

For the Rule of Law

THE REVIEW



INTERNATIONAL COMMISSION OF JURISTS

EDITORIAL 1

HUMAN RIGHTS IN THE WORLD

Equatorial Guinea	3	Sri Lanka	11
Honduras	6	Zaire	15
Latin America	9		

COMMENTARIES

UN Sub-Commission	19
ILO Committee on Freedom of Association – Poland	25
The Korean Minority in Japan	28
Unesco Special Committee on Human Rights	35

ARTICLES

Social Action Litigation in the Indian Supreme Court <i>Dr. Upendra Baxi</i>	37
Independence of Lawyers in Rumania <i>Liviu Corvin</i>	50
South Africa – The Veil of Secrecy <i>Gilbert Marcus</i>	56

JUDICIAL APPLICATION OF THE RULE OF LAW

Indian Supreme Court – A Controversial Decision	61
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Editorial

Writing in Bulletin No. 9 of the Centre for the Independence of Judges and Lawyers (April 1982), Mr. R. Hayfron-Benjamin, former Chief Justice of Botswana, urged that the judiciary in third world countries should not be too shackled by the traditions of the legal systems they have inherited from their former imperial or colonial masters. He urged that they should exercise their imagination to find ways of developing remedies to meet the problems of injustice in their countries.

The Supreme Court of India has, in fact, been engaged in judicial activism of this kind in remarkable fashion in recent years. It has been the subject of some controversy in India, but relatively little is known about it elsewhere, except by specialists. In the hope of stimulating interest and perhaps emulation in other countries, this issue contains a shortened version of an article on the subject written recently by one of India's leading academic lawyers, Dr. Upendra Baxi, Vice-Chancellor of the University of Gujarat.

This article may be of particular interest to lawyers in other countries that have inherited the British common law system, but with the advantage of written constitutions, often containing important 'guarantees' of basic human rights. Properly used, these can provide the justice system with a flexibility and scope for innovation which is lacking in Great Britain, due to its want of a written constitution and its consequently conservative approach to fashioning the law as an instrument of social reform.

Also included in this issue is an article by Mr. Liviu Corvin, until recently Vice-President of the Bar Association of Bucharest, explaining the organisation of the legal profession in Rumania and showing how it is gradually recovering some degree of independence. Mr. Corvin was one of the Group of Experts who prepared the Draft Principles on the Independence of the Legal Profession, published in ICJ Newsletter No. 13 (April-June, 1982).

French Edition of the ICJ Review

The International Commission of Jurists is pleased to announce that it is resuming publication of its Review in french. A double number of the two issues for 1982, i.e. Review Nos 28 and 29, is being published shortly, and as from June 1983 the 'Revue' will appear semi-annually in June and December, side by side with the english and spanish editions.

The International Commission of Jurists will be glad to send a complementary copy of the double number to anyone who is, or who others consider may be, interested in becoming a subscriber (16 swiss francs per annum, surface mail, or 21 SFr. airmail).

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Human Rights in the World

Equatorial Guinea

New Constitution in Equatorial Guinea

On August 15, 1982, almost three years after the *coup d'état* which overthrew the dictatorship of Francisco Macias Nguema, a new political Constitution known as the "Basic Law" was adopted by a popular referendum. Equatorial Guinea received its first Constitution in 1968 when it gained independence, ending almost 500 years of Portuguese, then Spanish colonisation. This Constitution was short-lived as several of its articles ceased to be applied as early as 1971 when they were illegally repealed by Macias Nguema, who had already established himself as an absolute dictator. Macias declared himself President-for-Life by decree in 1972. This process was completed in July 1973, when Macias had a new Constitution adopted to replace that of 1968, seeking to give an appearance of constitutionality to his regime. As was pointed out in the ICJ report on "The Trial of Macias in Equatorial Guinea" (1979) there existed an enormous legal vacuum after his overthrow as the regime had enacted hardly any legislation. The state was in practice governed without law by a system of purely arbitrary rule.

The coup of August 1979 was led by Lieutenant-Colonel Teodoro Obiang Nguema, a nephew of the former President Macias, and at the time Vice-Minister of the Armed Forces. Soon after the coup,

the Constitution of 1973 was declared by Decree to be no longer of any effect, and the country was governed without a Constitution by a Supreme Military Council, presided over by Colonel Obiang Nguema, until the current constitution was adopted in August 1982.

The Preparation of the 1982 Constitution

At the outset, this Constitution suffers from a major defect in that its text was drafted solely by a 20-member Commission designated by the Supreme Military Council. No representatives of the people or of political, trade union, social or community-based organisations, participated in the preparations or in discussions on the text. At no time was the draft studied and discussed by persons other than those designated by the government. Political parties were still banned and many opposition leaders, uncertain about the new regime, had not returned from the exile into which they were forced by the Macias regime.

This method of formulating the Constitution is all the more surprising having regard to the fact that the Special Rapporteur on Equatorial Guinea of the UN Commission on Human Rights, Mr. Fernando

Volio Jimenez, had insisted in his report and clearly recommended to the new government that, given its vital importance, the text of the Constitution should be widely discussed throughout the country and that the various sectors of the society should participate in this process. To this end, he had recommended the appointment of a National Constituent Assembly, responsible specifically for preparing the text.

In consequence, and considering that there was no political campaign to explain to the electorate the implications of voting for or against the new Constitution, it is questionable whether the new text in any real sense reflects the will of the people of Equatorial Guinea.

Outline of the Constitution

The Constitution provides for a strong presidential system of government, with a wide range of powers conferred on the Executive. There is to be a single chamber Parliament, called the House of Representatives of the People, with 45 to 60 deputies elected for a five year period by "universal, direct and secret ballot" (Art. 116). It is to meet twice a year for a *maximum* period of two months. It will have little power to exercise any control over the Executive. Whereas the President may dissolve the Parliament (Art. 121) he is not accountable to it.

At the Head of the Judiciary is a Supreme Court whose members are to be appointed and dismissed by the President (Art. 147). This gravely affects the independence of the judiciary, as appointment to and continued tenure of office in the Supreme Court will be dependent solely upon the will of the President.

The Constitution contains in Chapter III 22 articles which declare the Rights and

Duties of Persons, as well as the legal remedies and safeguards to ensure the application of these provisions. This is a comprehensive and adequate enumeration, following the lines of other instruments such as the International Covenant on Civil and Political Rights. Its effectiveness, however, in guaranteeing these rights is very doubtful in view of the power of the President to suspend Chapter III (see below).

While the right to life and physical integrity is affirmed, and torture and inhuman treatment are explicitly prohibited, the death penalty is maintained without limitation. The cases in which it may be applied are to be determined by law.

The articles referring to remedies and safeguards for the respect of rights are commendable. Thus, the remedy of *habeas corpus* is available (Art. 38) and extends not only to unlawful imprisonment, but also to torture and ill-treatment. Provision is made for recourse by way of *amparo* (Art. 39) for judicial review of executive decisions and acts, and the courts have power to declare a law, decree or regulation unconstitutional for reasons either of form or substance (Art. 40). These provisions, however, can also be suspended by the President under emergency powers.

With respect to political rights (Art. 23 et seq.) no reference is made to political parties. This is unfortunate, particularly as one of the main opposition movements, the A.N.R.D. (National Alliance for the Restoration of Democracy) has complained that it had not been allowed to participate in drafting the Constitution, nor in general political activity, and has insisted on its right to a role in the reconstruction of the country and the establishment of a true democracy.

The right to strike is denied not only to all civil servants but also to all workers engaged in providing public utility services or services which, if paralysed, may harm the

economy or national security (Art. 58). This article curtails the trade union rights of a very large number of people and runs counter to the term and spirit of the relevant ILO Conventions.

Provision is made for a Council of State, ten of whose eleven members are appointed by the President (Art. 101). This body is responsible *inter alia* for

- supervising "the democratic development of the political and social life" of the country;
- guaranteeing national sovereignty, territorial integrity, national unity, peace and justice;
- approving the candidates for election to the Presidency;
- hearing and deciding disputes concerning election; and
- pronouncing upon the constitutionality of 'institutional' laws, before they enter into force.

The President also appoints the thirty members of the National Economic and Social Development Council (Art. 150), a consultative organ in economic, social, fiscal and development matters.

The President is given broad powers "in case of imminent danger" to suspend the rights and safeguards in Chapter III, including *habeas corpus* and *amparo*, and to adopt "exceptional measures", which are not defined (Art. 93). The President may declare a state of siege, alert or emergency, without needing to consult Parliament, still less to submit the measure to it for approval (Art. 94). The Parliament is not empowered to annul such a measure. Emergency powers framed in such wide terms make the continuation of such elements of democracy as the constitution contains dependent solely upon the will of the President.

The President may also, under excep-

tional circumstances or in urgent cases of emergency, be authorised by the House of Representatives to legislate by decree on matters which normally require acts of parliament (Arts. 119 and 134).

Under Article 90, for a person to be eligible to become President he must, *inter alia*, "have been resident in the country for ten years". This provision is seen by the opposition as one aimed at preventing its leaders from standing in future elections. It may be recalled that from 1970 onwards the Macias dictatorship drove out almost a quarter of the population, who became political exiles or economic migrants. Many of the potential leaders of the country, including those who resisted the dictatorship of Macias, have therefore not been resident in the country over the past ten years.

Under the terms of Article 89, the President of the Republic should be elected by "universal, direct and secret ballot" for a seven-year period. Article 91 adds that he may be re-elected. This raises perhaps the most serious aspect of this Constitution - its three Transitional Provisions and an "Additional Provision". The latter suspends the application of Article 89, and the Constitution itself designates Col. Obiang Nguema as President of the Republic for the first seven years.

This provision calls to mind the case of Chile where, in 1980, the military regime obtained approval of a Constitution which included a number of transitional provisions under which the Constitution would become fully applicable only in 1997 and which provided that General Augusto Pinochet is to remain in power until 1989. Similarly, in November 1982, in Turkey, General Evren obtained approval in a referendum for a draft Constitution which names him as President for the next seven years.

The Transitional Provisions also state that until such time as the Parliament is elected, for which no date is fixed, the

President shall assume all legislative functions. Also, "until career judges and prosecutors are trained" the President may request the Supreme Court to reconsider its judicial decisions. This is an extraordinary and wholly inappropriate power even for a transitional period, particularly as the transition is of undetermined duration.

Conclusions

The provisions of the Constitution lend weight to the claim of the opposition that the true aims of the present government and of Col. Obiang Nguema are to keep themselves in power indefinitely and to institutionalise a system which gives them full control over the political life of the country. Opposition circles have also pointed out that, while the people of Equatorial Guinea come from six ethnic groups, the President has, for the most part, placed people from his native village and region

(Mongomo) and from his ethnic group in the main administrative posts of the State. This creates problems with implications for the principle of equality before the law and prohibition of discrimination as proclaimed by the Constitution.

It is regrettable that the opportunity has been lost to adopt a Constitution ensuring major progress towards democracy in Equatorial Guinea. When in 1982 the UN Commission on Human Rights discussed the plan of action proposed by the Secretary-General of the United Nations in the framework of the programme for assistance in human rights it was repeatedly stressed that, in order to ensure a return to democracy, the government should allow and even encourage the safe return of exiles, including those who legitimately aspire to participate politically in reconstruction, and that political parties and trade unions should once again be allowed to operate freely (see ICJ Review No. 28, p. 37). None of this has been done.

Honduras

In 161 years as an independent state Honduras has had 385 armed rebellions and 126 governments. After nearly 40 years of military rule, in 1971 elections took place and a civilian became President, but at the end of 1972 another military coup gave the power again to the army. Since then there have been a series of coups and the Presidency has been held by generals, colonels and a three-man military junta. During these years official propaganda has tried to justify the military governments by the need to fight against corruption and to reestablish democratic values,

but under almost all these governments there have been severe restrictions on fundamental freedoms and widespread violations of human rights. Political repression has been considerable but not on the same scale as in the neighboring countries of El Salvador, Guatemala and Nicaragua. The political opposition has never been able to develop to the point of constituting a threat to the regime.

On November 29, 1981, elections were held and a candidate from the Liberal Party, Mr. Roberto Suazo Córdova, a physician of 55, became the first civilian Presi-

dent of the Republic in nine years. As a moderate conservative, who campaigned on the slogan of "work and honesty", President Suazo by his election raised hopes that Honduras could escape the political violence affecting much of the region. Nevertheless, with a left-wing government in Nicaragua and civil wars between left-wing guerillas and the government in El Salvador and Guatemala, it was to be expected that the armed forces would continue to remain influential in Honduras.

Internally, the new government inherited an acute economic crisis, complicated by the fact of a popular expectation that a return to democracy would bring immediate relief. In foreign policy, the position of the country remains unchanged. No new appointments have been made among the army commanders and the military links with the U.S. army have continued.

Honduras is situated in a region of social upheaval and serious political and military conflict, where respect for human rights and fundamental freedoms continues to give grave cause for concern. The previous government had placed a specialized military counter-insurgency unit, known as the "Cobras", in charge of internal political repression. This force had committed many abuses against the population, such as large-scale house-to-house searches carried out without warrants in the suburbs of the capital, Tegucigalpa, in the hunt for national and foreign "subversives". These operations resulted in dozens of detentions and some deaths, and human rights organisations have also reported cases of enforced disappearances. These violations have continued into 1982. Three clandestine burial grounds were discovered close to the capital early in the year, which served to reinforce suspicions that some of the security authorities are involved in extra-legal executions. On August 27 and 28, 1982, the corpses were found of the recently disap-

peared Roberto Fino, Reynaldo Diaz Flores, a sociology student, and Felix Martinez Medina, a member of the University of Honduras' staff union. All three showed signs of violence and Martinez Medina's hands and feet were tied. There have been continuing reports of torture of political detainees.

On August 31, 1982, Mr. Leonidas Torres Arias, a colonel in the Honduran army who was serving as a diplomat in Mexico, declared in Mexico City that the then Commander-in-Chief of the armed forces of Honduras, General Gustavo Alvarez, was carrying out a plan for the physical extermination of opponents of the government, and that this policy was not only threatening the re-emerging democracy in the country but also threatening armed conflict with Nicaragua. The Human Rights Commission of Honduras, as well as leaders of the opposition parties, immediately demanded an investigation of the charges made by Torres Arias.

At the same time, left-wing armed groups have made their presence felt in the country, such as the "Cinchoneros", who take their name from a 19th century Honduran rebel. This politico-military organisation was responsible for the hijacking of a Honduran aircraft in 1981, for the return of which they demanded and obtained the release of 13 political prisoners. In September 1982, they attacked the San Pedro Sula Chamber of Commerce, taking over a hundred hostages, including two Ministers of State. After lengthy negotiations between the guerillas and the government, with the intermediation of the local Catholic Bishop and a Venezuelan diplomat, the rebels released the hostages and left the country in a Panamanian aircraft bound for Cuba. Their demands for the return of the hostages, the release of all political prisoners and the withdrawal of North American military advisers, were not met.

As stated, a large part of Central America is in turmoil. Civil war is under way in Guatemala and El Salvador, and Nicaragua established a revolutionary government after the civil war which put an end to the Somoza dictatorship. All three countries border on Honduras. According to the figures of the United Nations High Commissioner for Refugees of September 1982, there are 29,000 political refugees in Honduras: 16,000 Salvadorans, 12,000 Nicaraguan Miskito Indians and 600 Guatemalans. To this total of 29,000 should be added more than 3,000 former Somozan national guardsmen who are armed and remain in military units and are not recognized as refugees. These former guardsmen have been launching increasingly frequent armed incursions into Nicaraguan territory, after which they return to their bases in Honduras. The collaboration of the Honduran authorities with these armed gangs is obvious, in that they are allowed to operate from Honduran territory. It has also been admitted by the State Department that they receive assistance and training from the United States.

A recent article in the weekly *Newsweek*, alleging that the C.I.A. was attempting to overthrow the government of Nicaragua, using former Somozan soldiers based in Honduras, provoked a denial by a senior State Department official who stated however that "the United States supports small-scale covert military operations against Ni-

caragua aimed at harassing, but not overthrowing the government of that country..." and that they were "helping to train anti-Sandinist forces, composed mostly of Nicaraguan refugees..."¹

These developments have posed serious problems, leading Daniel Ortega, Coordinator of the Nicaraguan Government Junta, to declare recently that "there is an increasing possibility of military conflict between Honduras and Nicaragua".²

There has also been a series of incidents along the border between El Salvador and Honduras. International observers have reported that regular Honduran troops prevented several hundred Salvadoran peasants from crossing the border when fleeing from persecution by Salvadoran troops, and yet allowed these same forces to enter Honduras. As a result, hundreds of peasants were killed in both cases, the great majority being women, children and old people. The UNHCR has reinforced its presence in the area so as to avert such massacres and to be able to guarantee refugees a safe haven under its protection in Honduran territory, but further from the border.

This brief catalogue of events gives some idea of the tense atmosphere in Honduras, where the country is becoming sharply polarized as the political, social and economic situation deteriorates. They also indicate the growing risks of armed conflict between countries of the region.

1) *International Herald Tribune*, November 3, 1982; *Le Monde*, November 2 and 4, 1982.

2) *El Pais*, Madrid, August 30, 1982.

Latin America

Disappearances in Latin America

Secret Graves in Argentina

The discovery of at least nine clandestine cemeteries in the neighbourhood of Buenos Aires where hundreds of unidentified bodies were buried, has led organisations of relatives of disappeared persons and human rights groups in Argentina to ask that an in-depth investigation be carried out and that the bodies, which they fear may be those of some of the thousands of persons who have disappeared in that country, be identified. This is technically feasible, as was shown a few years ago in Chile when similar graves were discovered. All that is required is the decision of an independent judiciary to authorise and implement such an investigation.

It is to be hoped that the growing inter-governmental pressure on the Argentine government to conduct serious investigations into disappearances will produce results.

In Italy, following a parliamentary debate on the subject, a senior official of the Ministry of Foreign Affairs has been sent to Argentina to ask the authorities to account for 300 persons of Italian or dual nationality who have disappeared in Argentina since 1976. Some of them were arrested together with their young children, or were at the time expectant mothers.

The Federal Republic of Germany has also taken steps through the Ministry of Foreign Affairs to investigate the disappearance, for political reasons, of 48 persons of German nationality or origin.

It is understood that the governments of France and Sweden have similar action under consideration.

On 18 November 1982 the Parliament of the European Economic Community requested the Secretary-General of the United Nations to open an international inquiry into the thousands of disappearances in Argentina, including about 400 European citizens.

Despite the Argentine government's stated intention to move towards democracy in the near future, the press was ordered in September and October 1982 to avoid any mention of the subject of disappearances, the Falklands conflict, or corruption within the government. These measures have been accompanied by the closing down of several weeklies, and threats to individual journalists.

Recent statements issued by the relatives of detained or disappeared persons and political prisoners in Argentina have made a considerable impact in Argentina. They have shown that eight persons, listed as disappeared, have been released in a precarious state of health close to their families' homes, under severe threat to their lives if they reveal the conditions of their detention. Some of them disappeared as far back as 1976. It appears that there were over a hundred more prisoners in the secret centre in which they were detained.

It is also understood that the army is studying a draft Amnesty Law aimed at benefitting those responsible for "the abuses committed during the anti-subversive struggle". There has been similar legislation, so-called "self-amnesties", to protect the armed forces responsible for illegal methods of repression under the Pinochet regime in Chile and, prior to that, in Brazil.

International Solidarity

Representatives of various organisations in Latin America formed to assist detained and disappeared persons met in San José, Costa Rica in 1980 at the invitation of the Latin American Foundation for Social Development (FUNDALATIN). They decided to establish a Latin American Federation (FEDEFAM) comprising organisations from Argentina, Bolivia, Brazil, Colombia, Chile, El Salvador, Guatemala, Honduras, Haiti, Mexico, Uruguay and Paraguay.

In November 1982 the third congress of FEDEFAM took place in Lima. At the time of going to press the results of the conference have not been received, but it is understood that the conference had before it proposals calling for:

- it to be made a criminal offence in domestic law and a crime against humanity in international law to cause an involuntary disappearance;
- statutes of limitation to be made non-applicable to the crime of causing involuntary disappearances, and to apply to such cases the principles of international cooperation for the identification, detention, extradition and punishment of those responsible;
- the General Assembly of the United Nations to appoint a High Commissioner with power to act immediately on complaints of disappearances in situations where a systematic pattern of disappearances has been established.

In this connection, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities at its 1982 session recommended that the International Law Commission be invited to declare involuntary disappearances a crime against humanity when drafting the code

of offences against the peace and security of mankind.

Harassment of Activists

Relatives of arrested and disappeared persons, and others working on their behalf, are often themselves subjected to harassment and persecution. For example, in El Salvador the Oscar Romero Committee of Mothers (so named after the murdered Archbishop Romero) reported in August 1982 the disappearance of Mrs Recinos, the wife of an arrested trade union leader, together with her 13-year-old daughter, a Mrs Perdomo of the Commission of Human Rights of El Salvador, and Dr. Saul Villalta, a lawyer who had gone to discuss with Mrs Recinos the possibility of obtaining her husband's release. According to the information received by the Oscar Romero Committee of Mothers, they were all arrested by the Hacienda police, but the police deny any knowledge of their whereabouts.

In Uruguay it is illegal to attempt to organise relatives of prisoners or disappeared persons. Publications which have referred to the subject have been closed down, and proceedings have been started in military courts against members of the Justice and Peace group for having expressed solidarity on humanitarian grounds with the relatives of disappeared persons.

UN Working Group on Disappearances

The report to the 1982 session of the UN Commission on Human Rights by its Working Group on Disappearances (E/CN.4/1492) contains some important observations and conclusions after its first two years of work.

The Working Group has informed itself of the features of the constitutional, legislative and judicial systems of member states which can be invoked by a relative or other interested person in the case of a disappearance. The Group comments that there seems to exist in most systems "a widespread insistence on the protection of the individual from abuse or excess of power by state authorities and on the necessity to bring any persons detained before a court of law at an early stage... The evidence is overwhelming that relatives and other organisations have constantly resorted to these remedies, but in all too many cases the constitutional and legal safeguards have yielded no results".

The Working Group then goes on to show that the principal reason for this is the lack of a truly independent judiciary and the failure of the executive to provide the courts with the information they require. The report continues in outspoken terms as follows:

"Evidence to the Group has identified prevailing defects which prevent families from exercising their basic right to trace their relatives:

(1) when detentions occur, the judiciary is in practice or even in law unable to pursue its search for information from the military or the executive to enable it fully to uphold the constitutional guarantees of personal freedoms;

(2) the judiciary and officers of the courts may be too afraid for their personal safety to dare to pursue in accordance with law the cases presented to them;

(3) a variation on this situation occurs where the appointment and likewise the dismissal of judges or magistrates is so dependent upon the executive power, that their propensity to investigate the actions of the executive is profoundly diminished. In many countries there is a dual procedure; both civil and criminal judges and magistrates are involved. The civil courts deal with *habeas corpus* or *amparo* (a broader remedy for denial of constitutional rights) or the like, while the criminal courts are empowered to investigate such offences as kidnappings or the abuse or excess in the use of power by members of the executive. Fear or favour can vitiate either jurisdiction."

Sri Lanka

A Presidential election, sought by President Junius R. Jayawardene sixteen months before his first six year term expired, took place in Sri Lanka on 20 October 1982. This necessitated an amendment to the Constitution. The Constitution had already been substantially amended in 1977 when Mr. Jayawardene came to power, so as to convert the previous Constitution,

which followed the Westminster model, into an executive presidency, the president's term being fixed at six years. Mr. Jayawardene nevertheless found it expedient to amend the Constitution again so as to enable the President to seek election any time after the first four years of office. This is a curious amendment. If a presidential power to seek re-election before the end of the

term is thought desirable, why should it be confined to the last two years of the six-year term?

Even more surprising was the government's decision immediately after this election to seek approval by referendum for yet another amendment to the Constitution which would enlarge the term of the present Parliament by a further six years. This referendum is to be held in December 1982.

It is unprecedented in a parliamentary democracy for the life of a parliament to be extended in such a way, other than in time of war. The explanation given by the State Minister was that the President had indicated that, as the people had given him a mandate to implement the policies he initiated at the 1977 election by re-electing him for a second term... he proposed to ask the people... to extend the term of office of the first Parliament by six years".

It does not, of course, follow that, if Parliamentary elections were held, the electorate would necessarily vote the President's party back into power, still less that they would do so by the overwhelming majority which the party gained in the 1977 elections (143 seats out of 168). By the present manoeuvre, the President is seeking without an election to perpetuate that majority, which few observers think he would be able to do by an election and which gives his party the power to vote changes in the Constitution at will.

The President then claimed that a faction of the Sri Lanka Freedom Party (SLFP) had planned to assassinate him and set up a military government if their candidate had won the recent presidential election. The President said that he could not allow "political hooligans" to enter Parliament in large numbers and "wreck" parliamentary procedures. No proceedings, however, have been reported against the supposed assassination conspirators. The Presi-

dent has also called for the resignation of all members of parliament of his own party, so that he can get rid of some unwanted members and submit a reconstituted list in the referendum. This is a surprising use of a provision of the Constitution that when an MP resigns, his party can nominate someone to replace him in Parliament.

These declarations and manoeuvres are hardly those to be expected of the President of a parliamentary democracy.

Sri Lanka is one of the few countries in the third world to enjoy the advantages of a free multi-party parliamentary democracy. In a press statement on 25 November 1982 the Secretary-General of the ICJ, commented that the recent amendments and proposed amendments savoured more of political manoeuvring than of a desire to maintain the stability of the Constitution, and expressed the hope that in the coming referendum the electors would reflect carefully before allowing the undoubted popularity of the President to undermine the tradition of constitutional rules.

When the Jayawardene government won its sweeping victory in 1977, it was in part due to the campaign it had waged in favour of greater protection for human rights.

In view of this, it was perhaps unfortunate that one of its first acts was to set up a Special Presidential Commission to inquire into allegations of abuse of power by Mrs Bandaranaike and other members of her administration. Commissions of this kind are at their best unsatisfactory and smack more of a desire to gain political advantage than to see justice done. If members of a previous administration are believed to have violated the law, they should be charged and tried before the ordinary courts, with all the protection of 'due process' and full defence rights, including a right of appeal. The procedures under the Special Presidential Commission of Inquiry

were criticised in ICJ Review No. 21 of 1978, at p. 11.

The criticism included that the Commission could find persons guilty of acts of "political victimisation, misuse or abuse of power, corruption or any fraudulent act in relation to any court or tribunal or any public body or in relation to the administration of any law or the administration of justice". These are general charges, lacking the specificity of defined crimes. In so far as they go beyond existing criminal law, they are retroactive in effect.

Accused persons do not have the advantage of knowing with proper precision the charges against them. The Commission is at once an investigating body and a tribunal making findings of guilt. Its findings, which are published in the official Gazette, are "final and conclusive, and shall not be called into question by any court". In other words there is no right of appeal. The sentence to be passed on offenders is then determined not by a judicial body in accordance with a pre-determined law; it is imposed by Parliament, which in this case means by the defendant's political opponents.

In the case of Mrs Bandaranaike, the findings against her were that she had prolonged until 1977, the State of Emergency proclaimed in 1971, although conditions for such continuance had ceased to exist; suppressed legitimate political opposition and harassed political opponents; interfered with police investigations into an alleged threat to the life of Mr. Jayawardene, then leader of the opposition and present President; caused the eviction of a monk from his home and had another political opponent evicted.

None of these in terms constitute a criminal offence. Yet Parliament passed a law with the novel punishment of imposing civil disabilities on her for seven years, with

the result that she was banned from participating in elections, or even of campaigning on behalf of other candidates for that period, under pain of a fine or imprisonment, and any successful candidate for whom she campaigned could be unseated.

All this was a gross violation of the principles of the Rule of Law, and is also in violation of several articles of the International Covenant on Civil and Political Rights, to which Sri Lanka is now, but was not then, a party.

The Prevention of Terrorism Act

A major problem with which the government of Mr. Jayawardene had to deal and which was inherited from the previous administration was the ethnic conflict between the Tamil minority and the Sinhalese, and in particular the terrorist attacks of the extremists for Tamil Independence. When widespread violence broke out between the two communities in June 1981, the government declared an emergency and made extensive use of the 1979 Prevention of Terrorism Act. In July 1981, the International Commission of Jurists designated Professor Virginia Leary to study the human rights aspects of the Terrorism Act and the events related to its adoption and application.

In her report Professor Leary criticised certain provisions of the Act on the grounds that they were unduly vague, created offences retroactively and provided for detention incommunicado contrary to internationally accepted minimum standards¹.

Professor Leary recommended to the government of Sri Lanka that "in view of the draconian provisions of the 1979 Terrorism Act, which violate accepted standards of criminal procedure, the govern-

1) See ICJ publication "Ethnic Conflict and Violence in Sri Lanka", by Prof. Virginia Leary.

ment should urge its parliamentary majority not to re-enact the Act on its expiration in 1982, or to amend it so that its provisions on arrest, detention and evidence conform with the international commitments made by Sri Lanka in ratifying the International Covenant on Civil and Political Rights".

Contrary to this recommendation recent amendments made to the Act have enlarged its application. In March 1982, an amending Act deleted Section 29 of the Act which limited its operation to a period of three years, thereby making the Act permanent. Further a new Section 15 A was added which states that

"where any person is on remand, the Secretary to the Minister of Defence may, if he is of the opinion that it is necessary or expedient so to do, in the interests of national security or public order, make an order, subject to such directions as may be given by the High Court to ensure a fair trial of such person, that such person be kept in the custody of any authority, in such place and subject to such conditions as may be determined by him having regard to such interest... and the provisions of the prisons ordinance shall cease to apply in relation to the custody of such person".

The new Section empowers the executive to transfer a remanded prisoner from the prison where he is held to some other place of detention. The reasons for and the use being made of this new Section are not known, but in principle it appears objectionable.

Experience in many countries shows that when persons are removed from the custody of trained prison officers, and

handed over to military custody, abuses are liable to result. This experience includes Sri Lanka, as was shown when the Court of Appeal, dealing with habeas corpus petitions, found that violence had been used against detainees in an army camp².

Emergency to Deal With Labour Strikes

The other major problem the government has had to contend with is labour unrest. On 16 July 1980, an emergency was declared to deal with a general strike which was called by the Joint Trade Unions Committee. In spite of the emergency declaration, large numbers of workers went on strike. The government retaliated by dismissing all public service employees on strike and freezing the bank accounts of the trade unions. The emergency was, however, lifted on 15 August 1980.

The strike and its aftermath illustrate the inadequacy of the existing machinery to deal with the grievances of public service employees. Section 49 of the Industrial Disputes Act, which deals with trade union rights, including the right to strike, states that the Act shall not apply to the government in its capacity as employer or to a worker in the employment of the government. In addition, the Essential Public Service Act, enacted in 1979, imposes a total ban on strikes by public service employees. A minimum sentence of two years and a fine of up to 5,000 rupees is stipulated for contravention of the Act. Further, this Act enables the President to declare any services rendered by any government departments, public corporations and local authorities as essential services, thereby bringing the workers of these enterprises under

2) Court of Appeal, Habeas Corpus applications 10, 11 and 12 of 1981, decided on September 10, 1981.

the jurisdiction of the Act.

It is generally recognised that some public service employees, but by no means all, are in a special category and that it is necessary and legitimate to deprive them of the right to strike. But where there is a ban on strikes there should be statutory machinery to settle disputes. ILO Convention 151 of 1978, recognises this and suggests that impartial machinery such as mediation, conciliation or arbitration should be provided by governments to deal with the grievances of public services employees. Sri Lanka is not a party to this Convention. Perhaps its application in Sri Lanka would help to meet the grievances of the public service employees.

Report to the Human Rights Committee

The Government of Sri Lanka's ratification of the Covenant on Civil and Political Rights on 11 June 1980 is to be warmly welcomed. Its first report to the Human Rights Committee is due, in which it is asked to report on the measures it has adopted to give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of these rights. This provides an opportunity for the government to review the consistency of its laws with the provisions of the Covenant, and it is to be hoped that the President will use his fresh mandate from the people to initiate this process.

Zaire

An article in ICJ Review No. 21 of December 1978 described the then situation of human rights in Zaire. A few months before, the bishops of Zaire had launched "A Call to Recovery of the Nation", in which they concluded that the situation called for profound reforms in order to achieve the required recovery of the nation, and maintained that superficial reforms would only paper over the cracks. Four years later the situation is profoundly disturbing. Detention without trial, torture, summary executions, disappearances, inequitable trials of presumed opponents to the government, such is the state of affairs in Zaire, ironically one of the African states that has ratified the International Covenant on Civil and Political Rights and its Optional Protocol.

The various constitutional texts of Zaire claim to protect the fundamental rights of citizens. However, the gap between these

texts and the realities is immense. "The Call to Recovery of the Nation", from which extracts were published in Review No. 21 is still valid, as was affirmed by the Plenary Assembly of the Bishops of Zaire, held in Kinshasa in June 1981. In its declaration, the episcopal conference remarked: "One knows the old refrain... Zaire is a geological scandal, an extremely rich country with extremely poor inhabitants... for decades people have talked about its riches which always remain 'potential'. Meanwhile, there is shameless exploitation for the benefit of foreigners and their agents while the great majority of the people are sunk in a poverty, which is sometimes artificially created."

This picture is fully confirmed in a remarkable book published by the former Prime Minister of Zaire, Nguza Karl i Bond, entitled "Mobutu ou l'incarnation du Mal

zairois". In 1977 President Mobutu accused Karl i Bond, then the Minister of Foreign Affairs, of being in collusion with the 'enemy' in the Shaba conflict. He was arrested, detained in an underground cell and subjected to severe torture including electric shocks to his testicles. Later he was charged with high treason and sentenced to death on September 13, 1977. Two days later he was reprieved. In July 1978 he was freed and in March 1979 resumed his portfolio as Minister of Foreign Affairs, before being appointed Prime Minister in 1980. Less than two years later, while on an official visit to Belgium, he opted for exile.

In his book he traces his extraordinary political career, and above all presents a massive indictment against President Mobutu's regime, which he charges with responsibility for a situation of total bankruptcy, due to poor administration and disuses or misuse of the country's competent professionals. He shows the regime to be one of terror, recalls the political executions at Whitsun 1966, seven months after Mobutu came to power by a military coup, when four ministers were arrested and hanged publicly following a 'plot' invented entirely by Mobutu. He describes his own trial before the Court of State Security as a masquerade, one of many speedy, faked, and ridiculous trials. His lawyer, Maître Ndudi-Ndudi, was pressurised not to ask for an adjournment of the trial.

As to freedom of the press, Karl i Bond comments that the press is muzzled as in all totalitarian countries. He says that General Mobutu often himself dictates articles for AZAP (the Zaire press agency), or inspires them, which are then faithfully reproduced in the press and on radio and television.

In his conclusions Karl i Bond severely criticises the Western powers in blindly defending their economic interests in exploiting Zaire's mineral wealth and keeping si-

lent about the violations of human rights in Zaire, and he contrasts this with their denunciations of violations in Poland.

The disastrous fall in the standard of living in Zaire is well-known. There has been a constant diminution in purchasing power following vertiginous inflation. UNTZA (the National Union of Zairian workers) has calculated that between 1960 and 1969 inflation rose by 917% and the minimum salary of an unskilled worker by only 329%. The World Bank commented in 1980 on the lack of any systematic economy policy, and of any appropriate response to the external trade problems or to inflation. The result is that the greatest profits are made in commerce, speculation, flights of capital and luxuries rather than in productive work. The system creates many opportunities for corruption, above all at a time where real salaries are diminishing. Instead of establishing a policy of effective participation by the people in development, Zaire has concentrated on exploiting its mineral wealth leaving the rural areas to sink further into poverty.

In face of its inability to solve its problems, the government has had resort to authoritarianism and repression to silence criticisms. Hopes for a relaxation were raised in 1978 when, after the Shaba war, President Mobutu declared his intention to liberalise his regime. He said in a speech "the voice of people has been stifled for a long time. There is a danger that it will be heard too late... I have decided to establish a really representative parliament, elected on the basis of free elections and universal suffrage". The one party system, however, remained. The elections took place and the new parliament was given the right to call ministers to account, to set up parliamentary enquiries, to put oral or written questions, and parliamentary debates were relayed by radio and television. Two years later, on February 4, 1980, President

Mobutu decided that the elected representatives of the people could not exercise their rights to challenge or question the government without his express prior agreement.

In June 1978, again expressing his concern to liberalise his regime, President Mobutu succeeded in persuading many refugees to return to Zaire, granting them an amnesty. However, hundreds of those who were to benefit from the amnesty were arrested on their return, detained without trial and, in some cases, tortured and even executed. The representative in Zaire of the UN High Commissioner for Refugees protested against these arrests in violation of the amnesty.

Summary executions without trial in the middle of 1979 of alleged robbers in Matadi and other towns in Bas-Zaire have been reported by Amnesty International, and massacres in Eastern Kasai, and in particular at Katakakayai, on November 8, 1979, by the International Federation of Human Rights.

In January 1981, 12 Commissioners of the People (members of parliament) were arrested for having written an open letter to President Mobutu, contrasting his innumerable political declarations since he took power with his present policies. They were deprived of their parliamentary immunity, and their case was examined by a Disciplinary Commission of the Central Committee of the Mouvement Populaire de la Révolution, the single party. The Commission found them guilty of various breaches of discipline and ordered that they be dismissed from the party, with the consequence that they were no longer qualified to sit in parliament or occupy any position in the public service. The Commission also ordered that they be deprived of their civil and political rights, an order which it had no power to make. The authors of the letter were then tried together with six other de-

fendants by the Court of State Security. The 12 Commissioners of the People refused to attend the trial on the grounds that it was not being held truly in public, and their Belgian advocates accordingly refused to participate in the trial in their absence. The other defendants were represented by Zairian counsel. The Belgian advocates had previously been warned by President Mobutu that any pleading criticising in any way the Constitution would result in their immediate expulsion. The 12 Commissioners were sentenced to the maximum of 15 years penal servitude. An observer on behalf of the International Federation of Human Rights commented that the parliamentarians were condemned because they had expressed opinions other than those of the political authority in power, and had manifested an intention to found another party.

After the trial the former parliamentarians wrote to the Minister of Justice denouncing the ill-treatment and brutality to which their families had been subjected.

On March 26, 1981, a professor of history, Professor Dikonda, was arrested for having criticised the regime in a radio interview during a visit to Belgium. He was detained without trial for nine months before being released. This is far from being an isolated case. Anyone who expresses any criticisms is liable to be arrested and detained either by the CNRI (a civilian security service) or by the security service of the army.

Further convincing first hand evidence of the practices of torture and extra judicial executions by the 'security forces in Zaire was provided in a statement made by a former army sergeant, Kimbana Lulu Kilodio, at an enquiry held in Rotterdam in September 1982, in which he said "Under the command of Colonel Bolozi, we were ordered to torture and execute political [prisoners]... As we became increasingly notorious for kidnappings and assassina-

tions, my conscience was no longer clear... Dr. Motondo, a member of the family of the former President of the Republic, Joseph Kasavubu, is today paralysed. In torturing him, we smashed his knees with hammer blows... The regime is insane¹."

1) *Afrique Asie* No. 282, November 1982.

COMMENTARIES

UN Sub-Commission on Discrimination and Minorities

The 35th session of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities was held in Geneva, from August 16 to September 10, 1982.

High Commissioner for Human Rights

Outstanding was the speed with which the Sub-Commission replied to the Commission on Human Rights' request that it draft proposals for possible terms of reference for a High Commissioner for Human Rights. An informal working group was set up to prepare a draft and in due course the Sub-Commission adopted many of its suggestions. The Sub-Commission's recommendations were unfortunately far from unanimous. Ten members voted for them, six against, and four abstained.

Included in the proposed functions and responsibilities of the High Commissioner are the promotion and protection of the observance of human rights and fundamental freedoms for all, giving special attention to the importance of ensuring the effective enjoyment by all of their civil and political rights and their economic, social and cultural rights. The High Commissioner would be empowered to initiate direct contacts with governments, whenever such action appeared necessary or desirable. In cases of mass and flagrant violations of human

rights, the High Commissioner would, in addition to making direct contacts, consult with and consider collaborating with other elements of the United Nations system. He would report annually to the General Assembly, the ECOSOC and the Commission on Human Rights. The Sub-Commission suggests that, subject to the consent of the concerned governments, the reports include a summary of the results of the Office's direct contacts with governments, and also suggests that the Commissioner announce the results of such direct contacts at other times during the year. It recommends that the Commissioner be nominated by the Secretary-General and be elected by the General Assembly, for a period of five years and not serve for two consecutive terms.

Review of Status and Activities of the Sub-Commission

This agenda item was created in 1981, following criticisms made in the Commission on Human Rights regarding certain activities of the Sub-Commission. Some surprising and far-reaching proposals were discussed, including proposals that the status of the Sub-Commission should be raised to one of equality with the Commission. However no agreement was reached on any of these proposals and the matter has been deferred until next year.

Rights of Detainees

The Working Group on the Rights of Persons Subject to any Form of Detention, established during the previous session of the Sub-Commission, reviewed various issues, including the grounds for detention, procedures for arrest, duration of pre-trial detention, the rights of persons in detention, torture and other cruel or inhuman punishment, summary or arbitrary executions, curtailment of movement, trial procedures, disappearances and military courts.

The report of the Working Group contained 16 recommendations for procedures to guarantee respect for the human rights of persons held in prisons or in detention.

Many of these and other suggestions were passed on to the Commission, including proposals that

- persons arrested or detained should be tried within a fixed period, preferably 3 months, after arrest or released pending further proceedings;
- detained persons should have the right to be produced before an independent magistrate at brief intervals and asked if they have any complaints;
- there should be independent inspections without prior notice of places of detention and interrogation centres;
- the jurisdiction of military courts should be limited to military offences and personnel, with the right to independent legal defenders and to appeal to a civilian court against severe sentences.

The Sub-Commission also requested the Secretary-General to seek information from governments and others about arrest and detention 'on vague grounds or no grounds at all', the duration of pre-trial detention, procedural guarantees for administrative internment, especially under states of emergency, practices of incommunicado

detention, extra-territorial abductions and suicides in detention.

It also proposed that a special study should be made on the concepts of international *habeas corpus* and of "anticipatory bail" as practiced in India and elsewhere.

Also, following a suggestion made by the ICJ to the Working Group, the Sub-Commission decided to request the chairman of the Commission, to forward a telegram to the government of Malawi concerning the arrest and trial of Orton and Vera Chirwa (cf. ICJ Review 28, p. 13). The Sub-Commission expressed its concern over the allegations that the Chirwas were being charged with a capital offence of treason before a court not composed of legally-trained judges and without a right of representation and also expressed its concern about substantial indications that the accused were arrested by Malawi police in Zambia. The Sub-Commission urged a public enquiry into the circumstances of the arrest and the trial of the accused before the high court.

States of Emergency

Mrs Nicole Questiaux, Special Rapporteur, submitted her completed study on the implications for human rights of states of siege and emergency, to the Working Group on the Rights of Persons Subject to any Form of Detention.

The Sub-Commission requested the Commission to recommend to the ECOSOC that it transmit the study to the specialized agencies of the United Nations, the Committee on Human Rights and the Committee on the Elimination of Racial Discrimination and arrange for the study to be published and given the widest possible dissemination in all the official languages of the United Nations, and that the ECOSOC authorize the Sub-Commission to appoint one of its members to undertake a closer

study of the advisability of strengthening or extending the inalienability of the non-derogable rights enumerated in article 4, paragraph 2, of the International Covenant on Civil and Political Rights.

In her recommendations Mrs. Questiaux proposes a supervisory role for international and regional organs to monitor the human rights situation during states of emergency. Such a role would include regular reports to the Commission on Human Rights, and the holding of seminars and colloquiums involving concerned governments, legislators and jurists.

The criteria by which states of emergency should be judged are that the emergency should be officially proclaimed, the reasons for it should be stated publicly, the threat to be met should be exceptional, emergency measures should be proportional to the threat and should be applied without discrimination, and the non-derogable rights, such as the right to life and freedom from torture, should be strictly respected.

The study draws attention to the basic rules of international law and domestic legislation which limit the State's power with respect to human rights in emergency situations. Mrs. Questiaux observed that, too often guarantees provided by law were deviated from. The study includes an analysis of the *de facto* impact of states of emergency upon the rule of law and respect for human rights, and notes that states of emergency tend to become permanent or institutionalized, with increased powers being granted to the Executive and to military or special courts which sometimes applied retroactive laws in summary fashion. The effects of states of emergency are particularly damaging for persons detained on political grounds.

Indigenous Populations

The new working group on indigenous

populations met under the chairmanship of Asbjorn Eide (Norway). It was assigned two main tasks: to review developments pertaining to the promotion and protection of basic rights of indigenous populations and to submit conclusions, and to pay special attention to the evolution of standards concerning the rights of indigenous populations.

On the question of the definition it decided not to make a firm recommendation yet but to await the receipt of additional information on this issue.

The Working Group considered that special and urgent attention has to be paid to the cases of physical destruction of indigenous communities (genocide) and the destruction of indigenous cultures (ethnocide).

The Sub-Commission adopted the Working Group's recommendation that the ECOSOC be asked to establish a fund for the purpose of allowing representatives of indigenous populations to come to Geneva to participate in the Working Group.

Slavery and Slavery-Like Practices

The Sub-Commission recommended that the Report on Slavery of the Special Rapporteur, Benjamin Whitaker (UK) should be translated (including an arabic version) and widely distributed.

The report contains proposals for assigning a major co-ordinating role to the United Nations system in new efforts to combat slavery and slavery-like practices, and suggests that the United Nations and its agencies actively offer countries co-ordinated legal, technical, administrative, educative, financial and other practical assistance to eliminate conditions conducive to slavery-like situations.

The Sub-Commission also recommended that studies should be made or updated

dealing with debt bondage, indentured labour in South Africa, exploitation of women, traffic in persons and prostitution, the sale of children and female sexual mutilation.

The programme of action to combat exploitation of child labour prepared by Mr. Abdelwahab Bouhdiba, proposing a campaign which would include a UN seminar focussing on further national measures and coordinated international action, was submitted to the Commission.

Conscientious Objection to Military Service

Following a request by the Commission to study the question of conscientious objection to military service, the Sub-Commission requested Mr. Asbjorn Eide (Norway) and Mr. Chama Mubanga-Chipoya (Zambia) to develop principles (a) recognizing the right to refuse military or police service to enforce apartheid, to pursue wars of aggression, or to engage in any other illegal warfare; (b) recognizing the possibility of the right to refuse such service on grounds of conscience but with a duty to offer alternative service; (c) urging Member States to grant asylum or safe transit to persons compelled to leave their country because of refusal of military service.

Protection of Persons Detained on Grounds of Mental Disorder

The report of Mrs Daes (Greece) with draft guidelines, principles and guarantees for the protection of persons suffering from mental disorder received preliminary discussion in a working group. The Sub-Commission has proposed that the working group be renewed next year and sufficient time allotted to it to enable the report to be completed.

Independence of the Judiciary and the Legal Profession

Mr. Singhvi (India), the Special Rapporteur on this item, submitted a progress report on his study, in which he referred to his attendance at a meeting of a Committee of Experts convened by the ICJ and the International Association of Penal Law to formulate principles on the Independence of the Legal Profession. The participants included lawyers from 16 organisations and 20 countries. Mr. Singhvi noted in his progress report that the principles formulated by the Committee of Experts provided an instructive example of a broad convergence and consensual accommodation of diverse perspectives and experiences in different legal systems.

Human Rights Violations

The Sub-Commission has put forward under this item a revised proposal for visits by its members to countries under consideration by it. The present proposal is that the Sub-Commission be authorised to make arrangements for one or more of its members, following a decision of the Commission, to visit with the consent of the government concerned, any country "as regards which the Commission has received reliably attested allegations of a gross and consistent pattern of violations of human rights and fundamental freedoms with a view to examining such situations at first hand and reporting thereon to the Sub-Commission at its next session".

Meanwhile, two members, Mohamed Yousif Mudawi (Sudan) and Marc Bossuyt (Belgium) were nominated to visit Mauritania at the invitation of the government.

During the discussion on *Lebanon* under this item, the Sub-Commission decided to request the Chairman of the Commission

to transmit to the government of Israel a telegram calling for the immediate cessation of all military operations in Lebanon, with special reference to the blockade and massive bombardment of Beirut, and also called for the observance of international humanitarian norms, especially the 1949 Geneva Conventions and their additional protocols, in particular those relating to the protection of civilian populations and of prisoners of war.

In a resolution on this issue, the Sub-Commission recommended the Commission to condemn Israel for its invasion of Lebanon "which constitutes a deliberate act of aggression against a sovereign State and for the indiscriminate bombardment and destruction of Lebanese cities and Palestinian refugee camps, and further asked the Commission to declare that "Israel's grave breaches of the Geneva Conventions of 1949 and the Additional Protocols, ... are an affront to humanity and can be assimilated to crimes of war".

There were extensive discussions on the human rights situation in various parts of the world, and almost all the Sub-Commission members made comments on this agenda item. Additionally, the Sub-Commission heard comments from 15 governmental observers, one national liberation organisation and 12 non-governmental organisations. Resolutions were adopted concerning the human rights situation in seven countries apart from Lebanon, namely Guatemala, Chile, East Timor, Afghanistan, Kampuchea, Iran and El Salvador.

With respect to *East Timor* it recommended the Commission to call upon all parties concerned to cooperate fully with the UN with a view to guaranteeing the free and full exercise of the right of self-determination of the people, and to facilitate the entry into the territory of international aid to alleviate their suffering.

On *Guatemala*, it expressed its profound

concern at the deteriorating situation and noted with satisfaction the assurance given by the government that it would cooperate with the Special Rapporteur appointed by the Commission.

With respect to *Chile* it recommended the Commission to call upon the Chilean authorities to respect and promote human rights in conformity with the obligations they had assumed by virtue of various international instruments.

On *Afghanistan* it noted that a fourth of the Afghan people must now seek refuge and refugee status elsewhere in order to enjoy freedom, and expressed its grave concern at the persistent reports of serious violations of the human rights of the people of Afghanistan, including reports of the use of weapons outlawed by the international community. It stated that withdrawal of foreign forces was essential for restoring human rights and reaffirmed the right of all peoples to determine their own form of government and to choose their own economic, political and social system free from outside interference, subversion, coercion or constraint of any kind whatsoever.

On *Kampuchea* it endorsed the call made by other UN bodies for the immediate withdrawal of all foreign forces from Kampuchea and recommended the Commission to urge all concerned to take steps to enable the people of Kampuchea under UN supervision to choose their own constituent assembly to lay down the basic principles for a democratic government without foreign interference.

It considered that the human rights situation in *Iran* was sufficiently serious to merit continuing scrutiny by all concerned United Nations bodies, including the Commission on Human Rights.

It recalled the General Assembly resolution appealing to all States to abstain from intervening in the internal situation in *El*

Salvador and to suspend all supplies of arms and any type of military support, and recommended the government to apply the rules of international law, particularly Article 3 of the Geneva Conventions of 1949, which requires the parties to armed conflicts not of an international character to apply minimum standards of protection of human rights and of humane treatment.

Under this agenda item, the Sub-Commission sought permission to update the Study on the Question of the Prevention and Punishment of the Crime of Genocide with a view to having the update submitted to the Commission at its 40th session.

Also, Mr. Mubanga-Chipoya (Zambia) was requested to prepare an analysis of current trends and developments in respect of the right of everyone to leave and return to his country, and to enter other countries without discrimination or hindrance, especially of the right to employment, taking into account the need to avoid the brain drain from developing countries and the question of recompensing those countries for the loss incurred. The Special Rapporteur is to present his recommendations to the Sub-Commission during its 37th session.

The NIEO and the Promotion of Human Rights

Mr. Raul Ferrero (Peru) introduced the first part of his Final Report on the New International Economic Order and the Promotion of Human Rights. Some speakers suggested that more account should be taken of the documents and materials of the non-aligned movement in demonstrating the need for a new international economic order. It also was suggested that an analysis should be made of the controversial view that the denial of human rights might sometimes be justified in order to

achieve major economic reforms. Many members expressed the view that the promotion of respect for human rights is the ultimate goal of both the development process and of the establishment of the NIEO. Some thought that the promotion of equity and social justice must be pursued at the national level as much as at the international level. Wealth must be equitably distributed within States and progressive reforms such as land reform, economic planning, and the exercise of control over transnational corporations introduced.

The Secretary-General was requested to transmit the report of the Special Rapporteur to the Working Group of Governmental Experts on the Right to Development so that the Working Group would have it during its deliberations. He was also asked to report on the extent to which technical assistance is currently available to States to enable them to strengthen their legal institutions, including relevant educational facilities, in order to enhance respect for the rule of law in the development process.

The Sub-Commission requested that Mr. Eide (Norway) be authorised to prepare a study on the right to adequate food as a human right, giving special attention to the normative content of the right and its significance in relation to the NIEO.

The Affects of Gross Violations on Peace and Security

Under this item the Sub-Commission recommended that the ECOSOC

— direct the attention of the Security Council and the General Assembly to the fact that such mass and flagrant violations of human rights as aggression, invasion, military occupation, genocide and *apartheid* “result in threats to, or

- breaches of, international peace and security,
- request the Security Council to consider how such violations can be dealt with as effectively as possible''
 - request the General Assembly to ask the International Law Commission to take mass and flagrant violations of human rights into account when elaborating the draft code of offences against the peace

and security of mankind.

It also suggested that, the Sub-Commission be authorised to continue its consideration of this item with a view to establishing criteria to govern situations which could be considered as constituting gross and flagrant violations of human rights, the effect of which have an impact on international peace and security.

The Case of Poland before the Committee on Freedom of Association

On 8, 9 and 12 November 1982, the Committee met in Geneva. It had before it a number of complaints of violations of trade union rights in Poland presented by the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL). Moreover, two workers delegates (from France and Norway) to the 68th session of the International Labour Conference (June 1982) had made a complaint under article 26 of the ILO Constitution for non-observance, by Poland, of the Freedom of Association and Protection of the Right to Organise Convention (No. 87) and the Right to Organise and Collective Bargaining Convention (No. 98). The Committee had also before it, the information gathered by the ILO during a visit by a governmental delegation on 6 and 7 October 1982, the observations transmitted by the government in a communication

of 22 October and 12 November 1982, and the statements made by Mr. Gorski, Vice-Minister of Labour before the Committee on 9 November 1982.

The Committee had already examined the case in two previous reports, at its meetings of February and May 1982 (214th and 217th Reports).

At the initiative of the government, two ILO representatives visited the country from 10 to 16 May 1982. The information obtained during this visit is included in the 217th Report, in which the Committee requested the government to transmit information on any draft law which might be elaborated concerning the trade unions; on the 185 trade unionists who were, according to the government, still in detention; on the tragic incidents which led to the death of nine workers at the Wujek mine during the strike in December 1981; and

on the allegations of dismissals and the pressures that are said to have been exercised on workers belonging to Solidarity.

The allegations made by the complainants may be summarised as follows. After the proclamation of martial law, trade union activities had been suspended, trade unionists had been arrested or dismissed from their jobs by reason of their trade union activity, and loyal pledges had been required under penalty of dismissal from certain categories of civil servants.

The ICFTU and the WCL protested against the use, by the authorities of force and violence against workers during peaceful demonstrations held on 31 August and in the next days, marking the anniversary of the agreements signed at Gdansk. According to the complainants, this violence had resulted in deaths, hundreds of persons being injured and thousands of workers being arrested.

The delegation sent by the government on 6 and 7 October requested a legal opinion on the conformity of the draft law on trade unions with ILO standards. The written comments were immediately transmitted to the delegation, and on 8 October the Director-General addressed a telex to Mr. Obodowski, Vice-Prime Minister, in which he pointed out the major problems which the draft law posed. The same day, the Sejm (parliament) of the Polish People's Republic adopted the new law on trade unions.

In a letter to the ILO of 14 October 1982, the WCL states that this new law is contrary to Conventions No. 87 and No. 98. It refers to the suppression of existing trade unions (article 52) and to the fact that under article 53, only trade unions limited to particular enterprises will be allowed until the end of 1983. Nationwide unions will not be allowed until 1984 and inter-union associations and organisations until 1985. Moreover, the draft statutes of

these 'enterprise unions' have to be submitted to the authorities. The conditions for exercising the right to strike are such that in practice strikes will be impossible.

On 22 October, the government transmitted its observations. It stated that the progress made towards the normalisation of the situation in Poland will soon lead to the suspension or even the total lifting of martial law. Concerning the law on trade unions, it stated that a number of modifications had been made to the draft law, in the light of the comments of the ILO experts. Concerning the limitations of certain rights contained in the law, especially as regards the multiplicity of trade unions and the annulment of the trade union structure which existed before 13 December 1981, it stated that these temporary limitations were the only solution in view of the urgency of the situation. Concerning the persons interned, 109 persons had been freed as at 10 October 1982. Concerning the events at the Wujek mine, the government stated that the forces of order were in a situation of self-defence and that, accordingly, the inquiry into the events was closed by decision of the Military Prosecutor on 20 January 1982.

On 9 November before the Committee on Freedom of Association, Mr. Gorski, Vice-Minister of Labour, sought to justify the withdrawal of the registration of trade unions (article 52 of the law on trade unions) as follows: "There has been no dissolution by the administrative authority, but only by the supreme legislative body. The government could have opted for one or two other solutions, the one being to reactivate Solidarity under another name and with a new leadership, the other being to dissolve the union through the courts for violation of its statutes. Both these solutions had the same disadvantage, however, they would have caused profound divisions in society. The government wanted to

avoid such consequences since Poland, at all costs, needed tranquility and national understanding."

The Committee's Conclusions

The Committee considers that no real improvement in the trade union situation can be expected as long as martial law prevails in the country. It urged the government to take the necessary measures to lift martial law in the very near future.

Although some of the comments of the ILO experts have been taken into account in the text adopted by the Parliament, some fundamental provisions of the new law on trade unions which are not in conformity with the principles of freedom of association and collective bargaining, have not been amended. Among other comments were the following:

- *under article 12*, the officials of penal establishments are excluded from the right to strike, whereas under the provisions of Convention No. 87, only the members of the armed forces and the police may be excluded from this right;
- *under article 38*, strikes are possible only after acceptance, by secret ballot, of such a decision by the majority of the workers. The Committee considered that the requirement of a majority of those voting would not involve such substantial restrictions on the rights of trade unions;
- *under article 40*, the workers engaged in "essential activities" are excluded from the right to strike. The Committee considered that certain of the named activities should not be considered as "essential", but should figure among the services in which, under article 40(3), a minimum necessary service must be ensured (e.g. food industry, education, banks, oil and gas pipelines, installations

linked to international transport, radio and television);

- *under article 52*, the registration of existing trade unions is cancelled. The Committee considered that it is essential that any dissolution of workers 'or employers' organisations should be carried out by the judicial authorities, which alone can guarantee the rights of defence, even if such measures are taken during an emergency situation;
- the Committee requested the government to supply information on the measures taken with a view to making the necessary amendments to the legislation. The Committee of Experts on the Application of Conventions and Recommendations will examine the new law at its next meeting in March 1983.

On November 11, 1982, the International Commission of Jurists requested the Polish authorities to be allowed to send an international observer to the trial, which has been announced as taking place shortly in Poland, of the leaders of the former KOR organisation. Dr. Rudolf Machacek, a distinguished advocate, member of the Constitutional Court of Austria and Commission Member of the ICJ has been nominated as the Observer.

KOR (Defence of Workers) was created in 1976 to assist workers who had been arrested following demonstrations against increases in food prices. In 1977 when these workers were released it transformed itself into KSS-KOR (Social Defence Committee) to oppose violations of the rule of law and support social initiatives in the cause of human rights. It worked closely with the leaders of Solidarity, helping to frame its economic and social policies. When Solidarity was officially recognised it decided to disband, as its work was being carried out by Solidarity committees. It was dissolved in September 1981.

Japan's Denationalisation of the Korean Minority¹

According to official statistics of the Japanese government there are about 650,000 'Koreans' living in Japan. Most of them are second and third generation descendants of 'Koreans' who were initially brought to Japan as labourers, at the time when Japan had annexed Korea. 'Koreans' who were brought to Japan were treated as Japanese nationals. Now they have been deprived of their Japanese nationality and many of them have become stateless persons. This minority constitutes more than 80% of the total number of non citizens in Japan.

Historical Background to the Migration of Koreans to Japan

Japan annexed Korea in 1910 and ruled it through a colonial government. The colonial policy of Japan was one of complete subjugation and assimilation which resulted in very harsh policies. In particular the agricultural policy of the colonial government caused massive dislocation and hardship to the Korean peasants. In 1911 a land survey was begun under which the peasants were required to register their lands with the authorities. The procedure for registration was complex, but the time provided was only 30 days. Lands that were not properly registered became the property of the colonial government. The result of the land survey was that the colonial government came to control 10% of all farm land and 60% of the forests. Further, high rents

were extracted from the share croppers and tenants, and those who resisted payment were summarily evicted from their lands. The peasants who failed to register their lands and those who were evicted from their lands migrated to Japan to earn their livelihood. Between 1916 and 1920 the Korean population in Japan rose from 6,000 to over 40,000.

After the Japanese invasion of China in 1937, the second stage of migration began. In 1938, a National Mobilization Law was passed placing all material and human resources in Japan and Korea under the complete control of the government. To facilitate this mobilisation a policy of Japanese and Korean 'oneness' (Naisen Ittaika) was followed. Under this policy the Korean language was not allowed to be taught in schools, all Korean language newspapers were banned and Japanese was made the national language of Korea. Along with this a forced mobilisation of labour was initiated. In 1939, the Japanese government authorised the compulsory transfer of 85,000 Koreans to Japan. With the intensification of the war, the labour shortage became so acute that the mobilisation measures were further strengthened. During this period more than one million Koreans were forcibly transferred to Japan.

At the same time there was a parallel conscription of Koreans into Japanese military service. The Japanese government issued a special military order regarding volunteers in February 1938, a special naval order in May 1943, and finally in 1944 a con-

1) For the factual information in this commentary the ICJ is indebted mainly to a paper written by Mr. Choung Il Chee, lecturer in international law at Seoul National University, Republic of Korea, and to a Master's thesis by Soon-Chee Park, published by the Institute for Asian/Pacific Studies, University of San Francisco.

scription law. By the end of the Pacific war 364,186 Koreans had been conscripted into the Japanese armed forces. According to one estimate there were nearly 200,000 Korean casualties in the war, which does not include the estimated 30,000 to 50,000 Korean casualties in Hiroshima and Nagasaki.

Under the mobilisation drive even women were not spared. It is alleged that nearly 200,000 women were mobilised and that of these 50,000 to 70,000 young girls were sent overseas to serve the needs of Japanese soldiers.

Evolution of the Legal Status of the Korean Minority in Japan

The Korean minority living in Japan prior to 1945 enjoyed almost all the rights of ethnic Japanese including political rights, which were denied to Koreans living in Korea². As from 1925 they were permitted to vote, and a Korean was elected to the National Parliament in 1932 and 1937 from the Fukagawa district of Tokyo. By the end of the second world war, there were 410 Koreans holding civil service posts in Japan. Compulsory military service was imposed on them in 1944.

It is clear, therefore, that the members of the Korean minority were regarded as Japanese citizens and, as will be seen, this was confirmed by subsequent legislation depriving them of their Japanese nationality.

The Koreans in Occupied Japan, 1945-1952

After the defeat of Japan, a repatriation

programme was carried out under the orders of the Allied Commander. When both official and unofficial repatriation ended, approximately 600,000 Koreans remained in Japan. In November 1946, the Allied Commander announced that

“The Koreans who refuse to return to their homeland under the repatriation programme will be considered as retaining their Japanese nationality, until such time as an officially established Korean government will recognise them as Korean people.”

The Alien Registration Order

On May 2, 1947 Japan enacted the Alien Registration Law under which the Koreans were made to register as aliens. Article 11 of the Law stated

“The Taiwanjin (Formosans) whose status is determined by the Minister of the Interior and Choenjin (Koreans) shall be regarded as aliens for the time being for the purpose of administration of this law.”

Thus this law, without giving a hearing to the Koreans, classified them as aliens and arbitrarily deprived them of the rights they were enjoying as Japanese citizens.

Articles 7 and 8 of this order required all citizens to inform the authorities within 14 days of any change in the particulars of their registration, such as change of address or occupation. Article 10 prescribes that the alien should carry a registration card and present it to the competent authorities when so requested. Those who violated

2) Yoshio Morito, “The evolution and current state in the treatment of Korean residents in Japan”. Study of Legal Affairs, vol. 3, Report 43, July, 1955. Published by the Institute for Legal Research, Ministry of Justice.

these articles were subject to terms of imprisonment for up to six months or to a fine of up to a thousand yen. The local governor had the right to deport those aliens who committed crimes and were sentenced.

In 1952, after the Peace Treaty, the terms of the Alien Registration Order were made more stringent. The maximum term of imprisonment was extended to one year and the maximum fine was raised to 30,000 yen. The law was further revised in 1955, requiring finger prints on the registration card of all aliens more than 14 years old. Even today Koreans must carry the card at all times and they are required to show it upon request to competent Japanese authorities, who include not only police and immigration officials but also public safety officials.

Peace Treaty and the Koreans

The Treaty of Peace between Japan and the forty-eight allied powers was signed in San Francisco on September 8, 1951, and came into force on April 28, 1952.

Nine days before this date the Japanese government issued circular notice no. 438 which stated

“Since Korea and Taiwan are going to be separated from the territory of Japan on the day when the peace treaty comes into force, all Koreans and Taiwanese including those residing in Japan shall lose Japanese nationality.”

With the coming into effect of the Peace Treaty and the restoration of sovereignty, the Japanese government enacted Law 126.

This gave a restricted residence status to the Koreans by stating that

“any person who loses Japanese nation-

ality on the date of the first coming into force of the Treaty of Peace and who has resided continuously in Japan from before September 2, 1945 until the effective date of this law, (including the children of such persons who were born during the period from September 3, 1945 to the effective date of this law) may continue to reside in Japan without acquiring the status of residence pending the determination of his or her status of residence and period of stay as prescribed by law...”

This law postponed the question of status of the Koreans to a future date and also made no mention of the children of such persons born subsequent to the law.

Circular Number 438 and Law 126 confirmed the denationalisation of the Koreans that was implicit in the 1947 Alien Registration Law. To the Koreans it was an extreme and arbitrary step. They had been hoping to get their status determined under the Peace Treaty. However, Japan took the position that as renunciation of Japan's sovereignty over Korea necessarily includes renunciation of Japan's sovereignty over the Koreans in Japan, they should accordingly be deprived of their Japan nationality.

This argument ignores the fact that the Korean minority had acquired Japanese nationality and were therefore in law no longer Koreans. It does not follow that, on the creation of two Korean states after the war, the former Koreans (and still less their children born in Japan) should automatically lose their Japanese nationality, with the consequence that many of them would become stateless persons unless and until they opted to become, and were accepted as, Korean nationals.

However, the Japanese government's contention was upheld by the Supreme Court of Japan in the case of *M. Kanda v. State of Japan*, in 1961.

The case involved a Japanese woman's claim to Japanese nationality after her marriage to a Korean resident in Japan. The court ruled that her marriage to a Korean caused her to lose Japanese nationality since the Koreans had lost their Japanese nationality after the peace treaty.

The decision of the Japanese Supreme Court may be contrasted with a decision of the Administrative Court of the Federal Republic of Germany³ on a similar point. In the German case, an Austrian who became a German national during the annexation of Austria and who continued to live in Germany after Austria became once again an independent state, claimed to be entitled to retain her German nationality. The court held that

"... there was no rule of international law which provided for the automatic loss of a person's nationality as a result of territorial changes affecting the territory in which that person had lived, and that, in any event even if there was such a rule, it could not apply to persons like her (the petitioner) who were not domiciled in the seceding state on the date of secession, and that accordingly she was entitled to German nationality."

The German court made a distinction between 'persons who are within the sphere of power of the new state and persons who remain under the sovereignty of the old state'. This distinction was not made by the Supreme Court of Japan when deciding the nationality of the Koreans.

The policy of the Japanese government and the Supreme Court decision is also not in conformity with the more humane approach followed by other governments in dealing with their alien residents. For ex-

ample in 1956 the Federal Republic of Germany granted German nationality to all Austrians who had resided in the Federal Republic from April 26, 1945. Similarly when Indonesia became independent from the Netherlands, the Netherlands government decided that all those Indonesians who were not born in Indonesia and who were residing in Netherlands could retain their Netherlands nationality if they chose to do so.

Treaty between Japan and Republic of Korea

Law 126, referred to above, used the phrase "pending the determination of his or her status of residence... as prescribed by law." While the Korean residents in Japan were waiting for a final settlement of their status, Japan, to their surprise, complicated their problem by entering into a treaty with the Republic of Korea in 1965 recognising it as the only legitimate government in the Korean peninsula.

At the time of this treaty a separate agreement was reached on the legal status of Korean residents in Japan. Under the agreement, Japan agreed to grant Korean residents in Japan permanent residence provided they met certain conditions. Two important conditions to be met were that they must have resided in Japan since August 15, 1945, and that they must become nationals of the Republic of Korea before they could apply for permanent resident status.

The second condition created the complication because it meant that only those 'Koreans' who had previously registered as 'Konkoku' i.e. nationals of the Republic of Korea, or were now willing to adopt 'Kon-

3) Nationality (Secession) case, vol. 21. International Law Report, 1954. Ed. by H. Lauterpacht, p. 175.

koku' nationality could acquire the right to permanent residence in Japan. Originally the Alien Registration Forms had two columns one for 'chosen' i.e. Koreans and one for 'Konkoku'. After the treaty with the Republic of Korea the Japanese government said that the word 'chosen' referred to Koreans in general and had nothing to do with nationality.

The result of this policy was that in 1971, there were nearly 229,545 Korean residents who were unable to apply for permanent residence because they did not choose to become nationals of the Republic of Korea. Legally they have no status. They are stateless persons. They have no possibility of acquiring a North Korean passport, which in any case would not be recognised by Japan. As stateless persons, they cannot travel to any other country nor to their homeland. They are thus condemned to remain in Japan, not only deprived of their nationality, but deprived even of their status of permanent residence.

Koreans in Sakhalin Island

The tragic aspect of Japan's policy is apparent when the fate of the Koreans in Sakhalin Island is considered. They were brought to the island when the southern part still formed part of the Japanese territory. After the second world war, this territory became part of the Soviet Union and the Koreans who were there were not repatriated to Japan. At that time approximately 50,000 Koreans were living in Sakhalin and of them 25,000 opted for North Korean nationality, 13,000 became Soviet nationals and about 4,500 were left stateless. The Japanese government has refused to act on their behalf and since there are no diplomatic relations between the Republic

of Korea and the Soviet Union, they are left without any government to protect their interests.

Japan's Policy and International Standards

It is for each state to determine its policy on the question of nationality, but such determination is subject to rules of international law and other norms. In the words of Judge Lauterpacht⁴

"It is true that international law concedes to states the right to regulate matters of nationality. But a discretion which a state enjoys in this matter is subject to general principles of law, to legitimate rights of other states, and to those rights of human personality which international law was increasingly recognizing even before the charter of the United Nations gave recognition to fundamental human rights and freedoms."

Hence the actions of the Japanese government have to be weighed in the light of accepted international standards. The Universal Declaration of Human Rights, Article 15 states that

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

In the preamble to the San Francisco Peace Treaty, Japan declared her intention "to strive to realize the objectives of the Universal Declaration of Human Rights".

Apart from the Universal Declaration, a number of international instruments have

4) H. Lauterpacht. International Law: Collected papers: Law of Peace, vol. 3, p. 391.

been adopted under the auspices of the U.N. with respect to questions of nationality, statelessness and refugees.

In March 1948, the Economic and Social Council, in its resolution 116D recognised that the problem of stateless persons "demands... the taking of joint and separate action by member nations in cooperation with the United Nations to ensure that everyone shall have an effective right to nationality".

The Convention relating to the status of refugees came into force on 22 April 1954 and 89 countries, including Japan, have ratified it. This Convention makes it an obligation for the contracting parties to accord to refugees treatment as favourable as possible and, in matters of welfare, public education, public relief, labour legislation and social security, the same treatment as accorded to the nationals. Further it states that the contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings. The Convention came into force on 6 June, 1960. Japan is not among the 32 countries which have ratified it.

The Convention on the reduction of statelessness came into force on 13 December 1975. Ten countries have ratified it, but these do not include Japan. Under this Convention the contracting states undertake to grant nationality to a person born in its territory who would otherwise be stateless.

It is to be regretted that Japan has not become a party to these modern developments in international law, particularly in view of the social consequences resulting to the Korean minority.

The Social Consequences of Deprivation of Nationality

In addition to the sense of insecurity and the feeling of being second class citizens, deprivation of Japanese nationality has caused the loss of social rights to the Korean minority in Japan, as well as their political rights.

Some of the welfare laws have nationality provisions. These include:

- The Law for Aid to the Family of Deceased and Disabled Veterans, of 1967,
- The Law for Special Assistance to Wounded Veterans, of 1965 and
- The Retirement Pension Law for the Public Servants, of 1923, which was amended in 1977.

Thus, Koreans who, at a time when they were Japanese citizens, volunteered for or were conscripted into military service in the Japanese forces, or who were engaged in public service, are now deprived of the benefits which they had earned by their service.

Discrimination against Koreans in Japan

The deprivation of nationality and other official policies tend to increase the social discrimination inflicted on the Koreans by the Japanese population.

The earlier Japanese colonial policy was aimed at creating a permanent inferior class of citizens who would be trained to perform menial tasks for their Japanese masters. Consequently the Koreans in Japan were, and to a large extent still are, discriminated against in many spheres of life. Equality in jobs, housing or welfare is not assured. Usually the Korean worker is underpaid in comparison with the Japanese

worker. This discrimination may be illustrated by the case of Pak Chong Sok Pak who was a 'Korean' born and educated in Japan. When he sat for the Hitachi Company's entrance examination in his own name he failed eleven times. But when he sat for the same examination with a Japanese name, he was successful. This was later discovered and he was dismissed. He challenged the action of the Company in the courts and judgment was given against the Company. The court found that the Company had an internal document discriminating racially against Koreans, and Mr. Pak was reinstated in his job. This case came to light but there are many others that go unchallenged.

Attitudes of discrimination are usually deep seated and are not easily removed simply by changing laws. It is to be hoped, however, that the Japanese government will help to remove social discrimination by adopting a more positive and generous attitude towards the Koreans whom they brought to their country, and to their descendants.

In this context the draft "Declaration of the Human Rights of individuals who are not citizens of the country in which they live", at present under consideration by a Working Group of the UN General Assem-

bly, deserves mention.

Article 8 of the draft declaration contains, *inter alia*, the following economic and social rights

"The right to just and favourable conditions of work, to equal pay for equal work, and to just and fair remuneration. The right to public health, medical care, social security, social service and education, provided that the minimum requirements for participation in national schemes are met and that undue strain is not placed on the resources of the state."

Conclusion

In view of the strong trend towards protection of non citizens and abolition of statelessness, it is to be hoped that Japan will give serious consideration to restoring Japanese nationality to the 200,000 Koreans who, not wishing to assume Korean nationality, have become stateless persons, bearing in mind that the great majority of them were born in Japan. At the very least this Korean minority should be accorded all social security and other welfare rights enjoyed by ethnic Japanese.

Unesco's Special Committee on Human Rights: An Unfortunate Case

On October 21, 1981, the International Commission of Jurists submitted a communication to Unesco's Special Committee on Human Rights on certain violations of the rights of a university lecturer in Argentina, Dr. Eduardo Federico Llosa. These violations fell within the competence and purview of Unesco as, according to information reaching the ICJ, Dr. Llosa, a well-known personality in the field of education, science and culture, had been, and continued to be, persecuted mainly because his political views were contrary to those of the government. His case exemplifies the way in which academic freedom in the universities, cultural development and scientific research is restricted in Argentina.

Dr. Llosa is a citizen of Argentina, a psychiatrist, philosopher and theologian, who worked as a lecturer at the San Luis National University. He was politically active in the Peronist Movement in addition to being a practicing Catholic.

He was arrested in May 1975, and there are reports that he was tortured and ill-treated. Two charges were brought against him. On the first he was sentenced to three years' imprisonment for "illegal association" and on the second he was sentenced to three years and six months' imprisonment for a breach of the national security law. Both penalties were combined to total a single sentence of six years. Dr. Llosa completed his term on May 8, 1981, but despite this he was not released.

The ICJ's communication referred to violations of various articles of the Universal Declaration of Human Rights, the International Covenants on Economic, Social

and Cultural Rights and on Civil and Political Rights, the American Declaration of the Rights and Duties of Man and the Unesco Convention on the Prevention of Discrimination in Education (December 1960). These related, *inter alia*, to violations of his defence rights and the legality of his trial. However, the ICJ made clear that the issue which it was referring to the Committee was the fact that when he had completed his six year term of imprisonment, he was not released but continued to be held under indefinite administrative detention, for which no remedy or defence was available. It was argued that this constituted a violation of his right not to be punished twice for the same offence, and it was also submitted that Dr. Llosa's continued detention was arbitrary and constituted an illegal use of the exceptional powers granted to the Executive by the Constitution of Argentina during a state of siege. Article 23 of the Constitution grants to a person detained under a state of siege the right to opt to leave the country rather than continue in detention. Dr. Llosa had attempted to exercise that right and his wife, who was resident in Switzerland, had obtained a residence visa for him from the Swiss authorities. Dr. Llosa's request, however, was turned down without explanation.

In November 1981 and February 1982 the ICJ submitted further particulars of the case to Unesco. His family meanwhile instituted *habeas corpus* proceedings to obtain his release, but these were rejected.

Unesco's Special Committee on Human Rights met in April and May 1982 and declared the ICJ's communication "inadmis-

sible" under the provisions of Article 14, V a of Resolution 104/EX/3.3., which states that communications may be declared inadmissible when "relevant evidence" is not supplied. In adopting its decision on inadmissibility, the Committee took into account, as it informed the ICJ in its letter of 11 June 1982, the fact that the Permanent Delegate of Argentina to Unesco had submitted a letter and subsequently made a statement to the effect that Dr. Llosa had been arrested in May 1975, "because he was a militant of an extremist movement, the Montoneros, and because he had participated in acts of aggression against the institutions and property of the nation". He also stated that Dr. Llosa had indeed completed his term but, since he was a "terrorist", he had not been allowed to leave the country in exercise of the right of option under Article 23 of the Constitution, and that he was being kept in administrative detention "at the disposal of the National Executive Power, under the provisions governing the state of siege". The delegate also stated that the government of Argentina could not be unduly generous as it had to protect the security, not only of the state of Argentina, but of the state which may accept him..." He added that Dr. Llosa had not been arrested or detained because of his activities as a psychiatrist, lecturer or researcher, but because of his subversive acts.

The International Commission of Jurists was given no opportunity to reply to these assertions by the Argentine representative, who appears to have adduced no evidence to support his allegations. However, by his statement he admitted explicitly that Dr. Llosa had served his full sentence and was nevertheless still imprisoned under administrative detention, and he thus fully substantiated the factual basis of the complaint.

The ICJ was at no time asked to provide any supporting evidence for its allegations,

and it is clear that no such evidence was required since the material facts were admitted by the Argentine government.

Almost simultaneously with the Unesco decision, namely on June 23, 1982, this alleged terrorist, Dr. Llosa, was released by the Argentine authorities. This is difficult to reconcile with the statement made only some days or weeks earlier by the Argentine representative to Unesco that it was impossible to release him as he was an extremely dangerous person, and that the government of Argentina felt obliged to continue his detention in order to protect third countries prepared to grant him asylum.

The procedure of the Special Committee for receiving and processing individual communications would, it is suggested, be improved if rules similar to those already existing and applied in other intergovernmental organisations were to be established. For example, the procedures of the Human Rights Committee, which functions under the International Covenant on Civil and Political Rights, as well as those of the Inter-American Commission on Human Rights, provide that, just as all information from the author of a communication is brought to the attention of the state concerned, so all observations and comments made by the government on the communication — whether on matters of form or substance, on legal or factual aspects of the case — are referred to the author of the communication so that he can in turn submit comments and observations upon them.

Audi alterem parte is an elementary principle of justice and applies just as much to a Plaintiff's right to challenge allegations or arguments presented by the defence as to the defendant's right to challenge allegations and arguments of the Plaintiff.

Had the Special Committee of Unesco proceeded as suggested above, it would perhaps have arrived at a more convincing conclusion.

ARTICLES

Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India

by
Dr Upendra Baxi*

Introduction

The Supreme Court of India is at long last becoming, after 34 years of the Republic, the Supreme Court for Indians.

The transition from a traditional captive agency with a low social visibility into a liberated agency with a high socio-political visibility is a remarkable development in the career of the Indian appellate judiciary.¹

For the present, and the near future, there is little prospect of the Court reverting to its traditional adjudicatory posture where people's causes appear merely as issues, argued arcanelly by lawyers, and decided in the mystery and mystique of the inherited common-law-like judicial process. People now know that the Court has constitutional power of intervention, which can be invoked to ameliorate their miseries arising from repression, governmental lawlessness and administrative deviance. Undertrial as well as convicted prisoners**, women in protective custody, children in juvenile institutions, bonded and migrant labourers, unorganised labourers, untouchables and scheduled tribes, landless agricul-

tural labourers who fall prey to faulty mechanization, women who are bought and sold, slum-dwellers and pavement-dwellers, kins of victims of extrajudicial executions – these and many more groups now flock to the Supreme Court seeking justice.

They come with unusual problems, never before so directly confronted by the Supreme Court. They seek extraordinary remedies, transcending the received notions of separation of powers and the inherited distinctions between adjudication and legislation on the one hand and administration and adjudication on the other. They bring, too, a new kind of lawyering and a novel kind of judging.

They also bring a new kind of dialogue on the judicial role in a traumatically changeful society.²

The medium through which all this has happened, and is happening, is social action litigation***, a distinctive by-product of the catharsis of the 1975–1976 emergency. What emerged as an expiatory syndrome is now a catalytic component of a movement for “juridical democracy”³ through innovative uses of judicial power.

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** In India, ‘undertrial prisoners’ and ‘undertrials’ refer to persons awaiting or undergoing trial.

*** Throughout this paper, I use the term “social action litigation” (SAL) in preference to the more vague term “public interest litigation” (PIL).

Some Contributory Influences — Judicial Populism

A striking feature of SAL is that it is primarily judge-led and even judge-induced. And it is in turn related to juristic and judicial activism on the High Bench.⁴ Many justices have, on and off the bench, advocated active assertion of judicial power to ameliorate the miseries of the masses. Although the active, almost explosive, assertion of judicial power in the aid of the dispossessed and the deprived began in the aftermath of the emergency, judicial populism had become pronounced even before the emergency, particularly in the great decisions in *Golak Nath*⁵ and *Kesvananda Bharati*.⁶ In these decisions, familiar to every student of constitutional politics of India, justices who wished Parliament to have unbridled power to amend the Constitution invariably sought to justify it in the name of, and for the sake of, the 'teeming millions' of impoverished Indians.⁷ They sought to mould constitutional interpretation and doctrine in unmistakably and emotionally surcharged people-oriented ways.

Populist rhetoric is writ large in many judicial opinions, on both sides, in these landmark decisions.

Emergency Populism

During the 1975–76 emergency, legal aid to the people was one of the key points of the 20-point programme launched by Indira Gandhi, to which Justices Krishna Iyer and Bhagwati, themselves deeply committed to the spread of the legal aid movement,⁸ readily responded. They led a nationwide movement for the promotion of legal services. They organised legal aid camps in distant villages; they mobilized many a *high court of justice to do padaya-*

tras (long marches) through villages to solve people's grievances. They sought, through 'camps' and *lokadalats* (people's courts), to provide deprofessionalized justice. They also in their extra-curial utterances, called for a total restructuring of the legal system, and in particular of the administration of justice.⁹ Although they stopped short of overtly legitimating the emergency regime, they remain vulnerable to the charge of acting as legitimators of the regime. Be that as it may, many Supreme Court and High Court justices did systematically become people-prone in a manner conducive to the growth of judicial populism.

In the immediate aftermath of the emergency, populist rhetoric and stances decided many a vital issue of constitutional polity.¹⁰ Judicial populism was partly an aspect of post-emergency catharsis. Partly, it was an attempt to refurbish the image of the court tarnished by a few emergency decisions and also an attempt to seek new, historical bases of legitimation of judicial power.¹¹ Partly, too, the Court was responding, like all other dominant agencies of governance, to the post-emergency euphoria at the return of liberal democracy.

The Social Action Groups — Press Nexus

One such institution was the press, which for the first time since Independence strove consistently to expose governmental lawlessness and social tyranny through investigative journalism of a high order.

This print media transformation enabled activist social action groups (SAGS) to elevate what were regarded as petty instances of injustice and tyranny at the local level into national issues, calling attention to the pathology of public and dominant group power. SAGS found thus a new ally

in their struggle for social development and change. The SAGS-press nexus provided a fertile setting (as we shall note later) for the birth and growth of the SAL.

At the same time, the press became a medium of evaluation of how the dominant institutions of the government "collaborated" against the people.¹² The role of judges and courts was integral to this agonized reappraisal. And the Court, and some justices, became exposed to merciless professional critiques of the Court's emergency performance.¹³ In this environment, an Open Letter to the Chief Justice of India written by four anguished law teachers, chastizing the Court for its reversal of the conviction of two police persons for raping a tribal girl in the police station led to a nationwide mobilization of women's organisations and groups. Unexpectedly, it culminated in an unprecedented march by women's organisations to the Supreme Court of India demanding a review of the decision, which it ultimately declined.¹⁴

All this enhanced the visibility of the Court and generated new types of claims for accountability in the wielding of judicial power. And this deepened the tendency towards judicial populism. Justices of the Supreme Court, notably Justices Krishna Iyer and Bhagwati, began converting much of constitutional litigation into SAL, through a variety of techniques of juristic activism.¹⁵ The Court began to expand the frontiers of fundamental rights and of natural justice. In the process, they rewrote many parts of the Constitution. The right to life and personal liberty under procedure established by law in Article 21 was now converted *de facto* and *de jure* into a due process clause contrary to the intention of the makers of the Constitution.¹⁶ This expanding right was soon to encompass within itself the right to bail, the right to speedy trial, the right to dignified treatment in custodial institutions, the right to

privacy, and the right to legal services to the poor.¹⁷ Prisons and places of detention, theatres of torture and terror, received high priority attention, especially at the hands of Justice Krishna Iyer who developed, on the whole, a new normative regime of rights and status of prisoners and detainees.¹⁸ The insistence that the states behave in good faith and with utmost reasonableness in dealing with citizens and persons grew apace. Principles of administrative law met with urgent, painstaking and thorough revisions.¹⁹ The doctrinal innovations in their exuberance and normative impact provided further impetus to SAL.

Dramatis Personae of SAL

By 1979 it was clear to the discerning members of the Bar and to social activists that the Court was indeed in search of a new kind of constitutional litigation.²⁰

The first dramatic opportunity was provided by a Supreme Court advocate, Ms. Kapila Hingorani, who filed a writ based on a series of articles in a national daily, *The Indian Express*, exposing the plight of Bihar undertrial prisoners, most of whom had served long pre-trial detention, indeed to a point that they had as it were, sentences to their credit.²¹ In 1980, two professors of law sent a letter to the editor of the *Indian Express* describing the barbaric conditions of detention in the Agra Protective Home for Women the basis for a Writ Petition under Article 21.²² This was followed by a similar petition for Delhi Women's Home, by a third-year law student in Delhi Law Faculty and a social worker.²³ A law teacher on a social science research fellowship successfully brought to completion the trial of four young tribals, who grew up in a sub-jail awaiting trial.²⁴ Three journalists after an *exposé* of a thriving market in which women were bought and sold as

chattels, filed a writ demanding prohibition of this practice and immediate relief for the victims through programmes of compensation and rehabilitation.²⁵ In the same year, a legal correspondent of *The Statesman* brought to the notice of the Court the inhumane conditions of detention of 'Naxalite' prisoners in the Madras Jail, challenging in the process the entire edifice of the Prisons Act, 1892.²⁶ The special legal correspondent of the *Hindustan Times* also brought to the Court a social activist's report on forced importation of 75 young children for homosexual relations in Kanpur Jail.²¹ In early 1982, social workers of the Gandhi Peace Foundation, assisted by the author, filed writ proceedings against the state of Madhya Pradesh for allowing bonded labour to be paid wages in kind in the form of Kesari Dal, a toxic substance causing incurable lathyrism among the bonded labourers.²⁸ A newly formed association of law teachers has brought writ proceedings against the same state for inhuman torture of young prisoners in Chatrapur Jail.²⁷

This random listing illustrates the new brand of socio-legal entrepreneurs, who approach the Court pro bono publico on their own, without much support from the Bar (and often at its chagrin) and with their social commitment as their only asset.

Of about 75 SAL writs filed from 1980 to 1982, a preponderant number have been filed by social activists rather than individual lawyers or lawyer groups.³⁰ And this has been made possible by a rather unique development. Much of SAL in this period has arisen out of letters written by individuals to Justice P.N. Bhagwati in his twin capacities as a Justice of the Supreme Court and the Chairperson of the National Committee for the Implementation of the Legal Aid Schemes. The letters usually rely on newspaper and periodicals investigative reportage. More often than not, the Justice

brings them on the board of the Court, converting these letters into writ petitions. Justice Bhagwati has gone so far as to invite members of the public and especially public spirited citizens to bring to his notice violations of basic human rights, as embodied in the Constitution, for suitable judicial action.

In *habeas corpus* petitions, the Court usually acts on letters written by or on behalf of the detainee. But Justice Bhagwati has generalized this technique so radically that it could be justly said that he made a momentous social invention — namely, the epistolary jurisdiction. After experimenting with it for some time, he was able, too, to fully legitimate the epistolary jurisdiction by imaginatively extending the law of *locus standi* in constitutional litigation in the High Court Judge's Case.³¹ The judge-led and judge-induced nature of SAL renders it strikingly distinctive.

The Social Substance of SAL

Not thus merely in the style and process of generation of the SAL is the contemporary Indian experience unique. The substance of the SAL in India is also distinctive to its contemporary condition.

Much of SAL is concerned with combating repression and governmental lawlessness. Only, so far, in rare instances does the SAL concern assertion of new constitutional rights.³² The other distinctive feature of SAL proceedings is that all of them are Article 32 petitions; that is, they are writ proceedings for the enforcement of the fundamental rights. The Supreme Court is empowered and some would say rather obliged, to duly consider them.³³

Both these features lend a special complexity to the SAL in India. On the one hand, they impart high visibility and exalted status to the cause; on the other hand,

they present some specific problems for the Court, since all the complaints of governmental repression and lawlessness raise disputed questions of fact which the Court does not as a matter of practice normally handle and which cannot be wholly satisfactorily dealt with by 'affidavit evidence'.³⁴ We revert to these problems later. For the moment, it would suffice to emphasize this distinct profile of the SAL in India. SAL thus compels judges and lawyers increasingly to take human suffering seriously.³⁵

Old Structures, New Concerns

The Court's handling of SAL is at the present in an experimental phase. Much of the future of the SAL ultimately depends on the organisational learning capacity of the Court in dealing with novel and complex problems. And this capacity is affected by existent judicial thoughtways and styles of decision-making.

The most crucial general factor affecting, for weal or woe, the career of SAL is the fluctuating bench-structure. The bench which admits the writ petition is not necessarily the same, unless there is a constitution bench of five justices, as the one hearing it. Even if the presiding judge remains common, his companion justices may differ, often from one hearing to the next. The presiding judge, as well as the SAL petitioner (whether in person or through counsel) thus have to bear additional burdens of persuasion, more so because not all justices are as yet equally attracted by or committed to the SAL.³⁶ The difficulties are reinforced when the presiding judge is unsympathetic to SAL or, even if moderately sympathetic, is daunted by the problems of evidence and of shaping new types of reliefs.

Epistolary jurisdiction as developed by

Justice Bhagwati was partly addressed to this problem. Once a letter received by him was treated by him as a writ petition, he ensured that it came on his board. His Court No. 2 has, through this process, the largest number of SAL matters. While this result is welcome to many a SAL petitioner, it carries its own costs. First, it indirectly deprives the Chief Justice of India of his undoubtedly important role in docket management and allocation of work to his companion justices. This has clearly, its own implications on *inter se* relationship among justices, including perhaps the growth of factionalism on the Court. Second, many justices are deprived by this result of epistolary jurisdiction of much needed exposure to SAL; in the process, the learning capacity of the Court as an institution is constricted. Third, the existing overload on Court No. 2 is accentuated, causing problems of priority in handling. If high priority is accorded to SAL at the cost of other matters, irate leaders of the Bar (as is happening) are bound to seek to discredit SAL. If such priority is not accorded, SAL matters continue to drag on, like others. And this (as is already happening) begins to raise serious questions concerning the impact of judicial intervention for such causes.

On the other hand, most SAL matters do require, in their early phases, careful judicial handling. SAL is distinctive in that it does not raise the problems of validity of a law on the ground that it violates fundamental rights. The heart of the SAL proceedings is rather that gross violation of fundamental rights has actually occurred in the exercise of state powers, either by commission (repression) or omission (lawless disregard of statutorily or constitutionally imposed duties). The facts relied upon initially by the SAL petitioner, in most cases, are as stated in the press. And the SAL petitioner is himself often not the victim of

repression or lawlessness, but a public citizen.

Invariably, therefore, the Court has to satisfy itself about the factual foundations of the proceedings; and this requires constancy of the Bench. Justice Bhagwati's initiative in retaining many SAL matters with him seems to proceed on the appreciation of this requirement. On the other hand, it imprints the SAL with the insignia of an individual justice, whereas what is needed in days to come is a collective imprimatur of the Court for the new litigation. The future of SAL depends, in great measure, on a satisfactory resolution of this dilemma.

Like the technique of epistolary jurisdiction for its initiation, SAL also requires 'creeping' jurisdiction for its progress. Not a single leading SAL matter has yet resulted in a final verdict; the fundamental issue of how the Court should make the state and its agencies fully liable for deprivations or denials of fundamental rights still remains to be authoritatively answered. It is the task of the SAL entrepreneurs to ensure that these issues ultimately reach desired results. But, in the meantime, the Court rules through interim directions and orders. Bit by bit, it seeks improvement in the administration, making it more responsive than before to the constitutional ethic and law.

This kind of creeping jurisdiction typically consists in taking over the direction of administration in a particular arena from the executive. For example, the blinded undertrials³⁷ receive medical examination at New Delhi and their expenses and those of their relatives are borne by the state under interim orders of the Court. Conditions in Agra and Delhi Protective Homes for Women begin to steadily improve, again through a series of interim administrative orders. Fresh directions are issued by the Court to the state of Bihar, from time to time, to ensure that undertrials at least

serve less time in pretrial detention and not in any event more than the time which they would have served had they been tried and convicted! These and many examples show that the Court is undertaking those very administrative decisions, which the state should have taken in the first place.³⁸ In the meantime, the ultimate constitutional issues patiently await their turn.

Doing something about these questions is comparatively far more difficult than compelling the state to do this or that under the creeping jurisdiction. It is difficult because it involves viable momentous normative innovations in the lawyer's law.³⁹ Some of these have already been attained: for example, expansion of *locus standi*,⁴⁰ whittling down of the range of documents for which government may claim privilege,⁴¹ devising newer ways of fact-finding in the SAL-type proceeding⁴² and devising prospective inhibitions for potential recurrence of rights-violations in the same arena.⁴³ All this is noteworthy only so long as the underlying constitutional issues of citizen's rights against the state for violation of fundamental rights are faced and resolved.

These issues in the final analysis relate to exposing the State to liability for wide-ranging compensatory arrangements for violations of fundamental rights of the people.

And yet the challenge of devising appropriate compensatory arrangements for such violations is very daunting. How do we compensate young persons manacled for long years in pre-trial detention for their enforced loss of childhood and deprivation of all sociability? How do we compensate the blinded undertrials? Or the ones who have been inhumanly tortured? What does a court do, under fundamental rights jurisdiction, when it finds young persons thrown in jail for no other reason than facilitating homosexual assaults? What relief

may the Court provide in situations of extra-judicial executions? Creeping jurisdiction is an apposite strategy for gradualist institutional renovation; it furnishes no answers to the questions raised by the victims of repression and lawlessness, past, present or future. Inability to forge onerous patterns of liability of the state for gross violations of rights may well deprive the SAL of its future.

Evidentiary Problems

Accomplishing such a jurisprudential feat calls not just for vision and commitment of a high order on the part of justices; it also requires careful attention to the lowly details of how facts about the violations of rights are proved. Without this, no jurisprudence of liability of the state for constitutional violations can survive for long. "We accept the principle of compensation for rights-violation", the state will say then, but it will immediately add: "prove it"!

Problems of proof are most severe in cases of state repression, and there seems emergent a common pattern or argumentation by state counsel which make these problems more acute. First, state counsel deny on affidavit any or all allegations of torture or terror. Second, they contest if no longer the standing, the *bona fides* or the degree of reliable information of the social activists who come to the Court. Often wildest ulterior motives are attributed to them.⁴⁴ Third, they decry the sources on which the SAL petitioners rely: mostly media and social science investigative reportage. Fourth, they raise all kinds of claims under the law of evidence and procedure to prevent the disclosure of documents relevant to the determination of violation of fundamental rights. Fifth, even when disclosed there is always the possibili-

ty of impugning their evidentiary value. This is made possible by the device of multiple investigations; the state sets up many panels, one after another, and often consents in addition to an investigation by the Central Bureau of Investigation.⁴⁵ When, despite all this, the state is likely to lose the proceedings in favour of the SAL petitioners, it proceeds to give concessions and undertakings, thereby avoiding a decision on the merits.⁴⁶

And the Court, too, interested more in the inhibition of future illegalities is ready to develop a jurisprudence of the SAL *ex-concessionis*. The Court, rightly refuses to view the SAL proceedings as adversarial in nature; it likes to foster such collaboration between the SAL litigant and the state as would result in sound institutional arrangements avoiding recurrent injustice; and thus avoiding in the long term SAL-type confrontation between the public-spirited citizen and the state. This technique offers a neat way out of the burdens of proof on questions of fact; therein probably lies its appeal to the judges.

At the same time, the court is experimenting with several different strategies to overcome the problems of disputed facts, without having to take evidence itself. First, Justice Bhagwati has initiated the idea of socio-legal commissions of enquiry. The Court asks social activists, teachers and researchers to visit particular locations for fact finding and to submit a quick, but complete, report, which may also contain suggestions and proposals. So far the device of commissions has been invoked at least thrice.⁴⁷ The commissions are, under the Court's orders, to be financed by the state. Second, the Court has in a number of cases of torture or ill-treatment called upon medical specialists to submit⁴⁸ comprehensive reports and suitable therapy at state cost. Third, the Court has used on one or two occasions the services of its own officials⁴⁹

or those of the High Court.⁵⁰ In some cases, it has asked the district judge not merely to ascertain facts⁵¹ but also to monitor the implementation of the various directions given by the Court.⁵²

These modes of fact finding are somewhat novel and will raise, as the many SAL matters proceed to completion, rather difficult issues of evidence and procedure. But the Court is experimenting with new methods to go beyond the notoriously eclectic affidavit evidence.

The new litigation does not disturb the pattern of institutional comity between the Supreme Court and the supreme executive. Rather, it appears to lend a new kind of intensity to the model of judicial statepersonship which has since the independence steadily enhanced political accommodation and constitutional compromise in certain vital arenas. Even as the new litigation raises great expectations about the Court's role and power, the constitutional compromises in the 1980-82 period create new sources of anxiety.

The Supreme Court has during 1981 sustained the powers of the President (i.e. the Prime Minister) to issue ordinances even on the eve of Parliament sessions.⁵³ It has ruled that the satisfaction of the President⁵³ as regards declaration or continuance of emergencies cannot be judicially reviewed.⁵⁴ The Court has upheld the National Security Act, a latter day MISA, in spite of the fact that it violates the 1979 amendments to Article 22, which have not yet been brought into force: what is more, it has also ruled that no mandamus lies to the President to bring into force such an amendment.⁵⁵ The Court has also repelled the challenge to the Bearer Bonds Act which massively legalized black money, crucial, among other things, to the survival of all political parties in India.⁵⁶

But these constitutional compromises occur within the framework of retention of

the legislative, constituent and judicial powers of the Court. Chief Justice Chandrachud and his brethren have now unalterably laid down that judicial review is an aspect of the doctrine of the basic structure, and invalidated an emergency amendment designed to oust judicial review of constitutional amendments.⁵⁷ And the Court has gone so far as to say that each and every amendment to the Constitution since its inception has to run the gauntlet of the basic structure.⁵⁸

Simultaneously, the Supreme Court has put into cold storage two basic challenges to its supremacy. A year has gone by, without any action at all on the Presidential Reference on the extent of judicial power.⁵⁹ And the review petition moved by the Indira Gahdhi government in 1980 calling for reconsideration of the basic structure doctrine has also become a magnificent bit of judicial arrears.⁶⁰

In this context, the steady growth of the SAL appears to me as a master strategy. Give the executive not even a pretence of complaint on the distribution of political power in the constitutional scheme, treat the power of amendment of the Constitution as coordinate power. Having accomplished this much, go Concorde-speed in undoing injustices and unmasking tyrannies. The powers of the President are intact but surely the Police Commissioner must be held fully accountable under the Constitution. The executive may refuse to bring into force laws duly enacted by Parliament; but the district bureaucrat must be brought to book for commission and omission. Leave to politicians their opium-dreams of the omnipotence of their power and influence; but bit by bit prevent them from single-minded excesses of power. The respondents in the SAL matters are always political small fry: so the big ones may not complain. But the results of the SAL irritate the Big Men. No matter how irate (as

was Jagannath Mishra, the Chief Minister of Bihar, on the Supreme Court's swift probe in the Bihar blindings), they cannot so easily manipulate public opinion in their favour as the Court. And the print media opinionators just love the Court (barring the trauma of the Judges Case) because the Court is now newsworthy, to say the very least. As regards repression and lawlessness, the Supreme Court since 1980 has become the third chamber of Parliament and is close to acquiring, more effectively, the attributes of the House of the People. The SAL fits in beautifully with the well-conducted orchestration of concord and discord with the Executive.

Backslidings are bound to occur. But it is doubtful that the evolution of the Court as a people-oriented institution can be arrested substantially. Of course, nothing is irreversible, at least in legal history. But it would require considerable mobilization of regressive forces to return the Court to its club-house cloisterings.

In fact, the SAL movement is well under way to institutionalization. Hopeful signs for the growth of the SAL-type professional competence abound.⁶¹ The national legal aid movement is rapidly acquiring SAL orientation. And more and more High Court justices are becoming SAL-prone.

The surest sign of a modicum of success of the SAL movement is provided by the changing attitude of the Supreme Court Bar towards it.

The Bar's reaction has moved from indifference to indignation at what it regards as freak litigation.

At the present moment, two utterly different types of responses seem to be emerging. One is frankly antagonistic and hostile. On the other hand, some senior lawyers have now begun to say that they have always been pursuing SAL.

Undoubtedly, an empirical study of the changeful and conflicting attitudes of the

Bar to the new litigation is necessary. But available materials suggest a degree of agonizing within the Bar and a slow emergence of a new concern. The SAL movement does pose alternate modes of lawyering for the Indian people.

The response of the administration to SAL has also been mixed. The top bureaucrats seem to resent the mini-take-over of administration through creeping jurisdiction. Their resentment is shown in indifferent compliance with the Court's interim directions in many proceedings. But in some cases over a period of time, the tenacity of SAL petitioners and of the Bench has overborne their resistance.⁶²

Conclusion

This impressionistic account of the SAL movement in the last two years does indicate that small, *ad hoc* beginnings have been made. These have received such nation-wide attention as to generate emulation as well as hostility. Many avoidable deficiencies characterize the SAL work.⁶³ There is considerable introspection among the social activists on the role and limits of the Court's intervention. We still lack an assessment of what is really happening although it is perhaps too early to think of exploring the impact of the SAL. And there persists the need for developing critical thought on the mainsprings and meanderings of SAL.

Projections of the future of the SAL can, at the present moment, be only subjective. But to me the future of SAL looks bright. The future of law in India is partly, but vitally, linked to the future of social action litigation because, through it, great and unending injustices and tyranny begin to hurt the national conscience and prod at least one major institution of governance to take people's miseries seriously.

Notes

- (1) It is customary to think of administrative and regulatory agencies as 'captive'. See e.g. D.M. Trubek "Public Policy Advocacy: Administrative Government and Representation of Diffuse Interests" in III *Access to Justice* 445 (1979: M. Cappelletti & B. Garth eds) and the literature there cited. But, barring small causes courts and other similar juridical fora, the notion of 'captive agency' has not been explicitly extended to appellate courts. Even these latter can become 'captive' to certain professional interests, backed by societal dominant groups.
- (2) See U. Baxi, "On how not to judge the Judges..." (Mimeo: paper presented at a Seminar on Judicial Process and Social Change, Indian Law Institute and Andhra Pradesh University, (1980); Justice O. Chinnappa Reddy "Judicial Process and Social Change" LXVI *Supreme Court Journal* 1 (1981).
- (3) For an elaboration of the notion of juridical democracy, see T. Lowi *The End of Liberalism* 291-303 (1969).
- (4) Baxi, *Politics; Id.*, (ed), K.K. Mathew on *Democracy, Equality and Freedom* (1979).
- (5) *Golak Nath v State of Punjab* AIR 1967 SC 1643.
- (6) *Kesavnanda Bharathi v State of Kerala* (1973) 4 SCC 225 at 947.
- (7) See for examples of populist stances U. Baxi, *Politics* 127-51; *Id.* "Some Reflections on the nature of Constituent Power" in *The Indian Constitution: Trends and Issues*, 122 (1977), Indian Law Institute; R. Dhavan, *The Supreme Court & Parliamentary Sovereignty* (1979).
- (8) See the Krishna Iyer Committee's report, *Processual Justice to the People* (1975); and its critique in Baxi, "Legal Assistance to the Poor..." 27 *Economic Political Weekly* 1005 (1975).
- (9) For example, both Justices Krishna Iyer and Bhagwati called for thoroughgoing judicial reforms, minimizing reliance on foreign models of adjudication, including the system of *Stare decisis*. They advocated return to *swadeshi* jurisprudence including justice by popular tribunals.
- (10) Baxi, *Politics* 121-177.
- (11) See Baxi, *Politics* 79-120. Also see M. Ghose, "Constitutional Law" in XII *Ann. Sur. Ind. L.* 240, 264-74 (1976); H.M. Seervai, *The Emergency, Future Safeguards and the Habeas Corpus Case* (1978).
- (12) See David Selbourne, *An Eye to India* (1979).
- (13) The judiciary became, too, an object of the politics of hate in the immediate aftermath of the Sixth General Election; see Baxi, *Politics* (88-98).
- (14) See, for the text of the Open Letter, 1 SCC (Journal) 17 (1979). The review bench declined representation by women's organisations, to irked were some justices at what they thought to be pressure tactics of the protest march. The Bar too was indignant both at the Open Letter and the protest. But Chief Justice Chandrachud not merely publically welcomed such calls for judicial accountability through the "Open Letter" but he also received the women's delegation urbanely and even assured them a timely review, which in the event took nearly two years!
- (15) Juristic activism involves enunciation of new ideas and techniques perhaps not even urged at the Bar, which are in no way necessary to the instant decision but relevant, and in some cases decisively so, for the future growth of the law. See Baxi, Introduction to K.K. Mathew, *Democracy, Equality and Freedom* xxviii (1978).
- (16) Baxi, *Politics* 151-166.
- (17) *Id.* at 233-245; Baxi, *Crisis* 244-295.
- (18) *Ibid.*
- (19) U. Baxi "Developments in Administrative Law" in *Public Law in India...* (1982, A.G. Noorani ed) and the literature there cited; U. Baxi Introduction to I.P. Massey's *Administrative Law* (1980); *Id.*, *Politics* 151-166; M.P. Jain, "Justice, Bhagwati and Indian Administrative Law" *The Banaras Law Journal* (1980).
- (20) See notes 15 and 19 *supra*.

- (21) *Hussainara Khatoon v State of Bihar* (six interim decisions so far) discussed in U. Baxi, "The Supreme Court Under Trial: Undertrials and the Supreme Court" SCC (Journal) 35 (1980).
- (22) *Dr. Upendra Baxi v State of Uttar Pradesh* (1981) 3 SCALE 1136.
- (23) *Chinnamma Sivas v State (Delhi Administration)* W.P. 2526 of 1982; initiated by Ms. Nandita Haksar, who later also assisted the Court by surveying the conditions in the home as a Member of the Committee headed by the District Judge, Delhi.
- (24) *Kadra Pahadiya v State of Bihar* — W.P. 5943 of 1980; see also, V. Dhagamwar, "The Pahadiya File: A Cry in Wilderness" *Mainstream* (Annual Number) ... (1981).
- (25) *Ms Comi Caopor, Aswini Sarin and Arun Shourie v State of M.P.* W.P. 2229 of 1981.
- (26) *Ghanashyam Pardesi v State of Tamil Nadu* W.P. 2261/80; 3947/81 & 4252/81.
- (27) *M. v. State of Uttar Pradesh* W.P. ... 1981 (initiated by Krishen Mahajan).
- (28) *Jyoti Prakash v. State of Madhya Pradesh* (May, 1982).
- (29) *Association for Social Action & Legal Thought (ASSALT) v. The State of Madhya Pradesh* W.P. 8332 of 1981.
- (30) The number of 75 SAL cases is based on a rough count; a more detailed census is on the way with the help of an enthusiastic group of final-year law students at Delhi.
- (31) Among the many justifications provided by Justice Bhagawati, the following are important from the present perspectives. First, the rules of law will be "substantially impaired" if "no one can have standing to maintain an action for judicial redress in case of public wrong or public injury". It is "absolutely essential that the rule of law must wean people away from the lawless street and win them for courts of law". If breach of public duties was "allowed" to go unredressed by courts on the ground of standing, it would "promote disrespect for rule of law". It will also lead to corruption and encourage inefficiency. It might also create possibilities of the "political machinery" itself becoming "a participant in the misuses or abuse of power". Finally, the newly emergent social and economic rights require new kind of enforcement. *I.M. Chagla v.P. Shiv Shankar* (1981) 4 SCALE 1975 at 1991—1992.
- (32) The petition moved by Ms. Indira Jaising asserts the existence of constitutional fundamental right under Article 21 previously un contemplated by anyone — namely, the right of pavement-dwellers in the city of Greater Bombay to dwell on pavements so long as they do not constitute obstruction to pedestrian and vehicular traffic on the roads. It also argues that the State is under corresponding duty to provide them with appropriate house-sites as close as possible to their work-places.
- (33) See U. Baxi "Laches and the Right to Courtititional Remedies: *Quis custodiet Ipsos Custodes?*" in *Constitutional Developments since Independence* 559 (1975 Ind Inst.).
- (34) Practice of the Supreme Court to rely on Sworn affidavits of parties to ascertain facts.
- (35) We here modify Professor Dworkin's felicitous title *Taking Rights Seriously* (1977). Perhaps, in a context like India's one may not take rights seriously if one is unable to take suffering seriously.
- (36) U. Baxi, article cited *supra* note 21.
- (37) Eighty suspected criminals in the city of Bhagalpur, 160 miles northwest of Calcutta, who were blinded by the police by means of puncturing their eyes with needles and dousing them with acid.
- (38) Of course, even these directions are also not readily obeyed. Often, they require reiteration by the Court and a veiled threat of contempt proceedings by the SAL petitioner. But contempt jurisdiction is, more or less, in disuse in the Supreme Court. The Court prefers in SAL matters to nudge the executive, gently now, sternly on other occasions, into postures of compliance. See, *Dr. Upendra Baxi v. State of Uttar Pradesh* (1981) 3 SCALE 1136; *Khatri v. State of Bihar* (1981) SCALE 26.
- (39) The types of innovations required in combating governmental lawlessness and repression require a high degree of collective and sustained judicial activism. The task confronts justices with monumental demands on judicial craftpersonship and creativity. It also makes similar demands on the SAL bar, both in terms of strategies of argumentation and of deft manipulation of indigenous and comparative law materials.

- (40) See note 31 *supra*.
- (41) See the notable analysis of executive privilege in the opinions of Justice Bhagwati, Desai and Tulzapurkur in the High Court Judges Case, cited *supra* note 31.
- (42) See 'Evidentiary problems', *infra*.
- (43) See note 38 *supra*.
- (44) In *Baxi v State of Uttar Pradesh*, *supra* note 38, despite strong structures, the allegations have not ceased. They still continue to be made on affidavit drawn by state counsel! Professor Lotika Sarkar and I, as petitioners, stated in our reply that in India the SAL petitioners are under a duty to face character-assassination in the public interest!
- (45) In *Association of Social Action and Legal Thought (ASSALT) v State of Madhya Pradesh* the counter affidavit of the State showed that there were three enquiries containing the allegation by undertrials that they were rendered impotent by continuous application of electric shocks on penis. These were young persons, some of them just married, arrested under anti-dacoity operations. The analysis submitted by us on these reports shows that there was no real enquiry even once in the matter! We now await the Court's verdict on this.
- (46) For example, in *Baxi v State of Uttar Pradesh*, *supra* note 38, after a year's protracted litigation, the State has itself shown willingness to amend its rules and prescribe new schemes for rehabilitation, thus, in effect, avoiding a decision on the merits of the writ petition. In the Bhagalpur blindings case, too, a similar strategy has been followed.
- (47) In *Hira Lal v Zilla Parishad* (W.P.1869/80-81) the Court asked Kishen Mahajan and myself to conduct a socio-legal investigation on a complaint by chamars that their fundamental right to trade profession and business was being unreasonably taken away from them. We submitted a report, based on seven days intensive fieldwork in some sampled villages. See Upendra Baxi and Kishen Mahajan "The Chamars and the Supreme Court" (1981: mimeo). This first experiment seems to have encouraged Courts and SAL parties, as well as the state, to further efforts of a similar nature. There is a commission looking into the conditions of migrant bonded labourers in Faridabad brick-kiln industries; and a team of officials appointed by the Court to investigate the alleged violations of labour welfare laws for migrant and contract labour, in New Delhi.
- (48) In *Baxi v U.P.*, *supra* note 37, the Court appointed a panel of physicians and psychiatrists for the inmates of the Home. In *Khatri* extensive investigations were ordered to ascertain the precise agent and scope of blindings by the top-ranking eye specialists in India.
- (49) In *Khatri v Bihar* two batches of separate petitions reached two different benches. The first presided over by the Chief Justice asked the Registrar of the Supreme Court to conduct the investigations in Bhagalpur jail: in the second, Justice Bhagawati expanded the registrar's mandate somewhat further, while stating that a socio-legal commission would have been a more preferable device.
- (50) e.g. Justice O. Chinnappa Reddy directed in *Olga Tellis v State of Maharashtra* the Bombay High Court to appoint an official to hear and investigate the finding of the Municipal Commissioner that pavement-dwellers were constituting an obstruction to traffic on the road. No demolition order can be made without this procedure being fulfilled.
- (51) Kanpur undertrial 'rape' case at note 27 *supra*. The Court here asked the District Judge (also an ex-officio chairperson of the legal aid board) to investigate and report.
- (52) The District Judge, Agra, has been performing this role for about a year in *Baxi v. Uttar Pradesh*, note 38 *supra*. Further proceedings embodying the Court's appreciation of the several reports made by him are yet to be reported.
- (53) See A.K. Roy v *Union*, 1981 (3) SCALE 1959.
- (54) *Minerva Mills v. Union of India* A.I.R. 1980 S.C. 1789, *Waman Rao v. Union of India* (1980) 3 SCC 587.
- (55) See Judicial Application of the Rule of Law, *infra*.
- (56) *R.K. Garg v. Union of India* AIR 1981 SC 2138.
- (57) See note 54 *supra*. For the 'constituent power' of the Court see "Some Reflections on the Nature of Constituent Power" (note 7 *supra*).

- (58) *Ibid.*
- (59) Arising out of a remarkable assertion of judicial power in the Insurance Corporation bonus case.
- (60) No-one seems seriously interested in pressing it just yet. Also, a proper consideration would require a full court; and the Court is always working with many vacancies.
- (61) The National Committee on the Implementation of Legal Aid Schemes is shortly establishing an autonomous public interest litigation cell. Several groups of lawyers, mostly young, have started small centres of PIL in some High Courts. The Consumer Education and Research Centre, Ahmedabad, is now moving into concerns wider than consumerism and is heavily using court process in all its campaigns. Equally active are organisations like the Free Legal Aid Scheme, Rajpipla; Legal Support for the Poor Programmes organized all over India, by Harivallabh Parekh; the Free Legal Aid Clinic at Jamshedpur; the Public Interest Litigation Services, Cochin.
- (62) See notes 38 and 46 *supra*.
- (63) These include multiple petitions in relation to the same subject matter by different persons, inadequate prior research, variable levels of commitment and competence and, inability to deal with hardened lawyers, mostly state counsel.

The Independence of Lawyers in Rumania: Some Reflections

by
Liviu Corvin*

Rumania remained for a long time under the suzerainty of Turkey, and until 1856 it was divided into two neighboring principalities, called Muntenia¹ and Moldavia. The popular uprisings that began in 1821 and continued with the revolution of 1848 led to political unification of the two principalities in 1859.

Political unity resulted in the legislative unification of Rumania which, until then, was governed by differing legal provisions that had become completely outmoded. This unification took shape with the publication in 1864 of the first Rumanian code of civil law, which showed the influence of the French and, to a lesser extent, the Italian and Belgian codes.

The birth of the modern Rumanian state called for new legislation to pursue the work of unifying the various laws that prevailed in the different regions of the country, and in particular of amending Transylvanian legislation which was based on Austrian law. The fundamental reform of the code of civil law and civil procedure resulted in a more detailed regulation of the lawyer's profession.

Legal representation made its appearance in Rumania as early as the beginning of the seventeenth century, when minutely detailed provisions were included in stat-

utes, concerning the engaging of "*procatori*" (from the Latin "*procurator*"), who correspond to our present-day lawyers. These texts stressed the lawyer's duty to discharge his mandate with honesty, and provided for sanctions in case of malpractice, as well as judicial proceedings for enforcing them.

In the nineteenth century the splendour of France, its culture and advanced system of legislation, drew many young Rumanian intellectuals to Paris for their legal studies. These students, who saw France as their second homeland, brought back with them to Rumania a warm affection for the French model which they naturally followed when developing Rumanian institutions.

This was the climate in which the Rumanian bar was born. It closely resembled its French counterpart, in giving lawyers broad immunity in pleading and authentic freedom from interference by the political power; disciplinary sanctions, where necessary, could only be applied by the Council of the Order of Advocates.

Unfortunately, the outbreak of the second world war put an end to democracy in the Rumanian bar, and opened a new period marked by arbitrary acts and the exclusion of Jewish lawyers from the ranks of the advocates.

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1) In English this principality is generally known as Walachia (trans. note).

After the second world war, owing to political and economic changes as well as the advent of socialism, the western-style Rumanian legal system was supplanted by another, characterised by its class role, and influenced by the legislation of other socialist countries, especially that of the Soviet Union. As a result, the bar was also reorganised on the Soviet model, and thus was effected a structural change in the status of lawyers as members of a liberal profession.

A new organic law was adopted, in which the role and duties of lawyers are laid down, in addition to their organisation, requirements for admission, disciplinary sanctions, and the respective jurisdictions over them of the Council of the College and of the Ministry of Justice, the lawyers' profession being considered as "a public service".

Hence, as long as the Ministry of Justice supervises and directs lawyers' work, it is difficult to speak of independence with regard to the political power.

The former bars, located in close proximity to the Courts of Appeal, have been turned into "Colleges of Advocates", each administrative district having its own college.

Each college is a legal entity. The general assembly (a meeting of all the full-fledged lawyers enrolled in the college) as the governing body elects the Council of the College every four years, and approves the budget.

The president and vice-president are chosen by the board from among its members. Candidates for election to the board are nominated by the lawyers, and each name is then put to the general assembly for discussion. A candidate obtaining a majority is declared by the assembly to be "elected". The last election, in 1979, was held by secret ballot.

Whereas until 1965 the names of candi-

dates for election to the board were proposed by the Ministry of Justice, today its influence extends only to the nomination of the president and vice-president. However, the law empowers the Minister of Justice to dissolve the Council of the College and appoint a new one pending new elections.

If there is a large number of lawyers, as at the bar of Bucharest (which has about 600 lawyers), the law provides for the establishment of subdivisions, called "Bureau of (Collective) Legal Assistance", each comprising nearly 100 lawyers and distributed geographically in accordance with the administrative districts of Bucharest.

Each bureau is headed by a director appointed by the Minister of Justice, on the proposal of the Council of the College. Until 1969 he was deemed a civil servant and paid a salary, and was not entitled to plead or act as a legal representative. Later, the salaried director was replaced by the lawyer-director, who is a member of the college and is assisted by an executive committee of six to eight lawyers.

To enable it to carry out its manifold tasks, the Bucharest College has numerous officials, such as an administrative director, chief of personnel, secretaries, economists, accountants, administrative staff, and a medical polyclinic.

All lawyers must belong to a collective and must also belong to a professional group of about 20 lawyers. These meet once a month and discuss numerous questions related to lawyers' work, — chiefly professional problems and discussions about interpretation of the law.

Legal representation for individuals or corporate institutions is provided by lawyers who are entitled by law to represent and to plead, while retaining their role as legal advisers to their clients. Legal counselors of state institutions in Rumania are

not members of the bar but rather representatives of the institutions which employ them, exercising all the attributes of lawyers, but solely on behalf of these institutions. Hence they are public servants.

In civil actions heard before the lower courts, parties may be represented by a spouse, or relative by blood or marriage, providing that such a person holds a special power of attorney. This enables him or her to plead if he or she has a degree in law. As a rule, defendants may if they wish defend themselves without engaging a lawyer, except certain cases where representation by an advocate is requested by law.

The lawyer-client relationship is personal and direct, and the client is free to choose his lawyer. The lawyer's geographical field of action is not restricted, and parties may hire defence counsel from any "College" or "Collective Bureau" in the country.

The client is obliged to make a contract for the services, not with the lawyer, but with the bureau of assistance. In this respect, Rumania would seem to have found a solution to the remuneration problem, in the sense that the lawyer "does not concern himself" personally with it.

The director of the collective discusses all aspects of the case with the client and names a fee based on a schedule containing a maximum and minimum fee for every legal situation. The fee settled on depends only on the nature of the case; the amount of work done by the lawyer has no bearing, because whether a decision is reached after one hearing or a dozen, the fee remains the same.

The contract is signed by the director, the client and the lawyer (if he is present), and then the client pays the fee into the collective treasury, and receives a "delegation", (i.e. an authorisation) which enables the lawyer to appear before judicial bodies, and to represent or assist his client.

Under these conditions, the contract and its contractual nature have always been much discussed: is it a contract of agency or for the hiring of services; is the lawyer a party to the contract or is it only between the College and the client, with all that this implies? Likewise, if there is misconduct on the part of the lawyer, the question arises who should remedy the injury, who should pay the damages, the lawyer or the college, because the lawyer's fee is always charged to the losing party.

Furthermore, a lawyer may not receive monthly earnings in excess of an income ceiling set by the Ministry of Justice, which corresponds to a civil servant's salary-scale bracket and is only slightly higher than the average salary of university staff. This income is not guaranteed by the College: the lawyer's earnings (not to exceed the ceiling) will vary according to the number of clients he has brought to the collective, and in any case he receives only 50 percent of the monthly payments made by his clients to the collective, the remainder being withheld for taxes, insurance and the expenses of the College. Thus the ceiling may be reached after two or three or a dozen court cases either by a young lawyer with but a few years' experience or by a veteran "master" who has spent his whole life in the law libraries and pleading before the courts.

In this situation, Rumanian lawyers ask themselves with reason why they should work harder, why obtain outstanding qualifications, if it all comes to the same thing, if there is such a deepseated indifference to the quality of the defence and the amount of work put in.

Accepting presents or other material advantages in addition to the fee paid by the client to the collective is very severely punished. The present Rumanian penal code formerly contained a section providing sanctions for a lawyer who accepted even the most insignificant gifts from his client.

This section has now been repealed. However, the Supreme Court of Rumania has likened the practising lawyer to a civil servant, and termed his acceptance of a material advantage proffered by his client, over and above the fees paid to the collective, as "corruption", an offence severely punished under the Rumanian penal code.

All of this does immense harm to the lawyer. For example, if the client is dissatisfied with the final outcome, he can avenge himself by declaring that he gave extra money or various gifts, and the lawyer is then in danger of being convicted and sentenced to long years of imprisonment. Unfortunately, such things have happened.

The assimilation of a lawyer to a civil servant is odd, to say the least, since he has none of the rights of a civil servant, which include an assured pension, free medical care, a regular salary, the right to be organised in unions, and other advantages created for state employees. On the contrary, the lawyer has a struggle to obtain his own earnings, and is obliged to pay a contribution to the lawyers' insurance fund (25 per cent of his income), as well as paying for his holidays, hospitalisation, etc. He has no right to have a separate room as an office in which to exercise his profession (in Rumania habitable space is closely restricted according to the number of persons living in a flat), nor to place a sign at the entrance to his residence to make his presence known.

Moreover, the lawyer is obliged to offer legal assistance free of charge. In cases where the parties do not have the wherewithal to pay a lawyer, the Council of the College or the director of the collective bureau may assign them a lawyer without charge. If the recipient of free legal assistance wins his case, his lawyer recovers a portion of the fee his client would have paid the collective.

In cases where the parties are minors, lack legal capacity or have committed an offence punishable by more than five years imprisonment, the law requires the presence of a lawyer free of charge to the parties. The lawyer's fee for this service, paid by the Ministry of Justice, is determined according to a set schedule and is a mere token fee. In such cases, which imply the presence of a lawyer at the behest of the courts, the Council of the College or the director of the collective assigns defence counsel. Persons thus assisted are not entitled to choose their own lawyer.

All those who hold a doctorate or other university degree in law and who are in fact practising lawyers or undergoing a pupillage ('stagiaires'), are listed on the "rolls of the College". After two years pupillage under the supervision of a very experienced full-fledged professional, during which they attend lecture courses, pupil lawyers must sit an examination entitling them to membership in the college as full-fledged lawyers. If they have not passed after their second attempt, they are struck off and cease to be members of the College. Pupil lawyers may plead before the lower courts.

The instructions of the Ministry of Justice are that there must be professional surveillance over all the court activities of lawyers, within the framework of the College. Each bureau of assistance has a certain number of lawyers, considered among the best, who spend their time in the various courts, noting down the negative aspects of lawyers' professional conduct. If they note serious matters, such as professional incompetency, professional misconduct, etc., they are bound to notify the Council of the College, which may administer "collegiate admonishments", but has no power to apply disciplinary sanctions.

Once a year, the Ministry of Justice exercises its supervision, delegating inspectors to this end to check on lawyers' conduct.

These inspectors, who are certainly less well-equipped to understand the merits and substance of a pleading than the lawyer-supervisors, note all the negative aspects of lawyers' conduct and report their observations to the Ministry of Justice, where disciplinary measures are taken against lawyers deemed to be at fault. There is no appeal against the measures taken by the Ministry of Justice.

In the most serious cases the Ministry may order a disciplinary inquiry conducted by a member of the Council of the College, who may either propose to the Council that the complaint be dismissed, or that it be referred to the disciplinary commission. This commission is composed of several lawyers appointed by the Ministry of Justice after nomination by the Council of the College.

The commission of first instance is composed of three members: two lawyers and a judge who presides over the commission. The appeals commission is composed of two judges and a lawyer; one of the judges presides. The proceedings are always held in private.

The Minister of Justice has power to quash the decisions of these disciplinary commissions.

The presence of judges, as members and chairmen of the commissions, is a serious infringement on the lawyer's independence with regard to the judiciary, because he well knows that the judge who hears his pleading, revealing his convictions which may sometimes be at odds with the judge's own ideas, may tomorrow be judging him in disciplinary proceedings.

Lawyers do not enjoy any immunity, either in pleading or in the written documents they submit to the court, and they may be subject to penal or disciplinary sanctions if they impugn the honour of an adversary or third party.

Certain conclusions concerning the inde-

pendence of Rumanian lawyers are evident.

The repressive nature of Rumanian justice up to 1964-1965 had an adverse influence on the activity of lawyers. The large number of cases to be tried (about 200 per day per court), most of them criminal, forced lawyers to remain in attendance from 8 a.m. until midnight, and judges were turned into machines for convicting and sentencing, with no time to listen to pleading or study briefs.

Many judges, most of them without university training, saw the lawyers as a kind of enemy, and the lawyers began to regard the efforts they made in favour of the truth as practically useless. Under such circumstances the lawyer's prestige declined, and this decline was reflected in their income, most lawyers scarcely earning the bare minimum.

After 1964-1965, a change for the better occurred in the conduct of justice, which led to a need for the active presence of lawyers during hearings, and this in turn helped to improve the quality of decisions. Lawyers once again gained in prestige and many judges and prosecutors have shown respect for the advocates and have come to appreciate the assistance which lawyers can give them.

Unfortunately it is not yet possible to speak of absolute independence for Rumanian lawyers, as long as the Ministry of Justice still exercises an excessive surveillance over professional activity. In many countries the Attorney-General (*Procureur Général*) and the Supreme Court or the Court of Appeal are responsible for the more serious disciplinary proceedings, but the exercise of disciplinary powers directly by the Ministry of Justice appears to be found uniquely in the socialist countries, sometimes with the result that the bar becomes a simple appendage of the Ministry, and the Councils of the Colleges mere rubber stamps for its instructions and orders.

All of this may jeopardise the independence of Rumanian lawyers, even though Ministers of Justice and directors of the ministry may try at times to show understanding towards the problems of lawyers.

To be able to shed this supervision and lend true substance to the notion of independence, the Councils of the Colleges need to be given greater responsibility and greater freedom, since the independence of the Colleges is the best guarantee of the

individual lawyer's independence with regard to the public power.

Authentic freedom (within the limits of the law) can only be achieved by the re-establishment of the General Council of Advocates, which would group together all the Colleges and have sole responsibility for safeguarding the rights and professional interests of lawyers, and likewise have a constructive relationship with the Minister of Justice.

The Veil of Secrecy in South Africa

by
*Gilbert Marcus**

Over the years, the South African government has surrounded itself by a shield of protective laws ostensibly designed to preserve secrecy. The Protection of Information Act, which replaces the existing Official Secrets Act, simply perpetuates the trend. The Act comes at a time when there has been a move towards the cause of open government in other countries. The very opposite is occurring in South Africa. Apart from the Protection of Information Act, The Laws on Co-Operation and Development Amendment Act provides for the preservation of secrecy "in connection with matters dealt with by the Commission for Co-Operation and Development". The new Internal Security Act retains all the obnoxious features of the Terrorism Act (which it is intended to replace) including provisions preventing access to information relating to detainees.

It would be naive to deny that governmental secrecy is required in order to protect certain vital interests of the State. Prohibitions on the disclosure of information relating to military strategy, weaponry and intelligence matters generally can be found in most civilised legal systems. Were the Protection of Information Act designed to prevent disclosure of such matters only, it would be unobjectionable. Unfortunately, it goes much further and like other statutes in the security stable it is characterised by

the use of wide and vague phraseology. Its ambit is sufficiently wide and uncertain so as to cover not only genuine acts of espionage but also conduct which otherwise would be quite innocuous and acceptable in most Western societies.

The Act is yet another addition to the long list of statutes restricting freedom of the news media and the publication of information. It is a further step by a government which is obsessed with secrecy. The information that the news media is permitted to publish cannot be regarded as an accurate reflection on the state of freedom of speech in South Africa. The real test requires an assessment of what is never published and kept from public scrutiny by an ever increasing armada of restrictive laws.

The Act is an offshoot of the recent Rabie Commission on security legislation. Ironically, the Rabie Commission criticised the existing Official Secrets Act for its breadth and vagueness. Yet, the new Act suffers from precisely the same malady. For instance, Section 2 of the Act makes it an offence punishable by imprisonment for up to 20 years (without the option of a fine) to approach, inspect, pass over, be in the neighbourhood of or enter any "prohibited place" for any purpose prejudicial to the security or interests of the Republic. Apart from the obvious places such as military establishments and dockyards, the

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State President is empowered to declare any place or area to be a "prohibited place". There is nothing to indicate what constitutes an approach to or what area falls within the neighbourhood of a prohibited place. Such conduct is punishable not only if it is prejudicial to the security of the Republic but also if it is prejudicial to the interests of the Republic. Needless to say, the interests of the Republic are not defined.

Section 4 of the Act covers what may loosely be described as the offence of espionage. The breadth of the offence is breath-taking. It provides, for example, that a person commits an offence if he has in his possession any information which he knows or should know is related to a prohibited place or anything in a prohibited place and publishes such information "in any manner or for any purpose which is prejudicial to the security or interests of the Republic". The penalty prescribed is a fine not exceeding R10,000 or imprisonment not exceeding 10 years or both. Where, however, the publication takes place for the purpose of disclosure to a foreign state or to a "hostile organisation", the penalty is imprisonment for up to 20 years with no option of a fine. In the original Bill, the State President had virtually an unfettered discretion to declare any foreign organisation to be hostile. As a result of an amendment, the State President may only declare an organisation to be hostile if he is satisfied that the organisation "incites, instigates, commands, aids, advises, encourages or procures any person in the Republic or elsewhere to commit in the Republic an act of violence for any purpose prejudicial to the security or interests of the Republic". Despite the amendment this is still an extremely far reaching provision. The task of the prosecution is made easier by the presumption contained in Section 10 to the effect that in any prose-

cution upon a charge of committing an act for a purpose prejudicial to the security or interests of the Republic, it shall be presumed unless the contrary is proved, that the accused did act with a prejudicial purpose if it so appears "from the circumstances of the case or the conduct of the accused".

In terms of Section 3, any person, who, for the purposes of the disclosure thereof to any foreign state or organisation or to any agent or any hostile organisation obtains information relating to:

- (i) any prohibited place or anything in any prohibited place, or to armaments; or
- (ii) the defence of the Republic, any military matter, any security matter or the prevention or combating of terrorism; or
- (iii) any other matter which he knows or reasonably should know may directly or indirectly be of use to any foreign state or any hostile organisation,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 20 years.

This section is objectionable for several reasons. Its phraseology and ambit is inordinately wide and would seem to go beyond what is reasonably required to combat espionage. None of the critical words are defined. Perhaps the worst feature of the section is the fact that the offence is created purely by the intention to disclose information and not because of any intention to commit harm or possible prejudice to any person or body. It is not an element of the offence that the accused should intend to harm the interests or security of the Republic.

The offence created by Section 3 covers not only disclosure of information to a hostile organisation but also to "any office

bearer, officer, member or active supporter" of any hostile organisation. It is not inconceivable, that the State President would declare the Anti Apartheid Movement in Britain to be a hostile organisation. The information disclosed, need only be directly or indirectly of use to any foreign state or any hostile organisation and be such that, for considerations of the security or other interests of the Republic, it should not be so disclosed. This could not be much vaguer or more mystifying to the man in the street, or for that matter, a journalist.

In terms of Section 4, any person who has information which he has obtained by virtue of his position as a person who holds office under the government, or as a person with a governmental contract or a contract the performance of which takes place entirely or partly in a prohibited place and the secrecy of which information he knows or reasonably should know to be required by the security or the other interests of the Republic and who publishes such information for a purpose prejudicial to the security or interest of the Republic, shall be guilty of an offence.

The security police are given carte blanche by the provision making it an offence to disclose, publish or retain information relating to a security matter or the prevention or combating of terrorism. Publication must be for a purpose prejudicial to the security or interests of the Republic. Security matter is defined as "any matter which is dealt with by the National Intelligence Service or which relates to the functions of that service or to the relationship existing between any person and that service". This provision effectively prevents any investigation and, of course, the publication, of the methods and activities of the NIS.

The Act also makes it an offence for any person to receive any secret official

code or password or any document or information knowing or having reasonable grounds to believe that it is being disclosed to him in contravention of the Act and such person shall, unless he proves that the disclosure to him was against his wish, be liable on conviction to a fine not exceeding R10,000 or imprisonment not exceeding 10 years or both. This provision is virtually identical to a provision contained in the old Official Secrets Act. It has particularly serious implications for journalists. For example, there is nothing to indicate in what circumstances a journalist ought to have reasonable grounds to believe that he is receiving information in contravention of the Act. An accused person may escape liability if he can prove that the disclosure to him was "against his wish". Presumably, the fact that the information was unsolicited would not be sufficient to escape liability. The facts of an English case dealing with similar provisions in the English Official Secrets Act gives some indication of the absurdities of such provisions. The case arose out of an article in the Sunday Telegraph containing extracts from a British diplomat's report on the civil war in Nigeria. A former member of the International Military Observer team in Nigeria was charged with communicating the report without authority, a journalist was charged with unlawful communication and receipt, and the newspaper and its editor were also charged with unlawful communication and receipt. All the accused were acquitted after a lengthy trial. However, Mr. Justice Caulfield, who presided over the case was moved to suggest that the case "may well alert those who govern us at least to consider, if they have the time, whether or not Section 2 of this Act has reached retirement age and should be pensioned off". These sentiments should be repeated and echoed continually along the tortuous corridors of our security and apartheid legislation.

Journalists are particularly hard hit by the provision making it an offence for any person who obtains possession of any official document, whether by finding or otherwise, to neglect or fail to hand it over to the person or authority by whom or for whose use it was issued or to a member of the police force. The penalty for contravention of this section is a fine not exceeding R5,000 or imprisonment not exceeding 5 years or both. Once again clarity is lacking and "official document" is not defined.

A particularly outrageous provision is contained in Section 7 of the Act which provides that any person who "knowing that any agent or any person who has been or is in communication with an agent, whether in the Republic or elsewhere, is in the Republic, fails forthwith to report to any member of the South African Police or the South African Railways Police Force, the presence of or any information it is in his power to give in relation to any such agent or person, shall be guilty of an offence and liable on conviction to a fine not exceeding R1,000 or to imprisonment not exceeding 12 months or to both such fine and such imprisonment".

The term "agent" is perhaps surprisingly, defined in the Bill, although predictably its ambit is ridiculously wide. It includes any person who is or who has been or is reasonably suspected of being, or having been directly or indirectly used by or in the name of or on behalf of any foreign state or any hostile organisation for the purpose of committing in the Republic or elsewhere an act prejudicial to the security or interests of the Republic. Apart from the vagueness and breadth of this provision it is extremely unusual for the provisions of the criminal law to be used to punish mere omissions as opposed to positive acts.

The breadth and uncertainties of the Act are regrettably not matched by the provision of any special defences open to

an accused person. The only safeguard is the requirement that no prosecution shall be instituted without the written authority of the Attorney General. One hopes that the Attorney General would not prosecute innocent violations of the Act. Nevertheless while the all embracing provisions of the Act remain in existence, they may be utilised to prosecute any violation, however trivial.

What is required in South Africa is greater access to official information and not the imposition of restrictions. One of the methods of overcoming the problem, it is suggested, would be the introduction of a statute along the lines of the *Freedom* (not *Protection*) of Information Bill which was proposed in England last year, and which was narrowly defeated. In the words of the proposer of the Bill, Mr. Frank Hooley "the central thrust of the Bill was to get an intelligent flow of information between governments and the governed on the basis of which they could have more intelligent social and economic policies". The Bill provided for categories of information which should be exempt from the basic principle of protecting official information. Broadly, the categories requiring protection were defence, security and intelligence, currency and reserves, law enforcement, criminal procedures, commercial confidentiality and personal privacy. A citizen would have a right of access to information about himself held in government files, but not information about other people. What South Africa needs most urgently is a statute along the lines proposed by Mr. Hooley. It is crucial for citizens to be able to scrutinise and criticise acts of government. Without access to official information, the government is given the opportunity of moving in dark and secret ways. In this regard, the great English Constitutional lawyer Stanley de Smith once remarked that:

"History bears witness to the insidious effects of suppression of dissent and the denial of free interchange of ideas. Those effects are all the more insidious when the fact of suppression is itself suppressed or so concealed as not to be identifiable."

A danger of drafting statutes in such vague and uncertain terms is that they tend to have the effect of intimidating people and discouraging investigations which may be perfectly legitimate and in the best interests of both the people and the country. The dangers for journalists and the press in

general are obvious. Until such time as our Courts have pronounced upon the provisions of the Act, its ambit will remain uncertain.

The tightening of the veil of secrecy does not augur well for the cause of open government. If South Africa is to retain any vestige of democracy it is essential that as far as possible its workings and practices be open to public scrutiny and criticism. For South Africans, the most worrying feature of the Act is that a climate of secrecy creates not only fear and uncertainty in the minds of the people, but opportunities for the abuse of power.

Judicial Application of the Rule of Law

Controversial Decision of the Indian Supreme Court

A recent decision of the Supreme Court of India in the case of A.K. Roy v. Union of India, relating to the Law of Preventive Detention, has been a source of some controversy in India.

Article 22 of the Indian Constitution envisages preventive detention even in normal times, but the legislative powers of Parliament and the states are conditioned by certain safeguards incorporated in clauses (3) and (7) of Article 22. Section 3 of the Constitution 44th Amendment Act, passed in 1978 liberalised the provisions of Article 22 by imposing three additional restrictions on the power of the Parliament and the state legislatures:

- (1) the maximum period for which a person could be detained without obtaining the opinion of the Advisory Board was to be two months instead of three months;
- (2) it was to be obligatory for any preventive detention law to provide that the State Advisory Boards (which are to exercise strict supervision in all cases of preventive detention) had to be composed of such members as the Chief Justice of the appropriate High Court recommended and that the Chairman of the Advisory Board should be a sitting judge of the appropriate High Court and that the other members of the Board should be sit-

ting or retired judges of High Courts and not as previously persons who are or have been or are qualified to be appointed as judges of High Courts;

- (3) the system of preventive detention without reference to an Advisory Board under clause (7) (a) of Article 22 was to be abolished.

However Section 3 of the Constitution 44th Amendment Act 1978, has not been brought into force, since the Central Government, which was empowered under the commencement clause to notify different dates for the coming into force of different provisions of the Amendment, has failed to notify any date for the coming into force of Section 3. It seems clear that the decision not to bring into force Section 3 of the Constitution 44th Amendment Act 1978, was taken on political and not on administrative grounds. Since the National Security Ordinance of 1980 which was promulgated by the President at a time when Parliament was not in session, made provision for the Constitution of Advisory Boards strictly in accordance with the provisions of Section 3 of the 44th Amendment Act. However when Parliament met it amended the Ordinance bringing it into conformity with Article 22 in its original form.

A.K. Roy, the petitioner and a detainee (as detainees are called in India) under the

National Security Act, contended that the Central Government was under an obligation to bring section 3 of the 44th Amendment Act into force within a reasonable time after the President gave his assent. Since it had failed to do so, the Court by a Mandamus should direct the Central Government to issue a notification bringing into force the liberalised amendments to Article 22.

The Chief Justice speaking for the majority said:

"But we find ourselves unable to intervene in a matter of this nature by issuing a mandamus to the Central Government obligating it to bring the provisions of Section 3 into force. The Parliament having left to the unfettered judgment of the Central Government the question as regards the time for bringing the provisions of the Forty-fourth Amendment into force, it is not for the Court to compel the Government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it... If it were permissible to the Court to compel the Government by a mandamus to bring a Constitutional amendment into force on the ground that the Government has failed to do what it ought to have done, it would be equally permissible to the Court to prevent the Government from acting, on some such ground as that the time was not yet ripe for issuing the notification for bringing the Amendment into force. We quite see that it is difficult to appreciate what practical difficulty can possibly prevent the Government from bringing into force the provisions of S. 3 of the Forty-fourth Amendment, after the passage of two and half years. But the remedy according to us, is not the writ of mandamus."

A minority of two judges held that:

"After the Amendment Act had received the President's assent the Central Government could not in its discretion keep it in a state of suspended animation for any length of time it pleased. That Parliament wanted the provisions of the Constitution (Forty-fourth Amendment) Act, 1978 to be made effective as early as possible would appear from its objects and reasons. The following extract from the Objects and Reasons clearly discloses a sense of urgency: "Recent experience has shown that the fundamental rights, including those of life and liberty, granted to citizens by the Constitution are capable of being taken away by a transient majority. It is, therefore, necessary to provide adequate safeguards against the recurrence of such a contingency in the future... The right to liberty is further strengthened by the provision that a law for preventive detention cannot authorise, in any case, detention for a longer period than two months, unless an Advisory Board has reported that there is sufficient cause for such a detention. An additional safeguard would be provided by the requirement that the Chairman of an Advisory Board shall be a serving judge of the appropriate High Court and that the Board shall be constituted in accordance with the recommendations of the Chief Justice of that High Court." ... Parliament must have taken into consideration the practical difficulties in the way of the executive in bringing into operation all the provisions of the Act immediately... Now when more than two and half years have passed since the Constitution (Forty-fourth) Amendment Act, 1978 received the assent of the President, it seems impossible that any such difficulty should still persist preventing the Government from giving effect to Section 3 of the Amendment Act."

The majority decision has been severely criticised by leading lawyers in India. For

example, Mr. F.S. Nariman, Co-Chairman of the LAWASIA Committee on Human Rights, has said, in an article in the Indian Express of May 27, 1982, that the Central Government has claimed a dispensing and suspending power in respect of the Constitutional Amendment to Article 22 and regrettably the highest Court has upheld that claim. "The decision", he says, "has grave implications in the field of constitutional law — graver still in the field of human rights."

This viewpoint has been supported (in a letter to the ICJ) by one of India's foremost constitutional lawyers, Mr. H.M. Seervai, in which he states (inter alia):

"Section 1 (2) of the 44th Amendment Act, 1979, provides that '(the Act) shall come into effect on such date as the Central Government may by notification in the Official Gazette appoint, and different dates may be appointed for different provisions of the Act'. This provision must be interpreted in what Lord Wilberforce has called 'the matrix of the facts', and they were that during the Emergency amendments were made which greatly impaired the democratic nature of our Constitution, severely curtailed the effective enforcement of fundamental rights including the right to personal liberty, and curtailed the powers of the Courts. Therefore the amending Act was considered necessary, and was passed with the requisite special majorities in each of the two Houses separately as required by Art. 368(2). Once it is so passed "it shall be presented to the President who shall give his assent to the Bill and the constitution shall stand amended in accordance with the terms of the Bill": Art. 368(2). The President has assented. It is unreasonable to suppose that by empowering the Central Government to bring the amendments into effect, the Con-

stituent Assembly put it in the power of the Central Government to defeat the intention of Parliament acting in the exercise of its constituent power. For, if the view in the majority judgment were correct, the Central Government could refuse to issue the Notification to bring the whole amendment Act into force. In the context of the facts and circumstances, the more reasonable view is, that since extensive amendments may require time to implement them, a power was given to the Central Government to bring them into force, but in any event, within a reasonable time. For example, the amended Art. 22(4) requires the appointment of sitting judges: regard must be had to the number of detentions in each state, the judicial strength of each Court and whether it would have to be increased and the like.

All discretionary power must be reasonably exercised. It would not be open to the Central Government to say that the amendment ought not to have been made and therefore it will not issue a notification bringing it in force. The executive government cannot sit in judgment on the wisdom or propriety of any amendment passed by Parliament in the exercise of its constituent power. That the Council of Ministers is excluded is shown by the fact that once a Bill amending the Constitution is passed, the President *shall* assent to it: the Council of Minister's advice is excluded by necessary implication. No explanation was given by the Central Government as to why only one section of the Amending Act has not been brought into force."

Mr. Seervai takes the view that the government's failure to bring the section into force is *mala fide* in view of the provision for advisory boards appointed in conformity with it in the National Security Ordinance, 1980.

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Rural Development and Human Rights in South East Asia

Report of a Seminar in Penang, December 1981.

*Published jointly by the ICJ and the Consumers' Association of Penang (CAP)
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Available in english, Swiss Francs 10, plus postage.

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Human Rights in Islam

Report of a seminar in Kuwait, Geneva, 1982, 95 pp.

*Available in english (ISBN 92 9037 014 9) and french (ISBN 92 9037 015 7),
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The purpose of this seminar was to provide a forum for distinguished moslem lawyers and scholars from Indonesia to Senegal to discuss subjects of critical importance to them. It was organised jointly with the University of Kuwait and the Union of Arab Lawyers. The Conclusions and Recommendations cover such subjects as economic rights, the right to work, trade union rights, education, rights of minorities, freedom of opinion, thought, expression and assembly, legal protection of human rights and women's rights and status. Also included are the opening addresses, a key-note speech by Mr. A.K. Brohi and a summary of the working papers.

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Development, Human Rights and the Rule of Law

Report of a Conference held in The Hague, 27 April—1 May 1981, convened by the ICJ.

Published by Pergamon Press, Oxford (ISBN 008 028951 7), 244 pp.

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Increasing awareness that development policies which ignore the need for greater social justice will ultimately fail was the key-note of the discussions at this conference. It brought together economists, political scientists, and other development experts together with members of the International Commission of Jurists and its national sections. Included in the report are the opening address by Shridath Ramphal, Secretary-General of the Commonwealth and member of the Brandt Commission, a basic working paper by Philip Alston reviewing the whole field, shorter working papers by leading development experts, and a summary of the discussions and conclusions, which focussed on the emerging concept of the right to development.

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

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

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