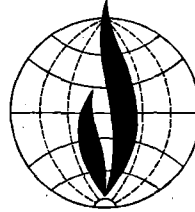


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No 23

December 1979

Editor: Niall MacDermot

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Editorial

1979 has been a remarkable year for human rights. It has seen the toppling in Africa of three most brutal dictators, Amin, Bokassa and Macias. One of them, Macias, has been brought to trial before an internationally observed tribunal to answer for his crimes.

Military regimes have given way to a return to civilian rule in Latin America (Bolivia, Ecuador and Nicaragua), in Africa (Ghana and Nigeria) and in Asia (Bangladesh). There has been progress towards greater democracy in Brazil. President Park's extraordinary assassination by the head of his security organisation offers the possibility of similar progress in South Korea. In Indonesia and many other countries tens of thousands of political prisoners have been released. The course of some of these events is described in this Review. More remarkable, the indomitable spirit of the people of Bolivia supported by their elected president, the political parties, the Congress and above all the trade unions, broke the attempt by Colonel Natush to reimpose a military regime. The aborting of this coup is one of the most significant and hopeful events of the year.

1979 has also seen the fall of the Shah of Iran, overthrown by an Islamic revolution largely inspired by Ayatollah Khomeini. The results of this revolution are yet to be discerned, and its repercussions are reverberating throughout the world at the time of going to press with the illegal detention of the US embassy staff in Teheran.

☆ ☆ ☆ ☆ ☆

This issue contains a somewhat longer article than usual. It is a comparative study of the law and practice relating to the detention of suspects before trial in Belgium, England, France and West Germany. One of the authors is a former Secretary to the European Commission on Human Rights. The time which suspects spend in detention before their guilt has been determined sometimes lasts for a year, two years, or even more and makes a mockery of the presumption of innocence. It betrays an indifference to the rights of those who are the victims of the law's delays.

This article says little about the conditions of detention, but in some European countries conditions of detention awaiting trial are worse than those of prisoners serving a sentence, with long and soul-destroying periods in solitary confinement, with no work, and with lengthy delays between interrogations by the examining magistrate.

The principles governing release on bail are virtually identical in all countries, but the practice varies widely. Nothing short of greater pressure on the courts and, in the civil law countries, on the police who assist the examining magistrates in collecting evidence, is likely to cure this evil. A simple solution might be a rule that suspects in custody must be released after six months if not by then sent for trial unless, in exceptional circumstances,

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a higher court authorises a longer period of detention. Another remedy would be to adopt a simple speedy appeal procedure against a refusal of bail, comparable to the english system of an immediate appeal to a High Court Judge in Chambers.

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The format of the ICJ REVIEW has been altered to the standard A5 size. This establishes a uniform size for the ICJ Review and for other ICJ publications printed by offset, namely the quarterly NEWSLETTER, the twice yearly BULLETIN of the Centre for the Independence of Judges and Lawyers and special reports. Those wishing to receive all ICJ publications are invited to become Associates. An application form will be found below.

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Human Rights in the World

EL SALVADOR

The recent military coup in El Salvador has again focused attention on the critical political situation in the smallest Central American country. On 15 October 1979, two Army colonels deposed the government of Gen. Carlos Humberto Romero, who had held power since 1 July 1977. A five member junta, also comprising three civilians, was installed. The junta promptly announced its intention of creating a climate of peace in the country by establishing the foundations for sweeping social and economic transformations. It promised to hold free elections within a reasonable time, and proclaimed that political parties of all ideologies could be organised and would be legalised. The government also announced an amnesty for all political prisoners and for Salvadoreans in exile, as well as the dissolution of ORDEN (Nationalist Democratic Organisation), a paramilitary body fully supported by the government, and other right-wing paramilitary groups. After denouncing the violation of human rights under the corrupt regime of President Romero, the junta declared that only a genuinely democratic government could surmount the present chaos.

El Salvador has indeed been experiencing chaos and violence in the past few years (See ICJ Review, No. 20, June 1978, pp. 10-14). During 1978, the Inter-American Commission of Human Rights, a British Parliamentary delegation, and a Unitarian Universalist Service Committee mission

headed by U.S. Congressman Robert F. Drinan visited El Salvador to examine the human rights situation. These missions have confirmed the occurrence of numerous killings, detentions without trial, disappearances, torture, and persecution of peasants, trade unionists, political parties and Catholic churchmen.

The Inter-American Commission of Human Rights reached unequivocal conclusions that point to a significant and serious deterioration of fundamental rights. Among these are:

- Numerous persons died as a result of the activities of security forces and ORDEN. Gen. Romero had promoted ORDEN while he was Minister of Defence and was its honorary president when he became head of state.
- The security forces and ORDEN committed acts of torture and physical and psychological ill-treatment in many cases.
- The security forces committed grave violations of the right to liberty by carrying out arbitrary detentions. They operated secret detention centres where several persons whose arrest and detention were denied by the government were kept under extremely cruel and inhuman conditions. In fact, at the headquarters of the National Guard, the members of the Commission inspected secret cells measuring 1 metre long by 1 metre wide. The cells were completely dark and its walls were covered with cockroaches. According to the National

Guard, these cells were used for drunken detainees to sober up and to keep explosives that could not be exposed to light.

- The laws of El Salvador contain provisions guaranteeing the protections of due process of law, but in practice legal remedies are not effective to protect human rights. This is particularly true in the case of disappeared persons.
- The concentration of land ownership, and of economic power in general, with the incident misery of peasants, explain in good measure violations of human rights and thwart the enjoyment of economic and social rights. These conditions, however, in no manner justify the violation of civil and political rights. In fact, they hinder the effective operation of a political system that could constructively meet the real social and economic needs of the country.

The unequal distribution of land has been historically a source of conflict in El Salvador. In colonial times, the private freehold estate coexisted with communal lands reserved for the Indian population. But at the end of the 19th Century communal lands were abolished. This brought about the development of coffee plantations and commercial agriculture in general. El Salvador is at present the third largest exporter of coffee in the world. The abolition of common lands and the dispossession of its cultivators resulted in several uprisings that took place from 1872 to 1898. In one of these disturbances the cutting off of the hands of land judges responsible for allocating common land as private property was reported.

Then, in 1932 some 17,000 peasants were killed by government forces during a rebellion of the rural population of the

central highlands. These people had suffered from the introduction of coffee and their village communities had retained a degree of social cohesion. Despite these uprisings, land ownership remains highly concentrated to this day.

During 1979, the situation in El Salvador has not improved. The Law to Protect and Guarantee Public Order, which according to an ICJ report by Donald Fox "results in serious infringements of the right of free speech... reduces the independence of the judiciary... and invites an abuse of power on the part of the security forces"¹, was repealed in February 1979. This did not, however, signal a return to legality. Violence has erupted often in the past few months. In May 1979, 23 demonstrators outside the Cathedral in San Salvador were fired upon by the police and died. Members of the Popular Revolutionary Bloc occupied several foreign embassies to press for the release of three of their leaders held by the government. During one such occupation, fourteen persons were killed by the police outside the Venezuelan embassy. A day later, left-wing gunmen killed the education minister. The government then imposed the state of siege. In September 1979 the President's brother was slain.

Violence has not abated following the overthrow of Gen. Romero. Many people have died in almost daily clashes of demonstrators and police. Some militant left-wing groups have announced that they will suspend their activities to see if the government will put its pledges into action. The Archbishop of El Salvador, a leading defender of human rights, has also indicated that he favours a dialogue with the junta. It is to be hoped that the present government will indeed set the country on the course to democracy. If not, violence will probab-

1) *The Application of the November 1977 'Law of Defence and Guarantee of Public Order'*, Donald T. Fox, ICJ, 1978.

ly continue and the likelihood of generalised popular insurrection, a right guaranteed by the Salvadorean Constitution, will increase.

There have been suspicions that the government is dragging its feet in carrying out the promised reforms. An amnesty decree has not yet resulted in the liberation of political prisoners, and disappeared persons have not been accounted for. Some political parties have been allowed to organise and hold rallies, but not the militant left-wing organisations. The ORDEN has been dissolved by decree, but its members threaten publicly to continue clandestine operations.

Nicaragua

Meanwhile, in neighbouring Nicaragua the new National Reconstruction Government formed after the Sandinista National Liberation Front took power on 19 July 1979 has begun the task of rebuilding a country ravaged by the war against the Somoza dictatorship. About 60,000 people (out of a population of 2.25 million) died during the fighting. Half a million people are homeless and food is in short supply.

GHANA

Military Coup in July 1978

A week after the article on Ghana was published in Review No. 20, in June 1978, General Ignatius K. Acheampong was removed from office by rival officers in the Supreme Military Council. In his first major address to the nation the new head of state, General F.W.K. Akuffo, gave as the main reason for his removal that communications between Acheampong and his colleagues had virtually broken down and that "the whole governmental activity had

Virtually all hospitals, schools and other public buildings were destroyed. The economy is shattered and foreign credit and relief are insufficient to meet the needs of the country. Despite these difficulties, the ruling junta is intent on assuring fundamental rights to the people. A Bill of Rights has been enacted. Some of its main provisions include: freedom of expression; the abolition of the death penalty; the prohibition of detention without a court order except in cases of flagrant crimes; the right of detainees to know the charges; the right to be arraigned within 24 hours or else be released; the right of detainees to be present at any court hearings against them; the right to get reparation for illegal detention; the right to privacy and security; the right to property subject to limitations related to security, public interest or utility, social interest, national economy, national emergency or agricultural reform. Furthermore, political prisoners are gradually being released.

The unfolding of events in Nicaragua has been and will continue to be of great importance for the future of the other five Central American republics.

become a one man show". As the economic performance of Acheampong's government had brought the country to the verge of bankruptcy, economic recovery was to be the main theme of the new regime's programme. The government announced a devaluation of the cedi, a measure which Acheampong, on taking power in 1972, had promised never to take. Two months later the cedi had depreciated by 58% against the US dollar.

One of the first actions of the new government was to release "all those taken into protective custody after the March 30 referendum" (see ICJ Review No. 20, p. 5)

and to announce a general amnesty for Ghanaians in self-imposed exile.¹ The Bar Association, which had earlier protested against the detentions, ended its strike on July 24, as did the students and university lecturers their boycott. The press regained most of its freedom and the influential Legon Observer and Catholic Standard published editorials critical both of the previous and the present government, with titles such as "beware of soldiers in politics, even if they bring gifts in the form of General Acheampong's resignation". In the same mood the Bar Association demanded (1) that a commission of inquiry be set up to investigate the "gigantic fraud" of the March 30 referendum (2) that Justice Abban be reinstated as Electoral Commissioner (3) that the "union government" programme be abandoned and that a number of organisations which had campaigned for it be banned (4) that press licensing be ended and (5) that the Constitution Drafting Commission be dissolved in favour of a constituent assembly whose work would be based on the 1969 (multi-party) Constitution.

In an effort to acquire more public confidence the government set up committees of inquiry to investigate the misconduct of public officials, in particular in the Cocoa Marketing Board, the Black Star Shipping line and the State Fishing Corporation. Corruption, embezzlement of public funds, tax evasion, trading irregularities and the "lack of discipline" in both the civil service and the private sector were declared targets of investigation, and there followed some dismissals of army officers and senior civil servants. The investigations, however, did not lead to the prosecution of any high-ranking person. Even in the case of Acheampong himself the new government

did not go any further than take him into protective custody and, as from May 1, stripping him of his property and rank before releasing him (to be confined to his native village). The decree doing this gave a staggering list of serious economic crimes, but no charges were brought against him. This did little to convince the public that corruption within the military could be tackled by a military government. In this climate – and even more after the 1978/79 budget had illustrated the seriousness of the economic situation – there was a growing public demand for "accountability". The Bar Association once again spoke for large segments of society by calling for a high-level inquiry into all foreign exchange transactions since the January 1972 coup and for "bringing to account" the previous government for its mismanagement, describing the military government as "incompetent, corrupt, rapacious and inept".

Constitutional Rule and Elections

The new government announced immediately after the coup that it would continue the programme (begun under Acheampong) for a return to constitutional rule by handing over power to "a popularly elected government on July 1, 1979", but the language employed indicated that "unity and stability" and "a national form of government" would be paramount in the search for a new constitutional framework. Indeed, on 31 July 1978 Akuffo announced that party politics would not be allowed for the time being and that the government preferred a transitional government for at least four years. In response to this the Bar Association refused to cooperate in nominating representatives to the enlarged Con-

1) Over 300 detainees were released in the first three months, nearly a third of whom had been detained for suspected economic offences.

stitution Drafting Commission and reiterated its call for an early resumption of party politics.

After receiving the report of the Drafting Commission and "in response to public views" the government reversed its position, and early in 1979 announced that the ban on party politics would be lifted. General elections were scheduled for June 18, but several restrictions on political activities were promulgated. The Elections and Public Offices Disqualifications Decree, dating from the 1966 coup against Nkrumah, was re-invoked and 105 politicians and officials of previous civilian governments were banned from standing as candidates or being on the controlling bodies of political parties. All parties in existence before the 1966 and 1972 coups were proscribed and so was the use of symbols and slogans of any of these parties. Parties based on regional or tribal cleavages were also forbidden.

A constituent Assembly¹ was set up and, after only four months work presented its draft constitution to the Supreme Military Council in May, 1979. The draft (1) barred the establishment of a one-party state without reference to the electorate, (2) provided for an executive president, (3) contained formal guarantees of fundamental human rights, (4) lowered the voting age to 18, (5) abolished government licensing of mass media, (6) continued the disqualification from public office for 10 years of persons convicted by commissions of inquiry (7) and granted an indemnity to SMC, NLC and NRC members². This last provision in particular was severely criticiz-

ed as legitimizing military coups and abuse of power.

On May 15, 1979, a group of 50-60 non-commissioned and junior officers, headed by Flight-Lieutenant Jerry Rawlings, tried to seize power. Although they demonstrated with armoured cars and heavy arms in the streets of the capital, Accra, the coup was unsuccessful. Rawlings and seven accomplices were arrested and charged with attempting to "commit mutiny with violence and to overthrow the lawful authority in the country's armed forces". During the court martial trial later that month Rawlings reiterated his accusations against high-ranking officers and declared that Ghana needed an "Ethiopian style" solution to its problems. In particular the corruption, the dominance of the Ghanaian economy by foreigners such as the Lebanese, the lack of resolve to prosecute Acheampong and other SMC leaders, and the immunity provision for the military leaders in the draft Constitution were cited as evils which the attempted coup wanted to cure. The cheering of the public indicated that his views were widely shared.

Economic Unrest and Emergency

The devaluation of the cedi led to further hardship for the urban poor who had already suffered much from rapid annual inflation under the previous regimes. In the face of large scale strikes throughout the country the government declared an official state of emergency on November 6, 1978, based on a newly promulgated Emergency

1) The Assembly consisted of 64 nominees of district councils, 42 nominees of important national institutions and professional bodies, and 34 persons appointed by the government. The Chairman was Justice Crabbe, a High Court judge.

2) i.e. the Supreme Military Council, the National Liberation Council and the National Redemption Council, the three military bodies which had governed Ghana at various times.

Powers Decree. Akuffo, in a nationwide radio and television statement, said that the budgetary objectives of the government would be pursued with full force. "Strikes... shall be regarded as criminal acts against the security of the state and will be dealt with according to the relevant laws of the country". He ordered an immediate investigation of an electricity strike in and around Accra and threatened that the damage caused would be recouped from the salaries of the workers involved. When in spite of Akuffo's warning the civil servants continued a strike after the deadline had passed, striking civil servants were dismissed en masse¹. After eight weeks the emergency was lifted. Although the government had shown toughness in executing its economic policies, it had provoked much ill-feeling among workers and civil servants.

Another economic measure was a surprise currency reform². Its aim was to reduce the money supply, and in this way inflation, and to catch smugglers, tax dodgers and profiteers who were likely to have more than 5,000 on hand in cash. The positive effects of the operations remained limited. Although a number of criminals seem to have been caught, a great deal of hardship was caused to simple people in rural areas, who did not invest their money in foreign exchange, bonds, shares or real estate, but kept their life savings in a mattress.

Fl/Lt Rawlings

When in early June 1979, two weeks before the national elections were to take

place, a rumour went through the ranks of the armed forces that there was a plot to kill Fl/Lt. Rawlings in his cell, a group of NCO's stormed the prison and released him. After seizing the armoury, they brought Rawlings to the national radio station to make a first announcement of the coup. On 4 and 5 June there was heavy fighting with troops loyal to the SMC, but when the army commander together with some tens of soldiers lay dead, the military operations came to an end. A ten member Armed Forces Revolutionary Council (AFRC) was established with Flight-Lieutenant Jerry Rawlings as its Chairman. From the outset he made known that the sole object of the coup was to deal with corruption in the army, and that he would "ensure a smooth transition to constitutional rule as planned". "Justice" he said, "which has been denied to the Ghanaian worker, will have to take place. That I promise you. Some of us have suffered for far too long".

On June 7 Rawlings called a meeting with all the presidential candidates to explain the "limited objectives" of the coup and to work out a common strategy for handing over power at the end of the "house-cleaning exercise". The only change was a postponement of the day for the formal handing over of power from July 1 to October 1, 1979. The politicians were warned that "no matter the quantity of money that is going to be pumped into this country, the success or failure of this system will depend on one thing - integrity, accountability and a certain degree of honesty".

The AFRC kept its promise of holding

1) In fact the strike was called off but only after the deadline had passed. Those who sought to return to work were not accepted.

2) Ghanaians were given two weeks to convert their cash in hand up to 5,000 cedis (approximately US\$13,500) at a rate of 7 new bills for 10 old (which represented the same value) and over 5,000 cedis at a rate of 5 to 10. After two weeks the old money lost its validity. The frontiers were closed during that period.

the elections on June 18, but they were overshadowed by the public execution, two days before the voting, of the former Head of State, Acheampong, and the former head of the Border Guard, a notoriously corrupt body. Six more military officers including the former heads of state Akuffo and Afrifa and former Commissioner for Foreign Affairs Felli, were executed on June 26. They had been tried by special courts, set up under an AFRC "Special Courts Decree", published with retrospective effect on June 25, and condemned to death by firing squad after a brief, closed trial without the possibility of appeal to a higher body, let alone review by a judicial tribunal. They were executed within hours of being sentenced and hence no time was left for seeking clemency on their behalf. Apparently they were found guilty – in terms of the decree – of "acquiring and obtaining loans, properties, material goods, favours and advantages and committing abuses by virtue of their official positions in the public service".

This stern action – in spite of breaking a Ghanaian tradition of bloodless coups – was received with widespread popular support and acclamation, although some criticism was voiced, in particular after the second series of executions. The Bar Association, Church leaders and leaders of several political parties asked for full investigations and fair trials instead of these summary trials and executions. Abroad the reactions were much sharper. The International Commission of Jurists and other non-governmental human rights organisations and some Western governments protested against the summary trials and executions, and, more significantly, African neighbours such as oil-producing Nigeria, Benin and Upper-Volta expressed their disapproval by blocking delivery of primary commodities to Ghana. It is hard to say what influence all this had, but the fact is

that, in spite of public pressure for more executions, the special courts did not pronounce any more death sentences. Although many others were tried on similar charges under similar circumstances, they were sentenced to long terms of imprisonment.

Civilian Government

The elections were held on June 18. Contrary to predictions Dr Hilla Limann's People's National Party, with leading members and programmes akin to Nkrumah's party, headed the poll with 35% of the votes followed by the Busia-oriented Popular Front Party with 30%. No party having obtained an absolute majority in the first round, a run off for the Presidency was held on July 9, 1979. Dr Hilla Limann won and became the first President of the New Third Republic, when the AFRC handed over power on September 24, a week before the original date.

The problems facing the new civilian government are tremendous. The AFRC house-cleaning operation may have created a "new mood" and fresh opportunities for "honest government", but they have not solved Ghana's deep-rooted economic problems. When Kwame Nkrumah was deposed by a military coup in 1966, the economy was ailing badly. The subsequent military regime and civilian government of Busia did not do much better. The decline in cocoa production, Ghana's main foreign exchange earner, was contributed to by the sudden expulsion by Busia of thousands of farm labourers to their home countries.

Acheampong's ill-calculated repudiation of Nkrumah's accumulated foreign debts plunged Ghana into further difficulties and the 1973 oil-crisis hit Ghana very hard. Droughts in 1974, 1975 and 1976 caused famine in some regions and an increased

import bill for food. However, in the same years many of the ruling civilian and military elite were able to accumulate considerable wealth and become big landowners. In the meantime, a policy of industrial development ill-adapted to the country's needs, dating from the days of Nkrumah, caused rapid urban growth and the use of foreign exchange for imports of machinery, spare parts and raw materials. Together with continued mismanagement (either by incompetence or by corruption) and expensive imports of luxury articles for a small urban elite, this led to inflation, black markets, balance of payments problems and shortages of many primary goods. These problems are difficult enough for any country

to solve, and are all the more difficult for a developing nation striving within the framework of an unjust international economic order.

Rawlings, who must be given credit for returning to barracks after fulfilling his promise of guaranteeing a smooth election and a transfer to civilian government, is still highly popular with the people and will doubtless be watching the performance of the new leaders. He may serve as a sword of Damocles hanging over the heads of present and future Ghanaian rulers. This may increase their honesty, but not necessarily their ability to solve the country's economic problems.

JAPAN

Protection Against Discrimination in Japan

On June 21, 1979, Japan ratified the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.

The 1947 Japanese Constitution guaranteed in general terms most of the rights subsequently enshrined in the Universal Declaration and in due course laws were enacted to protect and promote human rights. Normal judicial remedies are supplemented by a network of non-legal remedies. Perhaps the most interesting of these was the creation in 1948 of the Civil Liberties Bureau and in 1949 of the Civil Liberties Commissioners. Functioning within the Ministry of Justice, these bodies have no powers to prosecute, but they are able to take action with regard to a wide range of

human rights infringements. Japan has at present over 10,500 Commissioners throughout the country. Appointed by a complex process of representative selection, which excludes any kind of political interference, the Commissioners are volunteers who must meet high requirements of moral character, basic knowledge of and support for human rights and thorough acquaintance with the area where they are expected to work. "Popularization of human rights thinking, education and conciliatory settlements of disputes are the three pillars of their duties and achievements".¹

The Commissioners deal with infringements of human rights by public officials as well as by private individuals or organisations. They cannot make binding orders,

1) Human Rights in Japan: Some Protections and Problems, by L.W. Beer and C.G. Weeramantry. *Universal Human Rights*, Vol. 1, No. 3, July-Sept. 1979, p. 7.

but a process of consultation and mediation very often allows them to solve problems involving human rights violations.

By ratifying the two International Covenants, Japan has now taken a further step in the protection of human rights. However, some problems may arise in their implementation, due to social traditions deeply rooted in Japan's culture and tradition. Over the centuries Japan has demonstrated a certain tendency for Japanese society to organise in groups "based on origin, school, place of work, seniority, ability and other factors".¹ This has led to a tendency to reject "outsiders", those who do not belong to any of these groups. Questions may now arise whether the situation of the "outsiders" is in full conformity with the non-discrimination clauses in the two Covenants.

Among the "outsiders", reference may be made particularly to aliens and to the Burakumin. The Burakumin were a class of Japanese nationals who used to perform tasks regarded as unclean or sinful such as burying the dead, slaughtering animals and executing criminals. As a result of their activities they became a form of outcasts, living in ghettos and regarded as being outside any recognised group. The situation of their present day descendants has improved, but they still suffer from some forms of discrimination.²

Among the aliens, particular problems arise in relation to the Koreans. Many Koreans were brought to Japan by force following the annexation of the Korean peninsula by Japan. They constituted cheap labour for strenuous tasks, such as constructing dams, railways and roads, and coal mining. Today, there are about 650,000 Koreans living in Japan, 85% of whom are second and third generation Ko-

reans. Following the San Francisco Peace Treaty under which Japan surrendered Korea, the Japanese Alien Registration Act of 1952 deprived Koreans of their Japanese citizenship, and, as a result, of their right to political participation. Although most of them have been granted either permanent or temporary resident status, their right of residence is limited. Temporary residents may lose their right of residence if they receive prison sentences for more than a year. A permanent resident can be deported if sentenced to a prison term of 8 years or more. Japanese citizenship is not easy to obtain. Problems of discrimination in relation to aliens and Burakumin arise in different fields. Generally speaking, the *right to work* of aliens is subject to stringent conditions, principally relating to where they may work. For Koreans and Burakumin, problems arise in terms of job opportunity and promotion. There is a practice of scrutinizing closely the family background of an applicant for employment, and the discovery of buraku or Korean origins can engender discrimination against these people. To help to overcome their handicaps, special educational assistance has been granted to Burakumin. Also a law has been enacted according to which public offices should not enquire into the origins of job applicants, but the question of whether this law equally applies to the private sector is uncertain.

Cases have occurred of Koreans or Chinese being dismissed from their occupations after their identity was discovered. However, following a recent court ruling based on the Labour Standards Law and the civil code, a Korean was reinstated in such a case. This precedent should facilitate compliance with Japan's obligations

1) Ibid; p. 3

2) Japan's outcasts — The problem of the Burakumin, Minority Rights Group, Report No. 3, March 1971.

under article 6 of the Economic and Social Covenant (relating to the right to work) and article 2(2) (relating to non-discrimination on grounds of national or social origin).

Mention may also be made in this respect of the situation of women. Since 1945, the status of women has greatly improved in Japan, and perhaps this is one of the country's most important human rights achievements. However, with regard to employment, women are still subject to discrimination in job opportunities, remuneration and advancement, as in most other countries. Even in the public service this discrimination appears to exist. Out of about 120,000 executive and administrative civil servants, less than 1% are women.

All Japanese benefit from a *health insurance* system that also covers foreigners working in business organisations with more than 5 employees. But foreigners who are self-employed or who work in smaller businesses are not entitled to its benefits unless they reside in areas where special ordinances have extended such protection to them.

With regard to *social security*, important welfare measures have been taken in favour of the Burakumin. The Livelihood Protection Law, established in 1950 to provide protection to destitute persons, guarantees the Japanese a minimum standard of living, and a Health and Welfare Ministry notice instructed local officials that livelihood assistance may be extended to foreigners, but these are not yet recognised as rights. Following a demand made by the Korean residents' union, the government has recently opened public housing to them, but it seems that this measure only applies to certain areas. The Koreans have also made demands concerning other matters such as allocation of state children allowances, admission to the National Pension Fund, and loans from the National Treasury of Invest-

ment for private housing.

While the Covenant on Economic, Social and Cultural Rights calls for a progressive implementation of its provisions, ratification of the Covenant on Civil and Political Rights, on the other hand, means that the country concerned pledges itself to comply immediately with its provisions.

The Civil and Political Covenant protects the *right to participate in political activities*, which stems from the recognition of freedom of expression (article 19), of assembly (article 21) and of association (article 22). The issue of such freedom for aliens is certainly not peculiar to Japan, as aliens' political rights are limited in all countries. The extent to which the Covenant on Civil and Political rights, and in particular the right to take part in political activities, applies to aliens is unclear. The matter has been studied in the Commission on Human Rights and in its Sub-Commission, following which a draft declaration on the rights of non-citizens was submitted to the ECOSOC this year. It has not yet been approved and it is now being circulated to all governments for comment.

However, the situation of Koreans in Japan gives rise to particular problems. For practical purposes the Koreans in Japan enjoyed the right to vote as from 1928 until they lost it along with their Japanese citizenship in 1952. The deprivation of this right has been much resented and Koreans have claimed its reinstatement ever since. Like other aliens, they are entitled to take part in political activities, but they are exposed to the possibility that their activities may lead the government to refuse to renew their permit of residence. This is illustrated by a recent decision of the Supreme Court. A US national, McLean, who had worked as a teacher for nine years in Japan, expressed his opposition to the American intervention in Viet-Nam and to the Japanese support for the war under the US-

Japan security treaty. In consequence he was refused an extension of his visa. He appealed to the courts against the decision. In *McLean v. Japan*¹, the Supreme Court ruled that aliens certainly had the right, as a general principle, to engage in political activities. But it added that the immigration authorities were "allowed to refuse renewal of a period of stay to McLean on the ground of his political activity which was lawful". Moreover the court said that, in refusing a visa extension, the Minister of Justice was under no obligation to disclose his reasons.

One Japanese commentator castigated this decision as being "nothing but the prohibition of the exercise of aliens' lawfully regarded rights"². This may be its effect, but the decision is also one which upholds a right which most governments claim, namely the right to expel aliens they consider undesirable. Whether or not an absolute discretion in this respect is compatible with the International Covenant on Civil and Political Rights remains to be determined.

A question which concerns particularly the Burakumin and the Koreans relates to *the right to marriage* recognised under Article 23(2) of the Civil and Political Covenant. The problem here is a social rather than a legal one. Marriages in Japan are generally preceded by a process of enquiry about the origins of the future spouses. Discovery of Buraku or Korean origins will almost inevitably provoke the rupture of the engagement because of family opposition.

The question of the *protection of the family* by the state (contained in Article 23(1) of the Civil and Political Covenant) was recently raised before the Tokyo Main

Court. Mr Park, a Korean sentenced to five years imprisonment was released after having served three years, but was sent immediately to Omura Detention Camp, a camp for illegal entrants and persons due to be deported. Mr Park filed a petition for stay of the execution of deportation, and asked to be freed so that he could be reunited with his family, pursuant to Article 23 of the Covenant. On 17 March 1978, his petition was rejected on the ground that the Covenant did not, at that time, bind the country legally, and that since his family could follow him to Korea, the unity of the family was not endangered.

Other issues have arisen in relation to the *cultural rights of minorities*. Article 27 of the Covenant on Civil and Political Rights prohibits the denial of the right of minorities to enjoy their own culture and use their own language. Koreans contend that the Japanese policy has sought and still seeks destruction of their culture, and they are asking that action be taken to transmit their culture and language correctly to the coming generations of Koreans in Japan.

It can be seen from this brief review that a number of issues may arise concerning Japan's compliance with the two Covenants in relation to discrimination, and that by no means all of them arise from legal provisions, or gaps in legal instruments. Some of them are the result of customs, of states of mind, which cannot easily be changed. In any case, discrimination of this kind is not peculiar to Japan. Japanese institutions like the civil liberties Commissioner might well be able to help in reorienting attitudes, but unfortunately only Japanese citizens can resort to them. However, according to Article 98(2) of the 1947 Constitution, "the treaties concluded

1) *McLean v. Japan*, Hanrei Jiho No. 903 (1 December 1978), pp. 3-20 (Supreme Court, Grand Bench, 4 October 1978).

2) Shunsuke Nomoto, "Are foreigners entitled to human rights", the Japan Times, July 15, 1979, p. 12.

by Japan and established laws of nations shall be faithfully observed". Therefore, the ratification by Japan of both Covenants may place in the hands of those claiming to suffer discrimination a new weapon for the protection of their rights. In any event the Japanese government have now assumed an obligation not only to amend or remove laws which may be inconsistent with the Covenants, but also to take special measures to remedy the problems of the kind described above. Some

may need to be taken urgently, since the rights protected by the Civil and Political Covenant are rights which should be secured immediately.

In the 1978 case before the Tokyo Main Court mentioned above, the Court refused to uphold a provision of the Covenant because it had not yet been ratified. It will be interesting to see whether, now that the Covenant is in force, the courts will be more ready to enforce its provisions directly.

NIGERIA

Nigeria has been under military rule since 1966 when General Gowon came to power by a military coup. He was replaced, following another coup, by General Murtala Ramat Mohammed, who established himself as a man of remarkable vision and powers. After his assassination in an abortive coup on February 13, 1976, the Supreme Military Council unanimously appointed Lieutenant-General Obasanjo at the age of 39 as his successor. He has fulfilled his pledge to follow the policies of his predecessor, and in particular his programme for the return of the country to civilian rule.

Already in 1970 General Gowon had put forward plans for a return to civilian rule, set out in a nine-point programme: (1) reorganisation of the armed forces; (2) implementation of the national development plan and repair of civil war damage; (3) eradication of corruption; (4) settlement of the question of more states in the federation; (5) preparation and adoption of a new constitution; (6) introduction of a new formula for allocating revenue to the states; (7) a national population census;

(8) organisation of "genuinely national political parties"; (9) State and Federal elections.

The programme would be planned "very carefully" and "without rush". The target year for return to civilian rule was 1976. The first step was to be the preparation of a new draft Federal Constitution followed by the convening of a Constituent Assembly. The final stage was to be the organisation of free and fair elections contested by political parties which, General Gowon said, would not be the parties of the "old days of permanent crisis and mutual black-mail".

In October 1974 he announced that the resumption of political activities and other plans for return to civilian rule were postponed till further notice, because a precipitate military withdrawal would "certainly throw the nation back into confusion". There followed a public outcry. A year later the new Head of State, General Mohammed, responding to these feelings of disappointment among the population, announced a detailed timetable for handing over power to a democratically elected civilian government by October 1979. He proposed the following main stages:

- (1) By September 1976, the number of states in the federation would be increased from 12 to a number to be determined on the basis of a special committee's report;
- (2) a draft Constitution would be prepared, to be debated by a Constituent Assembly;
- (3) by October 1978, new elected local governments would be established, candidates standing on individual merit without party politics;
- (4) a Constituent Assembly, partly elected and partly nominated, would consider and accept the draft Constitution;
- (5) the ban on political activities would be lifted and political parties would be able to start preparing for a series of elections at state and federal level leading to a final handover by the military on 1 October 1979.

The number of States

On February 3, 1976 it was announced that the number of states was increased from 12 to 19. This was done in order to achieve a better-balanced division of the Federation, a matter of considerable political sensitivity after the civil war.

The Constitution drafting committee

A 50-member committee was set up on October 5, 1975 under the chairmanship of Chief F.R.A. Williams, a well-known lawyer from Lagos. The great majority were civilians with political, academic or administrative backgrounds. It acted within broad guidelines laid down by the military government, which inter alia stressed national unity (avoiding the "arousing of tribal frenzies"), and the need for consensus politics

and decentralisation. It was added that the government favoured a system of an "executive president" with strong but clearly defined powers and nation-wide representation in his cabinet. A draft Constitution was published for public debate in October 1976.

Local elections

In November–December 1976 the next phase proceeded with the elections of local government councillors which was linked with a comprehensive local government reorganisation. The purpose of this large-scale and expensive operation was on the one hand to make the administration at the local level more uniform, and on the other to "stimulate democratic self-government". Although some observers expressed their doubts about the desirability of allowing state governments to opt for indirect elections (using existing bodies) rather than direct elections, it was generally agreed that this event was important both in laying a new foundation for the administration and as a preparation for further and more democratic elections.

The Constituent Assembly

On August 31, 1977 the local governments elected 203 members to the Constituent Assembly and another 30 were appointed by the Supreme Military Council. Supreme Court Justice Udo Udoma was appointed Chairman and the members of the Assembly were given parliamentary immunity. Although the basic proposals of the draft Constitution were accepted by a large majority of the Assembly, there was considerable debate on a large number of amendments. The draft Constitution, as adopted, with nearly 300 clauses is one of the world's

most detailed, and includes the following main features:

- Nigeria is a federation with strong unitary elements. An executive president is elected by a majority of votes in direct elections, but he must obtain at least one quarter of the votes cast in two-thirds of the states.
- There is a House of Representatives of 450 seats divided proportionally to the populations of the states, and a Senate with 95 seats, five to each state. The National Assembly is to debate in English, but the State Assemblies can also use local languages. A two-thirds majority in each House is required to enact legislation to which the President refuses assent. State Assemblies have independent legislative powers in certain areas but approximately 70 items are specified in an "exclusive legislative list" which are the responsibility of the National Assembly.
- There is an independent judiciary with power of judicial review of all legislation. A provision in the draft Constitution establishing a Federal Sharia Court of Appeal presided over by the Grand Mufti, as an appeal court from the State Sharia Courts in those northern states where the Islamic system of family law is optional for their citizens, was heavily contested by a small majority in the Constituent Assembly. They considered it was discriminatory and in contradiction with the constitutionally prescribed equality of religions. A compromise proposal was adopted, which provided that the secular Federal Court of Appeal should hear Sharia cases by "three judges of appeal who are versed in Islamic law". The "pro-Sharia" minority left the Assembly in protest, but they returned reluctantly after the Head of State, Lieut.-General Obasanjo, had addressed the Assembly on the need for unity.
- Rights of assembly and association include the right of every citizen to form or belong to a political party. Political parties have, however, to register their constitution and the composition of their leadership with the Electoral Commission and must have their headquarters in the federal capital. They must avoid names, emblems or activities with "religious or ethnic connotations", and they must ensure that at least two-thirds of the 19 states are represented on their executive membership. Their finances are subject to supervision by the Electoral Commission.
- Other fundamental rights include the right to freedom of expression and information, providing that nothing in these provisions shall "invalidate any law that is reasonably justifiable in a democratic society" for the purposes of protecting defence, public safety, confidentiality, maintaining the independence and authority of the courts or imposing restrictions upon public officers or members of the armed forces and the police. No citizen can be arrested or detained for more than 24 hours without being informed of the charges against him, or held more than 2 months without having appeared before a court of law.

The Assembly completed its work on June 5, 1978 - four months ahead of schedule - and the chairman adjourned the meeting *sine die*, although the Assembly was not formally dissolved. In a subsequent statement a group of 101 members expressed their dissatisfaction with the proceedings, in particular the lack of debate on amendments to create new states, and the indefinite adjournment of the Assembly without resolving the issue of how the Constitution was to be enacted. In their view the enactment should be by the Assembly with only a formal promulgation

by the Supreme Military Council (SMC). However, the majority adopted the government's proposal that promulgation, with possible amendments, would be done by a decree of the SMC.

The road to elections

In preparation for the elections in 1979 the Federal Electoral Commission (FEDECO) carried out a nation-wide voters' registration which resulted in a list of 47,433,000 qualified voters (indicating a total population of well over 90 million). An electoral decree on the conduct of the elections contained progressive provisions for government financing of the campaigning by political parties.

In July 1978 the SMC gave further proof of its intent to hand over power to a civilian government by withdrawing the military governors of the 19 states, and providing that military officers who wished to seek office in the government must resign from the army within a month.

One of the major problems to be resolved before returning to civilian rule was the demobilisation of nearly half the 220,000 strong army. Progress on this was, however, disappointing. In the 1978/79 budget the allocation to the defence department was maintained at a high level in order to achieve the release of soldiers "prepared for civil life". A sharp drop in oil revenues¹, revealing the lack of diversification of Nigeria exports, and a slow agricultural development forced the military government to make serious cutbacks in public spending for 1978/79. When as a consequence the National Universities Commis-

sion announced a retrospective increase in students' board and lodging fees, the students' organisations called for a boycott and organised large demonstrations outside the campus. The military government responded with force and arrests. The handling of the increase in fees, and the way in which the students' demonstrations were dealt with by the security forces, stirred public indignation.

On September 21, 1978 the Federal Military Government ended the state of emergency which had been imposed in 1966 and finally lifted the ban on political activities.

The electoral regulations and the decisions by the FEDECO, from which no judicial appeal was allowed, limited the number of parties with a sufficient degree of nation-wide support to five². FEDECO also disqualified more than a thousand candidates, including one of the presidential candidates, Alhaji Aminu Kano, for not having made tax declarations, and many heavy legal battles were fought challenging the authority of the FEDECO. In the end several candidates, including Kano, were allowed to enter the elections at a later stage.

Elections

The FEDECO scheduled five elections, with weekly intervals, from July 7 to August 11, 1979. Starting with senatorial elections, through elections for the House of Representatives and for the State Assemblies, the gubernatorial and presidential elections were to be the final stage. If necessary run-offs for gubernatorial and presidential elections would be held through an

1) Resulting from a collapse in the world oil demand, the fall of the dollar and logistic problems within Nigeria.

2) For a critical statement by the Nigerian Bar Association see Bulletin of the Centre for the Independence of Judges and Lawyers, No. 3, ICJ/Geneva.

electoral college, in the president's case consisting of the National Assembly and the State Assemblies.

In spite of nationally-worded programmes and policy statements the campaigning was more and more done on local issues, and polls indicated that the strength of parties tended to be linked intimately to the home states of their leaders. This was to a large extent confirmed in the outcome of the senatorial elections in which the National Party of Nigeria, headed by Shagari, won 36 out of 95 seats, followed by Awolowo's United Party of Nigeria with 28 senators. It became clear however that the NPN was the most broadly based, winning 36 seats from twelve states against the UNP with 28 seats from only seven states. The other elections showed a similar ethnic-religious bias and a similar pattern of the NPN leading, with the UNP as a strong second, trailing not only in seats but also in nationwide distribution of votes.

The presidential election was won by Aliji Shehu Shagari of the NPN, although only after a curious calculation problem was resolved in his favour. The successful candidate had to receive a quarter of the votes cast in at least two-thirds of the 19 states. As two-thirds of 19 is 12.6 many people believed this to mean that Shagari would need 25% of the votes in 13 states. When the results indicated that he had won 25% in 12 states and only 20% in a thirteenth state, the political world started to prepare itself for the negotiations and trade-offs inherent in a run-off election of the kind envisaged. Shagari's party however claimed that the constitutional requirements were fulfilled as 25% of the votes in two-thirds of the states could also mean a

quarter in 12 states and 0.6 of a quarter (15%) in a thirteenth state. Their interpretation was sustained by the FEDECO in a ruling which was heavily contested by their adversaries, but many observers thought it preferable to the political chicanery which they anticipated in a run-off election by the electoral college.

The handover

On October 1, 1979, Shagari was inaugurated as the first President of the Second Republic after nearly fourteen years of military rule.

The SMC, just before passing on power to the new President, enacted a spate of decrees including a number which made changes in the new Constitution. The National Security Organisation, which was originally to be suppressed, was retained, and the provision in Presidential elections for a run-off in an electoral college was changed to a run-off by popular vote. In doing this the military government may have saved the new government some complicated and time consuming procedures for amending the Constitution, but it has been criticised as setting a bad example in respect for the popularly approved Constitution.

The new Constitution provides that control of the government of Nigeria can be lawfully assumed only through the procedures laid down in the Constitution. In spite of the gratitude which was expressed towards the voluntarily retiring military rulers, this provision will be foremost in the minds of Nigeria's politicians.

PAKISTAN AND BANGLADESH

Eight years after Bangladesh became independent from Pakistan the political conditions in the two countries are in strong contrast to each other. In Pakistan a military dictatorship has once again postponed parliamentary elections; in Bangladesh a military dictatorship has been peacefully replaced by a democratically elected civilian government.

Pakistan

The army took over in a bloodless coup in July 1977 after several months of political violence which erupted when the political opposition accused Zulfikar Ali Bhutto and his ruling People's Party of having rigged their massive victory in the elections held earlier that year. On taking over, General Ziaul Huq emphasised that he had no political ambitions and would return to the barracks after organising "free and fair" elections in October 1977. His caretaker government, however, cancelled the elections a fortnight before they were to have been held on the grounds that the political turmoil was too great for an orderly return to civilian government and that the "process of accountability" – the judicial scrutiny of the Bhutto government's five and a half years in power – must first be completed. Bhutto was charged with having ordered the killing of a political opponent, and after a much publicised and controversial trial, was convicted and sentenced to death. Despite pressure from home and abroad for clemency, the sentence was carried out in April 1979.

The "process of accountability" having been satisfied, parliamentary elections were called for November 1979, but at the same time the military government imposed a series of stringent conditions on political par-

ties intending to contest the elections. The parties were required to complete elections within their ranks annually, to submit their accounts for scrutiny, and to apply for registration with the electoral commission, which could refuse to register any party which it considered to be critical of the military or the judiciary or not based on the ideology of Pakistan. All except two of the major political parties refused to apply for registration and a month before the scheduled date the elections were once again postponed by the government. All political activity has been outlawed; all political parties have been banned, their offices sealed and their bank accounts frozen. Several political leaders, including the widow and daughter of Bhutto, are under house-arrest. The ban on political activity comes as no surprise. Although President Zia promised there would be no "witch-hunts" when he seized power, there have been extensive arrests and prosecutions before special tribunals of politicians, mainly from Bhutto's party. By the government's own admission some eight hundred people had been detained during the first year of his rule; that number may safely be doubled now without fear of exaggeration.

President Zia justifies the postponement of the elections and the continuation of military rule on the grounds that priority must be given to the establishment of Nizam-i-Islam (the Islamic Order). The Constitution has been amended to provide separate electoral registers for Moslems and non-Moslems, and the government can ban any political party not considered to be based on Islamic ideology. The courts have been empowered, on government or individual petition, to examine and decide whether a law violates the injunctions of Islam as laid down in the Koran and the Sunnah. In other words, the supremacy of the Sharia has been declared over the law of the land. Features of traditional Islamic

law, in particular relating to the punishment of adultery, rape, theft, and drinking alcohol, have been introduced as amendments to the criminal law. In the area of civil law, the most notable feature is the government's commitment to create an "interest-free economy" and the institution of Zakat (wealth tax) and Ushr (agricultural tax) funds. Parts of these provisions have been strongly criticised by the Shia minority (about 30% of the population) for being based on the Sunni interpretation of Islamic law.

Criminal punishments under the Code include stoning to death for adultery or fornication with a virgin, amputation of the hand for theft, and flogging for a range of other offences. By a martial law decree a series of mobile summary military courts have been set up to be sent into the different areas with the power to order on-the-spot punishment. The right of appeal to civilian courts has been abolished. Though medical personnel are present at the floggings to check the condition of the prisoners, victims are often lashed into unconsciousness. The public punishments are well attended, and though criticised by intellectuals, they appear to be regarded by the general public with approval.

Stern punishments are also applied to political offenders, although it is doubtful whether there is any justification for this in Islamic law. In the past two and a half years several hundred people have been flogged for political offences, some as trivial as shouting slogans supporting the People's Party. Under martial law, punishment for organising or attending a public meeting or procession without permission is up to seven years imprisonment; for any political activity it is up to five years imprisonment and flogging. All industrial action is banned and trade union activity is punishable by up to three years imprisonment and flogging.

The regime has banned the publication of all newspapers and magazines which it considers have been "poisoning and polluting" the atmosphere. They include two newspapers owned by the People's Party. As regards the others, the government has indicated that official censorship will be lifted soon. Instead, editors and journalists will be given guidelines by the regime prohibiting publication of political reports and interviews with politicians because of the ban on political activity. Journalists transgressing the official lines are subject to arrest and punishment, including heavy fines, imprisonment and flogging.

The Constitution of 1973 is still in operation in theory, though in practice it is constantly overridden since martial law decrees openly state in the preamble: "Notwithstanding anything to the contrary in the Constitution..." The regime has also ignored the decision of the Supreme Court in 1977 which legitimised the military coup as an extra-constitutional step justified by the doctrine of necessity and President Zia's promise to hold elections, but at the same time limited his powers to legislate or change the Constitution to those areas judicially recognised as falling within the doctrine of necessity. There is concern that he may use his Islamisation policy to support more fundamental constitutional changes. Already he has remarked that the Moslem mentality is more suited to the rule of one man, and that the concept of political parties and parliamentary elections are alien to Islam. He has also said that "under (Islam) only right decisions prevail, and the majority verdict, if misguided, is ignored".

The latest postponement of the elections has been greeted largely with public silence, but this is hardly likely to continue with rising inflation, suppression of civil liberties, and tension in the provinces bordering Afghanistan. Under these circum-

stances, unless the regime keeps it promise to hold general elections, it is likely to have to resort to even more drastic measures to suppress popular agitation.

Bangladesh

Unlike Pakistan, Bangladesh, under President Ziaur Rahman, has returned to a democratic government after three and a half years of military rule. The circumstances under which the army came to power in 1975 were similar to those in Pakistan in 1977. Shortly after gaining its independence in 1972 Bangladesh adopted a constitution establishing a parliamentary democracy with an independent judiciary (see ICJ Review No. 10), but in 1974 Sheikh Mujibur Rahman, using his party's overwhelming majority in Parliament, suspended the fundamental rights under the Constitution and in 1975 passed an amendment (the Fourth Amendment) replacing the parliamentary system with a one-party state and a presidential form of government. The Amendment took away the courts' power to uphold constitutional rights and made the judges' tenure dependent on the will of the President.

After the assassination of Sheikh Mujibur Rahman in August 1975 and following a number of military coups and counter-coups, General Ziaur Rahman came to power in November 1975. His military government dealt harshly with political unrest, applying the Special Powers Act of 1974 (see ICJ Review No. 12) and various martial law regulations. In a report in 1977 Amnesty International drew attention to thousands of political prisoners, many of whom were being detained without trial, to summary executions, martial law courts for civilians who had no right of appeal to the civilian judiciary, *in camera* proceedings, and the denial of habeas corpus or bail to

those charged with martial law offences.

However, despite the high-handed manner of suppressing political agitation, the military government gradually brought the country back to the rule of law under a civilian government. In 1977 that part of the Fourth Amendment abolishing the system of elected local representatives was repealed, followed by municipal elections. In June 1978 the President was elected on the basis of direct adult suffrage, and in February 1979 parliamentary elections were held. General Ziaur Rahman, the military ruler, was elected President and his party won two-thirds of the seats in Parliament. According to independent observers, the elections were fairly conducted.

The parliamentary elections were preceded by the repeal of laws restricting civil liberties. The martial law regulation of 1976 which required all political parties to receive prior approval from the authorities before functioning was repealed. Many political prisoners were released, restrictions on the press were withdrawn and the fundamental freedoms which had been suspended in 1974 were restored. Martial law was lifted after Parliament met in April 1979.

The system of government remains a presidential one, rather than the parliamentary type envisaged in the 1972 Constitution. However, prior to the general elections, the President announced that all "undemocratic provisions" of the 1975 Fourth Amendment had been repealed. A Prime Minister commanding the confidence of Parliament would be appointed, and the Cabinet would be responsible to both President and Parliament. The President gave assurances that Parliament would be sovereign within the presidential system, although any decision by Parliament to change the governmental system must be submitted to a referendum. During its first session Parliament accepted these proposals

as an amendment to the Constitution. The President is the chief executive, but Parliament retains the right to censure or impeach him.

There was some concern about Islamic revivalism in Bangladesh, which has a large Hindu minority, following a constitutional amendment of 1977 which made "absolute trust and faith in Allah", instead of secularism, one of the fundamental principles of the Constitution and state policy. However, the new government has denied any intention of proclaiming Bangladesh an Islamic republic or of providing separate electoral rolls for Moslems and non-Moslems, and has reaffirmed article 28(1) of the Constitution which grants equal status to all citizens irrespective of their religious beliefs.

The Fourth Amendment restrictions on the judiciary have also been repealed, and in 1977 a Supreme Judicial Council was formed to establish guidelines for the conduct of judges, who might be removed from office by the President on the recommendation of the Council. As the powers of the courts have been returned with the slackening and finally the lifting of martial law, many political detainees have been released on habeas corpus applications. According to the Home Ministry, there are now some three hundred political prisoners, several of whom are serving sentences for corruption in public office.

Significant reforms of the criminal and civil procedure have been made by Ordinance XLIX of 1978, mainly to simplify and speed up the trial process. Some of the changes are of substantive importance, such as the abolition of trial by jury or with the aid of assessors, and the granting

of the right of appeal to the prosecution against an acquittal or inadequacy of sentence. Committal proceedings have been substituted by direct trial after the accused has received written statements of the prosecution's case against him. The latter provision can cause hardship in a case where a defendant might otherwise have been able to get the charges dismissed at the committal stage and hence avoid a trial. The new law contains an interesting provision: any person who believes he may be arrested can apply to a court for a direction that in the event of his arrest he shall be released on bail. In a country where the legal machinery is slow, this may prove to be a useful protective device.

The return to civilian rule is to be welcomed. The new government, however, faces several problems. The relationship between the President and the army is unclear; and, in a country where economic issues determine the dynamics of politics, a severe spring drought has increased food prices, and popular discontent is open to exploitation by politicians. The President has called for a "new revolution", which some interpret as meaning massive land reform and a restructuring of the country's civil administration. The reforms will not come easily, if at all, because the rank and file of the ruling party is made up of landowners, and streamlining the administration may meet with opposition from the civil service on which the government heavily relies. The future of democracy and the rule of law in Bangladesh will depend largely on whether this "new revolution" can be brought about with the cooperation of Parliament in a peaceful and constitutional manner.

SINGAPORE

Member of Parliament detained over 16 years without trial

The Inter-Parliamentary Union (IPU) is an important non-governmental organisation with a membership of parliamentarians from 88 countries.

In recent years one of its concerns has been the predicament of parliamentarians in various countries who have been detained for long periods, often without trial. In 1976 it established a Special Committee on Violations of Human Rights of Parliamentarians to investigate the cases of parliamentarians "who have been subjected to arbitrary actions" during the exercise of their mandate, and to report with recommendations to the Inter-Parliamentary Council. The Committee has five members who at present come from France (Chairman), India, Venezuela, Yugoslavia and Zaïre.

When this Special Committee began operating in January 1977 the International Commission of Jurists joined with Amnesty International and the International Association of Democratic Lawyers in submitting to it 29 cases of parliamentarians who were known to be in detention. The International Commission of Jurists has also submitted on its own some other cases of arbitrary actions against parliamentarians. The Special Committee has now considered a total of 65 cases, and has reported on 38 of them to the Inter-Parliamentary Council. Eleven parliamentarians have been liberated following representations by the Special Committee or the Council.

One case in which, as yet, there has been no release, is that of Mr Lee Tee Tong in Singapore. It is of particular interest owing to the length of time during which he has been detained, to the great moral courage which he has shown, and to a debate

which arose recently in the Council concerning his case.

Mr Lee Tong has been held in preventive or administrative detention in Singapore for over 16 years without trial and without even being brought before a court. He was elected in 1963 to the Legislative Assembly of Singapore which, when Singapore left the Federation of Malaysia in 1965, became the national Parliament of Singapore.

Mr Lee was arrested shortly after his election in 1963 under the provisions of the Internal Security Act, 1960, for having led a strike. The government alleged that he "actively, knowingly and willingly supported the armed revolution perpetrated by the Communist Party of Malaysia". Mr Lee is a trade unionist. He belongs to the Barisan Socialist Party, and is not a communist. He insists that he did not apply violence and "has nothing to do with it".

On October 18, 1966, while still in prison, Mr Lee resigned his seat in Parliament in accordance with a decision of his party. This was intended as a temporary measure to bring to public attention the government's behaviour towards him.

Mr Lee, who is of Chinese origin, was later deprived of his Singapore nationality.

The government has offered to release him if he

- (1) gives up politics;
- (2) makes a public statement that he disavows and renounces the armed struggle espoused by the Communist Party of Malaysia to overthrow the constitutionally elected government of Singapore, and
- (3) will become a member of the ex-detainees Association (a 'rehabilitation' organisation).

Alternatively, he would be released unconditionally if he went back to his country of origin or to some other country of his choice.

Mr Lee has refused these offers. He is not prepared to make the required statement as it would imply an acknowledgement that he had supported an armed struggle espoused by the Communist Party to overthrow the government which, he says, is not the case. Nor is he prepared to leave the country. He feels that the offers and conditions proposed to him are undemocratic. He does not want to go abroad and abandon his ideals. On the contrary he wants to continue his work in what he regards as his country, including his union activities and the struggle for socialism through a democratic process and by democratic means, inside and outside Parliament. He considers that banishment and deprivation of citizenship, especially when he has never been charged with any offence, are a violation of his human rights. If Singapore is a democratic country ruled by law, only democratic and lawful means should be used against him.

In May 1978 the Inter-Parliamentary Council were notified that a request had been refused by the authorities for a lawyer designated by the IPU to be allowed to interview Mr Lee to obtain his observations on the reasons for and circumstances of the prolongation of his detention. The reasons given by the authorities for this refusal were that:

- *"Mr Lee Tee Tong is no longer a member of Parliament, having resigned his seat in 1966;*
- *The Singapore Inter-Parliamentary Group has on two previous occasions assisted by providing the facts of Mr Lee Tee Tong's case;*
- *Mr Lee Tong is no longer a Singapore citizen and he is free to emigrate to any*

country that may wish to accommodate him;

- *Mr Lee Tee Tong has been interviewed by (a representative of) the International Committee of the Red Cross on 29 April 1974 and 30 January 1975".*

The "facts" provided by the Singapore Inter-Parliamentary Group were in substance a repetition of the government's allegations against Mr Lee and the terms of the offers made to him.

The IPU Secretary General then asked the government for a copy of the reports of the International Committee of the Red Cross, but these were refused on the grounds that "in the view of the competent authorities the case of Mr Lee Tee Tong is not within the purview or the concern of the Inter-Parliamentary Union".

The Inter-Parliamentary Council rejected the argument that they had no jurisdiction and requested and obtained the agreement of the competent authorities to send a member of the Special Committee (Mr S.N. Sinha of India) and the Secretary General to Singapore to interview Mr Lee. They were able to see him in all for 3 hours and to satisfy themselves that they understood correctly his attitude.

Mr Lee was seen at the Moon Crescent Centre, a wing of the Changi prison, to which he had been returned only 5 days previously, after being held in an Interrogation Centre for nearly 9 months. His conditions of detention at the Moon Crescent Centre were good, but Mr Lee said that those at the Interrogation Centre were much harder.

When the Special Committee's report and draft resolution urging the immediate release of Mr Lee were considered by the Inter-Parliamentary Council meeting at Caracas, Venezuela, in September 1979, the Singapore delegation again urged that the Council could not consider the case as

Mr Lee was no longer a member of Parliament. They also argued that Mr Lee "actively and willingly engaged in activities seeking the overthrow of the constitutionally-elected government of Singapore", with active involvement in riots, that the reason he had not been prosecuted for these offences was that "those who step forward to testify against subversive elements do so at the risk of their own lives", and that all he "has to do to secure his release is to give an undertaking that he will not engage in any more activities that seek to overthrow the government by violence".

The New Zealand delegation presented an amendment to the Special Committee's revised draft resolution, proposing that "taking into consideration the openness of the Singapore authorities and the National Group in dealing with this case, and the generally good record of Singapore with regard to human rights", the Council should instruct the Special Committee "to seek further discussion with Mr Lee Tee Tong, the Singapore Government and National Group in order to achieve the release of Mr Lee Tee Tong".

This was opposed by the Chairman of the Special Committee in a reasoned reply. He established clearly the Council's competence to deal with the case, and on the issue of substance argued that "no political context whatsoever can justify such a long deprivation of an accused person's right to be brought before a judge". He asked why, if the authority of the Singapore Government was sufficient to permit the normal holding of free elections, it would not be able to ensure the protection of a few witnesses. As to the offer made to Mr Lee for his release, he commented that the declaration he was being asked to make "amounts to asking him to accuse himself of a crime of which he declares he is innocent."

During the debate one of the parliamentarians from Portugal explained that a simi-

lar offer had been made to him when he was detained by the previous Portuguese régime, and that he had rejected it on the same grounds as Mr Lee. He urged the rejection of the amendment.

In the event the Special Committee's revised resolution was carried without amendment by 112 votes to 11 with 24 abstentions. The 11 opponents of the resolution all came from the five ASEAN countries in South East Asia with the exception of the two delegates from New Zealand and one from the United Kingdom. The resolution which was adopted, after reciting the right in the International Covenant on Civil and Political Rights of a person arrested or detained on a criminal charge to trial within a reasonable time or to release, the right not to be compelled to testify against himself or to confess guilt, and the right in the Universal Declaration "not to be subjected to arbitrary detention or exile or to be arbitrarily deprived of his nationality",

- "1. Declares that the unduly long detention without trial of Mr Lee Tee Tong, as well as the conditions set by the Government of Singapore for his release, are contrary to the above-mentioned provisions of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and that they are consequently arbitrary;*
- 2. Urges the Government of Singapore to release Mr Lee Tee Tong immediately and unconditionally;*
- 3. Requests the National Group of Singapore to do all within its power to that end."*

Mr Lee's case is a wholly deplorable one, and it is to be hoped that the Government of Singapore will, in the light of the Inter-Parliamentary Council's overwhelming vote, reconsider its decision not to release him from detention.

COMMENTARIES

Human Rights Committee

The Human Rights Committee held its 6th, 7th and 8th sessions in 1979: the first in New York in April, and the other two in Geneva in August and October.

At present 60 nations have ratified the International Covenant on Civil and Political Rights, and 21 have ratified the Optional Protocol. The 18-member Committee devoted most of its time to the examination of periodic reports by states parties and of communications by individuals alleging violations of their rights under the Covenant by a state party to the Optional Protocol. The Committee also discussed the problem of overdue reports, the drafting of procedural rules, cooperation with the Specialised Agencies, and organisational matters.

Overdue reports

Under article 40 (1), the states parties to the Covenant have undertaken to submit reports within one year of the entry into force of the Covenant for the states parties concerned and thereafter whenever the Committee so requests. As of October 1979, the following states' reports due in 1977 has not yet been received: Colombia, Jamaica, Lebanon, Rwanda and Uruguay. Of the reports due in 1978 those of Guyana, Panama and Zaire had not been received.

At its April session the Committee decided to send reminders to those states whose reports were due in 1978, and asked

the Chairman to contact the Permanent Representatives of those states whose reports were due in 1977.

The matter of overdue, late and incomplete submissions was further discussed at the October session. It was suggested that methods other than reminders should perhaps be utilised, such as offers of assistance to the state preparing the report. It would be quite in keeping with the task of the Committee, which was to encourage states to comply with the provisions of the Covenant, said one Committee member. The failure of some governments to supply adequate additional written answers to questions put by the Committee during examination of the initial reports was felt to be a related problem, but further discussion on the matter was deferred for the time being. Denmark, the Federal Republic of Germany, Jordan, Libya, Madagascar, Mauritius, Norway and Yugoslavia have agreed to send supplementary information but have not yet done so.

The Committee decided to treat Lebanon as a special case, and not to send any further reminders for the time being. As regards the others, the Chairman was once again asked to approach their Permanent Representatives at the United Nations.

Consideration of reports

At its April session the Committee examined the initial reports submitted by Chile, Bulgaria, Romania, Spain, and a sup-

plementary report by the United Kingdom. In August the Committee studied the reports of the Ukrainian SSR, as well as supplementary reports from Syria, Cyprus and Finland. The report submitted by the United Kingdom on behalf of its dependent territories was studied at both these sessions. In October the Committee studied the initial report of Poland and the supplementary report of Sweden.

In examining the initial reports the Committee followed the established procedure of having representatives of the state party introduce the report, then listen to all the questions and comments of the Committee members before making a response. All responses were oral, although the state is asked to give a written supplementary answer at a later date. The supplementary reports were examined section by section, with oral replies being made by the delegation immediately after questions had been put on a particular section.

The Committee's questions, as at previous sessions, were detailed and thorough, placing as much emphasis on the factual situation as on the legal norms in the countries concerned. Indeed, in ascertaining the factual situation in Chile, the Committee set a precedent by drawing upon material other than that supplied by the Chilean government. Committee members expressed the view that the duty of the Committee was to study the implementation of the Covenant and make such comments as appropriate, and that in so doing the Committee should draw on whatever additional information it deemed useful, particularly when the information was drawn from competent United Nations bodies which had investigated and confirmed the existence of violations of human rights. Relying on the report of the Ad Hoc Working Group of the Commission on Human Rights, the Committee decided that the report submitted by the Chilean government

ignored the true situation in the country, and asked for a further report analysing the manner in which each Covenant right is in practice implemented, the rights which have been derogated, and the justification for and the extent of that derogation. The Chilean delegate challenged the Committee's competence to deal with "sources other than those provided for in the Covenant", i.e. the state party report, but nevertheless agreed to comply with the request for a new report.

The Committee found it helpful to be provided with the constitutions of the states submitting reports, and agreed that the measure should become a regular practice. The Committee was encouraged to learn the extent to which the new Spanish Constitution embodies the provisions of the Covenant, although the Spanish report was inherently limited by the fact Spain is still in the process of drafting new legal codes to give effect to some of these rights. The Spanish delegation promised to keep the Committee informed of the progress of human rights in Spain and to submit to it any relevant new legislation.

The questions asked followed the pattern established at previous sessions. Members expressed great interest in the status of the Covenant in internal law, what provisions took precedence in the event of a conflict between the Covenant and the internal legal order, whether the provisions of the Covenant had the force of constitutional law, and whether a person could invoke the Covenant before the courts and administrative authorities. Members commended the mention of relevant judicial decisions, notably in the reports of Cyprus and Poland. The fact that the United Kingdom did not have a written constitution and that the Covenant was not part of its internal law continued to give rise to various comments and questions by the members of the Committee. In the case of the

Ukrainian SSR, information was requested on the respective responsibilities of the Republic and the Union in the implementation of the Covenant. The representative answered that the Union set forth certain basic principles and the Republics elaborated their own legislation but every effort was made in the Republics to standardise provisions reflecting the norms in the Covenant. The representatives of Bulgaria, Romania, Poland and the Ukrainian SSR were also asked about the separation of powers between the executive, the legislature and the judiciary, in particular about the independence of the judiciary. Members noted that constitutional provisions gave to the chief legislative organ, and not the judiciary, the power to determine the constitutionality of laws, and they asked questions about the extent of the competence of courts to enforce Covenant rights. This issue was felt to be particularly relevant in countries such as these where the Covenant is not incorporated in the domestic law, but where the Constitution is said to give effect to the provisions of the Covenant.

Numerous questions were asked about the legal rights of persons in detention. Information was also sought on the role of the Procurator in Romania, Bulgaria, the Ukrainian SSR and Poland, and especially the manner in which he could ensure the protection of civil and political rights.

With reference to the right to life, equal emphasis was placed on the reduction of infant mortality and on the preservation of life of adulthood. Information was sought from countries which had not abolished the death penalty on the offences for which the sentence could be imposed. Some members felt that capital punishment for economic crimes was an excessively broad interpretation of the provision in article 6 (2) of the Covenant. While noting with satisfaction that capital punish-

ment had been abolished in Spain, they expressed concern that it had been replaced with excessively long prison sentences. The United Kingdom was questioned on the use of corporal punishment in some of its dependent territories.

More information was also requested on laws providing for non-discrimination, especially with regard to political opinion. It was felt important to know whether, in states where the constitution had defined its political position and social organisation, there was any room left for peaceful dissent. Frequently clarification was sought on vague terms restricting freedoms of opinion, expression and assembly, e.g. "interests of the people", "public security", etc.

In relation to socialist states, some members wanted to know where the line was drawn between the prohibition of compulsory labour and the obligation to work. The Ukrainian SSR was particularly questioned on the offence of "parasitism".

Except in the case of Chile, the Committee commended the depth and comprehensiveness of the reports. The seriousness with which the states regarded their obligations under article 40 was evidenced by the quality of their reports and the high level of the delegations, noted by some members.

Communications from individuals

Under the Optional Protocol individuals who claim their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit written communications to the Human Rights Committee for consideration. Consideration of communications started at the Committee's Second Session in 1977. Since then 53 communications have been registered, and relate to Canada, Colombia, Denmark, Finland, Madagascar,

Mauritius, Norway, Uruguay and Zaire.

At its recent sessions the Committee had before it new communications brought to its attention for the first time, communications pending a decision on admissibility together with further information from the authors and states parties concerned, communications which had been declared admissible on their merits, and recommendations from the Committee's working group, set up under the Committee's rules of procedure which met before and during each session. The meetings of the working group and the Committee on communications were private and documents relating to communications were only available to Committee members. A summary of issues discussed at the Sixth and Seventh Sessions was published in the Committee's Annual Report.

The Committee's work in relation to communications is divided into two main stages: (a) determining whether they are admissible under the Optional Protocol (the Committee may decide at this stage to discontinue consideration of a communication without taking a decision as to its admissibility); (b) considering the merits of the cases, and formulating the Committee's final views.

Under the Committee's rules of procedure, a communication may not be declared admissible unless the state party concerned has been given an opportunity to submit information or observations relevant to their admissibility. Of the 20 communications accepted as admissible by the end of the Seventh Session, a number of them were declared admissible on the basis of their authors' information only, in view of the fact that no information had been received from the states concerned despite requests by the Committee. At its Seventh Session the Committee also considered seven communications on their merits. The government concerned had made within

the six month time limit written explanation or statements in only four cases; these had been considered irrelevant, but no reply was received to the Committee's request for further information.

At its August session the Committee concluded its consideration with respect to one of these communications, which was made against Uruguay alleging three cases of wrongful arrest and detention, torture and denial of a fair trial. In the Committee's view the communication revealed gross violations of the Covenant, including articles 7, 9 and 10. The conclusion was transmitted to the author and to the government of Uruguay and was published. The significance of this case is that it is the first one on which the Committee has reached a conclusion on its merits, and that the Committee has seen fit to use the most powerful weapon it possesses of putting moral pressure on a state to remedy violations of human rights: publication of the communication and the Committee's views on it.

At its October session the Committee concluded consideration of another communication against Uruguay, alleging denial of habeas corpus and ill-treatment during detention. The Committee found that article 9 (4) of Covenant had been violated because the law under which the complainant had been detained did not provide for an effective remedy to challenge the arrest. On the question of ill-treatment the Committee could not find that there had not been ill-treatment and noted that Uruguay had failed to show that it had ensured to the complainant the protection against ill-treatment as required by article 2 of the Covenant. In a case such as this where the senior officials responsible for the alleged act are named, the state party should fully investigate the allegations in accordance with its laws, and general refutations by

Uruguay were considered to be insufficient. Six of the Committee went further than this and concluded that in view of the lack of any detailed refutation of the allegations the case of ill-treatment had been established. The six members were the experts from Canada, German Democratic Republic, Jordan, Senegal, Tunisia and Yugoslavia.

Cooperation with specialised agencies

The Committee had decided at its Fourth Session to transmit to the ILO and UNESCO the relevant parts of the reports of the states parties which might fall within the field of competence of these agencies, but without asking them to comment on the extracts. At its Sixth Session the Committee was informed of a letter from the ILO reiterating its readiness to provide any information on matters within its competence which the Committee might want.

Fuller discussion of the question of cooperation with the agencies was deferred until the Eighth Session, where the representatives of the ILO and UNESCO were asked to elaborate on the ways in which they felt they could be of assistance to the Committee. Two main issues were discussed.

Firstly, as regards the information received from the ILO and UNESCO, it asked what would be the status of such information. The precedent of using information from other UN bodies was pointed out in the case of Chile, but the Committee accepted that such information could only be used as background material for eliciting answers from the states parties concerned.

The second issue was whether or not the specialised agencies should submit comments and conclusions on the extracts of the reports transmitted to them. One member felt that the acceptance of such comments would not mean a substitution of

the judgment of the Committee, but only that the Committee could take account of the comments in reaching its own conclusion. However, consensus was reached only on the following: information from specialised agencies was necessary, but that information should be carefully distinguished from comments or conclusions. Otherwise, it was said, there was a danger that the Committee might become a forum for non-members to hurl accusations at the states parties. It was agreed that information on the practice and interpretation of relevant articles by the ILO and UNESCO should be made available to members, who were free to use the information as they wished, but the decision of the Committee remained that specialised agencies should not be invited to submit comments on the parts of the reports submitted to them.

Rules of procedure

Under article 41 of the Covenant a state party may make a declaration that it recognises the competence of the Committee to receive and consider communications from one state party to the effect that another state party, which has made a similar declaration, is not fulfilling its obligations under the Covenant. Following the entry into force of article 41 on 28 March 1979, the Committee set up a working group on rules of procedure.

The Committee stressed that its rules should be general and flexible in order to accommodate different situations as they arise and not to intimidate states parties from making such a declaration. However, to avoid delay, especially in view of the 12-month limit imposed on them by article 41 (1) (h) to review inter-state complaints, members argued that the procedural rules should be precise and clear on potentially confusing issues, such as the admissibility

of communications and the Committee's competence to deal with them.

The Committee also discussed the relationship of article 41 to article 42. Article 42 provides for a procedure to establish an Ad Hoc Committee in the event that either one or both of the states parties are not satisfied with the outcome of article 41 proceedings. After some discussion it was agreed that the failure of article 41 to solve a dispute did not automatically lead to the application of article 42, but that this pro-

cedure must be initiated by one or both of the states parties concerned and can only be applied with the consent of both parties. However, the Committee may recommend that the states parties use the article 42 procedure.

The draft rules of procedure, revised to take account of the points made during the Sixth Session, were unanimously adopted at the Seventh Session. The rules will be found in Annex III to the 1979 report of the Committee to the General Assembly.

UN Sub-Commission *ON DISCRIMINATION AND MINORITIES*

The Sub-Commission on Prevention of Discrimination and Protection of Minorities met in Geneva from August 20 to September 7, 1979, for its thirty-second session.

Disappeared persons

Perhaps the most noteworthy event of the session was the Sub-Commission's decision about disappeared persons. Last year the Sub-Commission rejected a resolution by Mme Questiaux (France) requesting the Argentine government to give information about persons who had disappeared in its country, and earlier this year the Commission on Human Rights failed to respond to the General Assembly's request to make recommendations on this question, other than to appoint two of its members to enquire into disappearances in Chile (see ICJ Review No. 21, December 1978, p. 26 and ICJ Review No. 22, June 1979, p. 25). In May 1979 the ECOSOC passed a resolution requesting the Sub-Commission to consider

this subject in order to make general recommendations to the Commission, and to examine communications on disappeared persons in its private session.

At the beginning of the Sub-Commission's public debate on this issue, Mr. Amadeo (the expert from Argentina) argued that since this debate was aimed at making general recommendations, no specific situations should be mentioned. However, other speakers took a different view. Mme Questiaux, a former President of the Sub-Commission, made an impressive statement describing the situation in Argentina in all its gravity. She said she had in hand a list of 4,500 persons who had disappeared in Buenos Aires and another of 8,000 persons missing in the whole of Argentina. She said that she would resign from the Sub-Commission unless some positive action was taken. She was followed by other speakers who referred to Chile, El Salvador, Guatemala and Uruguay in addition to Argentina. NGOs also contributed to the debate. The ICJ had issued a document containing a general description and analysis of the phe-

nomenon and its representative made an oral intervention. Speaking immediately after the Argentine Ambassador who had stated that the number of disappeared persons was now "virtually down to zero in his country", he showed that disappearances were continuing, though on a smaller scale and that in any event this did not resolve the problem of the 8,000 or more persons already missing.

The outcome was that the Sub-Commission adopted a resolution requesting the Commission on Human Rights to authorise members designated by the President of the Sub-Commission to constitute a group of experts. This group "would be given all the information available for locating disappeared and missing persons in different regions of the world and would make the necessary contacts with the governments and the families concerned". In view of the urgency of the situation, it also decided to transmit to the Secretary-General for action, pending decision by the Commission, the lists of missing persons communicated to it by members of the Sub-Commission.

In case this phenomenon were to continue, the Sub-Commission suggested that some form of emergency remedy of an international nature should be envisaged which could be based on the notion of *habeas corpus*.

Rights of Detainees

Among the papers prepared by the Secretariat on this topic was a synopsis of information submitted by non-governmental organisations, which drew heavily upon a memorandum submitted by the ICJ.

During the discussions, many experts felt that the independence of the judiciary and of the legal profession was a prerequisite for ensuring the rights of detained per-

sons, and especially of political prisoners. As a result, the Sub-Commission requested authority to entrust Mr. Singhvi (expert from India) with the preparation of a report on this question.

Exploitation of Child Labour

This subject was discussed under a new agenda item in relation to the International Year of the Child. According to the ILO representative, 52 million children are working in the world, 80% of them being unremunerated. Members of the Sub-Commission described the situation in different parts of the world. Mr. Ben Whitaker (expert from UK) reported principally on the exploitation of child prostitution in Brazil, on the working condition of 36,000 teenagers in Hong Kong and on the plight of children in India which has the largest child labour force in the world. NGOs, including the Anti-Slavery Society and the Minority Rights Group, took part in the debates. It was alleged that about 3 million children are working in Colombia, many of them underground in coal mines, without any safety precautions. In Morocco, thousands of children are working in the carpet industry, sometimes up to 72 hours a week. Conditions in Italy, Taiwan and Thailand were also referred to. The International Union for Child Welfare draw attention to the sale of children for adoption.

The Sub-Commission decided to review this question annually and appealed to all governments to ensure that "adequate legislation to protect working children is enacted and properly enforced". It sought authority for a study by Mr. A. Bouhdiba (expert from Tunisia) on the exploitation of child labour, "taking into account all the economic, social, cultural and psychological dimensions of the problem."

The Right to Development

"The New International Economic Order and the promotion of human rights" was also a new agenda item. Interesting debates took place in which many experts stressed the necessity of finding a concrete approach to the problem. Authority was requested for a study to be undertaken by Mr. R. Ferrero (expert from Peru), who should also represent the Sub-Commission at the proposed UN seminar on the effects of the existing unjust international economic order on the economies of the developing countries, and the obstacle that this represents for the implementation of human rights and fundamental freedoms.

Racism and Racial Discrimination

The Sub-Commission propose to undertake three studies on this subject. One on "discriminatory treatment against minority groups at the various levels in the administration of criminal justice", another on "political, economic, cultural and other factors underlying situations leading to racism", and the third on "recourse procedure available to victims of racial discrimination".

South Africa, Israel and the United States were mentioned during these debates as practising racial discrimination. The representative of the International Association of Democratic Lawyers submitted a report alleging racial discrimination in the United States in the administration of justice and in the prison system.

Mr. A. Khalifa (Egypt) submitted a revised list of 2,605 banks, firms and other organisations who are providing military, economic or political assistance to South Africa. Some speakers regretted that the list only mentioned companies trading with South Africa which were based in western

countries with free market economies, and made no mention of trade with countries in other regions, including Africa.

Human Rights Violations

An important issue discussed this year was the policy to be adopted when a change of regime occurred in a country in respect to which a study of alleged gross violations of human rights had been undertaken. This had occurred in Uganda, Kampuchea, Nicaragua and Equatorial Guinea. The Director of the Division of Human Rights asked whether these enquiries should be discontinued, or carried on in order to ascertain what had happened under the previous regime and to help the new governments to return to a normal situation and to avoid such violations in the future. There was a general consensus among the experts that such studies should be continued.

In particular, the governments of Kampuchea and Nicaragua should be invited to collaborate and to provide information on what had occurred, and their attention was drawn to UN facilities to assist governments on measures needed to strengthen their arrangements for the promotion and protection of human rights.

A resolution was passed regretting violations in the occupied territories Palestine and calling upon Israel to desist forthwith from its intervention in southern Lebanon. Another urged negotiations between Israel and the Palestine Liberation Organisation to restore the rights of the Palestinian people. It was noted that Ambassador Beverley Carter (US) did not vote against this resolution. The US government later issued a statement that he had acted in his capacity as an independent expert. The Sub-Commission reiterated a request that its rules of procedure be amended to empower it to vote by secret ballot when de-

cluding matters under the confidential Resolution 1503 procedure concerning communications.

Ratification of Human Rights Instruments

This matter was raised at the initiative of NGOs. Amnesty International, the International Commission of Jurists and the Minority Rights Group, supported subsequently by five other NGOs, proposed a procedure for encouraging ratification of the principal human rights instruments. Based on this proposal the Sub-Commission requested the Secretary-General to write to governments which had not adopted the relevant instruments, asking them to inform the Sub-Commission of the circumstances which so far had not enabled them to ratify or adhere to them, and "to explain any particular difficulties which they may face, in respect of which the United Nations could offer any assistance". The Sub-Commission also decided to establish each year a working group to consider ways and means of encouraging governments to ratify or accede to international human rights instruments, to examine the replies received and, if necessary, to invite representatives of the governments concerned for discussions.

Other Items

Among other questions discussed was the problem of persons alleged to be detained in mental health institutions by reason of their political opinions. Arising out of this a resolution requested the Secretary-General to prepare a report analysing available information concerning this subject, with a view to formulating guidelines regarding the medical measures that should properly be employed in the treatment of persons detained on the grounds of mental ill health and on appeal procedures for determining whether adequate grounds exist for such detention and treatment.

The Sub-Commission also decided to send a telegram to the Iranian government expressing "its deep sense of shock at reports of summary executions of numerous Kurds in Iran" and requested "the immediate cessation of these inhuman practices".

Procedure

Following the approval by ECOSOC of the Sub-Commission's request that its sessions be extended from 3 to 4 weeks, it decided to request authority to meet twice a year, one meeting being held if possible in New York. It also asked that its name be changed to the Sub-Commission on Human Rights.

ARTICLE

Pre-trial Detention in Western Europe

by

S. Grosz, A.B. McNulty and P.J. Duffy*

One of the most important decisions in the criminal process is whether the Defendant should be remanded in custody before trial. Every criminal prosecution will anyway entail some adverse consequences for the accused, which range from the inconvenience of having to attend Court or the financial consequence of having to pay a lawyer, to submission to questioning by the Police.

Every prosecution will affect the freedoms of the accused to some extent, but the interference with these freedoms is greatest when he is in prison pending trial. Needless to say he is automatically deprived of his livelihood and separated from his family and friends. Such absence, which may often be prolonged, may be difficult to explain to, say, an employer. Apart from these automatic consequences the individual must also conform to the prison regime: his mail may be read, his visits watched. He may develop "criminal tendencies" by his association with convicted criminals.

While unconvicted prisoners receive privileges not accorded to those serving sentences there are many ways in which they are worse off than convicted prisoners. Work is not readily available for unconvicted prisoners who wish to work and educational and recreational facilities are often minimal. Overcrowding and constraints upon the resources of the prison service effectively mean that many unconvicted prisoners spend most of their time "banged up" in their cells: many complain that they spend twenty-three hours a day locked up. Psychologically, the combination of boredom, uncertainty about the trial, prison conditions, supervision and the unpleasant surroundings can have a devastating effect on a person detained on remand. It has been recognised, for example, by a West German court, on the basis of psychiatric evidence on the effect on a remand prisoner of his uncertain future, that there is a time limit to his capacity for moral resistance. A period of six years on

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remand was declared to be absolutely above such limit.¹ Pre-trial detention can have serious consequences for the rights of the defence. Preparation of the case is severely hampered by the difficulties involved for lawyers in obtaining instructions from the detained client and for Defendants in locating witnesses.² The Defendant in custody suffers other, less obvious disadvantages. The legislation in most countries examined specifically requires that there be serious evidence of guilt against the Defendant for him to be detained on remand, or at least that the weight of the evidence against him be a consideration in deciding whether to remand in custody. Albeit unconsciously, the mind of the Judge, examining Justice or Magistrate may be affected by the fact that the Defendant has been produced in Court from custody.

Further, when sentence is passed, the fact of detention will again disadvantage the Defendant. It is a reasonable assumption that a Defendant in custody is more likely to receive a custodial sentence: imprisonment seems a less dramatic step where the person is already in custody, and such a sentence serves to vindicate his previous detention. There may also be a tendency to hand out to Defendants in custody longer custodial sentences than the "tariff" in order to "cover" the period spent on remand, especially under systems where a civil action lies for damages for unreasonable detention.

Perhaps the most serious aspect of pre-trial detention is that the individual is still at a stage where he is presumed innocent: he has not been and may never be convicted. Yet from his point of view detention is detention and there is no physical difference merely because he is not detained pursuant to a sentence. The distinction is a legal one, whose practical consequences are small. In most countries this is recognised by the integral deduction of the remand

period from any final sentence of imprisonment (or even from a fine).

It cannot be denied that pre-trial detention is a necessary evil to be invoked in exceptional cases in the interests of the community to ensure the proper conduct of criminal proceedings and the effective enforcement of criminal sanctions. The three principal grounds of detention in most countries are the prevention of absconding, the prevention of interference with witnesses or evidence and the prevention of further offences by a recidivist.

However, the prospect of detention, combined with the length of proceedings in some countries, may often militate against the very objectives which pre-trial detention is supposed to attain and replace them with the rough and ready process of bargaining between prosecution and defence.³ First, the prosecution may use the threat of opposing bail as a means of persuading a Defendant to confess, plead guilty and "get it over with". In this way an innocent Defendant may be pressurized into pleading guilty to a lesser offence rather than face a long period of pre-trial custody, the uncertainty of a trial on a more serious charge and the possibility of a longer sentence at the end of it. The period of custody awaiting trial for the more serious offence might be no longer than the actual sentence for the lesser offence.

Conversely, a guilty Defendant, sure of a custodial sentence in any event, may use delay to his advantage by offering to plead guilty to a lesser offence carrying a reduced sentence.

In every country examined, legislative reforms have been introduced to reduce both the length and the frequency of pre-trial detention but, although the provisions of each country bear a marked similarity of approach, the practice on both counts varies considerably. What is considered a reasonable time in one country would be

excessive in another. The practice regarding detention is intimately associated with the rest of the criminal procedure, whether that be "accusatorial" as in England or "inquisitorial" as in the other countries examined.⁴

The fundamental difference between the two procedures can be found in the division of functions. The accusatorial system is regarded as a contest between the prosecution and the accused to prove to the Court that on the evidence the accused has or has not committed the offence charges. The Judge acts as an umpire in the proceedings and does not participate in the investigations or the preliminary examination of witnesses, which are carried out by the Police and by Counsel for the parties respectively. The prosecution decides whether to bring a charge and, if so, what charge and must prove that charge. The Defendant need not submit to examination but has the right to remain silent.

By comparison the classical form of inquisitorial procedure is a far more elaborate process. The system is designed to guarantee that a full and independent investigation is carried out and that it is fairly and openly conducted in order to dispel any fear of abuse of power, collusion or suppression of evidence. Initial investigations are carried out by the Police, who then pass the case to a public prosecutor for a decision on the question of prosecution. The case is then brought before an investigating Magistrate who carries out a pre-trial judicial investigation: he may examine witnesses, issue search warrants and authorise detention. He will then have the dual role of Judge and Investigator, whose jobs are to discover all evidence pointing to the existence of any offence and to identify the perpetrator. At the end of his investigation he will either release the Defendant or send him to trial before another Court.

Different systems obviously have different consequences for the practice of remand in custody. The elaborate procedure of the inquisitorial system may go on for a considerable time after arrest and before the investigating Judge decides to send the Defendant to trial and draw up the indictment. There is a temptation to consider detention as automatic as this avoids the inconvenience of the Defendant not turning up at any part of the investigation. The investigating Judge, being intimately acquainted with the case, will be more easily convinced than an independent Magistrate that the needs of the investigation dictate the Defendant's continued incarceration.

The file can become voluminous and the handling by one branch of the prosecution will paralyze the proceedings by others. Moreover, proceedings before the investigating Magistrate are often protracted: there are sometimes insufficient Judges so that each hearing on any case may be preceded and followed by a considerable delay. The defence has a right of access to the Court file and, again, while this is out of the Judge's hands the case cannot proceed. By comparison, the system of Police investigation is informal and speedy, carried out wherever a witness may be and without the need to involve the defence. The proceedings are quicker and the occasions requiring the Defendant's presence are fewer. As a result both frequency and length of detention may be considerably reduced.

This study compares the provisions and, so far as possible, the practice of pre-trial detention in four countries in Western Europe: one operating the accusatorial system and the others operating the inquisitorial system in one form or another. It deals only with detention between first appearance in Court and trial. The periods of detention prior to the first appearance are uniformly short, i.e. not more than 48

hours, and provisions governing that matter are outside the scope of the present study.

ENGLAND

The investigation and prosecution of offences in England are undertaken by the Police in the majority of cases. The Police interview witnesses and decide on the charge and appropriate evidence. Police enquiries are for the most part not subject to judicial control and the defence has no right to be present when witnesses are questioned. The Defendant himself has the right to remain silent and cannot be forced to answer the questions either by the Police or subsequently by the Court. Nor does the Defendant have to disclose his defence in advance. The role of the Court is not to investigate but to decide whether, on the evidence presented by the parties, the Defendant committed the specific offence of which he has been charged.

Offences are divided broadly into summary offences, triable before one or more Magistrates (usually lay persons), and indictable offences, triable in the Crown Court before a Judge and jury. Certain offences may be tried under either procedure depending on the election by the prosecution or defence. Simple summary cases may be dealt with by Magistrates at the first appearance of the accused, even if he pleads not guilty. However, where the Defendant indicates that he wishes to plead guilty and wants to be legally advised or apply for legal aid, or if it appears to the Court that he ought to seek legal advice, or if the prosecution is not ready, the case may be adjourned. If a Defendant is then remanded in custody, he may only be held for eight days,⁵ after which he must be brought again before the Court. If the case

is still not ready for hearing he may be remanded for successive periods of eight days until it is ready.⁶ There is no statutory limit to the number of remands, although a Defendant may apply to a High Court Judge for bail if he considers his detention excessive or unjustified.⁷

If a case is to be heard in the Crown Court it will first come before the Magistrates for "committal" proceedings,⁸ at which the prosecution presents its evidence and the defence has a chance to examine prosecution witnesses and may submit that there is no case to answer. If this submission is accepted the case is dismissed. Such an occurrence is fairly rare and, in practice, committal proceedings are often no more than a formality whereby the defence consents to being committed without the prosecution statements even being read by the Magistrates. As a result the procedure is very rarely an effective sieve of cases and may be time-consuming. It can cause considerable delay in the determination of proceedings and has little useful effect. While a case is awaiting committal a Defendant may again be remanded in custody for eight days at a time. The Defendant in custody after committal will remain there until trial unless he is released by the trial Court or by a judge of the High Court.

Once committed, a case should be heard by the Crown Court not less than 14 days and not more than 8 weeks from the date of committal.⁹ The maximum limit is not mandatory¹⁰ and many Courts are so busy that they have produced stencilled proforma letters notifying the Defendant that his case will not be heard within the 8 week period. In 1978, 17.7 percent of Defendants on bail and 72.3 percent of Defendants in custody awaiting trial at the Crown Court were tried within 8 weeks of committal, and 71.3 percent of Defendants on bail and 93.6 percent in custody were tried within 20 weeks.¹¹

Bail – The Bail Act 1976

The decision to remand on bail or in custody is now governed by the Bail Act 1976. Bail may be granted by the Magistrates' Court prior to or at the hearing or committal.¹² After committal a Defendant seeking bail may apply to the Crown Court to which he is being committed, or to the High Court.¹³ The principles of the Bail Act apply to any of these situations. The striking feature of the Bail Act is that it provides a general right to bail by creating a statutory presumption in favour of it. The effect of the presumption is that the Court is obliged to consider bail on its own initiative and can refuse it only for the reasons specified in Schedule 1 of the Act.¹⁴ In addition, if the Court refuses bail or imposes conditions, it must give reasons,¹⁵ record them¹⁶ and supply the Defendant with written notices of them if so requested.¹⁷ The presumption of bail applies to pre-trial proceedings in respect of all cases other than offences of treason.

Schedule 1 of the Act contains the exceptions which may ground a refusal of bail. The Schedule distinguishes between "imprisonable" and "non-imprisonable" offences, but the question of bail where an offence is imprisonable is to be decided "with regard to any enactment prohibiting or restricting the imprisonment of young offenders or first offenders".¹⁸ As a result, the principle contained in Schedule 1, Part 11, of the Act, dealing with non-imprisonable offences, applied only to the most minor offences, which are mainly subject to summary procedure, for which special reasons for a remand in custody would have been required in any event. In practice, therefore, nearly all bail decisions are made under Schedule 1, Part 1, referring to imprisonable offences.

However, if a Defendant is accused (or convicted) of an offence which is not pun-

ishable with imprisonment, bail may be refused only if:

- (a) *it appears that he has previously failed to surrender to custody when granted bail and, in view of that failure, the Court is satisfied that it is probable that he will fail to surrender to custody if granted bail on the present occasion*¹⁹ or,
- (b) *he should be kept in custody for his own protection (or welfare if he is a child or young person)*²⁰

A person charged with an offence punishable with imprisonment may be refused bail if the Court is satisfied that there are substantial grounds for believing that:

- (a) *he would fail to surrender to custody or,*
- (b) *he would commit an offence while on bail or,*
- (c) *he would interfere with witnesses or otherwise obstruct the course of justice in relation to himself or someone else*²¹ or,
- (d) *he should be kept in custody for his own protection*²² or
- (e) *it has not been practicable to obtain sufficient information to make a decision on the above grounds because of want of time since the institution of the proceedings.*²³

In dealing with the first three grounds the Court must consider any relevant matter and in particular:

- i. *the nature and seriousness of the offence and the probable method of dealing with the Defendant;*
- ii. *the Defendant's character and antecedents and association and community ties;*
- iii. *the strength of the evidence against him.*²⁴

A person released on bail is under a duty to surrender at the time and place appointed²⁵ and failure to do so constitutes an offence of absconding.²⁶ This offence is pun-

ishable by three months imprisonment and a £400 fine on summary conviction or 12 months imprisonment and an unlimited fine on conviction by the Crown Court.²⁷ Additional conditions of bail may be imposed only where they appear necessary to the Court to secure the Defendant's surrender to custody, to prevent him committing an offence while on bail or to prevent him interfering with witnesses or obstructing the course of justice.²⁸ Examples of such conditions are sureties, the giving of security (either by way of money or surrender of his passport) or reporting to a Police Station, keeping out of certain areas or away from certain associates.

One further useful measure contained in the Bail Act is the introduction of compulsory Legal Aid for the purpose of bail proceedings, *inter alia*, where a person charged with an offence before a Magistrates' Court is brought before the Court in pursuance of a remand in custody on an occasion when he may again be remanded or committed in custody, if he was not represented on the previous remand.²⁹ This is one of the few examples of compulsory legal aid and serves to emphasise the importance attached to pre-trial detention.

No statistics are yet available which would show the effect of the Bail Act since its coming into force.³⁰ One of the major lacunae of the Act is that it does not apply the presumption to Police bail. While in itself Police detention represents only a small part of the time spent in custody, studies in 1971 showed that Police objections to bail, and the fact that a Defendant appears before Magistrates in custody will be a major factor in the Magistrates' decision.³¹ While the average length of time spent in pre-trial custody is short (29 days in 1977),³² many Defendants still spend considerable periods in custody at this stage. At the end of 1976 there were over 100 people in prison who had spent be-

tween 6 and 9 months in custody and 20 who had spent over 9 months in custody.³³

As had been pointed out,³⁴ the present policy (or at least the policy which existed prior to the coming into force of the Bail Act) is somewhat over-cautious. In 1971, Lord Hailsham, the Lord Chancellor, suggested that the absconding rate was about 3%. In the same year 51,753 persons were received into custody awaiting trial. Of these 2,602 or 5% were acquitted or had the case against them dropped and 19,767 did not receive a custodial sentence. While the custody period is short, 43% of those in custody should arguably not have been there at all. By 1977, the latest year for which figures are available, the position had improved. 44,988 people were received into custody awaiting trial. Of these 1,685 (3.8%) were acquitted or not proceeded against while a further 15,377 (34.2%) received non-custodial sentences.³⁵ In the same year, 3% of persons released on bail by Magistrates' Courts for indictable offences failed to appear to court bail.³⁶

In conclusion, however, it is worth noting that remand on bail is much more frequent than remand in custody. For the period July to December 1977 81% of Defendants remanded during proceedings at Magistrates' Courts for indictable offences (whether dealt with summarily or committed to the Crown Court) were remanded on bail throughout, while only 6% were in custody throughout. The remaining 13% spent part of the time on bail and part in custody.³⁷

FRANCE

The French system of criminal justice recognises three categories of offences, according to the degree of seriousness attributed to them. The category dictates the Court

which deals with the matter and the procedure to be followed, and also has consequences for the decision to remand in custody. The most minor, non-imprisonable, offences are *contraventions* and are dealt with by the Tribunal de Police. More serious offences are *délits*, normally punishable by two months to five years imprisonment, and heard by the Tribunal Correctionnel. The most serious offences (about 2% of the total) are *crimes* which are tried by the Cour d'Assises: *crimes* are punishable by five or more years imprisonment or by death.

Detention on remand may never be imposed in cases of *contraventions*, and the rest of this study will therefore deal only with *délits* and *crimes*. The procedure for prosecution of these types of offences is inquisitorial. The initial investigation and the apprehension of suspects are carried out by the Police Judiciaire under the directions and supervision of the Procureur de la République or Public Prosecutor. The Prosecutor decides whether to prosecute and, if so, by what method. He may either have the Defendant summoned to appear before a court at a future date, a method known as *direct-citation*, or if the Defendant was caught in the act he may request immediate trial (the *procédure de flagrant délit*). Finally, he may forward the case to an examining magistrate (*juge d'instruction*) to conduct a pre-trial investigation. This last procedure is adopted in all cases of *crimes* and in any case where detention of more than 24 hours is requested. It is in this type of case that pre-trial detention is most common.³⁸ The *juge d'instruction* combines the roles of Judge and Investigator. It is his duty to discover all the evidence pointing to the existence of an offence and to identify the perpetrator. He conducts the investigation for both prosecution and defence – he may compel the attendance of witnesses, examine the ac-

cused and issue search and arrest warrants. He is the only person competent to order pre-trial detention and indict the accused. The accused or his lawyer has the right to be present at all examinations and has the right to see the case file. At the end of the investigation, the Judge will release the accused if he considers that the charge is not grounded. Otherwise he will send him before the trial Court to which he will forward the file. The trial is accusatory and the calling of witnesses lies in the hands of the prosecution and defence, although the Court may call for other witnesses. The parties must disclose the witnesses they intend to call.

This is the usual procedure, although in the case of *délits* the prosecutor has the option to proceed to trial without a pre-trial investigation. In such cases detention on remand is not authorised.

Pre-trial Detention, Bail or Contrôle Judiciaire

The provisions governing the remand decision were reformed by the law of 17 July 1970 amending the Code of Criminal Procedure (CPP).³⁹ The aim of this law was to liberalise the practice and reduce the incidence of pretrial detention. The central features of that law are to:

- (a) create a presumption in favour of pre-trial release;
- (b) specify the exceptions and formal requirements;
- (c) introduce for the first time a system of *contrôle judiciaire* allowing the imposition of wide ranging restrictions or conditions on pre-trial release.

The general principle is contained in article 137 of the CPP which provides that remand in custody or *contrôle judiciaire* may not be ordered except by reason of the needs of the investigation or as a "safe-

ty measure". As regards *délits*, Article 144 imposes additional requirements before detention or control may be ordered:

- i. The sentence which may be imposed must be at least two years' imprisonment and
- ii. The obligations which may be imposed by way of *contrôle judiciaire* are insufficient to guarantee the matters mentioned in Article 137 and
- iii. Detention on remand is:
 - (a) the only way to preserve evidence, prevent the accused bringing pressure on witnesses or conspiring with accomplices or co-defendants, or
 - (b) necessary to keep public order from disruption in relation to the commission of the offence; to protect the accused; to put an end to the commission of offences or prevent their renewal or to guarantee the defendant's return to Court.

In addition the Judge may remand a defendant in custody, regardless of the length of sentence, if he has wilfully disregarded the conditions of *contrôle judiciaire*.⁴⁰

In applying the above criteria the Judge will be guided by the defendant's previous record, by the seriousness of the offence and the strength of his community ties. He will also take into account the seriousness of the evidence pointing to the defendant's guilt. As in England there is no bail information scheme and the Judge's decision could be made on insufficient information. The decision must be in the form of an order and specific reasons must be given based on the facts of the case and must refer to one or more of the grounds contained in Article 144 outlined above.⁴¹ A decision may be appealed by the prosecution or the defence and the defendant remains in custody pending the appeal.

As regards *crimes*, detention is consider-

ed the normal course for such serious offences and the strict conditions for *délits* do not apply. Although the general principle in Article 137 applies, remand in custody may be ordered by simple warrant and without the giving of reasons.⁴² However, the defendant may apply to be released and the Judge then has to give a reasoned order specifying the grounds for his continued detention.⁴³

Length of Detention

As regards *délits*, remand in custody may not exceed 4 months. At the end of this period it may be extended for a further 4 months by order of the Judge, who must give reasons. This decision may be appealed. However, where an accused charged with a *délit* has not previously spent at least 3 months in prison and will not be sentenced to more than 5 years, remand in custody may be extended only once and for 2 months only, making a total of 6 months in all.⁴⁴ There is no maximum length of detention for defendants charged with crimes other than the period of the maximum sentence which may be imposed.

During the pre-trial investigation release may be ordered by the Judge, either on his own initiative, after a request by the prosecution or, most often, after a request by the defendant.⁴⁵ The defendant may apply at any time and the Judge informs the procureur and the *partie civile* (aggrieved party). He must decide not earlier than 48 hours after informing the aggrieved party and not later than 5 days after notifying the prosecution. If he fails to do so the defendant can apply to the *Chambre d'accusation* which must decide within 15 days failing which the defendant is released.⁴⁶ The accused may also apply to the *chambre d'accusation* if he has not been examined by the Judge for more than 4 months.⁴⁷

At the end of the preliminary investigation, if the charge against the accused is not made out, he is released. Where the case is sent to trial detention ends automatically in the case of the defendant charged with a *délit*, and it must be extended by a specifically reasoned order. This can no longer be grounded on the needs of the investigation and must be based on "safety measures". The order is for detention until trial but is effective only for 2 months.⁴⁸

In the case of *crimes* detention continues automatically.⁴⁹

Contrôle Judiciaire and Bail

Prior to the legislation of 1970 Judges were faced with straight alternatives of remand in custody or release, with or without bail. In the face of this alternative Judges were sending many defendants to prison during the preliminary enquiries. The law of 17 July 1970 gave Judges wide power to impose conditions on release in order to reduce the incidence of detention. Money bail is subsumed as one of the conditions that may be imposed. The new legislation makes clear that, at any rate in the case of *délits*, *contrôle judiciaire* is to be preferred to remand in custody.

Like pre-trial detention, *contrôle judiciaire* may be imposed only where it is required by the needs of the investigation or as a safety measure.⁵⁰ It may be imposed where the accused risks a sentence on imprisonment for a *delit* (*emprisonnement correctionnel*) or a more serious sentence.⁵¹ It is ordered by the Judge who does not have to give reasons and his order is not appealable. It may be imposed or modified at any time and be removed by the Judge on his own motion or on application by the prosecutor or defence. There is no limit on its duration but, like pre-trial detention, it ceases at the end of the preliminary investi-

gation unless extended.

The conditions on release are broadly of two kinds. First, there are "preventive and restrictive" measures, similar to those in England, including reporting conditions, surrender of passport, and restrictions on mobility or associations, which are designed to ensure that the defendant presents himself before the Court at the relevant time, does not abscond or interfere with witnesses or commit further offences (e.g. restrictions on professional activities, on driving or on writing cheques). Secondly, there are measures requiring the Defendant to submit himself to treatment, in particular for drug or alcohol addiction, or requiring supervision of his professional or scholastic activities. Wilful disregard of the conditions of *contrôle judiciaire* is a ground for imposing pre-trial detention regardless of the length of sentence which can be imposed.⁵²

The granting of bail by way of the deposit of money or security may be imposed as a condition of *contrôle judiciaire*.⁵³ It may be payable by instalments. Unlike the English concept, bail has two separate elements:

- i. to guarantee the accused's appearance at all stages of the procedure, the execution of the judgment and respect for conditions imposed by way of *contrôle judiciaire*
- ii. to guarantee payment of the aggrieved party's costs and damages, the costs of the prosecution and any fine.⁵⁴

Despite the emphasis placed on *contrôle judiciaire* it continues to play only a small role in remand decisions. During 1978, out of 79,624 cases, examining Magistrates' ordered detention in 61,245 (76.9%) and release in only 18,379 cases. *Contrôle judiciaire* was not used in 12,426 (67.61%) of these cases. Of the remainder, bail was used in only 796 cases.

Of those detained on remand, 55.7% spent one month or more in detention.

About 17% had spent more than 4 months in detention. However out of all the cases of detention on remand, only 20,668 (about 34.5%) ended in convictions involving custodial sentences. Although it is impossible to calculate, some defendants will undoubtedly have received custodial sentences shorter than the period already spent on remand.⁵⁵ On 1 January 1979 there were 14,167 remand prisoners, representing 42.52% of the prison population.⁵⁶

The figures appear to indicate that detention on remand is used too much and *contrôle judiciaire* not nearly enough, and that in many cases (65.5%) pre-trial detention gives a person a taste of prison where the final sentence does not. It also seems that the periods of detention are in general longer than those in England, due mainly to the length of the pre-trial investigations, and virtually half of those detained on remand spend between one and 6 months awaiting trial.

GERMANY

The system of criminal justice in the Federal Republic of Germany is also of the inquisitorial type. Offences are classified into *Verbrechen*, punishable by imprisonment of one year or more, and *Vergehen* which ordinarily carry a sentence of less than one year. Prosecution is compulsory for *Verbrechen*, whereas in the case of *Vergehen* the Code of Criminal Procedure (St. PO) imposes a series of criteria governing the exercise of prosecutorial discretion.

Prior to 1975 the Code imposed a requirement that *Verbrechen* be investigated by a Magistrate once the Police investigations had been completed. This requirement resulted in considerable delay resulting from duplication of work by the prosecuting authorities and the examining Magistrate, and the length of proceedings

in the Federal Republic of Germany was the subject of many applications to the European Commission of Human Rights relating to the right to trial within a reasonable time and the length of detention on remand pending such trials. In 1964 the Code of Criminal Procedure and Judicature Act had been amended to limit generally the imposition of detention on remand and, in particular, to limit it to 6 months except in special circumstances. The Code was again amended by the law of 1975 the aim of which was to accelerate the criminal procedure in order both to eliminate these delays and to ensure the effective combating of crime by swifter retribution.⁵⁷ The new law did not lay down any absolute obligation to shorten trials because no effective sanction was put forward, nullity having been ruled out. Instead, it pinpointed the judicial preliminary investigation as the main cause of delay and abolished this institution, transferring the investigatory functions from the Judge to the Public Prosecutor. He now has authority to compel the attendance of witnesses, to inspect papers seized by search and to take various other measures associated with the investigation. The law made other amendments aimed at eliminating administrative delays. Theoretically at least, supervision of the investigations lies in the hands of the competent Judge and it is he who authorises search or pre-trial detention.

Detention on Remand

The Basic Law sets out the right to liberty of the person and gives precise legal guarantees to this right.⁵⁸ The "constitutional principle" of proportionality also applies to detention on remand both as regards the circumstances in which such detention may be ordered and the length of time for which it may be maintained.⁵⁹

The provisions of the European Convention on Human Rights are likewise applicable, but the Convention has only the rank of Statute law in the Federal Republic. Although it is nowhere expressly stated that there is a presumption in favour of liberty, the Federal Constitutional Court has held that the principle of proportionality implies that interference with personal freedom may be allowed only if and in so far as the legitimate requirements of society in the thorough elucidation of the facts and the swift punishment of crime cannot be secured other than by the temporary imprisonment of the suspect.⁶⁰

Detailed provisions relating to pre-trial detention are to be found in the German Criminal Code.⁶¹ Article 112 (1) provides that detention may be ordered in respect of an accused if a serious suspicion exists concerning his guilt and if one of the specified grounds for detention exists. It may not be ordered where it appears disproportionate having regard to the seriousness of the case and the sentence or other measure which may be passed.

In order to establish the existence of a serious suspicion, the Judge must mention specific facts arising from the investigation which create a strong probability that the accused wrongfully committed the act and that he will be convicted. This is sometimes difficult to establish in the short time available to the Judge and the main protection of the individual is contained in the requirement that the Judge specify the existence of one of the grounds justifying detention.⁶²

Until 1964, the only reasons justifying pre-trial detention were, first, absconding or danger of absconding⁶³ and, second, the need to preserve evidence.⁶⁴ The laws of 1964 and 1972 introduced further grounds, relating to the seriousness of the offence charged⁶⁵ and the risk that the accused would commit further offences if left at

liberty.⁶⁶ By far the most important ground in practice (about 93% in 1977) is that of absconding or danger of absconding.⁶⁷ The Judge must determine such a danger according to an appreciation of the circumstances of each case, and the factors to be considered are, inter alia, the family situation of the accused, his professional status, whether he has a fixed abode and the seriousness of the likely sentence (which, in turn, will reflect the seriousness of the offence).⁶⁸

As regards minor offences, punishable by 6 months imprisonment or less or by a fine, detention on the grounds of absconding may be ordered only if the Defendant has already previously absconded or attempted to do so, has no fixed abode or cannot prove his identity. Detention may not be ordered on the ground of risk of suppression of evidence for such offences.⁶⁹

Detention based on the second ground, risk of endangering the preservation of evidence, may be imposed where the accused's conduct justifies a "serious presumption" that he will:

- (a) *interfere with material evidence by destroying or falsifying it or,*
- (b) *bring illicit pressure to bear on the accused, witnesses or experts or,*
- (c) *take such action indirectly through a third party.*

Such action must present a real risk of making discovery of the truth more difficult. Detention on this ground is absolutely excluded in the case of minor offences.

The "serious crimes" ground of detention is not so much an independent ground as an authorisation to relax the strict conditions applicable to the previous two. It applies to cases where there is a strong presumption that the accused has committed a crime endangering life.⁷⁰ In such cases pre-trial detention may be ordered where neither of the two previous grounds (or the grounds relating to the commission of fur-

ther offences) is available. Although it appears on the face of it that this allows pre-trial detention *per se* in such cases, the Federal Constitutional Court has restricted the scope of this provision by its interpretation of it. According to the Court, neither the seriousness of the offence, nor the extent of the accused's culpability, nor consideration of the likely public reaction to leaving an alleged murderer at large is sufficient to justify detention. Facts must exist which justify a fear that if the accused is not arrested the investigation and rapid punishment of the offence will be jeopardised. It suffices that there are certain circumstances which tend to show that the danger of absconding, or the risk of interfering with evidence, or the risk of committing further offences, cannot be excluded, even in the absence of the precise facts which would justify detention on one of these grounds.^{71 72}

The final ground, introduced in 1964 and extended in 1972, is the risk that further offences may be committed if the accused is allowed to remain at large.⁷³ Relying on this ground, detention may be imposed:

- i. *in respect of offences against public morals where there is a serious suspicion against the accused and certain facts lead to the presumption that before conviction he will commit serious offences of the same nature or continue the offence, and where arrest is necessary to avoid an imminent danger;*
- ii. *under the same conditions, where there is a serious suspicion of commission of serious offences of assault and battery, robbery, habitual theft, armed robbery, extortion, dealing in stolen goods, fraud, arson, armed hold-ups of vehicles and certain offences concerning drug addiction. The offence must also be one which seriously disturbs public order. The likely sentence must*

*be at least one year and, generally, the accused must have received a prison sentence within the 5 preceding years.*⁷⁴

The third general condition imposed by Article 112 (1) and applicable to all the above grounds, is that the imposition of detention must not be disproportionate to the seriousness of the offence and the likely sentence. In other words, the Court must weigh the incursion on the rights of the accused with the public interest. In most cases, the accused will come before the Court following a Police arrest made without a warrant, although where the accused has absconded a "bench warrant" will be issued for his arrest. Since 1964, the Judge has a strict obligation to state his reasons when making the order and must specify the facts which substantiate those serious suspicions and the grounds upon which he bases his decision.⁷⁵ The accused must also be informed of his right to appeal and his right to request a review of detention.⁷⁶ These provisions are particularly important as the shortness of time available to the Judge often means that his decision is based on very scanty information.

The possibility of bail or liberty on conditions arises only when an arrest warrant has been issued. It has no separate existence but it is legally a suspension of detention subject to conditions, so that detention may be re-imposed simply by revoking its suspension. However, Article 116 of the code specifies the measures which may be taken in respect of each ground. Detention based on the risk of absconding *must* be suspended when the prevention of absconding can be achieved by less severe measures such as reporting conditions, obligations as to residence or supervisions, or bail. Other measures include withdrawal of the defendant's passport or driving licence and the Judge may impose a combination of these measures. In the case of detention

based on the need to preserve evidence or the risk of the commission of further offences, the decision to suspend and the choice of conditions depends on the discretion of the Judge. Detention based on the "serious crimes" grounds may or must be suspended depending on the main ground which the Court has held cannot be excluded.

Length of Detention

The German Code does not lay down any absolute time limits for pre-trial detention except that, where a person is detained because of a danger that he may commit further offences if at liberty, there is a maximum limit of one year until judgment in order to ensure that recidivists are tried quickly.⁷⁷

The main check on excessive detention is the system of review. The most important source of control is the right of the accused to seize the Court of the question. First the accused has the right to appeal against the issue of an arrest warrant,⁷⁸ but this remedy is of much less practical importance than the right of the accused to request a review of detention at any time during the proceedings.⁷⁹ In general, an oral hearing is held to decide whether the conditions justifying detention are still satisfied or whether the warrant should be lifted, or suspended by the use of other measures.

Review by the Court of its own motion is supposed to be a constant process, encouraged by the possibility of measures of substitution. However the German Code recognizes certain time limits, beyond which detention must be reviewed. After 3 months, if the accused has no Counsel and has neither requested review nor appealed against the warrant, the decision to detain must be reviewed.⁸⁰ Articles 121 and 122

also recognize that in principle pre-trial detention should not exceed 6 months. Therefore, after this period has passed detention must be reviewed by the Court of Appeal (*Oberlandesgericht*) and may be extended, exceptionally according to the Code, if the investigation presents particular seriousness and difficulties or if some other substantial reasons still preclude final judgment. Applying the principle of proportionality, the Federal Constitutional Court has held that the authorities must further demonstrate that they have done everything within their power to conclude the investigation and to bring about a decision concerning the alleged offences.⁸² A similar review must take place every three months thereafter.

Despite this reform and the reform of the criminal process, long trials and consequent lengthy detention still frequently occur. The criminal process and the shortage of judicial and prosecutorial personnel conspire to lengthen periods of remand and therefore of detention.

Thus, during 1977, 40,004 persons were remanded in custody pending trial. Of these, 24,974 (62.43%) spent more than one month in detention and 13,553 (33.88%) spent more than 3 months in detention. Despite the exceptional nature of detention exceeding 6 months, 5,784 persons (14.5%) spent over 6 months awaiting trial. 397 persons spent over 1 year in prison pre-trial.

Of the 39,865 remand prisoners whose cases were decided in 1977, just over half (21,053) received custodial sentences.

The figures suggest that judges take seriously the requirement that there be a serious suspicion of guilt before a person is remanded in custody. Only 2.6% of remand prisoners were acquitted or had the charges against them dropped.⁸²

For the guilty, the remedy is integral deduction of the period of pre-trial detention from the final sentence. (By a calculation

of a "daily rate" this deduction can be applied to fines as well). For those who are acquitted or whose cases are not proceeded with by the Court or prosecution, a system of compensation exists.

BELGIUM

In Belgium the division of functions in the criminal process as between the police, the prosecution and the judiciary is broadly similar to that operating in France. A pre-trial judicial investigation is conducted by the *juge d'instruction* under the supervision of the *chambre du conseil*, to establish whether an offence has been committed and whether there is sufficient evidence (*charges suffisantes*) to indicate that the accused is the likely culprit. As in France, the criminal code recognizes *crimes*, *délits* and *contraventions* in descending order of seriousness. Although the pre-trial procedure is the same for each, the trial court will be different (*Tribunal de Police*; *Tribunal Correctionnel* and *Cour d'Assises*); likewise the penalties attaching to the offences will vary. The classification of offences also has consequences regarding pre-trial detention.

The rules governing pre-trial detention in Belgium are among the oldest in force in Western Europe.⁸³ The fundamental right of the individual to personal liberty is guaranteed by Article 7 (1) of the Constitution of 1831, and the European Convention on Human Rights is also part of Belgian law. The basic law relating to pre-trial detention was passed on 20 April 1874 and has survived with amendments until the present day. By and large, these amendments have been inspired by a desire to provide a better guarantee of individual liberty by attempting to restrict the frequency and length of pre-trial detention and to provide compensation for wrongful detention. This process of reform culminated in the law of 13 March

1973, although further reforms are proposed. As in many other countries reforms have been necessitated by the "formalization" in practice of conditions imposed by law: the automatic use of arrest and detention and the use of stock phrases in place of factual justification.

Belgian law provides a presumption, which is clear in the law of 1874, that liberty is the rule and detention is to be used only in exceptional cases. Apart from the case of *flagrants délits*, no one may be arrested without the making of a reasoned order by a Judge which must be notified to the accused at the time of arrest or within 24 hours.⁸⁴

Certain conditions must exist before a decision to detain can be made.⁸⁵ First, there must be indications that the accused is guilty of the offence charged, although the weight of such indications is not as great as that of the evidence needed to justify sending him for trial at the end of the preliminary enquiry.⁸⁶

Secondly, the offence must be punishable by at least 3 months imprisonment on conviction by the Tribunal Correctionnel. If the offence is punishable by 15–20 years forced labour or a more serious sentence, arrest is automatic and the *juge d'instruction* may only allow the accused to remain at liberty if the prosecutor agrees. In all other cases, the decision is within the Judge's discretion.

Thirdly, if the accused resides in Belgium he may be detained only if there are "grave and exceptional circumstances affecting public security". Such circumstances must be specified in the reasoning of the order but, as in other countries, there has been a tendency in Belgium to recite the phrase without substantiating it. Accordingly, in the manner of the German legislation, the law of 13 March 1973 obliged the Judge to refer to "the elements peculiar to the case or the personality of the accused" and this

obligation is strictly enforced by the *Cour de Cassation*.⁸⁷ In the case of a defendant resident outside Belgium, there is no need to show the existence of such circumstances.⁸⁸ Broadly, these circumstances are the same as in other countries, i.e. the risk of absconding, the risk of interfering with the course of justice and the possibility of committing further offences.

Belgian law does not impose any absolute limit on the length of time which a person may spend in detention although, as Article 5 (3) of the European Convention of Human Rights is directly applicable in Belgium, a person may not be detained for more than a "reasonable time". As in other countries, the guarantee that detention does not exceed what is reasonable and is not imposed or maintained unnecessarily is to be found in the system of review.

The initial warrant for arrest is generally issued at the Prosecutor's request. This warrant lasts for 5 days, and the accused must be released unless the *Chambre du Conseil* confirms the Judge's decision. It must review the case and establish whether the necessary conditions are fulfilled and, if so, it extends detention by one month from the date of the examination of the defendant by the Judge. After one month, and every month thereafter, the *Chambre du Conseil* must decide, after hearing the parties, whether detention should be further extended. The law of 13 March 1973 restricted such extension by providing that the reasons justifying it must be as serious as those which led the investigating Magistrate to issue the warrant.⁸⁹ Secondly, since 1973 the *Chambre du Conseil* must specify in its reasoning the elements peculiar to the case or the personality of the accused.⁹⁰ Decisions of the *Chambre du Conseil* may be appealed by the prosecution or the defence.

Apart from the non-renewal of the warrant of the *Chambre du Conseil*, the *juge*

d'instruction may propose ending detention at any time during the preliminary enquiry. If the Prosecutor objects then the decision is taken by the *Chambre du Conseil* after hearing the prosecution and defence and reading the Judge's report. The decision must be taken within 5 days. If the *Chambre du Conseil* confirms the detention, it extends it by one month from the date of its decision.⁹¹

At the end of the investigation, if the *Chambre du Conseil* makes a *non-lieu* (decision not to proceed), commits the Defendant to the Police Court, or commits him to the *Tribunal Correctionnel* in respect of an offence punishable with less than 3 months imprisonment or a fine, the Defendant must be released. If he is committed to the *Tribunal Correctionnel* the *Chambre* has a discretion to detain the accused. If he is detained, he remains in custody until trial, although he has the right to apply to the trial court for release pending trial. Although bail may be imposed as a condition of release,⁹² there is a reluctance to use this as it is considered to be a form of economic discrimination by which only the rich may buy freedom.

As a further guarantee of individual rights, the law of 13 March 1973 introduced a right of compensation in two circumstances.⁹³ First, in pursuance of the obligations under Article 5 (5) of the European Convention of Human Rights, an individual may claim compensation in respect of any deprivation of liberty contrary to the provisions of Article 5 of the Convention either because the arrest was not lawful under Belgian law or because, for example, the length of time spent in detention was not reasonable. The law provides for an ordinary civil action for damages against the state. Secondly, compensation may be claimed for pre-trial detention which, although lawful, subsequently proves to be unnecessary. It applies to cases where a

person is cleared and not, for example, where he is given a sentence shorter than the time spent on remand in custody, or a conditional discharge. It applies to:

- i. acquittal at trial;
- ii. non-lieu supplemented by proof of innocence;⁹⁴
- iii. detention after the time limit for prosecution has expired;
- iv. non-lieu deciding that no offence has been committed.

Compensation will be awarded only if detention is in excess of 8 days and where it was not occasioned by the wilful or negligent fault of the accused during the investigation. Application, which is subsidiary to any civil action for damages, is made to the Minister of Justice. The level of compensation is fixed having regard to "equity, taking account of all the circumstances of public and private interest."⁹⁵ The Minister's decision may be appealed if compensation is refused, the amount is considered insufficient or he does not decide within 6 months of the application.

Both the frequency and length of pre-trial detention vary dramatically according to whether a defendant is committed to the *Cour d'Assises*, for a *crime*, or to the *Tribunal Correctionnel*, for a *délit*.

Of the 61 defendants dealt with by the *Cour d'Assises* in 1974, 57 appeared in custody. Of these, 51 had spent over one year in detention awaiting trial. Of the 6 who were acquitted, all had spent over 9 months and 4 had spent over one year in pre-trial detention.

The *Tribunal Correctionnel* disposed of 5,693 defendants in 1974 who had spent all or part of the pre-trial period in detention. (In the same year, just over 17,000 defendants were committed to the *Tribunal Correctionnel*, so that the custody rate appears to be about one in three). Of these, 2,610 (about 45%) spent less than one month in custody, 4,897 (about 86%) spent

less than 3 months in custody, and 5,423 (about 95%) spent less than 6 months in custody. Only 196 (3.4%) of those detained were acquitted and 46 (0.8%) received non-custodial sentences.⁹⁶

THE EUROPEAN CONVENTION ON HUMAN RIGHTS

*Nature of the Convention*⁹⁷

As is well known, the novelty and importance of the European Convention of Human Rights lies in its procedures, of which the most significant is the right of individual petition under Article 25. By this provision, "any person" may petition the European Commission of Human Rights when he claims "to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention" provided, of course, that the State in question has accepted the right of individual petition. If they satisfy the requirements for admissibility,⁹⁸ such petitions are examined by the Commission "with a view to ascertaining the facts" and "to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in (the) Convention".⁹⁹ If attempts at a friendly settlement fail, the Commission draws up a Report on the facts and states its opinion as to whether the facts found disclose a breach of the Convention.¹⁰⁰ Ultimately the case is decided either by the Committee of Ministers¹⁰¹ or by the Court of Human Rights.¹⁰² The Convention contains provisions relating to detention on remand and there have been several relevant cases involving the application of these provisions; indeed 5 important cases have been dealt with by the Court of Human Rights itself.¹⁰³ These provisions and the case law will now be briefly examined.

Article 5: "The Right to Liberty"

This Article, so far as relevant for detention on remand, provides as follows:

1. Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;...
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released pending trial. Release may be conditioned by guarantees to appear for trial.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Given that this paper deals with the length of detention of remand, paragraph 3 is, for present purposes, the most important part of Article 5. However, it should be noted that paragraph 1 (c) (which deals with the original arrest and detention) creates two requirements without which any period of subsequent *detention on remand* will be contrary to the Convention. First, such detention must be "lawful". Secondly, Article 5 (1) (c) requires that detention should be based on a "reasonable suspicion of (the accused) having committed an offence". In a *jurisprudence constante* (established case-law) the Commission

has held that, in assessing whether a reasonable suspicion existed, it must consider the circumstances of the case as they appeared at the time of arrest and detention.

Assuming, therefore, that the requirements of Article 5 (1) (c) are met and that the detainee is "brought promptly before a judge or other officer authorised by law to exercise judicial power", there still remains the central question whether the subsequent detention on remand has exceeded a "reasonable time". Article 5 (3), it will be recalled, provides that those detained on remand "shall be entitled to trial within a reasonable time or to release pending trial". The meaning of this requirement was first clarified by the Court of Human Rights in the *Wemhoff* case.¹⁰⁴ Three important points emerge from this judgment. First, the period of detention covered by the requirement of a "reasonable time" extends from the moment of initial detention until the day of the judgment that terminated the trial; it does *not*, however, continue thereafter until the conviction becomes final by the failure of any further appeal. Secondly, the Court explained generally "the precise scope of the provision in question;" it stated:

"Article 5, which begins with an affirmation of the right of everyone to liberty and security of person, goes on to specify the situations and conditions in which derogations from this principle may be made, in particular with a view to the maintenance of public order, which requires that offences shall be punished. It is thus mainly in the light of the fact of the detention of the person being prosecuted that national courts, possibly followed by the European Court, must determine whether the time that has elapsed, for whatever reason, before judgment is passed on the accused has at some stage exceeded a reasonable limit, that is to say imposed a greater sacrifice than could, in the circum-

stances of the case, reasonably be expected of a person presumed to be innocent. In other words it is the provisional detention of accused persons which must not, according to Article 5 (3), be prolonged beyond a reasonable time."¹⁰⁵

Finally, the Court considered the methods by which the Convention organs should assess the reasonableness of an accused person's continued detention. Its judgment on this issue is so important as to require quotation in full:

"The reasonableness of an accused person's continued detention must be assessed in each case according to its special features. The factors which may be taken into consideration are extremely diverse. Hence the possibility of wide differences in opinion in the assessment of the reasonableness of a given detention. With a view to reducing the risk and the extent of such differences and as a measure of intellectual discipline, as the President of the Commission put it in his address to the Court, the Commission has devised an approach which consists in defining a set of seven criteria whose application is said to be suitable for arriving at an assessment, whether favourable or otherwise, of the length of the detention imposed. The examination of the various aspects of the case in the light of these criteria is supposed to produce an evaluation of its features as a whole; the relative importance of each criterion may vary according to the circumstances of the case. The Court does not feel able to adopt this method. Before being referred to the organs set up under the Convention to ensure the observance of the engagements undertaken therein by the High Contracting Parties, cases of alleged violation of Article 5 (3) must have been the subject of domestic remedies and therefore of reasoned decisions by national judicial authorities. It is for them to mention the circumstances which led them, in the general interest, to

consider it necessary to detain a person suspected of an offence but not convicted. Likewise, such a person must, when exercising his remedies have invoked the reasons which tend to refute the conclusions drawn by the authorities from the facts established by them, as well as other circumstances which told in favour of his release.

It is in the light of these pointers that the Court must judge whether the reasons given by the national authorities to justify continued detention are relevant and sufficient to show that detention was not unreasonably prolonged and contrary to Article 5 (3) of the Convention."¹⁰⁶

In *Wemhoff*, the accused, a German broker, had been arrested on 9 November 1961 on grave suspicion of having incited breach of trust. Both the warrant for his arrest and the District Court justified Wemhoff's detention on remand because of the fear of his absconding or interfering with evidence. Wemhoff's appeals to higher Courts against his detention were rejected and he remained in detention on remand until he was convicted on 7 April 1965 when he was sentenced to 6 years and 6 months penal servitude and a fine of 500 DM, the period of detention on remand being counted as part of the sentence. It is noteworthy that the indictment which was 855 pages long had not been notified to Wemhoff until 2 May 1964, nearly 3 years after his arrest. In assessing whether Wemhoff's detention on remand had exceeded a reasonable period, the Court of Human Rights examined two issues: first, whether the grounds justifying his detention had been sufficient, and second, whether, even if this had been so, the period of detention had been reasonable. Although, to a large extent, these two points can and should be distinguished (and, for present purposes, the second is the more important), nonetheless the grounds for detention are very relevant when determining whether deten-

tion has been unreasonably prolonged contrary to Article 5 (3): if the grounds for detention on remand are inadequate, then, ipso facto, the detention has exceeded a reasonable time. As regards Wemhoff's case, the Court found that his detention had been "based on the fear that if he were left at liberty he would abscond and destroy the evidence against him."¹⁰⁷ It examined both of these reasons and found them to have been justified on the facts of the case. In the course of its judgment, the Court emphasised that "the concluding words of Article 5 (3) of the Convention show that when the only remaining reasons for continued detention is the fear that the accused will abscond and thereby avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance."¹⁰⁸ In Wemhoff's case, however, there was no suggestion that he would have been prepared to provide sufficient financial guarantees. Nonetheless, before concluding that no violation of Article 5 (3) had occurred the Court checked generally whether the detention on remand had been unduly prolonged.

This second aspect of the Court's *Wemhoff* judgment is of great significance, for might one not think that detention on remand for over 3 years would surely have been found to have exceeded a "reasonable time"? However, as the main part of this paper shows, such protracted periods of detention on remand are, sadly, all too common in certain European countries. No doubt strongly influenced by this knowledge, the Court of Human Rights held that Wemhoff's detention had not exceeded a reasonable time. The judgment stated:

"... the Court shares the opinion of the Commission that no criticism can be made of the conduct of the case by the judicial authorities. The exceptional length of the investigation and of the trial are justified

by the exceptional complexity of the case and by further unavoidable reasons for delay. It should not be overlooked that, while an accused person in detention is entitled to have his case given priority and conducted with particular expedition, this must not stand in the way of the efforts of the judges to clarify fully the facts in issue, to give both the defence and the prosecution all facilities for putting forward their evidence and stating their cases and so pronounce judgment only after careful reflection on whether the offences were in fact committed and on the sentence."¹⁰⁹

There was only one dissenter from this decision on Article 5 (3) and significantly the dissenter was the Cypriot Judge Zekia, the only member of the Court from a common law country. After commenting on the difficulty of assessing whether detention on remand had exceeded a reasonable time and having alluded to the strong differences between the common and civil law approaches to this question, Judge Zekia's opinion continued in such a powerful and relevant manner that it merits extensive quotation:

"My point is not to draw a comparison between the common law and continental systems governing criminal procedure. These systems being different in nature, one accusatorial and the other inquisitorial, may as a result cause a suspected person to be kept longer or shorter in accordance with the prevailing system in the country he lives in. My intention is neither to touch on the merits or demerits of either system. My digression from the track is to emphasise the fact that if in England — a Member of the Council of Europe — the concept of "reasonable time" regarding the period of detention of an unconvicted person awaiting his trial does not allow us to stretch the time beyond six months even in an exceptionally difficult and complicated case, could we say that in the continent in a similar case, the period of detention might be six times longer and yet it could be considered as reasonable and therefore compatible with the Convention?

The Convention has aimed at setting a com-

mon standard as to the right to liberty and safety of persons for the people living in the territories of the member States of the Council of Europe. The difference of standards therefore in such countries cannot be substantially a great one. Coming from a country where the system of common law obtains, I might unwittingly have been influenced by this system.

The point I am driving at is this: The High Contracting Parties who have signed the Convention, which is a multilateral and legislative instrument or treaty, intended to secure to everyone within their jurisdiction rights and freedoms enumerated in the Convention, one of which is the right to liberty as specified by Article 5. Furthermore, the same Parties resolved — as it appears in the preamble of the Convention — to take the first steps to the collective enforcement of certain rights stated in the Universal Declaration because they are “likeminded and have a common heritage of political traditions, ideals, freedoms and the rule of law”.

From the above it may fairly be inferred that the Governments signatories of the Convention intended amongst other things to set a common standard of right to liberty, the scope of which could not differ so vastly from one country to another.

I have said in the outset of my judgment that it was very difficult to obtain a consensus of judicial opinion at the level of international courts of justice on the point at issue.

I respectfully suggest that the following might serve as guiding principles in understanding and assessing in a general way the notion of “reasonable time” under Article 5 (3).

A. The Convention, by Articles 1, 2, 5, 6, 7 and 8 deals extensively with the right of liberty and security of person. It demands that a man arrested should promptly be brought before a judge (Article 5 (3)), and that the legality of his detention should be speedily decided by a court and his release ordered if the detention is not lawful (Article 5 (4)).

Article 6 (2) reads: “Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”. This is a fundamental provision. It clearly implies that until a man is proved guilty he is entitled to be treated as innocent. This should constantly be borne in mind in dealing with persons kept in custody pending trial. The tenor and import of these Articles point to the requirement of being strict in respect of time in depriving a man of his liberty. It follows that derogation from such rights should be for limited periods. It is absurd to de-

prive a man of his liberty for a period of three years and over and to assert on the other hand that by virtue of Article 6 (2) he is entitled to be presumed innocent.

B. I quote hereunder from Resolution (65) 11 of the Committee of Ministers, referring to Article 5 (1) and (3) of the Convention. Although the Committee is not discharging judicial functions, nevertheless they are representatives of the High Contracting Parties and as the ascertainment of the intention of the signatories of the Convention is of great help in the interpretation of the Articles contained therein, it is permissible, in my view, to quote the relevant part of the Resolution in question.

Resolution (65) 11 reads:

- (a) *Remand in custody should never be compulsory. The judicial authority should make its decision in the light of the facts and circumstances of the case;*
- (b) *Remand in custody should be regarded as an exceptional measure;*
- (c) *Remand in custody should be ordered only when it is strictly necessary. In no event should it be applied for punitive ends.*

I want to lay stress on the words “strictly necessary” contained in paragraph (c).

C. The security of a State, the enforcement of the law of the country and public order and interest do require a certain amount of sacrifice of the right to liberty of a citizen. On the other hand, in a democratic society the right to liberty is one of the valuable attributes cherished by the people living therein. One has to strike a fair and just balance between the interest of the State and the right to liberty of the subject.

If a man, presumably innocent, is kept in custody for years, this is bound to ruin him. It is true in the case of Wemhoff that the trial ended with a conviction, but it might have ended with an acquittal as well. By detaining a man too long before he is tried you throw him into despair and the will and desire of a despairing man to defend his innocence is materially impaired.

I believe that in all systems of law there exist always ways and means of avoiding unreasonably long delayed trials. In a case for instance, where a series of offences has been committed by a man along with other persons, surely there is a procedural device to sever the case of one person from others and/or to limit the charges against him to certain offences if by not doing so the man has to be detained for a very long time. The legal authorities might continue or discontinue proceedings against the man for a remaining offence or offences later on. Long unreasonable delays in

trials will thus be averted.

For the reasons I have endeavoured to explain, I find that there is a contravention of Article 5 (3) of the Convention on the part of the Federal Republic of Germany for keeping Wemhoff in custody awaiting his trial for an unreasonably long time."¹⁰

The Court's rejection of Judge Zekia's approach in the Wemhoff judgment and the confirmation of this jurisprudence in later cases is of the utmost importance. It seriously limits the value of Article 5 (3) as a protection against lengthy periods of detention on remand. This is not to deny that Article 5 (3) has intrinsic value: in three cases the Court has found violations of Article 5 (3) but – and this is an important qualification – the violations were found primarily because the reasons for detention on remand had been insufficient and not because the periods of detention had been excessive. Applying the Court's jurisprudence on Article 5 (3), the Commission has considered compatible with the Convention several cases where the accused has been detained on remand for some years. In the *Jentsch* case,¹¹ the Commission found that no violation of Article 5 (3) had occurred although the accused has spent 6 years in detention on remand. More recently in April 1978, the Committee of Ministers decided that no violation had occurred in the *Haase*¹² case although on three occasions he had been detained on remand for a total of nearly two and a half years.

Resolution (65) 11

Resolution (65) 11 of the Committee of Ministers of the Council of Europe adopted on 9 April 1965 sets out certain principles to be followed in order "to promote and extend the application of those principles relating to remand in custody already recognized" in the European Convention on

Human Rights. The broad notion of the Resolution is that freedom is the rule and detention is an exceptional measure to be used only when it is strictly necessary. The Resolution recommends guarantees against unnecessary or excessive detention, such as a right of appeal and review, representation by Counsel, and the obligation to give reasons for detention. It also places emphasis on the importance of measures of substitution to be used in place of detention.

Conclusion

Most member States of the Council of Europe have adopted into their own systems the principles set out in the European Convention and Resolution (65) 11. In all the countries examined, emphasis is placed upon the exceptional nature of pre-trial detention; all place limits on the offences in respect of which detention may be imposed; and all have adopted guarantees against unnecessary and excessive detention: the requirement that there must be convincing evidence against the accused, the limitation on the grounds on which detention may be ordered, the obligation to give reasons which refer specifically to the accused's personal circumstances, and the systems of review and appeal.

By contrast, the development and use of measures of substitution such as conditional release vary greatly. In Belgium, for example, the alternative to detention is money bail, and this is not greatly used. In the other three countries, far more sophisticated alternatives exist for conditional release. However, the evidence suggests that, for example, in France judges are much less ready to make use of these alternatives than their English counterparts. Moreover, one may question the French system of the calculation of the amount of money bail in the light of Article 5 (3) of

the European Convention, as it consists not only of a "guarantee to appear for trial," but also of a "down-payment" towards any fine or legal costs.

Despite the degree of uniformity in the legal provisions which result from adherence to the general principles in these two international instruments, judicial practice shows appreciable variations. For example, as far as the frequency of pre-trial detention is concerned, the latest available figures show that French *juges d'instruction* remanded in custody in about 77% of cases where detention was available, while magistrates in England and Wales did so in only 19% of cases. The result is that about 40% of the French prison population are unconvicted, while the equivalent figure in England and Wales is about 13%.

As far as the length of detention is concerned the figures show that in the countries examined the majority of cases are dealt with within 6 months. Thereafter there are significant differences and indeed, in France and Germany in particular, cases of detention for one year or more without trial are well known.

One is drawn to the conclusion that these divergencies result in large measure from the very systems of criminal procedure in the several countries, and from the judicial habits to which these systems give rise. Although these procedures are designed, at least in part, to protect the interests of the accused, each has its own internal logic so that what is considered justifiable and reasonable in one country may be con-

sidered excessive or unwarranted in another.

In the light of this state of affairs, it becomes a difficult and delicate problem to lay down any uniform standard which descends to particulars. To borrow and adapt the words of the European Court of Human Rights in the *Sunday Times* case, it would clearly be contrary to the intentions of the drafters of the European Convention to hold as unreasonable *per se* periods of detention on remand which result directly from the very systems of criminal procedure in the several High Contracting Parties.¹¹³ This problem is apparent also in Resolution (65) 11, and is no doubt facing the experts currently working under the aegis of the Council of Europe to produce a further Resolution on detention pending trial.

Notwithstanding these difficulties, one can only agree with the view expressed by Judge Zekia in his dissenting opinion in the *Wemhoff* case, that a common standard of the right to liberty can be useful and effective only if it makes substantial inroads into the national systems so that its scope does not differ so vastly from one country to another.

Ultimately, if one system of prosecution is by and large as fair as another, the common standard of right to liberty should derive from the system in which pre-trial detention is used least. Other systems should adapt their operation to the extent necessary to attain such a standard.

TABLE I

Length of Pre-Trial Detention

(Figures for the last available year in each country)

Period of Time	Percentage of all defendants in custody dealt with within that time, by country			
	Engl. & Wales 1976	France 1978	Germany 1977	Belgium 1974
Less than 1 month	not available	44.3	37.6	45.4
Less than 3 months	81.4	not available ¹	66.2	85.1
Less than 6 months	95.6	93.2	85.6	94.3
Over 6 months	4.4	6.8	14.4	5.7

Sources:

- England & Wales: Hansard 24 January 1977. Population of untried prisoners on 31 December 1976.
- France: *Compte général du Ministère de la Justice 1978*. Measures taken in respect of individuals whose detention has ended during the year.
- Germany: Statistical information provided by the *Bundesministerium der Justiz*. Persons whose cases were disposed of by judgment or otherwise during the year 1977.
- Belgium: *Statistiques judiciaires, année 1974*. Institut national de la Statistique. Length of pre-trial detention of defendants dealt with by the *Cour d'Assises* or the *Tribunal Correctionnel* during the year 1974.

TABLE II

Percentage of detained defendants who were acquitted, whose cases were not proceeded with, or who received a non-custodial sentence

	Engl. & Wales 1977	France 1978	Germany 1977	Belgium 1974
Acquitted/ case not proceeded with	4.4	2.1	2.6	3.5 ²
Non-custodial sentences	40.5	65	48	0.8

Sources: as above except England & Wales, for which the source is Prison Statistics: England & Wales 1977, Reception of untried prisoners showing disposal.

- (1) 83.3% of detained defendants spent less than 4 months in pre-trial custody.
- (2) Acquittals only, in cases dealt with by the *Cour d'Assises* or *Tribunal Correctionnel*.

Footnotes

- (1) L.G. Köln; Beschl. v.9.6.1964 – 31/5/64 – NJW 1964 Heft 38/39, p. 1816
- (2) See Michael King, *Bail or Custody*, Cobden Trust, 1971, pp. 76 et seq.
- (3) See Katz, *Justice is the Crime*, London, 1972, p. 4
- (4) Celia Hampton, *Criminal Procedure*, London, 1977, p. 2
- (5) Magistrates' Courts Act 1952, s. 105(4)
- (6) *Ibid* s. 105(2)
- (7) Criminal Justice Act 1967, s. 22
- (8) On committals generally see Hampton, *op. cit* pp. 93–115
- (9) Crown Court Rules 1971, rule 19, made under the Courts Act 1971, s. 7(4) (i)
- (10) *R v Urbanowski* (1976) IWLR 455
- (11) Information prepared by the Lord Chancellor's Office. For comparison with 1977, see *Judicial Statistics for England & Wales 1977, 1978 CMND 7254 HMSO*
- (12) Magistrates' Courts Act 1952, s. 105, as amended by Bail Act 1976 Sched. 2
- (13) See generally Harrington, *op. cit* p. 71 et seq.
- (14) Bail Act 1976, s. (4) (1)
- (15) *Ibid* s. 5(3)
- (16) *Ibid* s. 5(1)
- (17) *Ibid* s. 5(4). In the case of represented defendants in the Crown Court, a note will be provided only on request, s. 5(5)
- (18) *Ibid* Sched. 1, Pt. III, para 1
- (19) *Ibid* Pt. II, para 2
- (20) *Ibid* para 3
- (21) *Ibid* sched. 1, Pt. I, para 2
- (22) *Ibid* para 3
- (23) *Ibid* para 5
- (24) *Ibid* para 9
- (25) Bail Act 1976, s. 3(1)
- (26) *Ibid* s. 6(1)
- (27) *Ibid* s. 6(5)
- (28) *Ibid* sched. 1, Pt. I, para 8
- (29) Bail Act 1976, s. 11
- (30) The Act came into force on 17 April 1978: Bail Act 1976 (Commencement) Order 1978, s. 1 1978 no. 132
- (31) King, *op. cit* p. 17 et seq.
- (32) The authors are grateful to the Home Office for this information.
- (33) Hansard, 24 January 1977
- (34) Robin C.A. White (1977) *Crim L.R.* 338, 344
- (35) *Prison Statistics, England & Wales, 1977. CMND 7286, HMSO, p. 21.* The figures are provisional, and in about 7,000 cases the result of trial or sentence was not yet known.
- (36) *Criminal Statistics for England & Wales 1977, CMND 7289, HMSO, p. 128. Table 8.5*
- (37) *Ibid* Table 8.4
- (38) It should be noted, however, that direct citation is the most common method of prosecution. In 1977–78, 63,760 cases were dealt with by examining magistrates, while 490,791 were disposed of by direct citation. A further 19,587 were dealt with by the *flagrant délit* procedure.

- (39) For more detailed commentary on this law, see Merle, *Rev. Sc. Crim* 1971, p. 567; Plawski, *Revue de science pénitentiaire, droit pénal comparé*, 1973, p. 465
- (40) Code of Criminal Procedure (CPP), Article 141, s. 2
- (41) CPP, Art. 145
- (42) Art. 146
- (43) Art. 148
- (44) Art. 145
- (45) Arts 147 & 148
- (46) Art. 148
- (47) Art. 148 - 4
- (48) Art. 179
- (49) Art. 181
- (50) Art. 137
- (51) Art. 138
- (52) Art. 141 - 2
- (53) Art. 138 - 2, No. 11
- (54) Art. 142
- (55) These figures are taken from the *Compte général du Ministère de la Justice*, 1978
- (56) "Note sur la situation de la population pénale à la date du 1er janvier 1979". *Ministère de la Justice, Service des Etudes, de la Documentation et des Statistiques*, D. 42 a - ML/SA - no 79089
- (57) For a commentary on the Law of 1975 see Reiss: *Der Hauptinhalt des ersten gesetzes zur Reform des Strafverfahrenrechts* (1. STVRG), *NJW* 1975, Heft 3, p. 81
- (58) Basic Law, Articles 2 (2) & 104
- (59) BVerfGE 19, 342 ff.
- (60) BVerfGE 20, 45 ff.
- (61) StPO, Articles 112 ff.
- (62) Article 114
- (63) Article 112 (2), nos 1 & 2
- (64) Article 112 (2), no. 3
- (65) Article 112 (3)
- (66) Article 112 (a)
- (67) The next most frequent ground, suppression of evidence, was used in only 5% of decisions in 1977.
- (68) The Law of 1964 obliged the judge to give special weight to the accused's situation and the circumstances tending to prevent him from absconding. This injunction was removed by the 1972 Law and now all factors have equal weight.
- (69) Article 113
- (70) i.e. murder, death resulting from assault, genocide or crimes committed with the aid of explosives and endangering physical integrity.
- (71) BVerfGE 19, p. 342 ff.
- (72) This ground was used in only 0.99% of cases in 1977.
- (73) This ground was used in about 4.27% of cases in 1977. (N.B. in some cases the decision to remand in custody relies upon more than one ground.)
- (74) Article 112 a
- (75) Article 114 (2), no. 4
- (76) Article 115 (4)

- (77) Article 122 (a)
- (78) Article 115 (4)
- (79) Article 117 (1)
- (80) Article 117 (5)
- (81) BVerfGE 21, 220 ff. 14.3.67
- (82) Figures provided by the German Federal Ministry of Justice
- (83) For a comprehensive exposition of the Belgian law and practice on this subject, see Bernard-Tulkens and Bosly "*La détention préventive en procédure pénale belge*", *Revue de science criminelle et droit pénal comparé*, 1975, no. 11, p. 79; and Declercq "*Problèmes actuels de la détention préventive*", *Journal de Tribunaux (J.T.)*, 1975, pp. 109–116 & 129–133.
- (84) Constitution, Article 7
- (85) See Articles 1 & 2 of the Law of 20 April 1874
- (86) Cass., 5 August 1910, Pas. I, 413
- (87) Thus it is insufficient to say that "one is faced with very serious facts, having regard also to the serious past of the accused", Cass. (2nd Ch.), 19 June 1973, Pas. 1973, I, 976; see also Cass. 11 March 1974, J.T. 1974, p. 314.
- (88) Brux (ch. mis. acc.), 24 November 1966, Pas. 1967, II, 170. See also Cass. b., 14 January 1975, Pas., 1975, I, 492.
- (89) Previously, the existence of a "public interest" was sufficient.
- (90) Article 5 of the Law of 20 April 1874, as amended by Article 3 of the Law of 13 March 1973. The same obligation to give a reasoned decision applies: Cass. (2nd ch.), 5 March 1974, Pas., 1974, I, 695.
- (91) Article 6 of the Law of 20 April 1874, as amended by Article 4 of the Law of 13 March 1973.
- (92) Article 10 of the Law of 20 April 1874
- (93) Articles 27–29
- (94) A *non-lieu* may state only that there is insufficient evidence, and the accused must "clear" himself in order to receive compensation.
- (95) Article 28, para 2
- (96) *Statistiques judiciaires: Activités des Cours et Tribunaux – Statistiques diverses, année 1974*. Institut National de statistique, 1979, no. 1
- (97) The principal studies in English on the Convention are J.E.S. Fawcett: *Application of the European Convention on Human Rights* (OUP 1969); F.G. Jacobs: *The European Convention on Human Rights* (OUP 1975); A.H. Robertson: *Human Rights in Europe* (Manchester UP. 1977, 2nd ed.); a work on the Convention by A.B. McNulty and P.J. Duffy will be published by Butterworths in 1980.
- (98) See "Bringing an application before the European Commission of Human Rights". Case-Law No. 3 (revised edition 1978).
- (99) Article 28 of the Convention
- (100) Article 31 of the Convention
- (101) Article 32 of the Convention
- (102) See Section IV of the Convention; cases may only be referred to the Court if the respondent state has accepted the Court's jurisdiction either generally or ad hoc and where the case has been referred by either a government involved or the Commission.
- (103) *Wernhoff case, Neumeister case, Stogmuller, Matznetter and Ringeisen cases*.
- (104) Judgment of the European Court of Human Rights dated 27 June 1968, Series A
- (105) para 5 of the judgment, Series A, p. 22
- (106) paras 10–12 of the judgment, Series A, pp. 24–25
- (107) para 13 of the judgment, Series A, p. 25
- (108) para 15 of the judgment, Series A, p. 25

- (109) para 17 of the judgment, Series A, p. 26
- (110) Series A, pp. 38-40
- (111) Application No. 260/65, *Heinz Jentsch v Federal Republic of Germany*. Report of Commission adopted on 6 October 1970 approved by a resolution of the Committee of Ministers dated 5 May 1971. (DH (71) 2).
- (112) Application No. 7412/76, *Docter Haase v Federal Republic of Germany*. Report of the Commission adopted on 12 July 1977 and approved by a resolution of the Committee of Ministers dated 18 April 1978 (DH (78) 2).
- (113) *Sunday Times* case, judgment of the Court of Human Rights, dated 26 April 1979, para 47.

Judicial Application of the Rule of Law

Contempt of court and press freedom under art. 10 of the European Convention of Human Rights.

On 26 April 1979, the European Court of Human Rights delivered judgment in the *Sunday Times* case, which concerns the United Kingdom.¹

Between 1959 and 1962 a number of children were born deformed, allegedly by reason of their mothers having taken thalidomide as a tranquiliser or sleeping pill during pregnancy. Legal proceedings were subsequently instituted by many parents against the maker and seller of thalidomide in the United Kingdom, Distiller Company (Biochemicals) Ltd.

In September 1971, the *Sunday Times* published an article headed "Our thalidomide children: a cause for national shame" and announced that it intended next to publish an article tracing the history of the tragedy and of the manufacture and testing of thalidomide from 1958 to 1961.

Distillers made formal representations to the Attorney General claiming that the above articles constituted or would constitute contempt of court in view of the litigation still outstanding. The Attorney General subsequently decided to apply to the High Court for an injunction to restrain publication of the proposed further article.

This was granted in November 1972.

On appeal by Times Newspapers Ltd, the High Court's order was reversed by the Court of Appeal but, following an appeal by the Attorney General, the House of Lords, on 18 July 1973, unanimously restored the order. It found that publication of the proposed article would constitute contempt of court in that it was likely to cause public prejudgment of an issue in pending court proceedings, including settlement negotiations, between the claimants and Distillers. The injunction was finally discharged in 1976.

In their application, lodged with the Commission on 19 January 1974, the applicants alleged that the injunction issued by the High Court and restored by the House of Lords, and the principles upon which the latter's decision was founded, were in violation of Article 10 of the convention.²

In its report of 18 May 1977, the Commission expressed the opinion, *inter alia*, by 8 votes to 5, that the restriction imposed on the applicants' right to freedom of expression was in breach of Article 10 of the convention.

The Court delivered its judgment on 26 April 1979. The applicants alleged that there had been

1) This summary of the decision is taken from the *Report on the Activities of the Council of Europe*, Sept. 1978—Aug. 1979, pp. 58—62.

2) Art. 10 reads as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

a violation of Article 10 by reason, firstly, of the above-mentioned injunction and, secondly, of the continuing restraints to which they were subjected as a result of the over-breadth and lack of precision of the law of contempt of court. The Court, after referring to its earlier case-law, concluded that it had to examine only the first of these allegations. It had to ascertain, for this purpose, whether the interference with the applicants' freedom of expression:

- was "prescribed by law",
- had an aim that was legitimate under Article 10, paragraph 2, and
- was "necessary in a democratic society" for the aforesaid aim.

The applicants argued that, in view of the uncertainty of the law of contempt and the novelty of the principles enunciated by the House of Lords, the restraint imposed could not be regarded as "prescribed by law". In the Court's opinion, the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case and he must be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The Court concluded that, on the facts of this particular case, these two requirements were satisfied and that, accordingly, the interference was "prescribed by law".

The Court found that both the law of contempt of court in general and the injunction granted against Times Newspapers Ltd had an aim that is legitimate under Article 10, paragraph 2, namely the maintenance of "the authority... of the judiciary".

On the question whether the injunction was "necessary", within the meaning of the convention, for the aforesaid aim, the Court firstly recalled certain principles to be found in its case-law: Article 10, paragraph 2 leaves to the Contracting States, who have the initial responsibility for securing the convention rights and freedoms, a "margin of appreciation", but this is not unlimited; the Court is empowered to give the final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10; when confronted with decisions of national courts, the Court does not take the place of those courts but rather reviews the conformity of those decisions with Article 10. The Court also pointed out that its supervision was not limited to ascertaining whether a state had acted reasonably, carefully and in good faith; further, that since it had to assess the injunction's "necessity" in terms of the convention, the standards of English law could not serve as its criterion.

The Court then examined the facts of the case in the light of these principles. It was of the opinion that publication of the proposed article would probably not have added much to the pressure already on Distillers to settle the parents' actions on better terms and that, even to the extent that some readers might have formed an opinion as to Distillers' alleged negligence, this would not in the circumstances have had adverse consequences for the "authority of the judiciary". Whilst publication might have provoked replies, the Court could not decide whether this reason for the injunction was sufficient under Article 10, paragraph 2 without considering all the surrounding circumstances. It noted, in this connection, that a question as to the injunction's initial necessity was prompted by the fact that, when it was discharged in 1976, some actions involving the issue of negligence were still outstanding.

The judgment continues by stressing the importance in a democratic society of the principle of freedom of expression, which is applicable in the field of the administration of justice just as in other fields. Not only do the mass media have the task of imparting information and ideas concerning matters that come before the courts; the public also has a right to receive them. Whether an interference with freedom of expression is justified under the convention depends on the circumstances of the specific case and, in particular, any public interest aspect. The thalidomide tragedy and the question of where responsibility for it actually lay were matters of undisputed public interest, yet the case had been outstanding for several years, it was far from certain that the parents' actions would have come on for trial and there had been no public enquiry. Even though the *Sunday Times* was not prohibited from discussing wider issues, such as various general principles of English law, it was, in the Court's view, rather artificial to attempt to divide those issues from that of Distillers' alleged negligence. Besides, facts did not cease to be a matter of public interest merely because they formed the background to pending litigation.

The Court concluded, by 11 votes to 9, as follows: in all the circumstances, the injunction did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression; it therefore did not have reasons that were sufficient under Article 10, paragraph 2, was not proportionate to the legitimate aim pursued and, hence, was not necessary in a democratic society for maintaining the authority of the judiciary; accordingly, there had been a violation of Article 10.

ICJ NEWS

Bogota Seminar on "Human Rights in the Rural Areas of the Andes Region"

A seminar on Human Rights in the Rural Areas of the Andes Region, organised by the International Commission of Jurists and co-sponsored by the Consejo Latinoamericano de Derecho y Desarrollo (CLDD), i.e. the Latin American Council for Law and Development, was held in Bogota on 6-11 September 1979. This was the fourth in a series of Third World seminars organised by the ICJ, the previous ones being in Dar es Salaam (1976), Barbados (1977), and Dakar (1978).

The 61 participants came from Venezuela, Colombia, Ecuador, Peru, Bolivia and Chile and included judges, law professors, advocates, social and political scientists, economists, trade unionists and peasant and indian leaders, all having knowledge of problems in the rural areas. The subjects chosen for discussion were essentially ones relating to economic, social and cultural rights. They included agrarian reform, labour legislation and trade union rights, rights of the indigenous (indian) and peasant population, economic and agricultural policies, the administration of justice and access to legal services in the rural sec-

tor, and social services, in particular health care and education.

In most areas of the Andean region civil and political rights are severely curtailed, it often being claimed by the governments concerned that this is necessary in the interests of promoting economic development. The participants at the seminar did not share this view. On the contrary, in their conclusions and recommendations they stated that the failure to promote economic and social rights more successfully in the rural areas was largely due to the repression of civil and political rights and the denial to the rural population of the right to participate in the formulation and application of agricultural and development policies which concern them.

The participants said that they had found the seminar to be unusually stimulating and fruitful, due largely to the mixture of skills and occupations which were represented, and to the opportunity to learn more about the experiences of those in other countries of the region who face similar problems and difficulties.

ICJ Newsletter

In July 1979 the ICJ launched a new quarterly publication, the "ICJ Newsletter". It describes the activities of the ICJ Secretariat, observer missions, publications, press releases, interventions, and reports on conferences. Appendices include working

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RECENT ICJ PUBLICATIONS

The Trial of Macias in Equatorial Guinea

Report of an observer mission by Dr Alejandro Artucio, legal officer of the International Commission of Jurists, published by the International Commission of Jurists and the International University Exchange Fund, Geneva, December 1979, 70 pp. Available in english or spanish. Swiss Francs 4 or US\$ 2.50, plus postage.

The report includes a description of the nature of the repression under Macias and the economic and social conditions of the country resulting from it. Criticisms are made of certain legal aspects of the trial, but the observer found most of the charges fully proved.

Persecution of Defence Lawyers in South Korea

Report of a mission by Adrian W. DeWind, former President of the New York City Bar Association and John Woodhouse, Secretary, Centre for the Independence of Judges and Lawyers, published by the International Commission of Jurists, Geneva, November 1979, 68 pp. Swiss Francs 4 or US\$ 2.50, plus postage.

This report describes the prosecution and punishment or harassment of nine lawyers arising out of their defence of political prisoners. These cases indicate the harassment accorded to "the small body of civil rights attorneys who have attempted to carry out their obligation to be vigilant in the protestation of human rights." As a background to these cases, the authors describe the general nature of the political repression and the undermining of the independence of the judiciary in South Korea.

Human Rights in Guatemala

A report of a mission by Donald T. Fox, New York attorney, published by the International Commission of Jurists, Geneva, September 1979, 66 pp. Available in english or spanish. Swiss Francs 4 or US\$ 2.50, plus postage.

Mr Fox's report outlines the historical, social and economic factors which have resulted in "a large area of institutionalised exploitation and injustice"; gives an account of the prevailing violence by right and left wing forces, the greater part being by military and clandestine para-military forces acting in the "narrowly perceived economic interests" of dominant groups; and commends the recent proposals of the National Council of Economic Planning for a development strategy to achieve a just and stable social peace.

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