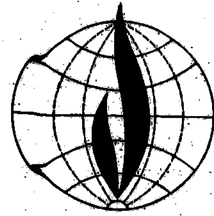
CIJL BULLETIN



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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

October 1983

Editor: Ustinia Dolgopol

THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)

The Centre for the Independence of Judges and Lawyers was created by the International Commission of Jurists in 1978 to promote the independence of the judiciary and the legal profession. It is supported by contributions from lawyers' organisations and private foundations. The Danish, Netherlands, Norwegian and Swedish bar associations and the Netherlands Association of Jurists have all made contributions of $1,000 or more for the current year, which is greatly appreciated. The work of the Centre during its first two years has been supported by generous grants from the Rockefeller Brothers Fund, but its future will be dependent upon increased funding from the legal profession. A grant from the Ford Foundation has helped to meet the cost of publishing the Bulletin in english, french and spanish.

There remains a substantial deficit to be met. We hope that bar associations and other lawyers' organisations concerned with the fate of their colleagues around the world will decide to provide the financial support essential to the survival of the Centre.

Affiliation

Inquiries have been received from associations wishing to affiliate with the Centre. The affiliation of judges', lawyers' and jurists' organisations will be welcomed. Interested organisations are invited to write to the Secretary, CIJL, at the address indicated below.

Individual Contributors

Individuals may support the work of the Centre by becoming Contributors to the CIJL and making a contribution of not less than SFr. 100.— per year. Contributors will receive all publications of the Centre and the International Commission of Jurists.

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Subscriptions to the twice yearly Bulletin are SFr. 10.— per year surface mail, or SFr. 15.— per year airmail. Payment may be made in Swiss Francs or in the equivalent amount in other currencies either by direct cheque valid for external payment or through a bank to Société de Banque Suisse, Geneva, account No. 142.548; National Westminster Bank, 63 Piccadilly, London W1V OAJ, account No. 11762837; or Swiss Bank Corporation, 4 World Trade Center, New York, N.Y. 10048, account No. 0-452-709727-00. Pro-forma invoices will be supplied on request to persons in countries with exchange control restrictions to assist in obtaining authorisation.

Inquiries and subscriptions should be sent to the
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C A S E   R E P O R T S

I N D O N E S I A

The Secretary of the Centre visited Jakarta from 14 to 18 September 1983. While there she was able to meet numerous lawyers and several independent observers and to discuss with them the situation of lawyers and, to a lesser extent, judges in Indonesia.

The Legal Profession

The composition of the legal profession in Indonesia is different from that of other countries. Under the constitution, every citizen has the right to appear in court, not only to represent himself but also to represent others. Because of this, many persons "practicing" law have not passed the qualifying examinations to become advocates and in many cases they have not had formal legal training. These are referred to as "bush lawyers". They may not appear before the high court.

Although there is some tension between the formally trained lawyers and the "bush lawyers", most of the former recognize the need for the "bush lawyers" in light of the scarcity of trained lawyers. There are only 1,000 private practitioners in Indonesia, and the majority of these practice in Jakarta.

No code of ethics or disciplinary system exists in Indonesia. However, Peradin (Indonesian Advocates Association, representing qualified private practitioners) has promulgated a code of ethics which governs the conduct of its members and has established a disciplinary system.

The other lawyers' associations are :

Persahi, Indonesian Lawyers' Association ("bush lawyers" may become members); Ikataw, Indonesian Association of Notaries; Persaja, Prosecutor's Association; and Mahindo, Indonesian Law Society. Litte information was obtained about these organisations.

The Bar Association

An outgrowth of the "New Order" in Indonesia or Pancasila (the creation of one national ideology) has been the establishment of a collective of functional groups known as Golongan Karya (Golkar). Although the leaders of Golkar claim it is not a political party, it holds the majority of seats in Parliament and the President and most cabinet officials are members. Essentially, Golkar is the ruling party.

During the past few years pressure has been placed upon the legal profession to consolidate and to become a part of Golkar. This would have the effect of putting the profession under government control. The leaders of Peradin have been threatened that if they do not cooperate, the legal profession will cease to be independent and Peradin will be banned as a separate organisation.

Harassment of Lawyers

Interference in a lawyer's ability to represent adequately his or her client can take many forms. In Indonesia, harassment and pressure is usually directed at the client rather than the lawyer.* Prosecutors often attempt to convince clients not to proceed with habeas corpus petitions or cases alleging torture of prisoners. In cases between private individuals "gangs" are hired to threaten tenants who are told to move out "or else". Although numerous complaints have been filed with the police, nothing has been done to bring to justice those responsible.

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* Cf. Bulletin 11, pp. 15 and 16. In that case both the lawyers and the client were threatened and the client was physically assaulted.

Lembaga Bantuan Hukum (LBH; the Institute of Legal Aid) has encountered situations where its clients have been told by officials not to use its services, accusing it of being a political organisation. Government attorneys often send correspondence to clients rather than the LBH attorney handling the matter.

LBH engages in two types of work: the representation of the poor and outreach work, i.e., educating people about their rights. Both of these are activities expected of lawyers, see Draft Principles on the Independence of the Legal Profession, paras. 29-32, in CIJL Bulletin 10 and the Universal Declaration on Justice, paras. 3.09, 3.22, reproduced herein. Despite this, members of LBH have been harassed by the government for carrying out their professional responsibilities.

The Judiciary

A major problem facing the judiciary is that the administration of the courts is under the control of the Ministry of Justice. Not only is the budget of the judiciary controlled by the Ministry, but posting, transfer and promotion are also controlled by it.

Both the Universal Declaration and the Draft Principles state that the assignment of judges to a post within a court is an internal administrative function to be carried out by the court. They also state that transfers should not occur without the permission of the particular judge and promotions should be made at the recommendation of an independent commission composed entirely or in its majority of judges. None of these principles is observed in Indonesia.

The outcome of this is that judges are afraid to decide cases adversely to the government. There is a fear of reprisals being taken for decisions unpopular with the government, particularly in political cases.

Conclusion

The independence of the legal profession and of the judiciary is essential for the preservation and protection of the Rule of Law. Yet the Indonesian government does not appear willing to permit either to be truly independent. To uphold these principles it is essential that the Bar Association remain independent of government control and that legal organisations working with the underprivileged and political detainees not be harassed either directly or through their clients. It is also essential that the judicial branch of the government be recognized as an independent and equal branch of government and not be controlled by the executive.

K E N Y A

Detained Lawyer is Released

John M. Khaminwa detained without charge or trial since 3 June 1982 was released on 12 October 1983 by the Kenyan authorities. He appeared to have incurred the displeasure of the government for his courageous representation of unpopular clients and those with private claims against government officials. Mr. Khaminwa is considered to be an excellent lawyer, with a strong commitment to the Rule of Law, who, because of this commitment, was willing to handle such cases. All sources agree that his representation of his clients was not politically motivated. (See CIJL Bulletin No. 10 for additional details.)

I R A N

Release of Detained Lawyers

Bulletins 3, 4 and 5 reported on the situation of lawyers in Iran. The case report in Bulletin 9 contained particulars of four members of the Bar Council who had been arrested during 1982 by order of an Islamic Revolutionary Court. No reasons were given for their arrest.

The CIJL recently received news that two of these lawyers, Me Djahanguir Amir Hosseyni and Me Batoul Kayhani, have been released. No reasons for their release were stated.

New Arrests and Continued Detention of Lawyers

The two other lawyers named in Bulletin 9 remain in detention; they are Me le Bâtonnier Madjid Ardalan Abdol and Me Taghi Damghani Mohammad.

In June or July of 1983, two more lawyers were arrested by the Iranian authorities, a former Bâtonnier, Mohammad Reza Djalali Naîni and Me Ahmad Djavid Tache. No reasons were given for their arrest. The CIJL has obtained the names of two additional lawyers presently in detention, Messrs. Nosrat Tabatabaï and Hadi Esmail Zadeh.

All the lawyers are detained in Evin prison.

The continued arrest and detention of lawyers in Iran without charge or trial seriously undermines the independence of the legal profession.

The Bar Association

During its July 1982 appearance before the Human Rights Committee (formed under the Covenant on Civil and Political Rights), Iran was questioned about the ability of lawyers to practice their profession freely and without fear of reprisals and about the organisation of the Bar Association. With respect to the first issue, no reply was forthcoming. As to the organisation of the Bar Association, the representative merely stated that the continuation of the Bar Association in its old form had not been feasible and a new law was passed in 1980. He said that the present Bar Committee was composed of legal experts, provincial judges and Supreme Court judges assigned by the Supreme Judicial

Council* and claimed that this insured the independence of the Bar.

An independent bar association, composed solely of lawyers, is essential for the protection of its members and the upholding and defence of their independence. For a bar association to be truly independent, its leadership must be freely elected by all the members; this does not occur in Iran.

UNITED STATES OF AMERICA

Political Influence - A Threat to the Independence of Judges

Although there is no single proper method of judicial selection, it is generally recognized that there should be safeguards against judicial appointments for improper motives. (See Universal Declaration on the Independence of Justice, paragraph 2.14a, reproduced in this Bulletin). The political manipulation of judgeships poses a serious threat to the independence of the judiciary and the Rule of Law.

Recently, the Democratic Party Chairman of the Bronx (a borough of the City of New York) blocked the renomination of two sitting judges of the New York State Supreme Court (the state trial court) because he had already made political commitments for the four available nominations for the Bronx Supreme Court. In the Bronx, the democratic nomination basically insures a candidate election.

Traditionally, judges who served creditably were renominated. Although not removing the underlying threat to the independence of the judiciary this tradition made it less likely that judges would be motivated by political considerations in reaching their decisions.

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* The Supreme Judicial Council is composed of the State Prosecutor General, the President of the Supreme Court of Cassation and three jurists.

The action of the Party Chairman has been severely criticized by the President of the New York State Bar Association, the President of the Bar Association of the City of New York and the New York State Attorney General. All have condemned his actions, calling them a serious blow to the independence of the judiciary. A resolution passed by the Judges' association states that the denial of renomination to capable judges "compromises the independence and integrity of the entire judiciary" and "will undermine a sitting judge's determination not to indulge in politics or take political considerations into account in the decision making process." (Judges in New York State are barred from taking an active rôle in politics.)

The judicial selection procedure has been criticized many times in the past and this event has caused a renewal of calls for reform.

In New Jersey, an unwritten political custom known as senatorial courtesy also undermines the independence of the judiciary and has the potential to make judicial appointments pawns in the controversy between the executive and the legislature. Judicial appointments are made by the governor with the advice and consent of the Senate. However, by invoking senatorial courtesy, a single objecting senator can prevent an appointment from being considered by the Senate Judiciary Committee or the full Senate. Members invoking this privilege do not have to offer explanations for their actions.

The potential for abuse in this system is a direct and serious threat to the independence of the judiciary. Some observers have attempted to justify the procedure, stating it is one of the few methods by which the legislature can force the executive to take its views into account. This argument ignores the need to maintain an independent and publicly respected judiciary by the appointment of qualified candidates who do not have to fear personal attacks by individual senators. It also ignores a basic tenet of New Jersey constitutional law that the judicial branch is a separate but equal branch of the government. Judicial appoint-

ments should not be used as weapons in power struggles between the executive and the legislature. This only serves to undermine public confidence in the courts and public respect for the Rule of Law.

THE PHILIPPINES

The Secretary of the Centre was in the Philippines from 1 to 14 September 1983. During this period of time, she had numerous opportunities to speak with and interview lawyers and judges about the status of the judiciary and legal profession. The following report is based on those interviews and the documentation provided by those interviewed.

The Judiciary

Members of the judiciary, at all levels, display an excess of deference to the executive. They are regarded as being subservient to the executive and the military and without the will to assert their independence.

Perhaps the Supreme Court's decision in Padilla v. Enrile, denying a petition for habeas corpus best exemplifies this problem. In this case the Court concluded it was without power to review the legality of continued detention without charge or trial when a Presidential Commitment Order (PCO) had been issued authorizing the detention. Although martial law had been terminated when the PCOs under consideration were issued, the "privilege" of the writ of habeas corpus remained suspended in the autonomous regions of Mindanao and in all other places with respect to persons detained for such crimes as rebellion, subversion or insurrection. (See ICJ Review 30 for additional details). The Court concluded that it did not have the authority to review the constitutionality of the decree continuing the suspension of the writ. The judgment also overruled a previous decision in which the Court concluded it did have such powers.

In effect, the Court renounced its judicial responsibility to oversee the legality of executive acts and abdicated its power as a separate but equal branch of government.

Both the Draft Principles on the Independence of the Legal Profession and the Universal Declaration on Justice make clear that it is essential for the preservation of an independent judiciary that judges have the power to review executive and legislative actions.

The Padilla decision also exemplifies another problem, which, although it does not affect the independence of the judiciary per se, has consequences for the judiciary, lawyers and Filippino society. Too heavy a reliance is placed on United States case law. Sometimes the US cases are misused, for example, quotes do not reflect the overall tone of an opinion nor the actual findings of the court and sometimes the cases cited are no longer good law in the United States. Perhaps the worst consequence of this is that it retards the growth of a truly Filippino body of law, which would provide innovative solutions to peculiarly Filippino problems.

Of major concern is the lack of facilities available to judges. A common complaint of judges is the lack of books, the lack of staff and the deplorable condition of the courtrooms and the low salaries. Judges often have to share court rooms and several cases are usually scheduled for the same day.

The problem is in part caused by the fact that provincial courts are funded by the localities. This opens the door for abuses of power and does not further the cause of an independent judiciary. Judges must stay on good terms with local leaders, including the local military commanders, in order to ensure minimally adequate funding.

There is a belief that the judges in certain areas, such as Mindanao, are too close to the military. In some provinces, military personnel have held briefing sessions for judges.

Those in government argue that the Judicial Reorganisation Act of 1980 cured many of the problems in the judiciary.* They claim it improved the efficiency of the Court and that the opportunity to appoint an entirely new judiciary allowed for the appointment of more competent judges.

Those outside the government disagree with this assertion. They state that there has been no improvement in efficiency. They note that most of the former judiciary was reappointed, despite the recommendation of the Integrity Council formed by the Minister of Justice that about half of the judges not be reappointed. Several of those interviewed stated that many of the appointments were made for political and personal reasons, and that regional origin also played a part. Apparently, the list of recommended appointees was submitted to the President by the Integrity Council and was reviewed by the President's advisors. Substantial changes were made and most of the sitting judges were reappointed.

Despite the government's assertion that the act would help to alleviate the backlog of cases because of the creation of new judgeships, this has not occurred. Many of the new positions remain vacant. Also the act did not address the procedural problems causing much of the backlog.

In addition, the authority and independence of the judiciary have been undermined by taking away juridiction over military personnel for the commission of ordinary crimes. Both the Universal Declaration and the Draft Principles state that the judiciary shall have jurisdiction directly or by way of review over all issues of a judicial nature. The Universal Declaration goes further and states: "The jurisdiction of military tribunals shall be confined to military offences committed by military personnel." Neither of these principles is being followed in the Philippines.

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* The act did not come into force until 1982.

The Legal Profession

The Integrated Bar of the Philippines (IBP) is the national bar association to which all lawyers must belong in order to practice. There are several other associations of lawyers and it appears that all are autonomous and free from government control.

The Human Rights Committee of the IBP has been fairly active, at least in recent years. It has been investigating and following the practice of hamletting (the removal of persons from their homes and the placing of them in militarily guarded camps). The IBP has been highly critical of the government's policies in this regard and has put pressure on the government to cease this practice.*

Those lawyers who have undertaken to represent the urban and rural poor or political dissidents are continually subjected to harassment and persecution. Several of the lawyers interviewed had received death threats and others had been told by military personnel that they were on a "hit" list. Clients are also harassed and are told by the police or the military to drop their cases. This occurs particularly in cases where the detained are charged with political crimes. Families are told that the detainees will be hurt if the lawsuit is not dropped.

The government tries to discredit lawyers by calling them subversives. This process of identification with clients and their causes undermines the independence of the legal profession and has the ultimate effect of making it difficult if not impossible for citizens to find lawyers willing to represent them. Lawyers must be able to practice their profession without fear of reprisal.

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* Defence Minister Enrile issued an order in early 1982 calling for a halt to this practice. However, according to IBP investigators, it has not stopped. Lawyers from the regions where it was occurring also state it is continuing.

One of the major problems facing lawyers representing those accused of political crimes is the lack of access to clients. The client is moved around from place to place and the authorities deny knowledge of their whereabouts.

Also, pressure is put on many people, particularly villagers who are not aware of their rights, to confess to crimes they have not committed. When lawyers hired by the families finally gain access to them, it is found that they have signed confessions whose contents they did not know or understand.

Conclusion

Serious threats exist to the independence of the judiciary and the legal profession. Judges are appointed because of their perceived loyalty to the executive and are either afraid or unwilling to decide cases in a manner unpopular with the government. The lack of adequate facilities makes it difficult for judges to carry out their functions and the need to rely on local authorities for funding creates a strong potential for abuse. Lawyers are harassed for representing clients or causes unpopular with the government and the military often tries to deny lawyers access to their clients.

Despite the harassment directed at them, many members of the Bar continue to undertake the representation of all those in need of legal services. Also, the Integrated Bar and other lawyers' associations have continued to speak out on human rights issues. The Filippino Bar is to be commended for its courage in continuing to assert its independence.

ACTIVITIES OF LAWYERS' AND JUDGES' ASSOCIATIONS

WORLD CONFERENCE ON THE INDEPENDENCE OF JUSTICE

The World Conference on the Independence of Justice was held in Montréal, Canada, from 5 to 10 June 1983. The delegates came from five continents and over 20 international organisations and professional bodies, including international courts. The conference was organised by the former Chief Justice of the Superior Court of Quebec, Jules Deschênes.*

The goal of the conference was to prepare a universal declaration concerning the independence of justice and to assist Dr. L.M. Singhvi, the Special Rapporteur, in his study for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The conference participants worked in five commissions, each dealing with a specific topic. These were: international judges, national judges, lawyers, jurors and assessors. Representatives of the ICJ and the CIJL participated in the conference and contributed basic working documents.

At the final plenary session on 10 June 1983, the delegates adopted the Universal Declaration on the Independence of Justice which appears on pages 27 - 55.

CIJL AFFILIATE

The CIJL is pleased to report that the National Bar Association of the Philippines has affiliated with the CIJL. The National Bar Association (NBA) is composed of judges and lawyers; it is the Philippine branch of the All-Asia Bar Association. The NBA is dedicated to upholding

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* At the time of the conference, Judge Deschênes was still sitting on the court. He resigned from office in July 1983.

the dignity and independence of the legal profession, participating more actively in the maintenance of a high standard of justice, promoting the independence of the judiciary and protecting and preserving the Philippine Constitution and the Rule of Law.

The President of the National Bar Association is Mr. Raul M. Gonzalez. The NBA's address is:

Suite 415-416 May Building
Rizal Avenue
Manila, The Philippines

The CIJL welcomes the NBA as its affiliate and wishes it success.

LAWASIA

LAWASIA Standing Committee on Human Rights

The meeting of the LAWASIA Standing Committee on Human Rights took place in Manila from 3 to 4 September 1983. Taking part in the meeting was the Asian Coalition of Human Rights Organisations, formed during the Standing Committee meeting in New Delhi in October 1982. The Secretary of the Centre attended the meeting as an observer.

Two papers were prepared for the conference: The Adequacy of Laws Affecting Women in the ESCAP Region, by Mrs. Pushpa Kapila Hingorani, and Preventive Detention in the ESCAP Region, by Mr. Justice S. Rangarajan. Extensive discussions took place and the participants expressed a desire to have comprehensive, comparative studies done on both topics.

There were also extensive discussions on the future activities and operations of the Asian Coalition. It was decided that the Coalition should become an independent

body. It will continue to work with LAWASIA in areas of mutual concern and interest and LAWASIA has offered to provide whatever assistance it can to the Coalition. Ceasar Espiritu of the Philippines was appointed temporary coordinator of the Coalition.

Several resolutions were passed by the Coalition. They were :

(a) The Coalition of Human Rights Organisations is outraged at and deplores the assassination of Senator Benigno Aquino, respected Opposition Leader in the Philippines, while returning to his homeland and requires that all independent measures be taken to secure the ends of justice;

(b) The Coalition of Human Rights Organisations deplores the continued imprisonment in Taiwan of Mr. Yao Chia-Wen and other persons imprisoned as a result of the Kaoshiung incident in 1979 and calls upon the Government of Taiwan to (i) improve the conditions of such prisoners; and (ii) grant early parole and amnesty to such prisoners;

(c) The Coalition of Human Rights Organisations condemns all forms of Preventive Detention in the region and decides to set up as soon as may be convenient fact-finding missions which will visit various countries in the LAWASIA region and report to the Coalition the state of the laws relating to preventive detention and the implementation of those laws in each such country;

(d) The First Meeting of the Asian Coalition of Human Rights Organisations being made aware of the grave situation relating to the oppression of women in Iran and the seeming total withdrawal of human rights from them condemns the continuous violation of women's basic human rights in that country and calls on the Government of Iran to specifically :

(i) Stop itself, its Revolutionary Guards and the mobs harassing and humiliating them;

(ii) Refrain from executing among others women accused of alleged political and anti-social activities;

(iii) Abolish laws, rules and procedures which discriminate against women in any way;

(iv) Re-establish the equal right of employment for women and their reintroduction to judicial and teaching positions particularly;

(v) Reintroduce and maintain the equal right of women to education.

AND FURTHER calls upon and urges all international bodies and governments concerned with human rights to exert positive influence upon the Islamic Republic of Iran to effect and implement immediate reforms affecting human rights to its women.

(e) The Coalition of Human Rights Organisations condemns the recent shooting down of a defenceless civilian aircraft even if it may have violated the airspace of another country and calls upon all responsible governments concerned to compensate adequately the relatives of the deceased passengers and crew.

(f) The Coalition of Human Rights Organisations condemns killings, salvaging or summary executions of criminals and dissidents in Indonesia, Iran, the Philippines, Sri Lanka and other countries in the region.

Eighth Biennial Conference of LAWASIA

The Eighth Biennial conference of LAWASIA took place from 8 to 13 September in Manila. The theme of the conference was Law and Social Development.

President Marcos had been scheduled to open the conference but was unable to appear and his remarks were read to the assembly. However, he did address members of the conference at a reception at Malacanang Palace. Mrs. Marcos spoke to the members at a luncheon meeting.

Conference topics included the rôle of the International Monetary Fund in the development process, laws governing transfers of technology, needed changes in national laws to encourage development and the need for a new international lending agency for loans to developing countries.

Numerous working papers were prepared for the conference and they are available through the LAWASIA Secretariat.

ANNUAL MEETING OF THE FREE LEGAL ASSISTANCE GROUP OF THE PHILIPPINES

FLAG held its annual meeting in Cebu City from 9 to 11 September 1983. It was organised by former Senator Jose W. Diokno, one of the principal founders of FLAG. The Secretary of the CIJL was invited to attend the meeting as an observer.

The commitment and dedication of those in attendance was most impressive. They had extensive knowledge of the problems being faced by the population in the areas where they practice and the laws touching on those problems.

FLAG attorneys must be practising lawyers. They agree to represent those unable to afford legal services, particularly those who find it difficult to obtain representation because of the sensitive nature of their cases. There are approximately two hundred lawyers in FLAG.

FIRST INTERNATIONAL SEMINAR-WORKSHOP ON

"MANAGING DELAY IN THE COURTS"

The First International Seminar-Workshop on "Managing Delay in the Courts" took place in Manila from 6 to 8 September. It was sponsored by the University of the Philippines, LAWASIA, the Integrated Bar of the Philippines, the Asia Foundation and the Foreign Service Institute.

The purpose of the Seminar-Workshop was to identify circumstances in which delay occurs and remedies that have been tried to deal with delay at different stages in the court process, and to examine on a case study basis the application of remedies to particular causes of delay. Dr. Purificacion V. Quisumbing acted as coordinator for the days the conference was in session.

The participants were judges, mostly from countries in the Asian region. Discussions are to be continued at the national level and it is hoped that a second seminar-workshop will be held within the next two years.

ARGENTINA

In July 1983, members of the International Association for the Protection of Industrial Property (AIPPI, its French acronym), in a letter addressed to the President, Reyenaldo Bignone, renewed their appeal of 31 July 1980 calling for the release of detained lawyers and information about the whereabouts and fate of disappeared lawyers. In addition, they called for the release of lawyer Eduardo Y. Jozami on humanitarian grounds (his health has deteriorated considerably during his imprisonment in June 1975, see Bulletin 9) and expressed their concern about the death threats addressed to Dr. Emilio Mignone of the Centre de Estudios Legales y Sociales (CELS, Argentine affiliate of the ICJ).

A report on these efforts has been published; it includes a description of the general situation in the country after the military coup of 24 March 1976 and excerpts from documents describing the treatment of detainees.

A R T I C L E

STATES OF EMERGENCY - THEIR IMPACT ON HUMAN RIGHTS*

The International Commission of Jurists recently completed a study on States of Emergency : Their Impact on Human Rights, which has an important relation to the independence of judges and lawyers. The 480-page publication (1) contains a detailed examination of states of emergency in 20 countries (Argentina, Canada, Colombia, Czechoslovakia, German Democratic Republic, Hungary, Greece, Ghana, India, Malaysia, Northern Ireland, Peru, Poland, Syria, Thailand, Turkey, Uruguay, USSR, Yugoslavia and Zaire), together with a summary of the replies to two questionnaires sent to 158 governments. An analysis of this material is made in a chapter of observations and conclusions, followed by a set of 44 recommendations for measures to be adopted at the national and international levels to ensure better respect for human rights during states of emergency.

The International Covenant on Civil and Political Rights recognises the right of governments in times of public emergency which threatens the life of the nation to derogate from many of its obligations under the Covenant "to the extent strictly required by the exigencies of the situation". There are similar provisions in the European and American Conventions on human rights.

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* Based on an article written by the Secretary of the CIJL for a colloquium on the Rights of the Defence under States of Exception in Latin America, held in Paris in May 1983.

(1) Those wishing to order a copy of States of Emergency - Their Impact on Human Rights, will find an order form on the last page of this Bulletin.

Unfortunately, there is a tendancy for some governments to regard any challenge to their authority as a threat to the life of the nation. This is particularly true of régimes which do not provide any lawful means for the transfer of political power and which in consequence are inclined to regard any criticism of the government as an act subversive of public order.

When these régimes feel threatened they often declare a state of emergency or other state of exception and use their emergency powers to suspend what remain of basic human rights and the procedures for their enforcement. Having dismantled the legal machinery for the protection of the citizen, they then permit their security forces to abuse 'non-derogable' rights, including the right to life and freedom from torture, or other cruel, inhuman or degrading treatment or punishment. There result such inhuman practices as anonymous arrests, secret detentions, disappearances, extra-judicial killings and the systematic practice of torture.

States of emergency pose serious problems for the independence of the legal profession and the independence of the judiciary. Lawyers are identified with their clients' causes and are harassed and persecuted. Their ability to represent their clients effectively is severely diminished. The power of the judiciary is undermined by laws creating special courts and by laws and decrees depriving the courts of jurisdiction to review executive and legislative actions.

The International Commission of Jurists decided to undertake this study of states of emergency in the hope of achieving a better understanding of the nature and causes of the systematic abuses occurring under many states of exception and to suggest safeguards which could be taken at the national and international levels to help prevent such occurrences.

Impact of States of Emergencies on Judges and Lawyers

The ability of judges and lawyers to exercise their profession freely and without fear of harassment takes on special significance in countries where states of exception are in place. Certain fundamental rights are deemed to be inalienable or nonderogable even in times of emergency. Lawyers have an important rôle in protecting and preserving human rights and in ensuring the equal protection of the laws.

When wider powers are given to the executive and police, they should be subject to, if anything, stricter controls to ensure that they are used only for the purpose for which they were introduced. The judiciary must be free to review executive actions and to ensure that emergency measures do not go beyond what is required in the circumstances. States of emergency should be governed by the principles of necessity and proportionality and these principles should form the framework for deciding the legality of the declaration, the continuance of the state of emergency, as well as of particular pieces of legislation or particular acts taken during the state of emergency. An independent judiciary is necessary to ensure that these principles are followed.

One of the most troublesome aspects of states of emergency is that they tend to become institutionalised, resulting in an erosion of the Rule of Law and in fundamental changes in the fabric of society. The principles of proportionality and necessity are hardly ever observed. The legislative and judicial branches become subordinated to the executive which may itself become subordinated to the military. In some cases, the state of emergency is declared by those who have actually caused the crisis or the threat to the life of the nation, as in the case of a coup d'état.

Also troublesomeis the erosion that takes place in the Rule of Law as a result of rule by decree. Government decrees form the basis of the new law, often abrogate portions of the existing constitution, and usually prohibit challenges to the legality of the decrees.

Of notable absence from the list of non-derogable rights is the right to due process of law. This right, in all its manifestations, is frequently infringed during states of emergency with grave consequences to the individuals concerned. The lack of due process of law is probably the most direct cause of gross violations of human rights, including the right to life.*

One of the practices most fundamentally affecting the right to due process of law is the use of administrative detention. Arrests frequently occur without warrant and detention is authorised for prolonged periods of time. Those arrested remain in incommunicado detention and the decrees authorising the detention do not provide for the right of counsel. If trials occur, they are before military tribunals, without the right to counsel of one's choice. Orders of release by civilian or military courts are often ignored. The prolonged use of incommunicado detention is directly related to the incidence of torture.

As noted earlier, some governments regard any challenge to their authority as a threat to the life of the nation. All those who criticise government policy or government actions are viewed as the enemy. Lawyers who represent the perceived "enemy" are considered to be "a part of the problem". They become identified with their clients' causes.

This process of identification occurs not only when lawyers are representing particular clients, but frequently occurs when lawyers engage in "outreach Programmes", i.e., educational programmes for disadvantaged groups to instruct them about their rights. Groups which

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* However, it must be noted that the Inter-American Commission of Human Rights has stated that the right to due process of law may not be derogated from in times of emergency, despite the fact that the relevant provisions in the American Convention are not classified as non-derogable by the Convention.

do not adhere to any particular ideology but are created to defend the interests of specific sectors of the society, such as youth, women, the rural poor or residents of a certain locality are treated as if they are part of the political opposition. Such organisations are often declared illegal or subversive by the authorities. Even where they are permitted to exist, those who participate in their activities are often harassed or persecuted.

Attacks against lawyers occur in order to dissuade them from representing clients or causes unpopular with the government. In this way, effective legal representation is denied to those the government disfavours. Lawyers become afraid to accept cases because of the possibility of reprisals being taken against themselves or their families.

This treatment ignores the rôle of lawyers in society and the need to have systemic means of redress of grievances. The Draft Principles on the Independence of the Legal Profession contain several statements about the social responsibility of lawyers. This responsibility includes the provision of services to all sectors of society, the promotion of the cause of justice by protecting human rights, economic, social and cultural as well as civil and political. The provision of legal services goes beyond legal representation before the courts, and includes education and counselling about rights and the ways to assert and secure them. Lawyers should work with organisations in deprived sectors of the community, informing them about relevant laws and the means of securing their rights.

Attacks on the independence of the judiciary are equally severe. Judges are persecuted for deciding cases adversely to the government, as by being dismissed or transferred to remote places. In this manner, a climate of fear is created so that no challenges to executive power will be forthcoming. Appointments to the bench are made for political reasons. Only candidates deemed sympathetic to the government are approved.

Of major impact are decrees and laws which deprive ordinary civil courts of jurisdiction over certain types of cases, usually "political" or "security" cases. Military or administrative tribunals are created, and often those appointed as judges lack any legal training. In many countries, the armed forces and police are made immune for acts committed during the period of the emergency. In other countries, charges can only be tried in military courts, despite the fact that the charge is an ordinary criminal offence and not a military offence.

Recommendations

The ICJ study concludes with a list of recommendations for inclusion in national laws and constitutions and for implementation at the international level. Some of these recommendations are of particular relevance to the independence of the judiciary and the legal profession, for example :

- The use of emergency powers to remove judges, to alter the structure of the judicial branch or otherwise restrict the independence of the judiciary should be expressly prohibited in the constitution;

- The ordinary courts should have jurisdiction over charges of abuse of power and human rights violations by security forces;

- The civilian judiciary should retain jurisdiction over trials of civilians charged with security offences;

- The following due process rights, as a minimum, should be respected in criminal proceedings during states of emergencies :
  - the right to be informed promptly and in detail of the charges,
  - the right to have adequate time and facilities for the preparation of one's defence, including the right to communicate with counsel,

- the right to a lawyer of one's choice,
- the right to an indigent defendant to have free legal counsel when charged with a serious offence,
- the right to be present at the trial,
- the presumption of innocence,
- the right not to be compelled to testify against oneself or to make a confession,
- the right to an independent and impartial tribunal,
- the right to appeal,
- the right to obtain the attendance and examination of defence witnesses,
- the right not to be tried or punished again for an offence for which one has been finally convicted or acquitted,
- the principle of non-retroactivity of penal laws;

- A detainee should be able to consult in private with a lawyer of his choice immediately after arrest and at any time thereafter;

- The detainee should have a right of representation in proceedings before any court, tribunal or committee.

It is a necessary corollary to the right to counsel that lawyers not be identified by the authorities or the public with their clients' causes and not be harassed, threatened or persecuted by reason of having advised or represented any client or client's cause.

Conclusion

The abuse of emergency powers is common and the only means of preventing such abuse is a major revision of national laws and international instruments which regulate states of emergency. There is need for continued publicity of their

negative ramifications and for scholarly writings concerning their effects on the life of a nation, particularly the Rule of Law. In time this may lead to a greater awareness of the dangers posed by states of emergency and increased pressure for reform.

D O C U M E N T

WORLD CONFERENCE ON THE INDEPENDENCE OF JUSTICE

UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE

	Preamble
I	International Judges
II	National Judges
III	Lawyers
IV	Jurors
V	Assessors

PREAMBLE

WHEREAS justice constitutes one of the essential pillars of liberty;

WHEREAS the free exercise of fundamental human rights as well as peace between nations can only be secured through respect for the Rule of Law;

WHEREAS States have long established courts and other institutions with a view to assuring that justice be duly administered in their respective territories;

WHEREAS the Charter of the United Nations has established the International Court of Justice as its principal judicial organ in order to promote the peaceful solution of disputes between States, in conformity with the principles of justice and international law;

WHEREAS the Statute of the International Court of Justice provides that the latter shall be composed of a body

of independent judges, elected regardless of nationality, which as a whole shall be representative of the main forms of civilisation and of the principal legal systems of the world;

WHEREAS various Treaties have established other courts endowed with an international competence, which equally owe exclusive allegiance to the international legal order and benefit from representation of diverse legal systems;

WHEREAS the jurisdiction vested in international courts shall be respected in order to facilitate the interpretation, application and progressive development of international law and the promotion of human rights;

WHEREAS national and international courts shall, within the sphere of their competence, cooperate in the achievement of the foregoing objectives;

WHEREAS all those institutions, national and international, must, within the scope of their competence, seek to promote the lofty objectives set out in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Optional Protocol to the latter Covenant and other pertinent international instruments, objectives which embrace the independence of the administration of the justice;

WHEREAS such independence must be guaranteed to international judges, national judges, lawyers, jurors and assessors;

WHEREAS the foundations of the independence of justice and the conditions of its exercise may benefit from restatement;

The World Conference of the Independence of Justice

RECOMMENDS to the United Nations the consideration of this Declaration.

- I -

INTERNATIONAL JUDGES

I - DEFINITIONS

1.01: In this chapter:

a) "judges" means international judges and arbitrators;

b) "court" means an international court or tribunal of universal, regional, community or specialised competence.

II - INDEPENDENCE

1.02: The international status of judges shall require and assure their individual and collective independence and their impartial and conscienscious exercise of their functions in the common interest. Accordingly, States shall respect the international character of the responsibilities of judges and shall not seek to influence them in the discharge of these responsibilities.

1.03: Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.

1.04: When governing treaties give international courts the competence to determine their rules of procedure, such rules shall come into and remain in force upon adoption by the courts concerned.

1.05: Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.

1.06: The ethical standards required of national judges in the exercise of their judicial functions shall apply to judges of international courts.

1.07: The principles of judicial independence embodied in the Universal Declaration of Human Rights and other international instruments for the protection of human rights shall apply to judges.

1.08: Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.

1.09: No reservation shall be made or admitted to treaty provisions relating to the fundamental principles of independence of the judiciary.

1.10: Neither the accession of a state to the statute of a court nor the creation of new international courts shall affect the validity of these fundamental principles.

III - APPOINTMENT

1.11: Judges shall be nominated and appointed or elected in accordance with governing constitutional and statutory provisions which shall, if possible, not confine the power of nomination to governments or make nomination dependent on nationality.

1.12: Only a jurist of recognized standing shall be appointed or elected to be a judge of an international court.

1.13: When the statute of a court provides that judges shall be appointed on the recommendation of a government, such appointment shall not be made in circumstances in which that government may subsequently exert any influence upon the judge.

IV - COMPENSATION

1.14: The terms of compensation and pension of judges shall be established and maintained so as to ensure their independence. Those terms shall take into account the recognized limitations upon their professional pursuits both during and after their tenure of office, which are defined either by their statute or recognized and accepted in practice.

V - IMMUNITIES AND PRIVILEGES

1.15: Judges shall enjoy privileges and immunities, facilities and prerogatives, no less than those conferred upon chiefs of diplomatic missions under and recognized by the Vienna Convention on Diplomatic Relations. Only the court concerned may lift these immunities.

1.16: Judges shall not be liable for acts done in their official capacity.

1.17:

a) In view of the importance of secrecy of judicial deliberations to the integrity and independence of the judicial process, judges shall respect secrecy in, and in relation to their judicial deliberations;

b) States and other external authorities shall respect and protect the secrecy and confidentiality of the courts' deliberations at all stages.

VI - DISCIPLINE AND REMOVAL

1.18: All measures of discipline and removal relating to judges shall be governed exclusively by the statutes and rules of their courts and be within their jurisdiction.

1.19: Judges shall not be removed from office, except by a decision of the other members of the Court and in accordance with its statute.

VII - JUDGES AD HOC AND ARBITRATORS

1.20: Unless reference to the context necessarily makes it inapplicable or inappropriate, the foregoing articles shall apply to judges <u>ad hoc</u> and to arbitrators in public international arbitrations.

- II -

NATIONAL JUDGES

I - OBJECTIVES AND FUNCTIONS

2.01: The objectives and functions of the judiciary shall include :

a) to administer the law impartially between citizen and citizen and between citizen and state;

b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights;

c) to ensure that all people are able to live securely under the Rule of Law.

II - INDEPENDENCE

2.02: Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

2.03: In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.

2.04: The judiciary shall be independent of the Executive and Legislature.

2.05: The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature.

2.06: a) No ad hoc tribunals shall be established;

b) Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law subject to review by the courts;

c) Some derogations may be admitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts;

d) In such times of emergency

   (i) civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts expanded where necessary by additional competent civilian judges;

   (ii) detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar procedures so as to ensure that the detention is lawful as well as to inquire into any allegations of ill-treatment;

e) The jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be a right of appeal from such tribunals to a legally qualified appellate court.

2.07: a) No power shall be so exercised as to interfere with the judicial process;

b) The Executive shall not have control over judicial functions;

c) The Executive shall not have the power to close down or suspend the operation of the courts;

d) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

2.08: No legislation or executive decree shall attempt retroactively to reverse specific court decisions nor to change the composition of the court to affect its decision-making.

2.09: Judges may take collective action to protect their judicial independence.

2.10: Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of belief, expression, association and assembly.

III - QUALIFICATIONS, SELECTION AND TRAINING

2.11: Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.

2.12: In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

2.13: The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

2.14: a) There is no single proper method of judicial selection but the method chosen should provide safeguards against judicial appointments for improper motives;

b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate.

2.15: Continuing education shall be available to judges.

IV - POSTING, PROMOTION AND TRANSFER

2.16: The assignment of a judge to a post within the court to which he is appointed is an internal administrative function to be carried out by the judiciary.*

2.17: Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the Rule of Law. Article 2.14 shall apply to promotions.

2.18: Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.*

V - TENURE

2.19: a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their detriment;

b) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office where such exists.

2.20: The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually.*

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* An asterisk refers to the corresponding explanatory note, at the end of Chapter II.

2.21: a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions;

b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office and be regularly adjusted to account fully for price increases;

c) Judicial salaries shall not be decreased during the judge's term of office, except as a coherent part of an overall public economic measure.

2.22: Retirement age shall not be altered for judges in office without their consent.

2.23: The executive authorities shall at all times ensure the security and physical protection of judges and their families.

VI - IMMUNITIES AND PRIVILEGES

2.24: Judges shall enjoy immunity from suit or harassment for acts and omissions in their official capacity.

2.25: a) Judges shall be bound by professional secrecy in relation to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings;

b) Judges shall not be required to testify on such matters.

VII - DISQUALIFICATIONS

2.26: Judges may not serve in an executive or a legislative capacity unless it is clear that these functions are combined without compromising judicial independence.

2.27: Judges may not serve as chairmen or members of committees of inquiry except in cases where judicial skills are required.

2.28: Judges shall not be active members of or hold positions in political parties.*

2.29: Judges may not practice law.*

2.30: Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property.

2.31: A judge shall not sit in a case where a reasonable apprehension of bias on his part may arise.

VIII – <u>DISCIPLINE AND REMOVAL</u>

2.32: A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33: a) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary and selected by the judiciary;

b) However, the power of removal may be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of a Court or Board referred to in 2.33(a).*

2.34: All disciplinary action shall be based upon established standards of judicial conduct.

2.35: The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

2.36: With the exception of proceedings before the Legislature, the proceedings of discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

2.37: With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.

2.38: A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

2.39: In the event a court is abolished, judges serving on this court shall not be affected, except for their transfer to another court of the same status.

IX - COURT ADMINISTRATION

2.40: The main responsibility for Court administration shall vest in the judiciary.

2.41: It shall be a priority of the highest order for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency; judicial and administrative personnel; and operating budgets.

2.42: The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirements to the appropriate authority.

2.43: The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

2.44: The head of the court may exercise supervisory powers over judges on administrative matters.

X – MISCELLANEOUS

2.45: A judge shall ensure the fair conduct of the trial and inquire fully into any allegation made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

2.46: Judges shall accord respect to the members of the Bar.

2.47: The state shall ensure the due and proper execution of orders and judgments of the Courts; but supervision over the execution of orders and judgments process shall be vested in the judiciary.

2.48: Judges shall keep themselves informed about international conventions and other instruments establishing human rights norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

2.49: The provisions of chapter II : National Judges, shall apply to all persons exercising judicial functions, including arbitrators and public prosecutors, unless reference to the context necessarily makes them inapplicable or inappropriate.

EXPLANATORY NOTES TO CHAPTER II

(The figures refer to the corresponding articles)

2.16: Unless assignments are made by the court, there is a danger of erosion of judicial independence by outside interference. It is vital that the court not make assignments as a result of any bias or prejudice or in response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the judiciary or similar body.

2.18: Unless this principle is accepted, transfer can be used to punish an independent and courageous judge, and to deter others from following his example. This principle is not intended to interfere with sound administrative practices enumerated in the law. Thus exceptions may be made, for example, where a judge in his early years is transferred from post to post to enrich his judicial experience.

2.20: This text is not intended to exclude part-time judges. Where such a practice exists, proper safeguards shall be laid down to ensure impartiality and avoid conflicts of interest. Nor is this text intended to exclude probationary periods for judges after their initial appointment in countries which have a career judiciary such as in civil law countries.

2.28: This text is not intended to permit membership of judges in political parties in countries where under law or practice such is excluded, but to lay standards limiting the scope of judicial involvement in countries where such membership is permissible.

2.29: See note 2.20.

2.33: In countries where the legal profession plays an indispensable rôle in maintaining the Rule of Law and judicial independence, it is recommended that members of the legal profession participate in the selection of the members of the Court or Board and be included as members thereof.

- III -

LAWYERS

I - DEFINITIONS

3.01: In this chapter:

a) "lawyer" means a person qualified and authorized to practice before the courts and to advise and represent his clients in legal matters;

b) "Bar Association" means the recognized professional association to which lawyers within a given jurisdiction belong.

II - GENERAL PRINCIPLES

3.02: The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.

3.03: There shall be a fair and equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

3.04: All persons shall have effective access to legal services provided by an independent lawyer to protect and establish their economic, social and cultural as well as civil and political rights.

III - LEGAL EDUCATION AND ENTRY INTO THE LEGAL PROFESSION

3.05: Legal education shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

3.06: Legal education shall be designed to promote, in the public interest, not only technical competence, but an awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

3.07: Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.

3.08: Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil or political rights.

IV - EDUCATION OF THE PUBLIC CONCERNING THE LAW

3.09: It shall be the responsibility of lawyers to educate members of the public about the principles of the Rule of Law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and the relevant and available remedies.

V - RIGHTS AND DUTIES OF LAWYERS

3.10: The duties of a lawyer towards his client include:

a) advising the client as to his legal rights and obligations;

b) taking legal action to protect him and his interest; and, where required,

c) representing him before courts, tribunals or administrative authorities.

3.11: The lawyer in discharging his duties shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

3.12: Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law and it is the duty of the lawyer to do so to the best of his ability. Consequently, the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

3.13: No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

3.14: No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.

3.15: It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to

raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

3.16: If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.

3.17: Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his professional appearances before a court, tribunal or other legal or administrative authority.

3.18: The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.

3.19: Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including:

a) absolute confidentiality of the lawyer-client relationship;

b) the right to travel and to consult with their clients feeely both within their own country and abroad;

c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work;

d) the right to accept or refuse a client or a brief.

3.20: Lawyers shall enjoy freedom of belief, expression, association and assembly;
and in particular they shall have the right to:

a) take part in public discussion of matters concerning the law and the administration of justice;

b) join or form freely local, national and international organizations;

c) propose and recommend well considered law reforms in the public interest and inform the public about such matters; and

d) take full and active part in the political, social and cultural life of their country.

3.21: Rules and regulations governing the fees and remuneration of lawyers shall be designed to ensure that they earn a fair and adequate income, and legal services are made available to the public on reasonable terms.

VI - LEGAL SERVICES FOR THE POOR

3.22: It is a necessary corollary of the concept of an independent bar that its members shall make their services available to all sectors of society so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

3.23: Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

3.24: Lawyers engaged in legal service programmes and organizations, which are financed wholly or in part from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

- the direction of such programmes or organization being entrusted to an independent board composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;

- recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgment.

VII - THE BAR ASSOCIATION

3.25: There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any othe body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists.

3.26: In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar association.

VIII - FUNCTIONS OF THE BAR ASSOCIATION

3.27: The functions of a Bar association in ensuring the independence of the legal profession shall be <u>inter alia</u>:

a) To promote and uphold the cause of justice, without fear or favour;

b) to maintain the honour, dignity integrity, competence, ethics, standards of conduct and discipline of the profession;

c) to defend the rôle of lawyers in society and preserve the independence of the profession;

d) to protect and defend the dignity and independence of the judiciary;

e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;

f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper procedures in all matters;

g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;

h) to promote a high standard of legal education as a prerequisite for entry into the profession;

i) to ensure that there is free access to the profession for all persons have the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;

j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;

k) to affiliate with and participate in the activities of international organizations of lawyers.

3.28: Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar association shall cooperate in assisting the foreign lawyer to obtain the necessary right of audience.

3.29: To enable the Bar association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice of

i) any search of his person or property,

ii) any seizure of documents in his possession, and

iii) any decision to take proceedings affecting or calling into question the integrity of a lawyer.

In such cases, the Bar association shall be entitled to be represented by its president or nominee, to follow the proceedings and in particular to ensure that professional secrecy is safeguarded.

IX - DISCIPLINARY PROCEEDINGS

3.30: The Bar association shall freely establish and enforce in accordance with the law a code of professional conduct of lawyers.

3.31: The Bar association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant. Although no court or public

authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar association with a view to its initiating disciplinary proceedings.

3.32: Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar association.

3.33: An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.

3.34: Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this declaration.

- IV -

JURORS

I - SELECTION OF PROSPECTIVE JURORS

4.01: The opportunity for jury service shall be extended without distinction of any kind by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

4.02: The names of prospective jurors shall be drawn from a jury source list compiled from one or more regularly maintained lists of persons residing in the court jurisdiction.

4.03: The jury source list shall be representative and shall be as inclusive of the adult population in the jurisdiction as is feasible.

4.04: The Court shall periodically review the jury source list for its representativeness and inclusiveness. Should the Court determine that improvement is needed in the representativeness or inclusiveness of the jury source list, appropriate corrective action shall be taken.

4.05: Random selection procedures shall be used at all stages throughout the jury selection process except as provided herein.

4.06: The frequency and the length of time that persons are called upon to perform jury service and to be available therefor, shall be the minimum consistent with the needs of justice.

4.07: All automatic excuses or exemptions from jury service shall be eliminated.

4.08: Eligible persons who are summoned may be excused from jury service only for valid reason by the court, or with its authorization.

II - SELECTION OF A PARTICULAR JURY

4.09: Examination of prospective jurors shall be limited to matters relevant to determining whether to remove a juror for cause and to exercising peremptory challenges.

4.10: If the judge determines during the examination of prospective jurors that an individual is unable or unwilling to hear the particular case at issue fairly and impartially, that individual shall be removed from the panel. Such a determination may be made on motion of a party or on the judge's own initiative.

4.11: In jurisdictions where peremptory challenges are permitted, their number and the procedure for exercising them shall be uniform for the same type of case.

4.12: Peremptory challenges shall be limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury.

III - ADMINISTRATION OF THE JURY SYSTEM

4.13: The responsibility for administration of the jury system shall be under the control of the judiciary.

4.14: The notice summoning a person to jury service shall be in writing, easily understandable, and delivered sufficiently in advance.

4.15: Courts shall employ the services of prospective jurors so as to achieve the best possible use of them with a minimum of inconvenience.

4.16: Courts shall provide adequate protection for jurors from threat and intimidation.

4.17: Courts shall provide an adequate and suitable environment for jurors, and jury facilities shall be arranged to minimize contact between jurors and parties, counsel and the public.

4.18: Persons called for jury service shall receive a reasonable allowance.

4.19: Employers shall be prohibited from penalizing employees who are called for jury service.

IV - JURY CONSIDERATION AND DELIBERATIONS

4.20: Procedures shall be provided to prevent a trial from being terminated because of unforeseen circumstances which would reduce the number of jurors.

4.21: Courts shall provide some form of orientation or instruction to persons called for jury service to increase prospective jurors' understanding of the judicial system and prepare them to serve competently as jurors.

4.22: In simple language, the trial judge shall:

i) directly following empanelment of the jury, give preliminary explanations of the jury's rôle and of trial procedures;

ii) prior to commencement of deliberations, direct the jury on the law.

4.23: A jury's deliberations shall be held in secrecy. Jurors shall not make public reasons for their decisions.

4.24: a) A jury shall be sequestered only for the purpose of insulating its members from improper information or influence.

b) Standard procedures shall be promulgated to make certain that the inconvenience and discomfort of the sequestered jurors is minimized.

- V -

ASSESSORS

I - STATUS

5.01: In defining assessor the following shall be considered: In general, on certain judicial, quasi-judicial bodies or administrative tribunals the assessor sits with a judge, magistrate or other jurist, to assist him in his duties. In most cases

he is a person who does not necessarily have legal training, but who has some specific professional qualification or socio-economic expertise that pertains to the subject-matter under consideration.

5.02: In some cases, the assessor shares with his legally-trained colleague responsibility for the decision to be rendered: this then becomes a multi-disciplinary judicial or quasi-judicial body.

II - APPOINTMENT

5.03: Unless he is selected by the parties unanimously, the assessor shall be appointed by a neutral authority not involved in the dispute.

5.04: Unless agreed upon by the parties or provided by law, the assessor shall be paid according to the decision of a neutral authority not involved in the dispute.

5.05: The assessor shall be selected for reasons of integrity and competence especially relevant to the matter to be considered by him.

5.06: The assessor shall enjoy a tenure which guarantees his independence; if he serves on a permanent basis he shall be guaranteed security, adequate remuneration and conditions of service.

5.07: Before commencing his duties, the assessor shall take an oath or affirmation of office.

III - EXERCISE OF MANDATE

5.08: In the decision-making process, the assessor shall be free from any orders or instructions by the authority which has appointed him, by the parties or by the professional associations to which he belongs.

5.09: The assessor shall have the right to participate in the decision with complete freedom and independence in the area of his jurisdiction.

5.10: The assessor shall behave in such a manner as will maintain the dignity of his position and the impartiality and independence of justice.

5.11: The assessor shall not sit in a case where a reasonable apprehension of bias on his part may arise.

5.12: The assessor shall be free to withdraw for generally-accepted reasons.

IV - POWERS AND IMMUNITY

5.13: The assessor shall be vested with the authority, immunity and powers necessary to carry out his duties.

5.14: The assessor shall not be sued or harassed for acts and omissions in his official capacity.

V - DISMISSAL

5.15: The assessor shall not be dismissed in the course of his mandate except for incapacity or misbehaviour.

BOOK REVIEW

The International Law of Human Rights, Paul Sieghart, Oxford University Press,

1983, 569 pp; £ 45 hardback

This book by Paul Sieghart is at once a codification of human rights in international law, a useful work of reference, and a handbook for practicising lawyers. It sets out the rights protected by the various universal and regional international instruments, including the African Charter of Human and Peoples Rights, and the procedures established for their defence. It deals with economic, social and cultural rights as well as civil and political rights.

After a historical introduction in which the concept of human rights is examined, in particular since the decisive turning point of the proclamation in 1948 of the Universal Declaration, there is a short account of the origin and content of all the main international human rights instruments. This first part outlines the general content of the code of international human rights. There follows in Part II an exposition, with commentary, of the articles of general application and the obligations flowing from them for States are examined. Part III is devoted to the rights and freedoms guaranteed. It is admirably structured and each right is examined as follows: the formulation it has received in each instrument is first stated, followed by a brief commentary, a historical note, and a selection of the relevant international case law. This presentation enables the reader not only to find quickly the definition of the right in each instrument, but also to see how these definitions converge and are related, so that the spirit and intent of each of these rights emerges.

It is, however, the last part, Part IV, which will be of the greatest use to the practitioner, as it gives a very full account of the procedures for application, enforcement and supervision in each instrument.

Accordingly, combining as it does a theoretical analysis of the content and scope at present given to the various human rights with an exposition of the practice as it has developed, it makes a real contribution to the understanding and application of international human rights.

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States of Emergency – Their Impact on Human Rights

A comparative study by the International Commission of Jurists, 1983.
Available in english (ISBN 92 9031 019 X). Swiss Francs 40 or US$ 19.50, plus postage.

This 480-page publication contains detailed studies on states of emergency in 20 countries during the 1960s and 1970s, a summary of the replies to two questionnaires sent to 158 governments, and an analysis of this material by the staff of the ICJ, followed by a set of recommendations. The country studies on Argentina, Canada, Colombia, Eastern Europe (Czechoslovakia, German Democratic Republic, Hungary, Poland, USSR, Yugoslavia), Greece, Ghana, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay and Zaire are based on papers prepared by experts, mostly from the countries concerned. The two questionnaires related to the law and practice under states of exception, and administrative detention. The concluding chapter of general observations and conclusions is followed by 44 recommendations for implementation at international and national levels.

★ ★ ★

Rural Development and Human Rights in South East Asia

Report of a Seminar in Penang, December 1981.
Published jointly by the ICJ and the Consumers' Association of Penang (CAP)
(ISBN 92 9037 017 3).
Available in english, Swiss Francs 10, plus postage.

Ways in which human rights of the rural poor can be adversely affected by processes of maldevelopment are illustrated with a wealth of detail in this report. The 12 working papers on such topics as land reform, participation in decision-making, the role and status of women and social and legal services are reproduced in full along with the important conclusions and recommendations of the seminar.

★ ★ ★

Human Rights in Islam

Report of a seminar in Kuwait, Geneva, 1982, 95 pp.
Available in english (ISBN 92 9037 014 9) and french (ISBN 92 9037 015 7),
Swiss Francs 10, plus postage.

The purpose of this seminar was to provide a forum for distinguished moslem lawyers and scholars from Indonesia to Senegal to discuss subjects of critical importance to them. It was organised jointly with the University of Kuwait and the Union of Arab Lawyers. The Conclusions and Recommendations cover such subjects as economic rights, the right to work, trade union rights, education, rights of minorities, freedom of opinion, thought, expression and assembly, legal protection of human rights and women's rights and status. Also included are the opening addresses, a key-note speech by Mr. A.K. Brohi and a summary of the working papers.

★ ★ ★

Civilian Administration in the Occupied West Bank

by Jonathan Kuttab and Raja Shehadeh. An analysis of Israeli Military Government Order No. 947, 44 pp. Published by Law in the Service of Man, West Bank affiliate of the ICJ.
Swiss Francs 8, plus postage.

This study examines the implications of the establishment of a civilian administrator to govern the affairs of the Palestinian population and Israeli settlers in the West Bank. Questions of international law and the bearing of this action on the course of negotiations over the West Bank's future are discussed.

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