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FEAR AND THE LAW IN LATIN AMERICA

„The first and great commandment is, Don't let them scare you". Elmer Davis (1890—1958)

1. *The frightened ones and their fear*

In countries shaken by political instability — normal source of military dictatorship — fear is one of the most outstanding causes to obstruct the working of law.

As it paralyzes individual human behaviour, fear also paralyzes certain social behaviours, particularly those apt to put in action the due process of law when is at stake the relation between rulers and ruled, the mighty and the mean, the have and the have not, the Establishment and the Dissenter.

Who is afraid of power? Obviously, the powerless, those far from the protective radiations of power, that is the bulk of population. Among them are those who suffer economic oppression or deprivation from domestic landowners or local big business and those who are abused for their intention to participate in political life or in labour union activities. The educated segment of society has their scared ones: teachers, professors, artists, scientists and other members of the *intelligentsia*, bishops, priests, nuns, religious and civic leaders committed to the poor and to human rights; even judges and journalists. Why are they afraid? Simply because to challenge the absolute power of dictatorships — and sometimes that of their economic allies punished in many Third World countries with murder, torture and prison. University students, newsmen, political dissidents, religious leaders, human rights and labour union activists are murdered, tortured or imprisoned for long periods without any kind of process. Thousand are murdered with premeditation and thousand murdered by

„mistake” or uncontrolled excess of murderous zeal. Thousand are murdered officially and thousand crypto-officially; some by apparent Government killers and some by unconvincingly disguised Government killers. Death is applied not like *ultima ratio* of the struggle for power, but like the first, superficial, practical and most available political resource.

The rulers usually tell their audiences that they act in defense of National Security, Sovereignty (never remembered when multinational corporations interfere in fundamental economic decisions), Law and Order and West Christian Civilization (forgotten when bishops, priests and nuns are murdered because of their basic fidelity to the Gospel's values). In fact, they have organized — consciously or unconsciously — an informal and invisible Ministry of Fear much more real than Mr. Graham Greene's imaginary creation.

This Ministry of Fear fabricates its own specific products. It produces tamed political parties that pretend to believe in „partial” or „limited” democracy under military rule. It produces docile judges who do not „meddle” in the forbidden areas of society: reservations of arbitrary power and lawless force. It produces bishops and priests confined to „spirituality” without any active relation with earthly conflicts and issues like political murder, torture and economic oppression. It produces newspapers and mass media that show an unreal, mutilated or expurgated version of internal and foreign affairs. It produces „tidy” universities devoted to the technical and ideal aspects of reality, in whose class rooms the real conflicts of society and the burning issues of politics and economics are never mentioned.

2. Ways of Fear

2.1. Absolute Power

The *Coup d'Etat* extinguishes democratic government and establishes a military dictatorship. That implies vanishment of Legislative Power, Parliament or Congress. From then on the laws are not made any more by people's representatives, elected politician under the influence and the control of their fellow citizens. Now the laws are made by the military in power. The idea of division of power, the idea of check and balance, the possibility of a parliamentary investigation on executive activities; all this is vanished too.

Also disappear independence of the Judiciary. The military and only the military appoints all judges.

The *Coup d'Etat* is made — rhetorically — to terminate a „faulty” democracy in order to establish a „true” democracy, but as a matter of fact the military government tends inexorably to become an absolute government. And Lord Acton's axiom works strictly: „Power corrupts and absolute power corrupts absolutely”. An unchecked, uncontrolled power is a sure source of fear.

From its very beginning law is distorted and its credibility entirely damaged. Because it springs not from an independent legislative power, separated branch of a threefold government in which every department

checks and balances the others, but from an unitarian selfelected government, not responsive to the public, that makes and executes all laws and nominate all judges.

Written in the 18th Century, the classic quotation of Montesquieu is utterly pertinent in many countries of the Third World:

„... In Turkey, where these three powers are united in the Sultan's person, the subjects groan under the most dreadful oppression" (*The Spirit of Laws*, Book XI, 6).

No doubt: *dreadful oppression* is the worst climate for the working of law.

2.2. Public and Private Law

The paralyzing effect of fear operates principally on the public branch of law; less intensely on the private one.

At the same time that signing a petition of *habeas corpus* is a dangerous action for any lawyer in any of these countries, the commercial or civil processes concerning promisory notes or mortgages between private individuals or merchants are usually as normal as in any democratic State.

The law affecting relations that challenge the established equilibrium of power (i.e., the dictatorship in itself, or the power of multinational corporations or the economic oppression exerted by domestic big business, etc.) is hindered and jeopardizes the life, physical integrity and freedom of those involved in the pertinent controversies. Instead, the law concerning relations in which there is no danger to alter the present balance of power, tends to work normally.

Sometimes, the dictatorships' rulers — and their accomplices, Ministers, Ambassadors — exhibit the private law section as a proof of a good standard of the due process of law. However, they systematically conceal the dark side of the picture. All processes concerning political liberties, the right to elect government personnel, the right to assemble, the freedom of speech and press, the right against unreasonable search and seizures, the right to a speedy and public trial, the right against cruel or unusual punishment, the right concerning labour unions — in brief, all the crucial issues of the due process of law, are quenched or gravely hurt.

This deterioration arises, sometimes, from legal dispositions aimed to neutralize certain freedoms or rights, but other times from the actual and present danger of government retaliation against any one who takes legal action invoking the protection of these liberties or freedom. That relation does not always adopt an open form; not seldom is it executed by unofficial or crypto-official members of the organs of the State. In addition, the degradation of the public law often results from the restrictive construction made by pleasing or frightened judges.

2.3. Military Tribunals

One specific factor of fear is the frequent subjection of civil citizens to martial courts.

Riots strikes, „revolutions“, are pretenses to put thousands under military discipline and by this way under military courts. Although the famous G. Marxos dictum („Military justice is to justice what military music is to music“) may seem in certain cases exaggerated, there is no doubt that the due process of law is severely injured every time that a civil person is taken from the civil courts and submitted to the military ones.

I have got a defined impression, through my personal experience as International Observer on the military trials in Chile in 1974, that in some Third World countries subjection of citizens to martial courts jeopardizes the rights to be informed of the accusation, to be confronted with the witnesses against them, to obtain witnesses in their favor, and to have assistance of independent counsel for their defense.

Whatever limited or approximated acts of justice could be done by martial courts, the risk to be subjected to them is a cause of reasonable fear. In this case, not a fear that paralyzes legal action but a *fear of law*, a fear of a menacing, alien law.

2.4. Emergencies

Constitutional emergencies (*Etat de Siege*, curfew, war zone — without real war —, emergency zone, etc.) often mentioned in Constitution and laws, were technically established to face uncommonly abnormal situations, in which restrictions of liberties and freedoms are permitted. These restrictions, very short in time and very exceptional in nature, are intended to give additional strength to the executive power in front of transitory disorders or crisis.

However, constructed in accomodating interpretations by helping judges and „jurists“, and in the hand of authoritarian governments, the clauses of emergency have become the normal — not the abnormal —, the permanent — not the transitory — way of legal life. There are countries that in thirty years have lived less than five without *Etat de Siege*. Chile was still under the State of Emergency seven years after the *Coup d'Etat*.

During these peculiar situations the executive power is entitled to suppress physical freedom and to imprison persons without criminal charges.

In such cases of very common occurrence in Third World countries, the Bill of Rights, although written in Constitutions, lost any possible relevance. The constitutions say that nobody will be imprisoned without due process of law, but everybody sees that political dissenters or labour union leaders remain incarcerated during years without any kind of legal accusation.

This lack of practical relevance of the fundamental rights creates a feeling of indifference or apathia toward legal affairs that, combined with the fear to power hardly allow the working of law.

3. Redress

It is obvious that improving this situation depends on the change of political conditions. To consolidate democratic government, with alterna-

te political parties, respect to minorities, checks and balances of separated powers, elected members of the executive and legislative, free criticism of the public officials, really operating fundamental rights, military under the authority of democratic leaders, will allow to start a defrosting period in which the paralyzing fear will begin to loose.

In the meantime, the international frame will be extraordinarily important to attenuate harsh conditions in many countries.

On one hand, the advance of International Law in matters affecting human rights and crimes against humanity, must be pointed out. In this connection, significant progresses must be stressed like the Convention draft of the Organization of American States (OAS) defining torture as an international crime, and the plan, proposed by Princeton University Professor Richard Falk, aimed to establish an international tribunal for the trial of dictators under the authority of United Nations(1).

On the other hand, international action of democratic states and humanitarian institutions must be mentioned. To isolate dictators, politically as well as economically, has a decisive part to play to reduce distressing internal conditions. Unfortunately, this solidarity is frequently interrupted for economic opportunism, ranging from giving up to multinational corporations' pressure to greedy exports of armaments to dictatorial governments. In every democratic country the human rights issue should be emphasized in such a way that its superiority in relation to balance of payment were clearly shown.

Vigilant international institutions like United Nation's Committee on Human Rights, OAS Commission on Human Rights, Red Cross, International Commission of Jurists, *Justitia et Pax* have remarkable merit and practical effect. In the same line, international personalities, like Mr. Sean McBride, and religious leaders, like Sao Paulo Bishop, Paulo Evaristo, Cardinal Arns, have decisive influence to save lives or conquer freedoms.

International solidarity is a powerful stimulus to those that are internally trying that justice and law may overcome. It makes them feel in worthy and operating partnership. Having the efforts of those inner fighters a multiplying effect on their fellow citizens, international solidarity has then a tremendous impact as a mean to push forward the defrosting line and to loose the paralyzing fear. When people's fear have faded away ruler's fear will remain. As John Steinbeck once pointed out: „Fear corrupts, perhaps the fear of a loss of power”. Final days of dictators are not better or less violent than the first ones. Then, in the difficult transit from autocracy to democracy, international solidarity will be too an invaluable support.

4. The Educational Side

The two main issues of Third World Constitutional Law are, on one hand, the difficult enforcement of human rights in these countries; and, on the other hand, the interruption of constitutional *regimes* by military dictatorship.

(1) „Le Monde diplomatique”, Paris, janvier 1980, p. 8.

Both are interconnected. Violations of human rights are like the natural result of military dictatorship's operations. Reciprocally, the human rights enforcement lessent the risk of military usurpation of the political power.

One of the deepest and most efficient ways to obtain human rights enforcement is that performed by educational and cultural means. That's why it is constitutionally pertinent to the following project concerning South America.

There is no more important educational and cultural issue in Latin America than the teaching and inculcation of the value of human condition and the respect due to the intrinsic dignity of the human being. Even literature, being such an elemental and widespread need, is not prior to human rights.

What has appeded during the last decade in a large part of the region is eloquent enough and there is no need to emphasize it.

This frightful experience gives the reason to create a Center for the Human Rights Educations and Culture in South America under the UNESCO's responsibility.

The Center would be limited to South America because the problems of Central America, the Caribbean Islands and Mexico have different shades and it will be convenient to make a concentrated effort on a smaller area.

The Center's goals would be:

(a) to propagate the knowledge of, and the respect to, human rights and all matters concerning the Universal Declaration of Human Rights;

(b) to cotribute to the creation of a colective conscience on the prior significance of human rights in all educational levels and ways, in all media and aspects of cultural communication.

To attain these goals the Center should:

(a) try that subjects and courses concerning human rights may be included in elementary and secondary schools curricula, in the University studies, especially in Law Schools and Social Sciences School teaching;

(b) help to organize seminars, symposia, rond tables and other academic meetings concerning human rights, both at the regional and the national level;

(c) promote the personal participation of political and religuous leaders and cultural personalities in the inculcation of human rights and the Universal Declaration of Human Rights;

(d) form in each country a National Commission for Human Rights Education and Culture, including prominent educational and cultural personalities, jurists and leaders of the human rights movements;

(e) hold permanent relations and information exchange with the diplomatic officers in charge of the human rights issues at the embassies in the South American countries;

(g) hold a library and a documentation center on the enforcement of human rights in the area.

A Director, with the help of a few employees, would be in charge of the Center.

The Director would be chosen among South American personalities with a human rights background.

The Center would be located in a South American city frequently and easily connected with the entire area, as Buenos Aires and Rio de Janeiro are.

РЕЗИМЕ

СТРАХ И ПРАВО У ЛАТИНСКОЈ АМЕРИЦИ

Страх је оруђе владавине опресивних режима, каквих је много у Латинској Америци. Писац разматра начине застрашивања које такви режими примењују. Апсолутна моћ је извор страха. У области јавног права ова се више осећа него у приватноме праву, чије се несметано функционисање наводи као аргумент при одбрани диктатуре. Војни судови и ванредне мере, које уводе диктаторски режими, по правилу су обележје њиховог режима страха.

Писац сматра да проблем диктатуре треба да буде интернационалан. По њему су два главна проблема уставног права у државама трећег света: тешкоће у остваривању људских права и прекидање уставног режима војном диктатуром. Правничко образовање у области људских права треба да помогне превазилажењу поменутих проблема.

RÉSUMÉ

LA TERREUR ET LE DROIT EN AMÉRIQUE LATINE

La terreur est un instrument des régimes oppressifs, bien nombreux en Amérique Latine. L'auteur examine les formes de la terreur que ces régimes pratiquent. Le pouvoir absolu est la source de la terreur. Dans le domaine du droit public il est plus présent qu'en droit privé, dont le fonctionnement sans entraves est souvent cité comme argument pour justifier la dictature. Les tribunaux militaires et les mesures exceptionnelles que les régimes dictatoriaux instaurent, sont en règle générale les signes de leur régime de la terreur.

L'auteur est d'avis que le problème de la dictature devrait être posé sur le plan international. Il pense que deux problèmes cruciaux s'ouvrent devant les États du tiers monde: les obstacles à la réalisation des droits de l'homme et la suspension du régime constitutionnel par la dictature militaire. L'enseignement dans le domaine des droits de l'homme devrait contribuer à surmonter ces deux problèmes.