For the Rule of Law

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conviction can be admitted without trial in strict legal form. If in the supreme interests of the community the liberty of individuals is taken away, *an asylum must be provided of a different order from jail.* This is of fundamental importance."

Detention laws generally empower the state to "regulate the place and conditions of detention." It is only by an executive order made under this provision that the detenu is lodged in a jail. But imprisonment is one of the forms of "punishments" prescribed by S.53 of the Indian Penal Code. Punishment without trial is patently violative of the Constitution (Art. 21). The Constitution permits "preventive detention", but, surely, not imprisonment without trial.

It would, it is suggested, be open to the courts to strike down as invalid executive orders which prescribe jails as places for lodging detenus, especially since the Supreme Court has ruled consistently that detention is not punishment and a detenu is not a convict.[1]

Perhaps it is time, after three decades of experience, for the Law Commission or some other body of experts to review the entire legislation and its working. When the 1950 Act was introduced, the Home Minister, Sardar Patel said: "It requires to be closely examined whether a better substitute of a more or less permanent nature based on specific principles can be brought in or not." Since then the Act has become permanent, with changes in nomenclature, but it has not been subjected to a careful review in the light of experience in India and elsewhere.[2]

One safeguard which appears imperative is legal representation before the Advisory Board.

Finally, Section 3(3) of the Ordinance which enables a District Magistrate or a Commissioner of Police to exercise the detaining power, under certain circumstances, should be deleted. The power of preventive detention should be exercised only by the Minister concerned.

Iran

Islamic Revolutionary Tribunals' Rules of Procedure

All those concerned to uphold the principles of the Rule of Law were deeply shocked by the procedures of the Islamic Revolutionary Tribunals set up after the overthrow of the regime of the Shah.

This concern was voiced by the International Commission of Jurists in a press release dated 12 March 1979 in the following terms:

"It appears that these are specially created ecclesiastical tribunals having no basis in law. The defendants are tried not according to any pre-existing legal provisions, but according to general principles of Islamic justice derived from the Koran. Consequently they may be held guilty of offences for acts which did not constitute penal offences under national or international law at the time when they were committed, contrary to article 11 of the Universal Declaration of Human Rights.

In violation of the same article the defendant is denied "the guarantees necessary for his defence". There is no formal charge or indictment, no time is allowed for the preparation of the defence, and the defendant is not entitled to the services or even the advice of a lawyer.

There is no form of appeal from the decision of the tribunal, and a sentence of death is carried out within an hour or so without any opportunity for an appeal for clemency to be made or considered.

A summary trial and execution of this kind is contrary to all recognised principles of justice. Even in time of internal armed conflict, article 3 of the Geneva Conventions, to which Iran is a party, prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples". It may be added that the procedures of these tribunals also depart from the strict requirements of proof and safeguards for the defence which are a marked feature of Islamic systems of law.

It is deplorable that those who have overthrown a regime which they rightly criticised, as did the International Commission of Jurists, for denying a fair trial to their prisoners, should now try their suspects under such wholly arbitrary procedures."

Three months later, on 17 June 1979, the Council of the Revolution approved regulations governing these tribunals and their prosecuting authorities ('parquet'). These go some way to meet the world-wide criticisms, but there are still features which give rise to concern, and which appear to conflict with Iran's obligations under the International Covenant on Civil and Political Rights, to which it is a party.

Jurisdiction of the Tribunals

Article 2 of the regulations states that the Tribunals have competence to try cases of:

(i) murder and massacre under orders or aiding and abetting the same with the purpose of consolidating the Pahlavi regime and repressing the struggle of the Iranian people;
(ii) torture and imprisonment under orders or aiding and abetting the same against persons who had fought (the Pahlavi regime);
(iii) gross economic crimes, that is to say pillage of the public treasury or the 'lapidation' of the national wealth for the profit of foreigners;
(iv) conspiracy against the Islamic Republic of Iran by armed action, assassination and destruction of institutions for the profit of foreigners;
(v) armed attack, assault and battery, and manufacture and distribution of drugs.

Other crimes are to be tried by military courts or the ordinary civilian courts. In this connection it may be noted that the new Iranian Constitution makes no mention of the Islamic Revolutionary Tribunals, and confers jurisdiction on the ordinary courts to try cases of a political nature (Principle 168). The Constitution also contains the principle of non-retroactivity of crimes (Principle 169).

1) *Sampat vs. State of Jammu & Kashmir* A.I.R. 1969 SC 1153; Para 10.
2) Vide the Gardiner (1975) and Diplock (1972) Reports on Northern Ireland; Cmnd. 5847 and Cmnd. 5185, respectively.

Prosecutors

A special body of prosecutors, known as the prosecutors ('parquet') of the Islamic Revolution, have been created, with a prosecutor and investigating magistrates for each province (Ostan), under the general supervision of a prosecutor-general in Teheran. They are appointed by the Council of the Revolution, subject to the approval of the Imam, and are chosen from among the 'jurists and judges of the Islamic Revolution'.

Preliminary Proceedings

The investigating magistrate has the normal powers to summon and examine witnesses, to grant bail in appropriate cases, to order sequestration of the property and monies of the accused ('taking into account the needs of his family').

As a general rule no arrest can be made, nor any entry into a home for purposes of sequestration, without the prior written authorisation of the prosecutor.

Where an arrest without warrant is authorised (e.g. danger of absconding) the prosecutor must be informed without delay.

There are special provisions for accused persons who are members of the armed forces or law enforcement bodies, or persons holding important political or administrative positions.

In such cases, the summons and arrest must be approved by a commission created by the Revolutionary Council, and the accused's superior officer must be informed in advance.

At the end of his investigations, the magistrate gives his opinion on the guilt or innocence of the accused to the prosecutor. Any difference of opinion between them on this issue is resolved by the tribunal. The prosecutor draws up the indictment.

The Tribunals

There is a Revolutionary Tribunal in each province, which may sit in several 'chambers'. Each tribunal is composed of three judges, a President, who is a judge of Islamic Law (qadi shara'), a judge with administrative responsibilities appointed by the President, and a judge 'who has the confidence of the people and who knows the needs of the Islamic Revolution', chosen by the Revolutionary Council or its delegate.

Procedure

The indictment must be communicated in writing to the accused or his lawyer at least three days before the trial. The accused can appoint his lawyer. The trial is not to last more than a week, and at least 15 hours must be allowed to the accused and his lawyer to present his defence.

Witnesses and experts and the accused can be summoned by the tribunal and compelled to attend. Where the accused fails to appear, he can be tried in his absence. After the reading of the indictment and the hearing of the defence, the tribunal proceeds to 'any inquiry it considers necessary to establish the legal guilt of the accused'. Any gap in the evidence will be referred back to the prosecutor. When the evidence is complete the tribunal, 'after deliberation in conformity with the principles of Islam', gives its verdict. This may be a majority verdict if the President forms part of the majority. Otherwise, two Islamic judges must be added to the tribunal, and then the judgment of the tribunal is final.

It is expressly stated that the verdicts are not subject to appeal or review.

Penalties

The penalties are those fixed by Islamic Law ('shara') and comprise execution, imprisonment, banishment and confiscation of illegally obtained property, after liquidation of the accused's debts. If the offender has no lawful property, the state must maintain those persons who are recognised by the tribunal as being his dependents.

Sentences of execution must be reported to the prosecutor ten days before they are carried out, and during this period the condemned person must be allowed to meet his family. Where possible the execution is to be carried out at the place of the crime.

The 'special places of detention' of the prosecuting authorities are to be under the supervision of the local prosecutor of the revolution.

Comment

As will be seen these rules cover a number of important safeguards. There are, however, several glaring omissions. There is no provision for the accused to be represented by a lawyer during the preliminary investigations, nor for his right to see and confer with his lawyer in private before the trial (though it may be that this is accorded in practice). The minimum time allowed for the preparation of the defence appears inadequate, and it is not clear whether there are any procedures for applying for an extension of time. The limitation of the maximum period of the trials to one week must be inadequate in some cases. Perhaps the most grave omission is the denial of any right of appeal or revision. This assumes that the tribunals are incapable of error, which experience in all countries shows to be an unwarranted assumption. Moreover, courts which are not subject to appeal or review tend to become lax in the strict application of the law. This provision is a clear violation of Iran's obligation under Article 14(5) of the International Covenant on Civil and Political Rights.

It is to be hoped that the work of the Revolutionary Tribunals will soon be terminated and all cases referred to the ordinary courts, which already have the necessary jurisdiction to try them under the new Iranian Constitution.

Zimbabwe

On 28 July 1980 the Minister of Justice of independent Zimbabwe, Mr Simbi Mubako, a former lecturer in constitutional law, spoke to a group of young Zimbabweans at a seminar at Bomboshawa Training Centre. The following excerpts from his speech demonstrate his government's commitment to the legal protection of human rights.

"... It was been said that the only thing all the parties represented at the Lancaster House Conference were agreed upon from the outset was the name of the state –