infants, and by pharmaceutical manufacturers such as Bristol Myers, Abbott Laboratories, and American Home Products which introduced new forms of formula and marketed them to the medical professions. The wide open marketing environments in many nations led to intensive competitive battles. At public hearings by a United States Senate committee in 1978, every industry executive who testified acknowledged that the industry had borne no responsibility to investigate who was actually buying and using their products, or what effects those products had on infant health and nutritional status.<sup>2</sup> That denial of responsibility is the ultimate source of the infant formula controversy.

Public interest began in the early 1970's with the publication of a pamphlet called the *Baby Killer* (1974) by a British charity organization, War on Want. When the Swiss based Third World Action Group translated it into German, they retitled it, "Nestlé Kills Babies," to call attention to the industry's largest member. Predictably, Nestlé sued for libel, and the ensuing trial placed "infant formula malnutrition" in the international spotlight. Soon the Interfaith Center on Corporate Responsibility (ICCR), a coalition of Protestant and Catholic groups that hold stock in American companies, took up the struggle by filing a series of shareholder resolutions calling for review

and revision of corporate marketing practices. Lawsuits, public education, Congressional action, and community organizing followed to increase public pressure on industry to revise its behaviour. In 1977, the Infant Formula Action Coalition (INFAC) came together and began organizing a boycott of all Nestlé products. The Nestlé Boycott spread further and faster than either its organizers or the firm could have anticipated; today, there are active campaigns in a half dozen countries, with support groups in another dozen. The International Baby Food Action Network (IBFAN) was recently formed to coordinate actions on an international scale.

## *Industry Behaviour*

The industry's response to this mounting public pressure has generally been to deny all charges that they are contributing to infant malnutrition, and to point, instead, to the underlying conditions of poverty, lack of sanitation, and illiteracy as circumstances beyond their control. Moreover, the companies argue that their purpose is to sell only to those mothers who need, can afford, and are able to use formula products properly. The gap between the manufacturers' intentions and the effects of their actual practices is a large one, however, and their inability to segment the market carefully in a way that confines the use of formula products *only* to those who are able to use them properly is a major problem.<sup>3</sup>

The infant formula industry will sell more than (U.S.) \$2 billion of products in 1980, including more than fifty percent in developing nations. Future growth depends heavily on the industry's ability to sell in the developing world, where annual market growth is often 15–20 percent compared to 5–10 percent growth in industrialized



nations. The size of this stake, and its importance to the multinational companies involved, explains much of their unwillingness to retreat from all promotional activity.

During the ten years of this controversy, the industry has responded to its critics by de-emphasizing direct consumer advertising to mothers, and by shifting its resources toward promotion to health professionals. Radio slogans, billboards, and company personnel in nurses garb ("milk nurses") are less frequently used to promote formula products. In their places are medical sales personnel, known as detailmen, who visit hospitals, clinics, and physicians, and who leave posters, weight charts, and free samples of formula behind. Such promotion, the manufacturers assert, does not mislead mothers and does allow medical professionals to provide counsel and advice to mothers on appropriate feeding practices.

Voluntary codes of conduct have been adopted by many of the firms in the industry as a means of demonstrating their commitment to responsible behaviour. In 1975, while the Nestlé trial was pending, the International Council of Infant Food Industries (ICIFI) was formed by industry members accounting for about 80 percent of world sales. ICIFI announced adoption of a marketing code that established non-binding standards or marketing conduct for members. The weakness of the provisions, however, led Abbott Laboratories to denounce the code as too weak and to withdraw from ICIFI. Abbott later adopted its own, more stringent code.

The voluntary codes which the industry members have adopted reflect both the industry's structure and the competitive strategies of the various companies. Particularly important is the distinction between food companies, which tend to sell their products via consumer advertising, and

pharmaceutical companies, which normally promote to the medical community. The ICIFI Code, for example, permits direct contact with consumers by sellers of formula products. Such provision serves the interest of Nestlé, the industry's largest firm, which had a relatively small medical marketing staff in 1975 when the code was first adopted.

Today some five years later, Nestlé is capable of promoting to the medical community on an equal basis with the pharmaceutical firms, and no longer insists on a direct consumer advertising provision.

Taken together, the public pressure on the industry, and the ability of the industry members to adapt to new competitive and political realities over time have produced changes in marketing behaviour. While this change has yielded some positive results, such as diminished consumer advertising, it has not affected the fundamental circumstances in which infant feeding decisions are made. Thus, the question of the commercial sellers' appropriate role in the infant feeding decision remains at issue. It is to this fundamental relationship that the WHO has addressed its efforts.

### *WHO/UNICEF Code*

International organizations have been concerned with the infant formula marketing issue for more than a decade. In 1970, WHO and UNICEF convened a meeting in Bogota, Columbia to focus on the problem of infant malnutrition. Industry representatives were invited to attend along with prominent pediatricians and nutritionists. During the meeting, allegations of unconscionable marketing conduct arose, and great diplomatic skills were required to achieve a measure of reconciliation by the end of the meeting.

The 1970 meeting was followed by an-

other meeting in 1972 under the auspices of the U.N.'s Protein Calorie Advisory Group (PAG) and a statement was drafted with regard to the promotion of special foods, namely infant formula and powdered milks. This statement, PAG No. 23 was revised and issued in November 1973. It was hoped it would generate a consensus among nutrition experts, the industry, and national governments about action that would resolve the problems. This line of activity continued when in 1974 the World Health Assembly, governing body of the World Health Organization, unanimously adopted a resolution which identified misleading sales promotion as a cause of declining breastfeeding and urged nations to take action to review and regulate marketing practices. In 1975, the International Pediatric Association passed a resolution calling for controls on the promotional activities of manufacturers.

The public pressure against the industry resulted in a U.S. Senate hearing in May, 1978, chaired by Senator Edward Kennedy. Having heard from many of the interests involved, Kennedy requested that the Director-General of WHO undertake to bring the parties together to find a new path toward solution of the problem. Because the request coincided with WHO's own interest in the matter, the Director-General organized a meeting in October, 1979, which was designed to produce a new level of dialogue on the issue.<sup>4</sup>

The WHO Secretariat commissioned distinguished researchers and consultants to prepare background statements on various aspects of the problem, including medical and nutritional aspects, marketing practices, and social legislation.<sup>5</sup> The October, 1979 meeting was then organized into working groups that addressed contributing factors. The working group which focused on marketing activities was most volatile, requiring great political skills to maintain

decorum and discussion. At the conclusion of the meeting, the participants called upon the Director General to take steps to produce a code of marketing conduct. This led WHO to begin the drafting process in late 1979.

### *The Code: Context and Content*

The desirability of having the WHO Secretariat draft a code of marketing rested on different sets of expectations in the minds of the parties about the central question: "What is the code expected to accomplish?"

The infant formula industry wants the code to provide an orderly frame of reference that will allow them maximum flexibility to sell their products while at the same time outlawing certain objectionable forms of promotion so that "less ethical" firms do not have competitive advantages. This will deal with the problem of industry members who have refused to abide by the voluntary code provisions.

The code will also be of value to the industry in providing a means to deflect public criticism by officially pronouncing certain marketing practices as "acceptable." More importantly, in our view, the legitimization of marketing practices will serve to endorse the industry's role as a legitimate actor in the process of nourishing infants during the first year of life. In the longer term, this may be the most valuable aspect of the code for established sellers of breast-milk substitutes.

In the view of the various consumer groups, the industry's appropriate role in providing infant nutrition is the primary issue to be addressed by such a code. If the code development process is one of political negotiation and compromise, rather than adherence to a set of principles based on notions of "equity," "social justice," or "what is best for infants," then legitima-

tion is inevitable and the code may serve the interests of the industry more than the populations in whose interests the code development process was undertaken. These concerns have led critics to argue for a code based on principles that are truly designed to protect mothers, infants, and health workers from inappropriate commercial pressures. A code which falls short of providing optimal guidelines, it is felt, will allow the industry room for "interpretations of convenience" that will nullify the practical effects of the code's restrictions.

The WHO and UNICEF secretariats, and the international experts who have assisted them, are sensitive to the concerns of both groups. The question they are asking is: "How strict can the code's provisions be and still retain the participation and commitment of the industry?" They obviously believe that more progress can be achieved by gathering industry support, even if it means weakening the code, than by adopting a code that would be "ideal" but unacceptable to the industry.

Given this orientation, much of the eventual impact of the code hinges on questions of the code's level of specificity, legal status, universality of application, enforcement and monitoring mechanisms, and approach to the regulation of conduct. We shall devote the next sections to a brief discussion of these issues.

## **Key Issues**

### **1. General Guidelines or Specific Provisions?**

The industry has steadfastly maintained that the code should consist of "general guidelines" and "flexible principles" rather than specific provisions. General guidelines provide room (and the need) for interpretation, and the industry has the staff, resources, and expertise to engage in debates,

discussion, and lobbying at both the international and national levels over interpretation of what general guidelines actually mean (or should mean). For example, the industry has been holding firm to a demand that "educational advertising" be treated as permissible practice in the code. But such a phrase lacks the specificity that would distinguish between billboards, posters in hospital waiting rooms, and information on tins of formula about when and how to use the product. Each has an effect on potential users that is arguably "educational." If such general language is used in the code, national governments will then be forced to determine which practices are "educational" and to be permitted, and which are "promotional" and to be barred. The industry is able, and prepared, to use its resources in case-by-case bargaining and negotiation, with the full knowledge that its critics are unable to provide countervailing pressures in each national setting. The governments of South Africa, Malaysia, Singapore, Peru, and Costa Rica have been persuaded by the industry to create codes that include much of the permissive language found in the industry's voluntary codes.<sup>6</sup> It is axiomatic that the more specific the provision, the more clearcut the criteria for determining what practices are and are not permissible. For policymakers seeking to apply the WHO/UNICEF code at a national level, the resolution of this issue will virtually determine whether or not real change will occur in marketing conduct.

### **2. Legal Basis of Code: Recommendation or Regulation?**

One of the most hotly debated aspects of the code development process is the legal basis for the code. The WHO Constitution provides for three possible bases: convention, regulation or recommendation. The formality of a convention makes it extraordinarily time-consuming and impractic-

cal; thus the debate has focused on the other two options, which are embodied in Articles 21 and 23, respectively, of the WHO Constitution.<sup>7</sup>

If the code is interpreted as a recommendation it appears that member nations would not be obligated to implement the terms of the code. The permissiveness of a recommendation has, understandably, considerable appeal to the exporting nations which are not anxious to see stringent standards of conduct in important markets. Thus, on this issue the industry and the exporting nations stand together.

The implications of interpreting the code as a regulation are unclear. Some experts believe that WHO's Constitution gives its regulations real binding power, on a par with the terms of an international treaty. This is true, however, only if the adopting country does not file any objections to the regulations as a whole, or to any part with which it does not intend to comply. At the time of writing, it appears that the Director-General of WHO will not take any formal position on this issue, nor will the Executive Board of the World Health Assembly which is due to review the code in January, 1981. Apparently, the matter will be referred for debate and decision to the whole Assembly at its May, 1981 meeting.

### 3. *Universality of Application*

Another point of controversy is whether this code is intended to apply universally to all countries, and equally to all population groups within those countries, or whether distinctions will be made according to "level of development" or other indicators of "risk of misuse." The industry has long argued that conditions in, for example, Sweden and Papua New Guinea, are so different that a single code of marketing would be inappropriate. Consumer organizations have long argued, on the other hand, that optimal standards of infant care

— including protection from commercial pressures — should be universally applied. While the risk of misuse in Papua New Guinea is certainly higher than in Sweden, there is no reason to assume that it is more ethically defensible to try to persuade the Swedish mother to abandon breastfeeding. Moreover, in every society, there will be some segments of the population for whom the risk of misuse is higher because of income levels or social circumstances.

Certainly the principle of universality is endorsed by the United Nations, thereby making it impossible for WHO/UNICEF to endorse officially a double standard of protection. What is more likely, is that the code will be advanced as a *minimum* basis for a national action, with the encouragement that any country that wishes can go *beyond the code* in its regulations.

### 4. *Enforcement*

Enforcement of international codes represents a thorny problem for governments and industry alike. In addition to national action to implement the breastmilk substitute code, effective enforcement will require that an apparatus be created to monitor company behaviour in the field and initiate proceedings to investigate, prosecute, and penalize violators. The experience of national governments with alternative enforcement mechanisms (e.g., self-reporting by manufacturers versus data collection by government agency) must be considered by policymakers, and it is to be expected that companies to be affected by the code will press for the least threatening option.

The necessity of national government action with respect to the codes underscores the concomitant need for WHO/UNICEF to provide technical assistance in the development of legislation regulations, and enforcement mechanisms. The need for such technical assistance was recognized in the initial draft of the breastmilk substi-

tutes code. A set of provisions called for the establishment of a *Central Office* at WHO which would collect information on marketing practices, hear complaints by parties of code abuses, and make decisions regarding the propriety of specific behaviour within the framework of the code. It was further proposed that the Central Office collect information from all nations on code compliance, and prepare regular reports for WHA members.

The Central Office provisions were deleted in subsequent drafts of the code because of the inherent administrative and political problems. But the proposal underscored the obvious need that exists for providing expert advice to governments that wish to act on the code. Given that there are relatively few experts in the world on infant formula marketing practices and strategies, and still less on regulatory actions that have successfully affected the behaviour of transnational firms in the food and pharmaceutical industries, a need exists for organizing this expertise in a technical assistance office of WHO/UNICEF. The failure to do so will leave government officials at the mercy of industry executives, lawyers, and lobbyists, all of whom have a pecuniary interest in seeing the weakest form of enforcement adopted at the national levels.

#### 5. *Regulating Conduct: Intentions and Effects*

In a broad context, the WHO/UNICEF code is intended to alter types of marketing behaviour that are widely believed to affect infants adversely. A vital question, which bears heavily on the ability of governments to implement the code, is whether the intention of a manufacturer in marketing its products should mitigate liability when injury to the public occurs. In terms of tort liability, the difference between a standard based on intent or effect is substantial. Yet,

there has been continuing ambiguity on this point in the code drafting process.

A brief example from Draft §3 illustrates the problem. In Section 1.3, the drafters provide that "The printing on the container or label should not contain pictures or other graphic material *designed* to increase the saleability of the product." (Emphasis added.) The emphasis on intent in Section 1.3 contrasts with other code language that emphasized the *effect* of promotional activity. In Section 1.2, for example, it is expressly stated that "No product... should be marketed or publicly referred to... in a way that *implies, or could* create a *belief*, that bottlefeeding is equivalent or superior to breastfeeding." (Emphasis added.) Normal rules of construction and interpretation would suggest that Section 1.3 is an exception to Section 1.2. Thus, a manufacturer would be liable where its promotion had the effect of leading customers to believe that bottlefeeding is equal or superior to breastfeeding *except* in the case of labelling, where the manufacturer's intention would have to be proven.

It is important that the code language be presented in a manner that emphasizes that manufacturers and sellers are liable for any actions which have the *effect* of promoting, advertising or educating consumers toward the use of breastmilk substitutes.

#### 6. *Burden of Proof*

According to the language of Draft §3, the burden of monitoring industry behaviour rests with governments, consumer and professional groups, and the manufacturers themselves. This approach draws on recent research studies of corporate social performance that emphasize the likelihood of corporate compliance with new standards when multiple parties are empowered to monitor performance. National legislation should, therefore, allow private parties (e.g., consumer groups) as well as public

agencies to initiate legal action for code deviations.

National laws and regulations must also deal with the burden of proof in hearings and enforcement proceedings, a matter on which the WHO/UNICEF code is silent. Just as it is difficult for a person outside a large organization to determine the intention that led to a specific action, so too is it difficult or impossible for an outsider to prove where the breakdown in organization occurred that resulted in a code deviation. That is a burden best borne by those who know and understand the organization, and who are in a position to have the information – namely, the managers of the enterprise. It is desirable for national governments to consider the creation of a standard of absolute liability in which the manufacturers are held liable for any deviation from the code standards. This will serve to place responsibility where authority rests, and where access to information is most likely to result in compliance.

## *Conclusions*

The WHO/UNICEF Code development process represents an unprecedented step by UN agencies to solve a major public health problem by controlling marketing practices of private corporations that are widely believed to be exacerbating this problem. The utility of the code now depends on two factors: the text of the final draft, and the extent to which each member state marshalls the political will and resources to transform the international code into practical, substantial steps at the national and local levels. The text of the code will be decided by the World Health Assembly in May 1981; until then, consumer groups, the infant food industry, experts, government officials and WHO/UNICEF staff members will continue to quarrel over

the wording of each significant passage. But the real challenge will lie in implementing the code.

Effective implementation of the code will be the product of more complex interactions of political and economic forces than those at work during the code development process (October 1979 to May 1981). National governments will emerge as the primary forum for further action. Adaptation of the international code to national needs and local circumstances will require the leadership of officials in Ministries of Health, Economic Planning, and Social Welfare. The role of WHO and UNICEF will be crucial in providing technical assistance to governments, both for developing marketing codes and monitoring systems, and for determining what additional steps are needed to protect and promote breastfeeding and timely supplementation with local foods.

To counter the industry strategy of pressuring national governments to adopt permissive codes, consumer organizations will have to provide countervailing information, and call public attention to discrepancies between industrial practice and government policy. Without such indigenous watchdog activity, few countries are likely still to have an effective regulatory mechanism in place in a decade or two.

Finally, the real usefulness of the code may lie not in its becoming a piece of consumer legislation, but in raising the underlying issues before government officials and health workers. It is to be hoped that it will foster a critical examination of the impact of food and drug promotion on the determination of health policies and practices. Only to the extent that doctors and nurses begin to say "no" to corporate promotion will this problem ever be solved, because it is clear that most government regulation can never reach the community level. It behoves the medical profession, in particular,

to undergo a fundamental reexamination of its responsibilities to its patients and to society, in view of the blandishments offered by industry to engage in practices – such as routine dispersal of infant formula samples to all mothers – that have no medical justification, and may indeed actually harm health.

The outcome of the code text itself must be seen as a product of a process of

negotiation and political bargaining. In the international arena, this is called consensus. But since it ultimately depends on power, it is really a process of compromise. The WHO/UNICEF code has shaped the dynamics of the conflict, but not eliminated the conflict itself. The appropriate role of the commercial food industry in influencing decisions about infant and young child feeding is still at issue.

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# *Judicial Application of the Rule of Law*

## *Torture Held a Violation of International Law in the US Domestic Courts*

### *Filartiga v. Peña*

An american court has ruled that torture by government officials is a violation of international law, and that torturers found in the United States may be sued there regardless of where the violation occurred.

Although all governments consider torture a criminal act and it is expressly prohibited by international and regional human rights instruments, most acts of torture go unpunished and the majority of victims have no access to effective remedies. International criminal tribunals do not exist and other international bodies have generally proved ineffective to enforce international conventions prohibiting it.<sup>1</sup>

The United Nations Commission on Human Rights is currently preparing a draft convention against torture which would give criminal jurisdiction to states other than those in which the offence has occurred. This decision appears, however, to be the first in which a state has unilaterally declared its courts to have jurisdiction over claims of torture which occurred in a foreign state. The case was brought under a United States statute giving federal courts jurisdiction over torts in violation of international law, so the decision concerns only civil, not criminal, jurisdiction.

The plaintiffs in the case are Dr. Joel and Dolly Filartiga, the father and sister of a 17 years old boy killed in Paraguay in 1976. The defendant is Americo Peña-Irala, then Inspector-General of Police in Asuncion, Paraguay. He was visit-

ing the United States, it is said as a tourist, when the lawsuit was filed.

The plaintiffs claim that four hours after the boy was kidnapped his sister was brought to the defendant's home and shown the body of her brother, to which electrical wires were still attached and which bore marks of severe torture. As she fled horrified from the house he is alleged to have followed shouting "Here is what you have been looking for so long and what you deserve. Now shut up." The father, a doctor who serves the indigenous population in a rural area, is a long time opponent of the military government, which has been in power since 1954. It is alleged that the boy was tortured and killed in retaliation for the father's activities and beliefs.

The father initiated a criminal action against Peña and the Paraguayan Police in Paraguay in 1976. In the course of these proceedings the defendant's son-in-law claimed to have discovered the boy in bed with his wife and to have killed him in a crime of passion. Criminal proceedings were brought against him based on this assertion, but he has not been convicted, and it appears that after four years these proceedings have not reached conclusion. The attorney acting on behalf of the Filartigas in this case was arrested, chained to a wall in police headquarters and threatened with death. He subsequently withdrew from the proceedings. Plaintiffs also claim that an independent autopsy showed the cause of death to be heart failure resulting from the methods of torture employed.

1) However, in the case of *Ireland v the United Kingdom* in 1978 the European Court of Human Rights found that the respondent government had violated the European Convention's prohibition of "inhuman treatment". Independently of this litigation the UK government ceased using the practices complained of in 1972 and subsequently compensated numerous victims. The Human Rights Committee has rendered several decisions under the Optional Protocol to the Covenant on Civil and Political Rights finding Uruguay to have violated the prohibition on torture, but its recommendations to the respondent government in these cases apparently have had no effect.



The U.S. courts have not yet examined the facts of the case, the trial court initially having held that there was no jurisdiction. The Court of Appeals for the Second Circuit noted in its decision<sup>2</sup> that the United Nations Charter obliges all member states to take action to promote 'respect for and observance of human rights and fundamental freedoms for all...'. Subsequent UN declarations, which "specify with great precision the obligation of member states under the Charter"<sup>3</sup> expressly prohibit any state from "permitting the dastardly and totally inhuman act of torture".<sup>4</sup> The court further notes that the prohibition of torture is incorporated in treaties such as the International Covenant on Civil and Political Rights and the American and European human rights conventions, that it is prohibited by the constitutions of over fifty five states and that diplomatic sources report that no government, even those reported to use torture, asserts a right to torture. It concludes:

"Having examined the sources from which customary international law is derived — the usage of nations, judicial opinions and the works of jurists — we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. Accordingly, we must conclude that the dictum in *Dreyfus v von Finck*, 534 F.2d at 31, to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state," is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them."<sup>5</sup>

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2) This decision not having been appealed, the case has been remanded to the United States District Court for trial.

3) *Filartiga v Peña*, — F2d 3911, 3926 (2 Circuit, 30 June 1980).

4) *Ibid*, at 3924.

5) *Ibid*, at 3929-3930.

# BASIC TEXTS

## *Riobamba Charter of Conduct*

The following Charter was adopted by the Foreign Ministers of the Andean Group in May 1980, and was signed in Riobamba on 11 September 1980 by Colombia, Ecua-

dor, Peru and Venezuela. Costa Rica, Panama and Spain have acceded to its spirit and purpose.

1. To achieve a subregional political order originating from democracy that is essentially popular and of a clearly participatory character, without prejudice to the principles of self-determination of peoples, non-intervention and ideological pluralism;

2. To promote new integral development schemes based on the principles of social justice which will make it possible to change the unjust structures that still exist;

3. To reiterate the solemn pledge that respect for human, political, economic and social rights constitutes a basic rule of the internal conduct of the States of the Andean Group, that their defence is an international obligation for States and that, consequently, joint action taken to protect those rights does not violate the principle of non-intervention;

4. To encourage the settlement of disputes that exist or might arise between the countries of the Andean Group, or between them and third parties, by means of the peaceful procedures provided for in international law;

5. To promote a process of subregional and regional disarmament based on the postulates of the Declaration of Ayacucho which constitutes an effective contribution to general and complete disarmament and makes it possible to free resources for economic and social development;

6. To reaffirm the sovereign right of States to dispose freely of their natural resources as a substantive rule of international coexistence;

7. To act jointly in the face of any economic threat or coercion affecting one of the States of the Andean Subregional Group, as a means of ensuring their collective economic security;

8. To encourage greater participation by the countries of the Andean Subregion in the negotiations relating to political and economic problems that are being debated by the international community, particularly those relating to peace and security and the new international economic order, in co-operation with the other Latin American countries and the other third world countries;

9. To make efforts to adopt common policies in the economic, social, labour, educational, cultural, technological and health fields, among others, and to bring the respective national legislations closer into line with each other;

10. Inspired by the principles of international social justice, to apply the instruments of the Andean integration scheme in such a way that the member States derive equitable benefits, including the preferential treatment for countries which are relatively less economically developed that is established in the Cartagena Agreement;

11. To contribute to the maintenance of freedom, social justice and democracy by fulfilling the Andean pledge to apply the basic principles established, among other international instruments, in the Charter of the United Nations; in the Charter of the Organization of American States; in the Universal Declaration of Human Rights; in the Charter of Economic Rights and Duties of States; in the Declaration on the Establishment of a New International Economic Order; in the Cartagena Mandate of 28 May 1979; in the Quito Declaration of 11 August 1979; in the Panama Act of 1 October 1979, and in the Lima Declaration of 29 July 1980.

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