

EUROPEAN CONFERENCE OF JURISTS ON THE INDIVIDUAL AND THE STATE

To mark International Year for Human Rights, the European Sections of the International Commission of Jurists organized a Conference on the Individual and the State. This Conference, which considered the essential legal elements to ensure the protection of the individual, was held at the Council of Europe, Strasbourg, on 26th and 27th October 1968. It was the second ICJ Conference held in Human Rights Year, the first being the Bangalore Conference on the Right to Freedom of Movement held in January, 1968.

The Conference was opened by the Honourable Mr. Justice T. S. Fernando, President of the International Commission of Jurists, and presided over by the Honourable René Mayer, President of *Libre Justice* and former Prime Minister of France.

The Conference was attended by one hundred and thirty participants from Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany, Ireland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom, and eight non-European invitees and thirteen observers from international organizations.

The Vice-Presidents of the Conference were :

The Honourable Per Federspiel

(Member of the Danish Parliament, former President of the Consultative Assembly of the Council of Europe)

Dr Wilhelm Martens

(former President of a Provincial Court of Appeal of the Federal Republic of Germany)

Professor Mattia Persiani

(Professor of Jurisprudence, University of Sassari, Italy)

The Honourable Samuel Silkin, Q.C., M.P.

(Chairman of the Legal Committee of the Council of Europe)

Judge Gustaf Petren, Deputy Ombudsman of Sweden, acted as Rapporteur and Dr Rudolf Machacek, Secretary-General of the Austrian Commission of Jurists, as Secretary of the Conference. Mr Pierre Juvigny, Maître des Requêtes au Conseil d'Etat, and Mr Norman S. Marsh, Q.C., Member of the United Kingdom Law Commission, were Special Consultants.

The Conference was followed by a meeting of the European National Sections, which was also held at the Council of Europe, on the afternoon of 27th October.

The Conference had referred to the meeting of European Sections the formulation of the text of a Resolution on Czechoslovakia. The text of the Resolution, as adopted by the meeting, is given immediately below and is followed by the Conclusions and General Recommendations of the Conference itself.

RESOLUTION ON CZECHOSLOVAKIA

This European Conference of Jurists,

ENDORSES the Statement of the International Commission of Jurists issued on the 21st August 1968 condemning the invasion of Czechoslovakia as a clear and indefensible violation of the Charter of the United Nations and of the rules of International Law and as an attempt to impose by military force political, economic and military control over a free sovereign people ;

ASSERTS that the right of self-determination should be respected in regard to all nations, old and new, in all continents, without discrimination ;

REJECTS as indefensible the pressures and intimidation used to deprive the Czechoslovak people of the management of their own policies and affairs ;

INVITES the International Commission of Jurists to continue the study of the legal issues involved and to publish its Report.

CONCLUSIONS OF THE CONFERENCE

Preamble

WHEREAS the Universal Declaration of Human Rights recites that it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, and enumerates the human rights and fundamental freedoms which States have undertaken to promote and observe.

AND WHEREAS by the European Convention on Human Rights (1950) the Member States resolve to take the first steps for the collective enforcement of certain of the Rights set forth in the Universal Declaration and guarantee the enjoyment of the rights and freedoms set forth in the European Convention,

AND WHEREAS by Article 2 paragraph 1 of the International Covenant on Civil and Political Rights (1966) each State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

AND WHEREAS by Article 2 paragraph 2 each State party to the said Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant,

RECALLING that the International Commission of Jurists has, at its Congress of New Delhi (1959), stressed that it is a function of the legislature in a free society under the Rule of Law to endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights and to create and maintain the conditions which will uphold the dignity of man as an individual, which dignity requires the recognition of his fundamental rights,

AND RECALLING that the International Commission of Jurists has, at the Congress of Rio de Janeiro (1962) on 'Executive Action and the Rule of Law', concluded that the Rule of Law depends upon effective government capable of maintaining order and promoting social and economic development on the one hand and upon adequate safeguards against the abuse of State power on the other,

AND RECALLING that the Assembly for Human Rights held at Montreal in March 1968 and the United Nations International Conference on Human Rights held at Teheran in April/May 1968 recognised that many aspects of modern technological evolution presented new dangers to human rights and to human dignity and recommended that a study be undertaken in this field,

AND REALISING that the ever expanding scope of State regulation resulting from increasing economic, social and scientific activity necessitates a more complete and effective system of protection for the individual,

AND REALISING that one of the primary responsibilities of the State towards the individual is to provide adequate and effective mechanisms for the protection and furtherance of his fundamental rights and freedoms ;

NOW THEREFORE this European Conference of Jurists adopts the following Conclusions :

Part I: Essential Safeguards

1. *Guarantee of Rights*

Fundamental human rights and freedoms should be guaranteed by law, preferably by a written constitution.

2. *Separation of Powers*

The principle of separation of the legislative, executive and judicial powers of the State should be respected.

3. *Independence of the Judiciary*

The independence of the judiciary should be secured. Such independence implies freedom from interference by the executive and legislature and freedom to interpret and apply the laws

of the land in accordance with the Rule of Law and the fundamental principles of justice. In order to ensure the independence of judges it is essential that their appointment should be free from political interference or patronage ; they should enjoy full security of tenure and should receive adequate remuneration which cannot be altered to their disadvantage during their term of office.

(For more detailed requirements see New Delhi Conclusions on the Judiciary and the Legal Profession under the Rule of Law).

4. *Availability of Remedy*

Remedies should be provided by law against infringements of the rights of the individual by State organs, public authorities or individuals.

5. *Speed of Remedy*

Judicial process should provide for the disposal of cases without undue delay.

Civil and criminal proceedings should be free from unnecessary procedural difficulties and technicalities, which result in undue expense or delay and present other obstacles to the speedy vindication of rights. To obviate delays it is essential that there should be an adequate number of judges and court officials.

6. *Fair Hearing*

There should be fairness and objectivity in judicial and quasi-judicial proceedings. This entails not only an objective tribunal, giving each party a fair and equal opportunity to present his case, but also the existence of an adequate system of legal aid.

7. *Judicial Appeal and Review*

There should be an effective right of appeal from the decisions of a lower court to at least one higher court. Administrative acts which may injuriously affect the rights of the individual should be subject to judicial review.

8. *Availability of Evidence*

The defence in a criminal case, a party to a civil action and a party before an administrative tribunal should have access to all oral and documentary evidence relevant to his case or to the matter under investigation, and effective machinery for com-

elling the attendance of witnesses and for ensuring the production of documents is essential. In any cause in which the State or a public authority is involved, the State should not be allowed to prevent the production of relevant documents or other evidence unless the court comes to the conclusion that the security of the State, or the fair administration of justice, would be seriously prejudiced by such production.

9. *Safeguards against Retroactive Legislation*

Constitutional or legal safeguards should ensure that the rights of an individual are never adversely affected by retroactive legislation or regulations.

10. *Provision against Double Jeopardy*

Due regard should be had for the principle, *Nemo debet bis vexari pro eadem causa*.

Part II: Administrative Acts

11. *Legal Basis*

Public authorities may only make decisions that are based on existing law, and in furtherance of the object envisaged by the law under which they are made.

12. *Prior Consultation*

Where an executive or administrative order ultimately affects the rights or interests of individuals, the public authority concerned should consult the organisations or groups interested in the measure contemplated and give to interested individuals a reasonable opportunity to present their views.

13. *Motivation for Order*

When an administrative order is made which affects or is likely to affect the rights of the individual, the reasons for the order should be fully stated.

14. *Concept of State Responsibility*

The State should be liable for damage arising from the negligence or wrongful acts of its executive and other organs. Under the

concept of State responsibility, the State should also be liable in principle for damage resulting from those of its operations which cast upon an individual a burden which is unreasonable in relation to the rest of society, particularly when his ability to earn his livelihood, his family rights or his property rights are adversely affected.

15. *Minimum Requirements for Quasi-Judicial Acts*

Save in periods of genuine public emergency, where an executive or administrative body has a discretionary power to make orders amounting to an adjudication affecting the rights or interests of an individual, the following requirements should be observed:

- (a) There should be adequate notice to the interested parties of the contemplated measures and the reasons therefor.
- (b) The interested parties should have an adequate opportunity to prepare their case, including the right of access to all relevant data.
- (c) The interested parties should be given the right to be heard, to present evidence and to meet opposing arguments and evidence.
- (d) The interested parties should be given the right to be represented by counsel or other qualified person.
- (e) Notice of the decisions reached and of the reasons therefor should be communicated without undue delay to the interested parties.

Part III: Extra-Judicial Protection

16. *Administrative Protection*

Consideration should be given to the provision of simple, inexpensive extra-judicial remedies within the administration itself for correcting administrative errors or abuses. Any such extra-judicial remedies should be capable of being grafted upon the existing legal and political systems.

17. *Ombudsman System*

The institution of 'Ombudsman', now operating in Denmark, England, Finland, Guyana, New Zealand, Norway, Sweden and

Tanzania, has proved of considerable assistance both in protecting the rights of the individual and in achieving a more efficient administration. An institution of this or a similar nature would be a valuable adjunct to the existing judicial safeguards in any jurisdiction, especially in countries which do not have a system of Administrative Courts.

Part IV: Control over Assumption of Emergency Powers

18. Restriction on Assumption of Emergency Powers

The restrictions on the assumption and exercise of emergency powers, as set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the United Nations Covenant on Civil and Political Rights, should be the minimum adopted in any State. Steps should be taken by every State to have at least these restrictions embodied in its basic law.

19. Judicial Control

There should be a system of judicial control over the assumption and exercise of emergency powers by the executive with a view to

- (a) determining whether the circumstances have arisen and the conditions have been fulfilled under which the powers may be exercised ;
- (b) limiting the extent to which such emergency powers may be exercised in derogation of the fundamental rights of the individual ; and
- (c) giving the courts a supervisory jurisdiction to ensure that emergency powers are used only for the specific purpose for which they were granted, and that they are not exceeded. The courts should have the power to grant effective remedies in cases of misuse or abuse of emergency powers.

20. Confirmation by Legislature

Wherever the executive power is legally authorised to declare a state of emergency, the declaration should be compulsorily referred to the legislature for confirmation within the shortest possible time. The legislature should retain control over the duration of emergency periods, which should only be extended

from time to time when the legislature is satisfied that extension is necessary.

21. *Periodic Legislative Review*

An obligation should be imposed upon the executive power to submit its programme and procedures to legislative review from time to time during an emergency.

22. *Safeguards against Continuing Arbitrary Confinement*

During periods of public emergency, legislation authorising preventive detention should contain safeguards for the individual against continuing arbitrary confinement by requiring in each case a prompt hearing and decision upon the need and justification for the detention. Such decision should always be subject to judicial review.

GENERAL RECOMMENDATIONS OF THE CONFERENCE

The principal task of the Conference was to set out the specific legal elements necessary to ensure the protection of the individual; these are embodied in the Conclusions of the Conference. Realising, however, that the proper safeguard of human rights cannot be assured solely by domestic legal remedies and that a proper political, social and economic structure is an essential prerequisite for the effective protection of human rights, the Conference makes the following General Recommendations :

1. *Economic and Social Rights*

The establishment and observance of standards that recognise and foster not only the political rights of the individual but also his economic, social and cultural rights and security — in accordance with the European Social Charter (1961) and the International Covenant on Economic, Social and Cultural Rights (1966) — is one of the first essentials.

2. *Public Opinion*

A further essential is a society of citizens conscious of their rights, resolute in their support of the institutions designed to safeguard them, and vigilant against erosion of the right to receive and impart information, the rights of free expression, assembly and petition and civil and political rights in general.

3. *Education*

It follows that there must be an adequate scheme of education in principles of human rights which utilises to the full all modern means of mass communication such as radio, television, films, newspapers and publications. Further, human rights should figure prominently in the curricula of schools and in the education of public officers.

4. *Free Press*

In order to ensure that the public is conscious of its rights and maintains its interest in human rights' problems, it is essential that there should also exist a free press, which not only truly represents different shades of public opinion, but also provides a medium for the expression of different points of view and of general or individual grievances.

5. *Elections*

A system of periodic and genuine elections on the basis of universal and equal suffrage by secret ballot must form the basis of government authority.

6. *Periodic Review*

To ensure that laws and procedures conform to the provisions of the Universal Declaration of Human Rights, there should be a system of periodic review of legislation. A competent body should be authorised by the legislature to examine existing legislation and formulate appropriate suggestions to better secure the rights of the individual and their protection.

7. *Advisory Institutions*

A valuable adjunct to State organs of protection would be an institution or institutions to examine the causes of infringements of different rights of the individual and to recommend legislative and administrative measures to prevent such infringements by State officials and other persons.

8. *Earlier Conclusions*

The individual rights which should be safeguarded are enumerated in the Universal Declaration of Human Rights, and the relevant international conventions; they have in many instances been defined by earlier Congresses and Conferences of the International Commission of Jurists, particularly the Congress of New Delhi (1959), the Conference of Lagos (1961), the Congress of Rio de Janeiro (1962), the Conference of Bangkok (1965) and the Ceylon Colloquium on the Rule of Law (1966). Accordingly, this Conference has not attempted to redefine them all.

In the light of present day evolution, the Conference considers that special attention should be drawn to two other Conferences of the International Commission of Jurists, each held to examine a specific right in depth, namely the Nordic Conference on 'The Right to Privacy' (1967) and the Bangalore Conference on 'The Right to Freedom of Movement' (1968). The Conference also wishes to draw special attention to the Conclusions of the United Nations Seminar held at Kingston, Jamaica, in 1966 on 'Effective Realisation of Civil and Political Rights at the National Level' and other recent United Nations Seminars on human rights.

9. *International Jurisdictions*

While the protection of the individual is most effectively safeguarded at the national level, international judicial and other effective supervision is also necessary. In order to give full effect to the provisions of the Universal Declaration, regional conventions and other arrangements should be encouraged. Such conventions should provide effective implementation machinery analogous to that provided by the European Convention on Human Rights. Consideration should also be given to the setting up within the framework of the United Nations of a Universal Court of Human Rights that could act as a final court of appeal in all matters related to human rights. In any international machinery provided, the right of individual petition is regarded as essential. Consideration should also be given to the establishment of an international jurisdiction to deal with crimes against humanity.

10. *United Nations High Commissioner for Human Rights*

The adoption of the proposal now before the General Assembly of the United Nations for the establishment of a U.N. High Commissioner for Human Rights with an independent status should be encouraged.

11. *Ratification*

Finally, this Conference urges every country

- (a) to adhere to the principles embodied in the European Convention for the Protection of Human Rights and Fundamental Freedoms (including Article 25 and the Articles relating to the jurisdiction of the Court), and those in the European Social Charter ;
 - (b) to sign and ratify the International Covenant on Civil and Political Rights (including the Optional Protocol), the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all forms of Racial Discrimination ;
and
 - (c) to take early steps by legislation or otherwise to ensure the effective existence in its legal and administrative structure of the essential and basic elements necessary for the protection of the individual.
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