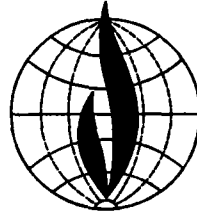


## THE REVIEW



## INTERNATIONAL COMMISSION OF JURISTS

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## *Editorial*

This issue contains an important commentary on the legal changes taking place in Turkey. International attention has hitherto focussed on alleged human rights violations since the recent military coup, such as torture and arbitrary arrests, and on restrictions declared to be temporary, such as the suspension of all political activity. This commentary draws attention to the perhaps more disturbing long-term effects of the constitutional and legal changes which have been made or are in preparation.

In this issue there is also a plea that the claim to self-determination of the people of Eritrea should receive a hearing in the United Nations, a description of the appalling situation in El Salvador, and an authoritative article on the commitment to psychiatric hospitals of political dissidents in the Soviet Union. The author, a soviet psychiatrist, has been arrested and is awaiting trial.

### *Development and the Rule of Law*

At its Commission Meeting, held in the Hague in April 1981, the International Commission of Jurists reached an important decision concerning its future activities.

This resulted from a conference held at the same time on Development and the Rule of Law, to which a number of development experts, including economists and political scientists as well as lawyers, were invited. The opening key-note speech was by Mr. Shridath Ramphal, Secretary-General of the Commonwealth and a member of the Brandt Commission.

The conference considered, *inter alia*, the concept of the 'right to development', participation in the formulation and application of development policies, self-reliance in development strategies, agrarian reform, and the role of lawyers and legal assistance in development.

At the Commission Meeting it was decided that the International Commission of Jurists should pursue these questions and concern itself with the impact on human rights of alternative development strategies.

A 125-page basic working paper by Mr. Philip Alston, entitled "Development and the Rule of Law, Prevention versus Cure as a Human Rights Strategy", has been published and is available from the ICJ (price, 6 Swiss Francs, plus postage).

A report containing the key-note speech, the working papers and the conclusions of the conference will be published later.

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# *Human Rights in the World*

## *El Salvador*

After a succession of governmental crises, the Revolutionary Government Junta found it impossible to attain the basic objectives it had announced on taking power after the coup that deposed General Carlos H. Romero in October 1979.<sup>1</sup> Among these objectives were the disbanding of paramilitary right-wing groups like ORDEN, an amnesty for political prisoners and exiles, the renewal of activity by political prisoners and exiles, the renewal of activity by political and trade union organizations, a radical agrarian reform that would redistribute the land and thereby the national wealth, nationalization of the banks and of foreign trade, the operation of private enterprise in the national interest, a pluralist government and the establishment of a dialogue with the revolutionary armed organizations.

The government crisis precipitated the collective resignation of the representatives of all the political parties, except the Christian Democrats, and the withdrawal of their support for the Junta. In December 1980 the armed forces appointed as President of the three man Junta, with executive powers, Ingeniero José Napoleón Duarte, the leading figure in the Christian Democrat movement who had been in exile in Venezuela while General Romero was in power.

Although the President is nominally the head of the government, he has little real political power. He has no possibility of taking decisions that are not approved by the armed forces; on the contrary, it is the armed forces who impose their wishes on him. So that there should be no doubt about this, Colonel Abdul Gutiérrez was made Vice-President of the Junta at Ing. Duarte's side. It is Colonel Gutiérrez who has emerged as the strong man of the régime.

The juridico-institutional framework is as follows:

- The Junta assumed executive and legislative powers, governing by decree with force of law (by virtue of Decree 1 of 15 October 1979);
- judicial powers remain in the hands of the Judiciary, but this is subordinated in practice to the Junta;
- a state of siege has been in force since March 1980, when the Junta invoked art. 175 of the Constitution. This authorizes the suspension of certain fundamental rights;
- a curfew has been in force since January, 1981;
- a state of emergency is in force under Decree 43 of 21 August 1980. This sub-

1) See ICJ Review, No 20, June 1978, p. 5, and No 23, December 1979, p. 64.

jects all the personnel of the public administration to military discipline and places them under the control of the armed forces.

## *Land Reform*

The social reforms proclaimed by the authors of the Movimiento 15 de Octubre (as a result of the 1979 coup) aroused strong expectations in certain groups of the centre at the time, but most of the left wing regarded them as purely demagogic promises on the part of the military.

The land reform was instituted by Decrees 153 and 154 of 6 March 1980, and subsequent decrees dealing with related social measures. Assessing its results so far, it can safely be said that it has failed as a measure designed, on the one hand, to increase production and on the other to improve the standard of living of the peasants. It has also failed as an indirect means of putting an end to a state of violence and civil war.

The need for a far-reaching land reform was never in doubt, any more than it is now. According to recent data,<sup>1</sup> the distribution of the land before land reform in this essentially agricultural country was as follows:

1.9 % of the population had 57.5 % of the land, including

0.02 % who had 39.5 % of the land;

91.4 % of the population had 22 % of the land.

The vast majority of the rural smallholders owned between 1 and 5 hectares (in areas where the land is poor, a family needs a minimum of 6 hectares for its subsistence).

Production on these minifundia does not even reach subsistence level, and the peasant owners are forced to join the ranks of the agricultural workers looking for seasonal employment on the coffee, cotton and sugar cane plantations.

Other data relating to the economic and social situation are: partial unemployment of more than 60 % of the rural workers; extreme poverty among almost 80 % of both the urban and rural populations; 74 % infant malnutrition; 45 % illiteracy among the adult population. Wealth and property are almost entirely in the hands of a tiny property-owning and financial oligarchy, who are not prepared to surrender any of their immense privileges and have ensured that the armed forces act as guardians of their interests.

The land reform was to take effect in stages. The relevant basic law (Decree 153 of 6 March 1980) planned to limit the area of privately owned rural property to a maximum of 100 to 150 hectares, depending on the quality of the land. This envisaged the expropriation of more than 200,000 hectares against payment of compensation, and their subsequent redistribution. During the next stage, the system of sharecropping and tenant farming was to be abolished, thereby benefiting 150,000 peasant families.

One aspect of the reform was that the peasants had no say in the planning or the establishment of priorities. The programme is still in its first stage which involves the expropriation of 15 % of the arable land; the rest, which included the big coffee, cotton and sugar plantations, from which the country obtained 50 % of its income, was left to a later stage. Non-resident (migrant) workers, who are continually moving about in search of work, did not benefit from the

1) "El Salvador y su historia", by the Instituto de Estudios Políticos para América y África (IEPALA), Madrid, 1980.

reform, which thus excluded more than 60 % of the rural population.

During the whole of this period, the armed forces, and the National Guard in particular, waged a campaign of savage and bloody repression in rural areas where guerrillas had been detected. This led to a large-scale movement of the inhabitants to safer areas, even including the neighbouring territory of Honduras, until the Honduran troops closed the frontier. Examples of repression by the armed forces are many and various, and include every kind of violation of human rights, ranging from multiple murder and the rape of women and children to the burning down of houses. The peasants see the armed forces not as protectors but as oppressors. In April 1981, the Central Confederation of Salvadoran Workers, which includes the peasants who have "benefited" from the reform, threatened to leave the big farms if the governmental repression continued.

To this picture must be added the intensive struggle against the opposing guerrilla forces, which have gained control of certain areas, and sabotaged production, bringing it almost to a stop.

In view of the situation described, it is clear that the social reforms proclaimed have not been achieved and that little or nothing has been done to redress the injustice prevailing in the country. At the present time, and especially after the offensive launched in January 1981 by the guerrilla forces, a state of civil war may be said to exist in the country.

### *Status of Other Human Rights*

As the representative of the ICJ stated before the United Nations Commission on Human Rights in March 1981: "there has been a spectacular increase in the violations of human rights, and this small country is plunged in a bloodbath".

The balance-sheet with respect to the right to life and to physical security is dramatic: 10,000 deaths by violence in 1980 at the rate of 30 a day, and hundreds of persons disappeared. Another 3,000 deaths occurred in the first four months of 1981 – a veritable massacre in a country of only 4,300,000 inhabitants. Many of the deaths take place in combat, in which a number of members of the government forces and of the paramilitary right-wing groups have also died. Some have been executed by guerrillas when occupying villages. But the majority are political assassinations carried out directly by the security forces or by the right-wing groups which the government claims it is unable to control. Nevertheless sufficient information and evidence exist regarding the participation and/or complicity of the military authorities in these crimes. According to Socorro Juridico, the legal assistance department of the Archbishopric of San Salvador set up by the murdered Archbishop Oscar Arnulfo Romero: "in El Salvador there are no ultra right-wing groups: it is the national army, the police and the national guard, sometimes in civilian clothing and sometimes in full military uniform, who commit unnumerable repressive acts against the people..." (April 1981).

Thus, for instance, in the week of 28 February to 6 March 1981, the forces of repression killed 534 people in the lower-income groups. A number of air and land bombardments have been indiscriminately carried out against rural settlements, and a series of "mopping-up" operations have been launched by the armed forces.

Prominent among the victims of the political violence are the defenders of human rights, such as the members of the Commission on Human Rights in El Salvador, several of whom have been assassinated or who have disappeared without trace. Members of the Churches, lawyers acting for the

defence in political trials, trade union advisers and magistrates involved in this type of legal case<sup>1</sup> have suffered in the same way.

The right to the free expression of ideas and opinions, and the rights of assembly and association are severely restricted by the state of civil war that exists and by the state of siege, augmented in January 1981 by a curfew. Several journals, publications and radio stations have been forced to interrupt their activities, due not so much to the official censorship as to the attacks made on their premises with explosives, and the threats to, assaults upon and even murder of journalists.

The right to physical security, which comprises the right to legal redress and due process, has also suffered. The judiciary has been made impotent by fear, while magistrates who have attempted to investigate crimes attributed to the security forces or right-wing groups have been immediately attacked, and several of them have been murdered.

Although religious freedom is still respected together with the right to profess or take part in the different faiths and religious services, etc., the attacks made upon priests and churchmen have limited ecclesiastical activities to a very great extent and more especially the social work which the Church in San Salvador has been doing for a long time.

Lastly, there are no political rights in the sense that citizens are not allowed to vote to elect their rulers and cannot take part in the conduct of public affairs. The

executive and legislative Powers are exercised by a Junta appointed directly by the military command. The Junta has promised to hold elections in 1982, but it is very difficult to see how these can take place freely in the present situation.

### *The Opposing Forces*

The opposing forces that are now struggling for power are, on the one hand, the Revolutionary Government Junta and, on the other, the armed opposition.

The Junta<sup>2</sup> is, as has been said, completely dominated and conditioned in its decision-making by the armed forces, where the real power lies. In the last few months, the regime has been strongly supported and encouraged by the change of government in the United States of America. The new American administration has refrained from criticizing the government as regards the question of respect for human rights, and has restored military and economic aid. This had been suspended in December 1980 after the assassination in El Salvador of four American citizens (3 nuns and one lay missionary), followed by that of two American advisers on land reforms sent by the confederation of labour, AFL-CIO. It appears from unofficial inquiries made at the time that the Salvadoran security forces were directly implicated in the murders. The American government is trying to present the internal conflict in El Salvador as an indirect act of aggression by international Marxism acting through Marxist

1) See Bulletin of the Centre for the Independence of Judges and Lawyers, April 1981, p. 25.

2) The following official forces are formally answerable to the Junta: The Armed Forces of the Nation, the National Police, the Salvadoran National Security Agency (ANSESAL), the Estate Police and the Customs Police. Side by side with these official forces, there are extreme right-wing paramilitary organizations, such as the Nationalist Democratic Organization (ORDEN) which, although formally disbanded in October 1979, continues to act with impunity, the Unión Guerrera Blanca (UGB), and the Fuerzas Armadas de Liberación Anticomunista-Guerra de Eliminación (FALANGE).



guerrilla groups armed and trained by various socialist countries. In this way it minimizes the political, social and economic reasons underlying the struggle against the regime and detracts from their inherent importance.

The opposition, for its part, succeeded in achieving unity on 18 April 1980 through the creation of the Democratic Revolutionary Front (Frente Democrático Revolucionario, FDR), and the adoption of a planned platform of political action. The armed struggle is directed by the "Frente Farabundo Martí para la Liberación Nacional (FMLN)", which forms part of the common front (FDR). The FDR also comprise Marxist, Socialist, Communist, Social Democrat and Christian organizations and independents.<sup>1</sup>

The military situation seems to have stabilised. The FMLN has built up a unit of regulars, which is beginning to take armed action of the kind appropriate to a war with fixed positions, although the unit does not stay in one place but is always on the move. In addition there are militia units, equipped with some modern arms but mainly with sporting guns, home-made bombs and other rudimentary weapons. They have gained widespread support among the populace, who often take part in isolated actions such as the seizure of villages and small towns, and keep the guerrillas supplied with food. There are areas of the country that are controlled by the opposition and, though the forces of the Junta make armed incursions into these areas, they have not managed to gain a foothold there and have had to surrender them to the guerrillas again. In other words,

the situation is more or less static as regards the positions achieved by the two sides, but is highly mobile and intensive in the sense that armed clashes occur every day throughout the length and breadth of the country.

Governments of some of the other countries in the region and the Socialist International have made an attempt to mediate between the government and the opposition, seeking by means of a dialogue to find a political solution to the problem that will put an end to the fighting and the destruction. The government of El Salvador has not supported these attempts and has indicated its opposition to a dialogue with the guerrillas, while these have expressed, through the FDR, their willingness to enter into a dialogue, although not with the present members of the Junta. Previously, on 9 March 1981, the government had refused an offer to mediate by the Organization of American States, made on the proposal of the President of Costa Rica.

There is a danger that the conflict will spread to neighbouring countries like Guatemala and Honduras, where the domestic situation is potentially explosive. A number of serious incidents have taken place. The latest was in March 1981, when Honduran troops who had closed the frontier are reported to have fired on groups of refugees (some 8,000) who were fleeing from the fighting and trying to cross the river Lempa which separates Honduras from El Salvador. Members of the french humanitarian organization "Doctors without a frontier" report that about 50 people lost their lives, most of them women, children and old people, and that scores of people were

1) They include the Fuerzas Populares de Liberación Farabundo Martí (FPL), Fuerzas Armadas de la Resistencia Nacional (FARN), the Salvadoran Communist Party (PCS), the Frente de Acción Popular Unificada (FAPU), the Movimiento Nacional Revolucionario (MNR), the People's Christian Democrat Party (PDCP), the Bloque Popular Revolucionario (BPR), the Ligas Populares 28 de Febrero (LP-28), and the Ejército Revolucionario del Pueblo (ERP).

wounded.<sup>1</sup> The conflict in El Salvador is also threatening to spread to nearby Nicaragua, with all the unforeseeable conse-

quences that this would entail for Central America.

## *Eritrea*

### *Eritrea's Claim to Self-Determination*

Of all the peoples who, since the second world war, have been the victims of great power rivalries and ambitions, perhaps the one with the greatest claim for consideration is the people of Eritrea. Nevertheless, no nation has yet been willing to raise the issue of the rights of this people in the United Nations. The truth is that the 'Eritrean question' is a source of embarrassment both to the United Nations itself and to almost all 'interested parties'.

It will, therefore, be a matter of some comfort to the Eritrean liberation movements that after 20 years of armed conflict, the question is at last being debated at the international level. It is still not on the agenda of the United Nations or of the Organisation of African Unity, but it has been discussed at the Islamic Summit Conference and at the Arab League Assembly.

In January 1981, the Islamic Summit Conference, held at Ta'if, Saudi Arabia, called for a just and peaceful settlement of the Eritrean question and set up a committee to investigate the issue and report back to the Council of Foreign Ministers in Baghdad in May.

More recently in March 1981 the Arab League, following a resolution passed by its Permanent Assembly in Tunis last September, brought together the various Eritrean movements in the latest attempt to create

a more united front in order that Eritrea may "achieve its national objectives".

The essence of the 'Eritrean question' is that Ethiopia contends that Eritrea is an integral part of its territory and that the movement for its 'liberation' is a secessionist movement to which no support should be given, as it violates the principle of territorial integrity.

It will be remembered that in 1952, following a resolution of the General Assembly passed two years earlier, Eritrea was united with Ethiopia as an autonomous unit within an Ethiopian 'federation'. Ten years later, its autonomous status was abolished and it was incorporated as a province in Haile Selassie's Ethiopian empire. This in turn led to the real beginning of the armed struggle, which has continued for nearly 20 years, first against the feudal empire and then, after the revolution, against the present communist regime.

The Eritrean liberation movements contend that the Eritreans are a people entitled to self-determination, that neither the federation with nor the incorporation into Ethiopia was ever agreed to by the Eritrean people and that, indeed, both were imposed against its will. They claim, therefore, that the people of Eritrea is entitled to assert its independence pursuant to the principle and right of self-determination.

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1) Boston Globe, March 26, 1981.

An alternative argument which can be put forward is that even if the Ethiopian people can be held to have agreed to the 1952 'settlement', this was an agreement to autonomous status within a federation. When this status was abolished, there was a fundamental breach of the agreement, which must lead to a revival of the people's right to self-determination.

Before these contentions can be considered further, the relevant events must be considered more fully.

Eritrea, as it is known today, with its present boundaries, was created when the Italians occupied and colonized it in 1890, and gave it the name of Eritrea, from the Red or "Erythrean" Sea.

The history of the territory before colonisation is complex and confusing. Like Ethiopia and other nations of Africa, it existed as a conglomerate of feudal entities, which were at times either victims of their neighbours or aggressors. The development of nation or multination states in the whole of Africa is indeed directly related to the European colonization of the continent. Eritrea's coming under a single political administration led to the creation of a feeling of national identity among the Eritrean people, a feeling that was clearly enhanced by a common oppression, and a common economic and political life.

### *Pre-Colonial History*

The original inhabitants of present-day Eritrea were a Nilotic people, who subsequently intermingled with the invading Hamitic tribes from North Africa. Between 1000 and 400 B.C., Semitic tribes crossed the Red Sea and settled in the Eritrean Highlands, bringing with them a more advanced civilization. Around the end of the 4th century B.C., the Axumite kingdom, based in highland Eritrea and Tigrai (the

latter now a province in northern Ethiopia), extended its reaches also to some important towns along the coast, like Adulis. At its height it made raids as far as the Sudan and the southern Arabian peninsula.

At that time the lowland regions of north-western and northern Eritrea were inhabited by the Beja. Their relations with the axumites were those of raid and counter raid, while the denkalia (inhabitants of the southern coast of present-day Eritrea) had little, if any, contacts with the Axumite kingdom.

With the rise of Islam, the power of Axum began to wane. This decline must be seen in the context of developments in northern Africa, the Middle East and the Red Sea in the 6th and 7th centuries. The Arab conquest of these areas cut off the Axumite kingdom from the rest of the world and also resulted in the southward movement of the Hamitic, mainly Beja, tribes of eastern Egypt and northern Sudan. Their Beja kinsmen (inhabitants of the northern highlands and the Barka lowlands) were consequently pushed onto the Eritrean plateau.

In 640 A.D., Adulis, the Axumite port, was destroyed by Arab invaders, and the following year the Moslem invasion of Egypt blocked the Axumite land route to the Mediterranean. Since the Axumite kingdom was based on trade, these events, in conjunction with the Beja invasion of the plateau, precipitated its collapse.

The claim by Amhara kings and the present Ethiopian regime that Axum included all of present-day Eritrea, and that Ethiopia is an "expansion", "extension" or "growth" of the Axumite kingdom is incorrect. The documentary evidence shows that Axum did not comprise all of Eritrea and that Axum and Ethiopia occupied different territories.

After the fall of Axum, the Bejas established several independent kingdoms which

exercised control over all of Eritrea as we know it today, except in the Denkalia coastal district. By the close of the 13th century, internecine conflicts had begun to erode their authority. From then until the middle of the 15th century there is a gap in historical chronology: all that is known is that no Abyssinian king ruled the plateau in this period.

By the close of the 15th century there were four different political divisions in the area, which followed a roughly geographical division: the Medri Bahri plateau; the Barka lowlands and the northern highlands; Massawa and the surrounding coastal areas; the Denkalia lowlands. Massawa was occupied by the Turks in 1557; the Barka lowlands and the northern highlands by the Fung kings of Sudan; the Medri Bahri plateau, ruled by the Beja clan called Bahre Negash, was in constant conflict with the Abyssinian kings; while the Denkalia region was considered the property of the Imam of Adal.

All these regions, except the Medri Bahri plateau, came under the control of the Egyptians in the middle of the nineteenth century. The Medri Bahri plateau was occupied by Yohannes of Tigray in 1879, but this occupation was short-lived as it came to an end with the Italian occupations.

Italy established its first protectorate at Assab in 1882, and by 1889, it had driven out the Egyptians and Yohannes of Tigray. This brought the entire country under Italian control thanks to its military superiority and the uncoordinated nature of the resistance that it had encountered. In June 1890, Italy proclaimed Eritrea its colony and continued to rule and exploit it for the following fifty years, until its forces were defeated by the British in 1941.

Under the British occupation Eritrea witnessed during the war an industrial boom, but the end of the second world war brought about a depression for Eritrea.

Many industries were closed down; indeed even earlier, the British had cancelled many of the work schemes that had been part of the Italian colonial structure. The result was mass unemployment and starvation for the working class. The lot of the peasantry was also very hard, as more and more land was expropriated while taxes on land were increased. In the administrative branches many officials and clerical workers were dismissed; those who wanted to start small businesses were refused licenses by the British who granted them almost exclusively to Italians.

This renewed wave of repression was not without consequences. The peasants of the highlands expressed their indignation at the expropriation of their land by burning farms and by killing the Italians who had taken over their land. For eight years (1942-49) a powerful antifeudal movement swept the western lowlands. The intelligentsia, many of them now jobless, were also astir. They organised demonstrations and struggles, and wrote articles attacking British colonialism. The demands were for land and independence, and an end to colonialism.

As the Allied Powers were unable to reach agreement about the future of the territory, the British brought the issue to the newly formed United Nations in 1948.

Various proposals were canvassed, varying from independence (supported by the soviet countries), annexation to Ethiopia (sought by the Ethiopians), partition between Ethiopia and the then Anglo-Egyptian Sudan (proposed by the British), trusteeship under the UN, and the solution which was eventually adopted under strong United States pressure, federation with Ethiopia. Shortly afterwards the United States concluded a 25 year treaty with Ethiopia guaranteeing the continued use of its military bases in Ethiopia, including the base at Asmara and port facilities on the

Eritrean coast.

A United Nations Enquiry Commission was set up to study the situation and make recommendations. The majority of the five man Commission, whose members came from Burma, Guatemala, Norway, Pakistan and, *mirabile dictu*, South Africa, rejected the partition solution and accepted the dubious proposition that Eritrea was not capable of establishing a viable economy, which it considered of decisive importance in influencing the decision not to support the demand for independence made by the Eritrean independence bloc. This bloc comprised 8 political parties and associations and, according to an estimate made at the time (August 1949) by the British administrator, commanded the support of 75 % of the Eritrean population<sup>1</sup>. No plebiscite was held in Eritrea to ascertain the wishes of the people or to approve the decision of the UN.

Of the five members of the Enquiry Commission one favoured the British/Italian plan for partition, two proposed independence after a 10 year trusteeship and two proposed "large autonomy" within a union with Ethiopia.

On December 2, 1950, the UN General Assembly adopted Resolution 390A(v) accepting the last of these recommendations and proposing that Eritrea be constituted as an autonomous unit to be federated with Ethiopia under the sovereignty of the Ethiopian Crown. This decision resulted from strong pressure by the United States which then tended to dominate the UN. As the Secretary of State, John Foster Dulles, later said to the UN Security Council in 1952, when the time came to implement this resolution:

"From the point of view of justice, the opinions of the Eritrean people must receive consideration. Nevertheless the strategic interest of the United States in the Red Sea basin and considerations of security and world peace make it necessary that the country has to be linked with our ally, Ethiopia."<sup>2</sup>

The wording of this quotation seems to imply a recognition that the chosen solution was not in accordance with the wishes of the Eritrean people.

Another United Nations Commission, chaired by a Bolivian jurist, Anze Matienzo, was appointed to prepare a draft constitution for Eritrea to be submitted to an Eritrean constituent assembly to be convened by the British "administering authority". The Commission was faced with the paradoxical task of trying to devise a democratic state federally united with a still feudal empire. How could the rights of the Eritreans be safeguarded in such circumstances, with such unequal partners, and with no neutral arbiter within the federation to settle any disputes which might arise between them?

The Chairman of the panel of jurists who drew up the Eritrean constitution recognised this dilemma and expressed himself prophetically in the following terms in his final report:

"With regard to the application of the General Assembly's resolution after the entry into force of the Federal Act and the Constitution of Eritrea, the panel (of jurists) expressed the following view: It is true that once the Federal Act and the Eritrean Constitution have come

1) This has since been disclosed by the publication of a telegram sent from the US Embassy in Addis Ababa to the US Secretary of State, No. 171 of August 19, 1949.

2) Market International Report, Ethiopian Summary, quoted in *Ethiopia and the United Nations*, a paper prepared by Bereket Habte-Selassie of Howard University for the Session on Eritrea of the Permanent Tribunal of Peoples, held in Milan, 24-26 May 1980.

into force the mission entrusted to the General Assembly under the Peace Treaty with Italy will have been fulfilled and that the future of Eritrea must be regarded as settled, but it does not follow that the United Nations would no longer have any right to deal with the question. The United Nations Resolution of Eritrea would remain an international instrument and, if violated, the General Assembly could be seized of the matter."

Nevertheless, although the settlement based on the UN General Assembly resolution of 1950 has been completely overthrown, the General Assembly has not seen fit to be "seized of the matter".

In 1952 by a 'Federal Act' Eritrea was incorporated in a supposed federation of Ethiopia, but without a federal constitution. An Eritrean Constitution was, however, adopted for the 'autonomous unit' which conferred upon the people of Eritrea rights and guarantees which were unknown to the people of Ethiopia. They were assured the "principles of democratic government" (Art. 16), with "periodic free and fair elections, directly and indirectly" under universal suffrage (Art. 18) and were guaranteed the enjoyment of human rights and fundamental freedoms (Art. 12). They were to have full legislative, executive and judicial powers in the field of Eritrean affairs, subject only to those matters reserved for the 'federal' (i.e. Ethiopian) jurisdiction over defence, foreign affairs, currency and finance, foreign and interstate commerce and external and internal communications, including ports. The role of the Emperor's representative within the territory was to be a formal one.

Three years later, in 1955 Ethiopia adopted a federal constitution. This constitution still gave less rights to the Ethiopian

citizens than the Eritrean constitution gave to the citizens of Eritrea. It also gave inadequate protection to the 'autonomous unit' of Eritrea, whose rights had already begun to be seriously eroded. Already in 1952 the Emperor ordered the application to Eritrea of the Ethiopian constitution, laws and statutes, and extended the jurisdiction of the Ethiopian courts to Eritrea. Basic civil rights, including freedom of the press, freedom of assembly, and trade union freedom were suppressed. Barely five years after the supposed federation came into force, Tigri-na and Arabic, which were both official languages under the Eritrean constitution, were suppressed and Amharic, the Ethiopian official language, became the language of official communication and instruction. This had the effect of barring the way to higher education for thousands of Eritreans.

The discontent arising from the erosion of the rights of Eritreans and of their status of autonomy, and the lack of any international interest in or support for their cause, led to the decision by some of the opposition leaders in 1961 to embark upon an armed struggle. This decision received impressive support when in 1962 the autonomous status was formally abolished and Eritrea was incorporated as a simple province in the Ethiopian empire.

The day before the Emperor's proclamation announcing the termination of the federation, a supposed "assent" to this measure was obtained from the Eritrean Assembly. It is not clear even whether a vote was taken on this issue, or whether the Assembly merely had read to it a prepared statement<sup>1</sup>. In any event, this can have no legal validity. Apart from the fact that it was obtained literally by gun-point, with police armed with machine guns visible to the members of the assembly, it is submitted that members of an assembly

1) See Bereket Habte-Selassie, *op.cit.*, p. 23.

elected to defend the Eritrean constitution and the rights of its citizens under it had no mandate or authority to agree to the abolition of that constitution without any referendum or other consultation with the electorate. Moreover, Article 91 of the Eritrean Constitution expressly provided that:

- "1. The Assembly may not, by means of an amendment, introduce into the constitution any provision which would not be in conformity with the Federal Act.
2. Article 16 of the Constitution, by the terms of which the Constitution of Eritrea is based on the principles of democratic government, shall not be amended."

In examining the Eritrean claim to independence under the right to self-determination, the following questions arise:

- (1) is the population of Eritrea a 'people' within the meaning of the right to self-determination?
- (2) if yes, was that right exercised in 1952 in favour of union as an 'autonomous unit' within Ethiopia?
- (3) if yes, what was the effect of the abolition of the federation and the incorporation of Eritrea into Ethiopia in 1962?
- (4) is the United Nations entitled now to enquire into the claim of the Eritrean liberation movement to self-determination?

As to the first question, it would appear that the Eritreans have at least as much right to be considered as a 'people' as the peoples of most of the African countries which were created by the division of Africa among the imperial powers at the end of the 19th century. Moreover, the UN General Assembly resolution of 1950 pro-

posing that Eritrea should be treated as an autonomous unit within an Ethiopia federation was clearly treating the population as a 'people', and a people distinct from the people of Ethiopia, with a recognisable territory of their own. They were not regarded as or treated as a mere ethnic, linguistic or religious minority.

As to the second question, the Eritrean liberation movements strongly deny that their people accepted the UN proposal for federation as an 'autonomous unit' within Ethiopian. They do not regard the Eritrean assembly which assented to it as being representative of the people or as having any mandate or authority to agree to this proposal. It is clear that they can bring forward strong evidence to support these contentions. Nevertheless, it seems difficult to conceive that the United Nations of today would agree to override a decision of the United Nations taken 30 years earlier on a matter of this kind, especially when the fate of many other peoples were determined in the post-war years by similar agreements reached with local assemblies or councils who were accepted, rightly or wrongly, as reflecting and representing the views of their people.

It is a general principle of international law that an exercise of the right to self-determination by union with another people is made once and for all. The people concerned cannot afterwards claim a right to secede as a further exercise of this right. It is submitted, however, that different considerations apply if the federal state concerned denies its democratic rights to the people who have opted to join it. The matter is dealt with in the authoritative Declaration of Principles of International Law concerning Friendly Relations and Cooperation Among States approved by the General Assembly in 1970.

In this Declaration both the principle of equal rights and self-determination of

peoples and the, at times conflicting, principle of the territorial integrity and political independence of states, are proclaimed.

The relationship between these two principles is defined in these terms:

"Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

This crucial passage indicates the way in which the two conflicting principles are to be reconciled. It states that the principle of territorial integrity is to prevail in the case of sovereign states conducting themselves 'in compliance with the principle of equal rights and self-determination of peoples' and possessed of a government representing the whole people of the territory without distinction as to race, creed or colour. By implication, where these conditions are not fulfilled, the right of self-determination may prevail over that of territorial integrity.

The answer to the third question posed above, therefore, depends upon whether the abolition of the federation and the integration of Eritrea within a unitary state of Ethiopia was "in compliance with the principle of equal rights and self-determination of peoples".

Since the people of Eritrea, *ex hypothesi*, agreed to union with Ethiopia only as an

autonomous unit, the abolition of that status and its integration within Ethiopia cannot be regarded as being in compliance with equal rights and self-determination of peoples unless there was a clear and unequivocal decision by the people of Eritrea in favour of that change.

The available evidence appears to indicate clearly that there was no such decision, and accordingly the people of Eritrea are still, or once again, entitled to determine their future within the principle of self-determination. This conclusion is re-enforced by the obvious support which the Eritrean liberation forces have obtained from the population. Guerrilla movements are notoriously dependent upon the support of the people in the areas where they operate, and it would have been impossible for the Eritrean forces to have controlled, as they did until recently, the greater part of the country including many of the principal towns, without such active support.

In any event, to put the matter at its lowest, the Eritrean people are entitled to have their case heard, and heard by the United Nations without any violation of Article 1 (7) of the Charter, which relates to matters "essentially within the domestic jurisdiction of any state". As Dr. Anze Matienzo argued in his final report, in the passage quoted above,

"The United Nations Resolution of Eritrea would remain an international instrument and, if violated, the General Assembly could be seized of the matter."

It is to be hoped that the growing number of states which now support the Eritrean claim, will succeed in bringing the matter again before the General Assembly.



## Namibia

The illegality in international law of South Africa's continued presence in Namibia has been established by the 1971 decision of the International Court of Justice<sup>1</sup> and frequently reiterated by resolutions of the UN Security Council and General Assembly. South Africa's only claim to any rights over and responsibility for Namibia derives from its mandatory status which made it answerable first to the League of Nations and then to the United Nations. This mandatory status has been terminated as a result of South Africa's failure to respect the terms of the mandate, in particular by introducing its *apartheid* doctrines of racism and racial discrimination.

South Africa has now accepted in principle that Namibia should be granted independence, but is seeking to do so in a way which preserves the privileged status of the white minority.

Since 1978 a group of five western powers known as the Western Contact Group (Canada, Federal Republic of Germany, France, United Kingdom and United States) has been seeking to arrive at an internationally acceptable settlement for the granting of independence. The United Nations' conditions for the granting of independence are that free elections be held under the supervision and control of the United Nations for a Constituent Assembly which will draw up a Constitution for Namibia, and that the elections be held for the whole of Namibia as one political entity. These conditions were laid down in Security Council Resolution 385 (1976) and have frequently been repeated in subsequent resolutions.

These conditions were clearly accepted by the Western Contact Group, for in a

proposal submitted to the Security Council in 1978 they stated that "... the key to an internationally acceptable transition to independence is free elections for the whole of Namibia as one political entity with an appropriate United Nations role in accordance with Resolution 385 (1976)" (S/12636 of April 10, 1978).

The conditions were again re-stated in Security Council Resolution 435 (1978), which established a United Nations Transition Assistance Group (UNTAG) to assist in the early transfer of power to the people of Namibia in accordance with Resolution 385. Its intended function was to supervise free elections for the constituent assembly. It was, however, impossible for this Group to reach agreement with the South African authorities on the procedures for holding the elections.

Accordingly in January 1981 a "pre-implementation" conference was held in Geneva to agree the procedures, and in particular to agree on a cease fire date and a date for the holding of elections in 1981. However, no agreement was reached on either of these points.

Whereas SWAPO, through its President, Sam Nujoma, stated its readiness to agree to a cease fire and to a target date for the arrival of UNTAG to assume responsibility for free elections in Namibia, South Africa, through the Democratic Turnhalle Alliance (DTA) delegates, adopted stalling tactics.

It is generally agreed by informed observers that if genuinely free elections were now to be held in Namibia, SWAPO would gain a decisive victory, comparable to that of President Mugabe's party in Zimbabwe. South Africa sees this as a threat and its answer lies in the consolidation of the DTA

1) See ICJ Review No. 7 (December 1971).

constitution, which is based on ethnic or tribal divisions of the territory, comparable to the 'Bantustans' in South Africa, and in intensification of its military action against SWAPO forces. For both of these time is required.

Accordingly, the delaying tactics took the form of an assertion that the United Nations could not be trusted to send impartial observers to the elections, owing to its recognition of SWAPO as the sole and authentic representative of the people of Namibia. This was an unusual piece of impertinence, coming from the representatives of an illegal regime, whose 'impartiality' has never been in evidence.

However, in the interest of trying to reach agreement, private consultations took place in which, according to the Secretary-General's subsequent report (S/14333), it was suggested that a cease-fire date be provisionally established for an early date and that, in the meantime, specific measures could be taken to ensure, and to reflect in public decisions, the impartiality of the United Nations, as well as of South Africa, from the time of agreement on the implementation date.

Nevertheless, the South African delegation announced on January 13 that it would be premature to set a date for the implementation of resolution 435 (1978), because its delegation's lack of confidence in the impartiality of the UN had not been resolved by the Conference. The South African delegation gave the impression that only after an unspecified period during which the UN would demonstrate its impartiality would it agree to a definite date for implementation.

The conduct of the South African government may cause no surprise, but the

Western Group's rather weak reaction to its manoeuvres is to be regretted. Undoubtedly the South African delegation found strength in the results of the US presidential elections. There is now understandable concern in many quarters, following the visit of the South African Foreign Minister, Pik Botha, to Washington that the new Reagan government in the United States will lend support to South Africa's policies for an ethnic division of Namibia. Mr. Sean MacBride, the former UN Commissioner for Namibia, has gone so far as to state that "It is generally believed that the plans for an "organised delay" in regard to the implementation of the United Nations decisions were arrived at a secret meeting which took place in July of 1977 in Zurich at which were present Prime Minister Vorster of South Africa, Dr. Henry Kissinger of the United States and General Alexander Haig, Commander in Chief of the NATO Forces".<sup>1</sup>

At the United Nations International Conference on Sanctions against South Africa, held in Paris 20-27 May, 1981, a Special Declaration on Namibia was adopted which called on the Western Contact Group "to exert the necessary pressure on the South African regime in order to enable Namibia to attain its independence without delay".

It is to be hoped that the Western Contact Group will stand firm on the position it took in 1978 in support of Resolution 385. Any attempt to resolve the issue of Namibian independence on the basis of South Africa's policies can only lead to increasing violence, prejudice the prospects of an agreed solution, and increase the pressures for sanctions against South Africa.

1) University of Illinois, College of Law, David C. Baum Memorial Lecture on "The Enforcement of the International Law of Human Rights", March 26, 1981.

## *South Korea*

### *The Amended Constitution of South Korea*

ICJ Review No. 13 (December 1974) contains an analysis of the authoritarian system of government introduced into South Korea in 1972 by the revised "Yushin Constitution" which vested wide powers in the presidency and weakened the powers of the legislative assembly.<sup>1</sup> The introduction of this system and the subsequent declaration of martial law resulted in widespread demonstrations. The government met this challenge by promulgating emergency decrees and laws which outlawed any form of criticism of the Constitution, the government and the decrees themselves. The assassination in October 1979 of President Park Chung Hee, President of the Republic since 1961, and the promulgation of an amendment to the Yushin Constitution calls for another review of the situation in South Korea.

Any hopes that the Korean people had of a more liberal and democratic society after the death of President Park were dashed by the subsequent actions taken by interim President Choi Kyu Hah and his successor, interim President Chun Doo Hwan. On 17 May 1980, a wave of strikes and widespread student demonstrations demanding the immediate lifting of martial law led to the extension of martial law throughout South Korea. All political activities were banned and many political leaders were arrested including the prominent opposition leader, Kim Dae Jung. These oppressive measures led to a popular uprising of some 20,000 in Kwangju (about 165 miles south of Seoul), which after heavy fighting, was brutally suppressed by

troops 8 days later on 27 May 1980. In a step which many observers describe as a military coup, political power was assumed on 31 May by a Special Committee for National Security Measures (SCNSM) controlled by the Armed Forces.

In June 1980, the SCNSM launched a sweeping process of "purification of society" which sharply restricted the rights of politicians, journalists, scholars and others. Some 8,667 public employees from the Korean Central Intelligence Agency, the Civil Service, State-run banks, corporations and other organisations were dismissed for corruption or incompetence or voluntarily resigned. A month later, 45,000 "hooligans" and petty criminals were arrested by the army and the police in a nationwide programme. 30,000 of them were sent to military camps to undergo weeks of rigorous "re-education". The press was not spared. The government banned 172 publications as "lewd, vulgar and obscene" or "creating social confusion and class consciousness" and dismissed hundreds of journalists. Whilst some of them were dismissed for alleged corruption, many of the 400 journalists who lost their jobs held views unacceptable to the government. The International Press Institute stated in September that over 30 % of South Korean journalists had been driven out of the profession, and that many had been killed or imprisoned.

Though stated to be a campaign to clear the country of corruption and incompetence, reports have been received that the "purification campaign" has been used to

1) See also ICJ Review No. 20 (1978), p. 19.

remove persons whom the government consider a threat. For example, in January 1981, the Chongye branch of the National Garment-Makers' Union was dissolved under the government's drive to remove 'dishonest labour' from the unions. However this action was seen by many to be part of the government's policy of removing democratic labour leaders and workers as the Union had been successful in negotiating better pay and conditions of work for its members.

In the meantime, President Choi had resigned in August 1980 and interim President Chun was elected by the electoral college provided under the Yushin Constitution. In his inaugural speech, he had promised inter alia, to conduct a "democratic welfare state" and reaffirmed that a draft constitution would be submitted to a referendum in October. However, there are circumstantial reports that Koreans continued to be subjected to harassment, arbitrary and illegal arrest and long detention without trial, and many of them to torture to elicit confessions to their crimes. In the August 1980 court-martial of Kim Dae Jung and 23 others, several defendants charged in open court that they had been beaten repeatedly to extract confessions or accusations against their fellow defendants. Evidence allegedly obtained in this way subsequently was accepted by the court. The government declared on 3 March 1981 a general amnesty on prisoners in the name of national harmony. It is understood that most of the prisoners who had been so "amnestied" by this declaration were suspects who had been released earlier when it was found that no charges could be formulated against them.

A substantial revision of the Yushin Constitution (described as a "draft amend-

ment"), prepared by a government committee chaired by the Prime Minister, was presented to the Korean people in a national referendum. It is said to have received a 99.9 % affirmative vote from the 95.5 % of the eligible voters who participated in the national referendum, and it came into force on 27 October 1980. The high turn-out of voters and the almost unanimous approval of the Korean people in the referendum are hardly credible. It is, therefore, not surprising that there had been allegations of fraudulent practices and vote-counting. In any event, the choice offered was merely the Yushin Constitution as it was or the Yushin Constitution as amended. In particular, the people were not offered a chance to vote on a draft constitution prepared by the National Assembly.

This draft which provides for direct election of the president, guarantees of human rights and strengthened independence of the judiciary was prepared by the National Assembly Constitutional Amendment Deliberation Committee in early 1980. With the extension of martial law throughout the whole country, the National Assembly was suspended on 17 May 1980. Since its suspension, no criticism or independent discussion of the government's draft constitution nor comparison with the National Assembly's draft was allowed.

The Interim President, Chun Doo Hwan, had declared in a statement announcing the proposed amendments to the Constitution that the previous executive structure of the 1972 Constitution which was centred on an all-powerful president would be changed into a rational presidential system based on a principle of checks and balances.<sup>1</sup> This claim needs to be examined in greater detail.

1) Constitution, Korea Background Series Vol. No. 1, p. 94, published by Korean Overseas Information Service, Seoul, Korea.

## *The Interim Legislative Assembly*

Before considering the amendments to the Constitution, it is important to note the formation of an interim legislative Assembly. Under Article 6(1) of the Supplementary Provisions to the new constitution, this Legislative Assembly was empowered to take over the functions of the dissolved National Assembly during the interim period before a National Assembly was convened under the new constitution.

Article 6(3) of the Supplementary Provisions states that:

"Laws legislated by the Legislative Assembly... shall remain valid, and may not be litigated or disputed for reasons of this Constitution or other reasons."

This means that none of the legislation enacted by the interim Legislative Assembly may be challenged as unconstitutional. This is an extraordinary provision as the Legislative Assembly is given the same weight and authority as the Constitution and is, in fact, an addition to the Constitution. Further, concern is raised by the composition of this assembly. The 81 members of the assembly were not elected but were appointed by the President, and 10 were members of the army-dominated SCNSM. It is, therefore, not surprising that allegations have been made that this assembly was used to continue and extend the control of the military group headed by President Chun.

Further Article 6(4) states that:

"In order to renovate the political climate and realize ethical politics, the Legislative Assembly may legislate laws regulating political activities of persons conspicuously responsible for political or social corruption or chaos prior to the entry into force of this Constitution."

Numerous laws have been passed by this body, the most significant being the law passed on November 3 restricting the political activities of large numbers of people. It bans all political activities of certain persons for the next 7 1/2 years, long enough to prevent them from participating in two consecutive presidential elections. More than 500 major politicians, including virtually all who have spoken for democratic reforms, are on the list of those banned. This law, together with Article 7 of the Supplementary Provisions providing for the dissolution of all existing political parties until 3 months before the date of the first presidential elections, had the effect of banning any potential threat to the government.

## *The President*

Interim President Chun was elected president of the Republic of South Korea under the new procedures on March 1981. The amended Constitution provides for the election of the President by an electoral college of 5,000 members themselves elected by universal suffrage. Members of the electoral college must be over 30 years of age and may be members of a political party (Arts. 39-41). This is some improvement on the selection process under the 1972 Constitution where members of the National Conference for Unification, a rubber stamp body which selected the President, were forbidden to be associated with any party. However, this procedure for electing a president is clearly not in accordance with the wishes of the Korean people since opinion polls show that as many as 98 % of the people favoured direct popular election of the president, and virtually all other draft amendments to the Yushin Constitution proposed by various groups provided for direct election. It is to be re-

gretted that the wishes of the Korean people had not been taken into account when the procedure for selecting a president was decided upon.

The President is restricted to one seven-year term (Art. 45). This is also an improvement on the Yushin Constitution which gave the incumbent both the constitutional basis and the power to remain in office for as many six-year terms as he wished. It also provides that any amendment making it possible for the President to serve for a longer time or to be re-elected will not benefit the incumbent (Art. 129 (2)), but the amendment might, of course, repeal this safeguard.

Some of the powers granted to the President under the Yushin Constitution no longer apply in the new constitution. Thus he no longer has the power to appoint one-third of the National Assembly, nor all the judges. He appoints the Chief Justice and the justices of the Supreme Court, but appointment of the former requires the approval of the National Assembly (Art. 105).

However, he appoints all nine members of the Constitutional Committee which judges the constitutionality of laws, impeachments and the dissolution of political parties. It is regrettable that the power to review the constitutionality of laws was not restored to the courts as many within the legal profession had recommended. The courts had this power from 1963 to 1972, but were deprived of it in the Yushin Constitution.

The President still has the power to take emergency measures. Article 51(1) states that: "In time of natural calamity or a grave financial or economic crisis, or of hostilities or similar grave extraordinary circumstances threatening the security of the State, thereby making it necessary to take speedy measures in order to safeguard the State, the President shall have the power to take necessary emergency measures

covering the whole range of state affairs, including internal affairs, foreign affairs, national defense and economic, financial and judicial affairs." Further, under Article 52, the President may declare martial law "when there is a military necessity or a necessity to maintain the public safety and order by mobilization of the military forces in time of war, armed conflict or similar national emergency..." Martial law was stated to be of 2 types, extraordinary martial law and precautionary martial law. Under extraordinary martial law special measures may be taken, as provided by law, with respect to the necessity for warrants, freedom of speech, the press, assembly and association, or with respect to the powers of the Executive and the Judiciary. The measures that can be taken under the second type of martial law, i.e. precautionary martial law, are not described. These powers are very broad although somewhat reduced from the powers conferred by the 1972 Constitution. The power to take emergency measures under the Yushin Constitution, much used by President Park, could be exercised when "... national security or the public safety and order is seriously threatened or *anticipated to be threatened*..." (Art. 53 of 1972 Constitution).

The use of these powers is subject to a measure of supervision by the National Assembly, for both Articles 51(5) and 52(5) provide that emergency measures and martial law shall be lifted by the President when the National Assembly so requests with the concurrence of a majority of the members of the National Assembly. Further the president must notify the National Assembly of a declaration of emergency without delay and obtain the concurrence of the National Assembly or the emergency measures lose their effect. The need for concurrence by the National Assembly does not apply to a declaration of martial

law by the President.

The President may dissolve the National Assembly when such action "is necessary for the security of the State and the interests of the people". He may not dissolve it within a year of its election, however, or dissolve it twice for the same reason (Art. 57). Upon dissolution, a general election for members of the National Assembly shall be conducted within 30 to 60 days from the date of the dissolution.

Whereas the Yushin Constitution provides the President with almost sovereign powers, the new Constitution provides a system where the powers of the President are to a certain extent subject to checks by the National Assembly. It remains to be seen what role the National Assembly will play in practice, but given the laws passed by the interim Legislative Assembly and the banning of politicians from political activity, it does not appear likely to be very effective as a check on the powers of the President.

### *The National Assembly*

Legislative power resides in the National Assembly, the members of which are popularly elected for four year terms (Arts. 76-78). Under the Yushin Constitution, one third of the National Assembly was elected by the National Conference for Unification which had the President as the Chairman. However the improvements made by these provisions have been undermined by the powers given to the interim Legislative Assembly to legislate laws regulating political activity as mentioned above.

The National Assembly has been given the power to override a presidential veto but only on a two-thirds vote. The 'power to inspect state affairs' and to demand production of documents and the appearance of witnesses, which the Assembly had up

until 1972, has been restored (Art. 97). The Assembly's power to call for the removal of the Prime Minister and other members of the State Council has been reduced by the provision that no such motion can be passed in the first year of its four year term.

However the provisions governing the sessions of the National Assembly remain unchanged (Art. 83). They limit regular sessions to 90 days a year, and extraordinary sessions called by the President or one-third of the members to 30 days. Extraordinary sessions called by the President are limited to acting on matters submitted by him. The National Assembly shall not convene for more than 150 days annually, including regular and extraordinary sessions. It is clear that 90 days a year for regular sessions is too short a period to enable the National Assembly to give detailed consideration to government legislation and to carry out its role as a check and balance against Executive power.

### *The Judiciary*

There is little change in the provisions relating to the judiciary. Judges are still supposed to "... rule independently according to their conscience and in conformity with the constitution and law" (Art. 104). Security of tenure is not provided. The term of office of the Chief Justice is 5 years and he may not be re-appointed, whilst that of other judges is 10 years with provision for re-appointment. There is no provision for a fixed retirement age and judges can be transferred by administrative decision.

However judges can no longer be dismissed by administrative disciplinary action as was the case under the Yushin Constitution. They can be dismissed by impeachment or for criminal conviction but cannot

otherwise be punished except in accordance with legally stipulated disciplinary proceedings (Art. 107).

As stated earlier, constitutional matters are still decided by a Constitutional Committee and appointment of senior members of the judiciary still remains with the President.

In practice the Judiciary of South Korea has not enjoyed independence in the past<sup>1</sup>. The provisions of the newly amended Constitution do not seem to provide for any greater independence of the Judiciary for the future. Although the power of dismissal by administrative disciplinary action has been removed, transfers to another court of forced resignations may still be used to punish judges who have displeased the President.

### *Rights and Duties of Citizens*

The new constitution has restored guarantees of certain fundamental liberties which existed prior to President Park's major constitutional revision in 1972 and has given guarantees to some rights for the first time.

"The duty of the state to confirm and guarantee the fundamental and inviolable human rights of individuals" is recognised for the first time (Art. 9). Habeas corpus and the exclusion of coerced confessions from evidence (Arts. 11(4) and 11(6)), the right to be presumed innocent until found guilty (Art. 26(4)), and the right not to suffer for the misdeeds of a relative (Art. 12(3)) are guaranteed under the new constitution.

The restrictive clause, "except as provided by law" has been removed from the guarantees of freedom of residence (Art.

13), occupation (Art. 14), correspondence (Art. 17), speech, the press, assembly and association (Art. 20). But the right of workers to independent association, collective bargaining and collective action may only be exercised in accordance with the provisions of law (Art. 31).

Some rights guaranteed for the first time are "the right to pursue happiness" (Art. 9), the right to a clean environment (Art. 33), and the right not to be discriminated against on account of fulfilling one's military obligation (Art. 37(2)).

The introduction of these provisions is to be welcomed but their application depends on the courage and independence of the Judiciary in Korea. Further these rights are equally subject to Article 6(3) of the Supplementary Provisions and to any restrictive laws passed by the interim Legislative Assembly limiting their effect. Moreover, the President has powers to suspend temporarily or take measures with respect to the freedoms and rights of the people if he deems it necessary to do so under Articles 51 and 52, considered earlier.

Further, even though Article 35 provides that

"The freedoms and rights of citizens may be restricted only when necessary for national security, the maintenance of law and order or for public welfare. Even when such restriction is imposed, no essential aspect of the freedom or right shall be violated."

there is no provision that the non-derogable freedoms and rights provided in Article 4 of the International Covenant on Civil and Political Rights and may not be suspended for reasons of national security, etc.

1) See "Persecution of Defence Lawyers in South Korea", report of a mission to South Korea in May 1979 by Adrian W. DeWind and John Woodhouse, ICJ.



## *Conclusions*

The changes made in the new constitution are an improvement on the "Yushin Constitution" which was tailored to the requirements of former President Park. What makes a Constitution work is the spirit with which it is implemented. Accordingly judgment on the extent to which the amended constitution will lead to the formation of a more democratic society must be suspended.

However, the manner in which the new constitution was drafted and put to a referendum, the vast powers given to the inter-

im Legislative Assembly, the action taken during the "purification process" whereby many prominent politicians were barred from political activity by new legislation, and the ease with which guarantees of freedoms and rights can be suspended by the President are all causes for concern. It is to be hoped that the Government of South Korea will respect the guarantees contained in the Constitution and work actively to provide the civil liberties demanded by its people. The release of political prisoners, many of whom are under sentence of death, would be a first step towards such a goal.

## *President Bani Sadr on Torture in Iran*

PARIS — The current Iranian government is carrying out unjust arrests and torture just as was practiced under the late shah, Iranian President Abolhassan Bani-Sadr said in an interview published Friday.

In the French daily *Le Matin*, the Iranian chief of state said in Tehran, "During our revolution, Islamic government meant 'government of law'... but today there is no more law."

"They are arresting people as before, they torture... Everybody knows there are tortures. It's just like before, man has no rights, they arrest him and eliminate him just as one throws out garbage," Mr. Bani-Sadr said.

*International Herald Tribune*  
16-17 May 1981

# COMMENTARIES

## *The Legal Situation in Turkey*

[This article on legal developments since the assumption of power by the armed forces on 12 September 1980 was presented as a memorandum by the International Commission of Jurists to the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe in April 1981.]

1. On 12 September 1980, for the third time since 1960, the Turkish armed forces took over the government of the country. The National Security Council (NSC), in which political power is now vested, and its Chairman, General Evren, defended this take-over on the grounds that the country was in "mortal danger" as a result of anarchist and terrorist activities compounded by the inertia of the state and the political parties, and was even facing a very real threat of "civil war"<sup>1</sup>.

2. Our aim here is to give a general description of the changes made in Turkey since 12 September 1980. The supporting evidence consists primarily of the communiqués, decisions, decrees and legislation promulgated by the National Security Council – in other words of official documents by which the present regime is attempting to establish a body of law to meet both present and future needs. Statements and speeches by both General Evren and General Saltik, Secretary General and spokesman of the National Security Council, have also been used.

It is worth noting in passing that a classification of such data will be more valuable if it is based on their effect in terms of

time, ie if a distinction is attempted between the "provisional" measures of a "transitional" regime and long-term measures designed to provide a framework for the military regime's successor.

### *I. State Machinery*

#### *A. The Legislative Arm*

3. The parliament and government established in accordance with the 1961 Constitution were dissolved and replaced by the National Security Council as from 12 September 1980. The Council is made up of the Chief of the General Staff and the Commanders-in-Chief of the Army, Air Force, Navy and Gendarmerie<sup>2</sup>. General Evren announced the same day that the NSC, which he chaired in his capacity as Chief of the General Staff, had "provisionally" assumed legislative and executive power pending the establishment of a new parliament and government<sup>3</sup>.

Legal force was given to this arrangement by three instruments enacted by the NSC, the first being the "Rules of Procedure for the NSC in its law-making capacity"<sup>4</sup>; the second the "Law on the Constitutional Order" which stipulates that "the powers and functions assigned by the (1961) Constitution to the Grand National Assembly of Turkey... shall, as from 12 September 1980, be temporarily exercised by the National Security Council"<sup>5</sup>; and the third, a law of 12 September 1980 confirming the members of the NSC in their

posts by stipulating that they will continue to carry out their duties as members of the Council until such time as the "Grand National Assembly of Turkey effectively resumes its work"<sup>6</sup>.

4. The NSC has also given itself the power to revise the 1961 Constitution which, as stated in the Law on the Constitutional Order, remains in force (Art. 1). The same law stipulates that if there is any discrepancy or contradiction between the provisions of the Constitution on the one hand and those of laws, decisions or communiqués promulgated by the NSC, the latter shall be deemed "constitutional amendments" (Art. 6). It should also be pointed out that the same law prohibits all appeals to the Constitutional Court to annul NSC instruments (art. 3).

It is clear from this that the NSC enjoys full power to legislate and to amend the Constitution, at least in this initial period of the transitional regime.

5. The second phase of that period will begin, apparently, with the summoning of a Constituent Assembly, scheduled, "barring unforeseen obstacles", for September or October 1981, as General Evren has just publicly announced. He also announced that the political parties, whose activities are suspended and will remain so until the new Constitution and the laws referred to below are adopted, will not be allowed to sit in the Constituent Assembly<sup>7</sup>.

The Constituent Assembly will be able to assist in the drafting of the new constitution and of the laws governing the electoral system, political parties, associations, public meetings and demonstrations and labour relations (strikes, lock-outs, collective bargaining, etc). The bills it drafts will be submitted for approval to the NSC, whose decision shall in all cases be final<sup>8</sup>.

6. In addition, it should be noted that there is a further bill whose scope is no less significant than that of the bills just listed, and which is not included among those that will be drafted with, at the very least, the Constituent Assembly's "participation". This is the Emergency Powers Bill, which confers full powers on the government for use in the event of national emergencies or disasters and/or in time of economic crisis, and enables it to impose a set of civic and material obligations and responsibilities on the citizens. This Bill, drafted by the Ministry of Justice, will soon be submitted to the government for consideration<sup>9</sup>. It is therefore likely to become law even before the Constituent Assembly is convened.

It should further be noted that, contrary to the statements of General Evren and General Saltik referred to in paragraph 6 above, the laws governing associations, freedom to meet and form associations and the bill to amend labour legislation are being drafted by the government. It would accordingly seem that they are going to be passed by the NSC even before the Constituent Assembly is convened (see paras 31 and 35).

## B. The Executive Arm

7. The executive in the present as in the previous system is bicephalous and consists of the head of state and the Council of Ministers. But the dominant partner is the head of state because, firstly, he is Chief of the General Staff and Chairman of the National Security Council, and, secondly, the powers and duties formerly conferred on the President of the Republic are expressly vested in him by Article 2 of the Law on the Constitutional Order. On the other hand, that same law does not unequivocally recognise the Council of Ministers as an organ of state. The only references to it are

in Articles 4 and 5 of that law and Articles 18 and 19 of the "Rules of Procedure", and then indirectly.

As far as relations between the NSC and the government are concerned, the "Rules of Procedure" place the latter under the control of the former<sup>10</sup>.

8. Furthermore, the legal responsibility of the Council of Ministers is largely revoked or suspended for the transitional period, for the Law on the Constitutional Order prohibits all appeals to annul Council of Ministers decrees (Art. 4). Similarly, it is henceforth forbidden to request the Council of State (the highest administrative court) to suspend the implementation of ministerial decisions affecting the status of public service personnel (Art. 5).

9. With regard to the government, consideration must be given firstly to the new relationship which has been established between the central government and the autonomous local authorities, and then to changes in the relationship between the civilian and military authorities.

In the first field, local independence is being reduced or removed by the central government: the NSC has, in fact, removed all the mayors from office and announced the dissolution of all municipal and provisional assemblies<sup>11</sup>. This is a temporary measure for the duration of the "transitional" regime. The NSC's aim here is to create impartial and "non-partisan" local authorities. To this end, new mayors were appointed by the Ministry of the Interior, whose Directorate of Local Government announced at the end of November that appointments had been made to 54 out of the 67 provincial administrations<sup>12</sup>.

Although these measures are temporary and may be explained by the present emergency, a tendency to perpetuate them is nonetheless visible. Thus the NSC's Admin-

istrative Affairs Committee in a report to the NSC on the "reorganisation of public administration" recommends abolishing municipal elections and adopting a system of appointing mayors<sup>13</sup>.

10. Concerning changes in the relationship between the civilian and military authorities, mention must first be made of a temporary measure placing the General Security Directorate under the control of the Gendarmerie<sup>14</sup>. But the shift in the balance of power between the two emerges much more clearly from the new legislation on martial law commanders. The essential features of that legislation, which is no longer temporary, are as follows:

Firstly, the responsibilities of the martial law commanders for security and censorship have been extended. The Law of 19 September 1980 amending the Martial Law Act<sup>15</sup> empowers commanders to request the immediate dismissal of any national or local government staff whose continued employment would be "undesirable" or "of no value" (Art. 1); to censor or suspend any kind of publication (newspapers, magazines, books, etc); to prohibit the circulation and communication of printed matter; to order the seizure of any kind of printed matter, including musical records and tapes; to halt the operations of printing works and recorded music firms that have printed or published such material; to forbid strikes, lock-outs, trade union activities, public meetings and demonstrations, as well as the activities of associations; to suspend teaching in secondary schools and universities; to request the authorities of such institutions to expel pupils and students whose presence in a region where martial law is in force is deemed incompatible with the maintenance of public order, etc (Art. 2). The new law also eases restrictions on the use of firearms by the police (Art. 3). The duration of detention without charge is

raised initially to 30 days<sup>16</sup>, and may be extended to 90 days, by a recent amendment to the Martial Law Act<sup>17</sup>.

11. Secondly, the changes in the superiors to whom the martial law commanders are responsible need to be noted. Unlike the previous system, in which the Prime Minister was responsible for co-ordination between the martial law commanders in the various regions, and in which the commanders themselves were directly answerable to the Prime Minister, a new law replaces the Prime Minister by the Chief of the General Staff<sup>18</sup>. Henceforth, therefore, the martial law commanders will be responsible to, and their activities co-ordinated by, the military hierarchy alone (Arts. 2 and 3).

12. A second change, made by the Law of 15 November 1980, concerns the answerability of the martial law commanders and makes it impossible to appeal to the courts against administrative acts by the commanders. The Law stipulates that "no proceedings may be instituted with a view to annulling administrative actions taken by martial law commanders under the provisions of the present act, nor can they be held civilly liable for personal fault" (Art. 7).

### C. The Judicial Arm

13. The most striking change in this field is the virtually complete suspension of judicial review of the legislative and executive processes. The Law on the Constitutional Order prohibits any appeal to the Constitutional Court to challenge the constitutionality of "communiqués, decisions, decrees and laws" promulgated by the NSC (Art. 3). All right of appeal to the Council of State against NSC acts, against Council of Min-

isters decrees and against "orders issued by any of the Ministries is also revoked" (Art. 4). The law also contains a provision on ministerial decisions regarding the personal status of civil servants, the effect of which is to deprive the latter, if not of the right to appeal to the Council of State for a decision to be reversed, at least of the right to request that the implementation of administrative decisions affecting them be postponed (Art. 15). This is simply a temporary regulation that will not outlast the transitional régime.

14. With regard to criminal justice, consideration may be given to the somewhat different pattern that is emerging from the legislation introduced since the military take-over and which is likely to affect the military government's successor.

Firstly, there is a trend towards extending the purview of military justice at the expense of civil justice. This is due in part to the fact that all Turkish provinces are at present under martial law. The NSC was therefore obliged, immediately after the take-over, to set up new military courts in the new martial law regions<sup>19</sup>. The new law has also extended the substantive and territorial jurisdiction of the military courts when martial is in force. The NSC's aforementioned decision not only gives the martial law courts jurisdiction over the offences detailed in the Martial Law Act, but also adds a further list of crimes, including "any kind of crime against the Republic, against the NSC or its communiqués, orders and decisions, against the integrity, indivisibility and independence of the fatherland and the nation, and against national security, as well as crimes likely to subvert fundamental rights and freedoms"<sup>20</sup>. This extension of the scope of military justice is legalised and even accentuated by the law amending the Martial Law Act<sup>21</sup>, which was followed by another of similar scope<sup>22</sup>. Furthermore,

the Military Court of Cassation has strengthened this trend by its decision that military courts shall be empowered to try the "ideological offences" provided for in Articles 141 and 142 of the Turkish Criminal Code<sup>23</sup>.

15. The second trend concerns the relationship between the judiciary and the executive and consists in increasing the former's subordination to the latter, particularly as regards military justice. Shortly after the take-over, the NSC assumed control over the appointment and dismissal of judges in the martial law courts<sup>24</sup>. This power was subsequently transferred to the Ministry of Defence, which must act in consultation with the Chief of the General Staff<sup>25</sup>.

But none of this prevents the NSC from acting directly either to appoint new judges to the military courts or to transfer them, whenever it considers such action is called for<sup>26</sup>.

16. Still in the field of criminal justice, a further new departure since the military take-over has been to increase the severity of sentences by amending the Turkish Criminal Code<sup>27</sup>.

17. To conclude, let us briefly consider the changes in both civil and military criminal procedure resulting from a series of new laws amending earlier legislation:

*Under the Law of 19 September 1980*

1. The martial law commander is empowered to interpret the law's provisions and decide whether a case should be brought before a civil or a military court (Art. 8, amending Art. 15/2, 3 and 4 of the Martial Law Act).
2. Prison sentences passed by military courts under martial law may neither be

suspended nor converted into fines (Art. 10, amending the former Art. 17).

3. The identity of an informer in a case may not be revealed, even during a trial, without his consent (Art. 11, amending Art. 18/c).
4. Crimes for which the penalty is a prison sentence not exceeding 3 years may be tried in absentia (Art. 11, amending Art. 18/1).
5. The right of appeal to the supreme court against prison sentences not exceeding 3 years is abolished (Art. 11, amending Art. 18/n).

*18. Under the Law of 14 November 1980*

1. Martial law courts under a single judge are established and are empowered to try offences for which the maximum penalty is five years' imprisonment (Art. 4).
2. The discretionary power of judges to lighten the sentences on accused persons whose conduct during the hearing is good is abolished (Art. 5).
3. The duration of adjournments in hearings and adjournments for the defence to prepare pleadings is reduced respectively to 30 days and 15 days (or 30 days in the case of mass trials) (Art. 6/k).

The above two laws amend the Martial Law Act of 1971. To them should be added the following two laws which were introduced subsequently:

*19. Law of 7 January 1981*

This law amends the Code of Criminal Procedure and makes two essential changes. Firstly, it revises the procedure for challenging judges, the aim being to forestall excessive questioning by the accused or his lawyer. Secondly, it allows a trial to continue in the absence of the defendant<sup>28</sup>.

## 20. Law of 21 January 1981

This law amends criminal procedure in military courts and merely extends the changes made by the Law of 7 January 1981 to the field of military justice<sup>29</sup>.

## II. Political and Social Life

Under this heading we shall discuss the problems relating to political democracy, human rights and the labour world.

### A. Political Life

21. Since 12 September 1980 all political activity has been suspended in Turkey by a measure directed in the first place against party activity.

"The political truce", says General Saltik, "must last until the adoption of a new Constitution, and new laws governing the political parties and the electoral system"<sup>30</sup>. General Evren too has just said that the resumption of activity by the political parties and "the constitution of new political groups" will be authorised once the Constituent Assembly – to be convened in the autumn of 1981 – has completed its main task, namely the adoption of new constitutional legislation<sup>31</sup>.

One of the consequences of the suspension of the activities of the political parties is the withdrawal of state aid to them<sup>32</sup>.

22. The "political truce" does not affect the political parties alone, but the whole of political life, and notably the press. The military leaders have reminded all journalists and writers of their duty "to avoid party polemics" and declared their intention of applying the letter of the decree prohibiting all political activity in the country un-

til further notice. The Head of Military Co-ordination of the Combined Forces General Staff denounced in a communiqué "certain writers and other members of the press who are trying to pursue their partisan struggle by defending their opinions in their articles or by criticising parties other than their own"<sup>33</sup>.

23. In addition there are the administrative measures and legal proceedings being taken against the leaders of the political groups. After 12 September the leaders of the four major political parties represented in parliament were placed "under Army protection". The National Security Council authorised Mr Ecevit and Mr Demirel, Presidents of the People's Republican Party and the Justice Party respectively, to return to their homes after spending one month at a military holiday centre. Most of the leaders of these two parties are under orders to make no political statements.

On the other hand, Mr Türkeş and Mr Erbakan, Presidents of the Nationalist Movement Party (extreme right-wing) and the National Salvation Party (Islamic) respectively, have been in prison since 12 September, with their party leaders. Türkeş and his followers are liable to prosecution under Article 149 of the Turkish Penal Code, which prescribes penalties ranging from 6 to 20 years' imprisonment for armed action against the government or action designed "to incite the people to revolt". Erbakan and his followers are accused of the offence of anti-secular acts, under Article 163 of the Penal Code. All are shortly to appear before military courts set up under martial law. In addition the leaders of the Turkish Workers' and Peasants' Party are in prison and on trial by a military court because of certain clauses of their party programme and rules which are alleged to infringe Articles 141 and 142 of the Penal Code<sup>34</sup>.

24. What is the attitude of the population to these bans and repressive measures? It is true that the silent majority, terrorised by the escalation of violence since 1978, do not seem to be disturbed by the ban on political activities and rivalries. On the contrary, they are pleased to see the spectacular fall in acts of terrorism and the return to peace and quiet after the military regime took over. In other words, they are content with having "recovered their right to life" or their "personal security". It is essential to grasp this in order to understand the relations between the military power and society in Turkey today. "Right-wing as well as left-wing terrorism", writes Mr Ecevit, the former head of the People's Republican Party, "had united with a view to demonstrating the inapplicability of democracy in Turkey and bringing people to the point where they will not care for anything else except their right to live... To some extent they have succeeded in this... But their success is only fleeting... To be content with a right to life is to accept to lead a vegetable life"<sup>35</sup>.

25. As regards the plans of the military for the future of the Turkish political regime, it can be said that they favour the introduction of a bipartisan political system which would prevent acute polarisation as well as the re-emergence of extremist political groups. There is also a noticeable attempt to restrict the influence of leaders over their political parties. On 28 October 1980, General Saltik announced that Mr Demirel and Mr Ecevit could resume their political activities "like any other citizen" when their parties were authorised to function again. The NSC then specified that future legislation on the functioning of political parties might include "democratic guarantees against the domination of leaders over their members of parliament"<sup>36</sup>.

26. Two important points should be added here. In the first place the intended changes in the political system will be introduced by a constituent assembly in which the parties will not be represented. Secondly, the NSC will have the final decision regarding the texts the assembly produces.

## B. Human Rights

27. The human rights and fundamental freedoms guaranteed by the 1961 Constitution have been largely restricted or abolished since 12 September, either by the decisions and communiqués of the martial law commanders or by the decrees and laws promulgated by the NSC. Freedom of association, freedom of assembly, the right to demonstrate and trade union rights, including the right to strike, have been suspended.

Freedom of expression is also in eclipse, on the one hand owing to press self-censorship and on the other because of a tendency to impose severer penalties for "crimes of opinion", many of them dating back to before 12 September. To quote one or two examples, there is the case of Mrs B. Boran, President of the Workers' Party of Turkey, who has been sentenced to 8 years and 9 months of hard labour and 2 years and 11 months of house arrest for having broadcast "communist propaganda" over the Turkish radio and television before the 1979 elections. Her conviction is based on Article 142 of the Turkish Penal Code, which makes Communist propaganda an offence<sup>37</sup> and which has just been ruled compatible with the Turkish Constitution and with democratic principles by the Constitutional Court in a recent unanimous decision<sup>38</sup>.

The editor of the journal *Ürün*, Mr Taskiran, was also sentenced to seven and a



half years' imprisonment for the commission of the same offence in the press<sup>39</sup>. Three journalists on the staff of the daily paper *Aydinlik*, Mr Yurdakul, Mr Büyüközden and Mr Oflaz, were sentenced, again by virtue of the same article of the Penal Code, to 7 and a half years, 2 years and one and a half years' imprisonment respectively<sup>40</sup>. The former Minister of Public Works in the Ecevit government, Mr Elçi, has been sentenced to two and a half years' hard labour for having said that there exists a Kurdish minority in Turkey. Mr Ozansu, assistant at the University of Istanbul, was sentenced to 7 and a half years' imprisonment for having translated a Marxist work. It should be pointed out that there is no appeal against sentences not exceeding 3 years<sup>41</sup>.

28. Let us now turn to the principles of individual freedom, inviolability and safety which protect individuals against arbitrary detention and arrest and against ill-treatment by officers interrogating accused persons.

It must first be said that the principle of habeas corpus is seriously affected by the new legislation in force since 12 September. A law amending the State of Siege Act extended the period of detention without charge to 90 days<sup>42</sup>. The period authorised in normal circumstances was extended to 15 days by an amendment to the Code of Criminal Procedure<sup>42</sup>. Here it should be pointed out that the corresponding period is 5 days in a country like Chile, whose authorities care little about protecting the individual.

It must be said that the length of these periods prescribed by the military regime in Turkey, which the Minister of Justice justifies by "the shortage of judicial personnel" and the "vast number of persons charged"<sup>43</sup>, is also a threat to the physical inviolability of the individual since it en-

ables police officers conducting interrogations to ill-treat or torture accused persons. The length of the period in particular under a state of siege makes it impossible to obtain a medical certificate attesting to traces of ill-treatment or torture. It must also be remembered that throughout this time suspects are cut off from all communication with a lawyer and denied, by the new legislation, as was seen in the first part of this report, any means of appeal against decisions by the martial law commanders concerning their detention. Turkish lawyers are, therefore, right to criticise the length of this period of custody, which they regard, among other things, as encouraging ill-treatment<sup>44</sup>.

29. Let us now look at practices affecting individual freedom, inviolability and safety. Mr Uluşu, the Prime Minister under the military regime, reviewed on 14 March 1981 the six months that had elapsed since the army took over. Where criminal proceedings were concerned, he said that of 23,111 people being detained 6,233 were in police custody and 16,188 had been charged. Of the 10,181 persons tried in the previous six months, 886 had received prison sentences. He admitted that 68 cases of torture had been reported. Enquiries had been opened into 40 of them; 14 trials were in progress and 14 other cases had proved unfounded. Questioned by the Military Prosecutor of Istanbul, Mr İsvan and Mr Bastürk, respectively Mayor of Istanbul from 1973 to 1977 and President of the DISK trade union, said that they had not been subjected to any ill-treatment, contrary to the rumours that had been current for some time<sup>45</sup>.

Another aspect of the "right to life" is the application of capital punishment. Four people have been executed so far, but the number may rise since prosecutors have called for the death penalty in some hun-

dred cases. In the same context mention ought also to be made of the cases of those people who were killed in "clashes with the police and security forces", who numbered 115 according to official sources in the first six months of the military regime<sup>46</sup>.

30. Another important change affecting human rights concerns the nationality of Turkish citizens. A law introduced by the NSC amending the Turkish Nationality Act stipulates that "any person having committed or committing acts against Turkey when abroad shall be allowed three months from the publication of the notice that they are being sought by the authorities – or one month only in time of martial law – to return to Turkey and present themselves to the authorities". Failing this, the law prescribes, such persons will forfeit their nationality and their property will be confiscated<sup>47</sup>. Since the adoption of this amendment lists of wanted persons have been published inviting the persons concerned to return to Turkey and present themselves to the authorities on pain of forfeiting their nationality. So far three lists comprising some thirty names have been published and some ten people have returned to Turkey.

In addition, an amendment to the Passports Act prohibits people charged with offences against certain articles of the Turkish Penal Code from leaving the country until they have been acquitted<sup>48</sup>.

31. Among the laws in preparation, which will probably be adopted by the NSC before the Constituent Assembly meets, is one concerning freedom to hold public meetings and demonstrations. The draft provides that public meetings and demonstrations may not be held until 72 hours after the application to the authorities has been lodged and that the authorities may postpone a public demonstration for 20 or

30 days, depending on whether the decision lies with the governor of the town or the Ministry of the Interior<sup>49</sup>.

Similarly, the revision of the Associations Act is being undertaken by the government. This will also be adopted before the Constituent Assembly is convened. It is designed to reduce the number of students' associations to one per faculty or establishment of higher education<sup>50</sup>.

## C. The Labour World

32. Under this leading we shall discuss the changes that have come about in the Turkish regime with regard to labour relations and in particular trade union freedom, the right to strike, the settlement of labour disputes, etc, together with the new regime's plans for the future in these matters<sup>51</sup>.

On 12 September 1980, the NSC decided to suspend the activities of the two trade union confederations – DISK (progressist workers' union) and MISK (nationalist workers' union) and to place their leaders "under the protection of the Turkish armed forces"<sup>52</sup>. The same measures were afterwards applied to the HAK-IS Confederation. The bank accounts of the three were blocked, their premises closed down and their management or administration placed in the hands of the public trustee<sup>53</sup>.

Only the TURK-IS Confederation, close to the regime, was authorised to pursue its activities and its Secretary General, Sadik Side, became Minister of Social Security.

The suspension of trade union activities was followed by a series of arrests of the Confederations' leaders and militants. The total number of members of the DISK Confederation alone who were in detention was estimated at 2,002 in the report of the World Labour Confederation (p. 37). On

this point, states the report of the ILO Freedom of Association Committee, the Turkish Government declares that "very serious indications apparently proved the existence of structural ties and co-operation between certain illegal clandestine organisations responsible for terrorist acts and some trade unions, as well as of the infiltration by terrorist groups into certain trade union structures. This seems to have led the Government to suspend the DISK's activities. The Government states that the same apparently happened to the MISK which was infiltrated by the extreme right and which explains why its affairs are now within the jurisdiction of the courts. The Government claims that the DISK leaders whose names are listed by the complainants were arrested following a decision by the appropriate court and were accused of contravening sections 141, 142 and 146 of the Penal Code, the provisions of Act No. 1402 of the State of Emergency and those of Act No. 6136 on firearms"<sup>54</sup>.

33. But it is reasonable to think that the suspension of these organisations and the arrests made were primarily directed against the DISK, since the MISK (extreme right) and the HAK-IS (with religious leanings) are little represented among the working classes. This is supported by the fact that the MISK leaders were released recently<sup>55</sup>.

These developments show that the aim is to wipe out the progressive trade union movement and recognise the pro-governmental Confederation TURK-IS as the sole representative of labour vis-à-vis employers. This attitude is made very clear in Mr Ulusu's programme: "The trade unions will pursue their activities according to democratic principles. Only those which exploit the workers, which wish to dominate them and which misuse trade union rights will be prevented from doing so"<sup>56</sup>.

34. Strikes have also been prohibited by decision of the martial law commanders in accordance with the Martial Law Act. This amounts to ignoring the right to collective bargaining. In order to fill the gap left by the abolition of collective bargaining the authorities have introduced two systems. The first, which is provisional, consists in applying the principle that where collective bargaining was already in progress, the workers would receive from the employers concerned 70 % of their gross earnings, as an advance. The second was introduced with the adoption of a new law replacing the system of collective bargaining by compulsory arbitration. This is entrusted to the Higher Arbitration Board, most of whose members are government representatives appointed by the Cabinet. The Board is empowered to lay down the content of labour contracts by final decisions against which there is no appeal<sup>57</sup>. Thus the new system does away with the role of trade unions and collective bargaining in the settlement of labour disputes.

35. So far we have been looking at the regulations for the "transition" period. Where the long-term revision of labour legislation is concerned, two trends can be distinguished. The first consists in restricting trade union freedom in a manner incompatible with the international standards adopted by democratic states. The proposed revised trade union legislation provides for control by the Ministry of Labour over trade union teaching programmes and seminars and forbids them to issue statements, except such as concern occupational activities, to support a political party or to join any international trade union organisation upholding the "class struggle" principle, etc.<sup>58</sup>. The second point to be underlined is that this revision will be completed in the course of next July, before the Constituent Assembly is convened<sup>59</sup>.

### III. Remarks and Conclusions

The few remarks that can be made here and the conclusions that can be drawn on the basis of the facts described above will be concerned (A) with the intrinsic nature of the military intervention, (B) with the question of derogation during the transitional regime, and (C) with the long-term action of the military regime.

#### A. The Military Intervention

36. The military intervention of 12 September 1980 cannot be judged in the light of the concept of "derogation" as it is understood in Article 15 of the European Convention on Human Rights. Here it is a case of a coup d'état, a take over by force, and not of legal action taken in accordance with the law like a declaration of martial law or of a state of emergency. We are thus faced with a *de facto* situation which is neither compatible with law, nor comparable to a legally taken measure, but is simply alien to both.

However, What was at first a purely *de facto* situation has since been converted into a legal situation, because the new regime has succeeded in imposing its legality and legitimacy both in internal and in international law. The regime has indeed given proof, in its 7 months of existence, that it is effective and has undoubted popular support, a fact that gives it the status of a legitimate regime. Internationally, too, it is recognised as legitimate.

37. With regard to the social and political dynamics of the military takeover in Turkey, three essential points need to be remembered.

In the first place, it occurred in a country where terrorism was unleashed (more than 5,000 deaths since 1978, with an aver-

age of 22 political assassinations per day in 1980) and was threatening to drag the nation into civil war, owing to the apathy and partiality of the political authorities.

In the second place, the drive against terrorism of all persuasions has shown itself to be successful since 12 September, since the daily number of victims has been reduced from 22, as stated above, to one. This result is the reason for the popularity enjoyed by the military regime.

Lastly, all the objective and subjective indications (the desire, preference, and declared intention of the military to return to their barracks) encourage the belief that the military regime is a *provisional* one. This is a primordial point which differentiates the coup d'état in Turkey from those in other countries of the Middle East, the Mediterranean and Latin America.

But none of this rules out criticism of the Turkish military regime in the light of the general principles of law in force in democratic countries, since the Turkish military authorities themselves describe their aim as the "restoration of democracy". The regime must be looked at above all in the light of the European Convention on Human Rights (notably its Article 15), to which Turkey is a party. Turkey remains bound by the international legal obligations which flow from it, despite the change in political power.

#### B. Emergency Actions or Measures

The fact that we are faced in Turkey not with a *state* of exception declared as such by the competent state authorities, but with a *regime* of exception set up following a military coup d'état, makes difficult any attempt to examine or judge the regime's action from the legal standpoint in the light of Article 15 of the Convention. The concept of "derogation" and the criterion rep-

resented by the words "to the extent strictly required by the exigencies of the situation" are inadequate yardsticks by which to measure the present situation in Turkey since the *regime is a de facto one*.

But, paradoxically, it is this special feature of the situation that makes it possible to form a legal judgment of it. For the Turkish regime today, while the result of a military take over, claims to be *provisional* and to aim at "*restoring democracy*". One can and must, consequently, judge it, without forgetting the weight attaching to the circumstances, according to the aims it has assigned itself. It is, by definition, not an arbitrary regime, governing by its mere existence and by force, but a regime or authority which is seeking to legitimise itself, to legalise itself and to set limits to its own power in the name of a democratic ethic. It can therefore be judged according to the principles it claims to respect, that is to say the legal principles which are unanimously accepted in democratic countries and cannot be waived even in times of great political crisis and upheaval.

39. In the context just described, one can understand and accept the expediency, even the inevitability, of certain steps taken by the military after they had taken over the government, such as the suppression of representative and democratic organs (the Parliament and its elected government), of the judicial control machinery (suppression of the power to monitor the constitutionality of legislation and the legality of administrative acts under the "transitional" regime, provided that these do not directly affect the rights and freedoms of individuals), and the imposition of the NSC as a body conferring on itself legislative and executive powers (see paragraphs 3 and 13). These actions were necessary as being the only ones which could overcome the great political crisis in Turkish politics which car-

ried the imminent threat of civil war.

Similarly, the declaration of martial law in all the administrative districts of the country, the provisional abolition of local self-government and the removal of the elected mayors from office (paragraph 3), the placing of the General Security Directorate under the control of the Gendarmerie (paragraph 10) are actions which are in line with this attitude. As such, they are comprehensible, legally irreproachable and proportionate to the imminence of the public emergency in the country, provided they remain limited in time.

40. The same cannot be said, on the other hand, of the changes made in the status of the martial law commanders. The conferring of excessive powers on the commanders, their release from responsibility to the civil authority (the Prime Minister) and placing them under the authority of the Chief of the General Staff, together with the abolition of all possibility of appeal against their decisions, are grave violations of the principle of the rule of law, according to which state decisions and actions are subject to control by the judicial authority, even in time of political crisis or emergency, when they affect the personal status of individuals. What is even more serious is the fact that these amendments to the State of Siege Act are not provisional but permanent (paragraphs 10, 11, 12).

41. The situation is the same as regards fundamental rights and freedoms. In the first place it is difficult to understand why, in a country where terrorists have always been a minority as compared with the great mass of the population who have had nothing to do with acts of terrorism, all public freedoms should have been restricted, including even the freedom of the press to criticise, with very harsh sentences being imposed for "crimes of opinion" and with

threats of repressive action (paragraphs 21, 22, 27). The fact that this has been done by an authority that wishes "to save democracy" constitutes, moreover, a contradiction in the official attitude.

The detention and charging of more than two thousand trade union leaders and militants also seems excessive, particularly as most of the charges against them concern "crimes of opinion", such as Communist propagandising or incitement to strike. Even if these charges were justified, that should not entail the total suspension of the activities of the unions to which the persons concerned belong. On this latter point, the distinction made between the trade unions according to their political persuasion is also to be criticised as constituting a violation of the principle of equality solemnly upheld by Article 14 of the European Convention on Human Rights.

42. As for the principles of individual inviolability and security, it must be admitted that they have been totally and unjustifiably overridden. Periods of 15 or 90 days in police custody, applicable at normal times and in time of martial law respectively, are quite incompatible with the right "to be brought promptly before a judge" embodied in Article 5 (3) of the European Convention (paragraph 28).

Whereas the NSC is very sensitive on the subject of torture, which it strongly condemns, itself examining all allegations of such treatment (paragraph 29), another fact connected with the "right to life" is rightly causing much concern. This is the number of people who have been killed "in clashes with the police and security forces". There were already 115 of them, according to official sources, at the end of the sixth month of the military regime (paragraph 29). This figure is disturbing, particularly as there is no means of checking whether these deaths were occasioned by "the use

of force which is no more than absolutely necessary" (Article 2 of the Convention).

43. The changes made in the military system of criminal justice are among the most important of the present regime's actions. Before analysing them, two essential features should be emphasised.

In the first place, the new legislation in this field gives the impression of being provisional, applicable solely during the "transition" period. That impression is wrong. In fact the legislation is definitely permanent and will be applied whenever martial law is declared. For this reason, it could well be dealt with under heading (C) "Long-term plans and action".

Secondly, fair, independent and impartial justice is the basis of any society that claims to be civilised. It is also the *sine qua non* of the concept of a state. It is accordingly inadmissible to derogate from this principle on the pretext of the existence of a "public emergency threatening the life of the nation".

Now, the new Turkish legislation in the field of military criminal justice has irremediable defects. The setting-up of new military courts after crimes have been committed and their perpetrators are known, the almost total take over of civilian justice by military justice thanks to the extension of the latter's temporal and territorial powers, the trial of so-called "crimes of opinion" by military courts, even when the alleged offences were committed long before the advent of the military regime (paragraphs 14, 27), the greater dependence of the military judges on the Ministry of Defence and the NSC (paragraph 15), the increased severity of sentences thanks to the amendments made to the Penal Code (paragraph 16) and lastly and above all the serious restrictions placed on the rights of the accused (judgment in the absence of the accused, abolition of the right of appeal, etc) are

typical violations of the principles cited above (see in particular paragraphs 17 to 20). They are in flagrant opposition to Articles 6 and 13 of the Convention.

### C. Long-Term Plans and Action

44. The NSC is not content with making rules for the "transition" period; it is also laying the foundations for the civilian regime which is to succeed it. The importance of the changes made in the status of the martial law commanders and in the military system of criminal justice has just been stressed. To these must be added all the new laws that the government is at present drafting and that are soon to be submitted to the NSC for approval. They comprise laws on exceptional circumstances, on the State Security Courts, on associations, public meetings and demonstrations, on labour relations, etc.

That a committee of high-ranking generals should seek to lay down rules for the political and legal future of the state is intolerable. Moreover, the plans and actions of this autocratic "legislator" are explicitly anti-democratic (paragraphs 5 to 7, 25, 26, 31, 35). Lastly, the Constituent Assembly which it is announced will be convened in the autumn of 1981, will be less a legislative and/or constituent assembly than a committee of experts (paragraph 5).

Taken together all this constitutes the most flagrant derogation on the part of the military regime from the concept of democracy.

It is true that all these moves and attempts to set up new legal machinery in Turkey are defended on the grounds that Turkish legislation was defective in the matter of the prevention of terrorism and anarchy and so allowed "ill-intentioned people" to take abusive advantage of the rights they enjoyed under the Constitution

and the laws of the land. Is this argument valid? That is the last point to be examined before reaching a general conclusion.

45. The alleged inadequacy of Turkish criminal law is a mistaken, if widespread, illusion. Some typical features of Turkish public law ought to correct this picture.

Any act of terrorism is severely punished by the Turkish Penal Code, whose Articles 146 and 149 even provide for capital punishment. Moreover, since 1962 there have been nine executions in application of these provisions.

The Turkish Penal Code goes even further in penalising dissemination of certain political ideas, such as Marxist doctrines (Article 142) and anti-secular ideas (Article 163). Moreover, these articles of the Penal Code were declared compatible with the Constitution by the Constitutional Court itself in 1964. Among other offences classified in the Penal Code as "crimes of opinion" is the propagation of ideas inciting to the class struggle, forbidden by Article 312 and likewise judged compatible with the 1961 Constitution by the Constitutional Court. The same Court also ruled that Section 89 of the Political Parties' Status Act banning any reference to the "existence of ethnic minorities in Turkey" was compatible with the Constitution.

The Penal Code and the Political Parties' Status Act also prohibit any attempt to form political parties upholding Marxist, religious or Fascist ideologies. The Constitutional Court ordered, for example, the disbanding of left wing parties (the Turkish Workers' Party in 1971, the Workers of Turkey Party in 1980, in application of Section 89 of the above-mentioned Act) and a party of Islamic persuasion (the National Order Party) in 1971.

Labour legislation is also extremely strict, but is still considered compatible with the Constitution in several decisions

of the Constitutional Court. To quote only two examples, incitement to an illegal strike is not only a ground for termination of contract but also lays the person responsible open to criminal prosecution. Another example: most of the penalties prescribed by the Penal Code for "political crimes" and "crimes of opinion" are increased where such offences are committed by trade unionists. On this point, the report of the ILO Freedom of Association Committee is revealing:

"The committee notes with grave concern that the trade union leaders and militants in prison are liable to very heavy penalties and that these penalties can be increased simply because they are trade union members. On this point the committee wishes to stress, as it has already done in earlier cases, that while the fact of exercising trade union functions in no way confers immunity from

ordinary criminal law, such provisions, which discriminate against trade-unionists, are gravely prejudicial to the exercise of trade-union rights." (p. 51)

Furthermore, it is clear that in Turkey in the years before 1980, terrorists of all persuasions acted in disregard of the legal rights enjoyed by all citizens, illegally, clandestinely and with recourse to violence.

It follows, therefore, that there is no cause to claim that an alleged inadequacy of the criminal law in Turkey justifies the restrictions cited.

By way of conclusion, it can be said that from the legal point of view the problems raised by the military regime in Turkey should not be posed in terms of "the date of the return to democracy" but rather in the following terms: "a return to democracy, but under what conditions?"

### *Notes and References*

- (1) Communiqué No. 1 issued by the National Security Council on 12 September 1980, and televised statement by General Evren the same day.
- (2) Communiqué No. 1 issued by the NSC on 12 September 1980.
- (3) Radio and television broadcast by General Evren, 12 September 1980.
- (4) *Official Gazette* (OG) of 28 September 1980 - 17119.
- (5) Art. 2 of the Law of 27 October 1980, No. 2324 (OG, 28 October 1980 - 17145).
- (6) Law on the National Security Council, 12 December 1980, No. 2356 (OG, 12 December 1980 - 17188 (b)).
- (7) Taken from General Evren's speech at Konya (see *La Presse turque* of 16 January 1981).
- (8) Press conferences given by General H. Saltik on 28 October 1980 and 1 November 1980 (see *Le Monde* of 30 October 1980 and the Turkish daily *Milliyet* of 2 and 23 November 1980) and General Evren's speech at Konya (cited above).
- (9) See statement issued by the Ministry of Justice (Turkish daily *Cumhuriyet* of 29 January 1981).
- (10) Articles 18 and 19 of the Rules of Procedure, amended by NSC Decision No. 10 dated 25 February 1981 (OG, 3 March 1981 - 17268).



- (11) Law of 25 September 1980, No. 2303 (OG, 29 September 1980 – 17120) and Law of 25 September 1980, No. 2304 (OG, 29 September 1980 – 17120).
- (12) *Milliyet*, 25 November 1980.
- (13) *Milliyet*, 1 February 1981.
- (14) Communiqué No. 9 and Decision No. 1 of the NSC (OG, 12 September 1980 – 17103 (b), and 14 September 1980 – 17105).
- (15) Law No. 2301 (OG, 21 September 1980 – 17112).
- (16) NSC Decision No. 8/12-1633 (OG, 17 September 1980 – 17108).
- (17) Law of 7 November 1980, No. 2337 (OG, 8 November 1980 – 17154).
- (18) Law of 14 November 1980, No. 2342 (OG, 15 November 1980 – 17161).
- (19) NSC Decision No. 7 of 14 September 1980 (OG, 15 September 1980 – 17106).
- (20) *Ibid.*
- (21) Law No. 2301 of 19 September 1980 (OG, 21 September 1980 – 17112). See in particular the amendments concerning Articles 12, 13, 14, 15 and 16 of the Martial Law Act of 1971.
- (22) Law No. 2310 of 8 October 1980 (OG, 10 October 1980 – 17131 (b)).
- (23) Decision of the 4th Chamber of the Military Court of Cassation, 7 October 1980 (*Cumhuriyet*, 24 October 1980).
- (24) NSC Decision No. 6, 14 September 1980 (OG, 15 September 1980 – 17106).
- (25) Art. 4 of the Law of 19 September 1980, No. 2301, amending Article 11/2 of the Martial Law Act (OG, 21 September 1980 – 17112).
- (26) A few examples:  
     NSC Decision No. 41/25496, 19 January 1981 (OG, 21 January 1981 – 17227)  
     NSC Decision No. 42, 23 January 1981 (OG, 28 January 1981 – 17204)  
     NSC Decision No. 43, 5 February 1981 (OG, 10 February 1981 – 17247)  
     NSC Decision No. 46 (OG, 3 March 1981 – 17268).
- (27) Law of 12 January 1981, No. 2370 (OG, 10 January 1981 – 17216).
- (28) Law of 7 January 1981, No. 2369 (OG, 10 January 1981 – 17216).
- (29) Act of 21 January 1981, No. 2376 (OG, 23 January 1981 – 17229).
- (30) Quoted by the weekly "Yanki", No. 501, 3–9 November 1980, p. 7.
- (31) *Cumhuriyet*, 29 March 1981.
- (32) *Milliyet*, 20 December 1980.
- (33) *Le Monde*, 31 December 1980.
- (34) *Cumhuriyet*, 2 March 1981.
- (35) *Arayis*, No. 3, 7 March 1981, p. 4.
- (36) *Le Monde*, 1 November 1980. These statements prompted the resignation of Mr Ecevit who, in protest against this attack, gave up the leadership of his party.
- (37) *Milliyet*, 17 February 1981.
- (38) Decision of the Constitutional Court of 27 November 1980; E 1979/31 K 1980/59 (Official Gazette, 8 January 1980 – 17214).
- (39) *Milliyet*, 14 March 1981.
- (40) *Cumhuriyet*, 4 and 18 February 1981.
- (41) Article 11 of the Law of 19 September 1980, cited in para. 17 above.
- (42) Law of 7 November 1980, No. 2337 (Official Gazette, 8 November 1980 – 17514).
- (43) "Ufuklar", No. 12, 9 March 1981, p. 3.
- (44) See in particular the criticisms of Professor Tosun in "Ufuklar", No. 2, 9 March 1981, p. 3.
- (45) *Le Monde*, 17 March 1981.
- (46) See *Yanki*, No. 520, 16–22 March 1981.
- (47) Law No. 2383 of 13 February 1981 (Official Gazette, 17 February 1981 – 17254).

- (48) Law No. 2418 of 25 February 1981 (Official Gazette, 27 February 1981 — 17264).
- (49) *Milliyet*, 7 February 1981.
- (50) *Cumhuriyet*, 4 April 1981.
- (51) For the most detailed documents dealing with all these problems see in particular "Trade Union Report on Turkey", World Confederation of Labour, January 1981, and "2076 report of the Committee on Trade-Union freedom", ILO, Geneva, 3–6 March 1981.
- (52) NSC communiqué No. 7 of 12 September 1980.
- (53) NSC Decision No. 8 of 14 September 1980 (Official Gazette, 15 September 1980 — 17106) and Law No. 2316 on the appointment of trustees for the suspended trade unions, federations and confederations of 10 October 1980 (Official Gazette, 11 October 1980 — 17132).
- (54) Report of the Freedom of Association Committee, p. 48.
- (55) *Cumhuriyet*, 23 January 1981.
- (56) Official Gazette, 1 October 1980 — 17122, p. 15.
- (57) Law No. 2364 of 24 December 1980 (Official Gazette, 27 December 1980 — 17203).
- (58) *Cumhuriyet*, 15 February 1981 and 28 February 1981.
- (59) *Cumhuriyet*, 7 April 1981.

## *Human Rights Commission*

The Commission on Human Rights held its 37th session in Geneva, from 2 February to 13 March 1981.

The cumulative effect of some significant events occurring prior to this session created a certain atmosphere of suspense, particularly among delegates of the developing world, concerning the likely outcome of the session. These included the failure of the western sponsored pre-implementation conference on Namibia (Jan. 1981), the escalation of South African military attacks on Angola, Zambia and Mozambique, the annexation of east Jerusalem by Israel and the de-emphasis on human rights in the foreign policy of the new Reagan administration in the United States.

Prominent among the features of this session were the general concern expressed about the deteriorating human rights situa-

tion in El Salvador, the completion, after 20 years of drafting, of the Draft Declaration on the Elimination of All Forms of Intolerance and Discrimination based on religion or belief, the greater attention and time devoted to the report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and the renewal of the mandate of the working group on disappearances.

The Commission adopted 40 resolutions dealing with all the items of its agenda, and 12 decisions on some of these items.

### *The Right to Self-Determination*

The Palestinian question once again dominated the discussions on self-determination. The report of the Special Commit-

tee to Investigate Israeli Practices, with which was distributed the study published by the ICJ on 'The West Bank and the Rule of Law', provided the factual basis for condemnations of Israeli violations of the human rights of Palestinian Arabs under its military occupation.

The Israeli delegate replying to certain points of law raised in the Special Committee's report stated that "International law recognises the fact of military occupation. It establishes for its specific legal rules. Israel maintains that the Fourth Geneva Convention is not applicable to the occupied territories. It applies the humanitarian provisions of that Convention on a de facto basis and there is no dispute as to the fact that Israel is competent to exercise at least the authority of a military occupant". However the relevant report, (as well as the study published by the ICJ) point out that the legal powers attending military occupation are related to limited and non-sovereign objectives, and hence to the temporary duration of such occupation. The study found at least a constructive intention on Israel's part to occupy these territories indefinitely, and showed that the nature, variety and extent of Israeli legislation and administration affecting these territories go far beyond the needs of Israeli security, transgressing into the bounds of annexation. The Special Committee's report went even further to establish an expressed intention by Israel to annex these territories, concluding, in the result, that the occupation itself has thus become the source of human rights violations.

The Commission adopted two resolutions on the Occupied Territories and on the Right to Self-Determination which repudiated the Israeli arguments. The first affirmed Israeli occupation as a fundamental violation of the human rights of the Palestinian and Arab population in the territories and again condemned Israeli policies and

practices aimed at establishing a Jewish state on the occupied land, declaring all measure, taken in this direction to be null and void. The resolution further reaffirmed the applicability of the Fourth Geneva Convention to all Arab territories occupied by Israel since 1967, including Jerusalem, condemned Israel's failure to acknowledge the applicability of this Convention and called upon her to abide by and respect the Convention.

The second resolution affirmed the inalienable rights of the Palestinians to self-determination, condemned all partial agreements and separate treaties which constitute a flagrant violation of the rights of the Palestinian people, noted that the Camp David accords were concluded outside the framework of the UN and without the participation of the PLO, and declared those accords and other agreements as having no validity "in so far as the purport to determine the future of the Palestinian people..." This resolution was adopted by a vote of 25 to 9 with 8 abstentions.

Other resolutions adopted under this item related to Afghanistan, Kampuchea, Namibia and Western Sahara. The resolution on Afghanistan took note of the decision of the 3rd Islamic Summit Conference held in Saudi Arabia (Jan. 1981) and of the relevant part of the Declaration of the Ministerial Conference of Non-Aligned Countries (New Delhi, February 1981), reaffirmed its concern at the continued denial of the right of the Afghan people freely to exercise their right to self-determination without outside intervention, and called firmly for a political settlement on the basis of the immediate withdrawal of foreign troops and observance of the principle of non-intervention and non-interference.

In the discussion on Kampuchea the Zambian delegate argued that total withdrawal by Vietnamese troops from Kampuchea would open the way for the return of

Khmer Rouge forces and the ousted Pol Pot regime, whose horrible human rights atrocities were greater than any alleged against the Vietnamese sponsored government (see report of Mr. Abdelwahab Bouhdiba and ICJ Review No. 22, p. 24). The resolution on Kampuchea reiterated the Commission's condemnation of the gross human rights violations which have occurred and continue to occur in that country. The source of current violations was identified in the Vietnamese occupation and a call was made for an end to all hostilities and for the immediate withdrawal of foreign forces from Kampuchea. All concerned were called upon to join in the search for a solution to the Kampuchean problems through a UN sponsored international conference.

Due to the failure of the Pre-Implementation Conference on Namibia, the debate on the question was vigorous. The western sponsors of the conference came under pressure to adopt more radical measures against Pretoria. The Namibian question constituted an integral part of a number of resolutions on human rights violations in Southern Africa. Two of these reaffirmed the inalienable rights of Namibian people to self-determination. In repudiation of the Democratic Turnhalle Alliance, it was declared that only the exercise of the right to self-determination by the Namibian people under conditions determined by the UN would conform with international law, and South Africa was held fully responsible for the breakdown of the Pre-Implementation Conference on Namibia. The resolutions also condemned Pretoria's military incursions into the front line states, as being aimed at destabilising the latter in their support for the Namibian struggle, and denounced these attacks as a breach of international law.

For the second time, the Commission adopted a resolution on Western Sahara. In

the discussion preceding the adoption of this resolution, Morocco was strongly denounced for its colonial occupation of Western Sahara. The resolution reiterated the concern of the UN, the OAU and the Non-Aligned countries regarding the decolonisation of the Western Sahara and deplored the continuance of Moroccan occupation; it also expressed the determination of the UN to cooperate fully with the OAU for the attainment of self-determination by the Saharoui.

### *The Right to Development*

Following the Commission's decision last year, the debate this year on the right to development was divided into two sub-headings namely a) *problems related to an adequate standard of living* and b) *the effects of the existing unjust international economic order on the economies of the developing countries and the obstacle that this represents for the implementation of human rights and fundamental freedoms*. Among the documents before the Commission was the report of the seminar held in Geneva from June 30-July 11, 1980, on the sub-items mentioned above (UN doc. ST/AR/SER A/8). The resolution on this item was opposed only by the United States on the objection *inter alia*, that the resolution prejudged the scope of the right to development, that the definition of 'development' was inadequate, that reference was not made to the right to permanent sovereignty over natural resources as being "within international law" (thus ensuring full compensation for compulsory acquisition), and that the question of reduction in armaments and peace was not an appropriate subject for the Commission. The resolution considered the legal basis of this right to be founded in the UN Charter, the Universal Declaration, and the Covenant on

Economic, Social and Cultural Rights. It stated the ultimate aim of development to be 'the constant improvement of the well-being of the entire population on the basis of its full participation in the process of development and a fair distribution of the benefits therefrom'. It placed economic, social and cultural rights on an equal footing with civil and political rights and emphasised the importance for all countries to evolve appropriate socio-economic systems that are best suited to their own political, economic, social and cultural situation within the New International Economic Order and free from external influence and constraints. The decision to establish a working group of 15 governmental experts, to study the scope and content of the right to development and the most effective means for its realisation, promises to add substance to the somewhat vague formulation of this right. The group is to submit its report along with recommendations for a draft international instrument on the subject.

A UN seminar is to be held in New York in August 1981 to consider the relationship between human rights, peace and development, and the impact of the arms race on the realisation of peace and the right to development, and to analyse the concrete measures for the implementation of the full enjoyment of these rights.

### *Human Rights Situation in Particular Countries*

Following the usual practice of the Commission public discussions were held on the human rights situation in many countries, in addition to the confidential discussions under Resolution 1503. While most were discussed under the item "Question of the violations of human rights and fundamental freedoms in any part of the world", South

Africa, Chile and Palestine were as usual discussed under separate items of the agenda.

### *South Africa*

The report of the ad hoc Working Group of Experts on Southern Africa drew attention in particular to the number of deaths of detainees, the ill-treatment of women and children, and the findings on gross violations of trade union rights, as indications of a greater determination by Pretoria to entrench apartheid. This conclusion was further backed by the suppression of numerous black dailies in South Africa in recent months.

The Commission adopted six resolutions condemning the continued policy of apartheid and Pretoria's intransigence, which were substantially blamed on the economic, military and other assistance the regime receives from western countries. The resolutions called for mandatory economic sanctions, including in particular an oil embargo, and requested Mr. Khalifa (Egypt) to continue updating the list of banks, transnationals and other organisations assisting the racist regime of South Africa. A seminar to study the formulation of measures to prevent transnational corporations from collaborating with the racist regimes of Southern Africa is to be held in Geneva from June 29-July 3, 1981.

Another resolution welcomed the International Conference on Sanctions against South Africa to be organised by the UN Special Committee against Apartheid and the OAU in Paris in May 1981. Some resolutions called on states which have not yet done so to ratify the Convention against Apartheid, and a call was again made for the establishment of an International Penal Tribunal under the Convention. A further resolution invited the General Assembly to request the World Court to give an advisory

opinion on the question whether a state which pursues a policy of apartheid and denies human rights as does South Africa may lawfully continue to hold a place in the international community in view particularly of Article 6 of the UN Charter, which enables the expulsion of a member which has persistently violated the principles contained in the Charter.

## *Chile*

The report of the Special Rapporteur on Chile, Mr. A. Dieye (Senegal), showed a situation similar to that of last year. The number of disappeared persons has reduced from 680 to 610, but the government remains intransigent in its position that the selection of Chile for the scrutiny of the UN is discriminatory, and consequently refuses to cooperate in identifying those responsible for the disappearances. On the question of torture Mr. Dieye said that though it has quantitatively decreased, the methods have remained the same and have sometimes become more refined. Moreover, persecution, ill-treatments and other abuses by officials had increased.

The legality of the new Chilean Constitution, for which a referendum was held in September 1980, was questioned by the Special Rapporteur. He noted particularly that the Constitution was prepared without the participation of any political party, that some parts of the Constitution will not be in force for at least 17 years, and that General Pinochet's rule is guaranteed for the next 8 years with broad powers for suspending fundamental rights. An ICJ communication on the New Constitution of Chile and its effect on human rights (E/CN.4/NGO 293) supported the Special Rapporteur by exposing the undemocratic nature of the Constitution and the threat it posed to human rights. In fact, the repre-

sentative of the Women's International League for Peace and Freedom informed the Commission that already 420 persons had been arrested in different localities as a result of military and police raids between December 15, 1980 and February 15, 1981. The representative of the International Indian Treaty Council also denounced the new Constitution as not having made provision for the land and other rights of the Mapuche Indians of Chile.

The UN Trust Fund for Chile, which was set up in 1978 to provide humanitarian, legal and financial aid to victims of torture in Chile, was redesignated as a UN voluntary fund for victims of torture in general. This redesignation was seen by some delegates as an attempt to water down the gravity of human rights abuse in Chile.

The Special rapporteur's mandate was renewed, and the Commission reiterated its indignation at the persistence and further deterioration of the human rights situation in Chile and strongly urged the Chilean authorities to respect and promote human rights in accordance with their obligations under international law. Specifically the Chilean government was urged to put an end to the state of emergency, as well as to torture and other forms of inhuman or degrading treatment, and to prosecute and punish those responsible for such practices.

## *Cases under the Resolution 1503 Procedure*

There were some significant developments relating to the confidential procedure under Resolution 1503. These included the number of countries discussed, the naming for the first time of an East European country, the ruling of the Chairman of the Commission on the scope of 'confidentiality', and a suggestion by Uruguay for the abolition of the confidential procedure.

Before opening the public debate on this item, the Chairman, Ambassador Carlos Calero-Rodriguez (Brazil), announced that Afghanistan, Argentina, Bolivia, Central African Republic, Chile, El Salvador, Ethiopia, the German Democratic Republic, Guatemala, Haiti, Indonesia, Japan, Mozambique, Paraguay, South Korea, Uganda and Uruguay had been dealt with under the confidential procedure of Resolution 1503 and, consequently, reference was not to be made to *the decisions taken on these countries and confidential materials relating thereto*.

These seventeen countries represent the highest number ever discussed at a single session of the Commission. Also the inclusion of the GDR, apparently on charges of impeding freedom of movement (cf. International Herald Tribune 23/3/81), marks the first time that an Eastern European country has been discussed under Resolution 1503. Of these countries, all but Indonesia, Mozambique, South Korea and Paraguay were at least mentioned by name in the public discussion, while Afghanistan, Bolivia, Central African Republic, Chile, El Salvador, Guatemala and Uganda were seriously discussed and resolutions adopted on them. This latter development was no doubt due to the ruling of the Chairman that 'decisions taken in private sessions' on the relevant countries, and the 'confidential material relating thereto' were what the Commission was barred from referring to in the public debate. This ruling, which correctly follows the terms of Resolution 1503, departs from the previous rulings that there could be no public discussion whatsoever on countries singled out for consideration under Resolution 1503. The result then was that even where a communication under the Resolution related only to one particular aspect of general violations being carried out by a government, it was no longer possible to raise any other

human rights violations by the same government in public.

A further interesting (though paradoxical) occurrence was the request by the delegate of Uruguay that the ECOSOC make what was in his view a long overdue revision of Resolution 1503 in which the confidential procedure would be abolished, as it prevented a government answering allegations in public.

All in all, these developments, coupled with the decision last year to allow NGOs to name countries in their oral interventions provided they did not attack governments, opens up the subject of gross violations of human rights.

Bolivia, El Salvador and Guatemala were prominent among the countries publicly discussed under this item.

#### BOLIVIA

Many delegates deplored the military coup of 7 July 1980, and the subsequent deterioration it brought about in the human rights situation. A report (E/CN.4/1441) prepared by the Sub-Commission's Rapporteur, Mrs Warzazi, contained an analysis of reliable information received from governments, specialised agencies and governmental and non-governmental organisations on human rights violations in Bolivia. However, the resolution on Bolivia made no mention of this report, perhaps because the Brazilian delegate had earlier criticised the mandate given to the Special Rapporteur as being beyond the powers of the Sub-Commission.

In its resolution, the Commission requested the Chairman to appoint a special envoy to make a thorough study of the human rights situation in Bolivia, and for this purpose to visit the country and to include in his report such comments and materials as the Bolivian government might wish to submit.

## EL SALVADOR

The human rights situation in El Salvador was the subject of widespread concern. Numerous reports and interventions, especially by NGOs, built up a strong case for the Commission to do its utmost to help redress the current situation of gross human rights abuses. The ICJ representative noted the spectacular aggravation of political repression estimating some 10,000 political assassinations in 1980. The resolution adopted, opposed only by Uruguay, deplored the murders, abductions, disappearances, terrorism and other grave violations of human rights variously reported on El Salvador and called upon all the parties involved to bring about a peaceful settlement and to seek an end to acts of violence.

The resolution also called upon governments to refrain from the supply of arms and other military assistance, urged the Salvadorian government to take the necessary steps to ensure full respect for human rights and fundamental freedoms, emphasizing that the people of El Salvador have the right, as soon as appropriate conditions have been established, to determine their own political, economic and social future. The resolution finally requested the Chairman of the Commission to appoint a Special Representative with a mandate to investigate the reports on the gross violations of human rights in El Salvador and to recommend steps that could be taken by the Commission towards securing the enjoyment of human rights.

## GUATEMALA

The situation in Guatemala, discussed for the third year running, was described by most delegates as having gone from bad to worse, with accounts being given of the daily deterioration in the human rights situation there. The resolution adopted, once

again opposed by Argentina and Uruguay, expressed the Commission's profound concern at the deteriorating situation and requested the Secretary-General to continue his efforts to make direct contacts with the government to collect information on the situation. The Commission requested that the Secretary-General report to the General Assembly in an interim report later this year, and to the Commission itself next year.

Certain other interesting developments accompanied the discussions under Item 13. The first of these related to a decision by the Commission in a resolution sponsored by Yugoslavia not to take a decision on certain proposals contained in draft resolutions submitted by the United States on Sakharov, by Byelorussia on human rights violations in the U.S., by Jordan accusing Syria of political executions, and by Syria charging Jordan with aiding terrorist activities against Syria. The Zambian representative may have expressed the view of other delegates when he pointed out that if the charges in the relevant resolutions were valid, a fact that could only be ascertained through a decision by the Commission to hear and act on these charges, the victims of the alleged violations will not be too grateful to the Commission for its indecision and would be none the better off for it.

The second development related to a resolution urging that U.N. assistance be offered to the Central African Republic, Equatorial Guinea and Uganda under the advisory services programme. The assistance would consist mainly of technical and advisory services for reforms, such as the drafting of legislation and the establishment of national institutions for the protection of human rights.

Thirdly, resolutions were adopted on the question of hostage taking and on the



problems of refugees, mass exoduses and displacements of populations. The resolution on hostages called upon all states to observe fully and unconditionally their international obligations to protect diplomatic and consular personnel and premises, and to prevent the taking of hostages. The resolution on mass exoduses and displacements of populations proposed a special rapporteur to study the problem and submit his conclusions and findings with recommendations to the Commission at its next session.

### *Draft Declaration on Religious Intolerance*

In contrast with previous years, the Commission had occasion this year to congratulate itself upon the completion of the Draft Declaration on the Elimination of all Forms of Intolerance and of Discrimination based on Religion or Belief, after twenty years of drafting. Mr A. Dieye, Chairman Rapporteur of the Working Group on this Draft Declaration, was widely complemented for his skill in getting the draft completed. The Draft Declaration was adopted by 33 votes to none with 5 abstentions, and was recommended for adoption by ECO-SOC. It provides that everyone has the right to freedom of thought, conscience and religion, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights of others (Article 1). Discrimination on grounds of religion by any person or institution, including the state, is prohibited (Article 2), and is declared an affront to human dignity and a disavowal of the principles of the Charter (Article 3). Article 4 requires that all states take effective measures, including the enactment or annulment of legislation to prevent and elimi-

nate discrimination based on religion or belief. Parents or legal guardians are to be entitled to decide on the religious and moral education of their children, who cannot be compelled to receive religious teachings against their parents' or guardians' wishes. The best interest of the child is to be the guiding principle for the religious upbringing of the child; consequently, the practices of religion in which the child is brought up must not be injurious to his health or full development (Article 5). Article 6 stipulates specific rights that are included in the right to freedom of religion, and under Article 7 the rights in the Declaration are to be accorded in national legislation such that everyone shall be able to avail themselves of them in practice.

Progress on the Draft Convention on the Rights of the Child was steady but slow and the Commission requested a further one week session of the Working Group before the next meeting of the Commission, with a view to completing the drafting of the Convention.

### *Draft Convention against Torture*

The Working Group on the Draft Convention against Torture met for one week prior to the Commission's session and had occasional meetings during the session. Little progress was made.

There was a general discussion on implementation, which revealed a wide area of disagreement. Some speakers took the view that implementation should be left to the national level and considered any further international mechanisms unnecessary and undesirable. Some considered implementation procedures an indispensable part of the treaty since self-enforcement had been shown to be a failure. Others thought that any international procedure should be optional.

An opinion was received from the Legal Counsel of the United Nations that the proposal in the Swedish Draft Convention to make the Human Rights Committee, established under the Covenant on Civil and Political Rights, the supervisory body for the Convention would require an amendment to the Covenant. Several delegations shared this opinion. The Netherlands submitted a revised draft of the implementation articles which proposed, *inter alia*, that the supervisory committee should be a separate committee but composed of persons who are members of the Human Rights Committee under the Covenant. Sweden submitted an alternative suggestion that the members of the supervisory committee "shall be nationals of States Parties and shall so far as possible be chosen among members of the Human Rights Committee". Some supported this, some vigorously opposed it and others thought it should be examined further.

Apart from this inconclusive discussion, the Working Group went over the undecided passages in square brackets in the substantive articles, and reached agreement on a number of these. There still remain, however, one article and four paragraphs in other articles upon which no agreement has yet been reached. The most important of these is the paragraph providing for 'universal jurisdiction', by imposing a duty on each State Party to assume jurisdiction to prosecute offences committed outside its territory in cases where the alleged offender is present in its territory and it does not extradite him.

### ***Further Promotion of Human Rights***

Under this agenda item the Commission advocated the stimulation of public interest in the promotion and protection of human rights and recommended that the Sec-

retary-General consider establishing small reference libraries containing material in the field of human rights in U.N. offices, particularly those situated in developing countries. The Commission also invited the Secretary-General to submit a report on the methods for stimulating public interest in human rights at its next session. The question of establishing a High Commissioner for Human Rights was raised once again, but no decision was reached.

### ***The Sub-Commission***

At the request of the Brazilian delegate on the second day of the Commission's session, it was decided that more time be allotted for consideration of the report of the Sub-Commission. Consequently when this item came up, discussion centred, for the first time, on the report as a whole rather than on its particular recommendations.

In a well written analysis of the Sub-Commission's report, which was acknowledged as such by the Commission and consequently distributed as a working document, the Brazilian delegate, while conceding the expertise of the members of the Sub-Commission and the usefulness of that body to the Commission, raised questions as to its competence to address itself directly to the Secretary-General, governments and international bodies and organisations. In his view, the activities of the Sub-Commission, being of a subsidiary nature, "must be kept within its terms of reference" with due respect to the Commission of Human Rights as "the first level at which results are evaluated". Other delegates pointed out, however, that inadequate attention given by the Commission to the Sub-Commission's work had facilitated the ability of the latter to operate beyond its terms of reference.

# ARTICLES

## *Involuntary Patients in Soviet Psychiatric Hospitals*

by  
Dr. Anatoly Koryagin

[The author of this article is a Soviet psychiatrist who until recently worked at the Central Psychiatric Hospital in Kharkov. He was previously the head doctor in a provincial hospital, and has a higher (doctoral) degree in psychiatry. He was a member of the Working Commission to Investigate the Use of Psychiatry for Political Purposes, established in 1977, to investigate and make public these abuses. All five members of the Working Commission have now been imprisoned. Dr. Koryagin was arrested on 13 February 1981 in Belgorod following his denunciation of the confinement of the Ukrainian coal mining engineer, Alexei Nikitin, who is referred to in this article. The article was originally published in a bulletin issued by the Working Commission. Dr. Koryagin has been charged with anti-soviet agitation and propaganda under Article 70 of the criminal code, an offence punishable with seven years imprisonment followed by five years exile.

The article deals mainly with the lack of any psychiatric basis for the confinement of the patients he examined. It also reveals that many of the confinements were clearly in violation of Soviet law.

Most of the cases deal with 'civil commitments', that is to say involuntary commitments to hospital of persons who are not prosecuted for criminal offences and then ordered to be confined by a court (i.e. not 'criminal commitments'). Civil commit-

ments may occur where a patient is an "evident danger" to himself or those around him. There is no definition of danger in the law, but a directive of the Ministry of Health of 26 August 1971 extends it to include "behaviour dangerous to society" or "social danger". There is no indication of what is meant by "social danger", but in practice it can be interpreted to include any opposition to the Soviet system. It may be wondered how the opposition of the mentally deranged can constitute 'behaviour dangerous to society'. This, however, is explained by a warning in the directive that mental illness "may be accompanied by externally correct behaviour and dissimulation".

The doctor who first orders the confinement must submit a psychiatric report justifying it, and within one day of confinement the patient must be examined by a commission of three psychiatrists to decide whether the confinement was justified and if there is a need for further confinement. The patient is supposed to be re-examined by such a commission at least once a month, but this rarely occurs, at least in the case of political dissenters. The diagnosis is invariably made by officially appointed psychiatrists. Dissenters have never been able to obtain the appointment of a psychiatrist of their choice.

Under the procedure for 'criminal commitments', the examining magistrate (or

'investigator' (cf. the french juge d'instruction) decides whether the accused should be examined by a forensic psychiatric commission. The accused has no right to be told the results of the examination or the commission's recommendations. If the commission finds that for reasons of mental illness the accused is 'not accountable' for his offence, there is a hearing before a court which decides whether the accused committed a socially dangerous action prohibited by the criminal code, whether to accept the commission's findings as to 'non-accountability', and what measures to apply to him.

*Special Psychiatric Hospitals are desig-*

*nated for the involuntary confinement of patients who are "especially dangerous". They are operated like prisons and several are in former prison buildings. They are under the Ministry of Internal Affairs and not the Ministry of Health. Confinement in these hospitals is usually more prolonged and the patients enjoy fewer visits and other privileges.*

*For a fuller account of these legal procedures, and the extent and manner of their application, see Chapter 7 of Prisoners of Conscience in the USSR: Their Treatment and Conditions, published by Amnesty International, London, 1980.]*

In my capacity as consultant psychiatrist to the Working Commission to Investigate the Use of Psychiatry for Political Purposes, I examined a number of people who had undergone compulsory treatment in ordinary and Special (i.e. prison) psychiatric hospitals on several occasions. These people were wards of the psychiatric service, although when I examined them they showed no signs of psychiatric illness, psychic defects or psychopathy. Furthermore, a study of their life histories leads to the conclusion that they had not previously shown any signs of mental disorder — therefore, these people must be considered psychologically healthy.

My present aim is to examine the conditions in which healthy people in the USSR are pronounced mentally ill and are condemned to exist as such. Circumstances allow me to mention some people by name — their cases provide typical illustrations of what happened to the whole group. A characteristic feature of all the cases I examined was that the people concerned all joined the ranks of the mentally ill because they did or said things which in our country are considered 'anti-Soviet'. Some of them tried to leave the USSR by crossing the fron-

tier or making their way into foreign embassies and asking for asylum, some circulated leaflets with appeals or poems, others stated that they disagreed with the existing order in the country and described how their economic, religious and other civil rights had been flouted by the administration at their place of work and by party and government institutions.

A study of the life histories of the people I examined presents virtually no evidence of the characteristics embodied in the generally accepted psychiatric description 'predisposition to premorbidity' — when certain physical and psychological features in an individual's personality are likely to lead to mental illness. In actual fact, the overwhelming majority of them were noted from early childhood for qualities which are typical of strong personalities: energy, enterprise, a marked ability to communicate, leadership qualities, good or excellent marks at school. They showed early signs of independent judgment and behaviour, determination in overcoming difficulties and achieving their aims. Many of them quickly completed their secondary and higher education and became exemplary production workers, took an active part

in voluntary activities, were active members of the Komsomol (some became Party members) and doting parents. When I examined them, most of them exhibited a fairly wide range of interests, were knowledgeable on several subjects, were consistent in their reasoning and clear and logical in their judgments and perfectly adequate in their emotional responses; they had firm convictions, clear aims and realistic plans for the future. It can be said that all of these people were 'positive' Soviet citizens with real prospects of succeeding in society, but all of them, eventually, came into conflict with this very society.

The moment these people came into conflict with the USSR state system, they came under the observation of psychiatrists who judged their behaviour abnormal. From this moment they assumed the clinical and social status of the mentally ill, with all its consequences: compulsory confinement to hospital and compulsory treatment, a definitive diagnosis of psychiatric illness; in some cases, invalid status due to mental illness was imposed and the right to function normally was taken away. Dr A. Butko's psychiatric 'odyssey' began when he attempted to swim to Turkey, that of engineer and former Communist L. Pribytkov when he renounced his Soviet citizenship, that of engineer A. Paškauskienė when she circulated nationalist leaflets.

A patient's first contact with a psychiatrist to a large extent determines his subsequent fate. Normally, such contact takes place at the patient's own request, or at the request of his family when they first notice abnormalities in his speech and behaviour. In cases of sudden manifestation of psychological disturbance (when the patient becomes 'socially dangerous!') the patient is taken to a psychiatric hospital from wherever he happens to be at the time, usually under police escort. Nothing of this kind happened to the people I examined.

None of them sought medical assistance, their families did not request psychiatric help on their behalf, their speech and behaviour posed no threat to anyone's life; nonetheless, they were all confined to psychiatric hospitals by force or by deception. The fate of these people depended on those who controlled their personal freedom: officials of the KGB, the Procuracy and the Ministry of Internal Affairs. These officials stated that the people I examined behaved in a manner incompatible with mental health and on this basis alone they were forced to see the psychiatrists who became responsible for them. Many of those I examined have said that they were initially presented with the following alternative: renunciation of their views and activities or internment in a psychiatric hospital.

The most widespread methods of confining dissenters to psychiatric hospitals in the USSR are as follows:

- 1) The investigative organs bring charges against you under one of the 'anti-Soviet' articles of the Criminal Code. At the investigator's request, you are subjected to a forensic psychiatric examination and pronounced mentally ill. The next stage is compulsory treatment in a special or an ordinary psychiatric hospital. A. Nikitin states that in 1971 and 1977 he was sent for compulsory treatment without a preliminary examination by a forensic psychiatrist and declared a hunger-strike in protest.

- 2) You are summoned to the Military Registration Office 'for examination by a military commission'. You arrive. You are escorted by a police officer to a psychiatric hospital 'for observation'. The role of the Military Registration Office is sometimes played by the Executive Committee of the District Soviet, the City Party Committee, the police, or the State Motor Vehicle Inspectorate, where you are summoned on

some pretext.

3) Due to circumstances with which you have no connection, a brawl breaks out between you and your neighbours at home or your colleagues at work. The police are called and for some reason, only you are taken to the police station and from there to a psychiatric hospital. Seventh Day Adventist V. Kushkun relates that he was beaten up by drunken colleagues at work who called him 'traitor' and 'spy', but the police took him to a psychiatric hospital without a psychiatrist's order.

4) You are in bed, or doing something at home when a car draws up outside. Medical orderlies and KGB officials take you straight to a psychiatric hospital. This happens all the more unexpectedly if the order to commit you to hospital is issued by a psychiatrist in your absence. A. Roslan recounts that in 1978, S. Buknis, District Psychiatrist in Mozheikov, Lithuania, issued an order for the former's admission to a psychiatric hospital without having seen him at all.

The methods used to confine people to psychiatric hospitals a second time differ little from those used on the first occasion, although physical coercion is more common and deception, in the form of false summonses to various institutions, is less so. The pretext for a second period of confinement to hospital is always 'deterioration in the patient's condition', which manifests itself in increased 'anti-Soviet' activity. The KGB and the police take people straight to a psychiatric hospital from home, from work, or from the street, often in handcuffs. Occasionally, a second admission to hospital takes the form of a preventive measure. This happened, according to several of the people I examined, before US President Nixon's visit to Moscow in 1972 and before the Olympic Games in 1980.

S. Belov, who was confined to Ivanov Regional Psychiatric Hospital in June 1980, was told by his doctor that 'they advised me to keep you' until the beginning of August. Such reports are confirmed by the fact that in towns where Olympic competitions were held and in districts through which the 'Olympic trail' passed, doctors at psychiatric clinics received instructions from their superiors to admit to hospital those patients who could present a danger to society — especially those with 'anti-Soviet tendencies' — for the duration of the Olympics.

Each time the people I examined were admitted to psychiatric hospitals, this was done forcibly and in contravention of an instruction issued by the USSR Ministry of Health in 1972 (which did not, however, apply to anyone admitted under an article of the Criminal Code). This instruction grants the health authorities the right to confine mentally ill persons to hospital if they become socially dangerous and to summon the help of the authorities responsible for keeping public order. The clinical meaning of the term 'socially dangerous' is that the person is in danger of committing acts which would endanger his own health or that of people around him (such as murder, suicide, personal injury, etc). There was no question of the people I examined being dangerous in this sense. It must be clearly stated that each time a decision was taken to hospitalise the people under discussion, the clinical meaning of 'socially dangerous' was replaced (consciously or unconsciously?) by its judicial meaning, ie. that the patient was capable of harming the social system as a whole. The responsibility for this lies undoubtedly with the psychiatrists who issue the orders confining people to hospital, as well as with those who accept them into hospital for treatment.

With rare exceptions, those I examined were aware of how their condition had

been diagnosed. However prudent doctors are, any intelligent patient confined to hospital for a long time will find an opportunity to get to know what is written in his case history.

On their first confinement to hospital, all those I examined were diagnosed in one of two ways: as psychopaths (70 %), or schizophrenics (30 %). In addition, in the vast majority of cases, the term 'paranoid' was used in the diagnosis. This refers to a disorder in the thought process which manifests itself in the formation of distorted or fantastic ideas. Several doctors, in different hospitals and at different times, diagnosed nearly all the people I examined in one of two ways, both of which are part of the same syndrome. A striking coincidence, illustrating the difference of opinion and divergence in diagnosis which always has a place in Soviet psychiatry! One easily gains the impression that 'paranoia' is an indubitable clinical sign of mental illness in all 'anti-Soviet elements'. All diagnostic problems disappear, however, when the psychiatrist adopts the attitude of Dr A.P. Filatova. During a forensic psychiatric examination of A. Butko in Kursk, she stated that 'No normal person can be opposed to the Workers' and Peasants' State!'

From what has been said by the people I examined, one may conclude that the nature, intensity and duration of the treatment they received was not based upon their diagnosis, but depended solely on their behaviour in hospital and evaluation of what they had said and done in the past. According to A. Butko, who was diagnosed as 'schizophrenic' and subjected to compulsory confinement in Chernyakhovsk Special Psychiatric Hospital and Kharkov Regional

Psychiatric Hospital from 1974 to 1978, he was given no treatment at all, although treatment was prescribed in his medical notes. L. Pribytkov was also diagnosed as 'schizophrenic' and was confined to a psychiatric hospital every time he attempted to enter a foreign embassy; on several occasions he was discharged after a few days without treatment, but during his nine months' stay in Kazan Special Psychiatric Hospital, he was given an intensive course of insulin therapy just before his discharge. A. Roslan was diagnosed as 'paranoid' and forcibly admitted to the New Vilnius Psychiatric Hospital in 1978. He spent six weeks there without any treatment and was then discharged. I. Koreisha was twice (in 1978 and 1979) admitted to Vitebsk Regional Psychiatric Hospital and was discharged after a few days each time, without any treatment. It seems that the main aim of these confinements to hospital was the isolation of the patient and not treatment of mental illness — a fact well borne out in cases where psychopathy was diagnosed. It is not without reason, therefore, that the term 'wall therapy' has become part of the terminology used by Soviet psychiatrists, as is described in detail by the well-known dissenter Yu. Belov<sup>1</sup> in his book *Reflections on Sychëvka*.

The patients' descriptions of their state of mind during their stay in psychiatric hospitals show no trace of any psychopathological symptoms. They all tried to make contact with 'undamaged' patients like themselves, mixed with the medical staff (some of them even established personal relationships with doctors and nurses) and made every effort to obtain a speedy discharge. Their only symptoms were those

1) Yury S. Belov, imprisoned in 1967 for writing a *samizdat* (unofficially published) essay entitled 'Report from the Darkness', was declared mentally ill in 1971. He spent the next six years in psychiatric hospitals, including three years in Sychëvka Special Psychiatric Hospital, Smolensk Region. He was finally released in December 1977.

very 'anti-Soviet' attitudes, expressions and actions, the 'degree' of which directly influenced the medical staff's attitude towards them and also the treatment they were given. Not an increase in hallucinatory or confused experiences, but 'breaking the rules' – for example by sending letters and complaints by-passing the doctor's censorship, making remarks 'of an anti-Soviet nature', circulating news from foreign radio stations etc, not admitting that their former actions were wrong, directly accusing the doctors of persecution and complicity with the KGB – these, according to the people I examined, were the basic reasons for giving them sulfazin, inducing insulin comas, administering high doses of neuroleptic drugs, depriving them of the opportunity to work in the open air. A. Nikitin relates that he was given neuroleptic drugs as a punishment in Dnepropetrovsk Special Psychiatric Hospital. After a foreign radio station had broadcast remarks about him, I. Koreisha was taken by KGB officials to Vitebsk Regional Psychiatric Hospital, where he was subjected to an intensive course of injections with neuroleptic drugs for a week. A. Paskauskiene states that at the age of 16 she was brought back to Kaunas Psychiatric Hospital after attempting to escape and that she was severely beaten by the medical staff there and subjected to treatment with neuroleptic drugs. All of the patients speak of punishment by 'treatment', threats and attempts to force people to renounce their beliefs and opinions as the way in which dissenters are treated by doctors in psychiatric hospitals. Doctors in Special psychiatric hospitals are especially noted for this. A. Butko relates that I. Biserov, his doctor in Chernyakhovsk Special Psychiatric Hospital, demanded

that Butko's aged father stop writing to enquire after his son's health, saying: 'Or we'll make a schizophrenic out of him, too. I can't tell him the real state of affairs – the letters are being checked.'

According to some of the people I examined, the KGB directly intervened to influence the conditions and length of their confinement, a fact which the doctors themselves did not conceal. For example, during his stay in Kharkov Regional Psychiatric Hospital (Streleche village), A. Butko was told by his doctor that after a call from the KGB, Chief Doctor A. Popov had forbidden Butko to go out freely, as he had been able to do until then. For the same reason Butko was refused permission to go to his father's funeral.

The Criminal Code article under which dissenters are charged often determines the length of time they spend in psychiatric hospitals. This undoubtedly means that the patient's condition as a result of treatment bears no relation to when he is discharged. The duration of an illness cannot correspond to a sentence prescribed in the Criminal Code, yet this is not taken into account by the psychiatrists, according to whom the condition of schizophrenics and psychopaths charged under Article 190-1<sup>1</sup> or Article 70<sup>2</sup> of the RSFSR Criminal Code can only improve after three or seven years respectively!

It is also incomprehensible from the point of view of medical logic that people who have been confined to psychiatric hospitals on several occasions and finally been given a definite diagnosis of mental illness, are still considered capable of military service (A. Nikitin, A. Roslan, S. Belov, V. Tsurikov and others). A. Nikitin, for example, spent a total of about seven years in

1) 'Dissemination of fabrications known to be false, which defame the Soviet state and social system'. Maximum penalty 3 years' imprisonment.

2) 'Anti-Soviet agitation and propaganda'. Maximum penalty 7 years' imprisonment plus 5 years' exile.



psychiatric hospitals, but was not granted invalid status. A. Roslan and S. Belov were deprived of their driving licences after their discharge from psychiatric hospital, but no note of their illness was made in their military registration cards. S. Belov was subsequently summoned to the Military Registration Office and then sent to a psychiatric hospital 'for observation'.

It is also worthy of note that all the people I examined were discharged from psychiatric hospitals without having fulfilled what is normally a fundamental requirement: that of having a critical attitude to their experiences during illness. None of them agreed with the doctors' assertions that their former opinions and behaviour were the result of mental illness. Nevertheless, they were eventually discharged, with the warning: 'Don't do it again.' They each left hospital unaided, without an escort. A totally arbitrary and incomprehensible attitude to the concept of 'social danger!' The patient's condition does not change, but he is dangerous when admitted and not dangerous when he is discharged!

Once out of hospital, these people took up their lives as before: they tried to obtain work according to their qualifications, went about their personal and family business, tried to have their diagnosis revoked and stood by their beliefs and opinions.

After care for discharged psychiatric patients includes their attendance at a psychiatric clinic for observation and treatment; there are also a number of measures intended, in a broad sense, to help their 'rehabilitation at work and in society', so that 'the patient may become as active in his work and social life as he is able'. Let us see from their own accounts, how our patients experienced this 'care'.

Immediately after his discharge from a psychiatric hospital, Dr A. Butko tried to find a job as a doctor. He wrote to the Head of Donetsk Regional Health Authori-

ty and received the following reply: 'I cannot give you even a temporary job because you have seriously discredited yourself.' However, he did manage to get a job as a doctor in a village in another Republic. Donetsk city police issued engineer A. Nikitin with a passport and residence permit five months after his discharge from psychiatric hospital, but he was still unable to get a job, notwithstanding his persistent visits to numerous institutions. And to this day, this person with a diploma from an Institute of Higher Education survives by doing odd jobs. The only job S. Belov, who is a trained lawyer, was able to obtain was that of shipping clerk at a food depot. Agricultural worker I. Koreisha is still trying to obtain the right to work on a collective farm in his native village and because of this is constantly being threatened by police and KGB officials: 'We'll put you in prison or shut you in a psychiatric hospital.' After six weeks in a psychiatric hospital, A. Roslan was dismissed from his job 'for failing to fulfill the plan as agreed' and was forced to go to court to get the job back.

Not one of these people has said that the health authorities, or more particularly the doctors at psychiatric clinics, have helped them in any way whatsoever. Yet each one of them was undoubtedly on his district psychiatrist's list; it was these very district psychiatrists who usually issued the orders for their confinement to hospital. The fact that the majority of the people we are discussing did not consider themselves ill and therefore did not attend their psychiatric clinic regularly obviously does not excuse the psychiatrists. A doctor is obliged to take an active interest in all the patients on his list, so that he may help them in legal and social, as well as medical matters.

All that has been said above concerning the group of people I examined leads to

the conclusion that criteria and instructions generally accepted in Soviet psychiatry were ignored by its officials in their attitude to the admission to hospital of these people, clinical appraisal of their condition, treatment and help in social matters. Thanks to this unorthodox approach, these people found themselves treated as chronic psychiatric patients. Our observations show that the most influential factor determining the psychiatrists' attitude towards the patients was the label 'anti-Soviet', which was commonly applied to representatives of this group.

Leaving to the doctors' own consciences their flagrant, almost criminal disregard of their professional duty, it is legitimate to pose the following question: how does it happen and who is responsible for the fact that in a country like the USSR, where every aspect of economic, political and social life is strictly controlled by the State, perfectly healthy people are treated as though they are mentally ill?

There can be only one answer: these things are done by those who have the power and for whom it is convenient to do so.

# *Information, Technology, Law and Human Rights*

by  
Paul Sieghart\*

Neither international law, nor most national legal systems, have much to say, explicitly, about information. Yet today there is constant publicity, and an increasing debate, about information and, more specifically, about 'the new information technology'. Hardly a week passes without the publication of another substantial report about the effect which that technology will have on people's lives.

Are our legal systems yet ready to deal with the problems which the new technology will present? Can one, and should one, legislate comprehensively about information? And has any of this any relevance for human rights law?

Before one can answer such questions, something needs first to be said about the new technology – especially because lawyers too often assume that it is something they are not equipped to understand.

## *The New Information Technology*

In the last two decades, the most remarkable advances have been made in information technology. To be precise, two different technologies have been involved.

The first is what is loosely called 'computing'. There is nothing very new about

the concept: the abacus, known throughout antiquity and still in use in the East, is a very simple computer, and the 'difference engine' and 'analytical engine' on which Charles Babbage worked from the 1820s to the 1860s (but which he never completed) were quite sophisticated ones, though still mechanical. What is new today is the development of *electronic* means for performing not only arithmetical operations on pure numbers, but logical operations on data of all kinds. These means can carry out all the different tasks needed for 'information processing': that is, the storage, complex manipulation, and retrieval of data, according to any prescribed rules, in any desired form or arrangement. To understand the implications of this technology, one need not understand the technology itself. It is enough to know what it can do, not how it does it.

What it can do is startling, but essentially simple. It can do with any kinds of specified data just about anything that anyone can prescribe to be done with them; it can do this with great accuracy; it can do it at speeds of the order of millions of operations per second; and it can do it all at a cost which is falling even faster than the speed of operation is rising.<sup>1</sup> Its limitations no longer lie in the size, complexity and cost

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of the equipment, but in the human effort required for designing that equipment, and devising and testing the instructions – conventionally called ‘programs’ – which have to be given to the equipment for each of the tasks it is required to perform.

The second technology is that of ‘telecommunications’. That too is not particularly new: as early as the 1790s, Claude Chappe was installing a ‘telegraph’ system in France which communicated news at high speed over great distances by the movement of semaphore levers mounted on towers, and soon afterwards a similar system installed between London and Plymouth in England was able to transmit naval signals at a maximum speed of around 10,000 miles per hour. What modern communications technology is adding here is, again, a matter of degree rather than of kind. Through the use of radio waves, satellites, cables, optical fibres and their associated electronic devices, vastly greater flows of data, arranged in any selected order, can be communicated over vastly greater distances, virtually instantaneously, and again at ever-decreasing cost. Today, millions of people all over the world can watch events on their television screens while they are actually happening – that is, in ‘real time’. Or else pictures of those events can be distributed only to a selected set of viewers, or stored for later retrieval or distribution. Or news of the events can be passed on in some other form, such as readable text – again almost instantaneously, and to any chosen number of recipients at any chosen time.

When these two technologies are combined, what they can achieve together is a huge increase in the possible number, size, contents and speeds of operation of information systems, all at rapidly falling cost. And what this means in effect is that vastly more information can become available, very cheaply, to everyone who can have ac-

cess to such information systems.

Though the word ‘revolution’ is often used to describe what is now happening in this field, it is not really apt, as the changes are more of degree than of kind. But if anything will be revolutionised in the process, it will be the patterns of information flows among, between, and about many millions of members of the human race.

### *Some Current Examples*

If all that sounds too abstract, a few examples may help to make it more concrete. These are some of the larger information systems which are already in operation:

- (1) Anywhere in the United Kingdom, a police patrol car can call out over its radio the registration number of a suspicious vehicle. The officer receiving that call at the local police station types the number into a keyboard connected with the Police National Computer at Hendon, near London. Within 6 to 8 seconds, all particulars of the vehicle and its registered owner appear on a display screen above the keyboard, and the officer passes them back to the patrol car over the radio. If the vehicle is stopped and its occupants are identified, a similar radio call will produce, by the same method and with the same response time, any information about them recorded on the same computer. When the patrol cars are fitted with their own keyboards, the response time will be even shorter.
- (2) In the USA and some other countries, a lawyer can type a few key words into a similar terminal about a legal problem, and the screen will display references to all statutes and court decisions which deal with it. Likewise, a medical practitioner can retrieve all known informa-

tion about a particular disease, or a particular drug. Alternatively, he can type in his patient's symptoms and receive suggestions from the computer about the possible diagnoses; when he selects a diagnosis, the computer will suggest the options for treatment.

- (3) Many enterprises which sell goods or services to individuals maintain computerised records of their transactions. These can have a substantial value for other suppliers: people who buy plants for their gardens are good prospects for the sale of gardening books, people who buy expensive jewellery are more likely to buy other valuable objects like mink coats. Such lists are therefore widely sold. Their value will be even greater if they can be merged – as for example lists of men who are stockbrokers, bankers or directors of public companies, and own an expensive car, and live in large houses, and travel frequently by air.
- (4) All the major airlines today make their passenger bookings through worldwide computerised networks, which hold all particulars about every passenger on every flight, instantly accessible at every terminal installed in any of the airline's offices in any country.
- (5) Every time anyone uses a credit card, the credit card company's computer records what he has bought, where, when, from whom and for how much. This provides a 'profile' of his spending habits – as well as a record of his movements.

### *Future Developments*

These examples are chosen at random. There are already many such systems. Even more are being planned or installed every day, and there is a wide range of specula-

tion about the rate, and the directions, in which this process will develop.

But the real question is how all this will affect people's lives. That is far more difficult to predict in any detail, or with any confidence. For that, there are too many uncertainties – not so much about the technology but about future human behaviour. The expert can say with some certainty what is, or will shortly become, technically feasible. But no expert can foretell whether, when, and how what is feasible will actually be used, by whom, in what degree, and for what purposes. To that extent at least, economics is a branch of psychology, and prediction is an art rather than a science.

Nonetheless, if we wish to be ready to deal with problems when they arise, we must at least try to foresee in what shapes they might present themselves. We may not be able to say what *will* happen, but we can at least make a good guess at the range of things that *could* happen. Information technology, like everything else that man has devised, makes certain things possible if people choose to use it, but there are also some things which it physically cannot do, and others which are necessary consequences of its use. And, like every other technology, it has the feature of being morally neutral in itself: only human beings can decide whether to use it for good ends, or abuse it for bad ones.

Here then are some of the purposes for which information technology *could* be used. Not all of them are yet in use, let alone fully in use. We are very much in a state of transition. But each of the categories of use which follow here is technically and economically feasible – that is, it *could* be done in the foreseeable future if a sufficiently high priority were given to it, without preempting natural or human resources to an unacceptable degree. For each of these categories, here is a specula-

tive list of the salient foreseeable consequences, ranging from the apparently beneficial, through the imponderable, to the probably worrying.

From that list, the reader can select for himself the problems which may present themselves to different legal systems.

### *Better Public Administration*

Regardless of its ideological orientation, and of its degree of development, every modern State is interventionist: politicians and officials everywhere regard it as one of their principal tasks to devise and carry into effect programmes for the betterment of the lives of their citizens – in health, housing, education, transport, energy supply, and every economic activity from agriculture upwards, quite apart from the traditional areas of national security and law enforcement. Such programmes depend crucially on a one-way flow of information from the citizenry to the administration. The more information the administration has, and the more accurate and up-to-date it is, the more effectively will the programme be carried out – or so, at least, every administration believes, probably with some justice.

Here, the new technology has already come into its own. Throughout the industrialised world, computerised administrative information systems abound, and have substantially increased both the quantity and the quality of the information available to the administrators who carry out their programmes. Developed countries with State health services, for example, now hold huge amounts of medical information about their citizens in State-owned computers.

But here, too, some problems are becoming apparent. There are clear signs that the great increase in information now avail-

able to such administrators is significantly tilting the balance of power in their favour, since it has not been accompanied by a parallel increase in the information which the citizen has about those who administer his affairs.<sup>2</sup> At all events in the world's free societies, that may not have been the intended result, and so long as those societies remain free there is no reason to suppose that the administration will deliberately abuse the additional power which the additional information gives it. But the tilt in the balance of power may itself be seen as a threat to the continuance of freedom, and the example of the many unfree societies on our planet may serve as a chilling reminder of what can happen if such powers are abused.

Apart from such a general risk, there are less dramatic but more specific ones. For instance, a particular item of information held by the administration may be wrong, or perhaps merely incomplete, sometimes by design but more often by accident. A criminal record, for example, may be attributed to the wrong person, or fail to include the fact that the conviction was reversed on appeal. As a result, someone may be wrongly sent to prison,<sup>3</sup> or refused employment in the public service.

Or else, through an excess of well-intentioned administrative zeal, too much information may be made accessible to too many officials: medical records to social workers, for instance, or vice versa.<sup>4</sup> And there can be some very real difficulties about drawing the 'right' boundaries between confidentiality and the public good: is the secrecy of the medical consulting room more important than the prevention of serious crime, or the secrecy of the banker's parlour more important than the collection of the State's fiscal revenue? How much information is it legitimate for the police to hold in computerised intelligence systems about citizens who have not

been convicted of any crime? Who should determine the directions and limitations of information flows like these, and by what procedures?

### *Greater Public Participation*

Viewed from the standpoint of modern information technology, the interplay of different institutions in national decision-making is still somewhere in the Middle Stone Age, even in the most politically mature countries. Ministers and officials hold meetings among themselves, and send each other memoranda, minutes and reports. Parliamentarians have sporadic oral debates, selectively reported in the press, and more often discuss issues briefly and in private with a few colleagues. From time to time, a TV or radio producer puts together 30 or 45 minutes of an ephemeral programme. Up and down the country, there is the occasional conference attended by perhaps 100 or 200 interested people. Most of the population is only dimly aware of what is happening. Out of all these people, only a handful will have access to *all* the relevant information, and most of those will be technical experts who will not in fact take the decisions themselves. With full use of the new technology, anyone even remotely interested would be able to retrieve, probably on his domestic TV screen literally everything that was known about the subject, ranging from the technical literature to the relevant views and voting records of every politicians – more than enough to be able to make up his own mind, on more than adequate information. Genuine public participation in public decision-making could at last become a real possibility.

Moreover, in an 'interactive' information system (that is, one that can communicate in more than one direction) the views of every citizen could be made in-

stantaneously available to Parliament and government, so that the decision-makers could know precisely how the public viewed the issue. But before giving an unqualified welcome to such a democratic paradise, a note of caution may be apt. Suppose, a week after the Iranian revolution, the public is consulted by instant electronic referendum about a major national nuclear power programme, and supports it by an overwhelming majority. Then suppose that, three years later, when the contracts have been let and construction and fabrication are under way, the Three Mile Island incident hits the TV screens. A week after that, 80 % of the electronic voters might favour the immediate cancellation of the programme. What would be the effect of such procedures on the processes of government of any nation? How could long-term plans be made and carried out if the power to decide about them were to be transferred to many people whose horizons of time and responsibility were much shorter?

### *Control of Communication Channels*

Though information processing units may be installed anywhere, they are useless unless they can communicate with other parts of their information systems – both as recipients of incoming data, and as originators of outgoing information. Such communications can now take place at high speeds, over long distances, and with great information density, but the channels for them are necessarily limited. A telephone or optical fibre network only has a limited number of wires or cables. There is only a finite number of frequency bands in the radio spectrum. And there cannot be an infinite number of satellites.<sup>5</sup>

Communication channels therefore provide a finite constraint on the potential in-

finitude of information flows. They are also very expensive to instal, though they are cheap to use once they are there. That is one of the reasons (though by no means the only one) why most major telecommunications channels have so far been installed, and continue to be owned and controlled, by State monopolies in the form of Post, Telegraph and Telephone entities, known as 'PTTs' for short.<sup>6</sup>

PTTs constitute typical public utilities: having a national monopoly in the carriage of information, they are generally required to adopt the philosophy of a 'common carrier' – that is, they must carry whatever traffic is offered to them at their standard tariff, regardless of what the traffic contains. But they also offer the State that owns them a wide range of opportunities for intervention, from a carriage of preferred traffic at preferential rates to outright censorship.

An acute problem for PTT philosophy is furnished by the Viewdata or Teletext systems now being introduced in a number of the industrialised countries. There, any household having both a TV set and a telephone can display, on demand and at very low cost, any one at a time of many thousands of 'pages' of printed or graphic text on the TV screen. These pages are made available by 'information providers', and may consist of advertisements, railway or air timetables, stock exchange and other prices, weather forecasts, technical data, or indeed anything else. Clearly, the potential benefits are great.

But so could be the risks. Suppose the information consists of medical or legal advice, and happens to be wrong. Someone relying on it suffers damage. Who will compensate him? Indeed, how will anyone ever know who prepared the information being disseminated, and whether it can be relied on?

Or suppose the information consists of a

list of everyone who has recently bought an expensive car, or been divorced within the last year, or had an abortion. Would the PTT, as a common carrier, be bound to carry all this traffic, regardless of the complaints of the individuals concerned?<sup>7</sup> If not, who would decide what it was entitled to censor, and subject to what safeguards? In short, how can the obligations of a common carrier be reconciled with those of a responsible editor?

In such a system, only the PTT's switching (and billing) computers 'know' who has had access to what pages, at what times and on what days. Is that knowledge to be made available to anyone else – and if so to whom, and in what circumstances? Suppose an information provider publishes the address of a very rich man, and the contents and combination number of his safe. Within the next few days, someone opens that safe and steals its contents, and also murders the owner. Would the police be entitled to find out who had called up that page on his TV screen? And would all those who had – even by accident – then be subject to search, investigation and possible arrest?

Or suppose the information provided was how to make a 'home-made' atomic weapon?

### *Matching of Information Resources and Needs*

Much technical information – about engineering, medicine, natural resources, and many other subjects – takes a great deal of human effort to bring together. Its first cost is therefore high, and beyond the reach of many poor countries. But, with the new information technology, it costs next to nothing to make it available to anyone wishing to retrieve it. The scope for cheap information transfer from the infor-



mation-rich nations to the information-poor ones is therefore enormous, and the necessary retrieval devices could be operated with the minimum of training. To take the simplest examples, the rural doctor in up-country Chad could have instant access to everything that medicine all over the world knows about the diagnosis and treatment of any of his patients. The farmer in Bolivia could have the earliest available warnings about crop blight and weather. The civil engineer in Burma could retrieve the best and cheapest design for a bridge over one of his rivers, using only the materials he has available. And the domestic or commercial consumer of goods and services anywhere in the world could find out instantaneously where he could get what he wants, for how much and how soon; and in an interactive information system he could even order it then and there, and have the cost automatically debited to his bank account.

But here too there are problems. The people who have spent time and effort in bringing the information together will want to be rewarded for their work. They will claim the 'intellectual property' in what they produce, in the form of patents, copyright, trade marks or whatever. How will they ensure that they receive the appropriate fees for the use of their creative work? So long as information resides in discrete and tangible objects — books, journals, gramophone records, etc. — it is not too difficult to collect a royalty on each item. But xerographic copying, and cassette tapes, have already demonstrated that one of the peculiar properties of information — namely that it is infinitely reproducible at very low cost — make the protection of intellectual property increasingly difficult.<sup>8</sup> What will happen when information resides in no specific place, is nowhere found in a tangible form, and is instantly accessible to everyone? And if the rewards for intellec-

tual creativity fall off, what incentive will there be to produce more of it? Could the new technology have the paradoxical result that there will be less valuable information to communicate?

Again, it has often been said that information (or, more accurately, knowledge) is power. But that is only true so long as someone has it, and others have not. Material commodities are finite, so that not everyone can have them all — or even as much as he may want of them. In that situation, the laws of classical economics operate, finite supply being linked to demand through the price mechanism in a market — ideally perfect, but more usually imperfect. But those laws break down in the case of information, which is potentially in infinite supply at near-zero cost, whereas the demand for it is ultimately limited by the saturation potential of the human brain. (Strictly, information cannot even be stolen: if I make a copy of someone's secret document, I do not deprive him of it, or even of the information in it; I merely succeed in enriching myself without impoverishing him of anything except the previous ignorance of others.)

How will those who now exercise power by restricting the flow of 'their' information respond to the new technology? Will they seek to preserve the existing power structure by seeking to dominate the technology, and the communication networks? If they make information available, how will they price it? At rates reflecting a return on the capital they have invested in producing it, or at the marginal rates appropriate to the near-negligible cost of communicating it? Will they claim that such questions should be regulated by 'market forces' — a claim more often heard from those whom the market favours because they are strong, and seldom from those who are excluded from it because they are weak, and therefore have a greater

need for information in order to strengthen their own positions?

And if there is to be a 'market' in information, who will dominate it – the producers or the consumers? Will the producers, as in the case of consumer goods, create the demand for their products by advertising, and so dictate the shape, structure and contents of the information market? Or will the consumers be sufficiently sophisticated and well-organised to decide for themselves what information they want, to the point where it becomes worth a producer's while to supply it?

### *Communication Between Peoples*

The cheap transistor radio has already wrought a true revolution in broadcast communications. The TV set, today still only widely used in the industrialised countries, could wreak another. So far, broadcasting services have been confined largely to their originating nations; outside Europe, only short-wave radio has been able to cross national boundaries to any substantial extent. But the advent of geostatic satellites now enables both sound and vision to be broadcast from virtually any country to virtually any other. There is no *technical* reason why the Amazonian Indian should not see what is happening in Moscow, as it happens in real time, and to switch instantaneously to events in Washington, Tokyo, Paris, Delhi, Sydney or Durban. Mutual understanding between peoples could be greatly increased, and mutual suspicions diminished.

But the expectations of the disadvantaged could be increased also, with a consequent acceleration of social pressures in their own countries. People brought up within a single culture could be exposed to, and indoctrinated by, the values of others. Canadians already complain of the 'cultural

pollution' of the US TV networks across their border – and so, for different reasons, do the authorities of the German Democratic Republic about the Federal German ones. The Soviet Union sporadically seeks to jam the Voice of America. How might a fundamentalist Islamic regime react to some Western cultural values (including theological and sexual permissiveness), when they become accessible to its population's TV sets from satellite broadcasts? And what is there to prevent a State from deliberately flooding the population of any other State with false or misleading 'information' on any subject?

### *Regulation by Legal Systems*

Despite the unique importance of information in human affairs, and despite the profound differences between information and all other commodities on which human societies depend, no domestic legal system yet contains anything even approaching a coherent information law. Instead, the legal regulation of information flows between members of a society everywhere constitutes a patchwork quilt of fragmented laws.<sup>9</sup> There are laws about the press, about defamation of character, about State and industrial espionage, and about personal privacy; there are the traditional laws of copyright, patents and trade marks protecting intellectual property; and there are laws granting monopolies, on terms, to PTTs and broadcasting media.

Only in one part of the information field has the new technology begun to effect some profound legal changes. Following the heightened concern about computerised 'data banks' (especially in State administrative systems) during the last decade, several of the industrialised countries have begun to enact 'data protection laws', with the general object of making the keeping of

computerised records of 'personal data' – that is, information about identifiable individuals – more transparent, and more accessible, to the subjects of those data, and submitting the record-keeping practices of the keepers of the data banks concerned to known rules and regimes of independent supervision, usually administered by some kind of Ombudsman independent of the national government.

This movement has been centred largely in Europe, and has been opposed by US and other interests on the grounds that it might have protectionist consequences in limiting the flow of information across national borders. To meet that objection, the Council of Europe has now approved a Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which was signed by seven European nations<sup>10</sup> in Strasbourg in January 1981, and will probably enter into force later this year. This Convention lays down certain minimum standards for national data protection laws, and requires States who comply with those standards *not* to inhibit information flows between each other. (*Implicitly*, State parties to the Convention will remain free to control personal information flows to and from States which are *not* parties to the Convention, and whose compliance cannot therefore be assured.)

Uniquely, this Convention is open to accession by States who are not members of the Council of Europe, and indeed the governments of the USA, Canada, Australia, Japan and Finland sent observers to the meetings at which it was negotiated. In parallel, the OECD at the same time adopted 'Guidelines on the Protection of Privacy and Transborder Flows of Personal Data'. And the Union Internationale des Avocats has proposed a very strong Sixth Protocol on data protection to be added to the European Human Rights Convention.

Data protection legislation marks an important advance in the response of national legal systems to the new information technology: for the first time, there are laws which deal directly with flows of information, assisted and facilitated by electronic computers and telecommunications. These have begun to concentrate the minds of legislators on a new category of problem, and to focus their attentions on the nature and effects of information as a quasi-commodity.

A noteworthy feature of one of the European national data protection laws – that of the West German State of Hessen, which dates back to 1970 and has the distinction of being the first ever to be enacted – is that the Data Protection Commissioner established under it is expressly charged to 'observe the effects of automatic data processing on the operation and powers of decision of [public authorities] and note whether they lead to any displacement in the distribution of powers among the State's constitutional bodies, among local administrations, and as between State and local autonomous administrations.' The Commissioner is given power 'to initiate any measures he thinks fit to prevent such effects.'<sup>11</sup>

But that is about as far as any domestic legal system has yet gone in an attempt to deal with the problems of the changes in information flows which are now becoming foreseeable.

### *International Human Rights Law*

The major international human rights conventions in force today were all drafted in the 1950s and 1960s; like national legal systems, they have very little to say expressly about information as such.

Perhaps the most explicit provision is to be found in the nearly identical texts of

the UN Covenant on Civil and Political Rights<sup>12</sup>, the European Convention<sup>13</sup>, and the American Convention<sup>14</sup>, where 'the right to freedom of expression' is defined (following the Universal Declaration on Human Rights<sup>15</sup>) to include 'freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers.' The two later instruments add the words 'either orally, in writing or in print, in the form of art, or through any other media of one's choice.' All three of these provisions are of course subject to the restrictions allowed by the immediately following paragraph – for the 'protection of the rights and reputations of others, national security, *ordre public*, public health and public morals,' to which catalogue the European Convention adds 'territorial integrity, the prevention of disorder or crime, the disclosure of information received in confidence, and the maintenance of the authority and impartiality of the judiciary.'

Other provisions in these international instruments may also deal with information flows, but not explicitly. For example, all three of the treaties protect 'privacy' (or 'private life'), 'family' (or 'family life'), 'home' and 'correspondence' – subject, at least in the case of the European Convention, to a long catalogue of exceptions. But only in the word 'correspondence' is there any reference to information flows; it is not immediately obvious, for example, that excessive (or even inaccurate or misleading) record-keeping by public authorities about their citizens would necessarily constitute infringements of those citizens' privacy.

International human rights law does in terms protect intellectual property: the UN Covenant on Economic, Social and Cultural Rights<sup>16</sup> (again following the Universal Declaration<sup>17</sup>) expressly recognises 'the right of everyone... to benefit from the protection of the moral and material interests resulting from any scientific, literary

or artistic production of which he is the author.'

Finally, both the UN Covenants declare that all peoples shall have the right to 'freely pursue their... cultural development' – without, however, considering how one nation's culture is to be protected against another's, especially when one of those Covenants protects the free flow of 'information and ideas of all kinds, regardless of frontiers.'

There is one other international treaty of marginal interest in this field: the Convention on the International Right of Correction, which entered into force in 1962 but to which only 11 States have so far become parties.<sup>18</sup> All this does is to give a State which considers that a news dispatch published about it abroad is false or distorted the right to require its version of the facts to be published in the form of a *communiqué*.

Apart from that, a Working Party of the UN Committee on the Peaceful Uses of Outer Space has been considering international broadcasting from satellites, and is currently preparing some 'Draft Principles on Direct Television Broadcasts.'<sup>19</sup> In their present version, these recognise the benefits from international direct television broadcasts, but they also declare unlawful trans-border broadcasts containing, *inter alia*, material 'aimed at interfering in the domestic affairs of other States, or which undermines the foundations of the local civilisation, culture, way of life, traditions or language,' so leaving the State in which such unlawful broadcasts are received with its rights of lawful reprisal unless it has consented to them.

That draft is of course still far from being adopted, but it is at first sight difficult to see how such principles can be reconciled with the right to freedom of expression as presently defined in international human rights law.

## *Needs for the Future*

Clearly, both national and international laws are lagging seriously behind the rapidly-developing information technology. Problem areas, and important conflicts of interest, are becoming apparent which will quite soon need to be regulated by law, but to which neither lawyers nor politicians have so far given any comprehensive attention. If mankind is to derive the maximum benefit from the hugely enhanced information flows which the new technology makes possible, and yet is to avert both the obvious and the not-yet-quite-so-obvious dangers of abuse, it hardly seems too soon for work to start on projects for future legislation.

The efforts made so far over data protection are creditable, but they are no more than a small start in one corner of the field. Information is crucial to many human activities, and so to many human rights. Indeed, it could be argued that one of the fundamental human rights should be access to as much accurate, complete, relevant and up-to-date information as everyone needs for the free and full development of their personality,<sup>20</sup> the enjoyment of their lawful rights and the performance of their lawful duties, and protection from the adverse consequences of the misuse of information by others.

Is it yet too early to consider the possibility of a future comprehensive International Convention on the Flow of Information?

## *Notes and References*

1. See the UK Report of the Committee on Data Protection, (1978) Cmnd. 7341, Appendix 5, Figs. 5 and 6.
2. Very few countries yet have "Freedom of Information" Laws: Sweden is probably the oldest, and the USA one of the most recent.
3. A recent case in the UK was reported in *The Guardian* for November 17, 1980: a man convicted of an offence could be sentenced to imprisonment, but only if he had been imprisoned before; his criminal record (wrongly) showed that he had, and the court sentenced him accordingly; he spent some time in prison before the mistake was rectified.
4. For a recent example of this in the UK, see the Report of the Committee on Data Protection, Cmnd. 7341, para. 9.19.
5. For example, quite apart from cost, the maximum number of satellites which can be placed in geostatic orbits without interfering with each other at any one time is probably only about 70 to 75.
6. States allocate their radio (and TV) frequencies nationally, under the overall *de facto* control of the International Telecommunications Union.
7. In 1980, for example, an information provider in the UK was induced to withdraw a guide to pornographic bookshops (not itself containing any pornographic, indecent or otherwise illegal material) which he had made available through the British Post Office's 'Prestel' viewdata service.

8. For example, there are currently substantial difficulties in finding an adequate form of legal protection for the intellectual property in computer programs.
9. See Sieghart, "Computers, Information, Privacy and the Law," *Journal of the Royal Society of Arts*, vol. CXXV, p. 456.
10. Austria, Denmark, Federal German Republic, France, Luxembourg, Sweden and Turkey. The UK has now also signed it.
11. Section 10(2). An English translation of this law (which has since been amended) may be found in the *UNESCO International Social Science Journal*, 1972, vol. XXIV, No. 3, as an appendix to a comparative study by the International Commission of Jurists on the right of privacy.
12. Article 19(2).
13. Article 10(1).
14. Article 13(1).
15. Article 19.
16. Article 15(1)(c).
17. Article 27(2).
18. Cuba, Cyprus, Egypt, El Salvador, Ethiopia, France, Guatemala, Jamaica, Sierra Leone, Uruguay and Yugoslavia.
19. At the request of the UN General Assembly, in Resolution 32/196.
20. Cf. Universal Declaration of Human Rights, Article 29(1).

# *Judicial Application of the Rule of Law*

## *Argentina: Administrative Tribunal Requires Evidence to Support Alleged Security Reasons for Dismissal of a Teacher*

In September 1976, Sister Lidia A. Cazzulino, a charity sister of the Order of Saint Francis, was disqualified from teaching in an institute of the Order and in other private schools for reasons of "state security". A disqualification decision results in the immediate dismissal of a teacher without compensation.

The decision to disqualify Sister Cazzulino was made by a "military delegate" who had been nominated to the Ministry of Culture and Education under the system introduced after the "coup" of March 1976. Law No. 21.381 approved by the President, who had acquired legislative powers after the coup, authorizes "military delegates" or the education authorities to disqualify from teaching persons who are "linked to subversive or disruptive activities; or those who recognize or support such activities openly, secretly or under cover" (Article 1). Article 2 states that dismissals resulting from disqualification are not eligible for compensation.

Following the appeal procedure for administrative decisions, Sister Cazzulino first appealed to the executive power, in this case the military junta. Having received no reply, she brought an action against the Ministry of Culture and Education in the Federal Court of Argentina. She claimed revocation of the decision to disqualify her, damages, including "moral damages", i.e. damages for loss of reputation, reinstatement to her former post, and compensation for her unpaid salary.

In reply, the Ministry of Culture and Education submitted that the Ministry was empowered to take such decisions under Law No. 21.381 and further that the executive was not under an obligation to prove before a court the existence of the "security reasons" under which they have been empowered by law to act.

The court of first instance found for the

claimant. The constitutional basis for Law No. 21.381 was not questioned. However, the judge was of the opinion that dismissals under it could take place only under administrative procedures which guarantee the right of defence, and upon sufficient evidence to support the alleged reason for dismissal. He stated further that the disqualification and consequent dismissal of Sister Cazzulino would seriously injure her reputation. The judge quashed the decision of the Ministry and ordered the reinstatement of Sister Cazzulino, finding that "there was no evidence to support her disqualification for security reasons".

The Ministry appealed against this decision submitting that the evidence required by the judge to prove reasons of national security "implied a limitation on the body responsible for internal security and permitted the wrong-doer to act with impunity". The Ministry contended that the interest of the community must prevail over the possible injury to the individual.

The case was heard by the Administrative Tribunal of Argentina, the highest tribunal of appeal dealing with matters of Administrative Law. The tribunal upheld the decision made at first instance. It held that the Ministry must provide evidence of the security reasons justifying the disqualification. In this case, there was insufficient evidence to link Sister Cazzulino in any way with "subversive or disruptive activities" or to show that she promoted such activities. The Ministry had stated that the security forces had found "compromising material" during a search of the house of the religious community in which the teacher lived. No explanation of the nature of this "compromising material" was given nor was it exhibited before the court. The only other evidence adduced before the court was the action taken by parents of a student in withdrawing their daughter from the institute where Sister

Cazzulino taught, because of the "post-conciliar"<sup>1</sup> tendencies of the institute. The military delegate attached to the Ministry of Culture and Education had concluded from this evidence that Sister Cazzulino was "jeopardizing the nation's existence, as she was spreading among the students marxist or communist doctrines that undoubtedly revealed her as a dangerous person".

The Tribunal held that the Ministry was not justified in imputing serious misconduct to the claimant and preventing her working in her profession, as the Constitution of Argentina guaranteed the right to teach, the right to work, and the right to a fair trial. The invalidity of the decision of the Ministry was confirmed and the Tribunal ordered that the claimant be awarded "moral damages". However, it did not confirm the order

that Sister Cazzulino be reinstated in her former post or that she be paid her salary since her wrongful dismissal. This final judgment was given in March 1981, 4 1/2 years after the decision was taken to dismiss her.

Despite the long delay, this decision of the Tribunal is of importance. It demonstrates that at least one sector of the Judiciary is ready to restrain arbitrary actions of the Executive which may be motivated by political reasons. The decision that it is not enough to invoke "national security reasons" when taking action that affects fundamental human rights, and that the Executive must prove the existence of these reasons before courts of law, is an indication that the Judiciary is ready to assume its role as the protector of the rights of the citizens of Argentina.

## ***India: The Right of Detained Persons to a Lawyer and to Visits***

Recent decisions of two panels of the Supreme Court of India have appreciably expanded the right of detained persons to have effective access to a lawyer. Both cases concerned petitions under Article 32 of the Constitution, which gives the right to move the Supreme Court for the protection of constitutionally guaranteed fundamental rights.

### ***Khatris and Others v State of Bihar and Others***

(Justices P.N. Bhagwati and A.P. Sen)

The petition in this case was filed on behalf of eighteen individuals blinded while in police custody in the State of Bihar. They sought compensation for violation of their fundamental rights un-

der Article 21 of the Constitution, which states that "no person shall be deprived of his life or personal liberty except according to procedure established by law".

In reviewing the circumstances which enabled these blindings to occur and to remain undiscovered for many months, the court noted that none of the eighteen prisoners had legal representation when first produced before a judicial magistrate nor when the remand orders were passed, and that only two or three of them managed to acquire a lawyer in the later stages of remand after already having spent a considerable amount of time in jail.

In its March 1979 decision in *Hussainara Khatoon's case* (3 S.C.R. 532) the Supreme Court had already held free legal assistance to be an "essential ingredient of reasonable, fair and just procedure for a person accused of an of-

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1) This term is used by Catholics to refer to the reforms introduced by the Vatican II Council during the papacies of Popes Jean XXIII and Paul VI.



fence"<sup>1</sup>, and thus implicit in Article 21 of the Constitution. The court therefore found it "difficult to understand" how the petitioners in this case had been retained in custody without access to a lawyer and expressed regret that, despite its 1979 decision which "declared the right to legal aid as a Fundamental Right of an accused person", most of the states of India have not yet taken the necessary steps to provide free legal services to indigent criminal defendants. The court also declared that budgetary considerations cannot be relied upon by a state to justify violations of fundamental rights.

In further defining the right of access to a lawyer, the court made two important points: the right arises from the time the accused is first brought before a magistrate, and the magistrate is obliged to inform the accused of this right. The relevant part of the decision is as follows:

"It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release, and also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage. We must, therefore, hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial but also at the stage when he is first produced before the magistrate and also when he is remanded from time to time.

"But even this right to free legal services would be illusory for an indigent accused unless the magistrate or the Sessions Judge before whom he is produced informs him of such right. It is common knowledge that about 70 percent of the people in the rural areas are illiterate and even more than that percentage of people are not aware of the rights conferred upon them by law. There is so much lack of legal awareness that it has always been recognised as one of the principal items of the programme of the legal aid movement in this country to promote legal literacy. It would make a mockery of legal aid if it were to be left to a poor ignorant and illiterate accused to ask for free legal services. Legal

aid would become merely a paper promise and it would fail of its purpose. The magistrate or the sessions judge before whom the accused appears must be held to be under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the State. Unfortunately, the judicial magistrates failed to discharge this obligation in the case of the blinded prisoners and they merely stated that no legal representation was asked for by the blinded prisoners and hence none was provided. We would, therefore, direct the magistrates and Sessions Judges in the country to inform every accused who appears before them and who is not represented by a lawyer on account of his poverty or indigence that he is entitled to free legal services at the cost of the State. Unless he is not willing to take advantage of the free legal services provided by the State, he must be provided legal representation at the cost of the State. We would also direct the State of Bihar and require every other State in the country to make provision for grant of free legal services to an accused who is unable to engage a lawyer on account of reasons such as poverty, indigence or incommunicado situation. The only qualification would be that the offence charged against the accused is such that, on conviction, it would result in a sentence of imprisonment and is of such a nature that the circumstances of the case and the needs of social justice require that he should be given free local representation. There may be cases involving offences such as economic offences..., where social justice may require that free legal services need be provided by the State."<sup>2</sup>

**Francis Coralie Mullin v.  
The Administrator, Union Territory  
of Delhi and Others**  
(Justices P.N. Bhagwati and  
S. Murtaza Fazal Ali)

The petitioner in this case, detained under the Conversion of Foreign Exchange and Prevention of Smuggling Activities Act, complained of

1) *Khatrai v Bihar*, writ petition No. 5670 of 1980, order of 19 December 1980, p. 6.

2) *Ibid*, pp. 8-10.

restrictions placed on her right to receive visits from her private lawyer as well as restrictions on visits from her daughter and sister. Pursuant to an order issued by the state under powers granted to it by the above mentioned Act, interviews with lawyers were permitted only by prior appointment and only in the presence of a customs or excise officer. Interviews with family members were limited to one per month.

### *Visits from a Lawyer*

The court first noted that the fundamental right to a lawyer implicit in Article 21 of the constitution is "not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention or filing a writ petition or prosecuting any claimer proceeding, civil or criminal..."<sup>1</sup> The requirement that the attorney's appointments with his detained client be fixed in advance by a magistrate caused needless hardship and inconvenience, said the court, and if the appointment provided did not conform with the practitioner's busy schedule "from a practical point of view the right to consult a legal adviser would be rendered illusory".<sup>2</sup>

Further, the court noted that requiring the presence of a customs or excise officer selected by the superior officer who has ordered the detention creates additional problems in scheduling interviews, and if the officer nominated for any reason fails to attend, prevents the detainee from consulting with his or her lawyer.

The court therefore ruled the regulations in question unconstitutional, and suggested that rules be devised which would entitle the detained person to interviews with a lawyer at any reasonable hour of the day, with appointments to be made by the jail superintendent. It was also suggested that the absence of a nominated customs or excise officer should not prevent an interview from occurring, and any officer who watches such an interview must not be within hearing distance of the detained person and lawyer.

### *Right to Life Includes Right to Live with Dignity*

Another issue raised by the petitioner was whether the regulation permitting her only one

visit per month by family members was consistent with Article 21 of the Constitution, which, as interpreted by the Supreme Court, permits only those deprivations of life and liberty which are fair and reasonable and according to a procedure established by law. In addressing this question, the court examined the content of the right to life. It stated in part:

"We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Of course, the magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human-self. Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights..."

"As part of the right to live with human dignity and therefore as a necessary component of the right to life, [the person in custody] would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as constitutionally valid under Article 14 and 21, unless it is reasonable, fair and just."<sup>3</sup>

The court then ruled that the regulation in question could not be considered fair and reasonable, particularly when convicted prisoners were accorded more frequent visits by their families, and suggested that a rule permitting visits twice weekly would meet constitutional requirements.

1) *Mullin v Administrator*, writ petition No. 3042 of 1980, judgment of 13 January 1981, p. 19.

2) *Ibid*, p. 20.

3) *Ibid*, pp. 15-17.

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