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CHILE

THE NEW CONSTITUTION AND HUMAN RIGHTS

On 11 September 1980 (the seventh anniversary of the coup that brought the Chilean military junta to power), a referendum was held to approve a new Constitution. This had been prepared by a special commission appointed by the military junta, without any participation by representatives of other currents of opinion. This referendum was held under a state of emergency and the supervision of the voting and the count was completely in the hands of officials appointed by the government. As was stated in an ICJ press release prior to the referendum, the result was a foregone conclusion. No dictator has ever lost a referendum.

The new Constitution is divided into two parts: the ordinary or permanent provisions which will not come fully into force until 1997, and 29 transitory provisions which will be the most significant part in the interim. The following is an analysis of some of the provisions of the Constitution, both ordinary and transitory.

Freedom of Association and Expression

According to Art. 8 of the new Constitution, any act of a person or group of persons is illegal if aimed at the propagation of doctrines that are directed against the family, advocate violence or a totalitarian conception of society, the state or the legal system, or are based on the class struggle. All organisations, political movements or political parties that, in their goals or the activities of their followers, tend to support the above objectives are unconstitutional.

These limitations on freedom of association and expression go beyond the restrictions allowed by Art. 19 of the Covenant on Civil and Political Rights to which Chile is a party and, due to their scope and unprecise wording, can be used arbitrarily against dissident groups. They are certainly aimed at outlawing certain political groups critical of the military junta but, in fact, this is not of great significance since, as will be seen later, all political activities have also been banned for the time being.

Apart from other sanctions to be established by law, persons who commit or have committed any of the illegal acts described above will not be allowed to apply for a post in the public service, whether or not this be by popular election, for a period of ten years, to be increased to twenty if the offence is repeated. Any such people who are already in the public service will automatically be dismissed after a decision on the matter has been passed by the Constitutional Tribunal. Obviously, this provision unfairly punishes persons who have expressed views that were permissible at the time or belonged to political parties that were allowed by the Chilean legal system. This clearly conflicts with the prohibition of retrospective laws enunciated in Art. 19, No. 3, 7th paragraph, of the same Constitution.

Art. 19, No. 15, repeats the same idea. According to this provision, associations contrary to the moral, public order and the security of the state are prohibited.

Political parties are not allowed to intervene in activities which are not 'proper to them', but what activities are proper to them is not defined. Similarly, trade unions and their leaders are not allowed to engage in political activities. According

to Art. 23, trade union leaders are not allowed to join political parties. Trade union leaders who intervene in political activities as well as political leaders who take part in the functioning of trade unions will be subject to criminal sanctions.

Torture

Art. 19, No. 1, prohibits the application of any 'illegitimate pressure'. This wording does not amount to a straightforward condemnation of torture and, in fact, suggests that there are some kinds of undefined 'legitimate' pressures.

Persons arrested in connection with terrorist activities do not have to be brought before a competent judge until ten days after their arrest or detention, without any effective legal protection during that period.

It is noteworthy that the Constitution provides no sanction against those who commit acts of torture, though it does against those who exercise freedom of expression and association.

States of Exception

The Constitution contains a classification and whole gradation of states of exception. Thus, in case of war, the President of the Republic may declare a 'state of assembly'; in case of civil war or internal strife, a state of siege; in cases of serious disturbance of public order, damage or danger to national security - whether this is due to internal or external causes - a state of emergency. Finally, in case of public calamity (natural disasters or the like), the President may declare a state of catastrophe.

Many rights enshrined in the Constitution can be derogated from during states of exception. Habeas corpus is not available in cases of 'state of assembly' or state of siege. Moreover, the remedy of 'protection', aimed at maintaining the rule of law and respecting the rights of the individual by ensuring for him due protection, is not available in any state of exception.

Tribunals are not allowed - during 'states of assembly' and siege - to determine or discuss the merits of the situation under which derogations have been made from certain rights and freedoms guaranteed by the Constitution.

Measures adopted during states of exception which derogate from human rights protected by the Constitution will last for the duration of the emergency. However, orders for expulsion from the country, or prohibitions against returning to it, will continue to be in force even after the emergency has ceased, as long as they are not expressly withdrawn by the authority that decreed them. These orders and prohibitions are not subject to any form of judicial appeal or control.

The Role of the Armed Forces

The armed forces maintain a prominent role in the new Constitution. Thus, the Senate will be composed not only of members elected by people, but also of the commanders of the armed forces (and of the Carabineros military police) who are appointed by the National Security Council.

The National Security Council comprises the President of the Republic, the Presidents of the Senate and the Supreme Court, and the commanders in chief of each of the branches of the armed forces, and the Director General of 'Carabineros'.

The commanders of the armed forces will be appointed for a period of four years and, during that period, will enjoy security of tenure.

According to the Constitution, the armed forces are essential for national security and are the guarantors of the institutional order of the Republic (Art. 90 of the Constitution). This provision will enable the armed forces to intervene in the political process any time they consider that national security is endangered, or whenever they decide it is needed to assure the institutional order of the Republic.

Transitory Provisions

The transitory provisions contained in the Constitution are the most important. They will be in force until 1997, granting special powers to the President of the Republic

and the military junta. During this period, political activities are banned and President Pinochet will enjoy special and extraordinary powers in cases of internal strife.

According to the new Constitution, the President of the Republic will be elected for a period of eight years, not being entitled to re-election. However, the next presidential period will start in March 1981 and, for that period, the President of the Republic will continue to be General Augusto Pinochet. Before that period has ended, in 1989, the military junta will decide who should be the President for the next period (1989 to 1997) and will propose that person to be confirmed by the citizenry. On this occasion, the prohibition against re-election will not be applicable (27th transitory provision), so General Pinochet may be re-appointed again.

In the unlikely event of the citizens rejecting the candidate proposed by the military junta for this second period (1989 to 1997), General Pinochet will continue in office for one more year (29th transitory provision). In such a case, ninety days before the expiration of his mandate, there would be elections for Parliament and President of the Republic.

Emergency Powers for General Pinochet

In addition to all the ordinary powers granted to the President under states of exception, during the transitory period from 1981 to 1989, General Pinochet will enjoy extraordinary powers in case of internal disturbances aimed at disturbing the public order, or internal peace. In either case, pursuant to a declaration of the President, he will have for six months, renewable, the following powers:

- (a) to arrest and detain people for up to five days and, in case of terrorist activities, for up to 20 days;
- (b) to limit the right of assembly and freedom of information by control of the founding, editing and circulation of new publications;
- (c) to prohibit the entry into the national territory, or to expel from it, those who propagate the doctrines mentioned in Art. 8 of the Constitution, those who are suspected or have reputation of being followers of those doctrines, and those who carry out acts contrary to the interests of Chile (whatever that may mean) or constitute a danger for internal peace; and
- (d) to decree internal exile of persons, for a period up to three months.

Persons affected by any of these measures will not have any judicial remedy (24th transitory provision, last paragraph). They can only request the reconsideration of the measure by the authority that decreed it.

It has not been contended that these powers are necessary to deal with an emergency; indeed, they have been granted to General Pinochet alone, in addition to the ordinary powers contained in the Constitution to deal with states of exception.

Powers of the Military Junta

Until a Parliament is elected (1990), all references to the National Congress or either of its chambers are to be understood as relating to the military junta (21st transitory provision).

During this period, the military junta will have authority, inter alia,

- (a) to exercise the legislative power;
- (b) to amend the Constitution; and
- (c) to pass laws interpreting the Constitution.

The legislative power will enable the junta to pass even legislation which, according to the Constitution, requires a special quorum. Thus, once the Congress comes into existence, it will be very difficult for it to change such laws.

Although the amendment of the Constitution by the military junta is subject to a referendum, the junta may resort to a much simpler procedure by passing laws that are supposed to interpret it. Thus, although the mechanisms established by the Constitution for its amendment are very complex and the requirements for amending the Constitution very hard to meet, this very straightforward procedure will be available to the junta. In the end, the Constitution supposedly approved of by the people last September, might be very different from that which will come into force in 1997.

Prohibition of Political Activities

In spite of what is said in the Constitution on behalf of freedom of expression, the fact remains that, according to Art. 19, No. 15, a special law, passed with a special quorum, will govern the founding, organisation and activities of political parties. Violating this law will be subject to legal sanctions. More important is the fact that election to Parliament will not take place until 1990 (28th transitory provision). In the meantime, according to the 10th transitory provision, and until the special law concerning political parties comes into force, it will be unlawful to carry out or to promote any political activity. Those who violate this provision will be subject to the punishments provided by law. These sanctions are without prejudice to the measures that can be taken by General Pinochet under states of exception, such as deportation, prohibition to return to the country, or internal exile.

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AMNESTY INTERNATIONAL NOTE:

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