

Law and justice: The case for parliamentary scrutiny

Seminar for members or parliamentary human rights bodies organized jointly by the Association for the Prevention of Torture, the Inter-Parliamentary Union and the International Commission of Jurists

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SUMMARY AND RECOMMENDATIONS PRESENTED BY THE RAPPOREUR OF THE SEMINAR

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We have met here at the invitation of the Inter-Parliamentary Union, the Association for the Prevention of Torture (APT) and the International Commission of Jurists (ICJ). Our topic was law and justice, a subject that is central to democracy. It has often been said that the separation of powers prohibits parliaments and their members from intervening in cases of abuse of due process of law. The seminar gave us the opportunity to explore this issue and see to what extent we, as parliamentarians, do in fact have a role to play to ensure due administration of justice, and - most importantly - the independence and impartiality of the judiciary.

Over the past three days we have joined with experts to measure the scope of fundamental rights such as the right to liberty and freedom from arbitrary detention, the prohibition of torture, and the right to a fair trial before an independent and impartial tribunal. These are all enshrined in the Universal Declaration of Human Rights and the major international and regional human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights, the American and the European Conventions on Human Rights and a number of United Nations declarations and principles.

Torture, one of the most serious human rights violations, has figured prominently in our discussions. As we all know, the absolute nature of the prohibition of torture has been increasingly called into question in the aftermath of 11 September 2001. Today's challenges include outsourcing of torture, rendition flights, secret detention centres, and the violation of the principle of non-refoulement. They include the practice of seeking diplomatic assurances that a person will not be tortured if sent back to a country where torture prevails, and the suggestion that some measure of torture should be allowed for security reasons. We firmly state that such practices are unacceptable. If we are to protect democracy in our countries, we need to guarantee respect for certain principles which are non-negotiable, and the prohibition of torture is one of them. We state that torture is unacceptable under any circumstances and in any situation. As parliamentarians, we must ensure that the necessary procedural safeguards are put in place to prevent torture at all times. We pledge to do everything within our power to ensure that our parliaments, if they have not yet done so, ratify the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol which provides for visiting mechanisms to prisons and detention centers. We must also adopt the necessary implementing laws. We must ensure that torture is defined as a crime in our criminal codes, that the appropriate punishment is meted out to torturers and that testimony obtained under duress cannot be used as evidence in court.

We have drawn inspiration from the practice of some of our colleagues who make regular visits to prisons and detention centers. These visits are instrumental in ensuring that both conditions of detention and procedural safeguards are such as to prevent torture and other forms of cruel, inhuman and degrading treatment from occurring. More generally, visits help ensure that detainees are held in decent conditions. We also believe that a well-trained police force is unlikely to resort to torture and more prepared to use legal means to obtain information. Our parliaments should ensure that resources are provided for such purposes.

We have heard much about fair trial guarantees, enshrined in Article 14 of the ICCPR. Some of the relevant principles have been eroded since 11 September 2001, becoming subject to a trade-off with security issues. Basic fair trial guarantees must be maintained even in states of emergency, and rights such as habeas corpus cannot be derogated from under any circumstances. Only very limited exceptions are permitted to the right to a public hearing. Defendants and their counsel must be treated on an equal footing with the prosecution; they must be entitled to question the source and the significance of evidence held against them. The right to equal access to courts must be guaranteed at all times.

Only an independent and impartial judiciary will ensure that justice is done and seen to be done. Too often the judiciary is subservient to the executive branch and corruption in the judiciary is a widespread phenomenon occurring in countries throughout the world. We have noted the harmful role that private business sometimes plays. The reasons for the corruption of judges and prosecutors are manifold. Inadequate training, poor salaries and the fear of the executive are some of them.

The judiciary can and must be organized in a way that ensures the independence of judges. The executive must not be involved in their election or appointment. Only an independent body set up by the judiciary itself should be entitled to remove them from office. Judges must be properly trained and able to resist pressure whatever its source.

We also discussed military tribunals which, in some countries, are hearing cases which should not fall under their competence. Under international law, military tribunals are competent only to hear cases concerning military personnel and offences strictly related to military matters. Their procedures must respect the fair trial guarantees contained in Article 14 of the ICCPR. Military tribunals should never judge civilians or hear cases of human rights violations.

We have also debated the specific requirements of juvenile justice. Child offenders should be treated as the victims that they are. Their incarceration only compounds the problems. Prevention, protection and participation of children are the key words in this field. Rehabilitation, conducted by multi-disciplinary teams, working on the social, psychological and health aspects of the problem is crucial. Questions were also raised about the age of criminal responsibility. The age for which most States had opted was 14 or 15, and a lower age should be considered inappropriate.

Impunity is a problem in many of our countries, especially those with a history of civil conflict and war. In recent years, the fight against impunity has made major strides. As one of the participants said, only 20 years ago it was inconceivable that human rights violators - even heads of State - could be brought to justice. Today, the worst human rights violations - genocide, war crimes, crimes against humanity - are outlawed. Some States apply universal jurisdiction for such crimes and they are being tried by international courts, most importantly the International Criminal Court (ICC). We urge all parliaments that have not yet done so to ratify the Rome Statute of the ICC and to adopt the necessary implementing legislation. It is our duty to fight impunity in all its forms at the national level, in its judicial, political, moral and historical dimensions. We firmly believe that nothing of value can be built if the past is ignored and forgotten.

The forms and purposes of punishment and the execution of sentences also figured in our debates. Prisoners continue to have human rights while in prison, apart from the right to liberty, and must be treated humanely. We consider that the purpose of punishment, apart from reflecting social disapproval and serving as a deterrent, must be to rehabilitate convicts and to integrate them back into society. One means to this end is community work and such forms of punishment are applied, for example, in Cyprus, Botswana and South Africa for certain types of offences.

Our prisons must provide humane conditions of detention. This is essential if prisoners are to be rehabilitated. Debate on this issue suggested that the great majority of our countries do not meet this criterion. Almost all our countries suffer from prison overcrowding which in some cases is severe. To address this problem, some countries have resorted to privatization of prisons. The majority of participants argued that prisons are an integral part of the criminal

justice system and that it is therefore the sole responsibility of the State to enforce prison sentences, a responsibility which cannot be outsourced to private companies. This does not mean that some prison services, like catering, medical care or vocational training cannot be supplied by private companies. More generally, the reasons for overcrowding in prisons merit further investigation as they may be symptoms of deeper problems in society.

We heard the plea of a panellist for us, as legislators, not to impose mandatory minimum sentences. Such sentences detract from the discretionary powers which judges require to award sentences tailored to each individual case.

We oppose the death penalty as the ultimate cruel and inhuman punishment and call on all States that have not yet done so to abolish it or, at least, to adopt a moratorium on the execution of sentences.

We also raised problems related to administrative detention. More particularly, we discussed the detention of mentally ill persons, and of asylum seekers and migrants. Receiving countries increasingly tend to consider asylum seekers and migrants, especially when they come from certain countries, as criminals or potential criminals and treat them accordingly. While countries must of course determine their own immigration policies, they are also bound to comply with fundamental human rights norms. Our panellist on the subject referred in this regard to the Handbook for parliamentarians on international refugee law, published by the IPU and the UNHCHR in 2001, which contains those norms and provides recommendations. We note with concern that the current immigration policies of receiving countries too often result in those who are most needy and vulnerable being the ones who are the least assisted. We consider the situation to be grave enough to recommend that the IPU organize a seminar on this particular topic.

Without an effective justice system, human rights cannot be guaranteed. Not infrequently, the executive branch imposes itself not only on the judiciary but also on our parliaments, sometimes to the detriment of the basic interests of the people we represent. We strongly affirm that as parliamentarians, we have the responsibility to ensure that there is an independent judiciary and that fair trial guarantees are respected. We have the constitutional powers to do so. As legislators, we must build the required legal framework rooted in international and regional human rights standards. We recommend particularly that the guarantees enshrined in Article 14 of the ICCPR be incorporated in our criminal procedure law. However, laws alone do not suffice. The best law is worth no more than the paper it is written on if it is not implemented. Our oversight function allows us to ensure that laws are enforced and that our justice systems put the relevant international and regional human rights standards in the field of justice into practical effect. We have the power to set up commissions of inquiry to look into systemic failures in the justice systems. We have the power to publicly question the executive and administrative authorities if we fear that there is abuse of due process of law in a particular case. The principle of the separation of powers is a system of checks and balances, and our duty is to ensure that the laws which we adopt meet the requirements of international human rights law and that they are properly implemented.

Lastly, we thank the President of the United Nations Human Rights Council, Mr. Luis Alfonso de Alba, for the time he took to inform us of the work that is at present under way to make the successor of the former Commission on Human Rights a truly effective human rights body, and to answer our questions in this respect. We urge the Inter-Parliamentary Union to explore ways in which way parliaments and their members can best be associated with and contribute to the Council's work. ■