CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

ATTACKS ON JUSTICE

THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS

10TH EDITION

EDITOR:
MONA RISHMAWI

WITH:
NADJA H.N.I. HOUBEN
CARLOS LÓPEZ HURTADO
GREGORY J. MAYNE

GENEVA
SWITZERLAND

JANUARY 1999-FEBRUARY 2000

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

The Centre for the Independence of Judges and Lawyers (CIJL), is a component of the International Commission of Jurists (ICJ). Established in 1978, the CIJL is dedicated to promoting the independence of the judiciary and the legal profession throughout the world. The CIJL bases its work on the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers, and it was instrumental in their formulation and adoption. In addition to issuing *Attacks on Justice*, the CIJL:

- intervenes on behalf of judges and lawyers who are harassed or persecuted;
- alerts a network of sources seeking their intervention on behalf of persecuted colleagues;
- sends observers to the trials of judges and lawyers;
- sends missions to countries to examine questions related to the independence of the judiciary and legal profession;
- cooperates with the UN Special Rapporteur on the Independence of Judges and Lawyers;
- organises seminars to promote the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers; and
- publishes a *Yearbook* containing articles and documents on the independence of judges and lawyers.

THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)
P.O. Box 216
81 A Avenue de Châtelaine
CH-1219 Châtelaine
Geneva - Switzerland
Tel. (+ 41 - 22) 979 38 00
Fax (+ 41 22) 979 38 01
E-mail: info@icj.org
www.icj.org

IMP. ABRAX F-21300 DIJON-CHENÔVE

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

ATTACKS ON JUSTICE

THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS

JANUARY 1999 – FEBRUARY 2000
GENEVA - SWITZERLAND

10th EDITION

EDITOR
MONA A. RISHMAWI

WITH
NADJA H.N.I. HOUBEN
CARLOS LOPEZ HURTADO
GREGORY J. MAYNE

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS CATALOGUING IN PUBLICATION DATA

TITLE:	ATTACKS ON JUSTICE: THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS
PERSONAL AUTHOR:	RISHMAWI, MONA A. (EDITOR)
CORPORATE AUTHOR:	CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL) OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)
PLACE OF PUBLICATION:	GENEVA
PUBLISHER:	CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL) OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)
ADDRESS:	P.O. BOX 216, 81 A, AVENUE DE CHATELAINE, CH-1219 CHATELAINE/GENEVA, SWITZERLAND
TELECOMMUNICATIONS:	TEL: (41 22) 979 38 00; FAX: (41 22) 979 38 01; E-MAIL: INFO@ICJ.ORG
DATE OF PUBLICATION:	JUNE 2000
PAGES:	504 PAGES
ISSN:	92 9037 091.2
FREQUENCY:	ANNUAL
STARTED:	1990/91
LANGUAGE:	ENGLISH
INDEX:	HUMAN RIGHTS VIOLATIONS / JUDGES / JUDICIAL SYSTEM / JUDICIARY / LAWYERS
FREE TEXT:	A YEARLY REPORT PUBLISHED BY THE CIJL. IT DOCUMENTS HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS THROUGHOUT THE WORLD.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

A wide network of sources provide the Centre for the Independence of Judges and Lawyers (CIJL) with information in the preparation of this report. The CIJL would like to particularly acknowledge and thank the following:

Concerning Africa: Professor Salif Yonaba (Burkina Faso), Mahamat Hassan Abakar (Chad), Ligue tchadienne des droits de l'homme-LTDH (Chad), Yangambi Firmin Libote (Congo, Democratic Republic of), Association de défense des droits de l'homme-ASADHO (Congo, Democratic Republic of), Mr. Loum (Ivory Coast), Ligue ivoirienne des droits de l'homme-LIDHO (Ivory Coast), Kenyan Section of the International Commission of Jurists (Kenya), Constitutional Rights Project (Nigeria), Justice Kayode Eso (Nigeria), Justice Arthur Chaskalson (South Africa), Amin M. Medani (Sudan), The Arab Centre for the Independence of the Judiciary and the Legal Profession -ACIJLP (Sudan); Ligue togolaise des droits de l'homme (Togo);

Concerning Asia and the Pacific: Justice Michael Kirby (Australia), Melinda Ching (Australia), Human Rights in China (China), Yu Ping (China), Gladys Li (Hong Kong Special Administrative Region), Mr. P.Y. Lo (China and Hong Kong Special Administrative Region), Justice Michael Kirby (Hong Kong Special Administrative Region), Rajeev Dhavan (India), Karnataka State Commission of Jurists (India), Human Rights Alert (India), Fali S. Nariman (India), Indonesian Legal Aid Foundation (Indonesia), Indonesian Institute for Independent Judiciary-LeIP (Indonesia), Japan Federation of Bar Associations (Japan), Dr. Yozo Yokota (Japan), Dato' Param Cumaraswamy (Malaysia), Janelle Saffin (Myanmar/Burma), Human Rights Commission of Pakistan (Pakistan), Justice John Dowd (Sri Lanka), Lord William Goodhart (Sri Lanka), Tamil Centre for Human Rights (Sri Lanka);

Concerning Europe: International League for Human Rights (Azerbaijan), Eldar Zeynalov (Azerbaijan), Vera Stremkovskaya (Belarus), International League for Human Rights (Belarus), International Helsinki Federation for Human Rights (Belarus), Helsinki Committee for Human Rights in Serbia (Federal Republic of Yugoslavia), Association of Judges of Serbia (Federal Republic of Yugoslavia), Karinna Moskalenko (Russian Federation), Human Rights Foundation of Turkey (Turkey), Human Rights Association (Turkey), Paul Richmond (Turkey), Lord William Goodhart (United Kingdom), British Irish Rights Watch (United Kingdom), JUSTICE (United Kingdom), The Royal Faculty of Procurators in Glasgow (United Kingdom), Guernsey Bar Council (United Kingdom), The Law Society of Scotland (United Kingdom);

Concerning the Americas: Federico Andreu Guzman, ICJ Legal Officer for Latin America and the Caribbean (Latin America), Comisión Andina de Juristas-CAJ (Andean region), Centro de Estudios Legales y Sociales-CELS (Argentina), Professor Dalmo de Abreu Dallari (Brazil), Comisión Colombiana de Juristas (Colombia), Professor José Zalaquett (Chile), Fundación Mirna Mack (Guatemala), Comisión Mexicana de Defensa y Promoción de los Derechos Humanos-CMDPDH (Mexico), Asociación Pro Derechos Humanos-APRODEH (Peru), Comisión Andina de Juristas-CAJ (Peru), Fundación Ecumenica por el Desarrollo y la Paz-FEDEPAZ (Peru), Programa Venezolano de Educación y Acción en Derechos Humanos-PROVEA (Venezuela), Jerome Shestack (United States of America), William Butler (United States of America), Justice James Apple (United States of America), American Bar Association (United States of America);

Concerning the Middle East and North Africa: Syndicat national des avocats algériens (Algeria), Mr. Bouchachi (Algeria), Tahar Hani (Algeria), Association internationale des avocats pour la démocratie (Algeria), Egyptian Organization for Human Rights (Egypt), Arab Center for the Independence of the Judiciary and the Legal Profession (Egypt), Organization for Defending Victims of Violence-ODVV (Iran), Elahé Sharifpour-Hicks (Iran), Professor Ruth Gavison (Israel), Adalah (Israel), Farouk Al-Kilani (Jordan), LAW (Palestine), Palestinian Centre for Human Rights (Palestine), Christian Grobet (Tunisia), Olivier Cramer (Tunisia), Comité pour le respect des libertés et des droits de l'homme en Tunisie (Tunisia).

The CIJL also relied on the work of other international organisations such as the Central and East European Law Initiative, Amnesty International, the Council of Europe, the Danish Centre for Human Rights, Fédération internationale des ligues des droits de l'homme, Human Rights Internet, Human Rights Watch, Inter-American Commission on Human Rights, International Bar Association, Lawyers Committee for Human Rights, Organisation mondiale contre la torture.

The CIJL acknowledges with thanks the support given throughout the year to this report by the entire ICJ staff. Special thanks are due to Karin Stasius, CIJL Administrative Assistant, for her outstanding work and assistance.

We would like to thank Ingrid Tasso for her hard work and dedication in writing drafts of several of the chapters for this edition. We would furthermore like to thank Annabelle Béjenne for preparing two chapters at a very late stage. Special thanks are due to Jane McCullough for tirelessly employing her editorial skills to put this publication into its final shape.

INTRODUCTION

It has become a tradition that the Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) produce an annual account of the measures taken during the year against individual judges or lawyers or which undermine the judiciary and the legal profession as a whole. This is our tenth annual report on this theme.

This year, the report mainly documents events that took place during 1999 and up to February 2000. In some cases where the situation substantially evolved during the drafting of the report, changes occurring until May 2000 have been included.

The report is indeed a bleak picture. Judges and lawyers who are meant to be the guardians of the Rule of Law, justice, and the fundamental right to defence were themselves often subjected to intimidation and persecution for carrying out their professional duties. Attacks were both violent and subtle ranging from killings and disappearances to dismissals and removal of judicial discretion. State agents, paramilitary groups, militias, as well as armed opposition groups, committed such attacks.

During the period under consideration, at least **412** jurists suffered reprisals in **49** countries for carrying out their professional duties. Of these, **16** were killed, **12** disappeared, **79** were prosecuted, arrested, detained or even tortured, **8** were physically attacked, **35** were verbally threatened and **262** professionally obstructed and/or sanctioned.

MAJOR TRENDS DURING 1999

VIOLENCE AGAINST JUDGES

The killing of jurists continued in many countries. In Colombia at least 31 judges and prosecutors were the target of physical attacks, threats and intimidation. More than 100 individuals associated with the administration of justice were also the subject of harassment and intimidation, in particular, those assisting in investigations.

There are numerous allegations of threats, intimidation and attacks on judges and prosecutors in several countries. This fact was highlighted by the report of the visit carried out by the UN Special Rapporteur on the Independence of Judges and Lawyers to Guatemala. The report was

released for the annual session of the UN Commission on Human Rights, which was held from 20 March-28 April 2000.

In Côte d'Ivoire, a judge had to flee the country as a result of threats which came after he issued a nationality certificate to a well known opposition figure who was a candidate in the presidential elections.

Attacks against Lawyers

Lawyers too are frequently subjected to attacks and intimidation. In Sri Lanka two internationally respected lawyers were brutally murdered in 1999. The lack of an independent inquiry into the murders of leading human rights lawyers, Patrick Finucane, who was killed in 1989, and Rosemary Nelson, who was killed in 1999, in Northern Ireland is a cause for deep concern, particularly considering the suggestion of possible collusion by the Royal Ulster Constabulary (RUC) in these killings.

The right of defence is seriously undermined in several countries. In Belarus, the government controlled Collegium of Lawyers has the competence to issue and revoke licenses for lawyers. Lawyers who defend persons who oppose the government or criticise the justice system can be arrested or have their license revoked. In Azerbaijan lawyers with a license who are not members of the government controlled Collegium are prohibited from representing clients in criminal cases.

In Iran, lawyers who vigorously defend their clients are frequently threatened. Some defence lawyers were detained because they protested against the denial of their right to call witnesses during the trial. Although trials are said to be open to the public, foreign observers, including the ICJ and CIJL, were not permitted to attend.

Lawyers in Brazil who appear against powerful landowners or defend the indigenous population are often subjected to intimidation and harassment. In Peru, lawyers face serious limitations while litigating before military courts. The ability of Israeli or Palestinian lawyers to visit their clients in Israeli jails is often restricted. Lawyers are also harassed in Egypt, Tunisia and Sudan.

In Malaysia there has been a marked increase in threats by the government to the institutional autonomy of the Bar and the relationship between the Bar and judiciary is strained. Contempt proceedings against lawyers constitute a serious obstacle to their ability to render their services freely.

In India, some 3,500 lawyers were arrested for several hours on 21 December 1999, and later released. Approximately 33 lawyers were injured when the police responded with tear gas and a cane charge to lawyers who allegedly attempted to force their way through road blocks.

The lawyers took to the streets to protest two proposed legal changes. The first relates to a suggestion that advocates would be subjected to an assessment every five years before their licence would be renewed. The lawyers considered that the mechanism for evaluation would not be sufficiently independent. The second related to allowing foreign firms and individuals to practice in India in accordance with the rules of the World Trade Organisation.

Impunity

In several countries, either law or practice inhibits prosecutors, judges and lawyers from pursuing justice, whilst granting impunity to certain State officials, particularly members of the military. Brazil, Guatemala and Peru constitute examples of this phenomenon. In other countries, like Algeria, members of non-state armed groups are also granted impunity under broad amnesty laws.

The undue extension of military courts' jurisdiction to try common crimes committed by members of the military or police results, most of the time, in impunity for the perpetrators. This happens, in particular, in Brazil, Colombia, Mexico, Peru and Venezuela.

Although Argentina took some serious steps towards restoring the power of the judiciary to deal with past human rights violations, the judiciary remained subject to political influence. In Chad, there are no signs of adequate action being taken against members of the security forces or their leaders who commit human rights violations. Charges against the former Chadian President, Hissene Habre, for committing gross violations of human rights while in power were brought before a court in Senegal, where he currently resides.

The ability of Chilean courts to consider cases against General Pinochet continued to evolve. In some cases involving enforced disappearances, the Supreme Court put aside the amnesty law allowing investigations and prosecutions to proceed.

The lack of an adequate system of justice leads to impunity in Turkey. The European Court of Human Rights frequently ruled against Turkey for its inadequate administration of justice. The CIJL sent a mission to the country in November 1999, and is scheduled to produce a report on its findings in June 2000.

Members of the judiciary in Israel have tended to acquiesce in government arguments of national security in sensitive cases. In Malaysia, the independence of judges and lawyers is seriously threatened with regard to politically or economically important cases. The government uses

restrictive acts and politically motivated prosecutions to quell opposition. This also creates a culture of self-censorship enabling the government to act with impunity.

Exceptional Courts

Exceptional systems of justice or military courts that try civilians also undermine judicial power. In Egypt such courts continue to try civilians, including lawyers, with little guarantee for defence rights.

In the Democratic Republic of Congo, the military court tries civilians. The court is composed of military officers. Its judgments are not subject to appeal. Two lawyers were tried before this court during 1999. They were accused of treason in time of war because they represented an American mining company. They were released, after much international pressure.

Civilians are tried before military courts and State Security Courts in the Palestinian Autonomous Areas. An ICJ/CIJL mission to the territory in January 2000 called on the Palestinian Authority to abolish the State Security Courts and to limit the jurisdiction of military courts to trying military personnel for offences committed while on duty.

After considering Chile's report in March 1999, the UN Human Rights Committee recommended that Chilean law be amended so as "to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature". Military courts in Peru try civilians too.

In Ecuador, a conflict of jurisdiction between military courts and civilian courts is often resolved in favour of the military courts. Although there was some improvement in Colombia, as the special court system that tries rebellion-related offences now reveals the identity of judges, the identity of prosecution witnesses may still be concealed.

Inadequate Method of Judicial Selection

The inadequacy of the selection process of judges in Kenya was recently demonstrated by the President's selection of the country's Chief Justice. Contrary to the legal requirements, the current Chief Justice was not a practising advocate or sitting judge at the time of his appointment. Moreover, he had previously been dismissed twice from judicial office on disciplinary grounds. In his capacity as Deputy Public Prosecutor, he was active in prosecuting government critics.

Judges in Pakistan were ordered to take a fresh oath of allegiance to the military-imposed Provisional Constitutional Order. The Chief Justice and approximately 20 judges who refused to take such an oath were dismissed.

A white paper drafted in July 1999 suggesting the removal of the distinction between magistrates and judges in South Africa created much debate. The paper recommended that magistrates become eligible for judicial office. The paper was greeted with some reservations due, *inter alia,* to the perceived lack of appropriate qualifications of magistrates for judicial office and concerns about funding.

The system of selecting judges through popular elections in some states in the United States of America has been the subject of debate amongst lawyers in the country. The American Bar Association supports merit selection.

Lack of Security of Tenure

In a number of countries the lack of security of tenure for judges severely affects their independence. In Peru approximately 80% of all judges are working on a temporary basis. In other countries such as Mexico, Guatemala and Ecuador judges are the subject of periodic evaluation and confirmation making them more vulnerable to political and other improper influences.

When some judges in Serbia tried to form an association of judges, several were removed. Threats of removal continued against the remainder.

Corruption and Inefficiency

The CIJL considers that as corruption and inefficiency undermines the Rule of Law, they should be combated with proper respect for the Rule of Law and judicial independence. The report raises the concern that the existence of corruption in the judiciary as well as issues of inefficiency are increasingly used by some governments as a pretext to attack the judiciary.

In Brazil, there were allegations of misappropriation of large sums of money by certain members of the judiciary. This created a wide debate on the allocation of resources. The Senate appointed a commission of inquiry into alleged irregularities by the judiciary. The final report of the Commission highlighted corruption, nepotism, irregular hiring of personnel and other serious deficiencies. It also stressed the need for reform. The work of the Commission was received with scepticism by judges and lawyers. Charging that the report contained many generalisations and

exaggerations, they contended that it was politically motivated. They claimed that the Commission's report contributed to the discrediting of the judiciary in the public eye.

During the year at least 229 judges were suspended from their posts in Venezuela without being afforded due process of law. Some of them were later dismissed on allegations of inefficiency or corruption.

In the Russian Federation, courts are often dependent on funding from local governments, increasing the risk of improper political influence. The lack of resources is so overwhelming that it prevents the judiciary from working properly. Long delays in trials paralyse the judiciary in Bolivia. Corruption is also allegedly widespread. Low salaries and poor infrastructure not only lead to inefficient performance, but also make judges and court officials more vulnerable to bribes.

The Case of the UN Special Rapporteur on the Independence of Judges and Lawyers

The report also documents the defamation proceedings against the UN Special Rapporteur on the Independence of Judges and Lawyers. An Advisory Opinion by the International Court of Justice, handed down on 29 April 1999, asserted that the Special Rapporteur was immune from legal action in Malaysia. The Advisory Opinion was requested by ECOSOC. The Malaysian Government still has not fulfilled its binding obligation to ensure that all arms of government enforce the opinion. During the year, Malaysia attempted to remove the Rapporteur from his mandate.

Efforts by International Bodies

The international human rights mechanisms have frequently voiced their concern about the state of the independence of judges and lawyers in many countries. Some international adjudicative bodies, such as the European Court of Human Rights, found some countries in violation of their international legal obligations with regard to judicial independence. During the year, the European Court of Human Rights ruled, for example, against France, Italy, Liechtenstein, Turkey and the UK on issues related to the administration of justice. The Inter-American Commission on Human rights expressed concern over the situation in the Dominican Republic, Paraguay and Peru, and the Inter-American Court of Human Rights ruled against Guatemala and Peru. The Inter-American Court also adopted a key Advisory Opinion concerning the right of information on consular assistance, and its relationship to the guarantees of due process in the framework of prosecutions for crimes punishable with the death

penalty. The Advisory Opinion enhances the protection of due process rights of individuals detained and facing the death penalty in foreign countries in the Americas.

During the examination of the state reports submitted under the International Covenant on Civil and Political Rights, the UN Human Rights Committee expressed concern with regard to the independence of judges and lawyers in several countries. Other international treaties bodies, including the UN Committee against Torture, the UN Committee on the Rights of the Child, the UN Committee on the Elimination of Racial Discrimination and the UN Committee on the Elimination of All forms of Discrimination against Women, expressed concern. Several UN Human Rights Mechanisms reporting to the UN Commission on Human Rights also raised their concerns.

Very important in this regard is the work of the UN Special Rapporteur on the Independence of Judges and Lawyers. During the year, the Special Rapporteur reported on developments in **51** countries regarding the independence of the judiciary. The Special Rapporteur intervened in **36** countries.

The Report

When reporting on the situation of judges and lawyers, the CIJL uses the 1985 UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers as standards. These standards are included in the report as annexes. Also included as an annex is a Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System which was elaborated by a group of experts in February 2000. The idea is that this document might help shed light on tackling corruption in the judiciary.

The structure of each chapter takes into account that judges and lawyers do not operate in a vacuum. This is why each chapter attempts to place the performance of the judiciary and the legal professionals within the constitutional structure and human rights background of the country under consideration. The chapters also describe the structure of judicial institutions. This is because serious structural defects in the legal systems of many countries are often at the heart of problems which undermine the independence of the judiciary and the legal profession, and lead to impunity. These defects include amnesty laws, the existence of exceptional justice systems, corruption and attacks on bar associations.

The report also examines issues such as the adequacy of the judicial structure, the speed of the litigation process, allegations of corruption in the judiciary and the allocation of resources to judicial institutions. These factors and others could be regarded as useful indicators of the degree of public confidence in the judiciary.

But why only 49 countries? The inclusion of countries in *Attacks on Justice* depends not only on the measures they take, but also on the availability of reliable information. Some countries with strong totalitarian tendencies evade scrutiny because of the lack of adequate information. The countries that are included in this report are those for which the CIJL had access to adequate information, enabling us to review their laws or practice, or both.

Attacks on Justice reflects the collective work of the entire ICJ family. In addition to ICJ and CIJL first hand information and research, members of the ICJ and CIJL Advisory Board, the ICJ and CIJL sections and affiliated organisations are main sources of information. Bar associations in many countries provide invaluable assistance. A team of CIJL researchers draft the report. It is verified and checked by experts on the specific countries who are members of the ICJ or the CIJL Advisory Board. Without such invaluable contribution from the entire ICJ family and the support of the legal fraternity, this report would not have been possible. Specific contributions are acknowledged in the report.

The report provides states with warning signals which should be taken seriously. At a time when international investment and trade are high on the international agenda, states which do not have a functioning and independent judicial system risk having their sovereignty further eroded by the international economic actors operating within their territory. Such actors often enforce international arbitration and mediation clauses to avoid dealing with a local judiciary that is neither equipped nor qualified, is slow, or lacks the necessary independence to rule impartially on issues.

Mona Rishmawi
CIJL Director
May 2000

ALGERIA

Judges and prosecutors do not enjoy security of tenure and can be transferred without their consent by a decision of the Minister of Justice. The independence of the judiciary is severely undermined by the constant interference of executive branch officials with the work of the judges. During 1999, the power of the courts to investigate and punish serious human rights violations was further restricted by President Bouteflika's decision to grant a broad amnesty to Islamist militants and the lack of political will to investigate members of the security forces allegedly involved in serious human rights abuses.

The Republic of Algeria gained independence from France on 5 July 1962. The Constitution of 1976 was amended a number of times. In 1989 an amended constitution was put to the popular vote in a referendum and approved. The 1989 Constitution has also been amended on a number of occasions, the latest being in 1996 through a referendum which was contested on the basis of alleged irregularities in the process. The 1996 amendments include the creation of a second chamber in parliament and the extension of presidential powers.

The Constitution does not establish clearly the principle of the division of powers among the branches of government. Algeria's constitutional system grants substantial powers to the President of the Republic at the expense of diminished powers for the other branches of government. The army has traditionally played a key role in the country's political, social and economic life although the Constitution confines its role to defence matters (Article 25). The President serves a five-year term which is immediately renewable only once.

Legislative power is vested in a bicameral parliament composed of the National Popular Assembly and the National Council (*Conseil de la Nation*). Members of the National Assembly are elected through general elections and serve a five-year term whereas the members of the National Council are appointed one third by the President of the Republic and the other two thirds are elected indirectly by the local assemblies and authorities, and serve for a six-year term. The latest parliamentary elections were held in 1997. In the same year there were provincial and municipal elections.

Under the Constitution, Islam is the official state religion. The President has the authority to rule by decree in special circumstances (Article 124).

The President must subsequently submit to the parliament for approval the decrees issued while the parliament was not in session.

Towards the end of 1998, President Liamine Zeroual, who was elected in 1995 for a five-year term, announced that he would be standing down from office before the end of his term and called for earlier presidential elections, which were initially scheduled for February 1999 but later postponed until 15 April 1999. The elections held on that date resulted in the triumph of Mr. Abdelaziz Bouteflika, a former Minister of Foreign Affairs, candidate of the ruling National Democratic Rally (*Rassemblement National Democratique - RND*) and the National Liberation Front. He obtained 73.8% of all cast ballots, although the turnout to the polls was said not to be higher than 50% of all voters. Mr. Bouteflika's triumph was foreshadowed by the withdrawal, some days before the date of the election, of the other six candidates alleging serious irregularities and fraud in the electoral process. President Bouteflika is believed to have enjoyed, throughout the electoral campaign and afterwards, the support of the military and the economic and financial elite of Algeria.

The election of Mr. Bouteflika to the presidency in Algeria has had a profound impact on the general political and human rights situation in the country. President Bouteflika, who was sworn into office in May 1999, immediately declared his intention to start a national reconciliation process to put an end to the seven-year conflict in the country. On 6 June 1999, the Islamic Salvation Army (*Armée Islamique du Salut - AIS*), the military wing of the Islamic Salvation Front (*Front Islamique de Salut - FIS*), announced that it had decided to make permanent its unilateral cease-fire declared in 1997. This announcement was confirmed by President Bouteflika who offered Islamist fighters an amnesty but excluded from its benefit the AIS members. In September 1999, President Bouteflika called once again for a referendum to approve a civil harmony initiative that would grant a limited amnesty to those involved in the struggle against the government. The law was approved by a large majority of the people. In January 2000 President Bouteflika granted amnesty to all armed groups (*see below*).

Human Rights Background

Serious human rights violations continued to be committed in Algeria, although at a lower rate than in previous years. This decrease was attributable to the peace initiatives implemented by President Bouteflika and the permanent cease-fire announced by the AIS in the middle of the year. However, Algeria continued to be one of the most violent countries in the Middle East and North Africa regions.

Although there is no official figure, there were thousands of people killed as a result of the political violence. The Armed Islamic Group (*Groupe Islamique Armé - GIA*), which did not accept giving up the armed struggle, carried out indiscriminate killings of civilians, including children and women. Throughout the year this group carried out massacres, attacks with car-bombs in the cities, summary executions, and abduction of women who were first kept as sexual slaves and then executed. The AIS, the main armed opposition group, was also considered responsible for a series of attacks on the civilian population.

On 22 November 1999, FIS leader Abdelkader Hachani was murdered in Algiers, allegedly by groups opposed to the peace process in Algeria. The killing of Mr. Hachani, who was released in 1997 after spending more than five years in detention without trial, constituted a severe blow to the efforts to bring peace to the country.

Government security forces have also been considered responsible for many serious human rights violations, amongst them summary executions, torture and arbitrary detention with long periods of incommunicado detention, against suspected members of terrorist bands. Under the pretext of fighting terrorism, the security forces continued to organise, collaborate with or otherwise tolerate the activities of self-defence paramilitary groups fighting against Islamic armed groups. Many of the violations of human rights against civilians were committed by either paramilitary groups alone or in complicity with security forces.

The number of people killed since violence started in 1992 was assessed as being approximately 100,000 by President Bouteflika himself shortly after his taking office in May 1999. By September 1999, the official Human Rights Observatory recognised that the authorities had received at least 4,300 complaints of forced disappearances which they had agreed to investigate. A similar figure has been given by certain human rights organisations.

Although the Constitution prohibits arbitrary arrest and detention, the security forces continued this practice throughout 1999. The Constitution provides that administrative detention for investigation should not exceed 48 hours, after which the detainee should be brought before a judge. The 1992 Anti-Terrorist Law extended the period of administrative detention up to 12 days. The same law, still in force, allows police to arrest people and search houses without a judicial order.

Following the AIS announcement in June 1999 that it would give up its armed struggle against the government and seek to reintegrate into the political system, the government, as a gesture of good will and reconciliation, released a significant number of AIS members (more than 2,000 during the whole year) who were held in detention, mostly without trial.

According to government sources these numbers did not include AIS fighters convicted of crimes involving blood shedding or rape. However, many more presumed AIS fighters or sympathisers remained in prison. Human rights organisations said that approximately half of the prison population, officially 34,000 inmates, is charged or convicted in connection with terrorism and crimes of subversion. Many of them have been charged with or convicted of vaguely worded crimes such as "belonging or participating in a terrorist organisation", acting to "advocate, encourage or finance" acts of terrorism, the "failure to report crimes to the authorities" or rendering "assistance to terrorist groups". Their trials were carried out by special courts, with anonymous judges, that did not comply with international standards on due process and did not permit them to prepare an adequate defence. These special courts were abolished in 1995.

The Bouteflika administration upheld the 1992 decree prescribing the state of emergency, which empowers authorities, *inter alia*, to ban public gatherings and demonstrations. The Constitution bans all political parties which are founded on a religious, linguistic, racial, sexual or regional basis (Article 42). President Bouteflika has refused to lift the ban on the Islamic Salvation Front.

Throughout 1999, international human rights organisations and activists were denied authorisation to visit the country. There is, nevertheless, some space for local human rights groups to work. In September 1999, the International Committee of the Red Cross resumed the supervision of prisons in Algiers.

Impunity and Amnesty Laws

Despite the progress made regarding peace and reconciliation, the Algerian authorities have made no progress in investigating and bringing the perpetrators of serious human rights violations to justice.

A draft bill for a law on civil harmony (*concorde civile*) was introduced in parliament by President Bouteflika and approved by a large majority of both chambers in July. The bill was then submitted for a referendum which was held on 16 September 1999. President Bouteflika's peace plans were backed by 98% of votes with a record turnout of 80% of the total electoral population.

The Civil Harmony Law granted immunity from prosecution to Islamist militants implicated in acts of terrorism and subversion excluding blood-shedding acts, AIS fighters being considered to be amongst the latter. The law also offered reduced punishments to those Islamist militants involved in crimes that caused the death or permanent injury of a person, rape or the use of explosives in public places. Those responsible for crimes

punishable with the death penalty would instead be punished with a maximum of 20 years in prison. The conditions to benefit from the law included: that the Islamist militants turned themselves in before 13 January 2000, provided a detailed account of their activities and vowed to cease them. The law does not include provisions regarding members of the security forces who are allegedly responsible for serious human rights violations. Thus, no amnesty was granted to them. However, no serious effort has been made to initiate investigations nor bring those responsible to justice.

Official figures released in January 2000, when the Civil Harmony Law expired, report that some 1,500 Islamists had surrendered and benefited from the law. Also in January President Bouteflika decided to grant a general amnesty to all members of the AIS after the latter threatened to break the truce with the government because of alleged cases in which some of its militants were denied full benefits under the Civil Harmony Law. The AIS decided in the same month to disband.

The implementation of the Civil Harmony Law and the January 2000 general amnesty law has been the subject of major concern among the victims of serious human rights violations and human rights organisations in Algeria and abroad. The terms of the January 2000 general amnesty have not been disclosed nor have been the number and identity of those who are to benefit from it. It is feared that the amnesty law would permit that those responsible for serious violations, such as murder, rape or mass killings, will be granted impunity.

A similar criticism was addressed to the manner in which the Civil Harmony Law was implemented. This law, based on the 1995 Decree N° 12 on Clemency Measures (*see Attacks on Justice 1998*), did not grant immunity from prosecution to Islamist militants allegedly responsible for serious human rights violations, but in practice all Islamist militants who have sought to benefit from it, more than 1,500, have been granted full amnesty without any meaningful investigation into the nature of their crimes. The absence of an impartial and independent mechanism to determine the circumstances and nature of the crimes committed might be the cause of the failure to implement the law in an appropriate way. Victims' interests and concerns have been neglected by the government and many fear that the victims and their relatives will not be given a place in a peace process which they believe fails to bring truth and justice to the country.

Peace and reconciliation efforts in Algeria have also raised concern due to their insufficient attention to past human rights violations committed by the security forces. As said above, there remain thousands of alleged Islamist fighters in prison, arbitrarily arrested and held without trial. President Bouteflika has not addresed the issue of the security forces' responsibility for these and other acts.

THE JUDICIARY

Chapter Three of Title Two of the Algerian Constitution regulates the judiciary. Article 138 states that the judiciary is independent and Article 147 states that the judge is subject only to the law and should be protected against any form of pressure that may undermine his or her impartiality (Article 148).

However, through several laws and decree laws the executive branch has undermined the judicial independence and put under control of the Ministry of Justice most aspects regarding the functioning of the judiciary. In November 1999, President Bouteflika appointed a commission to review the functioning of the judiciary and to recommend measures to improve it.

STRUCTURE

The judicial system is composed of a Supreme Court, three Courts of Appeal and a system of lower courts that include civil, criminal and commercial courts. The jurisdiction of the military courts, originally meant to try members of the military, has been extended to try civilians accused of state security crimes under the state of emergency law.

The Special Security Courts, established by Decree Law N° 3 of 1992 on terrorism and subversion, were abolished in 1995. However, most of the procedural rules used by these special courts have been incorporated into the ordinary legal system and the composition of the ordinary criminal courts empowered to try these kind of crimes has been changed. Nevertheless, some observers maintain that long-term detentions without trial have increased because security forces are reluctant to release suspects of terrorism and subversion to the ordinary criminal courts.

The Supreme Court is the body which regulates the activities of the courts and tribunals, while the State Council (*Conseil d'Etat*) regulates the activities of the administrative jurisdictions (Article 152). Both jurisdictions ensure the unification of jurisprudence throughout the country and respect for the law.

The Tribunal of Conflicts (*Tribunal des Conflits*) settles conflicts of competence between the Supreme Court and the State Council.

A 1989 law created a High Judicial Council (*Conseil Supérieur de la Magistrature - CSM*) and established rules for the appointment and career of magistrates within the judiciary. However, this law was abrogated by an executive decree of 1992. The High Council, which is still in place, although with diminished powers, is headed by the President of the Republic, and its membership has been reduced since 1992, from

26 to 17 members (with only six directly elected by their peers). The 1992 executive decree has had a negative impact on the independence of the judiciary.

There is also a Constitutional Council, which reviews the constitutionality of treaties, laws and regulations. Although the Council is not part of the judiciary, it has the authority to nullify laws found to be unconstitutional.

Appointment and Security of Tenure

According to the 1989 law, the High Judicial Council was to be in charge of the appointment, promotion, transfer and discipline of magistrates (judges and prosecutors alike) within the judiciary. The law established the principle that judges who have served for ten years already are not subject to transfer or removal without their consent (Article 16). The Minister of Justice was to keep the power only to transfer those magistrates working for the prosecution service, but even this power was not meant to be discretionary and could be challenged before the High Judicial Council.

The 1992 executive decree constitutes a step backwards with regard to the security of tenure of magistrates. This decree, issued in contravention to constitutional provisions which do not permit a law to be modified by a decree but only by another law, substantially amends the terms of the 1989 law, re-establishing the Minister of Justice with his old powers with regard to appointment, transfer and discipline of magistrates. It curtails also the rights of judges, in particular the right not to be transferred or promoted without their consent. The decree makes it compulsory for judges to accept a promotion even if this implies a transfer.

The 1992 decree has had a profound and negative impact on the independence of judges. Judges and prosecutors are frequently instructed by administrative officials as to the way they should perform their duties. Those who refuse to follow instructions are frequently harassed, threatened with transfer or suspension based, most of the time, on non-existent disciplinary grounds. Judges and prosecutors do not, therefore, enjoy security of tenure.

Judges are forbidden from joining political organisations. The 1989 law states that "all citizens except judges, army and security service personnel, and members of the Constitutional Council have the right to join political organisations".

Resources

Resources are scarce and delays in the judicial process are frequent. Reportedly, several hundred people are still awaiting trial on security-related charges.

Lawyers

Lawyers are entitled to have access to their clients at all times. However, the authorities do not always respect the legal provisions regarding defendant's rights. Defence lawyers representing members of the FIS have suffered harassment, death threats and arrest. In addition, some of them have been arrested and held in incommunicado detention.

Generally, numerous pressures and intimidation are exercised over Algerian lawyers, and of particular concern are the lawyers dealing with cases of disappeared persons. Approximately 20 lawyers disappeared or were killed during the conflict. A number of lawyers who had successfully defended cases of Islamists were killed. A lawyer disappeared one day on the highway between Algiers and Médéa. No investigation has been opened regarding these cases.

Cases

Mahmoud Khelili {lawyer, President of the National Union of Algerian Lawyers, President of the Algerian Bar Association and human rights defender}: Mr. Khelili and his family continued to be harassed. His son, 35 years old, who is mentally disabled, was mistreated while in detention by the security forces between 4 February 1998 and 7 February 1998 (*see Attacks on Justice 1998*). No response was given to the complaint made by Mr. Khelili concerning the disproportionate violence used against his son. The *Observatoire National des Droits de l'Homme* declared that Karim Khelili had not been submitted to any ill-treatment.

Another of Mr. Khelili's sons, Mr. Farid Khelili, has been sentenced to two years in prison. Initially accused of "belonging to a terrorist group" in 1994, the charge was modified as "non-denunciation of terrorism" in 1999.

The harassment against Mr. Khelili and his family is due to his work for human rights and his professional activities as a lawyer.

Nadhira Mesbah {lawyer}: Mrs. Mesbah was accused of fraud by one of her clients, arrested and put in preventive detention by an investigating judge in Blida on 19 December 1999. Although she was pregnant, she was

nevertheless arrested in violation of Article 123 of the Algerian Code of Criminal Procedure which states that preventive detention is only a subsidiary measure. The conditions of her arrest remain unclear and subject to legitimate suspicion, as the arrest warrant was not well-grounded. The Criminal Tribunal of Blida denied her conditional release for health reasons. Her doctor described Mrs. Mesbah's state of health as a high risk pregnancy, both for the mother and the foetus, as Mrs. Mesbah is diabetes insulino-dependent, a condition which can deteriorate at any time, and thus, he concluded, Mrs. Mesbah was in need of immediate medical care. Even Mrs. Mesbah's father, who is himself a lawyer, was prevented from visiting her while in preventive detention for more than one month.

The Algerian Bar Association (*Syndicat des Avocats Algériens*) organised a press conference and lodged a complaint for forfeiture and lack of assistance to a person in danger of death, threat to the liberty of the person (including the foetus) and to their dignity. Mrs. Mesbah's petition for release on medical grounds, which would not prejudice the final judgement, was rejected by the judge on 18 January 2000. The trial was then postponed until 25 January because of the absence of the Prosecutor. On that date Mrs. Mesbah was convicted and sentenced to 18 months imprisonment and immediately taken to hospital. The decision has been appealed, and meanwhile she has been released for medical reasons. The decision on her appeal will be taken during the year 2000.

A lawyer since 1991, Mrs. Nadhira Mesbah assisted, in particular, clients who have been victims of torture before the Special Court of Algiers, in charge of terrorist cases.

Rachid Mesli {lawyer and human rights defender}: Mr. Mesli was arrested towards the end of July 1996 and held incommunicado until his release which was granted due to the pressure of human rights defenders' organisations (*see Attacks on Justice 1998*). He was also convicted and sentenced to three years in prison on 16 July 1997, after having spent almost twelve months in detention during an unfair trial in which he was charged with "encouraging" and "providing apologies" for terrorism, although these charges were not initially in the indictment. On 20 June 1999 the sentence was confirmed and Mr. Mesli's allegations that his right to a fair trial had been violated were dismissed.

During the trial, which was closed to the public, Mr. Mesli was questioned about the nature of his relations with his clients, as well as about his contacts with the international human rights organisation Amnesty International.

Mr. Mesli was one of the prisoners released by the decision of President Bouteflika in July 1999.

ARGENTINA

Judges and prosecutors continued to play a key role in the full restoration of powers to the judiciary, including the power to investigate and try past human rights violations, but the judiciary, especially in the provinces, continued to be subject to political influence. During the year, the Council of the Magistracy began its work. In 1999, some substantial steps were made towards overcoming impunity for past human rights violations.

The Republic of Argentina is a federal state composed of 23 provinces and one Federal District. The Constitution, most recently amended in 1994, provides for the separation of powers and the Rule of Law. The legislative power is exercised by a bicameral assembly whose lower house (*Camara de Diputados*) is elected directly while the upper house (*Senado*) represents the provinces. Half of the Chamber of Deputies is renewed every two years, as well as one third of the Senate. Executive power is vested in the President of the Republic who governs with the help of a Cabinet of Ministers appointed and dismissed at will by himself.

The last parliamentary and presidential elections were held on 24 October 1999, together with provincial elections in some of the provinces. Elections for governors of most of the provinces were held throughout the year. The results reflect a new political balance in the country. Mr. Fernando de la Rua, Mayor of Buenos Aires and candidate of the centre-left coalition, Alliance, obtained 48.5 % of the vote against 38.1 % for Mr. Eduardo Duhalde of the ruling Justicialist Party. In parallel parliamentary elections to renew 130 of the 257 seats of the Chamber of Deputies, the Alliance won 63 of them, the Justicialists 50 and a third party, Action for the Republic, a further 9. With these results the Alliance becomes the primary political force in the legislature with 127 seats, only two seats short of a majority. However, the Senate is still controlled by the Justicialist Party, at least until the elections scheduled for the year 2001. President De la Rua was sworn into office on 10 December.

The presidential and parliamentary elections were foreshadowed by controversy within the ruling Justicialist Party whose leader, President Menen, wished to run for a third consecutive term. President Menen's bid was contested by Mr. Eduardo Duhalde, a senior leader in the party, and he eventually withdrew, allowing Duhalde to run on behalf of the ruling party. During the year a number of provincial elections for governors were carried out, in which the opposition coalition Alliance moved forward but the ruling party finally won 14 of the 24 governorships.

Human Rights Background

During the year under review there were instances of police killing and brutality that either went uninvestigated or did not result in prosecutions. In the few cases in which charges were brought, convictions have not been attained or have been very light.

In August 1999, the laws regarding police opening fire were relaxed by the government. The police may now shoot without prior verbal warning in some situations. In September 1999, in the context of a bank robbery that escalated into a hostage taking, the police opened fire indiscriminately on the car in which the bank robbers were driving with two hostages, killing the two hostages and one of the robbers. The second one was found hung up in his cell 24 hours later. The police have not explained satisfactorily what happened and there are suspicions that the prisoner was executed.

A number of cases of torture while in police detention occurred during the year. Some were investigated but no single conviction has been handed down. The cases have been attributed to the federal police, as well as the provincial police. There were also a number of other cases involving police brutality and torture in different provinces. In one case the victim, a youth, died after being tortured in detention. Other cases involved excessive use of force to repress public demonstrations and protests.

There were also problems relating to the treatment of immigrants. In February, President Menen introduced in parliament a bill aimed at stopping the flow of immigrants from neighbouring countries into Argentina. The bill imposed hard fines on those employing illegal immigrants and provided for automatic expulsion of any alien convicted to more than two years of prison.

Impunity for Past Human Rights Violations

During the year investigations into human rights violations which occurred during the period of military dictatorship between 1976-1983 continued. After the military rule had ended, criminal charges were filed against several perpetrators of human rights violations, and nine former members of the military junta were brought to trial, six of them being convicted with prison sentences. The majority, however, went unpunished as the Alfonsin government passed broad amnesty laws ("full stop" and "due obedience" laws) between 1986 and 1987. Later, the government of Mr. Carlos Menen pardoned those who had been convicted. The "full stop" and "due obedience" laws were repealed by parliament in 1998 but their effects were not annulled. It has been therefore understood that investigations into amnesty-covered human rights abuses can be carried out but they cannot lead to criminal convictions.

Investigating judge, Adolfo Bagnasco, and other judges continued investigations into cases of abduction of babies born to women held in detention who were then disappeared, and the abduction of children from parents who had disappeared. The number of children taken may be up to 300 and the abductions are said to be part of an organised plan in the context of the dirty war. Several high-ranking officers were interrogated and arrested in early 1999 in connection with these crimes, in addition to those already arrested or investigated in 1998. In January 1999, Judge Bagnasco ordered the arrest of retired General Reynaldo Bignone and retired Vice-Admiral Rubén Oscar Franco. In December, another former General, Guillermo Suarez Mason, was also arrested. This brought the number of high-ranking officers arrested up to nine. A number of prosecutors working on these cases of child abduction have reportedly received death threats.

On 9 September 1999, a federal appeals court confirmed the arrest order of a number of high-ranking officers already detained. The court found that they have not been tried already for child abduction, that the cases do not fall under military jurisdiction and that the crimes were not subject to the Statute of Limitations. Some of the claimants had argued that they had been already tried in 1985 and then pardoned by President Menen in 1990. They had not, however, been tried for child abduction.

Judicial investigations into the fate of foreign citizens or Argentineans of foreign descent tortured, killed or disappeared during the dictatorship were also carried out by magistrates in Spain, France, Italy and Germany. In November 1999, Judge Garzon of the Spanish National High Court ordered the commencement of criminal proceedings and issued an international arrest warrant against a number of former Argentinean officers. The order, unlike the former request for collaboration that the Menen administration had dismissed right away, was transmitted to the appropriate judicial authority. However, Judge Linares, who took up the international arrest warrant, sent it back to Judge Garzon for a more precise specification of the charges. Allegations of governmental pressure on the judge were voiced in some circles. Judge Garzon's warrants related to 98 Argentinean nationals involved in the disappearance of more than 900 Spaniards and Argentineans of Spanish descent during the military dictatorship. The list included two former presidents (Mr. Videla and Mr. Galtieri) and Admiral Massera, a former member of the military junta. At least seven of those on Garzon's list are already in detention on charges of child abduction. However, in a setback for Judge Garzon's investigation, on 4 November 1999 the key witness in the case, Officer Alfredo Scilingo, retracted his testimony. On 30 December 1999, Judge Garzon reiterated his international arrest warrants.

The Inter-American Commission on Human Rights intervened in a number of cases, most notably on the bombing of the building of the Jewish association, AMIA, and found that the delays in the investigation of the case amounted to a failure to provide justice. The Inter-American Commission on Human Rights'

Rapporteur on Freedom of Expression expressed concern about rulings of the Supreme Court that limit freedom of expression in the country.

The Judiciary

The Constitution provides for an independent judiciary but in practice the judiciary is sometimes subjected to political influence.

Structure

The judiciary in Argentina is organised into a federal and a provincial system. Article 5 of the Constitution provides that the provincial Constitution will be consistent with the principles and guarantees laid down in the federal Constitution. The federal judiciary is composed of a Supreme Court, which has jurisdiction over the entire country, and a varying number of Appeals Chambers which have jurisdiction over judicial districts. There are also judges of first instance for criminal and civil matters.

There is also an Office of the Public Prosecutor and an Office of the Public Defender, both of which are part of the Public Ministry (*Ministerio Publico*). The Public Prosecutor's office, which enjoys autonomy and independence according to Article 120 of the Constitution, as amended in 1994, has the power to initiate criminal investigations and participate in the prosecution of offenders. However, its actual powers are limited by an old code of criminal procedure that lays down an inquisitorial model of criminal justice, limiting the role of the Public Prosecutor and giving the investigating judge (*juez de instrucción*) control of the investigation and of the trial as a whole. Debates in parliament to reform the code were stalled by Menen's government. However, with the advent of the De la Rua administration, some observers have stressed the likelihood that the debates will go ahead.

An adversarial criminal system, with public trials focusing on oral hearings, was introduced in recent years in the province of Buenos Aires, which does not comprise the federal capital. The code of criminal procedure for the province of Buenos Aires was enacted in 1993 and applies only to trials of non-serious offences, which are left to the jurisdiction of the provincial courts. During 1999, the first convictions in public trials under the new adversarial criminal procedure were handed down in the province, with mixed results.

The outcome of these trials and the functioning of the new system in the region were observed with much attention by the rest of the country which expects the introduction of a similar system in the near future. The Prosecutor General declared his hope that very soon an adversarial system would be set up and that the prosecutors will be given authority over the investigation and prosecution of crimes, reserving the judicial issues for the judge.

The constitutional amendments of 1994 introduced the institution of the Council of the Magistracy (*Consejo de la Magistratura* - Article 114 of the Constitution). However, the implementing legislation took some time to be passed and it was not until 1999 that the Council actually started to work. The Council of the Magistracy is composed of 20 members elected by different constituencies: the judiciary, parliament, lawyers associations, the executive branch and the academic and scientific community. They serve a period of four years, renewable only once. The Council has authority to appoint the Administrator General of the judiciary, to initiate investigations and to bring judges before an impeachment jury (*jurado de enjuiciamiento*), to organise and oversee the education of the judiciary, to introduce training programmes and to select candidates for federal judges. The Council is divided into four sub-committees with four distinct functions: selection and training of magistrates, discipline, accusation and administration.

Each province of the Federation organises its own judiciary in accordance with its own constitution. The structure of the provincial judiciaries comprises a High Court as the highest court in the province, and lower courts. They have jurisdiction over civil, criminal, labour and fiscal matters reserved for the provinces. In general, however, provincial courts are subject to the political and economic influence of powerful local families and political groups. This is illustrated by the irregular situation of the judiciary in the San Luis province (*see Attacks on Justice 1998*), which has persisted throughout 1999, and the collapse of local institutions, including the judiciary, in another province, Corrientes. The latter prompted the federal government to suspend local institutions and establish direct rule on the province, appointing an intervening committee to address the situation by the end of the year. The head of the intervening committee has so far suspended temporarily the security of tenure of all provincial judges and ordered a new process of evaluation of the High Tribunal of the province.

Appointment and Security of Tenure

Changes in the appointment procedure took place with the introduction of the Council of the Magistracy. The old appointment system relied almost exclusively on the role of political constituencies. The new one assigns a key role to the Council which is more independent, though not totally free from political influence because of its own composition.

The President of the Republic has the power to appoint the justices of the Supreme Court with the consent of the Senate (Article 99 of the federal Constitution). The President also appoints judges for the lower federal courts upon the submission of a list of candidates by the Council of the Magistracy. All judges enjoy life tenure until the age of retirement.

Article 13 of Law 24.937 of the Council of the Magistracy elaborates a long procedure for the selection of candidates for judges other than Supreme Court

justices, including pre-selection by a jury composed of judges, lawyers and law professors, and a favourable vote by the whole Council before the candidate is included in the list to be submitted to the President. The selection of Supreme Court justices is entirely left to the discretion of the President who, if enjoying majority in parliament, can actually exert an extraordinary power over the process that normally results in the appointment of those very close to the government.

Removal Procedures

The authority to remove lower courts' judges is exercised by the Council of the Magistracy. The Senate exercises this power in the case of Supreme Court justices. According to Article 110 of the federal Constitution both Supreme Court justices and lower court judges remain in their posts while on "good behaviour". Article 53 provides that Supreme Court justices can be accused before the Senate by the Chamber of Deputies on the grounds of having wrongly performed their functions or having committed a crime. The Senate will decide on the removal of the concerned justice by a two thirds majority (Article 59 Constitution).

The Law on the Council of the Magistracy grants this body the power to initiate investigations as well as to formulate charges against judges of the lower courts before the impeachment jury (*jurado de enjuiciamiento*). The removal will be decided by this jury, which is composed of representatives of the judiciary, the legislature and lawyers associations, after a procedure that affords due process to and respects the right of defence of the accused judge (Article 25 of Law 24.937). The final decision of the jury, however, cannot be challenged. Only a request to the jury to clarify its decision is permitted (Article 27).

During 1999, a number of federal judges were subjected to disciplinary proceedings and some of them were suspended or dismissed from their posts, mostly on charges of misconduct. Most of these proceedings were widely seen as consistent with constitutional and legal due process provisions, although in some cases, political considerations prevailed and may have resulted in retaliation against the judge for his or her opinion while carrying out his or her judicial functions.

This shift to the new system is considered by most observers as positive given that the old procedure for dismissal, of political impeachment before the Senate, was often ineffective, lengthy and politically influenced. It has been underlined that in ten years the Senate has dismissed only 7 judges out of several dozen requests.

Resources

The Council of the Magistracy is in charge of the resources of the judiciary. A constitutional provision guarantees that judges will receive a salary as compensation for their work, which cannot be reduced while they remain in their posts. The

judiciary submits a budget which is sent to parliament for final approval after having been examined by the executive.

CASES

Ricardo Bustos Fierro (federal judge): Judge Bustos was suspended in his post by the Council of the Magistracy and sent to stand impeachment proceedings before a jury on the grounds of having decided manifestly in contradiction to the text of the law and the Constitution (prevarication). Judge Bustos, as judge in the Cordoba province, had granted a petition by the ruling Justicialist Party to allow President Menen to participate in his party's primary elections to define the presidential candidate. The Constitution prohibits a third consecutive term in the presidency and Judge Bustos was accused of ruling against the text of the Constitution. Regardless of whether or not the charges against Judge Bustos are well-grounded the case highlights the extent to which political considerations interfere with the disciplinary control to which all judges are subjected. The accusations and impeachment proceedings were first proposed and instigated by members of a wing opposed to Menen inside the Justicialist Party that did not want him to run for a third term. Once the accusations were formulated within the Council of the Magistracy and the judge was suspended pending his impeachment trial, political recriminations ensued inside the Justicialist party between Menen's supporters and those of Duhalde. The latter were accused of implementing a revenge by instigating the accusation inside the Council. Almost a third of the Council is appointed by parliament and among its members there is a significant number of deputies from the Justicialist Party.

Ana Maria Careaga (judge): Ms. Careaga was dismissed in December 1998 following an impeachment procedure that did not afford her due process of law (*see Attacks on Justice 1998*). As a result, and fearing for her security, she fled the country to Costa Rica where she was living for a year. A number of lawyers and human rights organisations lodged a *Habeas Corpus* petition in her favour. In December 1999, with the advent of the newly elected government, authorities in the interior ministry appointed her as a member of the High Tribunal that would intervene the judiciary in the Corrientes province. The appointment also put aside a decision barring Ms Careaga from any public posts for 15 years, thus rehabilitating her.

Adriana Gallo de Ellard (judge): Ms Gallo was dismissed from her post as a judge in San Luis Province and barred from public service for eight years in November 1998 (*see Attacks on Justice 1998*). During the year 1999 she has not been rehabilitated nor has she received any compensation for her arbitrary dismissal.

Maria Emma Prada (public prosecutor): Ms. Prada received death threats by phone during May 1999 while she was investigating a case of alleged torture of prisoners by three provincial police officers in Beccar. Investigations went on. No conviction has yet been secured.

AUSTRALIA

Attention in Australia in late 1999, early 2000, was focused on the issue of mandatory sentencing. The disproportionate effects that it had on indigenous people, particularly juveniles, was noted by the Committee on the Rights of the Child in 1997, and reaffirmed by the Committee for the Elimination of All Forms of Racial Discrimination in March 2000. A mandatory minimum sentence also places unwarranted restrictions on judicial discretion and is a threat to independent judicial decision making. These laws were widely condemned by members of the judiciary and human rights groups.

The Commonwealth of Australia is a federated union of six states and three territories, formed in 1901. It has a long history of representative parliamentary democracy at the federal and state level. A written federal Constitution provides for a separation of powers and it cannot be amended except by an affirmative vote by an overall majority of voters, and by a majority of voters in the majority of states.

Article 61 of the Constitution vests the executive power of the Commonwealth in the Queen of the United Kingdom of Great Britain and Northern Ireland, which is exercisable by the Governor-General of Australia as the Queen's representative. The Governor-General is appointed by the Queen on the advice of the Prime Minister. The Governor-General appoints a Prime Minister who, by convention, must be the parliamentary leader of the party with a majority of seats in the House of Representatives.

A Federal Executive Council, consisting of all ministers and the Prime Minister, is chosen by the Governor-General to advise him/her, and s/he is obliged to act on its advice. The ministers are all members of the party with the majority in the House of Representatives. In reality the Prime Minister and the Cabinet, a senior group of ministers, wields executive power, with the Governor-General playing a largely ceremonial role. The current Prime Minister is Mr John Howard, who was elected for a second term in 1998.

The legislative power of the Commonwealth is vested, by Section 1 of the Constitution of Australia, in the Queen and a bicameral federal parliament consisting of the House of Representative and a Senate. The House of Representatives consists of members directly chosen in proportional elections by the general public every three years. Currently there are

148 members of the House of Representatives. The Senate is composed of 76 representatives directly elected by the voters of the states and territories. Each state is represented by six senators who serve for six year terms, and the Northern Territory and Australian Capital Territory by two senators each who serve three year terms. The federal parliament has the power to legislate on the subject matters enumerated in Section 51 of the Constitution.

Australia has a federal and state judicial system. The federal judicial power is vested by Section 71 of the Commonwealth Constitution in the High Court of Australia, in other federal courts as parliament creates and in any other courts in which the parliament invests federal jurisdiction. Currently the federal court structure consists of the High Court, Federal Court, Family Court and the Industrial Relations Court of Australia. Judges in the federal judiciary are appointed by the Governor General, acting on the advice of the Federal Executive Council. They hold office until the age of 70 years and can only be removed on the grounds of proved misbehaviour or incapacity.

In November 1999, a referendum was held to determine whether Australia should become a republic. The proposal was defeated with 55% of the population voting to retain the monarchy. It was widely reported that the failure of the referendum was due to dissatisfaction with the particular model for a republic, the replacement of the Queen with a president elected by the parliament, proposed to the public.

Mandatory Sentencing

The CIJL has often raised concerns over mandatory sentencing requirements in various countries, such as the United States of America, the United Kingdom and Canada, that act as an impediment to judicial independence.

In Australia, several states have developed mandatory sentencing regimes, usually for serious repeat offenders. The Northern Territory and Western Australia use mandatory sentences for certain property offences which apply to both adult and juvenile offenders.

Northern Territory

On 8 March 1997, the Northern Territory introduced mandatory sentencing for property offences. The legislation was amended in 1999 to provide for further judicial discretion in relation to certain offences.

Section 78A of the Sentencing Act 1995 (NT) establishes the mandatory sentencing regime for property offences committed by adults, i.e. those 17 years and older. Property offences are defined by Section 3(1) of the act to mean those offences specified in Schedule 1, committed after 8 March 1997. Schedule 1 defines them as various offences specified by the Criminal Code including, *inter alia*, robbery, assault with intent to steal, unlawful entry into buildings, receiving stolen property or general criminal damage. Stealing is also included except where the offence occurred at premises or a place where goods are sold; the offender was lawfully in the premises or place; or the offender was not employed at the premises or place at the time of the offence.

Section 78A provides for three categories of sentencing for offenders:

- those found guilty of a first property offence, in the absence of exceptional circumstances, must be convicted and imprisoned for not less than 14 days: s78A(1);
- those found guilty of a property offence, and have previously been sentenced under this section, must be convicted and imprisoned for not less than 90 days: s78A(2);
- those found guilty of a property offence, and have previously been sentenced under this section on two previous occasions, must be convicted and imprisoned for not less than 12 months: s78A(3).

Under s78A(6B), in the case of exceptional circumstances the court can impose any sentence generally available under the act. Exceptional circumstances include the offence being trivial; the offender is of good character and there were mitigating circumstances, excluding drug and alcohol intoxication; and the offender had made reasonable attempts at restitution or co-operated with police in the investigation of the offence. The onus of proof for this lies with the offender and is only available for first offences.

Persons under the age of 17 are dealt with by the Juvenile Justice Act 1995 (NT). Section 53AE(1) provides that juveniles between the ages of 15 and 17 who commit property offences, as defined above, are covered by the mandatory sentencing provisions. Generally, a wide range of sentencing options are given under s53(1) to courts for juveniles who have committed their first offence. These include, *inter alia*, discharge, adjournment for 6 months, a fine, release subject to good behaviour and other forms of conditional release or imprisonment. However, under the mandatory sentencing provisions, if a court establishes the guilt of a juvenile for a property offence, the court must:

- if the juvenile has previously been dealt with under s53(1) for a property offence, order the juvenile to participate in a diversionary program, or detain the juvenile for not less than 28 days: s53AE(2);

- if the juvenile has failed to participate in a diversionary program or is found guilty of other offences, the court must record a conviction and order a detention period of not less than 28 days: s53AE(5).

Diversionary measures include diverting the offender into employment training, victim/offender counselling or other development programs.

Western Australia

The mandatory sentencing regime was introduced into Western Australia for property offences on 14 November 1996. The Western Australian provisions only apply to the crime of home burglary.

Section 401 of the Criminal Code (WA) provides that a court must impose a minimum sentence of at least 12 months imprisonment on a person 18 years or older who has previously been convicted on two occasions of home burglary. The previous convictions do not have to have involved imprisonment; a finding of guilt and the imposition of some other punishment is sufficient. Convictions under the age of 18 years are included as a prior offence.

Persons 18 years or younger are usually dealt with by the Young Offenders Act 1994 (WA). Section 46 provides that the court, when sentencing young persons, is to consider the nature of the offence, the history and cultural background of the offender and dispose of the matter in a way that is proportionate to the seriousness of the offence and is consistent with the treatment of other young persons who commit offences. Section 46(5a) states that where a mandatory penalty is required to be imposed for an offence the court is not obliged to impose it on a young person.

Section 401(4)(b) requires the court to impose a sentence of at least 12 months imprisonment or detention on a young offender who has been convicted for a home burglary for a third time, and explicitly excludes the operation of s46(5a). In a decision by the President of the Children's Court, Justice Fenbury, on 10 February 1997, it was ruled that a court may use Sections 98 and 99 of the Young Offenders Act 1994 (WA) to make an intensive youth supervision or a conditional release order in lieu of the sentence imposed by Section 401(4)(b). The Supreme Court of Western Australia also decided in *"P"(A child) v The Queen SCL 970580* that convictions that occurred more than two years prior to a current offence cannot be used towards a mandatory offence.

Judicial Discretion

The requirement to impose a mandatory sentence on an offender constitutes a threat to the independence of the judiciary. Mandatory sentencing laws are often said to be enacted in response to, as stated by a Northern Territory government submission to the Senate Legal and Constitutional References Committee inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, "a perception that sentences imposed by criminal courts did not properly reflect the seriousness with which the community viewed these offences." This shows that these laws are aimed at limiting judicial discretion.

A mandatory minimum sentence deprives judges of choice, except in imposing a higher penalty. Irrespective of the relative seriousness of the offence or any extenuating circumstances a judge is required to impose an order for detention or imprisonment of a predetermined length. For less serious offences this removes any proportionality between the punishment and the crime. Further, judicial discretion is limited at the appellate level as those convicted of an offence are precluded from appealing the length of their sentence, except for an amount imposed over the mandatory minimum.

Numerous examples of the arbitrary effect of these sentencing laws were highlighted during the public debate on mandatory sentencing. These included:

- a 24 year old indigenous mother was sentenced to 14 days in prison for receiving a stolen $2.50 can of beer;
- a 29 year old indigenous man was imprisoned for a year after he wandered into a backyard when drunk and took a towel worth $15. It was his third minor property offence;
- an 18 year old man was sentenced to 90 days prison for stealing 90 cents from a motor vehicle;
- a 15 year old girl was detained for 28 days for unlawful possession of a vehicle in which she was a passenger.

In the case of juveniles, Australia is required by Article 3(1) of the Convention on the Rights of the Child (CRC), in all actions concerning children, to place the best interests of the child as a primary consideration. Further, Article 37(b) of the CRC also provides that detention or imprisonment of a child shall only be used as a measure of the last resort and for the shortest period of time. By having a mandatory requirement to detain for a minimum period judges are precluded from determining whether this is the appropriate treatment in the circumstances.

Several UN human rights treaty monitoring bodies have expressed concern about mandatory sentencing. In 1997, the Committee on the Rights of the Child, in its Concluding Observations (CRC/C/15/ADD.79) on Australia's initial report submitted under the Convention on the Rights of the Child, expressed concern over the mandatory sentencing laws. Two points in particular were addressed:

- the unjustified, disproportionately high percentage of Aboriginal children in the juvenile justice system, and that there is a tendency normally to refuse applications for bail for them;
- the enactment of new legislation in two states, where a high percentage of Aboriginal people live, which provides for mandatory detention and punitive measures of juveniles, thus resulting in a high percentage of Aboriginal juveniles in detention.

In March 2000, the Committee for the Elimination of All forms of Racial Discrimination also expressed concern regarding the mandatory sentencing laws. The Committee stated in its Concluding Observations (CERD/C/56/Misc.42/rev.3) that:

> mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially in the case of juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the state party's obligations under the Convention and recommends the state party to review all laws and practices in this field.

During the debate in Australia many serving and former members of the judiciary, bar associations and law societies, and legal academics voiced concern over the mandatory sentencing laws. On 17 February 2000, former High Court Chief Justice, Sir Gerard Brennan, stated that "sentencing is the most exacting of judicial duties because the interests of the community, of the victim of the offence and the offender have all to be taken into account in imposing a just penalty." The Law Society of the Northern Territory was concerned about the shifting of discretion from the judiciary to the police and prosecutors and called mandatory sentencing laws "an unwarranted attack on the independence of the judiciary."

However it is a concern that the Attorney General criticised four judges of the Supreme Court of New South Wales for publicly stating their opposition to the mandatory sentencing laws. Mr Williams stated that "judges should refrain from commenting on politically contentious issues which are properly the domain of the democratic political process." Principle 8 of the UN Basic Principles on the Independence of the

Judiciary reaffirms that judges, like all others, are entitled to the freedoms of expression and belief.

Mandatory sentencing laws also have other negative effects on the administration of justice. By restricting discretion at the judicial level, discretionary decision making is shifted to lower levels. This enables prosecutors or police to use the future imposition of a mandatory sentence as a bargaining tool. Prosecutors can offer those accused of an offence a lesser charge that does not entail a mandatory sentence in exchange for a plea of guilt. This exercise of discretion is less transparent and offers less guarantees that it will be applied in an equal manner. Judicial sentencing procedures, however, are public, making judges accountable for their reasoning and decisions.

The certainty of a mandatory sentence also places extra burdens on the judicial system. When defendants are certain to receive a minimum sentence if convicted for a particular crime, they are more likely to contest the case. This creates delays and places an extra financial burden on the court system.

One final concern is that mandatory sentencing encourages judges to attempt to circumvent the sentencing laws in order to avoid harsh or disproportionate outcomes in individual cases. This is evidenced by the development, by the President of the Children's Court in Western Australia, of conditional release orders. These orders are not provided for explicitly in the Young Offenders Act 1994 (WA), but the court created them by combining an intensive youth supervision order with a suspended period of detention. The court reasoned that as Section 401(5) of the Criminal Code (WA) only provided that mandatory sentences of imprisonment imposed on juveniles under s401(4)(b) may not be suspended, the court could suspend any period of detention, other than prison, imposed. Althought this development has been accepted by the Western Australian Government it illustrates that judges may feel forced to engage in restrictive interpretation in order to do justice in a case.

AZERBAIJAN

The presidential power regarding appointment and dismissal of judges is a serious threat to the impartiality of the judiciary. Furthermore, the lack of security of tenure for judges constitutes a serious deficiency in the Azeri system. The Minister of Justice decided in December 1998 that the government controlled Collegium of Advocates had a monopoly in criminal cases.

Azerbaijan has been a republic with a president since it became independent from the Soviet Union on 30 August 1991. President Heydar Aliyev came to power on 18 July 1993 by overthrowing his predecessor. In 1995 the 125-seat parliament (*Milli Majlis*) was chosen for five years in elections that were widely seen as incoherent. The Constitution was adopted by referendum on 12 November 1995.

President Heydar Aliyev was re-elected in October 1998 for a period of five years. The Organisation for Security and Cooperation in Europe (OSCE), which observed the elections, concluded that they did not meet international standards. Municipal elections took place on 12 December 1999 for the first time in the country. Election committees who supervised the elections, however, were controlled by local authorities.

The President is head of state and the Prime Minister is the head of the government. The Cabinet consists of a Council of Ministers who are appointed by the President and confirmed by the parliament.

Azerbaijan is engaged in a conflict with neighbouring Armenia over the status of the Nagorno-Karabkh region, although a cease-fire has been complied with since 1994. As a result of the conflict there is a very large number of displaced persons, both in Armenia and Azerbaijan.

The Nakhichevan Autonomous Republic, in the south west of the country, is an autonomous state within the Republic of Azerbaijan. Nakhichevan has its own legislative power, a parliament (*Ali Majlis*); executive power, the Cabinet of Ministers; and its own judiciary. The parliament consists of 45 seats and is elected for five years.

HUMAN RIGHTS BACKGROUND

Azerbaijan's human rights record is poor. The country, however, has committed itself to uphold international human rights standards by acceding to six major UN human rights treaties, including the International

Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

Freedom of the press was severely hampered in 1999. Several journalists were subjected to harassment, ranging from threats and fines to beatings, arrests and kidnapping. Members from opposition parties are continuously harassed in Azerbaijan as the authoritarian regime does not tolerate criticism and opposition. In 1999, several politicians were arrested, some of whom even sought refuge abroad.

Torture is widespread. The Azerbaijani Criminal Code does not contain a separate offence punishing torture as defined in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. There are numerous reports of torture of prisoners by the police, especially during arrest, interrogation and pre-trial detention.

Azerbaijan's initial report to the UN Committee against Torture, which monitors the Torture Convention, was considered during the Committee's November 1999 session. The Committee against Torture expressed concern, *inter alia*, about the following:

- the absence of a definition of torture, as provided for by Article 1 of the Convention, in the penal legislation currently in force in the state party, with the subsequent result that the specific offence of torture is not punishable by appropriate penalties as required by Article 4, paragraph 2 of the Convention;
- the numerous and continuing reports of allegations of torture and other cruel, inhuman and degrading treatment and punishment committed by law enforcement personnel;
- the apparent failure to provide prompt, impartial and full investigation into numerous allegations of torture that were reported to the Committee, as well as the failure to prosecute, where appropriate, the alleged perpetrators;
- the absence of guarantees for independence of the legal profession, particularly with reference to the judiciary, appointed to a limited renewable term of years;
- the use of amnesty laws that might extend to the crime of torture.

The Judiciary

According to Article 125 of the Constitution, judicial power is implemented through the Constitutional Court, the Supreme Court, the

Economic Court, ordinary and specialised courts. Courts of general jurisdiction may hear criminal, civil and juvenile cases. Cases at the District Court level are tried before a panel consisting of one judge and two lay men.

The Constitutional Court was established in 1998 and is comprised of nine judges. The Constitutional Court takes decisions, *inter alia*, regarding conflicting legislation and disputes between the legislative, executive and judicial powers. The Constitutional Court also interprets law.

The Supreme Court is the highest judicial body in civil, criminal and administrative cases. The Economic Court is the highest court regarding the settlement of economic disputes.

Appointment and Dismissal

The judges of the Constitutional Court, the Supreme Court and the Economic Court are appointed by the parliament on the recommendation of the President. The President directly appoints lower level judges.

The judges of the Constitutional Court, the Supreme Court and the Economic Court can be dismissed on the initiative of the President after the parliament has voted for dismissal with a majority of 83 votes. The lower judges can be dismissed with a majority of 63 votes.

Pro-president members dominate the Azerbaijani parliament and, therefore, the career of judges depends almost entirely on the President. The presidential power regarding appointment and dismissal is a serious threat to the impartiality of judges, especially in politically sensitive cases.

Security of Tenure

Judges in Azerbaijan do not have security of tenure and the government has been criticised by the UN in this regard. The UN Committee against Torture, during the discussion of Azerbaijan's initial report in November 1999, said it was concerned about:

> the absence of guarantees for independence of the legal profession, particularly with reference to the judiciary, appointed to a limited renewable term of years.

State of the Judiciary

According to the Constitution, judges are independent and subordinate only to the Constitution and laws of the Azerbaijan Republic. In reality, however, there are credible reports of the lack of independence in the

judiciary and influence by the executive. As described above, the lack of security of tenure and the presidential power regarding appointment and dismissal constitute serious deficiencies in the system.

LAWYERS

Three types of professionals provide legal services in Azerbaijan: attorneys or barristers who can represent clients in the criminal court; jurists or solicitors who can represent clients in civil proceedings; and notaries who can authenticate signatures and prepare contracts in family law and real estate law.

Until recently, lawyers could only practice if they were a member of the Collegium of Advocates. This Collegium has a monopoly on criminal defence cases. Lawyers are obliged to turn their fees over to the Collegium and get back a percentage. Through the monopoly, lawyers are dependent on the Collegium for a living as the majority of cases in Azerbaijan are criminal cases. The Collegium has approximately 500 members out of a population of around 8 million Azeris. Needless to say there is an enormous shortage of lawyers.

Formally, the Collegium is independent from the Ministry of Justice and other state authorities. The political climate in Azerbaijan, however, does not allow an institution as the Collegium to operate autonomously.

President Aliyev issued Presidential Decree No. 637 'On Confirming the List of Activities which Required Special Permission (Licenses)' in October 1997 which lists all the types of fee-paid services that require a licence. The decree was implemented in May 1998 by regulations of the Cabinet of Ministers and lawyers could apply for licenses. According to information from the International League for Human Rights, an international human rights organisation based in New York, as of June 1999, 122 individuals and 13 firms had applied for licenses from which only 2 were rejected because the applicants did not have a higher education.

In July 1998, however, the Minister of Justice publicly announced that the regulations did not apply to lawyers in the Collegium. In December 1998 the Minister issued a letter prohibiting lawyers with a license who were not members of the Collegium to represent clients in criminal cases.

Seventy independent lawyers then complained to the Cabinet of Ministers about the order of the Minister of Justice to ban them from criminal practice. The complaint was referred to the Supreme Court which referred the case to a lower court where it was pending at the time of

writing. The order of the Minister of Justice has enormous consequences for civil society in Azerbaijan as dissenters are often charged with criminal offences. If independent criminal defence lawyers are barred from taking criminal cases those charged will have to rely on the lawyers from the Collegium who are controlled by the government.

On 27 January 2000 the 1980 Law on Advocates was replaced by the Law on the Legal Profession. At the time of writing no copy of the law was available in English to the CIJL. The International League for Human Rights, however, reported that the new law decided in favour of the Minster of Justice and that the Collegium indeed has a monopoly on criminal cases. Furthermore, the new law prescribes that the founder of a law firm should be a member of the Collegium, which can have consequences for already existing law firms.

Another major problem is the lack of access that detained persons have to a lawyer. In Azerbaijan persons are often detained arbitrarily, without a warrant or without being told what they are charged with, and often family members are not informed of their arrest. Although the Constitutional Court ruled in July 1999 that a lawyer should have access to a detained person from the time of arrest rather than from the time he is officially charged with a crime, access to lawyers remains poor. When a detainee is denied access to a lawyer and is also kept from seeing family members the risk of torture mounts, especially in a legal system that relies heavily on confessions, as is the case in Azerbaijan.

The Association of Lawyers of Azerbaijan and the Azerbaijan Bar Association

The Azerbaijan Bar Association is a non-governmental organisation (NGO) in Baku which aims to promote the Rule of Law and the independence of the Bar. The organisation has applied twice for registration but these requests were denied by the Ministry of Justice. The official reason for denial was that the Law on the Legal Profession had yet to be passed. The Azerbaijan Bar Association applied again for registration in February 2000, after the law came into force.

The Association of Lawyers of Azerbaijan, another non-governmental organisation, applied three times for registration which was three times denied by the Ministry of Justice. The organisation is currently contesting the rejection in court.

The denial to register these organisations, that apparently live up to requirements as prescribed by law, is in clear violation with Article 24 of the UN Basic Principles on the Role of Lawyers which states:

> Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

CASES

About one hundred lawyers have been barred from taking up criminal cases after the order of the Minister of Justice in December 1998.

Aslan Ismailov {lawyer}: Mr. Ismailov, a respected lawyers, was a member of the Collegium until his dismissal in 1999. He has served repeatedly *pro bono* or for a nominal fee as legal counsel in human rights cases that have met with government resistance, particularly cases involving freedom of the media.

Mr. Ismailov is believed to have been punished for a trip he made from 21 February to 5 March 1999 to the United States. Mr. Ismailov and two other Azerbaijani lawyers went on a training and advocacy trip sponsored by the International League for Human Rights. During their stay, they met with judges, lawyers, journalists, scholars, congressional staff and government officials. Their trip overlapped with a working visit by the Minister of Justice and the President's legal advisor, who were meeting with many of the same policy-makers as the lawyers. Within days of his return, on 18 March 1999, Mr. Ismailov was informed that he had been expelled from the Collegium.

The official reasons for his expulsion are that Mr. Ismailov failed to obtain permission from the Collegium for his trip to the US and to provide a formal explanation for his trip after he returned, and that his work as a privately licensed lawyer constitutes entrepreneurial activity which the Collegium argued is forbidden for its members under the 1980 Law on Advocates.

The International League for Human Rights reported that despite the fact that Mr. Ismailov could contest the accusations with legal arguments, the District Court ruled against Mr. Ismailov. He appealed the decision in higher courts, yet in September 1999 his appeal to the Supreme Court was rejected, and he has exhausted all existing local remedies for his right to practice his profession.

In September 1999, the International League for Human Rights published a report "Restrictions on the independent legal professions in Azerbaijan", *inter alia,* analysing in detail the case of Aslan Ismailov.

BELARUS

In Belarus the procedures regarding tenure, discipline and dismissal of judges do not comply with the principle of an independent judiciary. In fact, no respect at all for the Rule of Law is shown by the Belarussian Government. Lawyers cannot function independently and face problems and harassment at several levels. The human rights situation continued to deteriorate in 1999.

After the collapse of the Soviet Union, Belarus declared its independence on 24 August 1991, and later joined the Commonwealth of Independent States (CIS). In March 1994, the Constitution dating from the Soviet era was replaced and in July 1996 Alexander Lukashenko was elected as the first president.

In a referendum in November 1996, that is viewed as having been highly controversial, the 1994 Constitution was amended, eventhough the Constitutional Court had ruled that the Constitution could not be amended in this way. Furthermore, the Belarusian legislature, the Supreme Soviet, was disbanded and Mr. Lukashenko's term as President was extended for 2 years as from July 1999. As a result, the current political system is based on a constitution that was adopted unconstitutionally. The system of checks and balances among the executive, legislative and judicial powers have been distorted and now all branches are under the President's control.

A new bicameral legislature was established from remnants of the Supreme Soviet. The Council of the Republic is the upper chamber and the House of Representatives the lower chamber. The 110-member lower house was formed out of the membership of the existing Supreme Soviet. The 64-member upper house, the Senate, was created by a combination of presidential appointments for one third of its members and elections for the remaining seats. Several deputies of the Supreme Soviet belonging to opposition parties have refused to accept this new parliament.

The Belarusian opposition called for alternative presidential elections on 16 May 1999, in conformity with the abolished 1994 Constitution. A Central Electoral Commission (ECE) was formed to organise the elections. In the period leading to the alternative elections several opposition leaders were harassed, arrested and some disappeared. The ECE ruled the election results invalid due to irregularities that were,caused *inter alia*, by the hostility of the authorities.

Local elections took place in April and were described by the Organisation for Security and Co-operation in Europe (OSCE) as "characterised by the state's interest in organising political support for its institutions and leaders".

Despite strong opposition from the Belarusian population President Lukashenko and the Russian President Boris Yeltsin signed, on 8 December 1999, a Treaty on the Creation of a Union State. The treaty commits the two countries to become a confederate state and establishes joint governing bodies.

Human Rights Background

The human rights situation in Belarus continued to deteriorate in 1999. Political opponents disappeared, there have been reports of torture and freedom of expression was restricted, as was freedom of assembly and association. The death penalty continued to be enforced in Belarus and several executions took place in 1999.

On 20 October 1999, the ICJ voiced its concern over the constantly deteriorating situation in Belarus. The ICJ expressed alarm over "the dozens of arrests and the beatings of opposition members, including the head of the Belarusian Social Democratic Party, in the aftermath of an opposition rally in Minsk last Sunday". The ICJ said that "it appears that the police and other organised groups of thugs used extremely brutal means to quell the march of the opposition on Sunday 17 October, where many demonstrators were hurt".

The ICJ also voiced, once again, its great concern over "the harassment of local NGO s in Belarus, the closure of numerous opposition media outlets, and most of all the disappearance of personalities such as Viktor Gonchar, Yurij Zacharenko and Tamara Vinnikova".

Tamara Vinnikova, former head of the National Bank, who had been under house arrest since January 1997, disappeared in April 1999 under suspicious circumstances, but reappeared in December 1999. Yury Zakharenko, former Interior Minister, disappeared in May and Viktor Gonchar, the Deputy Speaker of the Supreme Soviet, disappeared in September. Several others were arrested during demonstrations and allegedly mistreated.

The Speaker of the Supreme Soviet, Semyon Sharetski, fled to Lithuania on 21 July 1999, the day after the Supreme Soviet declared him to be acting President. The term of President Lukashenko would have officially ended on 21 July under the 1994 Constitution. Mr. Sharetski feared for his safety.

Andrei Klimov, a deputy of the Supreme Soviet, was arrested in 1998 and charged with embezzlement. It was widely believed that his arrest was spurred by the work he had done as the chairman of a committee that investigated violations of the Constitution by the President. At the time of writing Mr. Klimov remains in jail pending his trial.

One of the candidates for the alternative presidential elections in May, former Prime Minister Mikhail Chygir, was detained on 30 March on charges of embezzlement. It is widely believed that political motives were behind his arrest.

Arbitrary Arrest and Pre-Trial Detention

As stated above, several political opponents of the President, and others disagreeing with the government, were arbitrarily arrested in 1999. According to the Criminal Procedure Code, the police may detain a person for 24 hours without a warrant. Within that period the Prosecutor is notified and should decide within 48 hours on the legality of the detention. A suspect can be held for 10 days without being formally charged.

Pre-trial detention can last up to 18 months and the authority to decide on the continuation of detention is that of the Prosecutor, not the judge. This is in clear violation of Article 9 (3) of the International Covenant on Civil and Political Rights, to which Belarus is a state party. In its review of the report of Belarus on its treaty obligations in 1997, the Human Rights Committee recommended that the "laws and regulations relating to pre-trial detention be reviewed as a matter of priority so as to comply with the requirements of Article 9 of the Covenant".

Detainees should have access to a lawyer and if unable to afford one, one should be appointed by the court. Often, however, detainees are not informed of their rights and frequently interrogations are carried out without the presence of a lawyer.

Human Rights Defenders

The Human Rights Centre in Mogilev is facing problems with the re-registration process. The authorities have told them that they can only be re-registered if they agree to provide legal services to their members only, and not to the public at large.

Human rights defenders also face other types of harassment For example, the director of the human rights organisation Legal Aid, Mr. Oleg Volchek, was beaten on 21 July 1999 by policemen. A complaint was lodged to the Procurator's office but the case has not been investigated.

Council of Europe

The Council of Europe expressed its concern that Belarus continued to fall seriously short of Council of Europe standards such as pluralist democracy, the Rule of Law and respect for human rights. The Parliamentary Assembly of the Council of Europe decided in January 2000 to continue to suspend Belarus' status. Following the referendum of 26 November 1996, the Council of Europe, in January 1997, suspended the special guest status of Belarus. The application procedure for membership of the Council of Europe was suspended in December 1998.

The Judiciary

Although the amended Constitution provides for an independent judiciary, persistent interference from the President has severely undermined the judiciary as it is largely unable to act as a check on the executive branch. Organised crime also, reportedly, has a significant impact on court decisions. The practice of executive and local authorities dictating the outcome of trials to the courts, known as "telephone justice", is also widely reported.

Court Structure

The court system is comprised of a Supreme Court, Regional Courts, District Courts and Military Courts. There are also Economic Courts. Although the law also permits the creation of specialised courts such as Family, Administrative, Land and Tax Courts, these have not yet been established. Constitutional issues are considered by a Constitutional Court whose powers have, however, been severely reduced by amendments to the Constitution.

Qualifications

Article 62 of the Law on the Judicial System and the Status of Judges establishes the requirements for becoming a judge. Any citizen of the Republic of Belarus, who has a higher legal education and a good moral reputation, and who is 25 years of age or older, may become a judge.

As a further requirement, potential judges must have at least two years of legal experience or two years of fieldwork and practical study. The judges of the Regional, Minsk City and Belarusian Military Courts, however, are required to have at least three years of experience, and Supreme Court judges should have at least five years of experience. All candidates

must also pass a qualifying examination and obtain approval from the relevant board of judges.

Appointment

The Ministry of Justice and the President are primarily responsible for the appointment of judges. Judges are dependent on the Ministry of Justice for sustaining the court infrastructure and on local executive branch officials for providing their housing.

Judges of the Supreme Court, including the Chair, are appointed by the President, upon approval by the Senate, of which one third is appointed by the President himself. The amended Constitution fails to provide judges with life tenure.

Six of the twelve judges from the Constitutional Court are directly appointed by the President, including the Chair. The other six are elected by the Senate. Judges do not have life tenure, but sit for eleven years.

Discipline

Article 73 of the Law on the Judicial System and the Status of Judges stipulates that the Regulations on Disciplinary Responsibilities of Judges shall prescribe the grounds and procedures for holding judges accountable. A judge can be removed from his position when he has committed a disgraceful act or deliberately breached the law in a manner that is incompatible with the status of a judge. The removal decision is made by the organ which elected or appointed him.

Since the judges of the Supreme Court are appointed by the President, this means that they may also be dismissed by him. The same applies for the six judges of the Constitutional Court who are directly appointed by the President. This is a grave violation of the principle of independence of the judiciary and it has been reported that several judges of the Constitutional Court have already been dismissed because they refused to decide a case pursuant to instruction by the President.

Article 18 of the Law on the Constitutional Court regulates instances where a justice is dismissed before the end of term. According to this provision a judge may be dismissed if he or she is convicted of a crime, if he or she has committed an act against the Constitutional Court that discredits the institution, if he or she has lost his or her citizenship or due to health problems.

All other judges can be dismissed on any basis determined by law, a provision which also gives the President the potential to manipulate the judiciary through his power to render decrees.

State of the Judiciary

As shown above the procedures regarding tenure, discipline and dismissal of judges do not comply with the principle of an independent judiciary. In addition, the President has refused to respect decisions of the Constitutional Court. In fact, no respect at all for the Rule of Law is shown by the government.

Lawyers

The Presidential Decree, Several Measures on the Activities of Lawyers and Notaries, issued on 3 May 1997, gives competence to the Ministry of Justice to licence lawyers, obliging them to be members of the Collegium which is controlled by the Ministry of Justice. Therefore, lawyers cannot function independently.

Lawyers in Belarus face problems at several levels. The first are the structural problems that make it difficult for lawyers to represent their clients. These include, among others, lengthy pre-trial detention, the difficulties facing defence attorneys in conducting their own investigations, limited access to clients in custody and the complete lack of confidentiality of lawyer-client conversations. Moreover, there are procedural obstacles placed in the way of defendants who want a lawyer to represent them, and there are general problems in exercising the right to a lawyer. All of these are issues that plague all lawyers, regardless of whether they are representing a "high profile" case or not. Lawyers representing "controversial" clients are subject to various forms of harassment (*see cases below*).

Cases

Galina Drebezova (lawyer in Brest): President of the Belarusian Association of Women Lawyers. Last year a lawsuit was filed against her by the prosecutors in Brest charging her with collecting too high a fee for her legal services in one case. The client in that case did not object to the fees charged, and in fact, objected to the legal proceedings against Ms. Drebezova. Finally, Ms. Drebezova was dismissed from the case.

Oleg Grablevsky (lawyer with the Free Trade Union in Orsha): Mr. Grablevsky participated in a demonstration on 17 October 1999 in Minsk, and a few days after fled to Poland where he is seeking political asylum as he was about to be arrested.

Dmitiri Pigul (lawyer in Minsk): A conversation that Mr. Pigul was having with one of his clients in detention was tape-recorded in the interview room. Mr. Pigul was later charged with inciting his client to perjury when he informed him that his brother had also been arrested. Mr. Pigul was convicted of these criminal charges and thrown out of the Collegium of Advocates.

Valeri Shchukin (lawyer and human rights activist): Mr. Shchukin was detained on 22 July 1999 when he tried to attend the public trial of Andrei Klimov, a member of parliament who was accused of financial irregularities. Mr. Shchukin was removed from the building where the trial was held and sent to prison for 15 days for "petty hooliganism". He was released after a week.

Vera Stremkovskaya (lawyer and President of the Centre for Human Rights in Belarus): Ms. Stremkovskaya was threatened with the loss of her license for criticising the inadequacies of legal protection in Belarus during a meeting in New York in September 1998, organised by the International League for Human Rights (*see Attacks on Justice 1998*). She also received an official reprimand by the Collegium of Advocates for her comments in New York.

Furthermore, Ms. Stremkovskaya was being criminally prosecuted for representing a politically unpopular client, Mr. Vasily Staravoitov. She was charged for slander for legitimate comments and questions made during the trial of Mr. Staravoitov.

The charges against Ms. Stremkovskaya were dropped in January 2000.

Yury Sushkov (former judge): Mr. Sushkov requested asylum in Germany on 24 February 1999, after he had refused to obey orders from the KGB to sentence two Belarusian customs officers to several years in prison despite the lack of evidence.

Uladar Tzurpanov (lawyer and member of the Human Rights Centre in Mogilev): Mr. Tzurpanov is actively involved in opposition activities, and is an active "public defender". He was arrested for participating in a demonstration in Mogilev. He was the only one demonstrating and he was only holding a sign and walking with it. The law requires more then one person to be present for it to be a demonstration, so the judge dismissed the charges.

On another occasion Mr. Tzurpanov represented a client who had been arrested. When he wanted to see his client, the investigator did not want Mr. Tzurpanov present, and after a heated discussion, Mr. Tzurpanov was arrested and charged with violating the order of a police officer. Mr. Tzurpanov and his client were brought to court

together, and he was convicted and sentenced to several days in custody. His client was released.

Ludmila Ulysahina {advocate in Minsk}: Ms. Ulysahina represents Tamara Vinnokova. Prior to her disappearance, Ms. Vinnokova was under house arrest with guards living in her house in Minsk. On the day that she disappeared, Ms. Ulysashina was detained and almost arrested and charged with the disappearance of her client. Her partner, Olga Zudova, acted quickly in calling in the press. The Collegium of Advocates also took a stand against this, and in the end, no charges were filed, although Ms. Ulysahina was questioned at length about her client's disappearance.

Olga Zudova {advocate in Minsk}: Ms. Zudova represents Mr. Leoniv (former Agriculture Minister). She has been told "unofficially" to watch herself because of the Leoniv case. Other sorts of threatening statements have also been made, leading her to be concerned that she herself could get arrested, or face other problems. She now works in Vienna.

BOLIVIA

The main problems affecting the judiciary are related to long delays in trials and widespread corruption. The year was dominated by the election and appointment of justices of the Supreme Court and the Constitutional Tribunal, in addition to dozens of judges and prosecutors, to fill up the high number of posts left vacant for many years which were threatening to lead to the collapse of the judiciary.

Bolivia is a constitutional republic with a Constitution originally adopted in 1976 and amended several times, the last time being in 1995. This last amendment introduced important modifications involving the organisation and work of the judiciary. The Constitution provides for the separation of powers: executive, legislative and judicial. It also recognises and guarantees a comprehensive Bill of Rights to all citizens as reflected in international human rights instruments.

Executive power is exercised by the President of the Republic with the assistance of a Council of Ministers. The President is elected, together with a Vice-President, for a non-immediately renewable five-year term in office. Mr. Hugo Banzer, a former military ruler, was elected in 1997 in fair and transparent elections and remained in office during 1999. The legislature is made up of a bicameral assembly with a Chamber of Deputies and a Senate as an upper chamber. Judicial power is vested in the ordinary court system and the Constitutional Tribunal.

Local elections to appoint mayors in nearly 314 municipalities were held in December 1999. The ruling party, the Democratic Nationalist Action (*Alianza Democratica Nacionalista - ADN*), of President Banzer won in the majority of the towns despite substantial progress made by the opposition.

HUMAN RIGHTS BACKGROUND

The human rights situation in Bolivia has improved to some extent in recent years, although there remain some serious problems. A number of legal reforms that may improve the protection of human rights in the country have been implemented in recent years. At the beginning of 1999 a National Plan of Action for the Promotion and Protection of Human Rights was adopted by the government and constituted a sign of its commitment on the matter.

The most serious human rights violations linked to the functioning of the judiciary result from the practice of arbitrary arrest with long periods of detention without trial that may amount to instances of denial of justice. The reasons for this practice are complex and involve a lack of human resources in the judiciary and the offices of the Prosecutor and the Public Defender. There is also a lack of sufficient training among judges and prosecutors as well as auxiliary staff, the existence of old and cumbersome procedures and corruption at various levels.

There were instances of police brutality and torture which resulted in deaths, and the police also used excessive force in the repression of public demonstrations that resulted in scores of injured people and detentions.

Impunity also constitutes a problem in Bolivia and reflects the inability of the judiciary to effectively impart justice and the unwillingness of the government to instigate investigations. A number of outstanding past human rights violations remained without investigation, or if investigated, did not result in trials or convictions, despite the authorities' commitment in this regard. The government has pledged to produce a report on the violent clashes between coca growers and security forces in 1998 in the Chapare region. Similar clashes also occurred in 1997. Furthermore, the Attorney General was urged to finish his investigations into the 1996 massacre of mining workers in Amayapampa. All these events resulted in a number of deaths that still need to be investigated. The Inter-American Commission on Human Rights found, in its report on the events in the Chapare region, that the security forces' actions were excessive while repressing the movements. There were also a number of alleged abuses committed by the security forces' special unit to combat coca-growing and drug-trafficking.

Early in 1999 the authorities finally initiated judicial investigations into the 1981 disappearance and murder of left-wing leader Marcelo Quiroga which had already been investigated by parliament. The long delay in starting investigations was attributed to political unwillingness and the fear that once investigations and judicial proceedings were started, they would require witness's testimony that may involve persons close to the government.

During the year the Permanent Assembly for Human Rights (*Asamblea Permanente por los Derechos Humanos - APDH*), a well-respected non-governmental organisation (NGO), handed to Spanish investigating judge, Baltasar Garzon, a number of documents that allegedly implicate President Banzer's first government, between 1971 and 1978, in a co-ordinated plan to eliminate political opponents – known as "Operation Condor"- carried out by the then military regimes in the southern cone. Similarly, the decision to send to Judge Garzon a report prepared by the Chamber of Deputies about the disappearance and death of seven Bolivian citizens in

Chile during the military rule of General Pinochet originated heated debate inside parliament and between parliament and the government.

Legal Reform

In March 1999 a new Code of Criminal Procedure was promulgated which will enter into force within two years, thus allowing a transitional period of time in which the necessary conditions for the full implementation of the code will be put into place. A National Commission on Implementation, with representatives from the three branches of government, was appointed to prepare the smooth transition from the old criminal procedure to the new one. The implementation activities will involve the training of judges, prosecutors and court officials, further legislative measures and the provision of adequate infrastructure.

The Code of Criminal Procedure is part of a broader programme of legal and judicial reform. By the end of the year, there were a number of draft bills pending for discussion in parliament. One of them is a draft bill of a law on the public prosecution service. A draft of a new law concerning the judiciary has also been under consideration by the government and will be introduced and discussed in parliament in the near future.

The Judiciary

The Constitution provides for the independence of the judiciary. Article 116 of the Constitution states that magistrates and judges are independent and only subject to the Constitution and the law. They cannot be dismissed except by a final sentence following a regular procedure. The Bolivian judiciary is characterised by its slowness and its lack of human and financial resources.

The year 1999 was the first year ever in which the full judicial system, as envisaged in the Constitution, began to function. The Council of the Judiciary, which took shape during 1998, started to work effectively in 1999. Another judicial institution, the Constitutional Tribunal, also started its work in the second part of 1999. 1999 also saw a renewed commitment on the part of the authorities towards a well-respected and efficient judiciary. In an unprecedented step, widely seen as positive, representatives of the three branches of government met together on 13 January 1999 and signed a document called "Commitment for a judiciary for the next century". In this agreement they established priorities regarding the judiciary and adopted a number of commitments, including a formal schedule to carry out the appointment of judges at all levels and the elaboration of a list of

legislative measures to be discussed and passed in parliament to further reform the legal system and the judiciary.

Structure

The structure of the judiciary comprises a Supreme Court as the highest ordinary court in the country, that sits in the capital city, High Courts with jurisdiction over judicial districts and a system of lower courts. The lower court system is composed of Trial Courts (*juzgados de partido*), and Investigating Courts (*juzgados de intrucción*). There is also a system of specialised courts. Law 2026 of 27 October 1999 created a special court system to deal with matters related to children and adolescents. The structure and the tasks of the different courts are likely to change in the process of the legal reform.

The amendments to the Constitution approved in 1994 introduced two key institutions and placed them as part of the judiciary: a Constitutional Tribunal and a Council of the Judiciary (*Consejo de la Judicatura*), but these were not implemented until 1999. It took five years to enact the respective laws that draw the features of each institution and only in 1998 and 1999 could their membership be elected. The Constitutional Tribunal has jurisdiction over constitutional matters and the review of decisions on petitions of *Habeas Corpus* and *amparo* (Article 19 and 117 of the Constitution). The Council of the Judiciary is charged with the task of selecting candidates for appointment by parliament or by the Supreme Court, as well as exercising disciplinary power within the judiciary.

Appointment and Security of Tenure

All twelve Supreme Court justices are elected and appointed by parliament with a two third vote that implies negotiation and agreement between the political groups. They serve for a period of ten years and can be re-elected only after an equal period of ten years has elapsed (Article 117 of the Constitution). Seven justices were elected in March 1999, although the election was originally scheduled for February. Three of the posts were vacant since 1997, while the four other vacancies arose in 1998. The delay caused a bitter dispute between parliament and the Council of the Judiciary, each accusing the other of being responsible for the delay. The postponement of the elections for a month, from February to March, constituted the first setback in the implementation of the 13 January agreement establishing a schedule for election of judges at all levels (*see above*).

The election process of Supreme Court justices highlighted the extent to which these appointments are subject to political negotiations among the

parliamentary groups so as to achieve the necessary two thirds majority. According to some observers, as the system stands it allows the "distribution" of posts in the Supreme Court among political groups. Be as it may, the election constituted the first step in a wider process of making a quasi-collapsed judiciary operative again, permitting the ensuing election and appointment of judges for lower courts by the now fully operative Supreme Court, sitting in plenary session.

Judges in the High Courts are appointed by the Supreme Court, sitting in plenary assembly, from a list of nominees prepared by the Council of the Judiciary. The same process is followed in regard to judges in the lower courts except that the elections are made by the High Courts upon the submission of a list by the Council of the Judiciary (Article 4 - Law on Organisation of the Judiciary, as amended in 1997). At the beginning of the year the authorities acknowledged that 40 % of the posts for judges in the High Courts were vacant. As to the number of vacant posts for lower court judges, there was no conclusive figures, but during the year different sources gave approximate numbers of around 200.

The appointment of Supreme Court justices paved the way for the appointment of the judges of the High Courts and lower courts. However, further clashes and misunderstandings between the Supreme Court and the Council of the Judiciary resulted in additional delays. For instance, in May 1999 the Supreme Court appointed two judges who were not on the list of nominees forwarded by the Council and this prompted a strong reaction from the latter which withheld further lists of nominees in protest. Later in June, the appointments of judges for some provinces were overshadowed by allegations that political considerations and nepotism prevailed in the Supreme Court's choices. As a result the Council decided to publish the lists of nominees forwarded to the court, ranked in accordance with objective and public criteria, in order to enhance the transparency of the process.

The Council of the Judiciary is composed of four counsellors, plus the President of the Supreme Court as an *ex officio* member, who also presides over the Council. The councillors are appointed by parliament from lists of candidates submitted by the Supreme Court, the Constitutional Tribunal, the faculties of law and the Bar Associations. Any other fully qualified applicant can also apply for the post (Article 6 - Law of the Council of the Judiciary December 1997). The councillors serve a ten-year period which is non renewable until an equal term has elapsed in between. The Council's powers comprise the implementation of planning and development policy within the judiciary, the administration of economic and financial resources, infrastructure and the management of human resources. It is also in charge of the selection of candidates and the preparation of lists of nominees to be forwarded to parliament or the Supreme Court for judicial

appointments. Finally, its disciplinary powers allows the Council to dismiss those judges and court personnel responsible for having committed serious misconduct (Article 53 of the Constitution).

In 1999, however, the Council of the Judiciary suffered a serious setback in the exercise of its powers. On 18 October 1999 the newly created Constitutional Tribunal declared unconstitutional Article 53 of the Law of the Council of the Judiciary and Article 24 of the Law on the Organisation of the Judiciary, which grant the Council the power to dismiss judges for serious misconduct. In the Constitutional Tribunal's opinion these articles are inconsistent with Article 116 of the Constitution which guarantees that magistrates and judges cannot be dismissed without a prior final sentence. In the case at issue concerning a judge in the Cochambamba High Court who had been dismissed by the Council, the Tribunal found that the final decision of the Council did not constitute a final sentence, and therefore, the judge in question had been dismissed without complying with all legal requirements. By the end of the year, the Council, together with other authorities and members of parliament, were still trying to figure out how to restore the Council's disciplinary power to dismiss judges in cases of serious misconduct. The way that was envisaged for doing so was the passing of an interpretative law by parliament stating that decisions of the Council regarding dismissal are akin to final sentences in the sense of Article 116 of the Constitution.

The Attorney General is appointed by parliament, requiring two thirds of the vote of the whole membership. He or she serves for a period of ten years. The Attorney General is the head of the public prosecution service. Prosecutors are appointed by the lower house of parliament (Chamber of Deputies) upon the submission of lists of candidates by the Attorney General and the Council of the Judiciary. During 1999, a number of prosecutors were appointed but the process for the appointment, as in other cases, raised serious issues as to transparency and adequate guarantees for their independence.

On 20 March 1999, Senator Walter Soriano Lea Plaza, one of the leaders of the Nationalist Democratic Action (ADN), the major party in the ruling coalition, declared to the newspaper *El Diario* that the US Embassy in Bolivia "have a say" in the election of district prosecutors. According to Senator Soriano Lea, the US Embassy participates in the selection process with the aim of guaranteeing that none of the candidates are involved with drug-trafficking. This is done by virtue of existing agreements with the US that give them such a right. Under these agreements the US provides most of the funding for anti-drug programmes and apparently, this allows the US to participate in the selection of prosecutors, with an opinion that sometimes is, in Senator Soriano's words, "determinant".

Resources and Corruption

During the year judges' associations called for, several times, a salary increase and better distribution of resources within the judiciary. In January 1999, some High Court judges threatened to resign if their salary was not improved. In June 1999 judicial authorities declared to the press that authorities in the executive branch of government were withholding the transfer of ordinary financial resources to the judiciary for the past six months, putting the judicial services at risk of paralysis. The heads of the Supreme Court and the Council of the Judiciary met the executive authorities from whom they called for respect for the judiciary's autonomy to elaborate and administer its own budget.

Low salaries and poor infrastructure not only lead to the inadequate administration of their duties, but also make judges more susceptible to bribes. The extent of corruption within the judiciary was officially recognised by the Minister of Justice, Ana Maria Cortes, in declarations to the press in March. However, she clarified that "not all judges are corrupt". The Minister of Justice's statement was in response to an allegation made by the US Ambassador that the Bolivian judiciary was unreliable.

In March 1999, a number of judges of the special courts for drug-trafficking matters (*juzgados de substancias controladas*) resigned and others were suspended by the Council of the Judiciary on charges of extortion and corruption (including illegal releases and the passing of light convictions), in the Santa Cruz province. Action by the Council was taken upon the request of the Vice-Minister of Social Defence. The six judges suspended in their posts faced disciplinary and criminal investigations.

Cases

Waldo Albarracin {lawyer}: Mr. Albarracin is a lawyer and director of the Popular Assembly for Human Rights in Bolivia (APDHB), a well-respected human rights organisation that works nation-wide. In May 1997 he was kidnapped, tortured and threatened with death before being arrested by the judicial police, apparently in retaliation for his statements to a local newspaper about a massacre which had occurred some time before. Since then his case has been under investigation but without concrete results. In May 1999, the Chamber of Deputies' commission in charge of investigating the case, decided to pass it, together with all the evidence gathered, to the ordinary courts for investigation and prosecution. According to the investigations carried out by the Chamber of Deputies, which are of a non-judicial character, those responsible for the attacks on Mr. Albarracin in 1997 are General Willy Arriaza, the Chief of Police;

General Hernan Cortez Vargas, Operative Chief; Colonel Jaime Espindola, Deputy Director of the Judicial Police; Captain Filmann Urzagaste, police investigator; Captain Alberto Antezana, police officer; and the Prosecutor, Walter Blanco.

The case of Mr. Albarracin has already been the subject of a petition to the Inter-American Commission on Human Rights.

BRAZIL

A parliamentary committee investigated allegations of corruption and mismanagement in the judiciary. A number of judges and prosecutors were denounced and the evidence collected was sent to the Public Prosecutor for the initiation of criminal investigations. The Committee's report constituted a major input to the ongoing debate over a new law reforming the judiciary, which will focus on external control, modifications in the structure of the court system and a better definition of administrative and functional misconduct.

The Federal Republic of Brazil is composed of 26 states and a federal district, which is its capital. The Constitution was adopted in 1988 heralding the transition from two decades of military government to civilian democratic rule. Each federated state has its own constitution whose provisions must be consistent with the federal Constitution. The Constitution establishes the separation of powers. The legislative power is exercised by a bicameral parliament: a Chamber of Deputies (*Camara de Deputados*) and a Federal Senate (*Senado Federal*). The executive is vested in the President of the Republic who governs with the assistance of a Cabinet of Ministers. In 1999 President Fernando Enrique Cardoso started his second consecutive term in office as the President of the Republic. Conflicts of competence between the federal government and state governments frequently occur over economic, social and, above all, security and judicial issues.

The year 1999 started in financial turmoil which threw the country into deep recession and prompted the federal government to adopt emergency measures. One of these measures was the passing into law, in January, of a civil service pensions bill enabling the government to deduct social security payments from pensions paid to retired civil servants, as well as increasing those paid by civil servants still at work. The measure was to affect 300,000 pensioners and improve the financial situation of the federal government. The measure was opposed by political and social groups who challenged the law as being unconstitutional before the Supreme Court which, on 30 September, granted the petition. The ruling prompted the government to enact further legislation in order to close the financial gap caused by the decision. At the same time it prompted criticism from government officials who accused the Supreme Court of undermining the economic and financial measures adopted by the executive.

Human Rights Background

In June 1999, a Ministry of Defence was formally created by law. The new Minister of Defence, who is a civilian for the first time ever, has control over the three branches of the armed forces. In the same month, President Cardoso appointed a new Federal Police Director-General, Mr. Joao Batista Campelo, but was obliged to request his resignation some days later after a strong campaign by human rights and social groups accusing the appointee of having direct responsibility in cases of torture against political prisoners during the 1970s.

Impunity continues to be one of the main reasons for the low level of public confidence in the judiciary. Police abuse and the killing of civilians are alarmingly frequent and the special branch of the judiciary empowered to try policemen continuously fails to punish those responsible.

During the year controversial acquittals were granted in various tribunals throughout the country. On 19 August 1999, a tribunal in Belem, the capital of the state of Parà, acquitted three senior officers of the so-called "military" police who were accused, together with many other subordinates, of the killing of 19 landless peasants in El Dorado de Carajas. This ruling was criticised by the survivors, as well as human rights groups, as enhancing the impunity of high-ranking officials. In August 1999, another member of the "military" police involved in the 1997 massacre in the neighbourhood of Vigario Geral was convicted by a jury in Rio de Janeiro on only one count of homicide, being acquitted of another twenty despite existing evidence. Yet another defendant involved in the same case was acquitted of all charges, while a third one was convicted. In the state of Sao Paulo, in June 1999, a judge cleared another member of the "military" police of all charges in relation to the 1997 killing of three squatters in the Fazenda da Juta neighbourhood.

In November 1999, the government set up a Federal Taskforce to Fight Impunity (*Núcleo de Combate à Impunidade*) to investigate and combat impunity in the country. The taskforce is composed of members of the police, state prosecutors and officials from the revenue and central bank. This demonstrates that the government intends to adopt a tough stance against organised crime and its influence on political and economic life. Observers say that the scale of the taskforce's operations may resemble the Italian "clean hands" (*mani pulite*) campaign in the early 1990s.

In the context of the land conflict in Brazil, landless workers who had been occupying privately-owned land were forcibly evicted by the police, and in many instances the police abused their power, with fatal consequences. There were also allegations of extrajudicial executions of landless workers, as well as harassment and persecution of peasant leaders through the institution of criminal judicial proceedings against them. It is also

within this framework that many attempts against the judiciary, jurists and legal practitioners are carried out.

The situation in prisons remains precarious and constitutes a form of inhuman and degrading treatment. Overcrowding and slowness of trial proceedings resulted in rioting, hostage-taking and consequent repression in state and federal prisons.

Corruption

Corruption at all levels continued to be one of the main problems in Brazilian society and this has also affected the judiciary. According to a survey carried out by the newspaper *O Estado de Sao Paulo*, 82% of the population considered that the judiciary is slow and favours only the rich. 56% thought that lawyers are, in general, dishonest. During the first months of the year cases of corruption, misappropriation and nepotism were aired by the press, prompting public outcry and demands in parliament by a conservative group of senators that an inquiry committee be set up. On 8 April 1999, the Senate set up a Committee of Inquiry into alleged irregularities, corruption and nepotism within the judiciary. The scandal erupted as many accusations became public, but many members of the judiciary rejected the investigations and the claims of corruption within the judiciary, denying the Senate's legal power to take action on the matter. Further, they maintained that the Senate's decision was politically motivated and aimed at discrediting some independent judges who were conducting investigations into alleged crimes involving politicians and people of high social class. The initiation of the investigations led to a wide discussion on the legality of the parliamentary Inquiry Committee and the broader issue of the necessity of reform of the judiciary (*see below*).

Parliament itself decided to take measures to counter corruption inside the legislature. Through a process of political impeachment two members of parliament were deprived of their parliamentary immunity and sent to stand trial. On 22 September the Chamber of Deputies deprived parliamentarian Hildebrando Pascoal of his immunity from prosecution, allowing criminal proceedings to start before the courts. Deputy Pascoal was accused of drug-trafficking and leading a death squad in the state of Acre. Earlier in the year another deputy, Talvane Albuquerque, was expelled from parliament to face a criminal investigation into his alleged involvement in the murder of another deputy.

During the year another parliamentary committee attracted public attention. The Chamber of Deputies' Special Committee on Reform of the Judiciary had started its work some years ago but it gained major impetus and became the focus of attention when the Senate Committee of Inquiry

into the Judiciary started its own work and issued its reports. The year ended with the discussion and approval by the Chamber of Deputies of a number of provisions contained in a draft bill to reform the judiciary (*see below*).

The Judiciary

At present the judiciary in Brazil is undergoing an important process of reform to adapt itself to the needs of modern society and to become more responsive to the demands for security, stability and peace among the population and the business community. During the year, important reform proposals were debated in parliament and among civil society involving the press, the Association of Judges and the Lawyers Bar Association.

Structure

Article 92 of the federal Constitution states that the judiciary is composed of the Federal Supreme Court (*Supremo Tribunal Federal*), the High Court of Justice (*Superior Tribunal de Justiça*), the Federal Regional Courts, and the federal one-judge courts. Tribunals and courts specialised in labour, electoral and military matters also form part of the judiciary although they have an autonomous structure. Finally, the tribunals and one-judge courts of the different states and the federal district are also considered part of the national judiciary.

The highest tribunal in the country is the Federal Supreme Court which is composed of eleven judges. Its powers include those to declare a federal law invalid on grounds of unconstitutionality, to try, *inter alia,* the President of the Republic, ministers and members of parliament for common crimes, to deal with *Habeas Corpus* petitions against the President and parliament, to try judges of High Courts for common crimes and misconduct (*crime de responsabilidade*) and to resolve conflicts of competence between High Tribunals and other tribunals (Article 102 federal Constitution).

The High Court of Justice is composed of at least 33 judges (Article 104 FC). It has, *inter alia*, powers to try state governors for common crimes, to try Chief Justices of the state High Courts, judges of the Federal Regional Courts and specialised tribunals for labour and electoral matters for common crimes and misconduct and to deal with *Habeas Corpus* petitions against Cabinet ministers (Article 105). It also works as a court of appeal for decisions taken by lower level courts.

The Federal Regional Courts (*Tribunais Regionais Federais*) are composed of at least seven judges each and have jurisdiction, *inter alia*, to try federal judges (including those specialised in labour and military matters) working within their jurisdiction, for common crimes and misconduct (Article 106 – FC). Decisions taken by federal judges can be appealed before these Regional Courts.

As the Constitution also establishes separate and specialised branches of the judiciary for labour, electoral and military matters, there is a High Court on Labour in Brasilia, a Regional Court on Labour in each of the states and the federal district, and Conciliation Panels at the lowest level. The High Court on Labour is composed of twenty-seven members, not all of whom are legal experts. Seventeen have legal training, whereas ten are representatives of labour trade unions - the so-called "class judges"- (Article 111 – FC). The same composition is observed in the case of the Regional Courts on Labour and the Conciliation Panels.

The country is divided into judicial districts (*seção judiciária*) which correspond with each of the states and the federal district.

Resources

The amount and the use of resources allocated to the judiciary are the subject of controversy and conflict between powers. Allegations of misappropriation and mismanagement of huge amounts of money by certain judges, especially in the Labour Courts section, were taken as justification for the appointment of a parliamentary Committee of Inquiry (*see below*). The President of the Senate, Senator Magalhães, said that the budget allocated for personnel salaries in the judiciary has experienced a 760% increase in the period 1987-1999, whereas the increase of the same for the two other branches of government did not exceed 300% for that period. However, in reality judges' salaries are very low, and many magistrates are leaving the judiciary to join private law firms because of this. Reports state that judges' salaries have not been increased in five years, the last increase being in January 1995. The explanation of this paradox of an increasing budget and low salaries is that most of the money is used for hiring new personnel or paying allowances to officials appointed temporarily and for *ad hoc* purposes. It has been highlighted that this practice has sometimes served as a framework for cases of nepotism and corruption.

A Federal Council of the Judiciary, attached to the High Court of Justice in Brasilia, oversees the administration and management of the judiciary's resources (Article 105). The 1992 Law of the Federal Council of the Judiciary empowers it to co-ordinate the use of human and financial resources of the judiciary.

Appointment and Security of Tenure

Federal judges are appointed by the President of the Republic, with the exception of the "class judges" serving in the Conciliation Panels who are appointed by the Chief Justice of the Regional Court on Labour and some of the members of the High Electoral Court. The justices of the Supreme Court and the High Court of Justice, which have nation-wide jurisdiction, are appointed by the President with the consent of the majority of the Senate. The members of the Federal Regional Courts are appointed by the President from a list presented by each Regional Court itself, whereas the members of the High Court on Labour are appointed by the President with the Senate's consent from a list presented by the court itself. One fifth of the members of the Federal Regional Courts should be lawyers and prosecutors coming, thus, from outside the judiciary.

This method of appointment gives considerable power to the President of the Republic and has been pointed out as a probable source of undue political influence, especially with regard to the Supreme Court. Proposals have been made to allow judges themselves to participate in the election of judges at higher levels.

Judges enjoy life tenure (Article 95). This security of tenure is obtained by first level judges only after two years in office. Judges cannot be removed except in the public interest and following the procedures and requisites established by the Constitution and the law.

Discipline and Causes for Dismissal

A lack of discipline and internal control is one of the main problems facing the Brazilian judiciary, together with slowness and inadequate legislation. The disciplinary and sanctioning procedures established to deal with judges and prosecutors accused of misconduct while performing their duties or for ordinary crimes are lax and incomplete. The law grants higher tribunals the power to discipline and sanction members of lower tribunals.

Article 52(II) of the Constitution grants to the Senate the power to impeach the Chief Justice of the Supreme Court, the Attorney General and the Defender General for misconduct whilst carrying out their functions. The Senate, by a two thirds majority vote, can decide on the dismissal of the incumbent and their ineligibility for any other public post for a period of eight years. This is the only instance where a member of the judiciary can be sanctioned by an organ outside the judiciary itself.

Judges of all other levels are subject to discipline and control by the judicial body immediately higher in the structure. In this way, the Supreme Court tries and sanctions its own members, other than the Chief Justice, those of the High Court of Justice, and specialised High Courts for labour and electoral matters (Article 102(I) paragraphs b and c). The High Court of Justice, in its turn, tries and sanctions members of all Federal Regional Tribunals (Article 104(I) paragraph a), and the Regional Tribunals do the same for all other federal judges acting within their jurisdiction (Article 108(I) paragraph a). The same system of internal control and discipline is applied in the judiciary of each state. In practice, however, this control system only works partially in the case of first level judges who are tried and sanctioned by the disciplinary section of the higher tribunal, but it does not work in the cases of judges of higher tribunals because of a lack of legal provisions on the matter.

Article 93(X) of the federal Constitution establishes that all disciplinary measures shall state the reasons for the decision and be adopted by the majority of members of the respective tribunal.

For a number of reasons, most notably the judges' tendency to protect each other, this system has not been very effective in combating corruption and general misbehaviour within the judiciary. Furthermore, the definition of misconduct is not sufficiently clear in the law. Law 1079 which defines misconduct (*crime de responsabilidade*) of the justices of the Supreme Court, fails to define what constitutes misconduct in the case of judges at lower levels (High Court, Federal Regional Tribunals, etc.). The reason for this failure is that at the time the law was promulgated, in April 1950, the provisions of the 1988 Constitution on misconduct of judges did not exist, and the law was never amended or supplemented to cover these new provisions. However, it has been noted that provisions in this regard do exist in the rules of the tribunals and in a law applicable to all public officials.

In its final report the Senate Committee of Inquiry did not miss the opportunity to underline the problem of effectively holding accountable all members of the judiciary. The matter is being dealt with in the context of the ongoing debates about reform of the judiciary in the Chamber of Deputies (*see below*).

The Senate Committee of Inquiry: Conclusions and Recommendations

As mentioned above, in March 1999 the Senate appointed a Committee of Inquiry into alleged irregularities in the judiciary (*Comissão Parlamentar de Inquérito* - CPI), which started to work effectively in April. The

Committee was mandated to investigate certain facts and allegations and to report its findings and recommendations to the Senate as a whole. However, the Committee considered that its tasks included making recommendations for legislative reform and to pass its findings and evidence to the Public Prosecutor who started criminal proceedings in many of the cases.

The Committee worked for a period of eight months during which time it held 61 meetings and hearings, received 73 depositions, examined public and confidential documents and issued orders to produce certain evidence necessary for its work. In November 1999, the Committee presented nine reports, one for each case investigated, and a final report with conclusions and recommendations. The nine cases investigated were chosen from nearly 4,150 complaints received from different sources and, according to the Committee, merely touched the surface of the problems faced by the judiciary.

The work of the Committee was preceded and constantly surrounded by an intense debate in political and judicial circles about the legality of its constitution, its mandate and the powers it intended to exert. From judicial circles certain voices alleged that the investigations carried out by the parliamentary Committee would interfere with the judiciary, putting into question, therefore, the constitutional principles of the separation of powers and the independence of the judiciary. Furthermore, judicial spokespersons stressed that the cases taken by the Committee had already been investigated by the Public Prosecutor. However, the Committee made it clear that its mandate was grounded in the constitutional provisions that grant to parliament, or any of its chambers, the power to set up committees of inquiry to determine facts (Article 58.3). It maintained that this power is founded in the general constitutional principle of checks and balances which is an integral part of the division of powers as such.

Further debate arose about the extent of the powers of the Committee of Inquiry, as Article 58.3 of the Constitution defines parliamentary committees of inquiry as having "powers of investigation proper to judicial authorities". The question assumed concrete characteristics when it came to decide whether the Committee was empowered to take interim measures of protection such as freezing bank accounts, the seizure of property or transcending the principle of confidentiality of bank accounts and telephone communications. In this regard the Supreme Court established in various rulings that parliamentary committees of inquiry do not have powers that are reserved for judges, such as ordering the arrest of a person or the seizure of property and the freezing of assets belonging to a suspect. However, the court found that committees of inquiry have the power to issue duly justified orders to lift the confidentiality of bank accounts, financial statements and telephone communications. In the cases at issue, where

the claimants had petitioned the court for a protective measure, the Supreme Court granted the petitions allowing the persons in question not to be bound by the Committee's summons to appear or to produce the evidence requested. In its final report the Committee, while recognising the Supreme Court's rulings over the issue, welcomed the passing in the Senate of a draft bill to amend Article 58.3 of the Constitution extending parliamentary committees' powers to include the possibility of ordering interim measures of protection.

In its final report the Committee emphasised the magnitude of the judiciary's problems: corruption, nepotism, irregular hiring of personnel, overvaluation of goods and other irregularities. It also stressed the need for reform. It observed that the judiciary is not only slow and inefficient, but also vulnerable due to its inefficient internal mechanisms of control and its self-contained features that make any reform from inside unlikely. The report remarked that the judiciary has turned a blind eye to the magnitude of the problems it faces and had shown unwillingness to collaborate with the work of the Committee itself. In yet another conclusion the Committee observed that, in general, it had not focused its investigations on the states' judiciary where, according to the Committee, even more numerous and serious problems exist.

The conclusions of the Committee of Inquiry were received with scepticism and strong criticism on the part of judges and lawyers in general. During the year, national and regional representatives of the Magistrates Association (*Associação dos Magistrados Brasileiros* - AMB) and of the Lawyers Bar Association (*Ordem dos Advogados do Brasil*) voiced their concern and protest at press statements involving wild accusations against the judiciary by members of the Committee of Inquiry. They also warned that political leaders in the Senate and the government were harbouring intentions to discredit and weaken the judicial institutions. However, although they opposed any inquiry at the beginning and maintained a critical attitude towards the Committee, they later decided to co-operate with the inquiry. The two organisations took the issue further by setting up a working group to draft a proposal for the reform of the judiciary.

The Committee of Inquiry highlighted serious shortcomings and deficiencies which, in the view of judges and lawyers, contributed to a major discrediting of the judiciary in the eyes of the public. Judges and lawyers also claimed that many charges were generalised and exaggerated and motivated by political intentions to weaken an independent judiciary capable of protecting the people's rights in the face of oppressive governmental policies.

Debates Over the Reform of the Judiciary

Important proposals aimed at reforming the judiciary were tabled during the year in the Chamber of Deputies. By the end of the year, the Chamber of Deputies' Special Committee of Reform of the Judiciary presented a package of legal measures that began to be discussed and approved by the plenary of the chamber. These measures entail amendments to the Constitution and a number of new laws which are necessary to speed up judicial proceedings and enhance the fight against corruption.

Among the most important and controversial matters relating to the reform of the judiciary are the following:

- Discipline and sanctioning of judges for misconduct, and the body in charge of discipline in the judiciary: as shown above, the 1950 Law defining misconduct for judges of the Supreme Court fails to do the same for the rest of the judiciary. According to the Senate Committee of Inquiry's report, it is practically impossible to hold accountable or discipline judges of lower levels for misconduct in carrying out their functions. This conclusion is not shared by representatives of judges and lawyers. A draft bill to modify the law relating to the misconduct of judges at all levels was tabled and will be discussed in the near future.

  Although there is general agreement as to the need to define misconduct, differences of opinion arise as to the most suitable body to be charged with initiating disciplinary proceedings and applying sanctions. The Chamber of Deputies' Special Committee of Reform has proposed the Supreme Court to be such a body, whereas there is a group of senators who prefer the formula of a National Council of the Judiciary composed mostly of representatives of the judiciary, the Public Prosecutor's office and the Bar Association. The Magistrates Association (AMB), an organisation that claims to represent 14,700 magistrates throughout the country, has supported the latter formula which was approved on the first reading in the Chamber of Deputies.

- Measures to speed up proceedings and punish undue delays: this is a primary concern of the Special Committee of Reform and has prompted some legislators to advance proposals that have given rise to heated debate. One such proposal is the incorporation of the legal principle of binding opinion (*súmula vinculante)* which resembles the legal institution of the "binding precedent" that is the basis of Anglo-Saxon legal systems, allegedly as a means of ensuring consistency of jurisprudence and to restrain the frequent recourse to the Supreme Court of cases essentially similar to others in which there already exists jurisprudence. However, the proposed formula would oblige the judge to follow the criteria established by the Supreme Court and would allow review by the highest court in all cases where no precedent exists. However, the

Magistrates Association - AMB maintains that the proposed formula does not imply the application of the same legal principles and solutions to similar situations but the imposition of legal recipes to all cases involving even different circumstances. In the judges' opinion this would restrict their discretion to improve and recreate the jurisprudence and may also be an instrument for political manipulation of the judiciary since the members of the Supreme Court, which establishes the *"súmula vinculante"*, are appointed by the President of the Republic with the consent of the Senate and can be dismissed by the latter. The AMB has proposed instead a different formula that would impede the recourse to a higher tribunal if the lower judge has decided to follow the established precedent and would allow it when the judge decides differently, but does not oblige the judge to follow the criteria set up by the highest tribunal.

Another proposed institution that has caused some controversy, but has already been discarded on first reading, is the power granted to higher tribunals to take up ongoing cases at lower levels and assume direct jurisdiction over them (the so-called *"avocatoria"*).

- The restructuring of the court system on labour matters: criticism towards the specialised tribunals on labour was very strong during the year, as in recent years. There is a strong tendency towards its abolition as a separate system and its integration in the main court structure. The institution of the "class judge" – in fact a representative of trade unions on the bench - has been the target of particular criticism and there is a general consensus that it should be done away with. However, the fate of the labour tribunals as a separate structure has not yet been decided.

- The reform of the procedure for criminal investigations, and especially the role of judges and prosecutors in the investigation stage. Brazil is one of the few countries that still maintains the institution of a preliminary investigation carried out by the police. According to the existing system, the police pass to the prosecutor the results of their investigation for his decision on whether to prosecute or not. The system has been blamed for the bad quality of the investigation and collected evidence, as well as for being the source of frequent and unpunished abuse by the police while carrying out the investigations. In January 2000 a proposal of constitutional reform allowing the elimination of the preliminary police investigation was presented to parliament by the Public Security Secretary of the state of Sao Paulo. In this proposal the police investigation is replaced by an investigation stage led by the prosecutor and controlled by a kind of investigating judge. The government has backed the proposal but it is faced by strong opposition from the police.

Obstacles to the Work of Lawyers

According to the federal Constitution (Article 133) the "lawyer is indispensable in the administration of justice and enjoys immunity for his exercising of the legal profession". The 1994 Law of the Advocacy grants lawyers a series of prerogatives such as the right not to be detained except in flagrant and only for crimes for which release on bail is not allowed, and to be detained in special sections of the prison in accordance with their dignity. The law also mandates that all authorities should facilitate lawyers with adequate conditions for their work.

In practice, however, lawyers are subject to many limitations in the exercise of their profession and even to mistreatment and abuse by the police. This occurs with particular frequency in cases of social conflict where lawyers intervene as advocates of landless workers, indigenous peoples or prisoners. During the year scores of lawyers working at the state and federal levels were the target of threats, intimidation and physical attacks.

The Judiciary in the Federated States

In one of the conclusions stated in its final report, the Committee of Inquiry set up by the Senate underlined the fact that it had not analysed the judiciary at the state level where the magnitude of problems is greatest. The tribunals in the states, according to the Committee, are undermined by rampant corruption and a pervasive practice of impunity for the powerful.

Judges and lawyers have to work in a hostile environment. Several judges, prosecutors and lawyers have been intimidated or physically attacked whilst trying to carry out their duties independently. A number of allegations of harassment against jurists were made during the year, especially regarding the situation in the states of Acre, Mato Grosso, and Rio Grande do Norte (*see cases below*).

Military Police Courts

The so-called military police, formally a division of the state police rather than the military, keeps its name because its members are subject to the jurisdiction of military tribunals for the commission of common crimes (*see Attacks on Justice 1998*). This special jurisdiction has reportedly been the source of impunity enjoyed by those who commit crimes against civilians.

The proposal for an amendment to the Constitution which would eliminate police investigation as an institution purports also to eliminate the

division between the civil and military police in the states and replace them by a single state police. The unified structure of the new state police would arguably lead to the unification of the jurisdiction to which its members are subject for the commission of common crimes. The proposal will be discussed during the year 2000.

CASES

Andressa Caldas and Darci Frigo {lawyers}: Mrs. Caldas and Mr. Frigo work for the National Network of People's Lawyers, an organisation linked to the landless workers movement. On 27 November 1999, lawyers Frigo and Caldas were arrested and jailed by the "military" police of the state of Parana during an eviction of landless workers carried out under the orders of the local authorities of Curitiba, capital city of the state of Parana. As the workers occupying the city's main square were being evicted, lawyers Frigo and Caldas tried to get close to them but were stopped, beaten and jailed by the police in charge of the operation. Lawyers Frigo and Caldas have filed a complaint and asked the state Bar Association to intervene on their behalf.

Maria de Nazaré Gadelha Ferreira Fernandes {lawyer}: Mrs. Ferreira suffered intimidation by members of a death squad that allegedly encircled her workplace on 10 September and have also surrounded her house. Lawyer Ferreira works with the *Centro de Defesa dos Dereitos Humanos,* a human rights organisation of the Rio Branco Diocese. The intimidating acts were perpetrated after Mrs. Ferrreira gave public testimony in an inquiry conducted into the activities of a death squad in the state of Acre.

Joilce Gomes Santana {lawyer}: Mrs. Gomes was the target of threats and intimidation from unknown authors. Lawyer Gomes works with highly sensitive cases in Natal, capital city of the state of Rio Grande do Norte, including amongst them the case of a murder committed by the federal police, the defence of torture victims, and the defense of victims of other human rights violations. The threats, which started in March 1999, intensified throughout September and October when one of her employees was allegedly coerced to steal some of Mrs. Gomes' personal documents and money. On 21 October Mrs. Gomes filed a complaint before the federal police but was still not given protection.

Valdecir Nicácio Lima {lawyer}: Mr. Lima suffered threats and intimidation from death squads following the discovery of a clandestine cemetery where the remains of alleged death squad victims were exhumed. A number of police were arrested following the discovery, in the state of Acre.

Leopoldino Marques do Amaral {judge}: Judge Marques, who worked in the state of Mato Grosso, was murdered on 3 September 1999. Reports say that he had important evidence of the state judiciary's involvement in cases of corruption and drug-trafficking, which he had partially presented before the Senate Investigating Committee, which was arguably the reason for his murder.

Roberto Monte {lawyer}: Mr. Monte received death threats. Lawyer Monte and his fellow human rights defender, Joe Marques, are witnesses in the official investigation into the 1996 murder of a human rights lawyer, Francisco Gilson Nogueira, and they received death threats following the murder, on 3 March 1999, of another witness, Antonio Lopes. It was reported that Mr. Lopes was killed by a death squad with alleged links with the state authorities.

BURKINA FASO

The judicial system in Burkina Faso is weak and remains under the control of the executive power, despite the fact that the Constitution guarantees its independence. Impunity in the country is still a widespread phenomenon.

Burkina Faso has a constitutional system that allocates substantial powers to the President, who governs the country with a Prime Minister and a Council of Ministers, presided over by himself. There is a bicameral National Assembly and a judicial system. The legislative and judicial powers are constitutionally independent, but remain susceptible to interference from the executive. President Blaise Compaoré is currently the head of state, and is assisted by members of his party, the Congress for Democracy and Progress (CDP).

Presidential elections were held in November 1998 and were won, for the second time since 1987, by President Blaise Compaoré who is to remain in office for a further seven-year term. The victory of Mr. Compaoré, with a wide majority of 87,5% of the vote, was contested by the opposition which had boycotted the elections. The CDP now controls 102 of the 111 seats in parliament.

HUMAN RIGHTS BACKGROUND

On 4 January 1999, Burkina Faso acceded to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The state is also a party to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

There is a general situation of impunity in Burkina Faso. Past human rights abuses are not punished and killings by the police remain uninvestigated. Prison conditions are harsh and torture and ill-treatment by the security forces are common practices and go unpunished. Arbitrary arrests and detention without charge are frequent occurrences, despite the fact that the Constitution provides for the right to an expeditious trial and access to legal counsel. The law limits detention to a maximum of 72 hours.

Although the 1991 Constitution and the 1990 Information Code provide for freedom of speech and the independence of the press, in practice,

the government exercises a strong influence over the media which results in the practice of self-censorship. Moreover, all media is supervised by the Ministry of Communication and Culture. In 1993, however, a provision in the Information Code granting the government a wide interpretation of press defamation was removed.

The killing of David Ouédraogo in January 1998, the driver of President Compaoré's brother François, allegedly by members of the Presidential Guard, continued to remain unresolved. This case is still under investigation by the military justice system because of a lack of cooperation on the part of the President's brother and an obvious manipulation of the judiciary.

On 3 January 1999, a massive demonstration took place in Burkina Faso, following the inauguration speech of the President, in protest against the results of the elections, as well as to demand justice in the case of Norbert Zongo, a journalist, human rights defender and director of the newspaper *L'Indépendant*. Norbert Zongo, who had pursued the case of the death in custody of David Ouédraogo, had been killed under questionable circumstances in December 1998. Government forces opened fire against the demonstrators, seriously injuring children as well as adults. A state of emergency was declared, which entailed the use of aggressive police tactics in order to prevent demonstrations. However, by the end of the month, the government agreed to the Collective of Mass Democratic Organisations' demand to end the state of emergency. Since then, the government has allowed demonstrations without prior notification.

The Zongo Case served to reveal the deficiencies of the judiciary, which already had a negative public image. This case highlighted the weakness of the judicial system and its lack of independence, in particular with regard to the security of tenure of judges, a lack of resources and the inadequacy of outdated legal codes.

On 18 December 1998, an Independent Investigating Commission was created to look into the Zongo death by Decree No. 98-490, but non-governmental organisations (NGO s) refused to participate because of the over representation of the government and the Commission's lack of guarantees concerning its own independence and transparency. This led to a modification of the Commission's composition in January 1999.

The Investigating Commission released its final report in May 1999 determining that Mr. Zongo was killed for "purely political motives": in other words, he was killed to put an end to his writing of press articles on the killing of David Ouédraogo. Although a judge was appointed to try the six members of the presidential security force involved in the Zongo Case, no progress in the trial has been made so far.

THE JUDICIARY

The situation of judges in Burkina Faso has considerably worsened in the last two years and the justice system has been discredited as a result of some scandals, as illustrated recently in the Norbert Zongo Case (*see above*).

There have not been any major amendments to the Constitution which was adopted in 1991 and provides for an independent judiciary (Article 129), as well as for a system of control of constitutionality carried out by a specialised section of the Supreme Court. However, the President has extensive powers in relation to the judiciary.

STRUCTURE

A law of 17 May 1993 organises the judiciary. The judiciary is hierarchically organised and is regulated by a decree of 26 August 1991. The Supreme Court is at the top of the system. With administrative and financial autonomy, it is composed of four chambers specialised in the resolution of constitutional, administrative, judicial and financial disputes.

The Courts of Appeal, which are competent in civil, commercial, criminal and social matters, sit in the two largest towns of the country (Ouagadougou and Bobo-Dioulasso). The creation of a third Court of Appeal is under discussion in order to ensure coverage of the entire country.

There are ten Tribunals of First Instance which are at the base of the system. The question of increasing their number is still under discussion.

There is also a High Court of Justice, with jurisdiction to try high ranking public officials, such as the President of the Republic and senior government officials, for treason and other serious crimes. This court, which was created in 1995, has never been put into operation.

In 1995, the National Assembly passed legislation reforming the military justice system. Until now, however, this reform has remained theoretical and the independence of this court system is in question.

COURT ADMINISTRATION

The Constitution (Article 131) stipulates that the head of state is also the President of the High Council of the Magistracy (*Conseil Supérieur de la Magistrature)*, which can nominate and remove high-ranked judges, as well as examine the performance of individual judges. A decree dating from 26 August 1991 governs the career of the judges, giving them guarantees of independence and tenure. A second decree concerning the High Council grants this institution the power to appoint, promote and

discipline judges. The composition of this council is pluralistic. Some are non-elected members (for instance, the head of state, the Minister of Justice, the President of the Supreme Court and President of the Courts of Appeal). Other members are elected by their peers.

Reforms

A forum on justice took place in October 1998. Reforms have been, however, under discussion since the report of a Council of Wisemen appointed to give recommendations was issued on 2 August 1999. This report recommends a reform of the judicial system, a revision of the Constitution (Article 37) reintroducing presidential term limits, the creation of a truth and justice commission to direct the nation's reconciliation process and the dissolution of the National Assembly. Consequently, in October 1999, a Commission of National Reconciliation was created.

President Compaoré said that he will accept the recommendations of this commission and that he would organise new parliamentary elections if necessary.

Although the judiciary is formally independent, there is general agreement that the system does not work properly and that there is a need for change. For example, the ability of citizens to obtain a fair trial remains circumscribed by an ignorance of the law because 77% of the population is illiterate and there is an insufficient number of judges. Moreover, courts are concentrated in the capital. Justice continues to be slow, expensive and inaccessible.

Very often, the judges themselves have been accused of corruption and the politicisation of the system as a whole is increasing. The lack of means and the poor working conditions of the members of the judiciary are demonstrated by incredibly low salaries for judges at the beginning of their career, a lack of equipment and violations of their private life.

Another major problem is the control exercised by public officials and politicians over the functioning of the judicial system, which undermines substantially the independence of the judiciary. Although this is not a new phenomenon, the judges themselves tend not to take the guarantees of their independence granted by the Constitution seriously enough.

Cases

Mr. Bénéwendé Sankara {lawyer}: On 2 December 1999, Mr. Bénéwendé Sankara, a lawyer, was taken into detention and

interrogated by the *Sûreté Nationale*. He was accused of inciting sedition of the army, civil disobedience and prejudicing the state security. The *Tribunal de Grande Instance* of Ouagadougou decided on 15 December 1999 to charge Mr. Sankara. In April 2000, he was again arrested and his conditions of detention are very harsh.

CHAD

For the first time in Chadian history a Supreme Court and a Constitutional Council officially began to function on 28 April 1999. The government continued to use the judicial system to harass members of opposition parties. The practice of impunity is widespread and the government continued granting amnesty to rebels who made peace with it. In August 1999, the National Assembly passed a law giving amnesty to members of one of these groups, a number of whom were integrated into the army.

Chad is a unitary republic, independent since 11 August 1960, and led since 1990 by General Idriss Deby, President of the Patriotic Movement of Salvation (*Movement Patriotique du Salut* - MPS), who was, however, only elected on 3 July 1996. He replaced the former dictator, Mr. Hissein Habre, who had been President since 1981 and who is currently indicted in Senegal on torture charges. Mr. Habre has lived in exile in Senegal since his ouster in 1990.

The 1989 Constitution was suspended in 1990 by then self-proclaimed President Deby and his transitional regime, and in 1996, a new democratic Constitution was adopted and approved by popular referendum , providing for an elected President and a parliament.

The new Chadian Constitution, adopted on 31 March 1996, provides for a system of three separated powers, the executive, the legislative and the judicial powers. This is a presidential regime in which the executive power belongs to the President, elected by popular vote for a five-year term, and the government (Article 59). The government is headed by a Prime Minister nominated by the President and confirmed by the National Assembly. The legislative power is exercised by the parliament, composed of the National Assembly and the Senate (Article 106).

POLITICAL AND MILITARY INSECURITY

In 1998-1999, the Deby regime still had difficulties stopping the proliferation of rebel military movements, which led, in 1999, to an escalation of fighting with rebels in the southern region.

The tensions raised by the opposition of many rebel armed groups led to the kidnapping of four French nationals in February 1996, by a movement called Union of Democratic Forces (UFD), led by Dr. Nahor. Then, in

March 1999, in the Tibesti region, 8 Europeans were kidnapped by an armed group, the National Front for a Renewed Chad (FNTR).

General Deby's MPS party had to face further rebellions in February and March 1999. However, some of those responsible were arrested in cooperating neighbouring states (Lybia and Nigeria), and a new peace agreement and reconciliation accords were signed in May 1998 and July 1999 respectively.

Chad's dispute with Lybia over the Aozou Band was definitively settled in favour of Chad by a decision of the International Court of Justice on 3 February 1994.

Human Rights Background

The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions of the United Nations Commission on Human Rights reported in December 1997 that the situation of human rights in Chad was a subject of concern, notably in regard to the right to life. Extrajudicial killings and death in custody have been common practices of the security forces throughout the fighting in the southern region. Hundreds of people were extrajudicially executed by the security forces in March 1999. In 1996, the commander of the Specialised Unit Group of the Chadian National Gendarmerie ordered members of the nine gendarmerie services to immediately eliminate anyone caught in the act of stealing. The Special Rapporteur called for an end to impunity.

Impunity

Despite this situation, there were no signs of prosecution or punishment by the government of members of the security forces who committed human rights abuses. Furthermore, the government did not prosecute security personnel accused in previous years of killings, rape, torture, arbitrary arrest and detention. Moreover, the government continued to grant amnesty to rebels who made peace with it. In August 1999, the National Assembly passed a law giving amnesty to FARF/VA members, a number of whom were integrated in the army.

The Right To Freedom of Expression and Political Freedom

Many political prisoners, detained as a result of unfair trials or without being tried at all, were tortured and ill-treated by the security forces in 1997. Peaceful demonstrations were strongly repressed and a number of

human rights defenders associations were suspended by the Minister of the Interior in late March 1998.

Public demonstrations are often banned by the government, although the Constitution provides for freedom of assembly and despite the fact that the organisers invariably respect the law which requires notification five days in advance.

In March 1998, the government suspended eight human rights organisations that had called on citizens to stay home on certain days in protest against human rights violations by the security forces. On 3 June 1998, President Deby publicly denounced the "imperialism of international human rights associations" which contribute to "making serfs out of Third World peoples," and "impose pre-packaged democracy" instead of "another form of organisation of society that would be better adapted to the context, reality and outlook of our peoples".

Non-governmental organisations (NGO s), however, have played an important mediation role in negotiations between the government and other parties, such as, for example, the reconciliation between herders and farmers and the government over land and water rights, as well as the negotiations which led to a peace accord between the government and the FARF.

Racial Discrimination

Article 14 of the Constitution provides for equal rights for all citizens, regardless of origin, race, sex, religion, political opinion or social status. In practice, however, the ethnic group to which President Deby belongs (Zaghawa) represents an elite which is over-represented in all key institutions in the country. This ethnic dominance has been a major factor behind the rebellion of political groups, like the FARF, in the south. These tensions are taking place in a country where there are approximately two hundred ethnic groups in a population of about seven million people. However, this racial discrimination does not only exist on an institutional level, but it is also present, *de facto*, at all levels of society between the ethnic groups themselves.

The Judiciary

Structure

The 1996 Constitution establishes an independent judiciary (Article 146). The judicial power is exercised by the Supreme Court, the Courts of Appeal, tribunals and the Justices of the Peace.

Law N°004/PR/98 of 28 May 1998 reorganises the judiciary. Article 1 of the new law sets out the jurisdictions as being the Supreme Court, the Courts of Appeal, the Criminal Courts, the Courts of First Instance, the Labour Tribunals (*les tribuneaux du travail*), the Trade Tribunals (*les tribuneaux de commerce*) and the Justices of the Peace (*justices de paix*) which are local courts with jurisdiction over light offences and established where there is no tribunal of first instance.

The Court of Appeal is composed of 6 chambers (civilian and customary affairs, administrative and auditing, trade, social matters, correctional and simple police affairs, and one accusation chamber).

The High Court of Justice is competent for judging the President of the Republic and high ranking government officials in cases of high treason. Cases of gross violations of human rights are assimilated to this crime and so the High Court of Justice is competent to try such crimes (Article 178).

The Creation of a Supreme Court and a Constitutional Council

For the first time since its independence in 1960, Chadian legislation (Law N°006/PR/98 and Law N°019/PR/98) provides for the creation of a Supreme Court and a Constitutional Council, which were officially installed on 28 April 1999. These two high jurisdictions complete the Chadian judicial system.

The Supreme Court is the highest jurisdiction, composed of three chambers competent in judicial, administrative and auditing matters (Article 7). It is the only tribunal competent in local elections affairs.

The Constitutional Council has jurisdiction over constitutional matters, international treaties and agreements. It is also competent to consider matters related to presidential, legislative and senatorial election disputes. Its decisions are binding on all administrative authorities and public powers and there is no possibility of appeal against them. Every citizen can question the unconstitutionality of a law during his trial and before any competent jurisdiction.

Appointment and Security of Tenure

Judges are nominated by decree of the President of the Republic with the approval of the High Council of the Magistracy (*Conseil Supérieur de la Magistrature*). They can be removed under the same conditions (Article 153).

The Supreme Court is composed of a president and fifteen *Conseillers*. The President of the Supreme Court is designated from among the highest judges of the judicial order by the President of the Republic, on approval of the National Assembly and the Senate (Article 8). The Presidents of the chambers are designated by decree of the President of the Supreme Court.

The *Conseillers* are nominated by the President of the Republic, the National Assembly and the Senate, from among high magistrates and specialists of administrative law and auditing.

The Constitutional Council is composed of nine members, among them three judges and six highly qualified jurists, nominated by the President of the Republic, the President of the National Assembly and the President of the Senate for nine years (Article 1 of Organic Law N°019/PR/98, of 20 July 1998).

Administrative Control

The Ministry of Justice exercises overall administrative control over the activities of the courts and the functioning of the judicial bodies (Article 78 of Law N°004/PR/98). The Presidents of the Courts of Appeal and the Attorney Generals (*Procureurs Généraux*) control their own jurisdictions and send an annual report on the functioning of the judiciary to both the President of the Supreme Court and the Minister of Justice (Article 79). The President of the Supreme Court and the Attorney General send a similar report to the Minister of Justice (Article 80) regarding the state of the independence of the judiciary.

There are reports of problems related to the right to equal justice in Chad. According to the International Federation of Human Rights:

> the judicial apparatus is a veritable instrument of repression in the service of the executive branch. Any opinion contrary to that held by the powers-that-be is forcefully repressed. For instance, Deputy Yorongar Ngarlejy was charged with slander, in contravention of any legal procedure, tried and sentenced to three year's imprisonment, while the law stipulates a maximum sentence of two years in such cases. Accordingly, those to be tried are wary of decisions handed down by Chadian justice. Lastly, and most importantly, to speak of the independence of justice is a total sham when the executive branch does not hesitate to take certain cases away from the courts. Anyone close to the authorities who seriously break the law is simply transferred or promoted to a higher post.

CHILE

The year was dominated by the events related to the arrest of General (retd.) Augusto Pinochet in the United Kingdom and the investigations into past human rights violations involving Pinochet and other high-ranking retired military officers. Judges are increasingly more willing to investigate and open trials for past human rights violations. However, the 1978 amnesty law continues to be the major obstacle. The Chilean judiciary is characterised by the predominant position of the Supreme Court and a concentration of different powers within it.

The Chilean Constitution was elaborated during the military dictatorship and was approved by plebiscite in September 1980. It was amended several times, the last amendment being approved in 1997. The Constitution, although guaranteeing the separation of powers and the Rule of Law in the country, assigns an excessive role in the functioning of the democratic institutions to the military. The parliament holds legislative power and works through two chambers (the Chamber of Deputies and the Senate). Only 38 out of 48 senators are directly elected and the rest are designated (four are former chiefs of military branches). In January the Inter-American Commission on Human Rights found that the institution of designated senators – non-elected, but appointed by the military and other corporations - violated human rights by distorting political representation and was, hence, undemocratic.

People went to the polls to elect a new president on 12 December 1999. However, none of the candidates could obtain a majority, and a second round was scheduled for mid-January when Mr. Ricardo Lagos, the candidate of the ruling Coalition for Democracy (*Concertación por la Democracia*), obtained 51.3 % of all votes, against 48.7% for his opponent, Joaquin Lavin, of the right-wing Alliance for Chile. Mr. Lagos thus became the first socialist President of Chile after the violent overthrow of Mr. Salvador Allende in 1973. He will have to govern with an assembly in which the Senate is still dominated by a conservative majority composed of right-wing parties and non-elected senators who can still block most new legislation and all constitutional reforms.

HUMAN RIGHTS BACKGROUND

Respect for human rights in Chile has been marked by a remarkable

switch in governmental and judicial attitudes towards the investigations into and eventual trials of those responsible for past human rights violations perpetrated during the military dictatorship. One of the major events influencing this development has been the proceedings against Pinochet in foreign countries. However, these developments are also marked by the persistence of large legal and institutional obstacles, namely the amnesty law enacted in 1978, covering crimes committed between 1973 and 1978, and the alleged influence of the military in the appointment of members of key institutions such as the Senate and the Supreme Court.

In March 1999 the UN Human Rights Committee examined Chile's periodical report under the International Covenant of Civil and Political Rights. In its Concluding Observations, the Committee expressed concern, *inter alia*, about:

- The amnesty law that covers crimes committed between 1973 and 1978 which prevents Chile from ensuring an effective remedy to anyone whose rights and freedoms under the Covenant have been violated. The Committee reiterated its previous view that amnesty laws are generally incompatible with the duty of the state party to investigate human rights violations;
- The enclaves of power retained by members of the former military regime. The Committee also observed that the composition of the Senate impedes legal reforms that would enable Chile to comply more fully with its Covenant obligations;
- The wide jurisdiction of the military courts to deal with all cases involving prosecution of military personnel and their power to conclude cases that began in the civilian courts contribute to the impunity which such personnel enjoy against punishments for serious human rights violations. Furthermore, the continuing jurisdiction of Chilean military courts to try civilians does not comply with Article 14 of the Covenant. The Committee recommended that the law be amended so as to restrict the jurisdiction of the military courts to the trials only of military personnel charged with offences of an exclusively military nature;
- Persistent complaints of torture and the lack of an independent investigating mechanism for such complaints;
- The reform of the Code of Criminal Procedure, which will strengthen compliance with the fair trial guarantees provided by the Covenant, will not come into force for a long period of time. The Committee recommended that such period be shortened;
- The law and practice of pre-trial detention that allows the holding of people in detention until the completion of the criminal process. The

Committee recommended that the law be amended so as to ensure that pre-trial detention is an exception and not the rule.

In June 1999 the OAS Special Rapporteur on Freedom of Expression visited Chile. His visit was advanced some months after a book by the journalist Ms. Alejandra Matus, the *Black Book of Chilean Justice*, was banned from circulation by a court order under the state security law provisions on defamation of authorities. The ban was instigated by the Supreme Court justice, Servando Jordán, who was mentioned in the book. The author had to flee to the United States where she was granted political asylum.

The 1978 Amnesty Law and Impunity for Human Rights Violations

Judges are increasingly more willing to investigate and open trials for past human rights violations. However, the 1978 amnesty law continues to be the major obstacle. In the context of increasing willingness on the part of the judiciary to investigate and prosecute crimes committed during the dictatorship, the Minister of Defence organised a series of round table discussions with the participation of representatives of the armed forces, human rights lawyers in their personal capacity, religious leaders and prominent intellectuals. Groups representing the victims of human rights violations refused to participate.

During the year under review the Supreme Court widened its progressive jurisprudence, putting aside the amnesty law and allowing investigations and prosecutions to proceed in some cases involving forced disappearance. On 9 June 1999 Judge Juan Guzman of the Santiago Appeals Court ordered the arrest of five high-ranking military officers who had been involved in a special army unit's operation in 1973 known as "the death caravan", in which dozens of prisoners from different regions were taken from the prisons and executed. The legal ground for the arrest was kidnapping rather than murder, which is covered by the amnesty law. The view taken by Judge Guzman, that a person should be considered as abducted until it is legally proven that he or she was released or killed, was upheld by the Supreme Court in July when it ruled that the amnesty law was inapplicable in the case of the five officers arrested pursuant to Judge Guzman's order. The core of this doctrine is that the kidnapping and disappearance of people should not necessarily be considered as having resulted in their death. The doctrine of disappearance as a continuing crime, upheld by the Supreme Court, constituted a step forward and added to the already well-settled Supreme Court doctrine that full investigations into a crime that is allegedly covered by the amnesty law, and the identification of the perpetrators of that crime, are necessary before the amnesty law can be applied in their favour.

In July 1999 Judge Carlos Cerda indicted the former head of the air force intelligence, Edgar Ceballos, for the 1974 murder and disappearance of two communist militants. The judge followed the Supreme Court's jurisprudence whereby in order for the amnesty law to be applied, a previous full investigation is required (*see Attacks on Justice 1998*).

In September 1999 two other senior officers (retired General Humberto Gordon and Roberto Schmied) were arrested and charged with participation in the 1982 abduction of trade union leader Tucapel Jiménez. The Supreme Court ruled again that the amnesty law was not applicable and that the trials could go ahead.

At the end of October Judge Milton Juica issued an arrest warrant against retired generals Hugo Salas and Humberto Leiva, former director and sub-director of the National Intelligence Centre (CNI), under charges of participation in and covering up of the 1987 killing of 12 members of the left-wing Manuel Rodriguez Patriotic Front, in the so-called "Operation Albania". Indictments were also served for six other high-ranking intelligence officers. These events followed the arrest and indictment in 1998 of eight former members of the intelligence service. The lack of progress in the case during 11 years in the military justice system prompted the Supreme Court to appoint a judge from the Santiago Appeals Court to work as investigating judge in the case in early 1998.

A number of cases involving serious offences which were previously closed by military tribunals, or even by the ordinary civilian courts, were reopened by decision of the Supreme Court in application of its new doctrine relating to the amnesty law described above. In all these cases investigations continue or indictments have already been served.

Investigations and prosecutions of human rights violations in Chile also continued in foreign countries. Besides the outstanding case of former ruler General Augusto Pinochet (*see below*) in October 1999, the President of the Supreme Court allowed extradition proceedings to start against former head of the Chilean secret police, General (retd.) Manuel Contreras, requested by Italy, where he had been sentenced in absence for the 1975 attempted murder of a Chilean Christian Democrat politician on Italian territory. Another former Chilean intelligence agent, Mr. Enrique Arancibia, continued his detention in Argentina, charged with the 1974 killing of Mr. Carlos Pratts, a former army chief, in Buenos Aires.

Developments in General Pinochet's Case

In October 1998 General Pinochet was arrested in Great Britain pursuant to an extradition request issued by a Spanish judge on charges of genocide, torture and hostage-taking. As General Pinochet, who is a

senator for life in Chile, alleged immunity from prosecution, his case was heard first by a High Court magistrate who granted his *Habeas Corpus* petition. Then a Law Lords panel of the House of Lords quashed that decision allowing the extradition to proceed, but in December 1998 the Law Lords reconsidered their previous decision and annulled it on the grounds that one of the member Lords of the first panel had links that may have involved a potential conflict of interests. The case was re-opened and in April 1999 the second Law Lords panel decided that General Pinochet does not enjoy immunity for certain crimes, namely torture and conspiracy to commit torture, committed between 1988, when the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment entered into force in Great Britain and Chile, and 1989 when General Pinochet ceased to be the President of Chile. In the same month the British Home Secretary, Jack Straw, decided to allow the extradition proceedings to start.

Spanish investigating judge, Baltasar Garzon, who issued the international arrest warrant, presented additional information including reports of a number of alleged cases of torture committed after 1988 involving General Pinochet, but Secretary Straw did not take them into account for his decision, although they were annexed to the dossier. Mr. Straw's decision was appealed by General Pinochet's defence.

Talks between the Spanish and Chilean governments were held during the year to submit the case to international arbitration. In October, the Belgian judicial authorities renewed their arrest warrant against Pinochet.

On 8 October 1999 the Bow Street Magistrate's Court ruled that General Pinochet could lawfully be extradited to Spain to face trial on thirty-four charges of torture and one of conspiracy to torture, therefore taking into account the additional evidence presented by Spanish judge Garzon, including the argument that the suffering of the relatives of those disappeared could amount to torture. General Pinochet's defence filed an appeal, but the decision was later confirmed by the High Court. The final decision was then left in the hands of Home Secretary Straw to carry out the extradition but, on the basis of a controversial medical report carried out at his own initiative and not disclosed to the complainants, he declared in January to be "minded" to release General Pinochet for unfitness to stand trial. After a short legal battle to oblige Mr. Straw to disclose the medical report to the complainants, among them Belgium, France, Spain and Switzerland, Mr. Straw implemented his decision. General Pinochet returned to Chile in March 2000.

However, investigations into alleged crimes involving General Pinochet continued in Chile. Judge Juan Guzman conducted investigations into a total of 57 criminal complaints brought against General

Pinochet by human rights organisations and victims' relatives. The complaints refer to a probable involvement of General Pinochet in the operations of the "death caravan" (*see above*) in which at least 72 persons were executed. The bodies of 20 of them were never found and Judge Guzman considered these to be cases of continuing forced disappearance which are, therefore, not covered by the amnesty law (*see above*). The case is still being handled in the military justice system, but towards the end of the year the Public Defender's Office requested the case be transferred to the ordinary civilian jurisdiction. Meanwhile, the number of criminal complaints filed before Judge Guzman relating to the same case is increasing and may reach 90 by the beginning of the year 2000.

Despite the progress made, the obstacles for the prosecution and trial of General Pinochet in Chile are still formidable. General Pinochet, as a senator, enjoys immunity from prosecution that can be withdrawn only by a decision of the Santiago Appeals Court confirmed by the Supreme Court. Towards the end of the year parliament discussed a proposed bill to grant former heads of state, among them General Pinochet, immunity from prosecution. This would permit General Pinochet to renounce his seat as senator for life without losing his immunity from prosecution. The bill, which is aimed at reducing the influence of General Pinochet in the Senate, at the same time guarantees him immunity that can only be taken away by a judicial decision. The bill was passed by parliament in January 2000. In March 2000 Judge Guzman requested the Appeals Court to deprive Senator Pinochet of his immunity.

The Judiciary

Structure

The judiciary comprises an ordinary court system and a special courts system. Within the ordinary system the Supreme Court occupies the highest position. There are also 17 Appeal Courts with jurisdiction over the regions, and first-level courts (*juzgados de letras*), with jurisdiction over a district within a region under the primary jurisdiction of an Appeals Court. The Chilean judiciary is characterised by the predominant position of the Supreme Court and a concentration of different powers within it. The Supreme Court is responsible for the general supervision of the judiciary including discipline and resource management and also plays a central role in the appointment procedure. The influence of supporters of the former military government has diminished, but it is still strong.

Justice Roberto Davila's term as President of the Supreme Court ended on 6 January 2000 after two years in the post. The end of his period,

following a decision of the Supreme Court sitting as a plenary assembly, was somewhat controversial as he argued that his term was to be for three years.

Appointment and Security of Tenure

Judges of all levels are appointed by the President of the Republic from a list prepared by the Supreme Court for justices of the Supreme Court itself or judges in the Appeals Courts, or the Appeals Courts for first-level courts. The new law of the Public Prosecutor's office establishes that the appointment of prosecutors will follow the same method of appointment (*see below*).

Article 77 of the Constitution guarantees security of tenure to judges "during good behaviour". The Supreme Court can remove judges on grounds of "bad behaviour" upon the request of the President of the Republic, an interested party or on its own initiative. By majority vote of its membership the Supreme Court can also transfer a judge to a different post. Furthermore, judges and magistrates are subject to periodic evaluations by the immediate superior court (Code of Tribunals, Articles 273, 275 and 277). During 1999 the Supreme Court removed, transferred or applied other sanctions to a number of judges, which was seen by most observers as generally being consistent with legal provisions and as favourable to a corruption-free judiciary.

The wide scope of the Supreme Court's powers with regard to magistrates and judges renders the latter's independence subject to significant constraint.

Resources

The uncovering of a substantial deficit in the judiciary's annual budget caused serious concern during the year and threatened to paralyse the administration of justice in the country. This prompted accusations of mismanagement and the request for an independent and public financial auditing of the judiciary. It further obliged the Supreme Court to adopt emergency measures that affected the hiring of a significant number of substitute and temporary judges, and also brought about the request of the director of the administrative body's resignation. The administrative body (*Corporación Administrativa del Poder Judicial*) is composed of five justices of the Supreme Court but is actually headed by an executive secretary whose resignation was requested. The financial gap in the judiciary's annual budget was said to reach 6 % despite the increase of funds allocated by the central government in the order of 10 %.

The issue contributed to a further public discrediting of the judiciary. In the second part of the year, however, an agreement was reached with the central government whereby the latter agreed to cover the existing gap and to transfer an additional 10 % for the 2000 budget.

Military Justice

Military tribunals continued to enjoy wide jurisdiction over all matters involving military officers, even in civil matters. Additionally, the military tribunals have jurisdiction to try civilians for certain kinds of criminal offences. Decisions in the military court system are subject to review by the Supreme Court, but the Supreme Court has rarely overruled a military court sentence. Furthermore, whenever a conflict of jurisdiction occurs between military tribunals and civilian ones the Supreme Court has tended to grant jurisdiction to the former. This tendency has begun to change in the past two years, however, as the composition of the Supreme Court no longer reflects as strong a military influence.

In January the President of the Republic revealed his plans to introduce for debate in parliament two bills affecting the military justice system. The first one would eliminate the right of the military Auditor-General to sit on the bench of the Supreme Court in all cases involving military officers (*see Attacks on Justice 1998*), whereas the second one would limit the jurisdiction of military tribunals and establish the primacy of the ordinary civilian courts.

In April the army Auditor-General, General (retd.) Fernando Torres, resigned and was replaced by Brigadier Juan Romero after holding office for ten years. The fall of General Torres was followed in August by that of his closest collaborators in the legal service of the military. Seven high-ranking officers were granted an early retirement, ending the Torres' era which had been characterised by unconditional support to General Pinochet and former military junta members.

With regard to the military tribunals' jurisdiction, the Committee against Torture recommended in March 1999 that "the law be amended to restrict the jurisdiction of the military courts to trial only of military personnel charged with offences of an exclusively military nature".

Legal and Judicial Reform

The reform of the judiciary and the legal system continued during the year with tangible results in different areas.

The Law Organising the Public Prosecutor's Office

The main achievement during the year was the enactment in October of a bill regulating the Office of the Public Prosecutor (Law 19.640) and the appointment of the first prosecutor-general the following month. The legal institution of the Public Prosecution was introduced into the Chilean legal order in 1997 through a constitutional amendment that granted it autonomy and independence (*see Attacks on Justice 1998*).

The new law gives to the Public Prosecutor the powers to investigate and formulate criminal charges. In the past these functions were vested in the criminal judge. The Prosecutor will have direct control over the investigations and the police forces for this purpose. However, orders to deprive individuals of their constitutional rights - such as arrest warrants - will need to be previously approval by a judge (*Juez de Garantias* - Article 4).

The Prosecutor General, the head of the Public Prosecutor's office, will be appointed by the President of the Republic with the consent of the Senate from a list of five candidates prepared by the Supreme Court, following an open and public contest (Article 15). The Prosecutor General will serve for a non-renewable term of ten years and will have, among others, the power to appoint regional prosecutors, who will act as heads of the prosecutions services in each of the judicial districts, from a list prepared by the corresponding Appeals Court. The regional prosecutors will also serve a non-renewable term of ten years.

The law establishes the criminal, civil and disciplinary liability of prosecutors for on-duty acts. Disciplinary authority is exercised by the immediate superior in the hierarchical line according to an established procedure that grants the questioned person the right to defence and to file an appeal. Disciplinary sanctions rank from private reprimand to removal from office, according to the gravity of the misconduct. The Prosecutor General and the regional prosecutors can only be removed by decision of the Supreme Court upon a request by the President of the Republic and the Chamber of Deputies of the national assembly as a whole, or through ten of its members.

It is worth noting that the procedure of appointment and removal for prosecutors resembles that of the ordinary judges within the judiciary, and presents the same inconvenience, namely, the concentration of power in the hierarchical superior of both institutions to appoint, evaluate, investigate and decide on the merits of a complaint that may lead to the removal of the person in question.

In November, the Supreme Court prepared a list of five candidates on the basis of open and public applications and hearings, and the President of

the Republic appointed Mr. Guillermo Piedrabuena as the first prosecutor general of the country.

Discussions of the New Code of Criminal Procedure and the Law on the Public Defender

The bill containing a new Code of Criminal Procedure, which is one of the pillars of the legal reform programme, continued to be discussed in the two chambers of the national assembly until the end of the year. The new code will set out a criminal procedure based on an adversarial model that is due to be implemented during the year 2000, initially in two judicial districts, and gradually extended to the rest of the country until the year 2003 when full implementation should be achieved. The entry into force of the new system envisages an increase in the number of criminal judges from 75 to 782, 404 of whom will be guarantee judges and 378 criminal judges who are to sit on benches of three during predominantly oral hearings.

Among the provisions of the new code, and the one that has provoked the most debate, is one which grants the Prosecutor control over the police during the investigations stage. This has been criticised by the uniformed police as an unjustified limitation on its initiative to investigate and an obstacle to prompt and efficient action against crime. The police currently enjoys free initiative to act.

The law on the Public Defender, another key pillar in an adversarial criminal system, was introduced in parliament for debate in July. The Public Defender's Office will be composed of approximately 417 legal defenders who will provide free legal assistance to those accused who do not have the means to pay their own legal counsel in criminal proceedings.

CHINA INCLUDING TIBET AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION

The Chinese judiciary is subject to the leadership of the Chinese Communist Party. Lawyers cannot function independently, as the Ministry of Justice has significant control over lawyers, law firms and bar associations. Lawyers also face frequent harassment from the authorities. In Tibet, particularly, political detainees are deprived of even elementary safeguards of the due process of law. The independence of the judiciary was further eroded in the Hong Kong Special Administrative Region with the judgements in the right to abode cases.

The People's Republic of China (PRC) is a unitary state with 22 provinces, five autonomous regions, (Guangxi, Inner Mongolia, Mingxia, Tibet, Xinjiang), three directly governed municipalities (Beijing, Shanghai, Tianjin) and two special administrative regions (Hong Kong and Macao).

Under the 1982 Constitution, legislative power is vested in the National People's Congress (NPC) which has 2,970 indirectly elected members. Executive power is exercised by the State Council, which is elected by the NPC. President Jiang Zemin is the head of the state and Zhu Rongji is the Prime Minister. Effective political control is in the hands of the Chinese Communist Party (CCP).

The PRC resumed sovereignty over Macao on 19 December 1999 and the former Portuguese colony became the Macao Special Administrative Region (MSAR) with the "one country, two systems" model similar to that of the Hong Kong Special Administrative Region. Edmund Ho Heu-Wah was elected in May 1999 to be the first Chief Executive since the handover.

The year 1999 was marked by several important anniversaries: 10 March was the 40th anniversary of an uprising in Tibet that led to the exile of the Dalai Lama; 4 June was the 10th anniversary of the student crackdown in Tiananmen Square; and 1 October was the 50th anniversary of the founding of the PRC.

HUMAN RIGHTS BACKGROUND

China signed the International Covenant on Civil and Political Rights on 5 October 1998, but has yet to ratify it.

Human rights continued to be violated on a large scale in China in 1999. The three anniversaries mentioned above led to extensive restrictions on rights and freedoms and numerous arrests of members of the opposition China Democratic Party (CDP), as well as others opposing the government. Furthermore, the death penalty continued to be carried out frequently in 1999, and the number of crimes carrying the death penalty has reportedly increased from 26 to 65.

The media continued to be tightly controlled and manipulated and the use of internet remained under surveillance. In January Lin Hai, a computer entrepreneur, was sentenced to two years imprisonment after having provided the email addresses of Chinese computer owners to a US-based democracy magazine published by Chinese dissidents.

In 1999, the authorities detained thousands of practitioners of the Falung Gong movement and the organisation was declared to be illegal in July 1999. Several hundred followers were tortured, given prison sentences, sent to "reeducation through labour" camps or to psychiatric hospitals

In the Xinjiang autonomous region the situation remained unstable and gross violations were perpetrated. Amnesty International published a report in April 1999 documenting many cases of arbitrary detention and imprisonment, unfair political trials, torture and arbitrary and summary executions, mainly against the Uighurs. The Uighurs is the major ethnic group of Xinjiang.

The Judiciary

Like other governmental organs of the PRC, the Chinese judiciary is subject to the leadership of the Chinese Communist Party. Although China's Constitution recognises the independent exercise of the power to adjudicate, and states that courts "are not subject to interference by administrative organs, public organisations or individuals", the CCP is neither an "administrative organ" nor a "public organisation".

The CCP, through various channels, can interfere with the judiciary at various stages of litigation. The Central Political-Legal Committee was established directly under the CCP Central Committee, together with political-legal committees at lower levels. Its responsibilities include supervision of judiciary personnel, discussion of "important cases", reporting to the party committee on the trends of legal affairs and the implementation of party policies on legal affairs throughout the judiciary.

On numerous occasions, the Central Political-Legal Committee held conferences attended by representatives from all judicial departments and issued legal directives independently and jointly with the judiciary. The Committee also periodically coordinated campaigns such as the "strike hard" campaign against corruption. In some cases, the Committee directly interpreted legislation and the law, even covering issues as detailed as setting a standard for the prosecution of a crime.

Job security for judges and prosecutors is far from satisfactory. The laws relating to judges and prosecutors do not provide any meaningful safeguards. Judges and prosecutors can leave jobs in "fault" and "no-fault" situations. In a "fault" situation, the Judges Law provides a list of prohibited acts which would trigger the removal of judges from their positions. These include the act of spreading words damaging to the reputation of the country, participating in illegal organisations, or taking part in illegal demonstrations. There is also a catch-all clause embracing all other acts deemed to be in violation of laws or disciplines. In a "no fault" situation, a judge could be removed if he or she is assigned a job outside the court. A judge might also be dismissed if he or she is found to be unqualified. There is no clear process or standard to determine what constitutes an "unqualified judge".

The judiciary is under the obligation to report on its work to the Political-Legal Committee, such as when opinions are divided on certain matters. This allows the Committee to routinely review the judiciary's work. In some cases, the Political-Legal Committee can preside over what are known as "union office conferences" with representatives from the judiciary to deal with "major or difficult cases". This has been less used in recent years.

Another threat to the independence of the judiciary in China is the system of "approval". According to this practice, judges send cases to senior judges and the President of the court before the verdict is reached, for examination and approval. The reason for such a practice is said to be to prevent punishment for a "wrongful judgement". When a judgement is reversed by a higher court, it is often considered that a "wrongful judgement" was given by the judge at the lower level. The lower court judge could be punished by, for instance, removal from office.

It must be pointed out that China has, however, made progress in legal reform in recent years with the passage of new legislation such as the new Criminal Procedures Law (*see below*). On 20 October 1999, the Supreme Court launched a "Five Year Program to Reform" which contains both positive and negative provisions. On one hand it maintains the party dominance over the judiciary, but on the other hand it offers some improvements in the conduct of trials.

The significant features of the program are as follows:

- Maintaining the party's dominance over the judiciary. The party continues to appoint and remove judges;
- Increasing the ability of individual judges to try cases. The number of cases handed to the Adjudicative Committee for decision will be limited;
- The Supreme People's Court reiterates that it will implement strictly the rules of public trials. The rule that the trial can be restricted if it involves "state secrets", privacy and minors, continues;
- Reform of the jury system. The Supreme People's Court finalised the drafting of the Resolution on People's Assessors, which is pending for passage in the National People's Congress.

Structure of the Courts

The Chinese court system is comprised of four levels of court: the Supreme People's Court, the Higher People's Court, the Intermediate People's Court and the People's Court. There are, in addition, a number of special courts.

The People's Court's jurisdiction includes criminal, civil and administrative cases, together with the resolution of commercial disputes. A collegial panel of judges, people's assessors, conducts trials of first instance.

There are also military tribunals, marine tribunals and rail transport tribunals. Military courts serve as the judicial branch of the People's Liberation Army and adjudicate military offences and other criminal offences committed by army personnel.

Appointment and Dismissal

The appointment of judges and prosecutors is under the control of the party committees. Similar to other "cadres" all judges and prosecutors are nominated by the local party committee under the guidance of the party's Political-Legal Committees. The local People's Congresses merely confirm the nomination. Although the new Judges Law and the new Prosecutors Law provide limited protections to judges and prosecutors from arbitrary removal, the party's nominations for judges and prosecutors remain largely unchanged.

Court presidents appoint the chief judge of each hearing panel, or they themselves serve in that capacity. The President also chairs the "Examination and Evaluation Committee" which conducts an annual

appraisal of judges' performances, and upon which promotions, salaries, training opportunities, rewards and penalties are based.

The Supreme People's Court consists of over 200 judicial officers. Its President is appointed for a five year term which may be renewed once and/or revoked by the NPC, while the divisional presidents, vice-presidents, judges and the Adjudication Committee are appointed and/or removed from office by the Standing Committee of the NPC. The Supreme People's Court is responsible to the NPC, to which it reports on its activities.

The presidents and judges of the three lower levels of court are appointed and/or removed from office in accordance with an identical but decentralised procedure involving the Standing Committee of the People's Congress of the judicial district concerned, to which the courts also report (Article 9 of the Judges Act and Article 10 of the Procurators Act).

People's Procurators are appointed and/or removed from office by the local congresses under the same conditions as judges. Each procuratorate has a Procurators' Committee, which takes the most important decisions by a majority of its members. If the head of the procuratorate is outvoted, however, the matter is submitted to the Standing Committee of the local People's Congress.

Criminal Procedures Law and Criminal Law

The 1996 edition of *Attacks on Justice* outlined the major features of the Criminal Procedure Law (CPL), which was adopted by the NPC on 17 March 1996 and came into force on 1 January 1997. Although the amendments to the original CPL were welcomed, genuine concern remains that the tradition of a dependent judiciary will prevent actual implementation of the amendments. Furthermore, the amended CPL still falls short of international standards.

The PRC also revised its Criminal Law, which came into force in October 1997. The most important amendment to this law is the elimination of crimes of "counter-revolution" (*see Attacks on Justice 1998*).

Lawyers

According to the new CPL, lawyers may perform two different functions in the criminal process: providing legal counsel and defence representation. The CPL now allows lawyers to provide legal counsel upon suspects being detained or questioned, while the old CPL permitted lawyers' involvement once the cases were brought to the courts. After cases are

transferred to the Prosecutor's office, defendants have the right to seek the assistance of a lawyer to handle their defence.

While they are preparing their defence, lawyers can collect evidence and check, take note of and duplicate the evidence collected by prosecutors. In addition, lawyers have the right to meet with their clients and maintain communication with them. More importantly, lawyers have the right to defend their clients in court trials, including cross-examining witnesses and appealing on behalf of their clients. These rights are not respected in practice, however. Lawyers who act according to these provisions often face problems with prosecutors and the police.

The Lawyers Law, which was promulgated in 1996, was a step forward but is still far from being consistent with the UN Basic Principles on the Role of Lawyers. Lawyers are, for example, not independent as the Ministry of Justice has significant control over lawyers, law firms and bar associations. Lawyers also face frequent obstruction and interference from the police, the procuratorate and courts. Furthermore, local judicial authorities issue regulations and judicial interpretations that limit lawyers' rights to represent their clients. The authorities also retaliate against lawyers representing defendants in politically sensitive cases. As a result political defendants frequently find it difficult to find an attorney.

Furthermore, lawyers are often not given access to a detainee within the required 48 hours or are denied permission to meet them under the pretext that the case involves state secrets. According to the CPL, in cases involving state secrets lawyers must obtain approval to meet with their imprisoned clients which is often denied for the sake of the investigation.

Even if lawyers are allowed to meet with their imprisoned clients, their visits often take place under restrictive conditions. Sometimes officials are present during meetings between lawyers and clients, or lawyers have to submit a written account of what they want to talk about with their clients. This practice is in clear violation of Article 8 of the UN Basic Principles on the Role of Lawyers.

Harassment of Lawyers

Since the new CPL became effective, ironically, lawyers have been at even higher risk than before. There are two main reasons for this: one is that since the new CPL provisions allow lawyers to become involved earlier in the criminal process and expand the scope of their work lawyers are more likely to come into confrontation with the authorities. The other is that hostility towards lawyers is mounting, especially among prosecutors. As a result, lawyers reportedly have been detained, beaten up, even convicted of crimes for representing their clients.

Some CPL provisions create an unfriendly environment for the provision of legal counsel or defence services. For instance, the provision on perjury is linked to lawyers, but the crime of perjury or assisting perjury can be committed by anyone involved in the criminal process, including prosecutors or even judges. The fact that the CPL singles out defence attorneys has no legal basis and puts pressure on lawyers. Furthermore, the Criminal Law does not stipulate in detail what constitutes the crime of forging evidence or perjury under Article 306. This leaves prosecutors wide discretion to prosecute lawyers and gives judges discretion to find them guilty of such an offence.

In practice, lawyers often run into serious legal trouble because witnesses or defendants/suspects change their testimony or statements after lawyers become involved. After the CPL took effect, witnesses and defendants reversing their testimony and statements became a frequent occurrence. Some lawyers have been convicted solely for acquiring a different story from witnesses to that which they have given to officials. Lawyers therefore can be detained by their counterparts in a criminal trial while they are in the middle of conducting a legal defence.

Cases

In 1998 many lawyers (more than **100** estimated by the All China Lawyer's Association) were harassed, detained, and even sent to jail for defending their clients. As a result, the number of lawyers appearing in criminal cases has been substantially reduced and they take part in less than one third of all criminal cases. Numbers for 1999 were unfortunately not yet available at the time of writing.

• Tibet

The Tibetan Autonomous Region (TAR) and other Tibetan autonomous areas have been given nominal autonomy with most local powers being subject to central approval. The actual extent to which Tibetans control their own affairs is even more circumscribed, however, due to the centralised dominance of the Communist Party and the exclusion of Tibetans from meaningful participation in regional and local administration.

The year 1999 marked both the official celebrations of fifty years of the founding of the People's Republic of China and the 40th birthday of an uprising in Tibet against China. The anniversaries led to extra surveillance and repressive measures in Tibet.

In December 1997, the International Commission of Jurists (ICJ) issued a study, *"Tibet: Human Rights and the Rule of Law"*. The study describes Tibetans as a "people under alien subjugation" entitled under international law to, but in practice denied, the right of self-determination. The reality for Tibetans is that there is neither democracy, nor an independent judiciary, nor any Rule of Law in Tibet. The autonomy which China claims Tibetans enjoy is fictitious, as real power is, in effect, in Chinese hands.

As described in the ICJ report, a judiciary subservient to the Communist Party results in abuses of human rights in all of China. In Tibet the problem is particularly severe due to China's campaign against Tibetan nationalism.

Many Tibetans, particularly political detainees, are deprived of even elementary safeguards of due process. Tibetan judges must report to the Communist dominated "Adjudication Committees" or the "Politics and Law Committees", which then advise on what they consider to be an appropriate ruling. The judge will then render his or her decision. Any judge who reverses the decisions of the Committees is subject to serious repercussions. Judges are appointed and may be removed without cause by the People's Congress or one of its standing committees.

• Hong Kong

Hong Kong was acquired by Great Britain from China and most of the land area of Hong Kong was scheduled to revert to the People's Republic of China (PRC) in 1997. On 19 December 1984, the Prime Ministers of the United Kingdom and the PRC, Margaret Thatcher and Zhao Ziyang, signed the "Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong", (hereafter "Joint Declaration"). On 30 June 1985 instruments of ratification were exchanged and the agreement entered into force.

In the Joint Declaration the basic policies of the PRC regarding Hong Kong are set out in Article 3 and elaborated in Annex I. One of the basic policies declared by the PRC in Article 3 of the Joint Declaration is that the existing social and economic system and the present lifestyle of Hong Kong will be left unaffected for a period of 50 years.

The format chosen for implementing this "one country, two systems" principle is the Special Administrative Region under direct authority of the Central People's Government of the PRC. The status of the Hong Kong Special Administrative Region (HKSAR) is envisioned in Article 31 of the 1982 Constitution of the PRC. For Hong Kong, the concept of the

HKSAR is elaborated in the Basic Law of 1990, a kind of "mini-constitution".

The Joint Declaration determines that the HKSAR is allowed to maintain control of its external and economic relations, to remain a separate customs area and to retain the status of an international financial centre, with foreign exchange markets and a convertible currency. Hong Kong is also allowed to retain a legislature and judiciary of its own. Although the Joint Declaration is called a "declaration", it is an international treaty as defined by the Vienna Convention on the Law of the Treaties. It has been registered in accordance with Article 102 of the United Nations Charter.

Tung Chee-hwa became, on 1 July 1997, Chief Executive of the HKSAR. An Executive Council of the HKSAR was established mainly consisting of pro-China political and business leaders. Rita Fan was elected President of the Provisional Legislative Council (PLC), which was set up under the assumed authority of the Central People's Government of the PRC before the transfer of sovereignty and which began to operate at the end of 1996 in conjunction with the Hong Kong Legislative Council. The PLC replaced the Hong Kong Legislative Council on 1 July 1997. The constitutionality of the PLC was challenged in a court case in July 1997. Ultimately, the Court of Final Appeal decided that the PLC had been lawfully established, however not as the Legislative Council of the Special Administrative Region.

The Standing Committee of the NPC adopted a resolution in early 1997 deciding that most of Hong Kong's laws would be retained in the HKSAR; however, certain laws in contravention of the Basic Law would not be adopted as part of the laws of the HKSAR. Part of the laws not adopted were key sections of the Hong Kong Bill of Rights Ordinance and amendments. They were introduced by the outgoing colonial Hong Kong Government to liberalise the restrictions on freedom of association contained in the Societies Ordinance and to remove the requirement to obtain police permission for demonstrations contained in the Public Order Ordinance.

The Legislative Council of the HKSAR, which was elected on 24 May 1998, consists of 60 members of whom 20 were directly elected from five geographical constituencies, 30 were elected from functional constituencies and the Election Committee, which consists of 800 members divided into four sectors, elected the remaining 10. This system of elections is generally seen as unfair because of the heavy influence which business and professional sectors have through the functional constituency system and the Election Committee. Election monitors were not allowed to enter polling stations to observe the issue and casting of the ballots, etc. They were only

able to observe the poll and the counting like any interested member of the public.

The Democratic Party led by Martin Lee won a total of 13 seats (of which nine were out of the 20 directly elected seats) and became the largest party in the Legislative Council. Mr. Lee called upon the HKSAR Government to speed up the process to establish direct elections by universal suffrage for all the 60 seats. The Chief Executive, Mr. Tung Chee-hwa, argued that political reform should take place according to the Basic Law which outlines a gradual increase in the number of seats to be elected directly and marks the year 2007 as the first opportunity to decide whether a fully directly-elected legislature should be established and when.

Human Rights Background

Slowly but steadily one can see the erosion of rights and freedoms in the HKSAR. To name only some examples: the Pope was not allowed to visit the HKSAR because of the ties between the Vatican and Taiwan; Legislator Margaret Ng was denied a visa to travel to mainland China for a seminar, allegedly for criticising Justice Secretary Elsie Leung; the director of the government-owned Radio Television Hong Kong (RTHK), Mrs. Cheung Man-yee, was transferred to a post in Tokyo, allegedly as a result of political pressure due to her steadfast maintenance of editorial independence.

The International Covenant on Civil and Political Rights was ratified by the United Kingdom on 20 May 1976 and extended to Hong Kong with several reservations. Because the United Kingdom did not ratify the Optional Protocol, neither the UK nor Hong Kong citizens had the right of individual petition. When the PRC resumed sovereignty over Hong Kong on 1 July 1997, the change in Hong Kong's legal status had implications for the extension of the ICCPR to the HKSAR.

However, this problem was negotiated, and consequently Section XIII of Annex I to the Joint Declaration stipulates, *inter alia*, that:

> [t]he provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong shall remain in force.

Through Article 39 of the Basic Law, these provisions apply in the HKSAR. As noted above, however, key provisions of the Hong Kong Bill of Rights Ordinance were considered by the Standing Committee of the NPC and the PLC to be in contravention of the Basic Law and ceased to

have effect on 1 July 1997. These included the provision which required that all pre-existing (Hong Kong) legislation which could not be construed consistently with the Ordinance be repealed to the extent of such inconsistency.

The Chinese Government has accepted the reporting obligation to the UN Human Rights Committee, the supervisory body established under the ICCPR, with regard to the HKSAR although the PRC is not a state party to the International Covenant on Civil and Political Rights (the PRC signed the Covenant on 5 October 1998 but has yet to ratify it). The fifth periodic report was the first report submitted by the Chinese Government after the return of the HKSAR to Chinese sovereignty. The report was discussed on 1 and 2 November 1999.

In the 1998 edition of *Attacks on Justice* we described cases of people tried in mainland China and sentenced to death for offences committed in Hong Kong. The HKSAR Government did not ask for the extradition of these prisoners.

With regard to deportation from the HKSAR to the PRC the Human Rights Committee said:

> In the light of the fact that the Covenant is applied in HKSAR subject to a reservation that seriously affects the application of Article 13 in relation to decision-making procedures in deportation cases, the Committee remains concerned that persons facing a risk of imposition of the death penalty or of torture, or inhuman, cruel or degrading treatment as a consequence of their deportation from HKSAR may not enjoy effective protection. In order to secure compliance with Articles 6 and 7 in deportation cases, the HKSAR should ensure that their deportation procedures provide effective protection against the risk of imposition of the death penalty or of torture or inhuman, cruel or degrading treatment.

The Judiciary

The Joint Declaration determines that the HKSAR is allowed to retain a legislature and judiciary of its own. Articles 19 and 85 of the Basic Law guarantee independent judicial power and freedom from interference. Article 82 of the Basic Law states that the "power of final adjudication" rests with the courts of the HKSAR.

Structure of the Courts

The Court of Final Appeal, Court of Appeal, Court of First Instance, District Court, Magistrates' Court and other tribunals with judicial officers presiding are the courts that exist in the Hong Kong Special Administrative Region. The Court of Final Appeal replaced the Judicial Committee of the Privy Council, which was the highest court when Hong Kong was a Crown Colony of the UK.

The Court of Appeal and Court of Final Appeal exercise appellate jurisdiction only. There is a constitutional limitation on the powers of interpretation of the Court of Final Appeal under Article 158 of the Basic Law. Under this provision the Standing Committee of the National People's Congress reserves some matters for determination. These relate to the provisions of the Basic Law which concern the relationship between the Central Authorities and the HKSAR.

The tribunals only exercise civil jurisdiction in relation to matters specified by legislation. These include minor labour disputes, small civil claims and determinations about obscene and indecent publications. They are staffed by magistrates and other lay appointees. There are other administrative boards and tribunals established by statute which are not the responsibility of the judiciary. Magistrates exercise an almost exclusive criminal jurisdiction, without a jury. The powers of punishment are limited to sentences of no more than three years imprisonment.

District courts exercise civil jurisdiction over monetary claims of not more than HK$ 120,000 as well as criminal jurisdiction. In the latter, the powers of the judge are limited to imposing sentences of not more than seven years on any one occasion. The Court of First Instance has an unlimited jurisdiction. It exercises both civil and criminal jurisdiction. Criminal cases are conducted by trial by jury upon indictment.

Appointment and Dismissal

A Judicial Officers Recommendation Commission was created to advise upon judicial appointment or promotions, conditions of judicial service and any other matters affecting judicial officers. The membership of the Commission consists of the Chief Justice and the Secretary for Justice *ex officio,* and two judges, one barrister, one solicitor and three lay persons by appointment of the Chief Executive. Certain categories of persons, like members of the legislature and other public pensionable officers, are not allowed to be members of the Commission.

Article 89 of the Basic Law places restrictions on the removal of judges of the courts of the HKSAR. Judges may be removed for misbehaviour or

inability to discharge their offices. A panel of local judges must make a recommendation to the Chief Executive who takes the decision to remove a judge.

According to Article 90 of the Basic Law, removal and appointment of the judges of the Court of Final Appeal, the Court of Appeal and Courts of First Instance must be endorsed by the legislature and reported to the Standing Committee of the National People's Congress. Only judges of courts, starting from the level of District Court, enjoy security of tenure guaranteed by the Basic Law. Magistrates are not regarded as judges and are appointed on contract terms.

The power of the Court of Final Appeal

In *Attacks on Justice 1998* we discussed the case of *Ng Ka Ling vs. the Director of Immigration* and expressed concern that the HKSAR Government referred to the Standing Committee of the National People's Congress (NPC) for interpretation of the Basic Law.

The move of the HKSAR Government to seek an "interpretation" was strongly opposed by members of the legal community in Hong Kong and abroad. The Hong Kong Bar Association issued numerous statements and appeals to the public. Although the Law Society Council took the position that interpretation and amendment were "both lawful" and the matter was a political choice to be left to the government, many of its members disagreed. Lawyers from both branches of the legal profession co-signed an appeal to the government against re-interpretation. Over 360 lawyers signed a four-page letter rejecting the arguments of the Secretary for Justice. A group of some 300 solicitors published in local newspapers an open petition to the NPCW not to accept the request of the government.

The Standing Committee of the NPC announced the "interpretation" on 26 June 1999. The Standing Committee considered that the CFA was wrong in not seeking an interpretation from the Standing Committee at the time when it heard the cases, and that its interpretation of the Basic Law was not consistent with the "legislative intent".

The HKSAR Government has refused to state publicly the situations or conditions under which it would again seek an "interpretation" from the Standing Committee, or the limits beyond which, or issues on which, it would not seek an "interpretation" from the Standing Committee. Rather, in a case concerning the constitutionality of flag desecration legislation of the HKSAR, the Secretary for Justice has not disavowed the possibility of seeking an interpretation from the Standing Committee of the relevant provisions of the Basic Law if the CFA ruled against the HKSAR Government.

During the discussion of the fifth periodic report of the HKSAR to the UN Human Rights Committee on 1 and 2 November this issue was also dealt with. The Committee expressed its serious concern:

> at the implications for the independence of the judiciary of the request by the Chief Executive of HKSAR for a reinterpretation of Article 24(2)(3) of the Basic Law by the Standing Committee of the National People's Congress (NPC) (under Article 158 of the Basic Law) following upon the decision of the Court of Final Appeal (CFA) in the Ng Ka Ling and Chan Kam Nga cases, which placed a particular interpretation on Article 24(2)(3). The Committee has noted the statement of the HKSAR that it would not seek another such interpretation except in highly exceptional circumstances. Nevertheless, the Committee remains concerned that a request by the executive branch of government for an interpretation under Article 158 (1) of the Basic Law could be used in circumstances that undermine the right to a fair trial under Article 14.

On 3 December 1999, the Court of Final Appeal of the HKSAR accepted that the Standing Committee of the NPC has a general and unqualified power to interpret the Basic Law. In a unanimous judgement, the Court applied the interpretation of the Standing Committee in June to overrule its previous decisions. In July, the Immigration Ordinance was changed following the interpretation of the Standing Committee in June.

In the flag burning case reported in last year's edition of *Attacks on Justice* the HKSAR Government appealed the decision by the Court of Appeal that the burning of the Chinese flag was a legitimate form of freedom of expression. On 15 December 1999, the Court of Final Appeal quashed the decision of the lower court. It was perceived that the decision was taken not to further anger China after the right of abode cases.

Cases

Alan Leong {lawyer and Vice-President of the Bar Association}: Mr. Leong was kicked in the back as he was leaving a forum he attended in mid-1999. The Bar Association had taken a very strong position against the proposal of the government to seek re-interpretation from the Standing Committee. Government propaganda that portrayed the claimants for permanent resident status as immigrants who would strain the social and economic resources of the HKSAR likely led to this assault. The attacker was not apprehended.

COLOMBIA

At least 31 judges, lawyers and prosecutors were the target of threats, intimidation or physical attacks during the year. More than 100 other people associated with the administration of justice were also the subjects of harassment. Colombia continued to show a further deterioration of human rights against a background of steady political conflict between the leftist guerrilla groups and state security forces. Paramilitary groups act in close association with the security forces. The main legal events affecting the judiciary during the year were the enactment of a law reforming the Military Penal Code and the enactment of a law establishing a new system of specialised District Courts to replace the old and controversial system of Regional Courts. By the end of the year the government vetoed two key laws that would have helped in bringing about the end to impunity for human rights violators.

Colombia is a republic whose Constitution, adopted in 1991, provides for a democratic political system, the separation of powers and the Rule of Law. The executive power is vested in the President of the Republic, Mr. Andres Pastrana, who was elected in 1998 for a five-year term. Legislative functions are carried out by a bicameral assembly in which Mr. Pastrana's political party does not enjoy a majority, although he gathers political support from other groups for certain policies. The judiciary is constitutionally independent but in practice there is gross interference with the independence of judges and prosecutors in the carrying out of their work by the government, the military and non-state armed actors.

The Colombian legal system is organised according to the principles of the legal tradition of civil law. Its criminal legal system is undergoing an important process of reform to incorporate some elements of an adversarial model.

HUMAN RIGHTS BACKGROUND

Serious violations of human rights and breaches of humanitarian law committed by paramilitary groups, leftist guerrillas and the security forces constitute the framework against which the poorly funded and understaffed judiciary operates. According to reports from human rights

organisations, the rate of violations of human rights and humanitarian law during 1999 reached a level similar to that in 1998 with notable increases in certain practices, such as extrajudicial executions, mass kidnappings, forced disappearances and the forced displacement of people.

Peace Talks

1999 began with the opening of formal preliminary peace talks between the government and guerrillas of the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN), the first and second largest guerrilla organisations in the country respectively. However, the first talks with the FARC soon slowed down to a virtual standstill when guerrilla leaders demanded that progress first be made in the fight against paramilitary groups. The process suffered an additional blow in March when members of the FARC killed three US citizens working with indigenous peoples in the country. In April 1999, representatives of both FARC and the government met again in working sessions, which included a personal meeting between President Pastrana and FARC leader Manuel Marulanda.

Formal peace negotiations started on 6 May 1999. The government's delegation included a former senior army officer, General Juan Salcedo, as the armed forces' representative in the peace talks, thereby recognising the role of the armed forces in the negotiations. On 21 May 1999, the leader of the paramilitary organisation United Self-defence of Colombia (AUC) kidnapped a prominent political leader and demanded to be recognised as a legitimate party to the peace talks in exchange for the release of the victim. The talks of 6 May 1999 resulted in agreement to a comprehensive agenda of 12 points called the "Common agenda for change to build a new Colombia". The agenda included issues such as the reform of the state military forces and judicial system, a new agrarian policy, human rights and the environment. However, by the end of the month the encouraging results were overshadowed by the resignation of the Defence Minister, Rodrigo Lloreda, over differences of opinion about the government's peace strategy. Mr. Lloreda's resignation was followed by the resignation of 20 army generals. This revealed that there is wide opposition within various sectors of the country to the perceived government concessions to the guerrillas, amongst them plans to permanently withdraw all military forces from an area equivalent to five municipalities in the departments of Meta and Caquetá. The military withdrawal ordered by the government from that area had been only temporary until then.

The actual negotiations of the peace agenda were scheduled for 7 July 1999 but were indefinitely postponed after the two sides failed to agree on the role of an international mission to monitor the human rights situation in

the territory under guerrilla control, the government insisting that the mission should investigate human rights violations in the demilitarised territory. In the following months deep concern about the future of the Colombia peace process was raised by neighbouring countries and the United States.

On 24 October 1999, after large popular demonstrations for peace, the government restarted the peace negotiations with FARC, dropping its demands for international human rights monitoring of the guerrilla strongholds. Several meetings took place between the government and FARC representatives during November and December 1999. On 3 November 1999 the government also concluded an agreement with the ELN to start peace talks. During these months military operations and fighting between the two parties increased as both sought to improve their position on the negotiating table. Scores of deaths and injuries were reported during the year as a result of these events.

By the end of the year FARC had declared a unilateral cease-fire to be in effect over the Christmas period until 10 January 2000. With the advent of the new year both the government and the guerrillas prepared themselves to pay visits to foreign countries to gather political and financial support for the peace initiatives.

Human Rights Violations and Breaches of Humanitarian Law During the Conflict

As the fighting intensified for the control of different areas, guerrillas and paramilitaries also intensified their war efforts and illegal actions to improve their standing in the peace process. Indiscriminate attacks on areas with considerable civilian presence, as well as the practice of mass kidnapping and hijacking of planes for ransom or just as a means to apply pressure and improve their own negotiating position were carried out by guerrillas and paramilitaries. The paramilitary groups have been acting always with the implicit or overt consent, and even cooperation, of the security forces. This constituted a further escalation of military action that affected the civilian population. On 30 May 1999 the ELN, the second largest guerrilla group, kidnapped 140 civilians while they were attending mass in a church in the city of Cali. The action followed the previous hijacking of a civilian airliner with dozens of passengers aboard. The ELN was reported as conditioning the release of all hostages on the government resuming the peace talks that had broken down in February.

During 1999 the Colombian Commission of Jurists released reports that attribute almost 80 % of all human rights and humanitarian law

violations to paramilitary groups. The reports also stated that security forces have an important involvement in paramilitary activity.

As a result of the conflict Colombia faces one of the largest displacements of people in the world. In 1999 the number of displaced persons reached 1.5 million. Many of them have been denied refugee status in neighbouring Venezuela where they have fled looking for a safe haven. The Colombian Government does little to respond adequately to the magnitude of the problem.

Human rights defenders continue to be one of the preferred targets of the paramilitaries. A number of human rights activists were killed, injured or threatened. Two members of the Committee of Solidarity with Political Prisoners were killed in January 1999. Four members of the Institute of Popular Training were kidnapped, although later released in the same month. Some human rights non-governmental organisations (NGO's) and their members have been receiving threats. Others were the targets of surveillance and telephone tapping. Some others even decided to close down their offices and to encourage their members to flee the country as a result of threats and attacks.

On 3 December 1999, press reports quoted General Néstor Ramirez, Deputy Army Chief, declaring that the army had to defend itself from rebel infiltrators in the Prosecutor's office, the Attorney General's office, the Ombudsman's office and also in international and national NGO s. These statements prompted a wave of public protest by various human rights constituencies in the country who asked President Pastrana to dismiss the General. However, the President merely noted the protest and left any subsequent action to the discretion of the Public Prosecutor. The declarations of General Ramirez have been interpreted as a confirmation of a predominant view in the armed forces that considers that human rights organisations are catering to the interests of guerrillas.

The UN High Commissioner for Human Rights established an office in Colombia in November 1996, which continued its work during 1999. The Office of the High Commissioner carries out monitoring tasks and technical co-operation activities throughout the country. In its 1999 report on its activities in Colombia, the Office of the High Commissioner concluded that "The government has not given sufficient priority attention to human rights and international recommendations"(paragraph 168); furthermore, in addition to "the serious deterioration of the fundamental rights situation, the problem of impunity persists so that persons responsible for human rights violations and breaches of international humanitarian law escape prosecution" (paragraph 173).

Impunity

Throughout 1999 little, if any, progress was made to put an end to the impunity enjoyed by members of the security forces and the paramilitary groups. On 9 April 1999 the government ordered the retirement of General Fernando Millan Pérez and General Alejo del Rio Rojas, trying to meet the demands of the United States on one side, and the guerrillas on the other, to effectively take steps to combat paramilitary activity in the country. Both army officers have been pointed out by human rights organisations as actively backing paramilitary groups. However, the case of General Millan is currently being considered by a military tribunal.

On 21 May 1999, General Jaime Uscátegui was placed under military arrest at the request of the Public Prosecutor's office. General Uscátegui was accused of participating in the November 1997 massacre of 11 members of a judicial commission of inquiry in the locality of San Carlos de Guaroa, as well as failing to prevent the massacre of 30 civilians by paramilitary groups in Mapiripán in July 1997. However, as in other similar cases, General Uscátegui's case is being investigated by the military justice system which has released him pending trial. This case is still continuing.

During 1999 the Human Rights Unit of the Public Prosecutor's office reported 161 persons arrested on charges of involvement in paramilitary activities and 75 members of the security forces were also arrested for human rights violations. However, many arrest warrants issued by the prosecutors were not enforced. Officials working in this unit and others in the front line of the fight against impunity were also the subjects of threats and attacks, mainly from paramilitary groups and security forces. It was reported that at least 40 officials of the Public Prosecutor's investigation unit were killed and many more were harassed during the year.

The Legal Reform Process

The process of legal reform in Colombia that started in 1991 continued at a slow pace throughout the decade. In 1999 the draft bills for a new Penal Code and a new Code of Criminal Procedure were discussed in the two chambers of parliament. Only the draft Penal Code was approved and passed to President Pastrana, who vetoed the bill.

The draft bill to define the crimes of forced disappearance, genocide, forced displacement and torture, which was approved by parliament towards the end of the year, was also vetoed by President Pastrana on 30 December 1999. It was the sixth draft bill on the same matter that has failed to pass into law. A first draft was presented as early as 1988. The governmental objection reflects the strong opposition from military circles to the criminalisation of those acts and to the empowerment of the civilian

judiciary to try them. The government objected in particular to Article 1 of the bill that contains the definition of the crimes. Its objections focused on the definition of genocide that included political genocide. The government argued that this would prevent the armed forces from combating the rebel guerrillas without being accused of political genocide. However, the government's objections do not differentiate between fighting against combatants belonging to the guerrillas and the elimination of non-combatant militants of political parties. The government added that the definition of political genocide was not present in the UN Convention on the Prevention and Punishment of the Crime of Genocide. Additional objections focused on "technical" problems related to the fact that certain formalities to adopt amendments to the draft were not fulfilled during the debate in parliament. As human rights organisations have said, these few formal defects could have been addressed without vetoing the law as a whole. The governmental objections seem to be more related to punishing the perpetrators of human rights violations as provided for in Article 7 of the bill that empowers the ordinary justice system instead of the military justice to try the crimes defined in Article 1. The governmental objection on this point was couched in "technical" wording, stating that this article had not been discussed in one of the parliamentary chambers before going to the plenary. Contrary to the government's claims, however, the two chambers did actually discuss the whole bill.

Another draft bill containing the Penal Code was approved by the legislature in December 1999. After a series of ambiguous declarations President Pastrana finally vetoed the bill in January 2000, specifically objecting to 86 of its provisions that, together, constituted 30% of the whole bill. The President objected to provisions that, if approved, would have defined serious crimes such as genocide, forced disappearance and various crimes against humanity as punishable crimes under the ordinary justice system in Colombia. The President objected, in particular, to the definition of genocide which again included political genocide, using the same argument that this would hamper the action of the security forces in combating the guerrillas. Further, the provisions incorporating breaches of international humanitarian law as crimes were also objected to because of the meaning given to the term "combatant". According to the government this term can only be applicable to members of the state armed forces and not to out-law groups participating in hostilities. If the term were to be applied to the latter, said the government, they would also claim the status of prisoners of war if captured by the armed forces. Different human rights groups, including the Colombian Commission of Jurists, have stated that the objections are unfounded in law and aimed at sinking the initiatives to punish those state agents that commit violations of human rights and breaches of international humanitarian law.

THE JUDICIARY

The judiciary experienced certain modifications that will have an impact on its ability to tackle the endemic practice of human rights violations in the country. These modifications include the partial replacement of the regional justice system (known as "faceless justice", *see Attacks on Justice 1998*) and the enactment of a new Military Penal Code. The changes fell short of expectations. During the year a new bench of justices of the Supreme Court and the Council of State was appointed, pursuant to the 1991 Constitution.

STRUCTURE

During the year, the structure of the Colombian judiciary suffered some modifications. The judiciary in Colombia is composed of the ordinary court system, the special court systems, the court system on administrative-contentious matters with the Council of State (*Consejo de Estado*) at the highest level, the High Council of the Judiciary (*Consejo Superior de la Judicatura*), the Constitutional Tribunal and the Office of the Public Prosecutor (*Fiscalia General de la Nación*).

Within the ordinary court system, the Supreme Court is the court of highest instance and is composed of 23 justices. There are High Tribunals at the head of each of the 30 judicial sections in which the country is divided, as well as mixed or specialised courts. The composition and powers of each of these courts are defined in the Constitution and the 1996 Law of the Judiciary. The Council of State is the highest judicial body with regard to administrative-contentious matters and is composed of 27 judges known as counsellors.

APPOINTMENT AND SECURITY OF TENURE

The 23 judges of the Supreme Court, as well as the 27 members of the Council of State, are elected and appointed by these bodies themselves, from lists prepared and submitted by the High Council of the Judiciary (Article 231 of the Constitution). These magistrates and those of the Constitutional Court serve for a non-renewable term of eight years and enjoy security of tenure whilst observing good conduct, satisfactory work and whilst they are below the age of retirement (Article 233). The Constitution does not contain a similar provision granting security of tenure for judges of lower courts.

The High Council of the Judiciary is the body in charge of discipline and resource management in the judiciary, as well as of deciding conflicts of jurisdiction between ordinary and military tribunals. For this purpose it

is divided into two chambers: the administrative chamber and the jurisdictional-disciplinary chamber. Its membership, a total of 13 magistrates, is elected as follows: from the six magistrates of the administrative chamber two are elected by the Supreme Court, one by the Constitutional Court and three by the Council of State. In contrast to this system of appointment by various bodies all seven magistrates of the jurisdictional-disciplinary chamber are appointed only by the national assembly from a list submitted by the government. All thirteen magistrates serve for an eight-year term (Article 254).

The powers of each chamber of the High Council of the Judiciary are wide-ranging. The administrative chamber has the power to create, locate, merge, transform or simply eliminate posts in the tribunals and courts in the country, as well as to elaborate and submit lists of candidates for the vacant posts within the Supreme Court and the Council of State. It also prepares and submits lists of candidates for the posts of judges in the tribunals and lower courts to be appointed by the High Tribunals in their respective jurisdictions. Finally, it administers the judicial careers and the resources of the judiciary.

The second chamber, the jurisdictional-disciplinary chamber, has the following powers: to decide on conflicts of competence between ordinary and military tribunals, act as the single instance in disciplinary proceedings against judges of the high tribunals and prosecutors of the same rank, and act as an appellate body in disciplinary procedures against all other judges and prosecutors. Taking into account the magnitude and the number of powers granted to this second chamber the method of appointment of its membership may not be convenient to preserve its impartiality and independence in the discharge of its duties. It is this chamber that has been taking decisions on conflicts of competence between ordinary and military courts, usually in favour of the latter. These decisions have been criticised as the source of the impunity granted to military officers by military tribunals for common crimes committed against civilians (*see Attacks on Justice 1998*).

Several decisions taken by both chambers of the High Council of the Judiciary were questioned and even legally challenged before the Supreme Court. In a landmark decision on 31 July 1999, the Supreme Court took the view that the decisions taken by the disciplinary chamber in cases in which it acts as a body of single instance can be appealed before the same body and are open to judicial review by the Supreme Court itself. The Court granted a *tutela* petition (a special remedy to protect constitutional rights) in favour of **six magistrates** who had been sanctioned for a disciplinary offence. The Supreme Court found that the magistrates in question had not been afforded the right to appeal the decision.

At the beginning of the year, the list of candidates prepared and submitted by the administrative chamber of the High Council of the Judiciary to fill a vacant seat in the Council of State was rejected by the organ empowered to appoint the replacement, the Council itself. The judges said that the list of candidates did not contain an explanation of the reasons for the selection of the candidates. This originated concern among press and judicial circles about the fact that the lists of candidates to be submitted may be elaborated without following objective and transparent criteria. The question was all the more important since 9 out of 27 magistrates of the Council of State and 7 out of 23 justices of the Supreme Court were due to leave their posts as of July in accordance with constitutional provisions about serving terms. In that regard there were a number of initiatives to set up a system of citizens to watch over the process to guarantee transparency.

Resources

The administrative chamber of the High Council of the Judiciary bears the responsibility of managing the human and financial resources of the Colombian judiciary. This includes the preparation of a budget proposal to be submitted to the national assembly for approval.

The Specialised Courts

On 1 July 1999, the system of regional courts or "faceless judges" (*see Attacks on Justice 1996 and 1998*) was replaced by a new system of specialised courts, rather than being simply abolished, in open contradiction with the 1996 Law of the Judiciary and the recommendations of international bodies. The law establishing a system of specialised one-judge criminal courts within the ordinary justice system to replace the old system (Law 504 of 25 June 1999) presents features that are worrisome and constitute a continuation of the old system with slight modifications that are positive.

The lapsed system of regional courts was composed of 58 one-judge regional tribunals (*jueces regionales*) and a National High Court (*Tribunal Nacional*) that functioned as an appeals court. The Supreme Court, sitting in plenary session, appointed the judges serving in these tribunals. The new system of specialised criminal courts will maintain jurisdiction over serious offences related to terrorism, drug trafficking, paramilitary activities and kidnapping for ransom, which were under the jurisdiction of the regional courts. Rebellion was excluded. This new system will be composed of 38 specialised one-judge tribunals. The High Courts of each judicial district will act as appeals courts.

The new specialised tribunals present a few positive changes from the old system. In general, however, the new system still suffers from some of the main problems for which the former system of regional courts was severely criticised by national and international human rights organisations, among them the Inter-American Commission on Human Rights in its March 1999 report. Some of the positive changes are that judges will not be allowed to keep their identity secret as they did in the old system, and that the police report or reports made by informants will not have full probative value (Article 50). Another provision prohibits the basing of convictions on anonymous witnesses' testimony as the sole evidence (Article 15) and the possibility of granting witness anonymity to police informants (Article 17).

However, the law allows prosecutors to keep their identities secret in the pre-trial investigations stage, though only in exceptional cases and with respect to cases involving kidnapping for ransom, terrorism, paramilitary activities, drug-trafficking in large quantities and money laundering. Article 13 grants the Prosecutor General discretionary power to grant anonymity to prosecutors carrying out the pre-trial investigations "when their life and physical integrity are at risk". The trial hearing, however, will be public and the acting prosecutor at this stage will not be the same as the one that conducted the pre-trial investigations and kept his identity secret. The prosecutor during the trial cannot be granted anonymity.

The law also reproduces the controversial provisions on the use of anonymous testimony as evidence during trial. What is more worrisome is that the power to grant witnesses anonymity resides with the Prosecutor General who assumes an important judicial role, but is not subject to judicial review, undermining in this way the judge's powers. Article 17 provides that the Prosecutor General can grant witnesses full anonymity "if their life and physical integrity are at risk". The anonymous witness' deposition can then be used as evidence during trial. Although this provision also states that these rules will be applied without prejudice to the rules contained in international human rights treaties ratified by Colombia and the rights of the defence to cross-examine the witness, it is clear that the provisions by themselves violate international human rights law.

The new law also reproduces certain questionable procedural aspects of the former regional justice system. Not only does it establish the detention of the accused as a general rule and the provisional release pending trial as an exception, but it also establishes that the terms and delays of all stages and proceedings will be twice as long as those of procedures before other ordinary courts.

With regard to the judges serving in the system of regional courts until July 1999, the administrative chamber of the High Council of the

Judiciary decided to reposition them in different courts within the ordinary court system. However, deep concern has arisen over the fact that these judges will have to act openly without concealing their identity, with the risk of becoming targets of retaliation for their past activities as "faceless judges". The security fund of the judiciary has, for these reasons, set up a special programme aimed at providing security schemes for former faceless judges relocated in ordinary courts. Nevertheless, in the near future the fund is due to be restructured and ultimately closed as part of the reorganisation of the state apparatus.

Towards the end of the year the Procurator General (*Procurador General* - a public officer that represents the state in law suits and also oversees the legality of public acts) petitioned the Constitutional Court to declare Law N° 504, creating the specialised tribunals, as unconstitutional. The Procurator General argued that the law was formally flawed since the creation of courts and tribunals require a statutory law and not a normal law (the difference is that the former requires a higher number of votes to be approved in parliament). Other arguments presented by the Procurator General are related to substantive provisions of the law, such as the one that limits the use of anonymous witnesses and deprives the declarations of informants and the police report of probative value. The Procurator General considered that these provisions were unconstitutional. In April 2000, the Constitutional Court declared this petition admissible.

The Reform of the Military Penal Code

On 12 August 1999 President Pastrana signed into law a bill reforming the existing Military Penal Code. This reform had long been demanded by human rights groups as an instrument for ending the impunity enjoyed by members of the military who commit serious violations of human rights and humanitarian law. The law, a draft of which was first presented to parliament five years ago, does not, however, incorporate the criteria established by the Constitutional Court regarding the limits of military jurisdiction and does not correspond to the draft prepared by a parliamentary committee in consultation with various civil society organisations.

Article 2 defines crimes related to military service as those "deriving from exercising of the military or police function proper to them". The definition omits the words "deriving closely and directly from..." as was stated in the Constitutional Court's judgement C-358 of 1997 (*see Attacks on Justice 1998*) and adopted in the original draft. The actual wording of the article leaves the final decision as to which acts actually fall within the military and police function, and consequently within the jurisdiction of military tribunals, to the High Council of the Judiciary. The jurisdictional-

disciplinary chamber of the High Council has consistently sent cases involving high-ranking military officers to military tribunals.

Similarly, Article 3 was initially drafted to define crimes not related to the service as being: "torture, genocide, forced disappearance, or any other crime that constitutes a serious violation of human rights, human dignity and sexual freedom". However, the approved Article 3 only mentions "torture, genocide and forced disappearance as defined in international instruments ratified by Colombia". This wording has the serious implication that it excludes some of the most frequent crimes committed in Colombia, such as massacres, summary executions, forced displacement of persons and rape. As Colombia has only ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment this poses an additional problem for the definition of crimes that fall within the military jurisdiction.

Article 214 purports to guarantee the independence and autonomy of military judges, establishing that in no case may military officers exercising command responsibilities carry out the investigation, indictment and trial of other military officers. However, the positive effect of this provision is diminished by other provisions which establish that the High Military Tribunal will be headed by the active Commander-General of the military (Article 235).

The new code also fails to clearly forbid superior orders as a legitimate defence in that one of its provisions states that criminal responsibility is precluded when the perpetrator has acted following "legitimate orders issued by a competent authority in full compliance with legal formalities" (Article 34). In this regard the wording of the new code is exactly the same as that of the old one.

The newly approved code also limits the role of the regular public prosecution in the military justice system. The law sets up a corps of military prosecutors who are members of the armed forces and therefore depend on the executive branch and cannot be said to be independent.

During the debate in parliament a last-minute provision was added that may endanger the whole effort of making a new code which contains some substantial, although insufficient, positive features. The legislators added Article 608 providing that the new code will enter into force within a year after its adoption provided that at that time the new law defining the structure of the military penal justice system is also in force. This provision makes the entry into force of the Military Penal Code conditional upon an uncertain event that is unlikely to happen since, by the end of the year, not even a draft bill on the subject had been introduced in parliament. In April 2000, however, the Constitutional Court declared that the requirement of a new law defining the structure of the military penal justice

system as a condition for the Penal Code to enter into force was unconstitutional.

Among the few positive aspects of the new code is the guarantee of the rights of due process, including the right to prepare the defence with or without the assistance of a lawyer. Additionally, it stresses the constitutional norm that prohibits the trial of civilians before military courts (Article 5)

The Judiciary in the Area Under Guerrilla Control

In August 1998, as a measure to facilitate negotiations, President Pastrana demilitarised the territory of five municipalities which the FARC guerrillas took under their control. FARC guerrillas carry out administrative and police tasks in the area and have reportedly established their own system for the administration of justice in the guise of an office to deal with complaints. The active commanders reportedly impart the guerrilla justice and the guerrilla units enforce their decisions. Press reports give accounts of how justice is imparted by the guerrillas. Cases normally start with a complaint which can be brought by any person; it follows a very short and summary procedure, with little respect paid to international standards of due process of law. In cases involving criminal offences guerrilla leaders assume the role of judges and prosecutors. Decisions or convictions are reached quickly and carried out expeditiously. People still living in this area have little confidence in the regular courts as their decisions are not enforced and they instead tend to look to the guerrilla leaders to solve their disputes.

In July 1999, the Office of the National Ombudsman issued a report in which it denounced the execution of 11 civilians and the detention of another 34 by the FARC guerrillas in the area under their control. FARC leaders accepted the validity of the facts but did not take any action. Additionally, some people who have fled the area and a number of non-governmental human rights organisations have reported abuses and crimes committed against the civilian population still living in the area, such as forced displacement and recruitment of children. Executions and arbitrary deprivation of individuals' liberty were carried out, without the victims being afforded due process, by guerrilla commanders, which constitutes a serious violation of humanitarian law.

The local prosecutors working in the five municipalities under guerrilla control were expelled in February and the authorities were reported as saying that they will not be sent back unless police and military control is resumed in the area.

Guerrilla justice not only takes place in the area under their control in the south-centre of the country, but also through discipline and control within the guerrilla units themselves. Discipline among guerrilla groups is said to be lax and units enjoy a high degree of freedom of action. This has led to abuses and serious crimes that have so far gone unpunished. In February, FARC guerrillas captured and executed three US citizens working with indigenous peoples. The leaders recognised FARC responsibility and promised to try and punish those responsible for the act.

CASES:

According to the Colombian Commission of Jurists, during 1999 at least 102 lawyers, judges, prosecutors and other judicial officials performing judicial functions were the target of various violent acts, among them threats, intimidation and killings. The armed conflict is the framework in which these attacks generally occur. Most of the jurists are attacked or harassed for trying to investigate, prosecute or try alleged perpetrators of human rights violations. There are also cases of harassment and attacks on jurists who perform their duties within the context of the fight against drug-trafficking groups and common criminals. Sixty-two% of all actions against members of the judiciary was attributed to paramilitary groups, and 17 % to the guerrillas. Attacks on the judiciary come also from the security forces.

Edna Patricia Cabrera Londoño (judge): Ms. Cabrera was working as a judge in Cartagena del Chairá, Caquetá, when she was kidnapped by FARC guerrillas on 1st March 1999. Her illegal detention occurred when she was taking steps to decide on a *Habeas Corpus* petition lodged by a peasant of the locality.

Olger Cáceres Gerardino (lawyer): Mr. Cáceres was working as a municipal delegate in Cáchira, North Santander, when he was kidnapped, together with four other persons, by EPL guerrillas on 18 May 1999. Hours after they were kidnapped the guerrillas executed one of the victims, a Catholic priest, but the others were released.

Numis Esther Camacho (lawyer): Ms. Camacho was working as a municipal delegate in Curumani, Cesar, when she was murdered by paramilitaries on 24 July 1999. At the time she was killed she was organising a public demonstration for peace.

José F. Castro Caicedo (ombudsman): Mr. Castro is head of the Bogotá-based Andean Council of Ombudsmen. He received death threats on 27 September 1999.

Maritza Chavarro Anturi {prosecutor}: Ms. Chavarro was working as a prosecutor in the San Vicente de Caguán locality when she was expelled by FARC guerrillas on 18 February 1999. Ms. Chavarro was told by the guerrilla leader that she could not stay and work there since the locality is part of the demilitarised area agreed upon between the government and the guerrillas.

Gerardo Cortés {prosecutor}: Mr. Cortés was working as a prosecutor before the High Tribunal of Florencia, Caquetá, when he was kidnapped and then executed by unknown persons on 21 November 1999.

Santiago Diaz {lawyer}: Mr. Diaz was working as a municipal delegate in Ibagué, Tolima, when he was threatened with death on 21 May, allegedly by paramilitary groups, who issued a public communiqué in which they identified lawyer Diaz, together with 16 other social and political leaders, as "military targets".

Ever Diaz Serrano {notary}: Mr. Diaz was kidnapped by unidentified persons on 11 April and released on 29 July 1999, in Riohacha, La Guajira.

Cecilia Fierro de Rodríguez {procurator}: Ms. Fierro, who is working as provincial procurator in Villavicencio, Meta, was threatened through phone calls on 15 September 1999. This happened after she had ordered disciplinary investigations to start into the conduct of several local officials.

Marco A. García Hernández {ombudsman}: Mr. Garcia was kidnapped by ELN guerrillas who lured him to a place where they had said that they would give him a report on soldiers detained by them. But instead of providing him with information the guerrillas detained him also, from 15 to 21 December, in Hacarí, North Santander.

Alvaro Fernán García Marín {prosecutor} and **Julián Hernández López** {judge}: Mr. Garcia and Mr. Hernandez were kidnapped by unknown persons on 30 April 1999 in Quinchia, Risaralda. One was released on 27 July and the other on 10 August.

Edgar Giraldo {prosecutor}: Mr. Giraldo, who is a prosecutor in Cundinamarca, was kidnapped when he was travelling from El Peñol to Guarne, Antioquia, by ELN guerrillas on 30 October 1999.

Argiro Giraldo Quintero {lawyer and law professor}: Mr. Giraldo is a former member of the 19 April Movement (M-19), and was physically attacked on 6 May 1999. He was not injured as a result of the attack.

Alfonso Gómez Méndez {prosecutor-general}: Mr. Goméz, head of the public prosecution service in Colombia, was publicly threatened by the leader of the main paramilitary organisation, the United Self-Defence of Colombia, Mr. Carlos Castaño. In a letter made public on 11 June, Mr. Castaño said that he does not recognise the authority of the

Prosecutor General to investigate his activities and that his group would confront prosecutors rather than flee from them.

Jesús Arnoby Gómez {lawyer and law professor}: Mr. Gómez, who is a lawyer and the Director of the Law faculty of the Cooperative University in Colombia, was killed by gunmen on 7 May 1999.

Virgilio Hernández {prosecutor}: Mr. Hernandez, who was co-ordinating the Human Rights Unity of the public prosecution service in Bogotá, resigned from his post on 12 July as a result of the numerous death threats he had been receiving, mainly from paramilitary groups.

Néstor Raúl Márquez {regional procurator} and **Jorge Rincón** {prosecutor}: Mr. Márquez and Mr. Rincón were injured when the police helicopter in which they were travelling was shot by FARC and ELN guerrillas on 11 April 1999 in San Pablo, Bolivar.

Eunice M. Mejia Maya {prosecutor}: Ms. Mejia was working in Medellin when she was murdered on 18 May 1999. Some days later the judicial police captured two of the alleged perpetrators who happened to be common criminals.

Luis J. Osorio Rodrîguez {lawyer and former magistrate}: Mr. Osorio was first kidnapped and then executed by FARC guerrillas on 19 November 1999 in Venadillo, Tolima.

Carlos A. Pareja Yepes {lawyer}: Mr. Pareja was working as a municipal delegate in San Juan Nepomuceno, Bolivar, when he was murdered by unknown persons on 17 September 1999.

Gustavo Pérez Palacios {notary}: Mr. Perez is a notary in Yolombó, Antioquia and was kidnapped by guerrillas of the National Liberation Army on 24 February 1999. He was released on 7 March.

Carmen Pineda Manrique {notary}: Ms. Pineda was kidnapped by ELN and EPL guerrillas on 28 July 1999 in Sardinata, North Santander.

Antonio Ponce Attie {lawyer}: Mr. Ponce was working as a municipal delegate in Guaranda, Sucre, when he was shot dead by a paramilitary group on 5 March 1999.

Rafael Quintero Araujo {lawyer working as a municipal delegate}: Mr. Quintero was a lawyer working as a municipal delegate (local ombudsman) in Codazzi, Cesar, when he was killed by two gunmen on 8 February 1999.

Fabian L. Restrepo Beltrán {prosecutor}: Mr. Restrepo was working as a prosecutor in San Carlos, Antioquia, when he was threatened with death, together with his family and his secretary, by the FARC

guerrillas on 10 March 1999. After this event he was transferred to another locality.

Ruth Marlene Sánchez (prosecutor): Ms. Sanchez works as director of the Office of the Public Prosecutor in Córdoba, and received death threats by phone on 25 January 1999.

Francisco Torres Taborda (prosecutor): Mr. Torres Taboada, who works in Cocorná, Antioquia, was kidnapped by ELN guerrillas on 9 November and was released some days later.

Iván Villamizar Luciani (regional ombudsman): Mr. Villamizar, who was working in Cúcuta, received death threats from paramilitary groups and was obliged to leave the region on 6 September 1999.

A judge working in Cundinamarca for the regional justice system - thus anonymous - received phone threats in Bogotá on 20 August 1999.

The following are persons who work, or used to work, for one of the different sections in the judiciary, mostly in the public prosecution service, as investigators or assistants, and who also suffered attacks, harassment or intimidation during the year. The attacks against them are considered by the Colombian Commission of Jurists as a means to pressurise or intimidate the prosecutors and judges themselves:

60 members of the investigations unit of the public prosecution service were attacked by paramilitaries of the Peasants Self-defence of Córdoba and Urabá on 15 February in La ceja, Antioquia. The investigators were looking for mass graves in the area and were with 40 other public officials of the Administrative Department of Security. As a result of the attack, 8 investigators were kidnapped, and one was injured. Some hours afterwards the kidnapped officials were released.

Other ten investigators and assistants have been harassed in various circumstances throughout the year.

CONGO, DEMOCRATIC REPUBLIC OF

A new Constitution, elaborated and approved by the President of the Republic, is still pending for approval in a popular referendum. Only some parts of the new Constitution were made public. The government continues to use the military courts to harass and persecute opposition politicians, while a poorly funded and widely corrupt system of regular courts continues to have a diminished jurisdiction.

Since power was taken over by Mr. Laurent Desiré Kabila and his troops of the Rebel Alliance of Democratic Forces for the Liberation of Congo (ADFL) in 1997, war and political conflict has continued in the Democratic Republic of Congo (DRC). The country is now militarily divided either side of a stabilisation line between the East and the West. The rebel movement Alliance for a Democratic Congo (*Rassemblement pour le Congo Démocratique* -RCD) receives military assistance from the neighbouring countries of Rwanda and Uganda.

President Kabila proclaimed himself head of state and government on 24 May 1997. During his inaugural address on 29 May 1997 he took it upon himself to "have full power until the adoption of a Constitution" and he promised that elections would be held in July 1999. In the summer of 1998, under the pretext of the existence of a military rebellion supported by Rwanda and Uganda, President Kabila announced that elections were to be postponed until all foreign military forces attempting to oust his government had withdrawn from the country. However, in May 1999 a peace accord was signed in Lybia between the DRC, Uganda, Eritrea and Sudan, which led to the withdrawal of troops from Goma. The transition to democracy that President Kabila announced when he assumed power has not yet begun.

Due to the difficulties faced by the current government in winning legitimacy, a strong civil society, willing to play an important role in the peace and democratisation process, has been developing. This new force has been recognised as an important actor and as a new element to take into account in the social and political evolution of the country.

A new Constitution was elaborated and approved by President Kabila in November 1998 and is still awaiting ratification by national referendum.

The Cabinet is composed of the National Executive Council, appointed by the President. Legislative activity has been suspended pending the adoption of the new Constitution and the holding of elections. In fact, legislative elections have never been held in this country, as those which had been scheduled under former President Mobutu never took place because his government was ousted in 1997.

Human Rights Background

After years of non-cooperation on the part of the Congolese Government, which has denied him permission to visit the country since 1997, the United Nations Special Rapporteur on the Situation of Human Rights in the Democratic Republic of Congo (DRC) made two visits to the country in 1999, one from 16 to 23 February and a second from 27 August to 6 September. The Special Rapporteur was permitted to visit, *inter alia*, police stations and military compounds. The authorities, however, did not respond to allegations of human rights violations or to urgent actions made by the Special Rapporteur. Government forces and rebel groups merely denied these allegations. However, the Minister for Human Rights of the government of the Democratic Republic of Congo admitted that there have been excesses and that abuses have been committed by the security forces which have resulted in the loss of life and harassment of human rights advocates.

The army continues to have a strong influence. According to reliable reports, there are 13 security, military and police forces in total, apparently all authorised to make arrests.

The Right to Life and the Right to Physical and Psychological Integrity

During 1999, a total of 100 executions were reported. Forced disappearances were perpetrated by the security forces which also employed torture against journalists, political leaders, human rights activists, university professors and refugees from the Republic of Congo. There were also reported cases of women being raped in detention centres.

The prison conditions are harsh. There is no health care and prisoners, particularly women and children, suffer from malnutrition.

International humanitarian law was frequently violated throughout the year. Attacks on the civilian population, by bombing towns, occurred and

claimed many lives in January and May 1999. Such attacks were perpetrated both by the government and the rebel forces of the RCD. Allegations of serious attacks against civilians in Kasika in 1998 and Makobola in 1999 were initially denied, before being later acknowledged as unfortunate mistakes.

Deportations, mutilation and the rape of women as a means of warfare are common practices.

The Right to Liberty

Many cases of persons being detained on political grounds have been reported, although President Kabila claims that there are no political detainees in the DRC. Political leaders, journalists, soldiers, students, traditional chiefs, priests and pastors, attorneys acting in their professional capacity and refugees are constantly being arrested without apparent reason. These arrests are often made by the State Security Council for "collusion with the rebels". Even judges and magistrates have been arrested under this charge.

Political Parties

Since the taking of power by President Kabila, all political parties have been banned, except the ruling ADFL. Opposition leaders who dared to disregard this prohibition have been treated as "mobutistes" (Mobutu supporters) or threatened with trial before the Military Court, or even arrested, tortured and imprisoned. Even advocates of opposition parties have been arrested by security forces.

In January 1998, the sentencing of Mr. Kalele and Mr. Kabanda, members of an opposition party, by the Military Court opened the way for further condemnations of opposition leaders before that court for acts which normally fall within the competence of the ordinary judicial system. There are many reported cases of political opposition leaders who have been harassed or arrested by the security forces in order to prevent them from exercising the basic right to freely express their political opinion.

Freedom of Expression and Association

Journalists have been harassed for exercising their professional duties and one was sentenced in March 1999 to four years imprisonment by the

Court of Military Order for "divulging state secrets". Licences for radio and television channels remain difficult to obtain and require authorisation. On 26 June 1999, the Minister of Justice stated that the government and the security forces would not hesitate in taking severe action against any person, especially journalists, who "unjustly slandered the head of state or a member of the government".

Non-governmental organisations (NGO s) and labour organisations are regarded as enemies of the state, or are simply assimilated to political parties. Thirty heads of NGO s were arrested during 1999 and many more were harassed. In January 2000, a large group of human rights activists were arrested and taken to the *Agence Nationale de Renseignements* (ANR), the security service in Bukavu. They were arrested because of their activities regarding human rights and because they had called for a general peaceful strike to protest the fact that workers' wages were not being paid, they were being taxed by the Rwandese forces and the continuing presence in eastern Congo of foreign Rwandan and Ugandan troops. Women's rights activists were also arrested by security forces and taken to the "Bureau 2" of the detention centre in Goma, where they were beaten and ill-treated. Some of them were further harassed in their homes.

The Judiciary

The state lacks structures and institutions, and President Kabila continues to rule by decree. A draft Constitution was, however, elaborated by the government in March 1999, but only parts of it have been published. The judiciary is still under the influence of the executive and corruption is widespread.

While Decree-Law N° 3 provides for the independence of judges, magistrates and the Public Prosecutor's Office, the President of the Republic has the power to replace them and, where appropriate, dismiss them on the proposal of the Supreme Council of the Judiciary. However, the Council was still not functioning at the time of writing, and its responsibilities were being discharged by Mr. Kabila's political party. The International Commission of Jurists' affiliate ASADHO (*Association Africaine de Défense des Droits de l'Homme*) observed that the justice system is in fact being administered by the head of state, some ministers and the security departments on a permanent basis.

Structure

The court structure includes a system of lower courts, appellate courts and the Supreme Court. There is also a Court of State Security, as well as military tribunals that exercise jurisdiction over civilians.

An informal judicial authority has developed on the side. It is applied by various security services, the ADFL militias, the local leaders and war lords, the rebels and other factions of the fragmented Congolese society.

State of the Independence of the Judiciary

The independence of the judiciary was formally recognised under the Mobutu regime, and later by President Kabila's Decree Law N° 3. In practice, however, the judiciary tends to be manipulated by the executive branch. There are no mechanisms to ensure the application of the principle of the separation of powers. The Democratic Republic of Congo is still waiting for a judicial reform to this end which should have been approved by President Kabila in 1997.

Such judicial independence has not been achieved in the country due to some long-standing obstacles: a lack of financial autonomy of the judicial institutions, the tendency of executive and legislative leaders to exert pressure on the judiciary in the context of generalised corruption, and the widespread corruption of judges and magistrates as a consequence of their extremely low salaries or indeed, lack of salary altogether. The judiciary is, furthermore, strongly influenced by the executive.

Under the pretext of a breakdown of the proper functioning of the judiciary, the Kabila government dismissed 315 magistrates in November 1998, hiring others (*see Attacks on Justice 1998*).

Resources

Article 97 of the proposed Constitution provides for the independence of judges. However, judges in the DRC are subject to desperate financial conditions. Salaries are extremely low and it has been reported that some judges have been unpaid for extensive periods of time. Judge's salaries in many instances have not been paid since 1996 and, in any case, range between US$ 3 and US$ 30 per month. Generally speaking, judges are still working without proper facilities or offices, and law libraries are not always accessible. As a consequence of the lack of financial autonomy of judicial institutions widespread corruption has emerged within the judiciary.

Furthermore, the strained circumstances affect all other judicial staff, including court clerks, duty officers and other judicial personnel.

The Military Court

A special Military Court (*Cour d'Ordre Militaire)* was created by decree (Decree-Law N° 019) on 23 August 1997. Although the Military Court was established to improve discipline within the army, its jurisdiction is ill-defined which has led to abusive trials of civilians for crimes such as armed robbery or activities that are perceived to be a threat to state security. The Military Court does not afford the right of appeal to a higher court or access to defence counsel. It has also begun to sentence civilians for non-violent offences with political connotations. Although the territorial competence of the Military Court was limited only to the province of Bas-Congo and the town of Kinshasa, its competence has been extended to other provinces of the Republic.

The court's decisions are heavily influenced by the executive. It systematically violates the rules of procedure, which constitute the very core of the right to legal counsel, on the grounds that the DRC is still in a state of war, and that accordingly, the existing legal procedures cannot be respected. The Military Court has curtailed the authority of the ordinary and legal tribunals and usurped their jurisdiction, by trying all types of cases, including those that fall within the jurisdiction of regular courts. In this manner, many members of the opposition have been tried and sentenced to prison.

The military police has jurisdiction over members of the armed forces. However, there were numerous cases of civilians tried for political offences with limited rights of due process, which resulted in some instances in their execution. The court has ordered the execution of 250 people in its two years of existence.

The rebel movement RCD has established a *Conseil de Guerre Opérationnelle* to try soldiers charged with robbery or insubordination. It is similar to the Military Court but has dual jurisdiction. According to lawyers in Bukavu, trials are secret and inaccessible. However, soldiers are arrested and tried only for ordinary crimes or for military offences, and not for war crimes or human rights violations because they are needed in war time.

Cases

M. Balanda {judge}: Judge Balanda was arrested on 9 January 2000 by the CNS (*Centre National de Sécurité*) in Kinshasa. His arrest was confirmed by the commander of the security forces. He has been charged with "subversion" for having had contacts with the United Nations Mission in Congo. He was released almost two weeks later, without trial.

Lambert S. Djunga and Pierre Risasa {lawyers}: Both lawyers are partners in the Kinshasa Office of the Mitchell & Associates law firm from the United States of America. They were tried before the Military Court of Kinshasa, on charges of "treason in time of war", an offence that carries the death penalty. The two lawyers were arrested on 5 March 1999. It seems that the arrest was connected to the law firm's legal representation of Banro American Resources, INC, a mining company that alleges that it owned mining concessions in the Democratic Republic of Congo (DRC). When the concessions were appropriated by the DRC Government, the company initiated arbitration proceedings against the government. Mr. Djunga and Risasa were arrested shortly after the legal proceedings were brought.

The two lawyers were obviously prosecuted for representing their clients in legal proceedings. This is contrary to Article 18 of the 1990 UN Basic Principles on the Role of Lawyers, which states that lawyers shall not be identified with their clients or their clients' causes.

The two lawyers were finally acquitted.

THE DOMINICAN REPUBLIC

Severe back log, ineffective methods, corruption and a lack of resources are the main problems affecting the Dominican judiciary. The majority of prison inmates are held without being tried or finally convicted, and there is serious disrespect for the individual right of due process. Judicial remedies are often ineffective.

The Dominican Constitution dates from 1966 and was last amended in 1994. The constitutional reforms of 1994 introduced substantial changes that affect the judiciary and its independence, amongst them the establishment of a National Council of the Judiciary.

The Constitution provides for the division of power into three branches of government. The executive power is assumed by the President of the Republic, elected by universal suffrage every four years. The current president is Mr. Leonel Fernandez who was elected in the last presidential elections held on 16 May 1996 to replace Mr. Joaquin Balaguer, who had been holding power, won through successive and controversial re-elections, for a total of 22 years. Legislative power is vested in a bicameral assembly with a Senate and a Chamber of Deputies. The judicial power is allocated to a Supreme Court and a system of lower tribunals.

The ruling party, the National Liberation Party (PLN), holds a minority of seats in both chambers of parliament.

The government has initiated a programme of reform that embraces comprehensive legal and structural issues with the aim of making the state apparatus more effective and predictable. This also includes a programme of legal and judicial reform that began with the 1994 amendments to the Constitution. Since 1997 significant new legal codes have been enacted. These include a code on minors and a law on domestic violence.

HUMAN RIGHTS BACKGROUND

The constitutional and legal system provide for an array of mechanisms and institutions to protect the human rights of the Dominican people. However,, inefficiency, corruption, lack of sufficient resources and poor training originate frequent and sometimes serious human rights violations. In February 1999, the Dominican Republic accepted the compulsory jurisdiction of the Inter-American Court of Human Rights.

The use of special constitutional remedies to protect human rights, such as *Habeas Corpus* and *amparo,* is not effective in the country. The effectiveness of these remedies has been undermined by the attitude of the police who refuse to enforce judicial orders issued pursuant to these remedies. This has led to a serious problem as a good number of prisoners are held despite judicial orders for their release.

One of the most common violations that occurs in the Dominican Republic relates to the right to due process, including the right, if arrested, not to be held in incommunicado detention, and to have access to a lawyer during questioning by the police. Frequent reports said that these rights are not respected in practice. The police routinely deny detainees access to a phone to call relatives or an attorney. Further, when there is a lawyer, he or she is very often prevented from being present during the questioning of the suspect by the police. Instances of mistreatment and torture, as well as self-incrimination, have been denounced as a result of these practices.

By the end of the year the Inter-American Commission on Human Rights (IACHR) issued its final report on its visit to the country in June 1997. The report contains an evaluation of the human rights situation and the institutional mechanism for the protection of rights in the country. The report is updated until 1999 with information supplied by the Dominican Government.

The Judiciary

The judiciary (*poder judicial*) is regulated by the Constitution, the Organic Law of the Judicature and the Law on the Judicial Career.

The IACHR received, during its visit, information on the critical situation of the administration of justice, "finding a high percentage of lack of confidence in the population at large with respect to the independence and probity of the judicial system, as well as repeated complaints over the excessive delays in judicial proceedings" (paragraph 91). The findings and concerns of the IACHR will be further elaborated below.

Structure

The judiciary is composed of a Supreme Court of Justice (*Suprema Corte de Justicia*) at the top of the hierarchy, followed by Appeals Courts, Tribunals of First Instance and Justices of the Peace. There are also specialised courts for land, fiscal and labour matters. The National Council of the Magistracy (*Consejo Nacional de la Magistratura*) is also part of the judiciary, although it operates autonomously.

Following the 1994 amendments, the Supreme Court's membership comprises a minimum number of eleven justices (it currently numbers sixteen). The jurisdiction of the Supreme Court covers the entire country but is restricted to the review of sentences passed by the Appeals Courts and the control of the constitutionality of the laws (Article 67 of the Constitution). It also enjoys sweeping powers with regard to administration, organisation and appointment of judges and personnel in the judiciary (*see below*).

The Appeal Courts have jurisdiction over a judicial district as determined by law. There are at least nine Appeal Courts in the country (Article 68 Constitution). The law also determines the number of first instance judges and Justices of the Peace in the country.

Appointment and Security of Tenure

Justices of the Supreme Court are appointed, following the 1994 amendment to the Constitution, by the National Council of the Magistracy, which also has the power to appoint the Chief Justice and one or two alternates or substitutes. The judges of the Appeal Courts are appointed by the Supreme Court, which also appoints lower level judges.

The National Council of the Magistracy is made up of seven members: the President of the Republic who presides over it (or the Vice-President who can replace him), the Speakers of the Senate and of the Chamber of Deputies, the Chief Justice of the Supreme Court and another justice elected by his peers, and one senator and one member of the lower chamber, who are from a different political party to that of the Speakers, who are elected by their respective chambers (Article 64 paragraph 1 Constitution). The composition of the Council, as well as the powers given to it with regard to appointment of justices of the Supreme Court, are aimed at providing a greater guarantee of autonomy and independence for the judiciary. Nonetheless, the predominance of political representations within the Council may jeopardise this aim in the future. So far, the work of the Council in appointing the first bench of the Supreme Court has reportedly been positive.

Article 63 paragraph III of the Constitution provides for all judges the guarantee of non-removal except for misconduct. Disciplinary measures against judges are provided for in Article 67.5 of the Constitution which grants to the Supreme Court disciplinary powers over all members of the judiciary, including the power of suspension and dismissal. Article 67 further grants to the Supreme Court wide powers not only with regard to appointment and discipline of judges at lower levels, but also in respect to the assignment of posts and salaries for judges and court staff.

The Supreme Court can transfer temporarily or definitively, from one district to another at will, any judge of a lower level court.

Article 14 of the Law on the Judicial Career Service provides that: "When appointing the justices of the Supreme Court of Justice, the National Council of the Magistracy shall determine the period for which such appointments are made, which shall be no longer than four years from the date of appointment...". This provision was reportedly declared unconstitutional by the Supreme Court of Justice in August 1998.

The Concerns and Recommendations of the Inter-American Commission on Human Rights

In its report, the IACHR analysed the factors that negatively affect the judicial system in the Dominican Republic. In particular, it underlined the inefficiency of the system "insofar as it is not able to expeditiously and adequately resolve the cases that are brought before it" (paragraph 92). This is reflected in the growing backlog of cases pending before the courts and also in the fact that 85 % of all prisoners are held in preventive detention for long periods of time without their legal situation being judicially determined. Criminal trials take on average between two and three years before a verdict is rendered, and the pre-trial phase may take an additional year and a half.

In one of the largest prisons in the country, the IACHR found that more than 500 detainees had been held for longer than would have been the case had they been tried, convicted and given the maximum sentence. The IACHR received information that this situation was being addressed by the government by releasing those detainees who have been in preventive detention for a period already equal or longer than would have received if they were found guilty and given the maximum sentence for the crime of which they were accused. However, the IACHR observed that to benefit from this measure the detainees are required to serve the maximum sentence for the offence they are charged with, but without having been tried and convicted. The IACHR reminded that "these persons were never sentenced, their guilt was never shown, and it is their right to be released...", and that no measure has been taken to make reparation to those persons unduly held in prison for such a long period of time (paragraph 100).

Besides the inefficiency of the system that leads to blatant violations of human rights, the actual procedures before the courts diminish or violate the rights of the accused. The IACHR found that :

> the possibility of preparing an adequate and timely defence from the very moment of the arrest is limited by many factors...The delays in the proceedings, the costs of hiring a private attorney, and the ineffectiveness of the public defenders help foster the virtual defencelessness and inaccessibility to justice by the accused (paragraph 106).

Additional problems are presented by the fact that prisoners have no right to a public defender until trial, which affects negatively their rights in the pre-trial stage and, due to the limited application of remedies such as *Habeas Corpus*, their human rights. The latter situation is due to the use of *Habeas Corpus* "by persons accused of particularly harmful crimes, such as drug-trafficking. It is in this context that some sectors assail the reputation of the judges, who are inclined to reject the admissibility of this constitutional action, even violating the rights of the accused, in order to safeguard their reputation" (paragraph 110).

Particularly troubling is the finding of the IACHR regarding instances in which judicial release orders pursuant to a recourse of *Habeas Corpus* are not enforced by the police. Prisoners held in detention despite a judicial order releasing them are called "contempt prisoners" (*presos desacatados*). During its visit to the country, the IACHR received information from a well-respected non-governmental organisation that those prisoners numbered at least 50.

In its report the IACHR also outlined the governmental efforts to modernise and improve the work of the judiciary. There is a Commissioner for Reform and Modernisation of the Justice System appointed with the mandate to co-ordinate the judicial reform programme. Among the first reforms carried out were a number of prison reform initiatives that are improving the situation of prisoners. The government has also appointed, as part of the reform of the justice system, special commissions for the reform of the Civil Code and the Code of Civil Procedure, as well as the Penal Code and the Code of Criminal Procedure.

Among the conclusions and recommendations given by the IACHR with regard to the Dominican judiciary are the following:

- The IACHR took note of the changes regarding the system of appointment of justices of the Supreme Court and recommended "that the judicial career service be strengthened in order to give judges job stability"(paragraph 128);
- That "the state quickly adopt measures to correct the chronic delays that characterise the administration of justice. In this regard, the state should pay special attention to the full application of Article 8 of the Dominican Constitution, pursuant to which detainees must be brought

before the competent authority within 48 hours of their arrest..." (paragraph 130);

- "That the state put an end to the practice of preventive detention" (paragraph 131);
- "The Commission urges the state to institute measures to give priority to the right to legal advisory services by providing the assistance of public defenders, and to establish provisions that guarantee the detainees protection for due process and the right to liberty" (paragraph 132).

ECUADOR

Widespread corruption and heavy back log constitute the main problems the Ecuadorian judiciary have to face, against a background of continuing political and economic instability. The judiciary also experienced economic hardship and renewed attempts against its independence.

The Republic of Ecuador is a constitutional democracy. The 1998 Constitution establishes the separation of powers among the three different branches of government. The executive power is exercised by the President of the Republic who holds office for a five-year term. Mr. Jamil Mahuad, elected in 1998, continued in office during 1999 but was overthrown in January 2000. In recent times no elected president has concluded his mandate. Legislative power is vested in a unicameral legislature comprising 121 deputies. The Constitution provides for an independent judiciary, although political influence is apparent and corruption is widespread.

Economic and financial instability constitute the framework in which political and institutional instability developed. The national currency was devalued many times during the year and governmental finances collapsed due to the effects of the 1998 natural disaster and the burden of debt repayment. Economic stabilisation programmes, implemented by the government, generated massive social protest led by the Workers Unitary Front (FUT) and the Confederation of Indigenous Nationalities of Ecuador.

In March 1999, following massive protest and social unrest, President Mahuad declared a state of emergency in the country and set up a fresh package of economic measures that triggered even more social unrest. After a reshuffling of the ruling coalition, some of the measures were withdrawn, including a partial repeal of the state of emergency. In the context of the negotiation of a loan with the International Monetary Fund (IMF), the government announced an austerity plan that triggered more public protest and a wave of strikes nation-wide. President Mahuad declared the state of emergency again, but suspended it some weeks later.

In September 1999, Mr. Mahuad carried out a new reshuffling of his Cabinet. As the financial and economic turmoil continued, he had to declare a moratorium on the repayment of the country's external debt in October 1999, becoming the first country to formally default Brady bonds. He also announced that Ecuador would default its debt on eurobonds.

In November 1999, trade unions, grassroots and student organisations escalated their campaign against the austerity plans, the new annual budget for 2000 negotiated by the government with IMF support and demanded the resignation of Mr. Mahuad as President.

In January 2000 President Mahuad announced the adoption of the dollar as the national currency, as a way to stabilise the financial situation of the country. In response, the Confederation of Indian Nationalities of Ecuador organised a series of national and regional manifestations demanding Mr. Mahuad's resignation and the closing of parliament and the Supreme Court. The indigenous movement managed, with the support of the army, to occupy the premises of parliament and the Supreme Court, from which the army forced President Mahuad to resign. Vice-President Noboa temporarily occupied the presidency until parliament, which was specially convened, formally dismissed Mr. Mahuad on charges of abandoning his post, and Mr. Noboa was sworn in as president on 26 January. Mr. Mahuad has always denied that he abandoned his post and claims there was a plot to overthrow him.

The new Ecuadorian President has vowed to continue the implementation of economic policies set up by his predecessor, especially the most criticised "dolarisation" of the economy. The leaders of the indigenous movement have threatened further protests in the future. By the end of January, criminal investigations were instigated against some army chiefs on charges of having supported the ousting of a constitutional government. Among the accused was General Paco Moncayo, a well known officer during the war against Peru. Military courts also initiated proceedings against 12 lieutenants and 300 junior officers on charges of sedition and insubordination.

Human Rights Background

The state of emergency declared in the Guayas province from January 1999 to July 1999, and then again in December 1999, was the framework for the practice of unlawful detentions carried out by the police. Hundreds were arrested, sometimes on mere suspicion or for not carrying an identification document. The state of emergency was purportedly declared to help the authorities to deal with the growing common criminality in the province.

A further state of emergency was declared in the whole country by President Mahuad in March and July 1999 due to the social and political unrest. According to legal provisions states of emergency can last only for 60 days, but may be extended if need be. In this context, wide restrictions on freedom of movement and assembly, as well as personal liberty and

integrity, were imposed by the authorities. The police carried out arrests and held people in detention whose actions, in many instances, had no connection with the state of emergency.

The Constitution and the law prohibit, under normal circumstances, the detention of a person without a judicial order, and allow the arrested person to challenge the lawfulness of his or her detention. However, the police do not always respect these provisions and in many instances relatives of those arbitrarily detained have to resort to bribing the police in order to get the victims released.

There were instances of extrajudicial killing by the police or civil patrols, though none were politically motivated. A number of the killings occurred when the police used excessive force to repress social protesters in the street, but many others were victims of lynching by mobs. Torture and other kinds of mistreatment were frequently used against suspected or detained persons in police custody. Prisons continued to be overcrowded, with 67.46 % of all inmates being held without a conviction (most of them are awaiting trial but others had already been tried). The 1998 Constitution provides for the immediate release of those persons accused of crimes punishable with a maximum of five years imprisonment but who have already spent one year in prison without a final sentence.

In February 1999, left-wing parliamentarian, **Jaime Hurtado,** was killed, together with two other people, by unknown persons. Mr. Hurtado was a lawyer but the evidence does not suggest that his murder was linked with his activities as a jurist. Instead, it seems to have been politically motivated. Parliament set up a commission of inquiry that issued a report some months later. The authorities investigated and charged three police officers but investigations continue.

In March 1999, former acting President, Fabian Alarcon, was arrested, pursuant to an order by the Supreme Court, on charges of illegally hiring personnel during his holding of the Speaker's office in parliament.

In what constitutes a positive step, the government of Ecuador settled amicably a number of cases before the Inter-American Commission and Court of Human Rights, respectively, during 1998 and 1999. Some of these cases involved killings and arbitrary arrest and torture. In all of these cases the government admitted fault and agreed to pay compensation to the victims or to their relatives.

Legal Reform

In December 1999, a law containing a new Code of Criminal Procedure was enacted and will enter into force during the year 2000. The

law was partially vetoed by President Mahuad, but after parliament accepted the modifications, it was approved. The new code is meant to introduce substantial elements of the adversarial system of criminal justice into the existing outdated and mainly inquisitorial system. The code was adopted by way of implementation of the provisions of the 1998 Constitution.

The Judiciary

The Constitution provides for the independence of the judiciary. Judges and magistrates are only subject to the Constitution and the law (Article 199). In practice, however, the judiciary is subject to political and other influences, and its work is undermined by insufficient resources, corruption and poor training. A programme of judicial modernisation has been carried out in recent years and this has helped to improve and speed up certain proceedings. In July 1999, a mission from the World Bank visited the country and carried out an inspection of the work being done with regard to the infrastructure of the judiciary.

Structure

The judiciary (*funcion judicial*) comprises the Supreme Court, the highest ordinary judicial authority, a number of High Courts that have jurisdiction over judicial districts, and a system of lower courts. The National Council of the Judiciary (*Consejo Nacional de la Judicatura*), the administrative and disciplinary body, is also part of the judiciary. There is a Constitutional Court.

The National Council of the Judiciary was introduced in the 1998 Constitution. It is in charge of administrative and disciplinary matters (Article 206 of the Constitution). Law N° 68 of March 1998 sets out the basic features and establishes the powers of the Council. According to Article 2 of the law, the Council of the Judiciary is composed of seven members plus the President of the Supreme Court, who presides over it *ex-officio*. The seven members are appointed by the Supreme Court, meeting in plenary, and with the vote of two thirds of its membership, from lists submitted by the High Courts, the law schools and the Bar Associations. They serve for a renewable period of six years.

Until November 1999 the Council of the Judiciary had received at least 2,000 complaints against judges and court staff. One of the most outstanding, for its political connotations, prompted the institution of proceedings against criminal justice **Isabel Segarra** on charges of opening an investigation into President Mahuad's alleged implication in an

embezzlement case without following the constitutional rules on impeachment before parliament. Judge Segarra was dismissed by the Council of the Judiciary in November 1999. The high number of complaints highlights the strong lack of confidence in the judiciary.

Appointment and Security of Tenure

Article 202 of the Constitution provides that the justices of the Supreme Court will be appointed by the Supreme Court itself, with a majority vote of two thirds, and will enjoy life tenure. They should only be dismissed for reasons stated in the Constitution or by law. Article 204 recognises and guarantees judicial career. It also provides that judges, other than Supreme Court judges, will be selected and appointed on the basis of public competition.

The members of the Constitutional Court are appointed by parliament from a list of candidates prepared by each of the branches of power and other corporate and social groups. They serve a renewable term of four years. After the constitutional reform of 1998 a new bench of judges for the Constitutional Court was due to be appointed. However, due to political instability the task was delayed and the period of the judges serving in the court at the time was extended. In 1999 parliament put an end to this transitional period, appointing the new members of the court.

The Council of the Judiciary is the body in charge of resource administration and discipline within the judiciary. According to Article 11(c) of Law 68, the Council has the power to decide on cases involving disciplinary sanctions, including separation and removal of judges of High Courts and lower courts. It has the same power with regard to the judiciary's personnel. Decisions of the Council on these matters can be appealed. It is worth noting that the Council does not have disciplinary powers over the judges of the Supreme Court.

In June 1999 a bill to amend Article 130.9 of the Constitution was introduced in parliament. The proposed bill grants the parliament the power to initiate impeachment proceedings against the justices of the Supreme Court and the counsellors of the Council of the Judiciary, as well as to dismiss them. The absence of a constitutional provision that subjects judges of the Supreme Court to the control of the legislature was underlined during the constitutional crisis originated by the Constitutional Court decision suspending Article 130.9 of the Constitution (*see below*). The proposed amendment will allow parliament to institute impeachment proceedings against the judges of the Supreme Court and the Council of the Judiciary for misconduct while on duty and one year after leaving office.

Constitutional Crisis and Appointment of Judges of the Constitutional Court

On 7 April 1999, the Constitutional Court passed a sentence suspending Article 130.9 of the Constitution which grants parliament the power to institute impeachment proceedings against the President of the Republic, ministers, the Human Rights Ombudsman and other high-ranking officials, but not against the justices of the Supreme Court, nor against members of the Council of the Judiciary. The Constitutional Court considered that the provision was discriminatory and should be suspended until it is amended. The decision, which came at a time when parliament was discussing an impeachment against the Human Rights Ombudsman, triggered strong reaction by parliament and was questioned by many observers as it declares invalid a constitutional provision, an action for which the Constitutional Court does not have competence.

The controversial decision of the Constitutional Court that questioned the powers of the legislature to hold politically accountable high-ranking public officials and members of other branches of government, prompted parliament to strike back, adopting a resolution that put an end to the extraordinary term that was being served by the members of the court. The judges of the Constitutional Court were serving on a temporary basis until the new membership of the court was appointed by parliament pursuant to the 1998 Constitution.

The ensuing negotiations in parliament to appoint the new members of the Constitutional Court highlighted the strong influence of political considerations in the process, as each political party in parliament tried to get a "representative" into the new Constitutional Court. On 11 May 1999, six new members of the court were sworn into office. The group included former justice of the Inter-American Court of Human Rights, Justice Hernan Salgado Pesantes, and two members of the old court who were re-elected. On 16 June 1999, parliament appointed the other three members of the Constitutional Court.

Also in May 1999 the President of the Constitutional Court resigned in the midst of the Constitutional crisis and the ending of his term as judge in the court.

In November 1999, the Constitutional Court declared that the freezing of bank deposits in dollars, declared by the government, in March 1999, as an emergency measure to prevent the flight of capital from the country, was unlawful. The ruling was questioned as damaging the national economy.

Resources

The judiciary continued to be poorly funded and understaffed. In March 1999, members and staff of the Constitutional Court initiated a strike in protest against the failure of the Ministry of Finance to transfer the financial resources necessary for the court's functioning. They also protested against the reduction of the Constitutional Court's budget. Staff working in the office of the Ombudsman joined the strike.

In October 1999, staff of the judiciary began to strike in protest against the reduction of the judicial budget for the year 2000. In November 1999, they carried out another strike that lasted three weeks and brought the judiciary almost to a collapse. They warned that the judiciary would be forced to close by mid-2000 for lack of budgetary resources.

Military Courts

The extended jurisdiction of military and police tribunals over military and police officers who commit common crimes continues to be a factor that undermines the powers of the ordinary justice system. Conflicts of jurisdiction between military tribunals and civilian ones are settled in favour of the former. In a case involving an Ecuadorian citizen who was tortured with fatal consequences, the Constitutional Court considered that the police tribunal had jurisdiction to try the case since the accused policemen committed the crime while on duty. Police and military tribunals carry out closed trials and their decisions or sentences are not made public.

In October 1999, the National Council of the Judiciary forwarded to the Supreme Court a proposal of a bill to transfer jurisdiction to the ordinary justice system for trials of military and police officers for common offences. The bill tries to implement the Transitional Constitutional Provision N° 26 that provides that all magistrates and judges dependant on the executive branch, as is the case with the military and police, should join the ordinary justice system. The bill, if passed into law, will subject military and police officers to trials directly before the Supreme Court to avoid undue pressure upon the lower level judges.

Corruption and Undue Political Influence

On various different occasions during the year the existence of corruption in the judiciary was recognised. In January 1999, the former Procurator General declared that the composition of the judiciary shows a high degree of politicisation despite the functioning of the National Council of the Judiciary. In October 1999, following declarations by the Vice-President of the Republic to the press pointing to the existence of

corruption in the judiciary, the President of the Supreme Court accepted the fact but said that it was extendible to the entire public administration.

During the year the Council of the Judiciary sanctioned a number of judges and court personnel for misconduct or corruption. In November 1999, the Council dismissed two judges and two court employees on the grounds that they had been involved in the illegal release of suspects of drug-trafficking. In November 1999, the President of the Guayas High Court resigned his post ostensibly due to the political pressure and rampant corruption in the local judiciary. He had just recently been cleared by the Council of the Judiciary of charges of exerting undue influence over a prosecutor.

EGYPT

An elaborate exceptional court system continued to function, undermining the jurisdiction of regular courts and allowing the government to choose which court to refer sensitive cases to. Towards the end of the year, judges' associations called for an ending of the control over the judiciary by the Ministry of Justice through the administration and financing of the court system. Although the Bar Association remained under governmental sequestration, and security forces prevented members of the Bar from holding their general assembly, the Court of Cassation upheld a previous ruling to lift the measure of sequestration.

Since 4 October 1981, Mr. Hosni Mohammed Mubarak has been serving as Egypt's President. On 26 September 1999, he was re-elected for a fourth six-year term which was approved by a national referendum. President Mubarak continued his policy of a controlled multi-party system and economic liberalism.

The President appoints the Prime Minister, who selects the various ministers. On 10 October 1999, a new Cabinet of technocrats was appointed in Egypt.

The legislative power belongs to a bicameral parliament. It is composed of the People's Assembly (*Majlis al-Sha'b*) elected for a five-year term and the Advisory Council (*Majlis al-Shura*). *Majlis al Shura,* which functions only as a consultative organ, is partly elected and partly nominated by the President.

HUMAN RIGHTS BACKGROUND

Although violent attacks by Islamic opposition seriously declined in Egypt during 1999, serious human rights violations continued to be committed with impunity. These include arbitrary detention, trial of civilians before military courts and serious limitations on the freedom of expression and association. Although human rights work is generally tolerated in Egypt, most human rights groups continue to operate without being legally registered. Human rights defenders continue to face harassment and persecution for carrying out their professional activities.

The Islamic movement continued to use the judicial system and to incite public opinion against writers and journalists who express views that they consider to be against Sharia and Islam. They continued to pressure the government to censor literary work and other forms of expression that they consider to constitute blasphemy.

State of Emergency

A state of emergency has been in effect in Egypt since 1981. On 22 February 1997, the People's Assembly voted to extend the emergency law until 31 March 2000. Act No. 162 of 1958, as amended by Act No. 50 of 1982, permits the proclamation of a state of emergency when public order and security are endangered due to the outbreak of war, the existence of a situation that threatens to lead to such an outbreak, the occurrence of disturbances within the country, general disasters or the spread of an epidemic (Article 1).

Since its institution in 1981, the state of emergency has been extended for a total of nine times over a period of 19 years. The State of Emergency Law grants excessive powers to the executive. It allows the President, *inter alia*, to impose restrictions on the freedom of assembly, movement and residence, and authorises the detention of individuals without charge or trial. After thirty days, a detainee can petition the State Security Court for review. If the review is favourable, the detainee must wait another month and then petition another State Security Court for release. The minister can, however, simply re-arrest the detainee, which is often the practice.

As a result of these powers, hundreds of individuals have been detained without charge or trial for several years. Although the courts have ordered that some be released, the court orders were either ignored or new detention orders were issued.

Professional Associations and Trade Unions

Within the framework of the government's campaign against Islamic opposition groups, trade unions and professional associations, including the Bar Association, have suffered serious restrictions during the past two years. Their members have been often arrested and accused of belonging to a "secret outlawed group", "planning to overthrow the system of government" and of "infiltrating the professional syndicates to undermine security in the country". They are sometimes tried before the Military Court for suspected links with the banned Moslem Brotherhood.

During 1999, the government referred three cases involving 148 civilians to the military courts. The cases involved the leadership of several

professional associations, including the Bar Association (*see Cases below*). Twenty of these defenders were suspected members of the Moslem Brotherhood. The charges included preparing for the associations' elections.

Torture

Torture and ill-treatment of detainees also continued to be widespread and systematic throughout 1998/1999. While there are reports of some investigations into torture cases, the sanctions received by the violators tended to be minor and administrative. In many instances where a civilian defendant sued the Ministry of Interior and the case was brought to court, however, compensation was ordered. According to the Egyptian group, the Human Rights Centre for the Assistance of Prisoners, between 1982 and 1997 the government was ordered to pay a total of 877,000 Egyptian pounds, which equals $ 260,000, in compensation.

The prosecutor, however, referred five security officers to the court for their alleged involvement in the death in police custody of Waheed al-Sayyed Ahmed in 1998. At the end of the year, no date had yet been fixed for this case.

Human Rights Defenders

The year witnessed several restrictions on human rights work in Egypt. The government prohibited the holding of the first regional Arab meeting on the independence of the judiciary. The meeting, which was shifted to Bayrouth, Lebanon, was organised by the CIJL affiliate, the Cairo-based Arab Centre for the Independence of the Judiciary and the Legal Profession, in collaboration with the CIJL. A regional meeting of the Arab human rights movement that was organised by the Cairo Institute for Human Rights was also prohibited and had to be shifted to Morocco.

The Egyptian Organisation for Human Rights (EOHR) was accused by the government of serving "Western interests" by denouncing the events of Al-Kosheh. Its Secretary-General, Hafez Abu Se'da, was arrested in December 1998 after EOHR published reports regarding sectarian violence that took place in the village of Al-Kosheh in Upper Egypt. (*See Cases below*)

A wide media debate took place regarding the financing of NGO's and other organisations in Egypt. Officials and government-sponsored papers insinuated that foreign funding undermines the impartiality of these groups. They accused human rights groups of being a tool in the hands of Western interest and of using the human rights issue as a weapon to undermine the state in crucial times.

Law No 153 on Association

In June 1999, Law No. 153 on non-governmental organisations (NGO s) was enacted. Its seventy-four articles ensure the Egyptian state's grip on political and civil life. The law uses flexible and vague terms to outlaw NGO activities, such as prohibiting them from "practising any political or trade-union activity exclusively restricted to political parties and trade unions" or engaging in activities that "threaten national unity" or "violate public order or morality". The law regulates the formation, functioning and funding of NGO s. It requires groups to re-register with the Ministry of Social Affairs.

Although it was rushed through parliament for approval, the law generated a major debate, particularly amongst human rights groups in Egypt. Several groups considered that it severely restricted their ability to function properly. On 28 November 1999, the Ministry of Social Affairs issued regulations to facilitate the implementation of the law. The regulations were said to take into account the criticisms presented by human rights groups.

In June 2000, as this report was being finalised, the Constitutional Court of Egypt ruled that Law No. 153 was unconstitutional. The court did not examine the substance of the law, rather it invoked procedural grounds, regarding the manner in which it was adopted by parliament, to consider the entire law as null and void.

The Judiciary

Although the year witnessed demands by Egyptian judges to boost their structural independence, the regular court system in Egypt continued to be regarded with high esteem. The elaborate exceptional court system continued, however, to deprive the regular courts of its jurisdiction in sensitive cases.

The Regular Court System

The regular court system is composed of two sets of courts: one that deals with civil, criminal, and commercial disputes, and another that deals with administrative matters.

The civil court system is composed of a Court of Cassation, Courts of Appeal, Courts of First Instance and Magistrate Courts.

The Magistrate Courts are courts of small claims and minor offences. The Courts of First Instance are the courts of general jurisdiction. In civil cases, they are generally composed of one judge. In criminal cases, howev-

er, they could be composed of either one judge or three judges, depending on the seriousness of the possible penalty.

Appeals Courts constitute the second level jurisdiction and are composed of three judges. There are seven Courts of Appeal in Egypt. Each is divided into civil and criminal chambers.

The Court of Cassation sits in Cairo. It accepts petitions on judgements rendered by the Court of Appeal on two grounds: mistakes of law and violations of due process.

There is also an elaborate system of administrative courts that is divided into primary level, appeal and the Council d'Etat.

The Supreme Constitutional Court is an independent judicial body. It is tasked with control of the constitutionality of laws and the interpretation of legislative texts in the manner prescribed by law. There is no possibility for individuals to petition this court.

In a move that created much criticism, a presidential decree amended the law establishing the court in July 1998. The decree was issued after the court annulled a tax that the government imposed on Egyptians working abroad. The effect of the court's judgement was that the government was required to return millions of dollars that it had collected from these workers. To by-pass this ruling, the presidential decree stipulated that the court's judgements cannot be applied retroactively.

Selection, Promotion, and Transfer

According to Articles 165 and 166 of the Egyptian Constitution, judges and the judicial authority are independent. The Constitution forbids interference by other authorities in their judicial functions. Judges serving in the regular court system are appointed by the President upon recommendation of the Higher Judicial Council. This council is composed of senior judges and chaired by the President of the Court of Cassation. The Council also regulates judicial promotions and transfers.

Judges are appointed for life and cannot be dismissed without serious cause. In practice, however, since the appointments are a presidential prerogative the executive enjoys considerable influence over the judiciary. The High Council of Judicial Authorities recommends appointees to the President, in addition to regulating promotions and transfers. Judges are considered functionaries of the Ministry of Justice, which administers and finances the court system. This scheme makes the executive the *de facto* head of the judiciary, which potentially undermines basic principles of impartiality and the separation of powers.

The Constitutional Court is comprised of seven judges appointed by the President of the Republic following consultation with the High Council of Judicial Authorities. The President of the court is also appointed by the President of the Republic and is third in line for the presidency of the Republic after the President and the Speaker of the People's Assembly. The potential to become head of state compromises the position of the President of the Supreme Constitutional Court as a member of the judiciary.

On 2 December 1999, the Judges Clubs in Egypt, which serve as associations of judges, met and called for the independence of the judiciary, and for the amendment of the law on the judiciary. The judges asserted that Law 47 of 1972 on the judicial authority in Egypt must be amended so as to lift the control of the Ministry of Justice over judicial affairs. In particular, they stressed the importance of separating the budget of the judiciary from that of the Ministry of Justice; placing the Judicial Inspection Department under the supervision of the Supreme Judicial Council rather than the Ministry of Justice; and amending the criteria for the selection of high ranking positions in the judiciary. The judges also expressed concern that the Judges Clubs are subject to the law on freedom of association (*see above*), and thus are controlled by the Ministry of Social Affairs. They nevertheless formed a committee to amend the Statute of Judges Clubs in order to conform to the association law.

Special Courts

There are several types of special courts in Egypt, which were described previously in detail in *Attacks on Justice 1998, 1997, 1996*. There has not been much change in the structure of these courts or in the scale of their operation. These special courts include the Permanent State Security Court, the Emergency State Security Court, as well as military courts. There is much overlap in the jurisdiction of these various courts, which mainly deal with issues of internal and external security. This allows the government to choose which court to refer a specific case to.

The Permanent State Security Court system is composed of Magistrate Courts and Supreme Courts. Civilian judges normally sit in these courts. The President of the Republic may, however, order two additional military officers to sit. The verdicts of these courts are subject to appeal before the regular court system.

The Emergency State Security Courts are formed by judges appointed by a presidential decree, upon the recommendation of the Minister of Justice. The Emergency Law allows the President to appoint military

officers to this court. The judgements of these courts are not subject to appeal. The President of the Republic may alter them, however.

The military courts are part of the military hierarchy. There is no right to appeal before these courts. The jurisdiction of these courts is not restricted to military personnel however. The President of the Republic may refer cases involving civilians to these courts. Hundreds of civilians, including lawyers, have been tried before these courts, which do not accord proper rights of defence. Death sentences are often passed and promptly executed without a fair trial.

The Bar Association

The dismantling of the lawyers' associations and the sequestration of the Egyptian Bar Association (EBA) have been a major concern to the CIJL since 1996 (*see Attacks on Justice* 1998). The sequestrators have taken over important powers of the EBA, such as the taking of disciplinary action against lawyers and the ability to propose and comment on legislative reform.

In March 1999, Egyptian lawyers were prevented by security forces from holding an extraordinary general assembly which was scheduled for 18 March and aimed at preparing the election for a head and a council for the Bar Association.

According to the Judicial Sequestration Committee, this assembly was illegal. The Public Prosecutor asserted that it was not part of his competencies to prevent the holding of this assembly, and the government officially declared itself neutral on the matter. Nevertheless, large number of security forces were dispatched by the government in order to prevent the meeting.

In October 1999, the Court of Cassation upheld an earlier court ruling to lift the government sequestration of the Bar. The court appointed a Supervisory Committee chaired by the head of the Cairo Court of Appeal. The Committee is to prepare for the Bar elections. Elections are expected to take place during 2000.

Cases

Hafez Abu Sa'da {lawyer, Secretary-General of the Egyptian Organisation for Human Rights}: The case of Mr. Abu Sa'da continued. On 1 December 1998 he was charged before an Emergency Supreme State Security Court for "accepting funds from a foreign country with the aim of

carrying out acts that would harm Egypt(...)" (*see Attacks on Justice 1998*). EOHR received the sum of $ 25,000 from the Human Rights Committee in the British House of Commons to support a women's rights project. This amount was channelled to EOHR through the British Embassy in Cairo in 1998, without giving the required notification to the authorities. The government claimed that this amount is to sponsor an EOHR report regarding sectarian violence that took place in the village of Al-Kosheh in Upper Egypt.

The Egyptian Government invoked Military Decree No 4/1992 which prohibits the collection or receipt of donations without prior approval of the Ministry of Social Affairs. Article 2/1 of that decree stipulates imprisonment for a minimum of seven years for violations of the decree. No appeal is possible from the decisions of this court.

Abdel Aziz Mohamed (lawyer, and chairman of EOHR): On 25 and 26 December 1999, Mr. Mohamed was questioned by the State Security Prosecutor regarding a report published in 1998 regarding events in Al-Kosheh in Upper Egypt.

Mukhtar Nouh, Khaled Badawi (lawyers of the Egyptian Bar Council) and **Ibrahim al-Rashidi** (lawyer): On 15 October 1999, and a few days following the Court of Cassation ruling with regard to the Bar elections, the three lawyers were arrested among twenty other individuals and referred to the Military Court, by virtue of a presidential order. The charges related to organising the Bar elections.

FRANCE

Important draft legislation that would have enhanced the independence of the judiciary, especially regarding the appointment and discipline of public prosecutors, failed to be approved by the bicameral parliament in January 2000. The lack of political will on the part of political parties was one of the main reasons behind this failure. Other legislative measures to guarantee equality of arms in criminal proceedings are still pending before parliament.

The 1958 Constitution regulates the functioning of the institutions of the Fifth Republic. The President of the Republic, who is the head of state, is elected for seven years by universal direct suffrage. Mr. Jacques Chirac was elected as President on 7 May 1995. In accordance with the results of the parliamentary elections, the President appoints the Prime Minister, who is the head of the government. The Prime Minister conducts the government's general policy and is accountable to parliament. The President of the Republic chairs the Council of Ministers, promulgates the laws and is the chief of the armed forces. He can dissolve the National Assembly and, in a case of serious crisis, exercise exceptional powers (Article 16).

The most recent legislative elections were held in 1997. The leader of the socialist party, Mr. Lionel Jospin, became the Prime Minister after his party won a comfortable majority.

The legislative authority is vested in a bicameral parliament composed of a 577 seat National Assembly (*Assemblée Nationale*), elected by universal direct suffrage for a five-year term, and a 321 seat Senate (*Sénat*), elected for nine years by indirect suffrage. The composition of the Senate is renewed in thirds every three years. The National Assembly and the Senate sitting together make up the parliament. Both legislative bodies exert control over the government, and play a role in the elaboration of laws.

HUMAN RIGHTS BACKGROUND

There have been reported cases of ill treatment by law enforcement officers against detainees, particularly foreigners, some of which resulted in the death of the victims. Although there were several prosecutions with

regard to such cases, this has not been sufficient due to the paucity of the prosecution service.

During 1999, the European Court of Human Rights ruled against France in a number of cases involving the right to a fair trial protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In the case of *Selmouni v. France*, the Grand Chamber of the European Court of Human Rights held unanimously, on 28 July 1999, that France had violated Article 3 (prohibition of torture) and Article 6 § 1 (right to a hearing within a reasonable time) in relation to Mr. Ahmed Selmouni, a Dutch/Moroccan national.

Mr. Selmouni was mistreated and tortured by French policemen while in custody between 25 and 29 November 1991 in connection with charges for which he was eventually convicted. The investigating judge dealing with the case ordered medical examinations and, in December 1992, Mr. Selmouni was questioned about the events for the first time by an officer of the National Police Inspectorate. In considering the length of the proceedings, the court took the view that, due to the seriousness of the alleged acts, it should not take as the starting point 01 February 1993, when the applicant formally lodged a criminal complaint, but instead the date on which he had expressly lodged a complaint while being interviewed by an officer of the National Police Inspectorate and the Public Prosecutor was informed of the events by the records of the interview. The court, having regard to the fact that more than six years had elapsed since then, concluded that the requirement of a "reasonable time" for a fair trial set forth in Article 6.1 of the European Convention had been exceeded.

In the case of *Khalfaoui v. France*, a seven-member chamber of the European Court of Human Rights ruled, on 14 December 1999, that France had violated Mr. Faouzi Khalfaoui's rights under Article 6 § 1 of the European Convention. Mr. Khalfaoui complained that his right to a fair trial had been violated when he was denied access to the Court of Cassation. The applicant, who had been convicted in November 1995 for indecent assault, was required under the Code of Criminal Procedure to surrender himself to custody. A convicted person who fails to surrender to custody without obtaining an exemption forfeits his or her right to appeal on points of law. As the applicant intended to appeal he sought such exemption but his petition was rejected by the Appeals Court. On 24 September 1996, the Court of Cassation ruled that Mr. Khalfaoui had forfeited his right to appeal on the grounds that he had not surrendered to custody on the day before the hearing of his appeal. The European Court found that the forfeiture of the right to appeal was a particularly severe penalty in light of the right of access to a court guaranteed by Article 6§1 of

the Convention. Furthermore, having regard to the presumption of innocence and the suspensive effect of an appeal on points of law, it appeared that the obligation of the defendant to surrender to custody was wrong. The court concluded that the applicant had suffered an excessive restriction of his right of access to a court and accordingly of his right to a fair trial.

Yet in another case, *Caillot v. France*, decided on 9 November 1999, the European Court found France in violation of Article 6 § 1 of the European Convention.

In the case of *Debboub alias Ali Husseini v. France*, on 9 November 1999, the European Court found France in violation of Article 5§3 on the right to personal liberty which limits provisional detention pending trial. Mr. Debboub, one of the defendants in the Chalabi Network Case in which 138 people accused of involvement with an Islamist terrorist network were tried for criminal conspiracy, complained that his rights had been violated as his pre-trial detention had been excessively lengthy. The court found that the reasons given to justify the provisional detention of the accused were no longer sufficient given the length of the provisional detention to which the accused was subjected. Further, the court found that the French judicial authorities had not acted swiftly enough in the case. Although Mr. Debboub was ultimately convicted and sentenced to six years in prison in January 1999, he was released in May 1999 after having spent more than four years in prison, most of it in pre-trial detention.

Universal Jurisdiction and the Case of the Mauritanian Captain

On 29 September 1999, the Montpellier Court of Appeal released Mauritanian army Captain Ely Ould Dah, while investigations in his case were continuing. The court required him to remain in the country. In what constituted a ground breaking step in the exercise of universal jurisdiction, the captain was arrested in July 1999, pursuant to a complaint filed by the International Federation of Human Rights and the French League of Human Rights under the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Captain Ould Dah was accused by two Mauritanian refugees living in France of being responsible for torture inflicted upon them.

Anti-Terrorist Legislation

Certain features of the anti-terrorist legislation and practices of the judicial authorities were the subject of heated debate during discussions

on the reform of the judicial system and the need to reform some institutions in particular, such as the investigating judge, and the need to reduce lengthy pre-trial detentions, so as to better ensure the rights of the defendant.

French anti-terrorist legislation dates back to 1986 when Law N° 1020 was enacted. The provisions of this law were later complemented by further provisions reforming the Penal Code and the Code of Criminal Procedure. Articles 706.17 to 706.22 of the latter establish a set of bodies with special procedural rules to deal with terrorist-related crimes at the investigation, indictment and trial levels.

All crimes related to terrorism are dealt with by the Attorney General, the investigating judge, the Criminal Tribunal or the Court of Assizes, all of which are based in Paris. The Attorney General can request that any such case occurring in any part of the country be transferred to Paris.

Exceptional legislation on terrorism formulates special procedural rules for the investigation and trial of people for terrorist-related crimes. The period allowed for administrative detention in these cases is doubled, from 48 to 96 hours. Furthermore, the suspect does not have the right to see his or her attorney during the first 72 hours of the detention. Article 698 of the Code of Criminal Procedure deals with the trial by the Court of Assizes of military matters in peacetime. The composition of this court is modified so as to reduce the number of lay members and consequently the risk for these to be threatened by terrorist bands. During the investigation the investigating judge (*juge d'instruction*) enjoys the power to order the detention of the suspect and his decision cannot be challenged. Finally, the judicial practice in the majority of terrorism-related cases is to allow prolonged pre-trial detention. This practice has been criticised for not being consistent with the presumption of innocence in favour of the accused.

The Judiciary

The 1958 Constitution of the Republic of France contains a chapter on the judicial authority (*"De l'Autorité Judiciaire", Title VIII*) which focuses on judges (*Magistrats du Siège*) and public prosecutors (*Magistrats du Parquet*).

Article 64 provides for the independence of the judiciary. According to the same provision, the President of the Republic is the guarantor of this independence and is assisted by the High Council of the Judiciary.

The year under review was marked by a debate on proposals to amend the Constitution and the enactment of additional legislative measures with the aim of strengthening the independence, effectiveness and accessibility

of the judiciary. However, the reform package failed to be approved in January 2000 (*see below*).

Structure

The judiciary is composed of a lower courts system, 35 regional Courts of Appeal and the Court of Cassation (*Cour de Cassation*) as the highest judicial body in the country. The French legal system makes a distinction between administrative courts and civil and criminal justice. The Council of State (*Conseil d'Etat*) is the highest body within the administrative court system and issues final judgements about the legality of administrative acts.

The judicial order is composed of three jurisdictions: the specialised jurisdictions (for children, labour and commercial matters), the civil jurisdiction and the criminal jurisdiction. The criminal justice system is organised into three levels: faults and contraventions are dealt with by Municipal Tribunals, crimes (*délits*) are tried by a Criminal Court (*Tribunal Correctionnel*) and the most serious crimes are tried by the Court of Assizes (*Cour d'Assise*), which is a tribunal composed of three professional judges sitting together with nine lay members as jurors. Rulings by the Court of Assizes are not subject to appeal except to the Court of Cassation and only on points of law.

The Court of Cassation reviews points of law in appeals made against decisions taken by the Courts of Appeal.

There is a Constitutional Council (*Conseil Constitutionnel*) composed of nine members which ensures that electoral processes are fair and transparent, and controls the constitutionality of organic laws and other laws submitted to its scrutiny.

The Minister of Justice (*Garde des Sceaux*) also plays an important role in the functioning of the French judiciary. He or she oversees the work of the Public Prosecution Service and issues instructions as to the implementation of national criminal policies.

Appointment and Security of Tenure

Judges are appointed by the President of the Republic with the consent of the High Council of the Judiciary (*Conseil Supérieur de la Magistrature* -CSM). However, the CSM has the power to propose names for justices of the Court of Cassation and the Presidents of the Courts of Appeal to the President. The President of the Republic should appoint one of the persons proposed by the CSM. The CSM is also the disciplinary authority within the judiciary for judges.

With regard to the appointment and discipline of public prosecutors, the CSM can only give its opinion, which is not binding, to the Minister of Justice (*Garde de Sceaux*) who holds power to appoint, transfer and apply disciplinary measures over public prosecutors.

The High Council of the Judiciary is established by Article 65 of the Constitution to assist the President of the Republic in the guardianship of the independence of the judiciary. It is composed of the President of the Republic himself and the Minister of Justice as *ex officio* members, and ten other members. It works in two sections, each one competent to deal with issues related to judges or public prosecutors respectively. The first section is composed of the President of the Republic and the Minister of Justice, plus five judges and one public prosecutor, one member of the Council of State and three other persons with a high moral reputation. The second section is composed of the President and the Minister of Justice, plus five pubhc prosecutors and one judge, one member of the Council of State and the three persons of high moral reputation mentioned above. Each of these sections exercises the powers of the CSM in regard to judges or prosecutors respectively.

Article 64 of the Constitution guarantees to judges security of tenure. A similar guarantee with regard to prosecutors does not exist.

The Proposals on Reform of the Justice System

A general package to reform the judicial system has been discussed since 1997 when a special commission, the Truché Commission, which was tasked with elaborating a diagnosis of the justice system and making recommendations, presented its report (*see Attacks on Justice 1998*). Immediately afterwards, the Minister of Justice, Ms. Elisabeth Guigou, addressed to the National Assembly a broad outline of the reforms as envisaged by the government.

The reform package includes a constitutional amendment on the composition and powers of the High Council of the Judiciary, and a number of other legislative measures aimed at making the judiciary more accessible, effective and trustworthy for the citizenry. However, due to the lack of political consensus between the government and the opposition parties in the legislature, the key measures needed to start the reform process failed to be approved during the parliamentary session of 24 January 2000. The discussion and approval of the measures has been postponed indefinitely.

The Constitutional Reform of the High Council of the Judiciary

The proposed amendment to Article 65 of the Constitution on the High Council of the Judiciary would increase the membership of the Council and grant this body broader powers with regard to the appointment and discipline of public prosecutors. This amendment is regarded as the pillar for the whole reform process.

If approved, the new Article 65 of the Constitution will make the CSM's opinion binding on the Minister of Justice when deciding on the appointment and discipline of public prosecutors. The reform intends, in this way, to provide the Prosecution Service with further guarantees of independence. The Minister of Justice will continue appointing and deciding on disciplinary matters but his or her discretion will have to conform with the CSM's opinion.

As to the reform of the composition of the CSM, the draft bill provides an enlarged CSM with twenty-one members, eleven of which will be from outside the judiciary (persons of high moral character). The CSM will no longer be divided into two sections, each one competent with regard to either judges or prosecutors, but there will be only one body with competence in regard to both judges and prosecutors.

The draft bill reforming the CSM was approved by the two chambers of parliament in June and November 1998. It needs to be approved by a three fifths majority of the two chambers sitting together in parliament as it requires a constitutional amendment. The failure to pass the draft by the parliament has been interpreted as a lack of political will to enhance the independence of the judiciary on the part of the political parties in the French parliament.

The Draft Bill on Public Action in Criminal Matters

This draft bill aims at clarifying the relations between the public prosecutors and the Minister of Justice and putting an end to the suspicions of political interference in the Public Prosecution's activities. To this end, the Minister of Justice would no longer have the power to issue instructions to the prosecutors in individual cases. However, the Minister of Justice would maintain his or her power to instigate investigations and proceedings when the public interest so requires, even if the Public Prosecution Service has decided not to take action on the matter. The Minister of Justice would also keep his or her power to elaborate and implement public policy on criminal matters which the Public Prosecution Service must follow.

This draft bill was approved on first reading by both chambers of parliament in June and October 1999 respectively. The second reading is scheduled for March 2000.

The Draft Bill on the Presumption of Innocence and the Rights of the Victims

The thrust of this bill is to implement an equality of arms within the criminal procedure by reinforcing the rights of the defendant from the beginning of the investigations. If passed, the bill will allow an arrested person under *garde à vue* to see his or her lawyer from the first hour of their detention and throughout the entire criminal procedure. Indicted individuals will have the right to request the judge to order the production of all evidence necessary for their defence.

Most importantly, the bill provides that the investigating judge will no longer be the sole judicial authority to decide on matters regarding the liberty of the suspect or accused. The investigating judge will have to request the detention from another impartial judge, the judge of detention (*juge de la détention provisoire*) who will take a decision on the matter.

The text of this bill was adopted on first reading by both chambers of parliament in March and September 1999 respectively. The second reading is scheduled for February 2000.

The Proposals on the Responsibility of the Magistrates

A draft of this law has never been formally introduced in parliament, but an informal draft was circulated by the Minister of Justice towards the end of the year 1999. According to the sponsors, this bill would reinforce the magistrates' responsibility in performing their duties and would prevent judicial abuses from occurring. The bill envisages the compulsory rotation of magistrates on a regular basis, the obligation to publish decisions on disciplinary matters involving magistrates and the establishment of a commission to receive complaints from citizens regarding the judiciary (*Commission Nationale d'Examen des Plaintes des Justiciables*). This commission could be petitioned by anyone who considered himself or herself to be a victim of the malfunctioning of the judicial system or the misbehaviour of a magistrate. The Commission would examine the complaints and forward to the Minister of Justice and the Presidents of the tribunals only those that are not frivolous.

The proposed bill on the responsibility of magistrates has been one of the most controversial points of the reform. Different magistrates' associations have voiced their opposition to the draft on the grounds that

disciplinary powers lie with the High Council of the Judiciary and that any other system will allow political interference in the judiciary.

The Dumas Case

On 23 March 1999, Mr. Roland Dumas, President of the Constitutional Council and former Minister of Foreign Affairs, announced his temporary stepping down to face investigations into his alleged involvement in a case of corruption. The judicial investigations, which started in April 1998, forced Mr. Dumas to resign a post he had been holding since 1995 due to pressure from several of his peers in the Constitutional Court. In February 2000, when the investigating judges dealing with the case decided to present the case before a criminal tribunal for the formal opening of proceedings, Mr. Dumas was forced to resign definitively.

Mr. Dumas was investigated for his alleged involvement in a case of undue influence over the French oil company Elf to hire his partner at the time, Mrs. Deviers-Joncour. He is also accused of having benefited from the almost 66 million French francs the oil company gave to Mrs. Deviers-Joncour to buy influence, and of accepting numerous presents from his partner although knowing their origin. In February 2000, the investigating judges officially presented charges for "conspiracy and harbouring stolen property" from the Elf company, and Mr. Dumas risks a five-year sentence in prison. With him, his former partner and five other officials of Elf are facing similar investigations.

This case has deeply damaged public confidence in the highest judicial authority on constitutional matters in France. Proceedings are due to start during the year 2000.

GUATEMALA

Frequent allegations of threats, intimidation and attacks on judges and prosecutors, as well as an ineffective or insufficient system of protection within the judiciary for those targeted by such threats, are the main obstacles for the independence of the judiciary in Guatemala. Although the justice system continued its process of reform with encouraging signals, insufficient funding, poor legal training, political unwillingness and the failure to address some collateral factors, such as legal education in the country, were pointed out by the Special Rapporteur on the Independence of Judges and Lawyers, who visited the country between 16 and 26 of August, as factors that hamper further progress on the matter.

General elections were held on 7 November to elect the new President, Vice-President, parliament and the mayors of 330 municipalities. The electoral contest, the first since the end of the civil war in 1996, was won by the conservative Guatemalan Republican Front (FRG, founded by the former military ruler General Efrain Rios Montt) whose candidate for the Presidency, Mr. Alfonso Portillo, obtained 47.8 % - just below the threshold that would have given him a sweeping victory in the first round. In the run-off election scheduled for 26 December, Mr. Portillo won by 68 % against 32 % for his opponent, Mr. Oscar Berger, from the ruling centre-right National Advancement Party (PAN). In the November general elections the FRG obtained 63 of the 113 seats in parliament whereas the PAN obtained only 37 seats. These results give the new government, due to take office in January 2000, ample majority in parliament. The elections were characterised by one of the highest levels of participation in Guatemala's history: 53.5 % of voters.

In May an important package of measures amending the Constitution were put to referendum and rejected by a majority of voters. A low level of participation (18 %) characterised the event and revealed important shortcomings in the carrying out of the process (*see below*). The constitutional amendments submitted to referendum included some that would have reformed the powers and structure of the Supreme Court, and would have had a positive impact on the judiciary as a whole (*see Attacks on Justice 1998*).

HUMAN RIGHTS BACKGROUND

The UN Special Rapporteur on the Independence of Judges and Lawyers, Dato' Param Cumaraswamy (hereinafter "the Special Rapporteur"), visited the country between 16 and 26 of August by invitation of the government. He presented his report to the 56th annual session of the UN Commission on Human Rights, in April 2000 (*see below*). In his report he expressed particular concern at the pervasive practice of impunity in the country as well as on the frequent threats and intimidation against judges and prosecutors.

Impunity for those responsible for human rights violations is at least partly the result of the judiciary's failure to conduct speedy criminal proceedings. Trials are characterised by their slowness and irregularities. Many times the irregularities originate in the investigation stage which affects the whole procedure, and often trials and investigations need to be carried out a second time. Venal judges and prosecutors, as well as the defendants, show an unwillingness to push forward the proceedings or use dilatory tactics. The exceptional length of proceedings ensures impunity for those allegedly responsible. During the year outstanding criminal cases under investigation, or in the trial stage produced disappointing results. In relation to the 1990 murder of anthropologist Myrna Mack, the order issued early in the year by a judge to proceed to the trial stage in the case was blocked by a series of dilatory manoeuvres by the defendants, three officers of the former Presidential Guard allegedly responsible for the murder. After more than nine years, the Guatemalan justice system has been not only unable to proceed in this case but has also granted impunity to the perpetrators by allowing the defendants' endless delaying tactics to prosper. In another illustrative case in April 1999, a former military commander, Cándido Noriega, was acquitted for a second time of charges of murder, rape, abduction, robbery and arson committed against the villagers of Tuluché in 1982. The ruling was reversed in July by the Appeals Court in Antigua which ordered the third retrial of the case.

On 25 February 1999, the Historical Clarification Commission issued its report on the abuses committed during the civil war that raged between the military and leftist guerrilla movements for more than three decades. The report found that 90 % of the abuses, many of them crimes against humanity, genocide and violations of the laws of war in time of internal armed conflict, were attributable to the security forces, while the guerrillas were responsible for 3 %. The President of the Republic, who had already expressed regret on the part of the government, decided nevertheless, in March 1999, not to set up an investigating commission into the reported abuses as recommended by the Historical Clarification Commission.

On 13 August 1999, a court imposed only a five year prison sentence on a second lieutenant and ten soldiers who were found guilty of manslaughter during the 1995 massacre of the Xaman ranch. The same court found another fourteen soldiers guilty of "complicity" in manslaughter and sentenced them to four years in prison. However, the sentence may be commuted with the payment of the small amount of 2,000 US dollars for all of them.

In October 1999, Mr. **Celvin Galindo**, the prosecutor in the case of the murder of Bishop Gerardi resigned and fled the country, as did his predecessor and a judge who had been dealing with the case earlier in the year (*see cases below*). It was reported that investigations into this murder have hardly made any progress as judicial and police authorities have consistently refused to investigate the military involvement in the case. In the same month a court sentenced to death three former members of the civilian defence patrols, organised and backed by the army to combat the guerrillas during the civil war, for their participation in two massacres.

The widely perceived impunity and the ineffectiveness of the judiciary in bringing justice to the victims of common crimes is the most important cause, according to the Special Rapporteur on the Independence of Judges and Lawyers, for the frequent practice of lynching in the countryside.

In what constitutes the first case regarding the failure to investigate serious violations of children's rights ever dealt with by the Inter-American Court of Human Rights, this court ruled on 3 December 1999 that sufficient evidence existed of the involvement of Guatemalan police officers in the 1990 torture and murder of three youths and two adults, and that Guatemala has failed to protect the rights of the victims. Guatemala was required to investigate the case, prosecute and punish those responsible for the crime and for the miscarriage of justice. At the highest level within Guatemalan domestic jurisdiction, the Supreme Court had acquitted the officers, but the case was taken to the Inter-American Court on account of violations of the American Convention on Human Rights.

Also in December 1999, Nobel Peace laureate, Rigoberta Menchú, filed a suit in the Spanish National High Court against a number of members of the Guatemalan army for crimes of genocide, terrorism and torture. Among the high-ranking officers named are the former Ruler General, Rios Montt, now Secretary-General of the Republican Front Party (FRG) that has just won the general elections.

THE JUDICIARY

The Guatemalan Constitution provides for the independence of the judiciary (Article 203 and 205).

STRUCTURE

The judicial organ (*organismo judicial*) is composed of the Supreme Court, Appellate Courts, lower courts and a Constitutional Court. There also exist specialised courts for labour, juvenile and military matters. The Public Prosecutor's office (*Ministerio Publico*) is an auxiliary body with autonomous functions (Article 251).

The Supreme Court, composed of 13 justices, has administrative and judicial powers. Its administrative powers, which used to encompass the management of resources, appointment, discipline and the sanctioning of judges of lower levels, have been curtailed by a new Law on the Judicial Career in an effort to improve the quality of the Supreme Court's work by focusing it primarily on juridical matters.

The Constitutional Court is the guardian of the Constitution. It is composed of five members with five alternates who serve a term of five years and are elected one each by the Supreme Court, parliament, the President of the Republic with the advice of the Council of Ministers, the University of San Carlos and the Bar Association.

The Special Rapporteur reported a total of 574 judges in the Guatemalan judiciary: 13 Supreme Court justices, 64 magistrates of Appellate Courts, 213 first instance judges and 284 Justices of the Peace. Of these, 157 are women (paragraph 20).

The organisation and functioning of the judiciary is governed by the Constitution, the Law of the Judicial Organ (*Ley del Organismo Judicial*) and the newly adopted 1999 Law of the Judicial Career.

APPOINTMENT AND SECURITY OF TENURE

The method of appointment of judges and magistrates is established in the Constitution, the Law of the Judicial Organ and the new 1999 Law of the Judicial Career. Article 215 of the Constitution provides for the election of the justices of the Supreme Court by parliament, for a period of five years. Parliament selects the appointees from a list of twenty-six candidates forwarded by a nomination commission which has a wide composition. The same method is applied in the case of the magistrates of the Appeals Courts and other similar tribunals (Article 217). They are elected by parliament from a list submitted by a nominations commission which has a similar composition as in the first case.

With regard to first instance judges and Justices of the Peace, all appointments are made by the Supreme Court after the completion of a training course in the Unit of Judicial Training (*Unidad de Capacitación Institutional del Organismo Judicial*) (Article 18 - Law of the Judicial Career - LCJ).

Security of tenure for judges, while in their post and for established terms, is provided for by Article 208. This article provides that magistrates and first instance judges shall serve for a five-year period. The former can be re-elected and the latter re-appointed. "During that term they cannot be removed or suspended, except in the cases and with the formalities set forth in the law". In his report, the Special Rapporteur on the Independence of Judges and Lawyers took the view that:

> the fixed term of five years with an option for re-election provided under Article 208 and 215 of the Constitution, does not provide the requisite security of tenure and may be inconsistent with the principles of judicial independence as provided in Article 203 of the same Constitution and Principle 12 of the UN Basic Principles on the Independence of the Judiciary (paragraph 138).

The Special Rapporteur also received allegations regarding the lack of transparency in the elections of magistrates and judges in which no objective criterion were reportedly followed.

By decision of the Supreme Court in 1998, a School of Judicial Training was set up. This school is in charge of selecting and training candidates for judges and Justices of the Peace, but does not provide continuing education for acting judges and court officials.

In October 1999, parliament elected the new Supreme Court justices and the magistrates of the Appellate Courts. The Special Rapporteur praised the timely appointment by parliament, as well as the efforts of the nomination commission to use objective criteria this time. He also reported the general approval of the decision by parliament among the different groups consulted (paragraphs 61 and 62).

In November 1999, the new Supreme Court appointed 52 new first instance judges. The move was widely criticised because it did not respect the founding agreement of the School of Judicial Training. The new appointees have not been trained and selected in the school and some fears were raised as to their independence and impartiality.

Judicial Career, Discipline and Removal

The new Law of the Judicial Career, approved by parliament at the end of 1999, establishes the organs that will be in charge of the judicial

career: the Council of the Judicial Career, the Council on Judicial Discipline, the Nomination Commissions and the Unit of Training (Article 4).

Among the powers of the Council of the Judicial Career are the following: to call for and conduct the public merit-based contests for the posts of judges or magistrates, and to evaluate their work.

In addition to establishing a Council on Judicial Discipline the law also establishes a disciplinary regime. Part of the responsibility for discipline within the judiciary, until now exclusively monopolised by the Supreme Court, is shifted to the Council on Judicial Discipline. The powers the Supreme Court enjoyed on the matter used to be very broad - ranging from the appointment of judges to their transfer and promotion, the granting of leave and issuing sanctions, including dismissal - and their actual exercise was often criticised, with allegations of arbitrariness. The Special Rapporteur reported that during his visit to Guatemala he received complaints from several judges that the Supreme Court exercised its functions in relation to judicial discipline in an arbitrary manner and that the General Supervision of Tribunals - the investigative body attached to the Presidency of the Supreme Court - acted irregularly and without a legal basis when conducting investigations of complaints filed against judges. Furthermore, the Special Rapporteur received allegations that judges were investigated on the basis of anonymous complaints and that the Supreme Court had removed judges, following reports of the General Supervision of Tribunals, using a process in which guarantees of due process, such as the right to a hearing, were not respected (paragraphs 64 and 94).

Under the new disciplinary regime, powers with respect to discipline within the judiciary, including the imposition of sanctions other than dismissal, are granted to the Council on Judicial Discipline (Article 8). The sanctions that can be imposed for disciplinary faults, which are defined as light, serious and very serious, range from oral reprimands to suspension in the post (Article 41). The Supreme Court and parliament retain their power to dismiss the judges they have appointed.

Sanctions against judges can only be imposed after a disciplinary procedure has been followed. The law establishes certain guarantees to be observed in the disciplinary proceedings against judges and magistrates, such as the right to a hearing and the right to conduct their defence personally or with the help of legal counsel. When the applicable sanction is dismissal, the Council will adopt a recommendation to the Supreme Court or parliament, as appropriate, to take the corresponding decision (Article 49). The law also envisages the possibility of investigations being carried out by the General Supervision of Tribunals under order of the Council on Judicial Discipline.

Resources

The Supreme Court is the organ that administers the judicial resources. It elaborates the annual budget and oversees its execution. Towards the end of the year a law on the Judicial Civil Service was also approved regulating labour relations between the judiciary and its workers and functionaries.

As to salaries, the report of the Special Rapporteur observes that he did not receive any serious complaint on the matter. However, he also underlines that different institutions or sections are under-funded (paragraph 148-149). For instance, it was alleged that the decree providing for protection of victims, witnesses and other persons related to the administration of penal justice could not be implemented for lack of resources. However, though the Constitution provides for a minimum of 2 % of the national budget for the judiciary, it has been reported that it is actually being provided with 4 %.

Threats and Intimidation of Judges and Prosecutors

Threats, intimidation and attacks on judges and prosecutors are common practise in Guatemala. During 1999, a considerable number of judges, prosecutors and even defence lawyers reported having received threats and intimidation from members of the military or former paramilitary groups. Most of these acts occur when sensitive human rights cases, involving members of the military or paramilitary groups, are investigated or tried before the courts. As a result of these threats and the inability of the government and the judiciary to provide the victims with adequate protection, they resigned and/or fled the country.

The government and the judiciary have so far been unable to provide adequate protection for judges and prosecutors. For instance, Decree 70 of 1996 which provides for a scheme of protection for persons related to the administration of justice has not been fully implemented, allegedly due to a lack of funds. It has also been reported that the Supreme Court normally deals with cases of threats and intimidation by transferring the targeted judge or prosecutor to another court or tribunal where, as the practice is common in the whole country, it is likely they will be the target of further harassment.

As part of his conclusions on his visit to Guatemala, the Special Rapporteur found that the concern over allegations of threats, harassment and intimidation are real, and that "the government failed to provide the requisite protection or assistance to those who complained". The Supreme Court, which is entrusted with dealing with these complaints by processing

them and recommending protection, failed in its duty to these judges according to the Special Rapporteur. "The widespread complaints threatened and undermined the very core of the independence of the judiciary" he concluded (paragraph 141).

The Reform of the Judiciary

The Commission on the Strengthening of the Justice System, appointed in 1997 in accordance with the provisions of the 1996 Agreement on the Strengthening of Civilian Power, issued its final report in August 1998. The report entitled "A new Justice for Peace" (*Una Nueva Justicia para la Paz*) analysed the most acute problems affecting the judiciary and recommended a series of constitutional and legal reforms to modernise the judiciary, ensuring access to justice for the population and providing safeguards for the independence of judges, among others. However, these recommendations were not taken up as a whole by the multi-party parliamentary commission set up to prepare the draft bill on constitutional reforms, though the most important ones were accepted. In October 1998 parliament approved a bill of constitutional reforms but, according to Guatemala's Constitution, the reforms need to be submitted to a referendum to obtain the people's approval before entering into force (Article 173 of the Constitution). The referendum was held on 16 May 1999 and a clear majority rejected the proposed amendments that included, *inter alia*, the recognition of the indigenous customary law, the reform and simplification of proceedings, the constitutionalisation of new institutions related to the judicial career such as the Council of the Judicial Career and Discipline and other key provisions related to that matter. There was also an amendment concerning the serving term of the justices of the Supreme Court that extended it from 5 to 7 years.

Some of the provisions that were submitted to the referendum and rejected were later developed in the Law of the Judicial Career enacted at the end of the year. Taking into account that there is nothing in this law that may be interpreted as inconsistent with the Constitution it is difficult to understand why a constitutional amendment was necessary at all. The preparation of the referendum was poorly carried out, the people were badly informed of the content and implications of the reforms and in the very few cases where information was given, it was confusing and incomplete. The result was that less than 20% of the official electorate turned out to the polls, allowing one to conclude that little more than 10% of the Guatemalan population actually rejected the constitutional amendments.

In parallel, the judiciary continued a process of internal and administrative modernisation, with the support of the international community. An

internal Commission for the Modernisation of the Judiciary prepared a plan for the period 1997-2000 that addresses several areas: improvement of the quality of the work of the courts, access to the courts by the citizenry and methods to combat corruption and the management of courts. The local office of the United Nations Development Programme has prepared a re-engineering programme that has obtained support from the Supreme Court. Foreign governments and agencies - among them the World Bank, USAID and the Inter-American Development Bank - are providing important funding for the implementation of the plans.

Other Concerns of the Special Rapporteur on Independence of Judges and Lawyers

The Special Rapporteur devoted special attention to the issue of the legal education system in the country. He observed that the reform of the judiciary per se may be inadequate for the long term well-being of an independent judiciary, and that reform of legal education in the universities and the training of lawyers for the legal profession should be looked at too. The disparity in the quality and calibre of lawyers could seriously undermine the quality of the legal services for the public and the quality of the judges who are selected from among the legal profession (paragraph 152). The Special Rapporteur also found that "there was not an organised system of continued legal education for judges, prosecutors and lawyers. This was a further contributing factor for the incompetence in the system" (paragraph 154).

The Special Rapporteur also paid close attention to the access to justice provided to certain segments of the populations such as indigenous groups, women and youth, as well as to their treatment by the legal system. In that regard he concluded that the indigenous Mayan community appears to be severely affected by the present state of the main stream justice system and that their claims for the recognition of their customs and practices are understandable.

Among the recommendations he made are the following:

- The Supreme Court should set up a committee in co-operation with the Attorney General to address the problem of threats, harassment and intimidation of judges. This committee should follow fair procedures in effectively investigating the complaints and the protection given should not be limited to the transfer of the judge;
- Articles 208 and 215 of the Constitution should be amended. "While fixed term contracts may not be objectionable and not inconsistent with

the principle of judicial independence yet a term of 5 years is too short for such security of tenure";

- The implementation of the legislation on the judicial career and judicial civil service and the speeding up of reforms to other laws;
- A comprehensive inquiry into legal education and into the structure and organisation of the legal profession to standardise and upgrade the teaching of law and the quality of the legal profession. Continued legal education for judges, lawyers and prosecutors should be made compulsory;
- With regard to discipline and removal of judges it was recommended that, if legally possible, the Supreme Court ought to review some of its past decisions to remove judges as there appears to be a failure of justice for those judges;
- An independent enforcement agency with powers to investigate complaints of corruption in the judiciary and the Public Prosecutor's office should be set up.

CASES:

Julio Arango Escobar {prosecutor}: Mr. Arango received at least 40 phone calls with death threats on 11 April. The threats are allegedly a retaliation for his work as procurator and the publication of several reports by him which are critical of the government. It was reported that Mr. Arango had been receiving threats periodically and for a long time but around April 1999 the threats intensified. Some members of his family were reportedly told orally that Mr. Arango would be killed.

Carlos Coronado {prosecutor}: Mr. Coronado is the prosecutor in charge of the Mirna Mack case and as such he is investigating the spying on people and organisations by the Secretariat of Strategic Analysis during the past government. Towards the end of 1999, while he was carrying out some investigations, he was informed that he himself was the subject of investigation and that a dossier on his activities existed in the Secretariat of Strategic Analysis. This troubling information was interpreted as a disguised threat against Mr. Coronado who initiated investigations into it.

Celvin Galindo {prosecutor}: Mr Galindo resigned his post on 7 October 1999 and fled the country as he allegedly was the target of telephone surveillance, persecution, threats and intimidation. He was the prosecutor investigating the 1998 murder of Bishop Gerardi and was following the hypothesis of political motivations behind it. The Inter-American Commission on Human Rights intervened in the case and it was also

reported by the Special Rapporteur on the Independence of Judges and Lawyers. From his exile in Switzerland, Mr. Galindo questioned the ability and willingness of the government to solve Gerardi's murder.

Mario A. Menchú, Carlos Palencia Salazar, Arturo Recinos, Luis R. Romero and Luis Vazquez Menendez (lawyers): On 31 January 2000 the International Bar Association intervened in the case of these five defence lawyers who had been receiving death threats during the previous weeks. The reasons for the threats are stated as being retaliation against the lawyers for defending some members of a kidnapping gang who were sentenced to death. The threats come, reportedly, from death penalty advocates who see the lawyers as protecting people who deserve to die. The threats led to the lawyers' resignation from handling the cases. Although the lawyers reported the issue to the authorities, no action was taken by them. This situation illustrates the frequency of threats and intimidation against jurists in Guatemala.

Henry Monroy (judge): In March 1998 Mr. Monroy resigned his post as judge after having received death threats for his role in the case of the anthropologist, Mirna Mack, murdered in 1990, as well as that of the murder of Bishop Gerardi. Some time after his resignation he fled the country to exile in Canada. During 1999 he continued living in exile as he fears for his life if he returns to Guatemala.

Marta Leticia Polanco de Garcia (judge): Ms. Polanco reported to have received death threats in January 2000 and also before this date. The Supreme Court has reportedly not adopted any steps regarding Ms. Polanco's reports, despite the fact that she was also kidnapped by some peasants of Cubulco and Rabinal on 22 September 1999. She was temporarily transferred to another court in the highlands but she had to go back to her original court as the Supreme Court refused her re-assignment to a different jurisdiction.

Jose Edwin Recinos Diaz (prosecutor): Mr. Recinos works as a prosecutor in Suchitepéquez. He has been receiving death threats by phone, presumed to be from a gang of common criminals and their accomplices. Mr. Recinos reported the threats in January 2000.

INDIA

The judicial system in India remained overburdened but able to function independently. There was some controversy during the year regarding the lack of members of lower castes and indigenous populations in higher judicial office. Also, the end of the year was marked by large demonstrations by lawyers, which turned violent, over proposed changes to the rules regarding the legal profession. Generally, human rights violations continued to be a problem in India, particularly resulting from the Kargil conflict in Jammu and Kashmir in May.

India became independent from British rule in 1947 and its Constitution came into force in January 1950. The Constitution of India embodies the separation of powers and establishes India as a "Sovereign Socialist Secular Democratic Republic". The Constitution creates a federal union of 25 states and seven union territories.

The executive power of the Union is vested in the President, aided by a Council of Ministers headed by the Prime Minister, whose advice the President is obliged to follow. Although largely a ceremonial position, the President can exercise influence over the selection of the appropriate candidate for Prime Minister and in requiring the government to submit to confidence motions.

The President is elected for five year terms by the elected members of both houses of parliament and the legislative assemblies of the states, and is eligible for re-election. The current President is K. R. Narayanan. Members of the Council of Ministers are appointed by the President on the advice of the Prime Minister and hold office during the pleasure of the President. The Council of Ministers consists of members of either house of parliament and is collectively responsible to the House of the People.

Parliament consists of the President and two separate houses, the Council of States *(Rajya Sabha)* and the House of the People *(Lok Sabha)*. The Council of States is composed of 12 members appointed by the President and 233 representatives elected by the legislative assemblies of the states and union territories. The House of the People consists of 543 members directly chosen by proportional representation in elections in the states and union territories. The President can also appoint two members to represent the Anglo-Indian community if he believes they are under represented. The Council of States cannot be dissolved and its

members are elected at staggered biennial elections, whilst members of the House of the People serve 5 year terms, unless dissolved sooner.

Each state has its own parliament and executive. Article 356 of the Constitution allows the President to assume any of the functions of the government of the state, and declare that the powers of the legislature of a state be exercised by the Union parliament. The President can invoke "President's rule" upon receipt of a report from the governor, or if otherwise satisfied, that the government of a state cannot be carried out in accordance with the Constitution.

The BJP led coalition government of Prime Minister Shri Atal Bihari Vajpayee lost a confidence vote in the House of the People by one vote in April 1999. After elections held in September-October, the BJP and its National Democratic Alliance of 14 parties formed a government. Shri Atal Bihari Vajpayee was sworn in as Prime Minister on October 13 1999.

In May and June 1999 armed conflict occurred in the disputed region of Jammu and Kashmir. Islamic militants, allegedly backed by Pakistani forces, crossed the line of control near the town of Kargil in late May, resulting in heavy fighting. The fighting continued until an agreement was signed by both sides to withdraw on July 18 1999.

Human Rights Background

The Constitution of India contains certain fundamental rights that must be respected by the state. Part III also guarantees the right to petition the Supreme Court for the enforcement of the fundamental rights contained in the Constitution. The Supreme Court has also developed the notion of Public Interest Litigation. This allows a publicly spirited individual or social action group to petition the court on behalf of a socially and economically disadvantaged group who have suffered a legal wrong.

India is also a party to the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. India has signed, but not ratified, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requiring it to not act in a manner that would defeat the object and purpose of the treaty before its entry into force.

Human Rights Violations

Violations of fundamental human rights in India continue to be serious. Violations by the armed forces sometimes go undetected, are tried in military courts by a secretive court martial procedure or are subject to a weak supervisory mechanism by the National Human Rights Commission. Violations of human rights are of particular concern in the areas of Jammu and Kashmir, Punjab, and the North Eastern states.

Most human rights violations occur in areas of internal armed conflict or result from religious and racial discrimination and violence. Torture, extra judicial killings, rape and disappearances are frequently perpetrated by armed and security forces, and by militant forces supported by the government. Armed opposition groups also commit serious abuses. In the Kargil conflict in May many civilians were killed in the military action and from an increase of revenge violence by militant forces.

Discrimination based on caste *(dalits)* or against members of the indigenous population continues to be pervasive. Dalits are considered to be unclean and outside the caste system and, as a result face violence, discrimination in labour, education and land ownership. Violence between castes also continues to be a serious problem, with an escalating cycle of attacks and reprisal attacks by members of different castes. These problems are particularly of concern in the state of Bihar, Tamil Nadu and Uttar Pradesh. In February 1999, caste violence in Bihar resulted in the suspension of the state government and the imposition of direct rule by the President.

In the north eastern states of Arunachal Pradesh, Nagaland and Manipur members of the security forces commit extra-judicial killings and make use of torture and illegal detention to suppress political, and often violent, dissent by members of independence organisations. Civilians are often caught in the crossfire and other human rights defenders are subjected to violence and threats due to their perceived political activities.

Religious violence increased this year, particularly against Christians. Christian churches and schools were destroyed, and people accused of converting others to Christianity were subjected to physical violence. In Orissa in January 1999, an Australian missionary and his two sons were murdered, and in August a Muslim man was killed and set on fire in front of 400 witnesses. Members of leading political parties such as the BJP and Shiv Sena, a Hindu party, often support this violence.

Human Rights Commissions

A National Human Rights Commission (NHRC) was established under the Protection of Human Rights Act 1993 (PHRA). The NHRC is

empowered to inquire into alleged violations of, and intervene in legal proceedings involving, human rights, however its powers are recommendatory only. It can utilise the services of government investigation agencies with the consent of the government for the purposes of conducting an investigation. The Commission has limited powers to summon witnesses and require the production of public documents. The act authorises the creation of State Human Rights Commissions with similar functions and powers.

Alleged human rights violations by the members of any of the federal armed forces cannot be inquired into by the NHRC. In this area it is limited to requesting a report from the government and the making of recommendations based upon that report. The Commission's inquiry powers are also restricted in relation to Jammu and Kashmir. The NHRC can only inquire into matters relating to entries in List I and List III of the Seventh Schedule of the Constitution, thereby excluding violations, *inter alia*, related to the police, prisons and public order of a state. Article 36(2) of the act limits the NHRC to inquire into matters occurring within one year of the alleged violation. These limitations were criticised by the Human Rights Committee in 1997 (*see Attacks on Justice 1998*).

A review of the PHRA was undertaken by an advisory committee established by the NHRC in June 1998, and it delivered its report in October 1999. The Advisory Committee recommended, *inter alia*, that financial autonomy be secured; the definition of armed forces be changed so that the NHRC can inquire into human rights violations by paramilitary forces; and that the national and state human rights commissions be allowed to investigate violations after a year has expired if there is sufficient reason for not filing a complaint within the required period.

The PHRA also authorises the creation of Human Rights Courts, which have been established in Tamil Nadu, Uttar Pradesh and Andhra Pradesh. These courts have not been established as separate courts, but hear cases in special hearings of Sessions Courts.

Restrictive Legislation

Several pieces of legislation contribute to impunity in India. The Armed Forces (Special Powers) Act (AFSPA) and the Disturbed Areas Act continue to be in effect in several states. This AFSPA allows officers to use lethal force in response to a suspicion of, or the commission of, an offence against a law prohibiting the freedom of assembly or the carrying of weapons, or things capable of being used as weapons. This force can be used after the giving of such prior warning that the officer considers necessary, and the officer must be of the opinion that it was necessary to do so to maintain public order. The AFSPA also allows the army to arrest without a

warrant, using such force as is necessary, anyone who is suspected of, has committed, or is about to commit any offence.

Section 197 of the Criminal Procedure Code (CPC) prohibits the commencement of legal proceedings against members of the armed forces and public servants acting in their official capacity without the prior consent of the relevant government. Section 6 of the AFSPA similarly restricts the commencement of proceedings without prior consent against members of the armed forces acting under the act.

The National Security Act and the Jammu and Kashmir Public Safety Act permit the detention of people considered to be a security risk. Detention periods can be for up to a year, subject to approval by three High Court judges after seven weeks of detention. Under the Terrorism and Disruptive Practices (Prevention) Act, which lapsed in 1995, many violations of human rights occurred. People continue to be detained under this act due to delays in being brought to trial in special courts. The Law Commission of India has advocated the revival of this act.

Threats to NGOs

In September 1999, the government threatened strong use of the Foreign Contribution (Regulation) Act 1976 to limit contributions to NGOs which it perceived to be acting politically. This act provides that organisations of a political nature must receive prior approval by the government before they can receive foreign funding. The government sent certain NGOs a presumptive notice classifying them as a political organisation which they were required to refute. The NGOs targeted by the government's action had sponsored an advertisement promoting a peoples' agenda on secularism, social justice and gender issues. These threats clearly constitute an attempt to intimidate these organisations and interfere with the important role they play in defending human rights.

The Judiciary

India operated under British rule until 1947 and its legal system has largely been shaped by the common law tradition. The Indian judiciary plays a central role within the Indian constitutional structure, with the right to apply to the Supreme Court for the enforcement of the fundamental rights contained in the Constitution in Article 32, itself a fundamental right. The Constitution is the fundamental law of the land and actions of state organs are subject to judicial review.

Under the terms of List III, Schedule 7 of the Constitution of India, the central and state governments have concurrent responsibility for the administration of justice, criminal law and procedure, and civil procedure. Matters involving the development or use of any armed forces of the Union, or use of the civil power, remain within the competence of the central government. States have exclusive competence with respect to police and public order. The Attorney General is responsible for providing advice to the government on all legal matters and for the performance of all duties of a legal character that may be assigned by the President.

Schedule 7 of the Constitution also provides that the central government has exclusive authority to determine the constitution, organisation and the people entitled to practice before the Supreme Court and the High Courts, and the jurisdiction and powers of the Supreme Court. Jurisdiction can be conferred on other courts by the central and state governments in accordance with their legislative competencies. Provisions regarding officers and servants of the High Courts come within state power.

Court Structure

The Supreme Court sits at the apex of the court structure and its decisions are binding on all lower courts. Section 131 of the Constitution gives it original jurisdiction to hear any dispute between the government and the states, or between states if and in so far as the dispute involves any question, whether of law or fact, on which the existence of a legal right depends. The Supreme Court has appellate jurisdiction from any judgement, decree or final order of a High Court, if the High Court certifies that a party can appeal under Article 134A, in:

- civil, criminal or other proceedings, if the case involves a substantial question of law as to the interpretation of the Constitution: Article 132;
- civil proceedings that involve a substantial question of law of general importance: Article 133;
- criminal proceedings where the High Court has, on appeal, reversed an order of acquittal, or withdrawn a case from a subordinate court for trial before itself and subsequently convicted the person, and then sentenced the person to death, or if the High Court believes the case to be fit for appeal to the Supreme Court: Article 134.

Article 136 grants the Supreme Court a discretionary power to grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed by or made by any court or tribunal in the territory of India. The President can also request an advisory opinion from the Supreme Court, under Article 143, on a question of law

or fact that has arisen or is likely to arise. Cases involving the determination of a substantial question of law as to the interpretation of the Constitution, and requests for an opinion under Article 143 must be heard by a panel of at least five judges. The seat of the court is in Delhi.

Chapter V, Part IV of the Constitution creates a High Court of Record for each state, and Article 241 extends the provisions of that chapter to any High Courts created for union territories. Each existing High Court, subject to the Constitution, has the same jurisdiction as it had before the commencement of the Constitution. All High Courts have such jurisdiction as may be conferred on them by the central or state governments on subject matters within their legislative competencies. High Courts also have original jurisdiction to issue writs and orders for the enforcement of the fundamental rights contained in Part III of the Constitution. State High Courts have a supervisory power over all subordinate courts and tribunals in areas where they exercise jurisdiction. There are currently 18 High Courts.

The Constitution places the power to establish subordinate courts within the competence of both the central and state governments. Article 235 places the administrative control of all district and other subordinate courts in the High Court of that state. Special tribunals and courts are under the judicial control of the High Courts and the Supreme Court. Section 6 of the Criminal Procedure Code 1973 requires that the following criminal courts, in descending order of superiority, be created in each state: Courts of Sessions, Judicial Magistrates of the First Class, Judicial Magistrates of the Second Class and Executive Magistrates. Similarly, the Civil Procedure Code 1908 requires the establishment of a District Court. The Sessions and District Courts are the principal courts of original jurisdiction in civil and criminal matters subordinate to the High Court. The precise jurisdiction of these courts and their names vary from state to state.

Judges

The independence of judges is safeguarded by extensive constitutional provisions regarding their selection, conditions of tenure and removal. The main threats to judicial independence in India derive from an overburdened court system and from the lack of enforcement of their decisions in areas of armed conflict, such as in Jammu and Kashmir.

Selection

Article 124 of the Constitution of India states that every judge of the Supreme Court shall be appointed by the President after consultation with

such judges of the Supreme and High Courts as the President may deem necessary. In the case of appointments other than the Chief Justice, the Chief Justice shall always be consulted. Article 217 provides that every judge of a High Court shall be appointed by the President after consultation with the Chief Justice of India and the Governor of the state, and in the case of appointments other than the Chief Justice of a High Court, the Chief Justice.

The Supreme Court of India, in *Supreme Court Advocates-on-Record Association v Union of India 1993(4) SC 441* (the Second Judges Case), ruled on the selection process for judges. The court ruled that the Chief Justice has a pre-eminent position in the appointment process. The Chief Justice is responsible for the initiation of the process, and no appointment can be made without the consent of the Chief Justice.

In *Special Reference No. 1 of 1998 (JT 1998(5))* the court further stated that consultation with the Chief Justice required consultation by the Chief Justice with the four most senior judges of the Supreme Court in the formation of the opinion of the Chief Justice. The individual opinion of the Chief Justice was not sufficient to be considered a consultation.

The practical effect of the 1998 decision resulted in some controversy. The decision laid out in detail the procedure for appointments and transfers of judges, with the final authority lying with the judiciary. After the decision the President took an active role in ensuring that all the procedural requirements set down in the decision were followed. A difference of opinion between the President and the Chief Justice as to whether appointments of High Court judges as Chief Justices of other High Courts should be considered appointments or transfers, resulted in delays in the filling of vacancies. Appointments and transfers entailed different procedural requirements. The responsibility for the selection and transferral of judges lies exclusively with the judiciary, with the President unable to approve such an action without the consent of the Chief Justice of the Supreme Court.

The President, in considering the appointment of four Supreme Court judges, also suggested that "it would be consonant with constitutional principles and the nation's social objectives if persons belonging to weaker sections of society like scheduled castes and scheduled tribes, who compromise 25% of the population, and women are given due consideration." The President further suggested that such candidates are available and their under-representation is not justifiable.

Part VI, Chapter VI governs the appointment of judges to subordinate courts. Article 233 provides that the appointment of district judges shall be made by the Governor of the state in consultation with the High Court of the state. Appointments of persons other than district judges to the judicial

service of a state shall be made by the Governor in accordance with rules made by him after consultation with the State Public Service Commission and the High Court of that state. The provisions of this chapter can be extended to any class of magistrate upon public notification by the Governor.

Conditions of Tenure

Articles 124 and 217 provide that Supreme Court and High Court judges shall hold office until attaining the age of 65 and 62 years respectively. Articles 125 and 218, in conjunction with Part D of the Second Schedule, provide that judges of the Supreme and High Courts shall be paid a salary and entitled to such privileges, allowances and rights as may be determined by law. The latter benefits may not be altered to their disadvantage after their appointment to office. These salaries and benefits were increased by the legislature in 1998.

Removal

The Constitution provides that Supreme and High Court judges cannot be removed from office except by an order of the President passed in the same session after an address by each house of parliament, supported by a majority of the total membership of that house, and by a majority of not less than two thirds of those voting and present. Removal can only be on the grounds of proved misbehaviour or incapacity.

Under the Judges (Inquiry) Act 1968, 100 members of the House of the People *(Lok Sabha)* or 50 members of the Council of States *(Rajya Sabha)* can request their respective Speaker or Chairman of the House to consider material relating to accusations of misbehaviour or incapacity. A committee consisting of a Supreme Court judge, a Chief Justice of a High Court, and an eminent jurist is formed to inform the judge of the charges against him and to allow him to defend himself. If the committee is of the opinion that misbehaviour or incapacity have been proved they will report this to parliament for action. Members of the subordinate judiciary can only be removed by the High Court, in its administrative capacity.

Lawyers

In late 1999 and early 2000 large protests and strikes were held by lawyers against changes proposed by the Code of Civil Procedure (Amendment) Bill 1999 and other changes to the Advocates Act 1961. The

changes were aimed at alleviating the excessive delays in the administration of justice, improving the quality of legal services and incorporating changes required by the General Agreement on Trade and Services.

Two issues regarding the legal profession were of concern to the lawyers. A working paper had proposed that advocates would be subjected to an assessment every five years before their licence to practice would be renewed. It was reported that the lawyers were concerned that the mechanism for evaluation would not be sufficiently independent. Also, changes that would allow foreign firms and individuals to practice in India were objected to on the grounds that the principle of reciprocity, a requirement for access, would not be followed in practice.

On 21 December 1999, approximately **3,500** lawyers in Delhi who protested the changes were detained and later released. A further protest occurred on 24 February 2000. Approximately **33** lawyers were injured when the police responded with tear gas and a cane charge against lawyers who allegedly attempted to force their way through barricades. On 15 March 2000 the Delhi government suspended three junior police officers and transferred two Assistant Commissioners of Police involved in the police action on 24 February 2000. A press release by the Home Department stated that "some police officials used force against some individual lawyers, including a lady lawyer, which was unwarranted and should have been avoided."

Principle 23 of the Basic Principles on the Role of Lawyers guarantees lawyers the rights to freedom of expression, belief, association and assembly and in particular the right to participate in matters concerning the law and the administration of justice. The UN Code of Conduct for Law Enforcement Officials, adopted by the General Assembly, requires that force only be used when strictly necessary and to the extent required for the performance of their duty.

The Union government announced on 28 March 2000 that an inquiry commission, constituted by retired Justice N. C. Kochlar, would investigate the circumstances leading to the use of force by police on 24 February 2000. The terms of reference are:

- to enquire into the facts, circumstances and events leading to the use of force, i.e. the *lathi* charge and the use of tear gas, by the police on the lawyers' demonstration;
- to examine and report whether the force used by police was excessive and disproportionate and, if so, fix the responsibility on the erring police officials;
- to recommend measures that need to be taken to avoid occurrence of such incidents in the future.

The commission of inquiry is required to report to the government within three months of the first hearing. Justice N. C. Kochlar was later replaced by former Supreme Court Judge, Justice G. T. Nanavati.

Cases

Justice Shivappa {judge of the Madras High Court}: In March 1999 Justice Shivappa of the Madras High Court was removed from office after the President made a determination under Article 217(3) of the Constitution. This article provides that if a question arises as to the age of a High Court judge, the question shall be determined by the President after consultation with the Chief Justice of the Supreme Court and the President's decision shall be final. The Supreme Court ruled in *Union of Trade v Jyoti Prakash Mitter (AIR 1971 S.C. 1093)* that no procedure had been established under this section, but the President could establish one. Justice Shivappa was not given an oral hearing but the President invited him to provide a written statement.

Justice Shivappa alleged at the time of removal that it had occurred for political reasons. He had heard corruption cases involving the leader of the All India Anna Dravida Munnetra Kazhagam (AIADMK) political party, J. Jayalalitha, and was to hear a case involving relatives of the Union Law Minister. The Union Law Minister, at that time, M. Thambidurai, had been nominated by J. Jayalalitha.

Irrespective of the actual merits of the decision the judiciary should have a more formal role to play in this process. Principle 17 and Principle 20 of the UN Basic Principles on the Independence of the Judiciary provide, respectively, that the judge shall have the right to a fair hearing in any discipline, suspension or removal proceedings and that this decision should be subject to independent review. Also, in light of the central role of the judiciary in India in the selection process and in any proceedings for removal of a judge, it would be consonant with the principles of judicial independence if a formal investigation procedure was established involving members of the judiciary. The consent of this body should be necessary before any determination is made by the President under Article 217(3).

INDONESIA

The Indonesian Constitution has little practical effect. Effective judicial review is absent and the judiciary depends upon the executive, in both legal and administrative terms. Human rights were extensively violated in 1999, *inter alia,* in East Timor, Aceh, Irian Jaya (West-Papua) and the Maluku.

The year 1999 was a turbulent year for Indonesia: the people of East Timor voted by a wide majority for independence, but military backed violence resulted in serious human rights violations; President Habibie lost the elections and was replaced by President Wahid in October 1999; communal and religious violence continued in the Maluku; and violence related to separatism in Aceh and Irian Jaya (West Papua) persisted.

Article 1 of the 1945 Constitution proclaims that Indonesia is a unitary state, which takes the form of a republic. The Majelis Permusyawaratan Rakyat (MPR) exercises sovereignty over the people. The MPR is the sovereign deliberative assembly of the nation and is comprised of members of the Dewan Perwakilan Rakyat (DPR), the Indonesian parliament, together with delegates from regional and special interest groups provided for by statute. The most important of these groups is the Indonesian military forces.

Article 6 of the Constitution provides that the President and Vice-President of the Republic shall be elected by the MPR for a renewable five-year term. The President has extensive powers as the Supreme Commander of the army, the navy and the air force (Article 10 of the Constitution). According to Article 12 of the Constitution the President may declare states of emergency. The President also appoints and dismisses Ministers of State (Article 17 of the Constitution) and may exercise a veto over legislation submitted by the DPR. The President appoints and dismisses judges (Article 25 of the Constitution in accordance with law 14/1970). The President may issue decrees having the standing of law and in the event of an emergency, the President may issue regulations in lieu of laws (Article 22 of the Constitution).

Before the elections in June 1999, three bills passed by the DPR reformed the election laws. The legislative seats reserved for the military were reduced from 75 to 38, the restriction allowing only three parties to contend elections was ended and a proportional representation system for voting was introduced. Furthermore, in a presidential decree President

Habibie prohibited campaigning by civil servants during the elections. In the past civil servants, including judges, were obliged to endorse the ruling Golkar Party.

General elections took place on 7 June 1999. The three leading opposition parties, the Indonesian Democratic Party (PDI-P) of Megawati Soekarnoputri, the National Awakening Party (PKB) of Abdurahman Wahid and the National Mandate Party (PAN) of Amien Rais formed an electoral alliance against the Golkar Party.

The count was completed on 15 July 1999 but the declaration of the results was postponed when 27 of the 46 political parties rejected the figures on grounds of electoral fraud. The official result was endorsed on 3 August 1999 by the President: the PDI-P gained 154 seats, the Golkar Party 120, the PKB 51, the United Development Party (PPP) 58 and the PAN 35 seats, with the remaining seats for minor parties.

On 30 August 1999, a referendum on the future of East Timor took place. The voters could choose between independence and autonomy within Indonesia. About 98.6% of the 438,500 registered voters participated in the referendum. Before and after the referendum the militia caused widespread destruction in East Timor, killing people, forcing people to flee and destroying property. Around 80% of the voters chose for independence.

On 20 October 1999, Mr. Abdurahman Wahid, leader of the PKB, was chosen as the new President by the MPR. Mr. Wahid had, since 1984, been the leader of the largest Muslim organisation in Indonesia, the Nahdlatul Ulama. Megawati Sukarnoputri, leader of the PDI-P was appointed Vice-President.

General Wiranto lost his position as Commander-in-Chief of the armed forces and was replaced as Defence Minister. Juwona Sudarsono became the first civilian to be appointed Defence Minster in Indonesia. Mr. Wiranto was appointed Coordinating Minister of Politics and Security.

Human Rights Background

Indonesia has not ratified important human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The UN Working Group on Detention conducted a mission to Indonesia from 31 January to 12 February 1999 and stated that:

> In its contacts, particularly with lawyers and representatives of civil society, the Group developed the feeling that several

> decades of authoritarian regimes in Indonesia have often contributed to some form of desensitisation in relation to human rights. This can take the form of loss of confidence in institutions, of acceptance of the absence of the Rule of Law and of a certain fatalism vis-à-vis the phenomena of impunity and corruption. On this last point, the Working Group considers that the envisaged judicial proceedings against the highest official of the former regime, especially for embezzlement of public funds and other economic crimes, should be conducted with firmness, independence and transparency so as to permit public opinion to regain confidence in the country's institutions.

The Working Group spent three days in East Timor, but was not allowed to visit Aceh or Irian Jaya. The Working Group, *inter alia*, concluded that:

> [t]he incidence of violence accompanying repressive activities has hardly diminished (for example, in Aceh, Irian Jaya and East Timor). Arrests continue to be characterised by numerous flaws that result in detentions being arbitrary within the meaning of one of the three categories under the Group's working methods.

The 1963 Anti-Subversion Law that was often used to detain political opponents of the Soeharto regime was abolished in April 1999. The Indonesian Criminal Code, however, was then revised and many of the articles of the 1963 Anti-Subversion Law were incorporated into the Criminal Code.

Political prisoners began to be released under the Habibie government. The Wahid government continued with the release of more political prisoners and by the end of the year most or all had been freed.

The International Commission of Jurists conducted a mission to Indonesia from 20 March - 3 April 1999 to review issues related to the Rule of Law, judicial independence and human rights. The mission's report, *Rulers Law*, was issued in October 1999.

Aceh

Since 1989, conflict has been erupting between the Indonesian military and the armed separatist opposition group Free Aceh Movement (Gerakan Aceh Merdeka, GAM) in Aceh in the north of the province of Sumatra. The region was declared an Area of Military Operation (DOM), a status which was only lifted in August 1998. Large scale human rights violations

were committed during this period by the military (TNI). There are also reports of human rights abuses by the GAM.

In December 1998, violence erupted again, despite President Habibie's promise to deal with the human rights problems in Aceh. As the situation deteriorated the call for a referendum to decide on the status of Aceh became stronger. Human rights violations were committed by the military and the police in 1999 and, along with many victims from the GAM, many civilians were killed, tortured, disappeared and arbitrarily detained. Human rights activists were prevented from carrying out their work in Aceh and also became the target of severe human rights violations. Again there were also reports of human rights abuses committed by the GAM.

In November 1999, President Wahid made a statement confirming that a referendum on Aceh could be an option. The referendum would only offer the possibility of a broad degree of autonomy, not independence. The armed forces, however, opposed such a referendum out of fear of disintegration of the country.

In November, former Commander-in-Chief of the armed forces, Wiranto, along with six other generals, had to testify before a committee of the DPR on human rights abuses by the army in Aceh. In the first trial dealing with human rights violations committed by the military forces in Aceh, five military officers stood trial in December 1999 before a combined military-civil court. Although this was the first time military officers were held legally responsible for committing human rights abuses in Aceh, only military officers of low rank were tried.

Irian Jaya

During the year voices for independence grew stronger in Irian Jaya. Many people were killed in clashes between the police and the Free Papua Movement (OPM). The UN Working Group on Arbitrary Detention was denied access to Irian Jaya when it conducted a mission to Indonesia from 31 January to 12 February 1999.

On 18 December 1999, the DPR agreed to change the name Irian Jaya to West-Papua without recognising demands for independence for the province.

Maluku

Throughout the year religious violence between Christians and Muslims continued to claim many victims. The Indonesian armed forces

were sent to the Maluku to suppress the violence but were unsuccessful. By the end of 1999 about 1,500 people, mainly civilians, had died.

Jakarta

On 23 and 24 September 1999 student demonstrations were held in Jakarta against the proposed State of Emergency Bill. The bill would have given the armed forces far reaching powers to declare states of emergency. Six demonstrators were reported to have been killed by the military. Finally, the bill was suspended by President Habibie.

There were reports of more killings on the occasion of other demonstrations during the year.

East Timor

During the whole year many people were killed by pro-integration forces, especially in the period immediately before and after the poll of 30 August 1999. Many people fled from East Timor when the violent incidents continued to occur. There were numerous attacks on villages, and the army was accused of supporting the pro-integration militia.

On 5 May 1999, the Foreign Ministers of Indonesia and Portugal, Ali Alatas and Jaime Gama, signed an agreement on holding a poll in East Timor on 8 August in which the population of the former Portuguese colony would choose between an Indonesian autonomy package and independence. The agreement was backed by UN Security Council Resolution 1236 on 7 May 1999. On 28 July 1999, the UN Secretary-General postponed the poll until 30 August 1999 because of the dangerous security situation.

On 30 August 1999, 98.6 % of the 435,000 registered voters participated in the ballot. The overwhelming majority of the votes (78.5%) chose for independence as opposed to 21.5% who choose for autonomy within Indonesia. In the weeks before the vote hundreds of people were killed and injured and thousands driven from their homes by militia attacks. The Indonesian military (TNI) was condemned by the international community for cooperating with the militia or failing to stop them. After the poll, the violence erupted again, and personnel of the UN Assessment Mission in East Timor (UNAMET) were evacuated and its compound was burned by the militia. Many people were killed or fled the region, including priests and nuns who tried to protect the refugees.

A delegation of the UN Security Council visited Indonesia on 7 September 1999 and two days later President Habibie gave his approval

for a peacekeeping force, which arrived in Dili on 20 September 1999. The International Force East Timor (INTERFET) was headed by Australia's Peter Cosgrove. Fierce attacks on journalists, UN workers and local people by the militia followed.

From 23 to 27 September 1999, a special session of the UN Commission for Human Rights convened in Geneva at the request of Portugal. The special session was convened against the background of increasing reports of widespread violence and serious human rights violations in East Timor, following the referendum on the future status of East Timor. This was the fourth special session of the Commission. Two special sessions had been held, in 1992 and 1993, on the situation in the former Yugoslavia and one in 1994 on the situation in Rwanda.

The Commission adopted a resolution calling for the establishment of an international commission of inquiry to "investigate violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the announcement in January 1999 of the vote". The International Commission of Inquiry was requested to cooperate with the Indonesian National Commission on Human Rights and UN thematic rapporteurs, to gather and compile systematically information.

East Timorese independence leader, José Xanana Gusmao, returned to Dili on 22 October 1999 after having been released from prison and house arrest some time earlier. In December 1999, José Ramos Horta, the Vice-President of the National Council of Timorese Resistance (CNRT) returned to East Timor after 24 years of exile.

The International Commission of Inquiry delivered its report to the UN General Assembly on 31 January 2000 and concluded, *inter alia*, that:

> there were patterns of gross violations of human rights and breaches of humanitarian law which varied over time and took the form of systematic and widespread intimidation, humiliation and terror, destruction of property, violence against women and displacement of people. Patterns were also found relating to the destruction of evidence and the involvement of the Indonesian army (TNI) and the militias in the violations.
>
> There is evidence that the policy of engaging militias was implemented by the Kopassus (Special Forces Command of TNI) and other intelligence agencies of the Indonesian army. The policy manifested itself in the form of active recruitment, funding, arming and guidance, and of the provision of logistics to support the militias in intimidation and terror attacks.

> There is evidence to show that, in certain cases, Indonesian army personnel, in addition to directing the militias, were directly involved in intimidation and terror attacks. The intimidation, terror, destruction of property, displacement and evacuation of people would not have been possible without the active involvement of the Indonesian army, and the knowledge and approval of the top military command.
>
> The Indonesian police, who were responsible for security under the 5 May agreement, appear to have been involved in acts of intimidation and terror and in other cases to have been inactive in preventing such acts.
>
> The Commission is of the view that ultimately the Indonesian army was responsible for the intimidation, terror, killings and other acts of violence experienced by the people of East Timor before and after the popular consultation. Further, the evidence collected to date indicates that particular individuals were directly involved in violations of human rights.
>
> The Commission received allegations that armed groups supporting independence were also involved in violent attacks during the period from January 1999. The incidents were relatively fewer in number and confirmation of their existence has not been obtained.

From 4 to 10 November 1999, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Ms. Asma Jahangir, the UN Special Rapporteur on Torture, Sir Nigel Rodley, and the UN Special Rapporteur on Violence against Women, Ms. Radhika Coomaraswamy, conducted a joint mission to East Timor. The visit was undertaken pursuant to the resolution adopted by the Commission on Human Rights at its special session on the situation in East Timor. The Special Rapporteurs concluded, *inter alia*, that the attacks:

> took place in the context of an attack against the East Timorese population that overwhelmingly supported independence from Indonesia. They include murder, torture, sexual violence, forcible transfer of population and other persecution and inhumane acts, including destruction of property. These have all been committed on a scale that is widespread or systematic or both.

The MPR voted in October 1999 in favour of revocation of the 1978 decree that annexed East Timor to Indonesia. On 25 October 1999 the UN Security Council voted unanimously to replace INTERFET with a UN force of military personnel and police to support the establishment of the

UN Transitional Administration in East Timor (UNTAET). UN Under-Secretary-General for Humanitarian Affairs, Sergio Viera de Mello, was appointed as transitional administrator in charge of rebuilding the infrastructure of East Timor.

The 13-member National Consultative Council (NCC) was established to make policy recommendations to the UNTAET. The NCC includes seven members of the National Council of Timorese Resistance (CNRT), a Catholic priest, UN officials and a former pro-Indonesia leader of the East Timorese People's Front.

THE JUDICIARY

The 1945 Constitution makes reference to the judiciary in Articles 24 and 25. It is apparent from these articles that the nature of judicial power, the content of its exercise and the tenure of those who exercise it will be regulated principally by statute rather than by constitutional provisions.

Indonesia is constructed upon the principles of "Pancasila", the official state ideology. The principles of Pancasila are set out in the Preamble of the Constitution as follows:

> ...the national independence of Indonesia shall be formulated into a constitution of the sovereign Republic of Indonesia which is based on the belief in the One and Only God, just and civilised humanity, the unity of Indonesia, democracy guided by the inner wisdom of deliberations amongst representatives and the realisation of social justice for all the people of Indonesia.

As described in the ICJ's mission report *Rulers Law* the ideology of Pancasila is founded upon five broad principles. It is accepted in Indonesian constitutional theory that the Constitution's provisions, and the provisions of all statute law, should be interpreted so as to be consistent with these principles. The principles are so broad, however, that they can attain meaning only in the hands of definitive interpreters. While in normal circumstances one might expect that such interpretation would be within the sole jurisdiction of the courts, in Indonesia, where the courts are very weak, the task of interpreting the principles has passed to the executive government. It is thus made easy for the President to declare that actions or omissions are contrary to Pancasila and therefore contrary to the interests of the state.

Given these circumstances, the Constitution has had little or no effect upon the constraint of executive power. It has not and cannot act as the

foundation of a state based on the Rule of Law as this term is commonly understood. A vague and imprecise Constitution has been preferred to one that constitutes the supreme law of the nation. The open-textured nature of the constitutional document, the absence of effective judicial review, the very limited guarantees of human rights, the judiciary's dependence upon the executive in both legal and administrative terms and the heavy emphasis on breadth and flexibility in the exercise of presidential power, have all contributed to a situation in which the Constitution is accorded symbolic respect but not practical effect.

Structure

The Supreme Court (Mahkamah Agung) stands at the apex of the judicial system. Beneath the Supreme Court four branches of the judicature are created (Article 10) - the General Courts of Justice (Peradilan Umum) which have jurisdiction to try civil and criminal cases. There are special courts such as a Child Court, Economic Courts, the Islamic Courts of Justice (Peradilan Agama) which have jurisdiction to try civil cases related to the Islamic religion, the Military Courts of Justice (Peradilan Militer) which have jurisdiction to try any crime committed by military officers, and the Administrative Courts of Justice (Peradilan Tata Usaha Negara) which have jurisdiction to try administrative cases.

The right of appeal from District to High Court to Supreme Court exists in all four systems. The Supreme Court does not consider factual aspects of a case, only the lower courts' application of law.

According to Law 8/1981, a crime committed by a military officer together with a civilian should be tried in a general court, unless the Minister of Law and Legislation (before: Minister of Justice) together with the Minister of Defence and Security decide that the case should be tried in a Military Court of Justice. If the case is tried in a General Court of Justice, the panel of judges is mixed: two judges, including the President, are civilian judges and one is a military judge. This procedure is called "Peradilan Koneksitas".

Article 11 of Law 14/1970 provides that each of these branches of the judiciary shall be subject in their organisation, administration and finance to the ministry in relation to which their jurisdiction is primarily concerned. The General Courts of Justice, therefore, are responsible to the Minister of Justice, the Military Courts of Justice to the Minister of Defence, and so on. Where the courts are required to review the laws and actions of their parent ministry, a potential conflict of interest will clearly and inevitably arise. Article 11 is a substantial threat to the independence of the judiciary in Indonesia.

Jurisprudential supervision remains with the Supreme Court but the fact that the Minister of Justice supervises the organisation, administration and financing of the court provides for the potential of governmental interference with judicial decision-making. In fact, during its mission from 20 March - 3 April 1999, many cases of actual interference were cited to the ICJ.

Article 26 of Law 14/1970 provides another threat to judicial independence as it contains that the Supreme Court is empowered only to review the validity of regulations and other inferior statutory instruments. The People's Assembly (MPR) has the power to review the constitutionality of legislation.

Human Rights Court

On 8 September 1999, a law on human rights was passed in the parliament allowing, *inter alia*, for the establishment of a Human Rights Court within four years. On 8 October 1999, President Habibie created a government regulation in lieu of legislation with regard to the establishment of a Human Rights Court. This court has the authority to deal with cases that take place after 8 October 1999 and that involve extinction of a national or ethnic group, extrajudicial killings, forced disappearance, slavery, systematic discrimination and torture. The regulation gives the National Commission on Human Rights the right to request an explanation regarding a human rights case from the Attorney General at any moment.

Appointment, Promotion, and Dismissal

The position of judges may be prejudiced when their mode of appointment and dismissal is considered. In accordance with Article 31 of Law 14/1970 judges are to be appointed and dismissed by the President without further consultation or approval by either the legislature or the judiciary itself.

Article 16 of Law 2/1986 Concerning the General Judicial System elaborates on the provisions of Law 14/1970. Article 16 elaborates on Article 31 of Law 14/1970 by providing that:

> A judge of a court is appointed and discharged by the President in his capacity as head of state on the proposal of the Minister of Justice and based on consultation with the Chief Justice of the Supreme Court.

Furthermore, according to Article 14 a judge in Indonesia is a civil servant which means that Law 8/1974 on the Principles Concerning Civil Servants is applicable to them.

Promotion within the judiciary can be made in Indonesia only from within and only from the ranks of judges in the courts immediately below. There is no possibility for the appointment of a judge to a senior judicial office from outside the ranks of the existing judiciary. Within this system in which judges rely completely on the Minister of Justice and the President for their promotion, it is likely that judges will try to please them.

According to Article 13 of Law 2/1986, judges may be dishonourably discharged from office when they have: committed a crime; engaged in improper behaviour; neglected their duties; or violated their oath of office.

The definitions of improper conduct and neglect of duty, however, are very vague. Improper conduct is defined as meaning that a judge, whether in court or out of court, dishonours a judge's dignity. Duty, with respect to neglect of duty, is defined simply as all duties entrusted to the judge concerned. The decision as to whether these criteria are met and whether dismissal should follow rests entirely with the Minister of Justice and the President .

With respect to appointment, dismissal, transfer and remuneration of judges in the Islamic Courts, the Administrative Courts and the Military Courts, the same legislative foundation is applicable except that regarding the Military Courts the Minister of Defence makes decisions instead of the Minister of Justice, etc.

The ICJ report of its mission to Indonesia, *Rulers Law*, which reports on the situation until April 1999 states in this respect that:

> The most persistent complaint we received was that the Minister of Justice has used his authority with respect to the appointment, promotion, transfer, and remuneration of judges in order to reward judges whose decisions the Minister approved and penalise those whose decisions he disapproved. In the alternative, the complaint was framed in terms of judges at all levels below the Supreme Court having been unwilling to take difficult decisions adverse to the government for fear of having their prospects for promotion and desired geographic location prejudiced by adverse Ministerial response.

Judicial Corruption

Corruption is institutionalised in the Indonesian judiciary, especially in the Supreme Court, which is notorious for its corruption. In the past the military has always held the post of Minister of Justice and the Chairman of the Supreme Court. Now, however, both these positions have been filled by civilians.

One reason for the judicial corruption could be that judicial salaries in Indonesia are very low compared with the private sector. The ICJ was informed of several cases where judges had received financial rewards in exchange for a favourable decision.

Reform of the Judiciary

Decree 10/1998 altered the division of authority between the Minister of Justice and the Supreme Court so as to make it clear that principal responsibility for the supervision of the judiciary rests with the Supreme Court rather than the Minster. The Ministry may still play a role in court administration.

The Supreme Court Act 14/1985 is in the process of being amended. The draft bill on the Supreme Court was scheduled to be ready early January. It will establish an independent committee that will select Supreme Court judges. A very important question is where the committee should be placed in the system; under the parliament or under the assembly.

Lawyers

In ordinary cases, an investigator, prosecutor or prison official cannot listen to the content of the discussion between a lawyer and their client. According to Article 71 (2) of the Criminal Procedure Code, officials may listen to the conversation when crimes against state security are involved. Because of the high penalties involved in national security cases, confidentiality between lawyer and client is all the more important. Furthermore, according to Article 115 b of the Criminal Procedure Code, when an examination is being conducted in national security cases, the lawyer may be present to watch, but not to listen to the examination of the suspect. This clearly hampers the minimum rights of a suspect.

Article 56 (l) of the Criminal Procedure Code states that only in cases where the accused is being tried for an offence punishable by imprisonment of at least five years and does not have their own counsel, is an investigator, prosecutor or judge obliged to assign a lawyer.

The Criminal Procedures Code does not provide for witnesses' impunity or for the defence power of subpoena. Therefore, witnesses are often reluctant to testify against the authorities. Forced convictions are common and defendants do not have the right to remain silent and can be obliged to testify against themselves.

Cases

Herman Abdurrachman, S.H. {lawyer and legislator in the Regional House of People's Representatives}: As the defence lawyer in a case in Sleman District Court, Mr. Abdurrachman was banned, on 25 January 2000, from attending the court proceedings on the ground that he is also a member of the Regional House of People's Representatives (DPRD).

The legal ground of banning him to act as defence lawyer is not solid, because it is only based on the Law on Composition and Position of MPR, DPR, DPRD Membership (Law No. 4 of 1999) which does not explicitly prohibit a legislator from also holding the position of advocate/lawyer.

Mr. Abdurrachman had been a legislator and advocate for seven years and had never faced a problem before.

S.H. Herlambang {lawyer}: On 22 July 1999, Mr. Herlambang, as defence counsel in a minor criminal offence case, was treated disparagingly by the presiding judge. The judge would not except the objections of Mr. Herlambang against the charges and expressed the opinion that the defendants were guilty during the trial. The judge accused Mr. Herlambang of obstructing her.

Sinar Mahadini, S.H {lawyer}: Ms. Mahadini, who was acting as defence counsel, was harassed on 20 December 1999 and 17 January 2000 in the Yogyakarata District Court by relatives and friends of the accusing party in a criminal case. She was not protected by the authorities.

IRAN

The judiciary in Iran is not free from government or religious influence. The judiciary and law enforcement agencies continue to serve as the main tools of oppression in Iran. Although the Constitution of Iran endorses some fair trial rights they are not respected in practice. In the Revolutionary Court the magistrate functions both as prosecutor and judge in the same case. The trials in these courts are therefore not fair and impartial.

The Islamic Republic of Iran was established in 1979 after the revolution that led to the fall of the Shah. The 1979 Constitution, as amended in 1989, is the constitution that applies.

President Mohammad Khatami was elected in 1997 for a 4-year term. Ayatholah Ali Khamenei is the Leader of the Islamic Revolution and head of state. Chosen by the Assembly of Experts after Ayatollah Khomeini's death in June 1989, it is legally forbidden to criticise his actions and he is, in practice, accountable to nobody. He is constitutionally the highest authority in the country and controls the judiciary and the state broadcaster, as well as the security and police forces, although he has granted nominal control of the police to Interior Minister Abdolvahed Musavi-Lari. The Leader is the commander-in-chief and he appoints the President after the people elect him.

The eligibility of candidates for presidency has to be confirmed by the Council of Custodians prior to election and endorsed by the Leader for the first term of presidency. The Council of Custodians consists of six theologians and canonists, nominated by the Supreme Leader or the Council of Leadership, and six Moslem jurists nominated by the Supreme Judicial Council.

The Leader can dismiss the President after the Supreme Court of Cassation has ruled that he has departed from his legal duties or after the Majlis has ruled as to his political incapability. The Leader also appoints the members of the Council of Custodians and appoints the highest-ranking official of the judicial bench.

The President of the Republic is second in line after the Leader and according to Article 113 of the Constitution "shall have the responsibility for enforcing the Constitutional Law and coordinating the correlation between the three powers of the country". The President is also the chief of the executive power, "except for such matters of government that fall directly within the jurisdiction of the leadership".

The President is elected for a term of four years and can be re-elected for one more term. According to Article 115 of the Constitution the President has to be "of Iranian origin and nationality...faithful in the foundations of the Iranian Islamic Republic and the state religion". The President nominates the Prime Minister, who presides over the Council of Ministers.

The National Consultative Assembly, the *Majlis*, is the 270-seat unicameral legislative body. The representatives are elected for a term of four years. The Council of Custodians reviews legislation passed by the assembly for adherence to Islamic and constitutional principles.

The Supreme Council for National Security, presided over by the President, is entrusted, according to Article 176 of the Constitution, with the following tasks: determining the defence and national security policies within the framework of general policies determined by the Leader; coordination of activities in the areas relating to politics, intelligence, social, cultural and economic fields in regard to general defence and security policies; and exploitation of materialistic and intellectual resources of the country for facing internal and external threats.

In February 1999, local elections took place in which reformists won. In February 2000 parliamentary elections took place and resulted again in a victory for the reformists.

Human Rights Background

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights entered into force in Iran in 1976. The two Optional Protocols were not ratified by the government, nor was the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment. The second and third periodic reports to the above mentioned treaties are long overdue.

The Committee on the Elimination of Racial Discrimination considered the compliance of Iran with the Covenant on the Elimination of all Forms of Racial Discrimination at its August 1999 session. The thirteenth, fourteenth and fifteenth periodic reports of the Islamic Republic of Iran were considered. The Committee, *inter alia,* expressed concern that:

> the definition of racial discrimination found in, *inter alia,* Article 19 of the Constitution of the Islamic Republic of Iran and the 1977 Bill for the Punishment of the Propagation of Racial Discrimination, is not in complete conformity with the broad definition contained in Article 1, paragraph 1 of

> the Convention, which refers to any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.

Freedom of expression was severely hampered in 1999, despite efforts by the government to create a more tolerant atmosphere. Several newspapers were closed and publishers were prosecuted.

Many dissident literary and political figures were killed in 1998 and 1999 and public outrage in Iran was enormous. Several government officials have been arrested in relation to these killings but at the time of writing no trial had yet begun.

On 8 July 1999 a peaceful student demonstration in the University of Teheran took place to protest against the closure of the pro-reform newspaper Salam. The day after the protest the university dormitories were attacked by uniformed troops. Reportedly, four students were killed, several hundred were arrested and hundreds more wounded. This attack was followed by more student protests all over Iran, which were forcefully broken up by groups belonging to the conservative stream in the government. The protests led to riots in which criminal elements were involved and which resulted in more unrest in the country.

Allegedly, four students have received the death penalty for their role in the demonstrations. The sentence was given by the Revolutionary Court after a secret trial. In February 2000, the trial against the former Teheran police chief and other police officers accused of beating the students began.

Widespread torture is reported in Iran, especially in prisons. Torture is often inflicted with total impunity for the perpetrators. The UN Special Representative on the Situation of Human Rights in Iran reported in his report to the 2000 session of the UN Commission on Human Rights on the first official trial of a state official for engaging in torture.

The Special Representative expressed his concern about the re-promulgation of amputation as a punishment in the Procedures in the General and Revolutionary Courts published in Official Gazette 1591 of 10 October 1999.

Religious minorities in Iran face blunt discrimination, especially the Baha'is who are prosecuted and even sentenced to death for practising their religion. They have no legal rights in society and may not teach or practise their religion.

Trial of Mr. Amir-Entezam

The International Commission of Jurists (ICJ) expressed its concern over being barred from observing the trial of Mr. Abbas Amir-Entezam in

Iran that began on 16 February 1999. The ICJ wished to attend the trial by sending an observer. The ICJ declared that "such a development is indicative of the fact that Mr. Amir-Entezam might not benefit from a fair trial".

The ICJ voiced its concern after having read in a report of the Iranian news agency IRNA that the head of the judiciary, Ayatollah Mohammad Yazdi, announced that Iran would not admit any foreign observer missions to attend judicial proceedings.

The principle foreseen in international human rights law that trials must be open to the public has never been understood as limiting attendance to only nationals of the country where the trial is being held. Such a limitation would be incompatible with the principle of universality of human rights and the general recognition that their respect is of international concern.

Mr. Amir-Entezam, a deputy prime minister of Iran just after the Islamic revolution of 1979, was detained for 17 years in the notorious Evin Prison in Tehran. He was arrested again in September 1998, after having made critical remarks about Mr. Assadollah Lajevardi - the then recently assassinated prosecutor and former chief warden at Evin. During a first court hearing, which Mr. Amir-Entezam was not allowed to attend, the judge reportedly stated that he did not know the reason for the detention of Mr. Amir-Entezam, but that he could only be released by a revolutionary tribunal. The detention of Mr. Amir-Entezam was then prolonged for 10 more months, apparently to receive accusations from the public against him. It has been reported since then that Mr. Amir-Entezam has serious health problems and that he was the victim of an assassination attempt during a transfer. It has also been said that he is denied proper medical treatment.

On the occasion of the 20th anniversary of the Islamic revolution, President Mohammad Khatami is reported to have urged respect for the Rule of Law in Iran. After such encouraging words, the ICJ appealed to the government and judiciary of the Islamic Republic of Iran to ensure a fair trial for Mr. Amir-Entezam, release him in the absence of valid legal charges and provide him with proper medical attention.

The Judiciary

According to Article 4 of the Iranian Constitution all laws are based on Islamic standards. According to Article 61 of the Constitution, the judicial power shall be exercised through courts of justice which shall be formed according to Islamic criteria to reach a decision on the cases in dispute,

protect the public rights, further the administration of justice and uphold the divine jurisdiction.

The judiciary and law enforcement agencies continue to serve as the main tools of oppression in Iran. The judiciary in Iran is not free from government and religious influence as can be seen from the structure. Women and men are not treated equally before a court as the testimony of a woman is worth only half that of a man.

Although the Constitution of Iran endorses some fair trial rights they are not respected in practice. The UN Special Rapporteur on Iran, who has been denied access to the country, has identified the following problems in the judicial system in his report to the 2000 session of the UN Commission on Human Rights:

> There are references in other parts of this report to the shortcomings of the legal system. These include such critical matters as treatment in pre-trial detention, forced confessions, the overcrowding in the prison system, the continuing existence of detention centres outside the official prison system, and not least, the denial of fair trial. Some problems suggest that urgent attention must be paid to the judiciary itself. Unacceptable conduct includes: conduct such as denying the right of the defence to call witnesses, stating that judgement would be rendered following the submission of the defence's closing submission and then issuing the judgement without giving time for the submission, sitting in on a jury deliberation, making statements about cases which do not fall within the jurisdiction of the speaker's court, sending defence lawyers to jail for such action as protesting the judge's refusal to allow him to call witnesses. Such a list is not exhaustive and perhaps not representative. However, it does suggest to the Special Representative that very thoroughgoing reform of the judiciary is urgently required.

Structure of the Courts

Traditional courts deal with civil and criminal offences and Islamic Revolutionary Courts were established in 1979 to try offences against internal or external security, narcotics crimes and official corruption. Special Courts of the Clergy examine alleged crimes within the clerical establishment.

Military courts investigate crimes committed in connection with military or security duties by members of the army, the gendarmerie, the police and the Islamic Revolution Guards Corps. They are tried in public courts

for common crimes or crimes committed while serving the department of justice in executive capacity.

The Court of Administrative Justice investigates complaints, grievances and objections of the people with respect to government officials, organs and statutes, under the supervision of the head of the judicial branch.

The Supreme Court supervises the correct implementation of the laws by the courts, ensuring uniformity of judicial procedure and fulfilling any other responsibilities assigned to it by law.

Islamic Revolutionary Courts

In the Revolutionary Court the magistrate functions both as prosecutor and judge in the same case. The trials in these courts are therefore not fair and impartial and, in addition, defendants do not have the right to confront their accusers. Moreover, secret or summary trials take place and defendants are often indicted with vaguely defined offences.

Special Courts of the Clergy

The Cleric's Court was set up by Ayatollah Khomeini soon after the 1979 revolution to try clergymen thought to be affiliated with the former regime. More recently, it has become an instrument for putting pressure on clerics who do not back the policies of Ayatollah Khamenei. The head of the court, Gholamreza Mohseni-Ezhei, was appointed by Mr Khamenei in December 1998 and reports directly to him.

The mandate of this court is to deal with all acts committed by clergy contrary to rehgious law; all disputes harmful to public security in which one of the parties is a member of the clergy; and all other cases entrusted to it by the Leader's office. The cases are to be argued on the basis of religious law. Appeals are heard by another chamber of the Cleric's Court; the Supreme Court has no jurisdiction in such cases.

The defence counsel in a trial before a Special Court of the Clergy has to be chosen from designated clergy. The hearings are not public and decisions are not usually made public. The court apparently has authority to impose the death penalty.

The UN Special Representative on Iran commented on the Cleric's Court in his report to the 1999 session of the UN Commission on Human Rights. He said:

> he continues to believe that at this point in the Islamic Republic's history, it is difficult to justify the continued

existence of such an apparently arbitrary and secretive tribunal. The Special Representative recommends that it be abolished, or at least that it be converted into a commission charged with settling theological disputes in the narrowest sense. The Special Representative sees the appointment of a press jury in the Cleric's Court as an ominous expansion of its jurisdiction, and a prescription for further confusion in the press regulation regime established by the Press Law.

In the Special Representative's view the experience of many other countries with such tribunals suggests that they inevitably deny a defendant what is today recognised as a fair trial, and that they are thus instruments of denial of human rights.

Qualification, Appointment and Dismissal

The conditions and qualifications to be fulfilled by a judge will be determined by law, in accordance with religious criteria. The Supreme Leader appoints the head of the judiciary for a period of five years. He then appoints and dismisses the judges. Ayatollah Mohammad Yazdi was replaced as head of the judiciary in August 1999 by Ayatollah Mahmoud Hashami Shahroudi. The Chief of the Supreme Court and the Prosecutor General are nominated by the head of the judicial branch for a period of five years, in consultation with the judges of the Supreme Court. Many graduate law students were employed by courts after short-term training.

Lawyers

Article 35 of the Constitution provides that "In all courts, the parties to a case shall be entitled to appoint an attorney and if they cannot afford a retainer, they shall be provided with means to appoint and retain an attorney".

In his report to the 1999 UN Commission on Human Rights, the UN Special Representative on Iran reported on a discussion with the President of the Central Bar Association Council, S.M. Jandaghi. Mr. Jandaghi said that:

> to make lawyers more accessible, the Bar Association has established a Legal Assistance Department which provides legal advice and, if appropriate, assistance in obtaining the services of a lawyer. The Special Representative noted the apparent difficulties faced by some disadvantaged groups such as the Baha'is in obtaining a lawyer, particularly a good one. The President said that every lawyer is expected to take

> on four *pro bono* cases a year. In court proceedings in which a lawyer is required and is not already retained, the judge is expected to turn to the Association which will nominate four or five lawyers from among whom the judge will make a choice. With regard to the diligence and integrity with which such assigned lawyers advance their client's interest, the President acknowledged as possible the complaint brought to the Special Representative's attention of assigned lawyers seeming to play a passive role and, in some cases, being openly denounced in court by the accused as not telling the truth. He noted that there was a disciplinary court for lawyers within the Bar Association but it was only really becoming active since the election of the Bar Council.

In his report to the 2000 UN Commission on Human Rights the Special Representative reported on an open letter the Bar Association had sent in November 1999 to the head of the judiciary concerning the arrest of a lawyer representing a newspaper (*see Cases below*). Also in November 1999, the Bar Association sent a letter to the *Majlis:*

> protesting a provision in a bill before that body that would empower the judiciary to authorise lawyers to practise, a provision that the Association asserted was in flagrant contradiction with the existing Bar Independence Act, which gives such a power exclusively to the Association.

The competency of the 24 members of the Iranian Bar Association was rejected by a verdict of the Special Judges Court (Dadgah Entezami Ghozzat) in February 2000 and therefore they could not become candidates for the Bar Association Directing Board.

Cases

Hojatoleslam Sayyid Mohssen Saeidzadeh {legal scholar, former judge}: According to the Lawyers Committee for Human Rights, Mr. Mohssen Saeidzadeh was arrested without a warrant on 28 June 1998. It is believed that Mr. Mohssen Saeidzadeh was arrested because of his criticism of the lack of equality before the law for men and women. Mr. Mohssen Saeidzadeh's whereabouts are unknown at the time of writing.

Seyed Mohammad Seifzadeh {lawyer}: As a lawyer for the banned "Neshat" newspaper, he was arrested in November 1999 on foot of a verdict of the Teheran Court (branch 1410) and charged with insulting the court. He was detained for 48 hours.

ISRAEL

The Israeli judicial system guarantees judicial independence and this is respected by the government. However, the courts tend to acquiesce in government arguments of national security in sensitive cases. Respect for human rights was more pronounced with the Supreme Court delivering several ground breaking judgements on equality, torture and ordering the release of Lebanese hostages. Human rights violations in the occupied territories, however, remained a serious concern.

In July 1999, Ehud Barak was inaugurated as Prime Minister of Israel after winning the elections held on May 6, 1999. He was elected on the basis of a campaign promising a unified Jerusalem, despite East Jerusalem being part of the territory occupied by Israel in 1967, continuation of the middle east peace process and a withdrawal from Southern Lebanon within a year. The signing of the Sharm el-Sheikh agreement in September 1999 restarted the Palestinian peace process and set a September, 2000 deadline for the conclusion of final status negotiations. These negotiations will deal with the permanent status issues agreed on in the 1993 Oslo Accords, i.e. Jerusalem, refugees, settlements, security arrangements, borders, relations and co-operation with neighbours. Talks regarding development of a permanent peace settlement with Syria also commenced in January 2000.

Israel does not have a single constitutional document, instead its governing bodies are established in a series of basic laws which act as its Constitution. The President is the head of state and is elected by the legislature for a period of 5 years. The President's powers are largely ceremonial and the position is currently held by Ezer Weizman. Israel's legislative body is a unicameral parliament called the Knesset. It consists of 120 members and is elected for a 4 year term by popular elections. The executive authority is exercised by the government, consisting of the Prime Minister and at least 8 other ministers. The Prime Minister is elected directly by the public on the same day as Knesset elections and appoints the other ministers, subject to approval of the Knesset. The Prime Minister and at least half of the other ministers must be members of the Knesset.

Most of the West Bank, including East Jerusalem, and more than a third of the Gaza Strip are still under Israeli Military Government control. In accordance with the agreements that have been signed since the 1993 Oslo Accords the military government has slowly been returning areas in

the occupied territories to Palestinian control. At the conclusion of the redeployments on 20 January 2000, as required by the Sharm el-Sheikh agreement, Israel will still exercise control over 80% of West Bank territory. As of 1 February 2000, Israel had failed to comply with the remaining provisions to transfer 6.1% of the West Bank to Palestinian control.

Human Rights Background

Although the human rights of the majority Jewish population are generally well respected, there are serious threats to the human rights of minority groups within Israel. Israel has ratified many international rights treaties including the Convention on the Prevention and Punishment of the Crime of Genocide, the International Covenant of Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Israel has enacted two laws relating to human rights: Basic law: Human Dignity and Liberty 1994 and Basic Law: Freedom of Occupation 1994.

The Principle of Equality

Israeli Basic Laws do not explicitly guarantee equality amongst ethnic or religious groups within Israeli society. The Supreme Court has asserted a general commitment to equality in Israeli law, including several recent cases in relation to Arabs, outlined below. However, a question remains as to whether the principle of equality in Israeli law is strong enough to overrule explicit legislation to the contrary. The Supreme Court, sitting as the High Court of Justice, noted in 1998 that there is prima facie discrimination in the allocation of funds to the various religious communities. In that year the government allocated only 1.86% of the budget to the Muslim, Christian and Druze communities even though they comprise almost 20% of the population. The court, however, declined to rule in favour of the petitioners and asked them to return with more specific claims of discrimination.

In April 2000 the court unanimously accepted a petition by Adallah, the Legal Centre for Arab Minority Rights in Israel, which claimed that allocations to non-Jewish cemeteries were much lower than those for Jewish ones. The petition requested the court to order the Ministry of Religious Affairs to set criteria that would ensure equality in the allocation of funding. The judgement of the court stated that "the resources of the state, whether land or money, or other resources as well, belong to all

citizens and all citizens are entitled to enjoy them according to the principle of equality." The court ordered that the budget for that year be amended so that allocations to cemeteries would be equal.

The Supreme Court decided another case (H.C. 6698/95) in March 2000, which could have far reaching implications for the Arab minority in Israel. The case concerned an application by an Arab family to build a home in Katzir, a Jewish communal settlement. The land for this settlement was allocated by the Israel Land Authority to the Jewish Agency and the Katzir Co-operative Society, which only accepted Jewish members. The petitioners claimed that this policy constituted discrimination on the basis of religion or nationality. In the decision the court reaffirmed the general principle of equality and ruled that the Israeli state may not discriminate directly, or indirectly through a third party, in the allocation of state land. However, the court limited its decision to the particular facts of the case and to future allocations of land. The court explicitly stated that it did not take a position with regard to other kinds of settlements and that other "special circumstances, beyond the type of settlement, may be relevant."

The Arab minority do not enjoy equal quality and access in the provision of basic services. The government discriminates against Arab villages, of which approximately 100 are yet to be recognised. This deprives these villages of basic infrastructure such as electricity, sewerage, water and roads. Recent court decisions have ordered that these settlements be granted minimal electricity, health and educational services, but these are substantially lower than those supplied to Jewish villages and the problem requires a more comprehensive solution.

Gender Discrimination

Matters of personal status are decided in accordance with religious law resulting in discrimination against women. Under both Jewish and Islamic religious law women are not allowed to request a divorce without their husband's consent, which is frequently not given, or only given after obtaining concessions. There is also widespread violence against women and children, committed by both Arabs and Jews, including killings in the name of honour.

Lebanon

In areas in Lebanon occupied by Israel since 1982 human rights violations are committed by the Israeli Defence Forces and the South Lebanon Army, a militia controlled by Israel. Lebanese civilians continued to be administratively detained in the Al-Khiam prison, held in sub-standard

conditions and reportedly subjected to torture. Israel has detained Lebanese nationals without charge or trial for periods up to 11 years as "bargaining chips" in negotiations for the return of Israeli soldiers. This illegal detention was permitted by the Supreme Court of Israel in a decision by a three judge bench in 1997. On 12 April 2000 a nine judge bench, with six judges in the majority, ruled that the 1979 Emergency Prerogatives Law does not allow the Defence Minister to place a person in administrative detention if the person does not pose a threat to the security of the state. As this was the only basis of detention for these prisoners, they must be released. Thirteen of the fifteen hostages were released. Mustafa al-Dirani, detained since 1994, and Sheikh Abdel-Karim Obeid, detained since 1989, were not released as the government sought to continue their detention on the basis that they constitute a danger to the security of the state.

Administrative Detention

Although Palestinian political prisoners have been released as a part of the peace process, their number remains high and Israel continues the practice of administrative detention. The Minister of Justice can issue detention orders for periods of six months which can be renewed indefinitely. Osama Barham, who had been administratively detained since November 1993, was released on 18 July 1999. Major efforts by human rights groups, both Jewish and Arab, have brought the number of administrative detainees down and at this stage they do not number more than a dozen. All Palestinian security detainees from the occupied territories are held in Israel contrary to international law and subject to different conditions of incarceration, even within the same prison, than Israeli prisoners. All Palestinians are subject to Israeli Military Law, even if detained within Israel.

The use of torture in interrogations continued to be used contrary to Israel's obligations under the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *(see following section)*.

Occupied Territories

Israel occupied the West Bank and Gaza Strip in 1967 and exercises control over these areas through a military government, committing numerous violations of international humanitarian and human rights law. Since 1993 areas containing most of the population have been returned to Palestinian control. However, Israel still controls the majority of the occupied land.

The report of the Special Rapporteur, Mr Giorgio Giacomelli, on the situation of human rights in the Palestinian territories (E/CN.4/2000/25) identified several major concerns regarding human rights in these areas.

In addition to the question of Palestinian refugees to be decided within the permanent status negotiations, displacement also continues to occur with the eviction of Palestinians from their property in the West Bank and Gaza Strip. Evictions and house demolitions occur for a variety of reasons, such as security concerns or the lack of appropriate permits, and often involve the use of force. This land may then be reallocated to Jewish settlers, or reserved for other purposes such as military zones, bypass roads and quarries. Israel exercises planning control over the majority of the occupied territories and Palestinians face difficulties and discrimination in the granting of permits to build. The Special Rapporteur reported that Israel had confiscated approximately 60% of the West Bank, including 33% of Palestinian land in Jerusalem and 33% of the land in the Gaza Strip. The Special Rapporteur also noted that settlement activity continued to increase, with the settler population increasing by 12.5% in 1999. Settlement in the occupied territories constitutes a violation of Article 49 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (4th Geneva Convention).

Restrictions on the freedom of movement continued to be placed on persons travelling between the occupied territories and Israel, and within the occupied territories itself. Complete closures of the territories are applied in anticipation of, or in the aftermath of, terrorist attacks and on major Jewish holidays. Internal closure can also be applied, which prohibits travel between towns and villages of the occupied territories. Many Palestinians work in Israel or are required to travel through Israel from the Gaza Strip to study in the West Bank. The effect of the policy of closures on trade seriously undermines the economic well being of the West Bank and the Gaza Strip. A safe passage was opened between the West Bank and the Gaza Strip on 25 October 1999 facilitating movement between these areas, but Israel maintained total control over the route, including the provision of permission to travel. Palestinians have to travel through Israeli controlled checkpoints within the West Bank where they are frequently subjected to verbal and physical harassment. The Special Rapporteur noted the construction of the "Erez II" checkpoint which "de facto would completely separate the northern part of the West Bank from the southern part."

Palestinians in East Jerusalem are subject to a wide variety of restrictions on their freedom of movement, and the dispossession and destruction of their homes. Israel applied a "centre of life" policy to Palestinians resident in Jerusalem untill 17 October 1999. This policy allowed Israel to revoke the permanent residency permits of Palestinians who resided for

outside of Jerusalem. After the revocation of the policy, in the context of a Supreme Court challenge, the Israeli Government announced that it would reconsider individual cases where the validity of residence permits was previously questioned, and that Palestinians could retain their residency permits if they could show an appropriate connection to Jerusalem during the period they were absent. This determination remains exclusively at the discretion of the Interior Ministry.

Israel also continued carrying out extra-judicial executions. On 15 December, 1999 the Israeli Defence Force killed two Palestinian men, Iyad al-Battat and Nadir al-Massalmah. Israel suspected that Iyad al-Battat was involved in a *Hamas* attack in January 1999 that killed an Israeli policeman.

The Supreme Court Decision Regarding the Legality of GSS Interrogation Methods

The Supreme Court of Israel, on 6 September 1999, decided in a landmark judgement that certain interrogation methods employed by the Israeli General Security Service (GSS) were illegal. This judgement is a welcome movement towards the prevention of torture and increased respect for the human rights of all within Israel.

Background

In 1987 the Landau Commission of Inquiry released its report concerning the GSS and its interrogation methods. The report concluded that even in the absence of express statutory regulation of its activities the GSS was authorised to investigate those suspected of committing terrorist attacks. This power was derived from the government's residual prerogative powers contained in Art 40 of the Basic Law: Government. More disturbingly, the Commission concluded that GSS investigators were entitled to apply both psychological pressure and a moderate degree of physical pressure. This was said to only apply in cases where the saving of human lives necessarily requires the obtaining of certain information. This report was widely condemned by human rights groups as it effectively sanctioned the use of torture or cruel, inhuman or degrading treatment of detainees during interrogations.

Israel ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in October 1991, but has not explicitly enacted its provisions into domestic law. The Committee against Torture, in 1997 and 1998, called for Israel to implement the

Convention into its domestic law, and found that the interrogation practices used by the GSS constitute torture and therefore violate the Convention. Israel has so far failed to implement any of the recommendations of the Committee.

The Basic Law: Human Dignity and Liberty 1994 protects individuals from violations of their life, body or dignity. The use of moderate physical pressure clearly violates this principle. Article 8 provides that rights granted under this Basic Law can be violated by laws befitting the values of the state of Israel, enacted for a proper purpose, and to an extent no greater than is required. Further, the Basic Law provides that members of the GSS, among others, shall not be subject to a restriction of their rights, nor shall conditions be placed on their rights except by law and to an extent not greater than is required by the nature and character of their service.

Applicants and Arguments

The case resulted from the joining of several High Court petitions regarding the use of interrogation methods by the GSS. The petitions came from individuals who stated they had been subject to GSS interrogation methods during their detentions, and other human rights organisations generally concerned with the GSS interrogation procedures. The applications ranged from assertions that the GSS was not empowered to investigate hostile terrorist activities at all, to protests against the use of particular methods in individual cases. The state responded with arguments asserting that the GSS investigators are duly authorised to interrogate terrorist activities and that the physical means employed do not violate international law and do not cause pain and suffering. The state further asserted that these methods are legal under Israel's domestic law due to the necessity defence.

The Judgement

The Supreme Court concluded that GSS investigators derive their powers from the Criminal Procedure Ordinance (Testimony) which entitles police officers to hold enquiries into the commission of offences. The court ruled only fair and reasonable methods of interrogation would be allowed depending on the circumstances of the case. A fair and reasonable interrogation would never involve the use of torture or other cruel, inhuman or degrading treatment.

The Supreme Court, sitting as the High Court of Justice, specifically stated that the interrogation methods used by the GSS at issue in this case were illegal. The methods examined included shaking, waiting in the

Shabach position, the Frog Crouch, excessive tightening of handcuffs, prolonged exposure to noisy music and sleep deprivation. It was acknowledged by the court that during an interrogation a person may be deprived of normal sleep but stated that intentional deprivation of sleep for excessive periods of time for the purpose of breaking the individual was not within the scope of a fair and reasonable investigation.

The court assumed that while the necessity defence, available in Israeli criminal law, was available to GSS investigators, it could not form the basis of an authority to permit GSS investigators to infringe human rights. Any permission to use physical force in interrogations "must be rooted in an authorisation prescribed by law." Therefore in the absence of an explicit authority, any criminal liability arising from the use of physical pressure in interrogations can be dealt with by the Attorney General. The Attorney General has the discretion to decide in what circumstances investigators shall be prosecuted if they claim to have acted from necessity. The court concluded by saying that:

> Endowing GSS investigators with the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the latters' dignity and liberty, raise basic questions of law and society, of ethics and policy, and of the Rule of Law and security. These questions and the corresponding answers must be determined by the legislative branch.

This statement by the court allows the Israeli Knesset to enact legislation that can sanction the use of physical force in interrogations by members of the GSS. The court added that this legislation, if passed, will have to pass the requirements of Article 8 of the Basic Law: Human Dignity and Liberty. This requires the legislation to befit the values of the state of Israel, to be enacted for a proper purpose, and to be of an extent no greater than is required.

However, the judgement also leaves the government a wide discretion to decide when to prosecute those who use physical pressure in interrogations. As a party to the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Israel is obliged under Article 2 to take effective measures to prevent acts of torture in territory under its jurisdiction. Article 2 of that convention also clearly states that no exceptional circumstances whatsoever may be invoked as a justification of torture. Acts of the GSS involving the placing of any physical pressure on a person come within the definition of torture provided in Article 1 and an official sanctioning of the practice by the Knesset, or a permissive attitude by the government, would breach Israel's international obligations under the Convention.

On 15 September 1999 the Ministerial Committee for GSS affairs established a commission to examine alternatives for developing a lawful manner in which physical force could be used if there was an immediate security danger. The commission, in January 2000, proposed three alternatives which would either allow GSS interrogators to apply moderate physical pressure, allow physical pressure in certain limited circumstances or to not alter the situation created by the Supreme Court decision. In October 1999, forty members of the Knesset submitted the draft Criminal Procedure (Powers and Special Interrogation Methods for Security Offences) Law for enactment. This law would allow the use of physical pressure by GSS investigators where there was a reasonable suspicion that a person had information which if immediately revealed could prevent danger to human life or state security. Both the Minister of Justice and chair of the Knesset Committee on Security and Foreign Affairs strongly opposed the legislation.

The Judiciary

The independence of the civil judicial system is protected in basic laws of Israel, and is generally respected by the legislature and the executive. However, members of the judiciary have tended to acquiesce in government arguments of national security in sensitive cases. The court structure is based on the British Mandate system but the current form of the basic laws has strongly been influenced by the Canadian Constitution. The Basic Law: Judicature, in Article 1, vests all judicial power in the Supreme Court, District Court, Magistrate Court, Religious Courts and any other court designated by law as a court. Article 2 guarantees the independence of persons vested with judicial power when exercising that power. Laws regulating the structure of the court system are contained in Basic Law: Judicature and the Courts Law (Consolidated Version).

Magistrate Courts are at the base of the court structure and are courts of first instance. They hear criminal cases where the penalty does not exceed seven years and civil cases for immovable property or where the value of the claim does not exceed one million shekels. Cases in this court are usually heard by a panel of one judge, but in a particular matter may be heard by a panel of three. Judgements from this court are appealable to the District Court. Currently there are 29 Magistrate Courts, with approximately 220 judges presiding over cases in these courts.

District Courts sit as courts of first instance in limited matters and as an appellate court. As a court of first instance, District Courts hear cases involving serious criminal offences with a penalty exceeding seven years imprisonment and civil matters where the claim exceeds one million

shekels. As a court of appeal, District Courts hear appeals from Magistrate Courts and Administrative Tribunals. Certain District Courts act in special capacities as Maritime Courts or Appeal Courts for elections. In District Courts single judges usually hear cases, but in particularly serious criminal cases or as a court of criminal appeal it sits in a panel of three. The jurisdiction of these courts is slowly being reduced in an overall rationalisation of the court structure. Currently there are 5 District Courts, with approximately 90 judges presiding over cases in these courts.

The Israeli judicial system suffers from long delays and overburdening. A special commission, headed by Supreme Court judge, Theodor Orr, was constituted to suggest structural reforms of the courts. According to the proposed reforms, the Magistrate Courts would become the general courts of first instance, with District Courts hearing appeals from them and being the first instance for the majority of administrative petitions (now submitted to the Supreme Court as High Court of Justice sitting in the first and last instance). The reform proposals have been met with some opposition, and it is not clear at this stage which parts of them will be enacted.

The Supreme Court is the head of the court structure and sits as an appellate court and a High Court of Justice. As a court of final appeal it hears cases from the District Court and its decisions act as a binding precedent for all other courts. As a High Court of Justice it acts as a court of first instance in matters concerning the powers and responsibilities of all those exercising public functions and can order the release of persons unlawfully detained or imprisoned. The Supreme Court also has the power to order the retrial of any person if it appears that a case was based on false evidence that would have changed the outcome of the case or that new evidence has come to light. Cases before the Supreme Court are heard by a panel of three judges, or if a party requests a rehearing of a case already decided by the court, the rehearing is heard by a panel of 5 judges. Questions of fundamental importance or those regarding constitutional issues can be heard by a larger number of judges. The Supreme Court sits in Jerusalem.

Various other courts have been established to deal with specific subjects. Religious Courts are vested with jurisdiction to hear cases that involve personal status. This jurisdiction derives from the Palestine Order in Council 1922. Fourteen religious denominations, *inter alia,* Jewish, Muslim and Christian, have their own courts. Labour Courts have jurisdiction to try offences that arise out of various pieces of legislation concerning labour relations between employer and employee, between two workers or employee unions, or any disputes arising out of a collective agreement. Cases from these courts are appealable to the Supreme Court. The Magistrates Courts also sit as the Family Court, Small Claims Court, Municipal Court, Traffic Court and the Tenancy Tribunal.

Military Courts

Israeli Military Courts established by the Military Justice Law hear cases involving military personnel for military and civilian offences. Separate Military Courts, based on emergency defence regulations enacted during the mandate period, can also try civilians, but are rarely used for this purpose. The definition of military personnel includes all those in compulsory or career service, those in reserves whilst actively on duty, and also, with certain limitations, civil employees in the army and prisoners of war. This is an expansive jurisdiction and removes cases from the civil court system which do not involve active military personnel committing purely military offences. The military court system consists of Military Courts of First Instance and the Military Appeals Court. Decisions from the Military Court of Appeals can be procedurally reviewed by the Israeli Supreme Court. Judges of these courts are military personnel, with the President of the Court having legal training.

Israeli Military Courts also have jurisdiction in the areas of the occupied territories that have not been returned to full Palestinian control (*see chapter on Palestinian Autonomous Areas*). Military Courts in these areas have an expanded jurisdiction covering all cases involving security considerations of the Israeli Military government.

Judges

The independence of the judiciary is secured by a non-political selection process and the guarantee of life tenure. Judges are appointed by the President of the state upon the recommendation of a Judges Election Committee. This committee consists of the President of the Supreme Court, two other Supreme Court judges elected by the body of judges, the Minister of Justice and another minister designated by the government, two members of the Knesset, usually one from the coalition and one from the opposition, elected by the Knesset, and two members of the Chamber of Advocates elected by its National Council.

Judges have guaranteed life tenure and a salary that cannot be reduced except in the case of a general reduction in salary for public officials. Judges can only be removed from office by a majority decision of seven members of the Judicial Election Committee or by a decision of the Court of Discipline. The Court of Discipline consists of a panel of three or five judges with at least two being members of the Supreme Court, and is appointed by the President of the Supreme Court. The grounds for removal are the conviction of the judge for an offence which involves moral turpitude, the judge acting in a manner unbecoming his status as a judge or if the Judicial

Elections Committee finds that the judge has obtained his appointment unlawfully. These provisions guarantee members of the judiciary procedural and substantive independence from interference by the state.

LAWYERS

The legal profession is regulated by the Chamber of Advocates Law, which established the Israeli Bar. The Israeli Bar is headed by a president who is elected every 4 years by all the Bar's members. The President heads the Central Committee which is the Bar's executive organ and is responsible for the management of its affairs. Members of the Central Committee are elected by the National Council. The National Council makes rules concerning the organisation of the Bar and its activities and is responsible for proposals to amend the Chamber of Advocates Law. The National Council consists of the President of the Bar and his predecessor, the Director General of the Ministry of Justice, the State Attorney, the Military Advocate General, 25 members elected by the other members of the profession generally and 3 members from each district elected by each district committee. This structure ensures that the legal profession maintains a sufficient degree of independence from the executive, and that the interests of lawyers are properly represented.

The ability of Israeli or Palestinian Lawyers to visit their Palestinian clients is often restricted. Palestinian lawyers are frequently unable to visit their clients in Israel jails because of the difficulty in obtaining travel permits due to general security concerns. Even if an Israeli lawyer is representing a Palestinian client, they will frequently be denied access through court orders. For instance, Elia Theodory attempted to visit his client Iyad Habib Mohammad on 31 January 1999, who had been detained by Israeli General Security Services on 26 January 1999. This request was refused because a prevention order denying access to a lawyer had been issued. This order was renewed several times until 4 March 1999. Also, Andre Rosenthal was denied access to his clients, Bassam and Hasan Al-Arabid, for 35 days after their arrest. Mr Rosenthal's clients were arrested to obtain information about his client's brother who was wanted by Israeli security forces. This is a serious breach of every detainee's right and a state's obligation to ensure assistance by a lawyer upon arrest or detention within 48 hours of that detention.

CASES

Fares Abu Hassan {lawyer, Director of Solidarity International}: In October 1999, the Israeli Military Commander of the Central Division

issued a six month administrative order preventing Fares Abu Hassan from representing any individuals in Military Courts unless he received prior permission. No reasons were given for this order, apart from that it was required for security reasons. In January 2000 the issuance of the order was appealed to an appeals committee, but the appeal was rejected. Fares Abu Hassan is the Director of the West Bank office of the human rights organisation Solidarity International, and his practice focuses on the representation of Palestinians in Israeli Military Courts. On 23 January 2000 a request was placed to represent 15 individuals before these courts, but as of 1 March 2000, no response had been received.

ITALY

The main problems in the Italian judiciary are the excessively lengthy trials and the influence of corruption and organised crime on political and economic life which have important repercussions for judicial activity.

Italy is a republic composed of regions, provinces and municipalities. The 1948 Republican Constitution subjects the state to the Rule of Law, establishes the division of power and basic human rights guarantees for citizens. The political structure is composed of an executive, a legislature and a judiciary. The government is in the hands of the President of the Council of Ministers (Prime Minister) who is nominated by the President of the Republic and must have the confidence of parliament, to which he or she is accountable. The President of the Republic, who enjoys mostly supervisory and guarantee functions, is also elected by a two thirds vote of parliament sitting in plenary session, jointly with representatives of the regions, for a renewable seven-year term. On 13 May 1999, the parliament, which comprises a Chamber of Deputies (lower chamber) and the Senate of the Republic (Upper chamber), elected Mr. Carlo Azeglio Ciampi as President of the Republic.

Italian politics have long been characterised by high instability, illustrated by the series of successive and short-lived government political coalitions that have been in power since the end of the Second World War. This instability has prompted some legal initiatives to change the electoral system in order to provide the Italian political system with greater stability. With this aim a referendum for the abolition of 155 seats in the Chamber of Deputies, which are elected on the basis of proportional representation, was held on 18 April. The initiative was approved by 90% of voters, and it also seeks to eliminate the system of proportional representation and introduce the majority system in the election of the lower chamber. However, the results are not legally binding as less than 50% of the electorate actually cast their votes.

Mr. Massimo D'Alema and his party of the Democratic Left (PDS), leading a centre-left coalition, has been in office since November 1998 when he was invited to form the government after Mr. Romano Prodi stepped down. Mr. Prodi resigned after a series of successive political crisis within his coalition. Mr. D'Alema also faced similar problems. In December 1999, he resigned after an internal crisis split the centre-left coalition, but the President of the Republic asked him to stay and form a new government, which he did with the support of the political party of former Prime Minister Prodi. Local and regional elections were held in June and resulted

in the advance of the right-wing Freedom Party led by former Prime Minister Mr. Silvio Berlusconi.

Human Rights Background

Human rights are generally respected by government officials and security forces. However, there were frequent allegations of torture, especially against immigrants, and mistreatment in prisons. On 5 May 1999, the United Nations Committee against Torture examined Italy's third periodic report and adopted its Concluding Observations. Apart from welcoming the introduction of a bill criminalising torture for discussion in parliament, the Committee expressed concern that:

- despite the efforts of the authorities, the prison system remains overcrowded and lacking in facilities which makes the overall conditions of detention not conducive to the efforts of preventing inhuman or degrading treatment or punishment...the Committee notes with concern that reports of cases of ill-treatment in prison continued and that many of them involved foreigners;
- the lack of training in the field of human rights, in particular, the prohibition against torture, to the troops participating in peacekeeping operations and the inadequate number of military police accompanying them, which was responsible in part for the unfortunate incidents that occurred in Somalia.

The Committee against Torture's observations came only some months after the UN Human Rights Committee had issued its own observations and recommendations in August 1998. Among those concerns and recommendations more directly related to the judiciary are the following:

- the system of holding offenders, before and after trial, in "preventive detention" until all possible stages and appeals are finalised, which can take up to 6 years, "could constitute an infringement of the presumption of innocence and the right to the principle of a fair trial within a reasonable time or to release". The Committee recommended in this regard the elimination of the system by which the length of time a person could be held in preventive detention is calculated proportionately to the possible prison punishment for the offence, and to restrict the grounds for preventive detention only to those cases in which detention is essential to protect legitimate interests such as the appearance of the accused at the trial (paragraph 15);
- further steps need to be taken to speed up criminal and civil trials, in order to increase the efficiency and promptness of the entire system of justice (paragraph 17);

- that "the maximum period during which a person may be held in custody following arrest on a criminal charge be reduced, even in exceptional circumstances, to less than the present five days and that the arrested person be entitled to access to legal advice as soon as he or she is arrested" (paragraph 14);
- the concern at the increase in incidents of racial intolerance (paragraph 18).

It should be noted that non-governmental reports also included instances of discrimination and violence against immigrants. In June more than a 1000 gypsies had to flee their homes after a local mob in Naples burnt their camps in revenge for an incident involving a young Serbian gypsy.

Anti-Mafia Operations and Organised Crime

Numerous Mafia leaders and members were captured and tried during the year. Authorities ordered police crackdowns in main cities such as Milan in order to keep under control the ever increasing and diversifying activities of Mafia groups. In August 1999 the police discovered a Mafia network for teaching children how to shoot from moving motorcycles. The information was revealed by the Public Prosecutor of Caltanisetta (south Sicily), Mr. Gianni Tinebra, who said that the children had already carried out a series of killings. On 10 December 1999, seventeen Mafia members were sentenced to life imprisonment for the 1992 planting of a car bomb that killed Mr. Paolo Borsellino, Chief Public Prosecutor in Palermo, Sicily, and five policemen in an attempt to halt investigations. Italian legislation permits joint trials (*maxiprocessi*) for offenders charged with criminal association.

Despite these encouraging steps forward judicial officials reported that organised crime is far from being defeated, but rather is growing by adopting new forms of organisation and establishing international links. Among the new fields into which organised crime has extended are: trafficking of immigrants, mainly from the Balkans, drugs dealing and arms trafficking.

During the first months of the year, Prime Minister D'Alema ordered army troops to return to Sicily to help combat organised crime. The troops returned to the island less than a year after they had pulled out.

In late August 1999, Rome investigating judge, Ms. Rosario Priore, made public the report of her investigations into the 1980 crash of an Itavia aircraft DC9 near the island of Ustice (north Sicily) which resulted in the death of 81 people. She concluded that the flight was caught up in an air battle between a NATO fighter aircraft and Libyan MIGs and that

evidence relating to this had been concealed. This led to the indictment of four Italian generals with charges of crimes against the Constitution and high treason. Another five military officials were charged with giving false testimony.

The fight against Mafia and other organised crime has also resulted in threats and attacks on judges and magistrates. The Prosecutor General, in his 1999 report, stated that a magistrate in Milan had received a bomb-package, without mentioning the magistrate's name. The Prosecutor qualified the attack as politically motivated. Another bomb-package was sent.to the adjunct to the Public Prosecutor of Turin, allegedly by an anarchist group. The attack was also reported by the Prosecutor General.

THE JUDICIARY

Article 104 of the Constitution guarantees the autonomy and independence of the judiciary. However, political influence, pervasive corruption and organised criminality pose great threats to that independence.

The Italian judiciary has been under close scrutiny in recent years, mainly because of the excessive delays of trials and the lengthy proceedings. Since the new European Court of Human Rights initiated its work in November 1998, there have been 40 cases against Italy. In 37 of these cases Italy was found in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms's (ECHR) provisions on reasonable duration of trials. The Committee of Ministers of the Council of Europe, in accordance with its powers under the European Convention, also found Italy in violation of the Convention in at least 361 cases, most of them for reasons related to the unreasonable duration of proceedings. Most of the violations occurred in civil cases.

On 15 July 1999 the Committee of Ministers of the Council of Europe passed a resolution on "The excessive duration of proceedings before the civil jurisdiction in Italy". In this resolution the Committee, while recognising and praising the measures adopted by the Italian authorities to overcome the slowness of judicial proceedings, decided to keep Italy under scrutiny for a year to see if the measures adopted actually help to prevent new violations of the Convention.

In response to this criticism, and presumably to the observations and recommendations of other human rights bodies, Italy has tried in the last two years to improve the performance of its judiciary with regard to the speed of trials so as to fully respect the international standards that require trials to take place within a reasonable time. For this purpose Italy has introduced new institutions into its legal system and widened the powers of others.

Structure

The ordinary Italian judiciary is composed of a Supreme Court of Cassation which is the highest tribunal in the country, Appeal Courts and a system of lower courts that has recently been restructured. The Court of Cassation is based in Rome and has national jurisdiction to review sentences passed by lower courts, but only on questions of law. Appeal Courts are located in each judicial district – a total of 29 - and hear cases on questions of law and fact.

The lower court system is composed of Justices of the Peace at the bottom, which were introduced by law in 1992 and are fully operative since 1995. On 2 June 1999 a reform introducing single-judge Courts of First Instance (*Giudice Unico di Primo Grado*), to replace two other tribunals of first instance, was implemented. The single-judge courts replace the one-judge courts of first instance for minor criminal and civil cases (*Pretura)* and the first instance tribunals for more serious civil and criminal cases (*Tribunale)*. The reform, which has already started and will take some time to be fully implemented, is aimed at making the first level of the justice system simpler and more expeditious. It implies the closing of some 502 posts of *Pretura* and 100 posts of prosecutors which are attached to them, but on the other hand it will increase the number of single-judge tribunals.

Justices of the Peace, originally with jurisdiction over minor civil cases, were given additional jurisdiction over minor criminal cases not involving prison punishment in 1999. These cases were formerly dealt with by the Pretura and so this reform hands over part of their jurisdiction to the Justices of the Peace.

The new single-judge Courts of First Instance (*Giudice Unico*) were first given jurisdiction over civil matters. Jurisdiction over criminal matters was due to be transferred also to these new tribunals in January 2000, but a last minute measure postponed the transfer until June 2000 as a result of certain problems of implementation that could not be solved on time. Apparently, the law of procedures applicable in criminal matters needs to be adapted for the operation of the new tribunals. There were also administrative and procedural problems to be solved before the new tribunals could assume full jurisdiction over criminal matters.

The implementation of the *Giudice Unico* in the bigger cities has also been problematic in that the populations they are to serve in the cities are very large and a single judge, dealing with civil and criminal matters at the same time, would obviously be insufficient. For this reason a special status has been given to the tribunals in the cities and major towns and a bench of judges sits instead of a single judge, with additional "chambers" when necessary.

To try the most serious crimes there are also special courts called Courts of Assizes (*Corte ∂e Aββiβe*) at the first level, and Appeals Courts of Assizes at the appeals level. These courts sit as benches composed of two professional judges, one of whom presides, and six lay members who sit together and rule on both the facts and the law, which distinguishes them from jurors.

Public prosecutors are considered part of the judiciary, as magistrates. In fact, all magistrates, as members of the judiciary, can perform the tasks either of judges or prosecutors, as the Council of the Judiciary sees fit. During the past years there have been multiple legislative initiatives to separate the careers of these two positions within the judiciary and some are still under study in parliament. The Prosecutor has a monopoly over criminal prosecutions. According to the Constitution he or she is bound to prosecute whenever a crime has been committed. He or she can also order the arrest of a suspect at any time although his decision is subject to review by a judge.

There is a judge of preliminary inquiries (*Giu∂ice ∂elle In∂agini Preliminari*) whose role is to control the legality of the Prosecutor's acts. At the request of the Prosecutor this judge examines the evidence and decides whether it is sufficient to warrant a trial. At the same time the judge decides whether the accused should be detained pending their trial, and his decision on the matter is subject to review by a special tribunal on liberty (*Tribunale ∂ella Libertá)*.

There is a Constitutional Court with fifteen members, one third of whom are appointed by parliament, another third by the President of the Republic and one third by the supreme ordinary and administrative courts, for a period of nine years. The functions of the Constitutional Court are judicial review of the constitutionality of laws and the arbitration of conflicts of competence between state organs, or between the central government and the regions.

Appointment and Security of Tenure

Judges and prosecutors are appointed through public and competitive examinations organised by the High Council of the Judiciary (*Conβiglio Superiore ∂ella Magiβtratura*), an autonomous body under the 1948 Constitution (Article 104 of the Constitution). This body has powers to decide on employment, assignments and transfers, promotion and disciplinary measures for judges (Article 105). It is headed by the President of the Republic who, together with the President of the Court of Cassation and the Prosecutor General attached to it, are *ex officio* members of the High Council. In addition to these there are a further thirty members who are

elected as follows: two thirds are voted in by all ordinary judges of all categories and one third is elected by parliament in joint session of its two chambers. The elected members of the High Council remain in office for a non-immediately renewable period of four years. By the end of 1999 a proposal was underway for a referendum on a rule that would allow judges to elect their representatives in the Council from among all serving judges, and not only from those included in the list prepared by the High Council itself.

Article 107 states that judges may not be removed from office, dismissed or assigned to other courts or functions unless following a decision of the High Council of the Judiciary, taken in accordance with the guarantees of defence established by the rules of the judiciary or with the consent of the judge in question.

With regard to discipline, the Minister of Justice, who plays an important role within the judiciary, as provided for by the Constitution, has the power to instigate disciplinary proceedings against magistrates (judges and prosecutors alike). The Prosecutor General attached to the Supreme Court of Cassation has the same power. However, it is for the disciplinary chamber of the High Council to ultimately decide on the matter.

Administration and Resources

General responsibility to administer all services related to the judiciary is in the hands of the Minister of Justice. In matters of organisation or distribution of courts the Minister of Justice has to consult with the Council of the Judiciary, but is solely responsible for providing all the material needs of the judiciary, including the recruitment and management of personnel, adequate premises and equipment, among others. The Minister of Justice is also empowered to carry out inspections and inquiries or to request information from the administrative heads of every court in relation to the functioning of the justice system.

The budget allocated to the judiciary has experienced a slight increase in recent years. In 1998 it amounted to 1.38% of the general national budget and in 1999 and 2000 it rose to 1.40%.

Constitutional Reform: Due Process of Law

By a constitutional law (Law 2, published on 23 December 1999), Article 111 of the Constitution was amended by adding a paragraph that guarantees the right to due process of law in all judicial proceedings. The amendment states that due process of law should always be afforded in every proceeding before the courts, and, more precisely, in criminal

proceedings where the accused shall have the right to be promptly informed of the charges against him or her and be allowed time and conditions to prepare his or her own defence. The accused shall also have the right to examine or have examined witnesses against him or her and to present witnesses in his or her favour under the same conditions. The amendment also establishes the principle whereby all evidence being produced during trial should be subject to contradiction by the other party. Finally, it establishes the legal right to be tried within a reasonable time. The old Article 111 did not contained a similar provision, nor did one appear in any other part of the Constitution. The amendment introduces an internationally recognised right into the Italian constitutional system.

The full implementation of this constitutional amendment is, however, proving to be somewhat problematic. Its intended immediate application, which extends to currently ongoing criminal trials, may paralyse the proceedings because of a lack of adequate implementing legislation. Some confusion in judicial circles has already been generated and there are fears that the predictability of the legal system will suffer due to a change of the procedural rules in ongoing proceedings. By January 2000 the necessary implementing legislation was ready to be approved in the form of an urgent decree-law.

Clean Hands (Mani Pulite) Anti-Corruption Operations

The *mani pulite* operation continued during 1999 in its eight consecutive year. However, the initial impetus has faded away and the Milan pool of judges and prosecutors denounced the presence of an increasing number of obstacles which impede the carrying out of their anti-corruption investigations, at a time when corruption is re-emerging. In February 1999, when the campaign celebrated its eighth anniversary, authorities and magistrates made a positive appraisal of their work, but also denounced the persistence of formidable obstacles. On that occasion, the Chief Prosecutor of Milan, Mr. Gerardo D'Ambrosio, declared that "investigations are more and more difficult in a time when corruption re-emerges, and successive reforms have had the effect of extending the duration of proceedings". The declarations were backed by former Chief Prosecutor, Mr. Paolo Di Pietro, and the National Magistrates Association. Mr. Di Pietro stated in particular that "in eight years the parliament has only approved norms making the investigations more difficult, slowing down the proceedings and allowing those accused to escape convictions". Many people under investigation, amongst them politicians, have accused the magistrates of abuse of power, violating human rights, such as the right to be presumed innocent, and of abuse of the institution of preventive detention.

Figures issued on the occasion and disseminated by the press illustrate the magnitude and importance of the operations during the past eight years: 2,565 people were investigated, of whom 1,408 were actually prosecuted or have been already convicted, but only four are serving prison sentences.

During 1999 anti-corruption trials involving some prominent politicians, such as former Prime Ministers Mr. Bettino Craxi, Mr. Silvio Berlusconi and Mr. Giulio Andreotti continued. These and other defendants accused the magistrates of being politically motivated.

On 11 March 1999 a court of Milan acquitted former Prime Minister, Mr. Berlusconi, of tax fraud. It was the first acquittal after three convictions. Later, in October, the Court of Appeal in Palermo confirmed the acquittal of Mr. Berlusconi. Another Appeals Court overturned one of his convictions for the use of an "offshore" account to channel funds to Mr. Craxi's party in 1991. However, a judge in Milan decided on 26 November 1999 that there was enough evidence to sustain a trial against Mr. Berlusconi on charges of bribing judges in a case linked to the sale of a supermarket chain. A former Defence Minister in Mr. Berlusconi's Cabinet was also sent to stand trial for the same charges, which also include false accounting for funds allegedly used for bribery. The trial is due to start in March 2000. In yet another case Mr. Berlusconi is due to stand trial on charges of channelling "unaccountable funds" for illegal party financing between 1991-1995, through one of his offshore companies.

The highest criminal court ordered a retrial of Mr. Betino Craxi, former Prime Minister, on charges of illegal party financing. He had already been found guilty in four other corruption cases and sentenced to a total of 26 years in prison. In January 2000 he died in his self-imposed exile in Tunisia after refusing to go back to Italy for medical treatment. The Chief Prosecutor for Milan, the leader of the *mani pulite* operations, had said in October 1999 that Mr. Craxi would not risk immediate transfer to prison if he returned for medical treatment. This was confirmed in November when a court in Milan ruled that he could return to Italy and serve his convictions for corruption under house arrest.

On 24 September 1999 a tribunal of Perugia, composed of professional judges and lay people, acquitted former Prime Minister, Mr. Giulio Andreotti, of charges of ordering the murder of an investigative journalist in 1979. The trial started in 1996. All other defendants, including well-known Mafia members, were also acquitted. In another case, Mr. Andreotti was also cleared of charges of collusion with the Mafia by a three-judge tribunal in Palermo on 27 October 1999.

Outstanding Cases

Sofri Case

In January 2000 Mr. Adriano Sofri and two other members of the leftist group "Continuous Struggle" were convicted by the Court of Appeal of Venice for the murder of a police inspector in 1972. The Sofri case started in 1988 and underwent a series of trials and retrials due to alleged irregularities. In August 1999 Mr. Sofri was provisionally released pending his retrial which was ordered by the Supreme Court of Cassation.

The convictions, and the sentence of 22 years of imprisonment, raised considerable criticism among the public in Italy, not only because of the excessive length and the cumbersome proceedings of the trials, but also because the convictions were largely based on the late and confusing testimony of a police collaborator considered biased and unreliable. The comparison with other trials was inevitable and it was noted that in one of the trials against Mr. Berlusconi the testimony of another police collaborator was not considered reliable.

IVORY COAST

The Ivorian court system continued to be used as a means to harass political opposition leaders and independent jurists. The judiciary is often subjected to interference from the executive branch and is highly vulnerable. Towards the end of the year, a *coup d'etat* led by General Robert Guei ousted President Bédié.

The Ivory Coast is a republic, having gained independence from France on 7 December 1960. The 1960 Constitution provides for the division of power between the three branches of government. The executive power is vested in the President of the Republic who is both the head of state and head of the government. The legislative power belongs to a bicameral parliament composed of a National Assembly, elected for five years by universal direct suffrage, and a Senate, two thirds of which is elected for six years by universal indirect suffrage, the remainder being elected by the President him or herself. The judicial system is organised under the provisions of Title VII of the Constitution.

Under the provisions of Law N° 98-387 of 2 July 1998, the President is elected for 7 years. The Cabinet is selected by the President and is responsible to him or her. Formerly, Article 9 of the Constitution only provided for the duration of the President's mandate and re-election. Article 9 was amended, however, and now also provides for conditions of nationality (born of Ivorian parents), residence and age, and extends his or her mandate from 5 to 7 years.

The Ivory Coast had for a long time been considered as an example of political stability and economic growth in Africa, although it was not a democracy. The political framework was dominated for 30 years by Mr. Houphouet Boigny and his party (*Parti Démocratique de Côte d'Ivoire, PDCI*). In 1990, there was hope of democratisation when the country embraced a multiparty system, and freedom of the press, the Rule of Law and other positive developments were introduced.

However, on 24 December 1999 General Robert Guei took power in a military *coup* and the then President Bédié was exiled. General Guei promised to respect democratic rules but dissolved the National Assembly, the Constitutional Council and other institutions of the Republic. The International Commission of Jurists (ICJ) condemned this military *coup*, irrespective of the reasons behind it.

Human Rights Background

Constitutional Changes

In 1998, several constitutional amendments were discussed and were finally approved by Law N° 98-387 on 2 July, 1998. The most disputed amendments were those which extended the presidential term from 5 to 7 years, the amendment allowing the President to extend his or her term in office indefinitely in cases of emergency (Article 10), and the establishment of a Senate, making the Speaker of the Senate an alternate to the President of the Republic (Article 11). These amendments were contested by the opposition parties.

Political Parties

Opposition political parties have enormous obstacles *vis-à-vis* the increasing power of the ruling party, the Democratic Party of the Ivory Coast. The major opposition party is the Rally of Republicans (RDR), whose leader is former Prime Minister, Mr. Allassane Ouattara, considered to be the main challenger to Mr. Henri Konan Bédié in the year 2000 elections. Thirty opposition members were arrested and held without trial for a long period after the presidential elections in October 1995 and the government did not instigate investigations into these arrests. They were released in December 1998 when an amnesty was granted by the National Assembly.

Impunity

Impunity is widespread in the country. Killings and many other abuses by security forces go unpunished. In addition, violence and insecurity lead to an ongoing situation of human rights violations in the country.

Freedom of Expression

There were widespread student demonstrations in May 1999, reportedly in response to the failure of the government and the RDR to discuss the forthcoming elections of the year 2000. The demonstrations were harshly repressed by the security forces and the university was closed. Student associations had already been the subjects of harassment by the authorities in 1995, with many reported cases of torture and incommunicado detention.

The situation worsened in 1999 as many political opponents were arrested during the demonstrations, including some members of parliament. Although the Constitution provides for political freedom under Article 7, political opponents are often prevented from exercising this right.

The freedom of expression of the national press is not respected by the authorities and the press is generally closed to opposition parties. In 1996 Amnesty International stated that "the legal system is being used systematically to stifle the opposition press and restrict its right to freedom of expression".

In November 1999, eleven leading opposition members were sentenced to 2 years in jail for public order offences after organising demonstrations. The trials were highly political, according to Mr. Ouattara, leader of the RDR, and were condemned by the international community.

Nationality Issues

One third of the population of the country is composed of foreign immigrants, as the Ivory Coast was a host country for asylum seekers from Burkina Faso and Liberia during the war there. However, there are now problems emerging regarding land rights. Ivorians want back much land which has been cultivated by immigrant populations. A conflict has developed between the landlords (*Kroumen*) and the workers (*Allogènes*). The authorities are not doing anything to prevent or halt the situation. Twelve thousand Burkinabés have been expelled from the Tabou region.

One case in particular is very illustrative of this problem of nationality. The government accused political opposition leader, Mr. Alassane Ouattara, of not having Ivorian nationality ("Ivoryness"), and of falsifying his identity documents in order to participate as a candidate in next year's presidential elections. Mr. Ouattara accused the government of defamation, and violence between police and the opposition leader's supporters erupted.

Mr. Outtara's Ivorian nationality certificate was cancelled. His supporters say that he is being harassed simply because of the threat he represents to the government in the upcoming elections in the year 2000. President Bédié claims that Mr. Ouattara's father is from Burkina Faso, and that consequently he does not fulfil the Ivorian nationality requirement for candidacy for president, and thus he is not eligible to run as a candidate in the elections.

Mr. Ouattara maintains that both his parents were born in the Ivory Coast and that he can prove this.

The Judiciary

Title VII of the 1960 Constitution deals with the authority of the judiciary and the Supreme Court (*De l'Autorité Judiciaire et de la Cour Suprême*).

Every article from this title has been modified by Law N° 98-237 of 2 July 1998. The amended Article 58 provides for the independence of the judiciary, of which the President of the Republic is guarantor, assisted by a High Council of the Magistracy (*Conseil Supérieur de la Magistrature)*.

Section 2 provides, in Article 62, for the Supreme Jurisdictions (*Juridictions Suprêmes*). The Court of Cassation (*Cour de Cassation)* is the court of final instance for civil affairs, whereas the Council of State (*Conseil d'Etat)* is the highest tribunal for administrative affairs. The Supreme Court is a single body composed of 4 chambers (constitutional, judicial, administrative, auditing). It is competent to try government officials for major offences.

Although the Constitution provides for an independent judiciary, it is in practice subject to executive and other outside influence (it follows the lead of the executive in national security or politically sensitive cases).

Appointment

According to Article 60 of the 1960 Constitution (as amended), judges are appointed by the President of the Republic, on proposal by the Minister of Justice and after the approval of the *Conseil Superieur de la Magistrature.*

Cases

Zoro Epiphane Ballo (judge): In September 1999, Judge Zoro E. Ballo issued an Ivorian nationality certificate to political opponent Mr. Alassane Ouattara.

On 27 September 1999 Mr. Alassane Ouattara, who had declared himself a future candidate in the 2000 presidency elections, asked for a nationality certificate. He gave all the documents required for this kind of certificate. The following day, Judge Zoro E. Ballo issued the certificate, signed it and recorded it. On 29 September, copies of the certificate were given personally to a representative of Mr. Ouattara.

Prior to this, Judge Zoro E. Ballo had received a phone call from the criminal affairs desk of the Ministry of Justice and Human Rights, saying that he should not issue any document before receiving the approval of the Minister of Justice. As this phone call was not confirmed by mail and the judge had no doubt about the validity of the documents given to him by Mr. Ouattara, he decided to ignore it.

On 5 October, an investigation took place at the Ministry of Justice to

establish whether the judge had signed Mr. Ouattara's nationality certificate. The Minister of Justice asked the judge to find a remedy to cancel this certificate. He was also threatened with being charged with forgery if he refused to cancel it. He was further accused of being a "rebel judge".

On 6 October, a meeting was held, at which Judge Zoro E. Ballo was not present. The Minister of Justice alleged that there were irregularities in the document. As a consequence, on 12 October, the judge was accused of forgery by the Minister of Justice, without respect for the presumption of innocence.

The principal accusations were that the judge did not sign a written inquiry, despite the fact that the law provides for the possibility of oral inquiry. It was also alleged that the date of signature of the certificate was not correct, which the judge denied.

In a press conference, Judge Zoro Ballo said:

> It was not a provocative attitude. I am a judge. The law gives me the power and the competence to take decisions. I do not have to refer to the head of state. The head of state is head of the executive. I am a member of the judicial power. In the name of the principle of separated powers, I am not bound by the head of state's declarations.

On 12 November 1999, the judge resigned under heavy pressure.

JAPAN

A drastic reform of the judicial infrastructure is to be carried out by the Judicial System Reform Council established in June 1999. The right to request government funded legal counsel is guaranteed only after indictment, even for capital cases. Thus, in Japan only persons able to pay lawyers' fees are guaranteed the right to counsel before indictment.

According to its 1947 Constitution, Japan is a parliamentary democracy. Sovereignty is vested in the people, and the Constitution refers to the Emperor as the "symbol of the state". Executive power is held by the Cabinet, composed of the Prime Minister and ministers of state. The Cabinet is responsible to the Diet, a bicameral parliament holding legislative authority. The Diet is elected by universal suffrage and secret ballot and is composed of the 500 member House of Representatives and the 252 member House of Councillors. The Prime Minister must be a member of that body. The Emperor has no powers related to government, but formally appoints the Prime Minister.

The Liberal Democratic Party (LDP) formed a Cabinet in July 1998 under Prime Minister Keizo Obuchi. In January 1999, the Liberal Party (LP), led by Ichiro Ozawa, was brought into the government. On 5 October 1999, the Cabinet was again reshuffled and the New Komeito Party was included in the government. This gave the government a majority in both the House of Representatives and the House of Councillors. Prime Minister Keizo Obuchi died on 30 April 2000 after weeks in a coma following a stroke. Yoshiro Mori replaced Mr. Obuchi as Prime Minister on 2 April.

HUMAN RIGHTS BACKGROUND

The UN Special Rapporteur on Torture, in his report to the 1999 UN Commission on Human Rights, expressed deep concern about harsh rules and punitive measures in prisons, and the lack of fair and open procedures for deciding on disciplinary measures against prisoners accused of breaking the prison rules.

The Special Rapporteur noted the Concluding Observations of the Human Rights Committee after the discussion of the Japanese report in

October 1998 (*see Attacks on Justice 1998*). The Committee expressed concern about allegations of violence and sexual harassment of persons detained pending immigration procedures.

The Human Rights Committee also expressed concern that Japan did not take steps to abolish the death penalty and about the conditions under which people are held on death row. Executions in Japan are often surrounded by secrecy. In 1999, several executions took place without the families of the prisoners being informed.

On 29 July 1999, Japan became a state party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. The Japanese Government accepted the inter-state complaint procedure under Article 21 of the Convention, but did not allow individuals to lodge complaints to the Committee against Torture under Article 22 of the Convention.

Allegations of coerced confessions remained persistent in Japan throughout 1999. The *daiyo kangoku*, the substitute prison system (*see Attacks on Justice 1998*) is under the control of a non-investigating branch of the police. This lack of supervision by a separate authority presents an opportunity for the abuse of the rights of prisoners.

The Permanent Mission of Japan to the International Organisations in Geneva, in its reaction to the chapter on Japan in the 1998 edition of *Attacks on Justice*, said that detention officers treat prisoners properly and referred to the Constitution and the Code of Criminal Procedures under which torture and coerced confessions are forbidden. Allegations of coerced confessions, however, continue and a separate authority would better protect prisoners from possible mistreatment.

The issue of compensation for "comfort women" who were detained and forced to provide sexual services to the Japanese military during the Second World War remained unresolved and the provision of funds by the Japanese Government through the Asian Women's Fund to individual victims was the subject of severe criticism from many victims and their defenders. The UN and the ILO called on the Japanese Government to fully compensate these women and to prosecute those responsible.

The Judiciary

The Constitution establishes the independence of judges in the exercise of their duties. Judicial power is vested in the Supreme Court and inferior courts as established by law. The inferior courts include eight High Courts (with six additional branch courts), 50 District Courts (with 242 local

branches), 50 Family Courts (also with 242 local branches) and 438 Summary Courts.

The Supreme Court has jurisdiction over appeals and those complaints specifically prescribed by the Code of Procedure. The opinion of every judge of the Supreme Court must be expressed in writing. The High Court has jurisdiction over appeals from judgements by the lower courts.

Appointment Procedures

The Supreme Court consists of 15 justices, among them the Chief Justice, who is designated by the Cabinet, and formally appointed by the Emperor. The Cabinet appoints all other Supreme Court justices. Article 41 of the Court Organisation Law provides that Supreme Court justices shall be appointed from among persons "of broad vision and extensive knowledge of law, who are not less than forty years of age". The law also requires that at least ten of the Supreme Court justices have been a President of the High Court or a judge for at least ten years, or have been a judge of the Summary Court, a public prosecutor, a lawyer, or a professor or assistant professor of legal science for a total of at least 20 years.

Lower court judges are appointed by the Cabinet from a list prepared by the Supreme Court. The list is generally composed of persons who have passed the Bar and who have completed two years at the Legal Research and Training Institute. The recruits selected from the list serve as assistant judges for ten years, after which they can be appointed to full judicial positions, renewable every ten years.

Security of Tenure and Impeachment

The retirement age of Supreme Court judges is 70. As provided for in Article 79 of the Constitution, the appointment of the judges of the Supreme Court is reviewed at the first general election of the House of Representatives after a period of ten years. When the majority of the voters favours the dismissal of a judge, he shall be dismissed. The Constitution provides that judges shall be removed only by public impeachment or when the judge has been declared mentally or physically incapable of performing his duties.

No disciplinary action is to be administered against a judge by any executive organ or agency. The Constitution provides, however, that when a judge has "deviated from his duty, neglected his duty or degraded himself, he shall be subjected to disciplinary punishment by decisions as provided for elsewhere by law".

According to the Law of Impeachment of Judges enacted in November 1947 a judge is "liable to be removed from his post on being impeached and convicted for either conduct in grave contravention of official duties or grave neglect of official duties; or other misconduct seriously affecting the integrity of a judge".

The Indictment Committee of Judges consists of five members of the House of Representatives and five members of the House of Councillors and is convened by the chairman or on request of at least five members of the Committee. The Indictment Committee investigates the request for indictment, but it may also entrust the investigation to government officials. A resolution to remove or suspend a judge requires a two thirds majority vote of the members. The proceedings of the Committee are not open to the public.

A Court of Impeachment consisting of seven members of the House of Representatives and seven members of the House of Councillors considers the written indictments. The Court of Impeachment must notify the indicted judge upon receiving a written indictment, whereupon the indicted judge is entitled to retain a lawyer. The provisions of the laws and ordinances concerning criminal procedure will apply.

Oral proceedings are conducted in public and a written judgement is determined by a two thirds majority of the judges participating in the hearing. A judge shall be removed upon the pronouncement of a judgement; however the position may be recovered if, after five years, a justification exists or any new evidence is found which rebuts the cause for removal.

According to the Court Organisation Law, the courts at all levels are responsible for their own administration and supervision by means of a Judicial Assembly at each level, and the corresponding chief judge. The Judicial Assembly of the Supreme Court is ultimately responsible for the administration of the judiciary.

The Judicial Assembly is comprised of all the Supreme Court justices with the Chief Justice as its chair. A General Secretariat assists the Supreme Court judges. The Supreme Court General Secretariat, together with the Legal Training and Research Institute, sponsors conferences and study sessions on various topics, including the interpretation of the law.

The recommendations of these conferences are compiled by the General Secretariat and distributed to the judges for application when deciding cases. It is feared that this practice allows the General Secretariat to exercise *de facto* control and influence over the Judicial Assembly and consequently, the judiciary.

Judicial System Reform Council

In June 1999, the law for establishing the Judicial System Reform Council was enacted. The Council, a government body comprising thirteen members appointed by the Cabinet, aims to draft in two years proposals for Japan's judiciary in the 21st century. On 21 December 1999, the Council published a report "Aiming at Judicial System Reform," which states that drastic reform of the judicial infrastructure, whereby further human resources are integrated, is essential.

Japan Judges Network

Progress in terms of the independence and freedom of judges was made when, on 18 September 1999, twenty judges from all over the country gathered to form the Japan Judges Network aimed at an open legal system. Their first effort was to publish the book "Judges Appeal!" authored by twelve members under their real names. On 30 October 1999, they held a symposium in Osaka at which four judges on active duty expressed their opinions on several themes.

As previously reported (*see Attacks on Justice 1998*) Japanese judges have been restrained with respect to joining organisations and making statements outside court since the Supreme Court in 1970 issued a warning to judges not to become members of a politically coloured organisation. The Network therefore specifies that "the Network shall not have political or labour union type characteristics".

Lawyers

The Constitution provides under Article 34 that there shall be no arrest or detention without privilege of counsel. Article 40 para. 1 of the Criminal Procedures Code (CCP) guarantees the right to counsel for all suspects and accused.

The right to request government funded legal counsel, however, is guaranteed by the CCP only after indictment, even for capital cases. Thus in Japan, only persons able to pay lawyers' fees are guaranteed the right to counsel before indictment. Through the efforts of the Bar Associations, the Duty Attorney System, supported by funds from the lawyers themselves, gives free first visits with counsel. For suspects who require pre-indictment counsel but are unable to pay lawyers' fees, there is a legal aid system run by the Japan Legal Aid Foundation.

Cases

Tsutsumi Sakamoto (lawyer): Mr. Sakamoto and his wife and son were slayed in 1989 by the Aum Shinrikyo or Aum Supreme Truth, the violent sect that is accused of plotting the nerve gas attack on the Tokyo subway in March 1995 that killed 12 people and injured thousands. Mr. Sakamoto was an anti-sect lawyer that represented families of some of the cult's members. In October 1998, Mr. Okazaki, a former member of the sect, was convicted for these murders and sentenced to death.

Yoshihiro Yasuda (lawyer): Mr. Yasuda is the chief defence counsel for Chizuo Matsumoto (alias Shoko Asahara), founder of the Aum Shinrikyo or the Aum Supreme Truth, a violent sect. Mr. Yasuda has also served as defence counsel in many death penalty cases and is well known as a core activist for Japan's death penalty abolition movement. On 6 December 1998, Mr. Yasuda was arrested and on 25 December indicted for financial irregularities. Mr. Yasuda pleaded not guilty during the trial.

The Tokyo District Court decided on 11 June 1999 to release Mr. Yasuda on bail, after he had spent 6 months in custody. The Public Prosecutor appealed this decision and the release was revoked. These proceedings were repeated three times and finally, after more than ten months in custody, Mr. Yasuda was released on bail by a fourth decision on 27 September 1999.

It is argued among some lawyers that the arrest, indictment and long-term custody in his case were intended to interfere with Mr. Yasuda's efforts in death penalty cases and particularly with his defence of the Asahara case.

The Japan Federation of Bar Associations (JFBA), an ICJ affiliate, issued a statement on 23 July 1999 saying that the custody of Mr. Yasuda for as many as seven and a half months (at that stage) resulted from misuse of the detention system. The JFBA strongly demanded a fair trial based on the principle of "the presumption of innocence" and under the condition that a suspect who pleads innocence and is proved so should be released at the earliest possible juncture.

JORDAN

There have been several examples of government interference with the judiciary over recent years such as allegations that judges have been reassigned temporarily to another court or judicial district in order to remove them from a particular case. Individuals to be tried before the State Security Court are usually held in pre-trial detention without access to lawyers until shortly before trial, and trials are frequently held in camera.

The Hashemite Kingdom of Jordan is a constitutional monarchy. On 7 February 1999, King Hussein bin Talal who had been the ruling monarch since 1952 passed away and was succeeded by his son, Abdullah bin Hussein. The Jordanian monarch is the head of state and shares executive power with the Prime Minister and other Cabinet members who are responsible to the parliament. The King appoints and dismisses the Prime Minister and the other Cabinet members. Islam is the state religion in Jordan.

The parliament consists of a 40-seat upper house, the Senate, and a 80-seat lower house, the Chamber of Deputies. Members of the Senate are appointed for four years by the King and the deputies are directly elected, also for a four year term. The King may convene, adjourn and suspend the lower house of the parliament.

HUMAN RIGHTS BACKGROUND

Since 1989, significant improvement has been witnessed in Jordan. Parliamentary elections have been restored and martial law suspended. A greater margin of freedom has been installed.

Freedom of expression and freedom of the press are still infringed upon somewhat in Jordan, despite the 1999 amendments to the Press and Publications Law which removed some restrictions. Journalists remain a vulnerable group in Jordan and face harassment if they criticise the royal family. Harassment goes as far as arrest and conviction. Journalists are also pressured into conducting self-censorship.

Jordan has committed itself to live up to international human rights standards by becoming a state party to six major UN human rights treaties, including the International Covenant on Civil and Political Rights and the

International Covenant on Economic, Social and Cultural Rights. With regard to the Convention on the Elimination of Discrimination against Women, the monitoring committee expressed its concern in January 2000 that although the Convention was ratified in 1992 and:

> although the Convention acquired the force of law within the country upon ratification, it has still not been published in the Official Gazette, which is a prerequisite to it becoming legally binding.

Honour Killings

According to reports of the UN Special Rapporteur on Violence against Women, each year about 25-30 women are killed in Jordan in so-called "'honour-killings", which refers to the murder of a woman by a family member for the perceived or presumed violation of family honour. Often the perpetrators receive only a mild sentence as the practice of honour-killings is socially accepted.

Jordan's first and second periodic reports were considered by the Committee on the Elimination of Discrimination against Women (CEDAW) in January 2000. During the presentation of the reports of Jordan a representative of the Jordanian Government referred to a number of proposed revisions to the Penal Code that were pending before parliament. These included amendments to provisions relating to the penalties for adultery and for violence against women, as well as rape and murder.

A proposal made by the government, supported by the royal family, to repeal Article 340 of the Penal Code, which exonerates a man for killing or injuring his wife or certain other female relatives in an adulterous situation, had also been placed before parliament. On 27 January 2000, however, the lower house of parliament did not accept this proposal to abolish Article 340. The Senate had, in fact, earlier voted to abolish it. In March 2000 the parliament was to vote again on the matter.

In its Concluding Observations the Committee expressed its concern:

- that cultural practices and the persistence of strong stereotypical attitudes about the roles and responsibilities of women and men affecting all spheres of life are impediments to the full implementation of the Convention;
- that several provisions of the Penal Code continue to discriminate against women. In particular, the Committee is concerned that Article 340 of the Penal Code provides a defence to a man who kills or injures his wife or his female kin caught in the act of adultery.

The Committee urged the government:

> to provide all possible support for the speedy repeal of Article 340 and to undertake awareness-raising activities that make honour killings socially and morally unacceptable. It also urges the government to take steps that ensure the replacement of protective custody with other types of protection for women.

The Judiciary

The Constitution provides for the independence of the judiciary. However, the judiciary is sometimes subject to pressure from the executive branch in politically sensitive cases.

There are three types of courts in Jordan: civil, religious and special courts. The civil courts include Magistrate Courts, Courts of First Instance, Courts of Appeal, the Court of Cassation and the High Court of Justice. Magistrate courts, the lowest in the civil system, hear minor criminal and civil cases; more important cases go to Courts of First Instance. Decisions of these courts are subject to review by the Courts of Appeal. The Supreme Court of Jordan presides over cases against the state, hears appeals, and interprets the law.

Religious courts (*Shari'a Courts*) deal with personal status matters and rule on issues such as marriage and divorce for Muslims and inheritance cases involving both Muslims and non-Muslims.

State Security Court

The state of emergency and martial law, declared in 1967, were suspended in 1991 and a State Security Court was established. The court is comprised of three judges who may be either civilians or military officers, appointed by the Prime Minister. Lawyers have challenged the appointment of military judges to the State Security Court in civilian cases as a violation of the independence of the judiciary (*see Attacks on Justice 1996*).

The State Security Court has a broad range of competence, including jurisdiction over cases involving sedition, armed insurrection, financial crimes, drug trafficking, slandering the royal family, crimes involving the possession of weapons and explosives and conspiracy against state security.

Individuals to be tried before the State Security Court are usually held in pre-trial detention without access to lawyers until shortly before trial, which are frequently held in camera. Confessions extracted under duress

have been accepted by the State Security Court, although the Court of Cassation has ruled that the State Security Court cannot issue death sentences based on such confessions alone. Sentences issued by the State Security Court may be appealed to the Court of Cassation and death penalties are automatically referred to it for review.

Judicial Council

Judicial affairs are administered by a Judicial Council. The Judicial Council is composed of *ex-officio* members: the Chief of the Court of Cassation, the Chief of the High Court of Justice, the Attorney General, the Secretary General of the Ministry of Justice, the Chiefs of the Courts of Appeal, the two most senior judges in the Court of Cassation, the most senior Inspector of the Ministry of Justice and the Chief of Amman's Court of First Instance.

The Council examines matters related to the judiciary and the Prosecutor's office. It then reports to the Minister of Justice with recommendations relating to improving the functioning of the courts and public prosecutions. Judges are appointed, transferred, or removed upon a decision of the Judicial Council, confirmed by the King. Article 24 of the Law on the Independence of the Judiciary states that judges may not be transferred from a judicial career to another profession without prior consent of the Judicial Council.

Article 30 of the Law on the Independence of the Judiciary provides that disciplinary action may be undertaken by the Public Prosecutor upon request of the Minister of Justice. The Judicial Council is only to be informed of the Minister's request. If the Public Prosecutor fails to submit a case against the judge within 15 days, the Council can initiate its own disciplinary procedures. The action should state all the charges and evidence against the judge. Grounds for disciplinary action include delays in the examination of cases or in the pronouncement of judgements and revealing state secrets. After it makes the necessary investigations and interrogates witnesses, the Judicial Council may decide to hold a hearing which is made public only on the request of the judge. The judge may present his or her position personally or be represented by a lawyer. The decision should include the reasons on which it is based and may be appealed before the Supreme Court.

Appointment, Promotion, Transfer and Dismissal

A committee whose members are appointed by the King decides about appointment, promotion, transfer and dismissal of judges. The Ministry of

Justice has great influence over a judge's career. There have been several allegations that judges have been reassigned temporarily to another court or judicial district in order to remove them from a particular case.

Security of Tenure

According to Article 43 of the Law on the Independence of the Judiciary, the age of retirement for a high judicial office, such as those of the High Court of Justice, the Court of Cassation and the presidency of the Courts of Appeal, is 72. All other judges may remain in service until they reach the age of 68.

As reported in the 1996 edition of *Attacks on Justice*, Article 14 allows the Judicial Council, upon the recommendation of the Minister of Justice, to require the retirement of any judge who has completed the period of service prescribed by the law on retirement. Consequently, judges may be forced to retire upon completion of 20 years of service or they may be suspended, in accordance with the Law on Civil Service, with half-pay, upon completion of 15 years of service. The Minister of Justice has used Article 14 in the past to recommend to the Judicial Council that senior and independent judges be forced to retire, as in the case of Judge **Farouk Al-Kilani** for example.

Government Interference

There have been several examples of government interference with the judiciary over recent years. A case is known about a judge who was pressured by the President of the Judicial Council to replace the bail he had set in a case by a legal guarantee. The judge resigned from his post.

In 1998 Judge **Farouk Al-Kilani** was forced to retire from the Supreme Court, allegedly because of his involvement in the High Court of Justice's decision that considered the May 1997 amendments to the Press and Publications Law unconstitutional.

Another example of government interference with the judiciary is the appointment of three judges for a tribunal specially established to deal with a case of child trade. The chosen court members considered and decided this case according to the wish of the Minister of Justice. The Ministry of Justice used its influence over the judiciary in this case to protect an influential person. In another case a judge gave a reception to celebrate the verdict of innocence of a politician. In addition, he was given a promotion afterwards.

KENYA

Corruption in the Kenyan judiciary is reported to be widespread, and the administration of justice suffers generally from inadequate funding and political influence. The extent of executive influence was illustrated with the appointment of a noted government supporter to office of Chief Justice. The continuing economic crisis and political instability further undermined the judiciary and led to a deteriorating human rights situation. These factors contribute to a climate of impunity.

Kenya achieved independence from the United Kingdom in 1963. Since then it has only had two presidents, Jomo Kenyatta and Daniel arap Moi, and the National Assembly has been dominated by the Kenya Africa National Union (KANU).

The Constitution of Kenya provides for the separation of powers between the arms of government. The President is the head of state and appoints a Cabinet of ministers from among the members of the National Assembly to aid and advise the government of Kenya. The Cabinet is collectively responsible to the National Assembly in the execution of its office. The current President, Daniel arap Moi, has been in power since 1978, and is serving his last term which ends in 2002.

The legislative power of Kenya is vested in the parliament which consists of the President and the National Assembly. The National Assembly consists of 210 popularly elected members, 12 members nominated by the President and two *ex officio* members. The President is responsible for the summoning of parliament at least once a year and can at any time dissolve it.

The worsening financial situation and continuous reshuffling of government ministers by President Moi led to a growing lack of confidence in the government and the development of political instability. All government bodies were subject to persistent allegations of corruption.

There was continuing controversy surrounding President Daniel arap Moi's proposal for a review of the Constitution. In June 1999 the President announced that the review was to be carried out solely by the National Assembly and not by an independent body consisting of the National Assembly and other interest groups. However, on 11 November 1999, the National Assembly voted, by a margin of 185-0, for a constitutional amendment affirming the supremacy of the National Assembly and limiting the power of the presidency to control the management of the assembly.

HUMAN RIGHTS BACKGROUND

The human rights situation in Kenya continues to deteriorate with the worsening economic crisis and as the government actively attempts to silence any political criticism or opposition. The absence of adequate enforcement mechanisms and a lack of political will leads to a general culture of impunity for violators of human rights.

The Constitution of Kenya, in Chapter V, protects the fundamental rights and freedoms of the individual. This chapter protects, *inter alia*, the right to life and liberty, the freedoms of expression, assembly, association and movement and prohibits slavery, discrimination, and inhumane and degrading treatment. These rights are subject to such limitations to ensure that the enjoyment of those rights and freedoms does not prejudice the rights and freedoms of others or the public interest.

Kenya is also a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

The Special Rapporteur on Torture, Mr Nigel Rodley, visited Kenya in September 1999 (E/CN.4/2000/9/Add.4). He concluded from his mission that there was widespread and systematic physical abuse of suspects, amounting to torture, by the police. These beatings were administered generally to obtain confessions or other information. The Special Rapporteur further stated that there "is a general sense of impunity among those, notably members of the Criminal Intelligence Department, charged with investigating suspected criminal activities." Those alleging torture or abuse by police must lodge their complaint at the same police station where they allege the torture took place. The police and other security forces also commit a large number of extra-judicial killings. The Kenyan Human Rights Commission reported that 167 people were killed by police between January and September 1999, with at least 24 being subjected to torture.

The Special Rapporteur also reported that the police frequently detained individuals for extended periods without bringing them before a magistrate. The Constitution provides that a person is to be brought before a court as soon as reasonably practicable, and where he has not been brought before a court within 24 hours, or within 14 days for a capital offence, the onus of proving that the detention was reasonable shall rest with those asserting such. The Penal Code provides that robbery with violence is a capital offence, and it appeared to the Special Rapporteur that a large number of cases were classified in that manner to enable arbitrary detention for extended periods.

The elimination of all civil groups from the constitutional reform process led to increased political protests and calls for a more democratic society. Police responded to these protests with mass arrests and physical violence, including the use of tear gas and, on occasion, live ammunition. There were also increased reports of state supported gangs to assault political opposition and disperse protests.

The Public Order Act allows public meetings upon notification to the police. The police can only prevent a meeting from occurring if there is another meeting scheduled for the same area. The police continue to ignore these provisions and disrupt meetings with force that they claim are illegal. President Moi has called for the denial of permits to politicians who use public demonstrations to abuse other politicians.

The extent of executive influence over the judiciary has resulted in a system where the government can violate fundamental human rights with impunity. Actions cannot be taken to uphold the Rule of Law without facing reprisals from the government. The judicial system can then be used to further political objectives and to persecute opponents of the ruling political party, without fear of judicial condemnation.

The Judiciary

The Kenyan legal system is primarily based upon English common law with tribal law, hindu and sharia law being applied in certain disputes. The Constitution is the supreme law of the land and can only be modified by a vote of sixty five percent of all the members of the National Assembly. The legal system suffers greatly from inefficiency, corruption and a lack of adequate funding. The Kenyan Government announced on 5 April 2000 at the 56th Session of the Commission on Human Rights that the court registries were in the process of being computerised, and an increase in the number of judicial officers was being considered in order to address the inadequacies of the judicial system.

The Court of Appeal and the High Court are superior courts of record and are estabhshed by Chapter VI, Part 1 of the Constitution of Kenya. The Court of Appeal sits at the head of the court system and has jurisdiction to hear appeals from the High Court as may be conferred upon it by law. The High Court has unlimited original jurisdiction in civil and criminal matters and such other jurisdiction as may be conferred on it by law. As a result of the Kwach Committee report (*see Attacks on Justice 1998*) a criminal division of the High Court was estabhshed in March 2000. The High Court has sole jurisdiction to hear election petitions and constitutional references. There are approximately 60 High Court judges and 11 Court of Appeal judges.

Section 65 provides that parliament can establish subordinate courts which have such jurisdiction as may be conferred by law. Magistrate Courts are the main subordinate courts and are divided into District Magistrate Courts of three classes, appeals being brought to the more senior categories of the courts. A wide range of tribunals have also been created to deal with specialised issues. Islamic and hindu law can also be applied for those of that faith, generally for personal issues such as marriage or divorce.

Although legislative power is vested in the legislature by Section 30, and executive power is vested in the President by Section 23 of the Constitution of Kenya, the Constitution does not explicitly vest the judicial power in the judiciary. The structural separations in the Constitution imply the vesting of judicial power in the judiciary, but the lack of a direct provision to that effect theoretically enables the legislature or executive to usurp the exercise of that power. It is then possible to establish a separate branch of courts, directly under the control of the other arms of government, to exercise judicial power in particular cases or in general.

Section 77 of the Constitution provides that those charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. This section also provides for the presumption of innocence, the allocation of adequate facilities and time for the preparation of a defence, and the right to legal representation of one's own choice.

The lack of independence of the judiciary allows the government to violate these rights with impunity. People are detained for long periods without being charged or brought to trial, are subject to police brutality, and a detainee's right to have access to legal counsel is frequently denied. These cases violate the provisions protecting the fundamental rights and freedoms of the individual in the Constitution and do not come within the public interest exception. These actions also violate the Kenyan Penal Code.

The Attorney General

By virtue of Section 26(3) of the Constitution the Attorney General has absolute discretion to institute and undertake, take over and continue, or discontinue at any stage before judgement, any criminal proceeding. Subsection (8) of that section provides that in exercising his functions the Attorney General shall not be subject to the direction or control of any other person or authority. Section 109 of the Constitution vests the power of appointing the Attorney General in the President.

The Attorney General is also an *ex officio* member of parliament, and is the government's principal legal adviser. The placing of such a wide discretionary power to institute criminal proceedings in a member of the government clearly creates a conflict of interests. The Attorney General has used his power to discontinue private prosecutions against government officials, stifling criticism and limiting the accountability of the government.

JUDGES

The Constitution does not explicitly guarantee the independence of the judiciary or provide adequate safeguards to ensure judicial independence. The judiciary is subject to executive interference and is widely perceived by the public to be corrupt. This has resulted from improper selection procedures and the provision of insufficient funds to ensure the adequate and impartial operation of the judicial system.

JUDICIAL SELECTION

The procedures for selection and removal and the conditions of service for superior court judges are guaranteed by the Constitution. The Chief Justice of Kenya is appointed directly by the President, and all other judges in the superior courts are appointed by the President acting in accordance with the advice of the Judicial Service Commission. The Judicial Service Commission consists of the Chief Justice as chairman, the Attorney General, two other judges of a superior court designated by the President and the chairman of the Public Service Commission. The Attorney General and the chairman of the Public Service Commission are appointed by the President. The criteria for appointment is experience in advocacy for seven years.

This selection process clearly indicates that the judiciary is not free from executive influence. The legal structure creates a selection process in which the main role is played by the President. The President is solely responsible for the selection of all participants in the appointment process and can exercise considerable influence over their decision making. Furthermore the consolidation of power in Kenya in the President clearly exacerbates the deficiencies in the selection process. There is not a sufficient guarantee against appointment for improper motives and therefore judicial impartiality is undermined.

Conditions of Service and Removal

Judges serve until seventy four years of age and can only be removed from office for inability to perform the functions of their office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour. The Chief Justice is responsible for determining the remuneration of members of the judiciary. The President is responsible for the ultimate removal of judges, and he acts upon a recommendation provided by a tribunal specially constituted for the matter.

Section 62(5) of the Constitution of Kenya provides that the President shall appoint the tribunal consisting of a chairman and four other members that have held judicial office, who are qualified to hold judicial office, or upon whom the President has conferred the rank of senior counsel. The members of the tribunal are selected by the President. The President can suspend a judge, upon the recommendation of the Chief Justice, where a question of removal has been referred to a tribunal.

The inadequacies of the selection process are shown clearly if one looks at the appointment of the Chief Justices of Kenya. As stated previously, the appointment of the Chief Justice is solely a presidential responsibility. The Chief Justice is responsible for the administration of the judiciary and has the power to transfer cases and judges within the judicial system.

Since 1963, the President has frequently appointed judges of a foreign origin on the basis of a contract, thereby bypassing life tenure and clearly making the position of Chief Justice subject to executive influence. Furthermore, the absence of governing criteria for appointment, or any review process, allows the President to appoint a Chief Justice purely on a discretionary basis. The previous Chief Justice, although having seven years experience as an advocate, was not a practising advocate or sitting judge at the time of appointment, and had been previously dismissed twice from judicial office on disciplinary grounds.

The current Chief Justice, Bernard Chunga, was previously Deputy Public Prosecutor, and was active in that role in prosecuting critics of the government. The Presidential control over the selection process clearly undermines the independence of the judiciary and allows the President to directly assert control over the judiciary. It also creates a climate in which the judiciary exercises its powers in accordance with the President's wishes, or otherwise faces administrative retribution from the President or his direct appointee, the Chief Justice.

The inadequacies of the judicial system are highlighted by the case of Tony Gachoka, the editor and publisher of the Post on Sunday. Mr Gachoka was convicted of contempt of court on 20 August 1999 after he published articles alleging corruption in the judiciary. The case was

heard by the full bench of the Court of Appeal exercising its discretion to invoke its original trial court jurisdiction and sentenced Mr Gachoka to six months imprisonment as well as fining him 1,000,000 Kenyan shillings. Some of the judges hearing the case had been mentioned in Mr Gachoka's articles as being involved in the corruption scandal. During the trial Mr Gachoka was not permitted to give oral evidence or call witnesses in his defence. As the case was heard by the highest court of appeal, the full court of the Court of Appeal, Mr Gachoka was deprived of the ability to appeal the decision.

LAWYERS

Lawyers in Kenya are represented by the Law Society of Kenya. The Law Society is established by an act of parliament and governed by a ruling council elected annually by the members of the Law Society. All practising lawyers within Kenya are required to become members of the society.

The Law Society of Kenya is mandated to maintain and improve the standards of conduct of the legal profession, to conduct continuing legal education of its members, and to assist the government and the judicial system in all matters regarding legislation and the administration of law in Kenya. In the latter role the Law Society has been active in the promotion of human rights and in participating in the constitutional reform process.

The Special Rapporteur on Torture, from his mission to Kenya (E/CN.4/2000/9/Add.4), reported that lawyers are frequently denied access to clients even when they are in possession of a court order. During the mission, the Attorney General of Kenya acknowledged that, based on Chapter V of the Constitution of Kenya, lawyers have a legal right to free and immediate access to their clients at any time. This right was routinely ignored by police or prison officials and detainees were not informed of their right to have access to legal counsel. The UN Basic Principles on the Role of Lawyers provides that it is a primary responsibility of government to ensure that lawyers are able to perform their professional functions without intimidation, hindrance, harassment or interference.

The unavailability of legal aid, with approximately only 10% of those accused of crime being represented by counsel, was also of concern. This problem was particularly serious in the north of the country. All persons are entitled to have the assistance of a lawyer in defending themselves in criminal proceedings. Governments have a positive duty to ensure effective and equal access to lawyers and to allocate sufficient funding to legal services for poor or other disadvantaged persons.

CASES

Babu Achieng {Chief Magistrate in Nakurà}: Justice Achieng was murdered on 15 January 1998 by unidentified persons. (*see Attacks on Justice 1998*. On 7 September 1999, three men were charged with Justice Achieng's murder. The accused denied the charge and alleged that they had been tortured by the police, displaying injuries to various parts of their bodies.

LIECHTENSTEIN

The European Court of Human Rights ruled on 28 October 1999 in the case *Wille v. Liechtenstein* that the government of Liechtenstein had violated Articles 10 and 13 of the European Convention on Human Rights and Fundamental Freedoms.

The Principality of Liechtenstein is a constitutional monarchy and a parliamentary democracy. There is a hereditary monarchy and Prince Hans-Adam II is the head of the state. The leader of the majority party in the unicameral parliament, the *Landtag*, is appointed by the monarch as the head of the government. The *Landtag* consists of 25 seats and its members are elected, for a period of four years, directly by universal suffrage. The parliament elects the members of government who are then appointed by the Prince.

HUMAN RIGHTS BACKGROUND

Liechtenstein is a state party to the major international human rights treaties: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

There have been no allegations of grave violations of human rights in Liechtenstein. In February 1999, however, the Committee on the Elimination of All Forms of Discrimination against Women, criticised the Liechtenstein Government in its Concluding Observations after discussion of the government's initial report on the implementation of the Convention. The Committee expressed its concern:

> that patriarchal patterns of behaviour persist and thereby compromise *de jure* equality between women and men that has been achieved.

> The Committee expresses deep concern at the persistence of *de facto* inequality between women and men, which is particularly reflected in the low participation of women in public life and decision-making, in the economy and in their under-representation in tertiary education.

JUDICIARY

The court system is comprised of lower courts, High Courts, a Supreme Court and an Administrative Court that hears appeals against government decisions. The State Court protects the rights accorded by the Constitution, decides on conflicts of jurisdiction between the courts and the administrative authorities and acts as a disciplinary court for members of the government.

The *Landtag* elects the members of the judiciary who are then consequently appointed by the Prince. The Prince also has the authority to alter criminal sentences or pardon offenders.

WILLE V. LIECHTENSTEIN

The European Court of Human Rights delivered a judgement on 28 October 1999 regarding a complaint lodged against the Liechtenstein Government by Mr. Wille under the European Convention for the Protection of Human Rights and Fundamental Freedoms The Court found the government in violation of Articles 10 and 13 of the Convention.

In 1992 an issue arose between Prince Hans-Adam II and the Liechtenstein Government relating to political competence in connection with the question of Liechtenstein's accession to the European Economic Area. Mr. Wille was at that time a member of government. Following a discussion between the Prince and members of the government at a meeting on 28 October 1992, the matter was settled on the basis of a common declaration by the Prince, the *Landtag* and the government.

In December 1993, Mr. Wille was appointed President of the Liechtenstein Administrative Court (*Verwaltungsbeschwerdeinstanz*) for a fixed term of office. On 16 February 1995, in the context of a series of lectures on questions of constitutional jurisdiction and fundamental rights, Mr. Wille gave a public lecture at the Liechtenstein Institute on the nature and functions of the Liechtenstein Constitutional Court. Mr. Wille expressed the view that the Constitutional Court was competent to decide on the interpretation of the Constitution in cases of disagreement between the Prince and the *Landtag*.

A newspaper published an article on the lecture and as a result the Prince wrote a letter to Mr. Wille stating that, *inter alia*, he would not appoint Mr. Wille in the future to a public office as he considered that Mr. Wille did not feel himself to be bound by the Constitution.

In spring 1997, Mr. Wille's term of office as President of the Administrative Court expired. On 14 April 1997 the Liechtenstein *Landtag* decided to propose him again as President of the Administrative Court, but the Prince refused to accept the proposed appointment. He stated that he was convinced that Mr. Wille did not feel bound by the Liechtenstein Constitution and that he would violate his duties as head of state if he were to appoint Mr. Wille as President of the Administrative Court.

On 25 August 1997 Mr. Wille filed a complaint against the Liechtenstein Government with the European Commission on Human Rights. Mr. Wille complained that the decision of the Prince not to appoint him to public office in the future constituted a violation of his rights under Articles 6 (right to a fair trial), 10 (freedom of expression), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Commission declared the application admissible and stated that:

> there had been a violation of Article 10 (fifteen votes to four); that in the present case it was not necessary to determine whether there had been a violation of Article 6 (seventeen votes to two); that there had been a violation of Article 13, in conjunction with Article 10 (sixteen votes to three); and that no separate issue arose under Article 14, in conjunction with Article 10 (seventeen votes to two).

After the Commission declared the complaint to be admissible both the Commission and the government of Liechtenstein referred the case to the European Court of Human Rights. Mr. Wille, in the proceedings before the court, only submitted a request to establish a violation of Articles 10 and 13 of the Convention.

• Violations of Article 10

Article 10 of the European Convention on Human Rights and Fundamental Freedoms states:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...

> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The court decided on 28 October 1999 on the matter and said that:

> The announcement by the Prince of his intention not to reappoint the applicant to a public post constituted a reprimand for the previous exercise by the applicant of his right to freedom of expression and, moreover, had a chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future.
>
> It follows that there was an interference with the exercise of the applicant's right to freedom of expression, as secured in Article 10 § 1.

The government was of the view that Mr. Wille was invited to give the lecture as a judge and that he had used the opportunity to express his own political and legal opinions, thereby risking the public trust in the independence and impartiality of the judiciary.

The court, however, stated that "questions of constitutional law, by their very nature, have political implications" and that Mr. Wille's lecture did not contain remarks on pending cases, nor did he criticise persons or public institutions or insult high officials or the Prince. The court further observed that the government did not refer to any incident suggesting that the lecture of Mr. Wille influenced his performance as President of the Administrative Court. Furthermore, the government did not indicate that Mr. Wille acted in a objectionable way in the pursuit of his judicial duties.

The court then assumed that the interference was prescribed by law and pursued a legitimate aim but it was of the opinion that the interference was not "necessary in a democratic society":

> On the facts of the present case, the court finds that, while relevant, the reasons relied on by the government in order to justify the interference with the applicant's right to freedom of expression are not sufficient to show that the interference complained of was "necessary in a democratic society". Even

> allowing for a certain margin of appreciation, the Prince's action appears disproportionate to the aim pursued. Accordingly the court holds that there has been a violation of Article 10 of the Convention.

• **Violations of Article 13**

Article 13 of the Convention states:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In a previous judgement, the court determined that the remedy must be "effective" in practice as well as in law. The court in this case therefore decided:

> As regards the government's argument that the applicant should have seized the Constitutional Court against the *Diet [Landtag]* for not having insisted on its right to nominate him for a new term of office as President of the Administrative Court, it suffices to note that the applicant's complaint under Article 10 concerned acts by the Prince and not by the *Diet*. The government, however, has failed to show that there exists any precedent in the Constitutional Court's case-law, since its establishment in 1925, that that court has ever accepted for adjudication a complaint brought against the Prince. They have therefore failed to show that such a remedy would have been effective. It follows the applicant has also been the victim of a violation of Article 13.

The court decided that the government had to pay non-pecuniary damage of CHF 10,000 and bare the cost and expenses of CHF 91,014.05 for the Stasbourg proceedings.

MALAYSIA

The Malaysian judiciary, although it generally acts independently, was widely seen to be complicit in political prosecutions by the government, particularly in the trial of former Deputy Prime Minister, Anwar Ibrahim. There were continuing tense relations between the judiciary and the legal profession and there were sustained attacks on the independence of the legal profession by the government. The government instituted sedition proceedings against Karpal Singh, Anwar Ibrahim's defence lawyer, for statements he made in court in the defence of his client. Malaysia continues to act in defiance of the International Court of Justice, by not granting the Special Rapporteur for the Independence of Judges and Lawyers immunity from prosecution.

Malaya gained independence from the United Kingdom in 1957. In 1963 the areas of Malaya, Sabah, Sarawak and Singapore joined to form the Federation of Malaysia. Singapore left the Federation in 1965. The Federation of Malaysia currently consists of thirteen states: the eleven states of peninsular Malaysia and the two states of Sabah and Sarawak on the island of Borneo.

Malaysia is a constitutional monarchy, headed by the *Yang di-Pertuan Agong*, who is elected by the Conference of Rulers for a term of five years. The Conference of Rulers consists of the hereditary rulers of the states of peninsular Malaysia. The current *Yang di-Pertuan Agong* is Salahuddin Abdul Aziz Shah who was elected in April 1999.

The Constitution embodies the principle of the separation of powers. The legislative power of the Federation is vested in a bicameral parliament consisting of the Senate (*Dewan Negara*) and the House of Representatives (*Dewan Rakyat*). The Senate consists of 26 members elected by state assemblies and 43 appointed by the *Yang di-Pertuan Agong*. The members of the House of Representatives are directly elected by the public for a period of five years. The National Front (*Barisan National*), a coalition of twelve parties dominated by the United Malays National Organisation (UMNO) has held power since independence.

The executive authority is vested in the *Yang di-Pertuan Agong* and is exercisable by him or by the Cabinet, or any other minister authorised by the Cabinet. Section 40 of the Constitution requires that the *Yang di-Pertuan Agong* act in accordance with the advice of the Cabinet or the Prime

Minister. The Cabinet is appointed by the *Yang di-Pertuan Agong* and is collectively responsible to the parliament.

Each of the thirteen states of Malaysia has its own constitution and legislative assembly. The federal Constitution delineates the respective legislative competences of the federal and state parliaments.

Concurrent federal and state elections were held in November with the ruling National Front Coalition maintaining its two thirds majority. The UMNO lost twenty seats including those of five cabinet ministers. Dr Mahathir bin Mohamed Iskandar continued as Prime Minister for his fifth consecutive term.

The International Bar Association, the Centre for the Independence of Judges and Lawyers, the Commonwealth Lawyers Association and the *Union Internationale des Advocats* conducted a joint mission to Malaysia from 17-27 April 1999. The mission examined the legal guarantees for the independence of the judiciary and whether they are respected in practice; the ability of lawyers to render their services freely and whether there were any impediments to the proper administration of justice. The report, entitled Justice in Jeopardy, was published in April 2000.

Human Rights Background

Human rights continue to be routinely violated in Malaysia. The trial of former Deputy Prime Minister, Anwar Ibrahim, highlighted the repressive measures that the Malaysian Government uses against what it perceives as actions prejudicial to Malaysia or as representing a lack of understanding of sensitive issues facing the government.

Anwar Ibrahim was found guilty on 14 April 1999, on four charges of corruption under the Emergency (Essential Powers) Ordinance 1970 No. 22 and sentenced to six years imprisonment. The trial was widely seen to be unfair, and was criticised by NGO s and the governments of Australia, the Philippines, the United States of America and the European Union.

During the trial allegations were made of coerced confessions, torture and police brutality. Anwar Ibrahim himself was subject to a beating by the Inspector-General of Police, Abdul Rahim Noor. Peaceful public protests in support of Anwar Ibrahim were the subject of excessive force by the police, with the use of tear gas, water cannons and mass arrests.

The trial itself was considered to be unfair, with the prosecution being permitted to alter the charges after the completion of their evidence; the Attorney General being permitted to head the prosecution team despite

being implicated in Anwar Ibrahim's defence of political conspiracy; the determination of the relevance of defence witnesses before they had given evidence; and finally, the defence of political conspiracy being ruled irrelevant by the presiding judge.

International Obligations

Malaysia is party to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, both with reservations, and the Convention on the Prevention and Punishment of the Crime of Genocide. It is not a party to the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, citing the reason that they do not properly reflect Asian values.

Domestic Obligations

Part II of the Federal Constitution of Malaysia protects certain fundamental liberties. These include the right to life, freedom from slavery, equality before the law, freedom of religion and the freedom of movement, speech, peaceful assembly and association. However, the Constitution allows the derogation from these rights as is deemed necessary or expedient in the interest of the security of the Federation or public order and morality.

Sections 149 and 150 allow the derogation from the provisions of Part II of the Constitution. Section 149 allows the parliament to promulgate a law in response to actions taken or threatened by a substantial body of persons that, *inter alia*, excite disaffection against the government. This law can be inconsistent with the provisions regarding the freedoms of speech, assembly and association and the due process of law, including the right to be represented by a lawyer. Section 150 allows the declaration of a state of emergency by the *Yang di-Pertuan Agong* where the security or economic life of the Federation is threatened.

A declaration of a state of emergency was made in 1969 and has not been revoked by the *Yang di-Pertuan Agong*, or by a resolution of both houses of parliament as required by the Constitution.

Restrictive Legislation

Various pieces of legislation have been enacted under the exceptions provided by the Constitution which allow the government to violate human

rights with impunity. The Internal Security Act 1960, based on Section 149, allows the executive to detain persons for two years without trial, renewable indefinitely and not subject to judicial review, except on procedural matters. The act also provides the police with the power to detain a person suspected of "acting in a way prejudicial to Malaysia" for up to 60 days without trial. The Dangerous Drugs (Special Preventive Measures) Act 1985, and the Emergency (Public Order and Prevention of Crime) Ordinance 1969 also allow for administrative detention for periods of two years without trial.

The Sedition Act 1948 defines a "seditious tendency" as a tendency to bring hatred or contempt, to excite disaffection against any ruler or any government, or to excite disaffection against the administration of justice. The government invokes this act against criticism of the government, in particular criticism related to the Attorney General's perceived political and selective prosecutions. The Printing Presses and Publications Act 1984 also severely limits the freedom of the press and of free speech. It grants the Minister absolute discretion to grant, refuse or revoke a licence for a printing press or for publishing a newspaper. It also makes an offence the production of a publication that, *inter alia*, is likely to promote feelings of ill-will, hostility, enmity, hatred, disharmony or disunity. The use of these acts contributes to a large degree of self censorship by publishers, further institutionalising limits on freedom of expression.

In July 1999, a bill was passed by the Malaysian parliament for the creation of a National Human Rights Commission. The Commission will have the power to advise the government on human rights issues and have a limited power to investigate allegations of infringements of human rights. However, the Commission's investigation powers will be limited only with respect to those rights contained in the Malaysian federal Constitution. As previously outlined, these are deprived of force by extensive exceptions and other restrictive legislation.

The Judiciary

The Malaysian legal system is based on the English common law and is enforced through a unified court system. Section 121 vests the judicial power of the Federation in the High Court. Separate *Syariah* Courts exist to deal with disputes involving Islamic religious law, and indigenous people in Sabah and Sarawak have a system of customary law. The Constitution is the supreme law of the land, and any law which is inconsistent with it shall be void to the extent of the inconsistency. Section 145(3) of the Constitution grants the Attorney General complete discretion to institute, conduct or discontinue any proceedings for an offence.

The Court System

The court system is divided into the superior and subordinate courts. The Federal Court, Court of Appeal and High Courts are the superior courts and are established by the federal Constitution. The Session and Magistrate Courts are the subordinate courts and are established by federal law.

At the head of the court system is the Federal Court (*Mahkamah Persekutuan*), situated in Kuala Lumpur. Section 121(2) of the Malaysian federal Constitution grants the court jurisdiction to determine appeals from the Court of Appeal, the High Court or a judge thereof, as provided by federal law. The court also has original and consultative jurisdiction to determine the validity of actions of the states; disputes between the states or between the states and the Federation; and any question regarding the interpretation of the federal Constitution that arises in proceedings or is referred to it by the *Yang di-Pertuan* for its opinion. The Federal Court also has such other jurisdiction as federal law may confer. The court consists of the President of the Court (the Chief Justice), the President of the Court of Appeal, the two Chief Judges of the High Courts of Malaya and Sabah and Sarawak, and presently three other judges.

The Court of Appeal (*Mahkamah Rayuan*) has jurisdiction to determine appeals in any matter from decisions of the High Court or a judge thereof, and can also hear appeals in criminal matters directly from the Sessions Court. The Courts of Judicature Act 1964 provides that the Court of Appeal can grant leave to appeal, on a matter of law, against any decision of a High Court where it exercised its appellate or revisionary jurisdiction in respect of criminal matters from the Magistrates Court. The federal Constitution in Section 122A(1) states that the court shall consist of a President of the Court and ten other judges, until the *Yang di-Pertuan Agong* otherwise provides.

Section 121(1) creates two High Courts of co-ordinate jurisdiction and status situated in the state of Malaya and in the states of Sabah and Sarawak. These courts have such jurisdiction and powers as may be conferred by federal law. In criminal cases the High Court has jurisdiction to hear cases that involve the death penalty, and can exercise an appellate or revisionary jurisdiction on questions of law from criminal cases heard by Magistrate Courts. In civil cases the court has jurisdiction to hear matters involving, *inter alia*, divorce, bankruptcy and probate. There are currently 49 judges on the High Court of Malaya and 6 judges on the High Court in Sabah and Sarawak.

Under Section 121(1) of the federal Constitution two inferior courts have been created. The Sessions Court has jurisdiction to hear all criminal matters involving offences other than those punishable with death and

civil cases where the claim does not exceed 250,000 ringgit. Magistrate Courts have the jurisdiction to hear criminal cases where the maximum sentence does not exceed 10 years imprisonment and civil cases where the value of the claim does not exceed 25,000 ringgit. Currently there are 52 Session Court judges and 122 Magistrate Court posts in Malaya and 8 Session Court judges and 19 Magistrate Court posts in Sabah and Sarawak.

A special court was established in 1993 with jurisdiction over cases involving the rulers of the states of Malaysia and the *Yang di-Pertuan Agong*. The court hears all criminal cases involving alleged offences committed by the rulers or the *Yang di-Pertuan Agong* and all civil cases involving them. The court is constituted by the Chief Justice of the Federal Court, the two Chief Judges of the High Courts and two other persons appointed by the Conference of Rulers who hold or have held office as a judge.

The formulation of Section 121 of the Constitution makes the High Court's, jurisdiction and powers dependent upon federal law, i.e. the court has no constitutionally entrenched original jurisdiction. This undermines the separation of powers and presents a subtle form of influence over the exercise of judicial power. This makes the operation of the High Court dependent upon the legislature and is a threat to the structural independence of the judiciary.

Judges

Appointment

The appointment of judges to the Federal Court, the Court of Appeal and the High Court is governed by the Constitution. Section 122B(1) vests the power of appointment in the *Yang di-Pertuan Agong,* acting on the advice of the Prime Minister, after consultation with the Conference of Rulers. The Prime Minister, before giving his advice regarding the appointment of any judge apart from the Chief Justice, must consult the Chief Justice. For appointments to particular courts the Prime Minister is also required to consult the respective heads of the court, i.e. the Chief Justice, the President or the Chief Judge, as applicable.

For appointment as a judge to any of the superior courts a person must be a citizen and have acted as an advocate in any of those courts or have been a member of the judicial and legal service of the Federation or of a state. In practice most appointments are made from the judicial and legal service.

Appointments to subordinate courts come almost entirely from the judicial and legal service. Members of this service spend time in the various departments, such as public works, prosecution, revision of legislation and magistracy. Therefore it is possible that a person can be both a prosecutor and a magistrate in a court at various times during their career. This interchangeability of functions seriously threatens the independence of persons appearing as magistrates and creates an inherent conflict of interest in their position. It is difficult to see how a person who must change between representing the interests of the state in the prosecution of crime and an independent application of the Rule of Law, can exercise judicial power in an independent and impartial manner free from direct or indirect interference from the executive.

Further, promotion through the judicial and legal service is entirely dependent on the executive and allows the executive to exert direct or indirect influence over a magistrate's decision making. Promotion to the superior courts is also dependent upon a person's performance in the judicial and legal service.

Conditions of Service

The conditions of service of judges of the superior courts is guaranteed by Section 125 of the federal Constitution. They hold office until the age of sixty-five and their remuneration and other terms of office cannot be altered to their detriment during service.

Magistrates' conditions of service, as members of the judicial and legal service, are governed by the rules that apply generally to the public service. These rules are specified by federal law and can be altered by an act of parliament. A Judicial and Legal Commission is created by Section 138 of the federal Constitution and is responsible for appointment, placement, promotion, transfer and the exercising of disciplinary control. The Commission consists of the chairman of the Public Service Commission, the Attorney General or Solicitor General, and one or more other members appointed by the *Yang di-Pertuan Agong* after consultation with the Chief Justice of the Federal Court.

Discipline and Removal

Superior court judges can only be removed from office according to the provisions of Section 125 of the federal Constitution. If the Prime Minister or the Chief Justice, after consulting the Prime Minister, is of the opinion that a judge ought to be removed from office, they can represent this to the *Yang di-Pertuan Agong* who will constitute a tribunal to consider the matter.

If the tribunal recommends that the judge be removed, the *Yang di-Pertuan Agong* may remove the judge. The tribunal consists of not less than five persons who have held office as a judge in a superior court, and if it appears to the *Yang di-Pertuan Agong* to be expedient, other persons who hold or have held equivalent office in any other part of the Commonwealth. The grounds for removal are:

- any breach of any provision of a code of ethics promulgated by the *Yang di-Pertuan Agong* on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, after consultation with the Prime Minister;
- inability, resulting from infirmity of body or mind or any other cause, to properly discharge the functions of his office.

Section 125(5) provides that pending a recommendation of the tribunal a judge may be suspended by the Yang di-Pertuan Agong on the recommendation of the Prime Minister after consultation with the Chief Justice.

Lawyers

There is continuing tension between lawyers, the government and the judiciary. This stems from the belief by the government that the Bar Association behaves irresponsibly without seeking to understand the various sensitive issues facing the government. Tension between the Bar and judges also continues, stemming from the Bar Association's vote of no confidence during the events of 1988, despite the restoration of normal relations in 1994.

Lawyers are regulated by the Legal Profession Act 1976, which establishes an independent Malaysian Bar Council with the primary purpose to "uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour." The Bar Council consists of 36 members elected by members of the Malaysian Bar Association or nominated by state bar committees.

In January 2000 the independence of lawyers was seriously threatened by the government with the charging of **Karpal Singh** with sedition due to statements he made in court whilst representing a client *(see cases)*. The charging of a lawyer in respect of statements made in court clearly breaches Principle 20 of the 1990 Basic Principles on the Role of Lawyers. This guarantees lawyers civil and penal immunity for statements made in good faith in oral or written proceedings before a court. It is a basic duty of a lawyer to properly represent the interests of a client and provide a full and adequate defence. The charging of a lawyer for statements made in court improperly

associates a lawyer with his client's cause and represents an unjustified interference in the performance of a lawyer's professional duties.

Amendments to the Legal Profession Act

On 2 February 1999 the Attorney General notified the Malaysian Bar Association that Part IIA of the Legal Profession Act 1976 had come into effect on 1 February 1999. This part allows the Attorney General to issue Special Admission Certificates to a range of persons, including legal practitioners from foreign jurisdictions and those that have been employed in a legal or judicial capacity by any government or any authority, organisation or body, constituted under any law. These certificates are issued for a specific time period, determined by the Attorney General, and subject to confirmation by a judge of the High Court on the criteria of genuineness. The granting of a Special Admission Certificate is not subject to judicial review.

This part had been enacted by parliament in 1978 in response to a boycott by the Bar Association of cases involving the Emergency (Essential) Security Cases Regulations, but had never been brought into effect. The Bar Association initiated the boycott due to the violations of the accused's human rights that occurred in these cases. The government asserts that these provisions have now been brought into effect in order to fulfil Malaysia's obligations under the General Agreement on the Trade in Services (GATS). This requires that foreign lawyers be allowed to practice in Malaysia subject to certain considerations.

The executive promulgated guidelines for the granting of a certificate in August 1999. These stated that the Bar Association would be consulted before the issuing of a certificate, but not on renewal, and that those admitted under these provisions would be subject to the rest of the Legal Practitioners Act 1976. The guidelines did not specify how long a certificate would be issued for. The enactment of these provisions are of concern as they were drafted to deal with a situation where the Bar Association was in conflict with the executive. As a result they are not properly drafted to deal with GATS obligations and if abused, would allow the executive to bypass the Bar Association, threatening its independence and its duty to uphold the cause of justice.

Contempt of Court

There have been several cases of excessive use of the contempt of court power against lawyers who have questioned a judge's impartiality. In Anwar Ibrahim's trial, his defence lawyers filed an affidavit alleging that two prosecutors had attempted to fabricate evidence and requesting that

they be excluded from the proceedings. The court ruled that this was an abuse of process and amounted to a serious contempt of court. After allowing half an hour for the preparation of a defence the court convicted the lawyer of contempt. In another case, contempt was threatened after an application was made to have a judge removed on the basis of prejudgement of an issue. After the initial application was dismissed the Court of Appeal ruled that if the application for appeal was not immediately withdrawn notices of contempt would be issued as the action was misconceived and intemperate.

The power of contempt is an essential part of the justice system. It ensures that all participants in the court system and those commenting on the administration of justice properly respect the procedures of, and maintain the confidence of the public in, the courts. This power cannot be used too broadly otherwise it will stifle proper criticism of the court, or deny court participants the right to a fair and impartial tribunal. The current use of this power is excessive and has the effect of restricting bona fide actions by lawyers attempting to represent their client's interests.

Cases

Dato' Param Cumaraswamy {lawyer, member of the Executive Committee of the International Commission of Jurists and the CIJL Advisory Board and United Nations Special Rapporteur on the Independence of Judges and Lawyers}: On 29 April 1999 the International Court of Justice issued a binding advisory opinion stating that Malaysia had violated the 1946 Convention on the Privileges and Immunities of the United Nations. (*see Attacks on Justice 1998*). This was because it failed to inform its domestic courts of the UN Secretary-General's finding that Dato' Param Cumaraswamy was immune from legal process, which was confirmed by the court. Dato' Param Cumaraswamy had been subject to several defamation suits from Malaysian businessmen amounting to US $ 112,000,000. The Malaysian Government conveyed the decision of the International Court of Justice, but the High Court, on 18 October 1999, ruled in interlocutory proceedings that the issue of immunity could only be decided at a full trial, as the court was bound by the previous Court of Appeal decision regarding the Special Rapporteur's immunity.

The Special Rapporteur appealed that decision which was partly heard on 19 January 2000. The court there observed that there were two conflicting points in the opinion and queried whether it had to be bound by a decision that is conflicting in itself. Further hearing of the matter has been postponed until 11 May 2000. It is a well recognised principle of international law that the act of an organ of state is an act of the state itself. The

Malaysian Government is obliged to certify to the courts of the immunity of the Special Rapporteur, thereby removing the need for the matter to be heard at trial. Therefore, Malaysia is still acting in breach of its obligation to apply the decision of the court and must grant Dato' Param Cumaraswamy immunity from legal process.

During the meeting of the Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights in February 2000, the Malaysian Government used technical arguments in an attempt to limit the tenure of the Special Rapporteur to the completion of his current term in April 2000. This, and a further effort at the 56th Session of the Commission on Human Rights, failed and the Special Rapporteur's mandate was extended for a further three year term.

Karpal Singh (lawyer, lead defence counsel for Anwar Ibrahim): Mr Singh was charged with sedition on 12 January 2000 with respect to statements made in court on 10 September 1999 in the defence of Anwar Ibrahim. The statements were "It could be well that someone out there wants to get rid of him....even to the extent of murder" and "I suspect that people in high places are responsible for the situation." Mr Singh was charged under Section 4(1)(b) of the Sedition Act 1948 which carries a 5,000 ringgit fine or a maximum of three years imprisonment. The case was transferred to the High Court on 27 February 2000 which has yet to fix a date for trial.

Tommy Thomas (lawyer, former Secretary of the Malaysian Bar Council): Tommy Thomas had been the subject of several defamation actions by Malaysian businessmen resulting from comments he made in an article entitled "Malaysian Justice on Trial." The cases were settled out of court in November 1998, but Mr Thomas made a statement that the cases had been settled despite his express objections. The court issued a notice of contempt, irrespective of his unconditional apology, and he was sentenced to six months imprisonment in December 1998. He appealed this decision, the proceedings of which were observed by the International Bar Association. As at the time of writing, 1 April 2000, the decision was still pending.

Zainur Encik Zakaria (lawyer, member of Anwar Ibrahim's defence team and former President of the Bar Council of Malaysia): Mr Zakaria was sentenced to three months imprisonment for contempt on 30 November 1998. He had made an application for the exclusion of two prosecutors on the basis that they had attempted to fabricate evidence. The court ruled that this application was an abuse of process and interfered with the due administration of justice *(see Attacks on Justice 1998)*. Mr Zakaria appealed to the Court of Appeal, and as of 1 April 2000, the decision was still pending.

MEXICO

The ineffectiveness of the Mexican system of justice allows most violations of human rights to go unpunished. Ordinary courts lack jurisdiction to try members of the armed forces for violations of human rights committed against civilians. This erodes the independence of these courts. During 1999 frequent violations of due process rights continued in the country and especially in the states of Chiapas, Guerrero and Oaxaca. The government passed a series of legislative measures that weaken individual rights and undermine the ability of the ordinary judge to effectively impart justice. The powers of the Public Prosecutor have also been significantly increased to the detriment of judges' powers.

Mexico is a federal republic with 31 states and a Federal District as a capital city. The Constitution provides for the separation of powers and the judicial function is assigned to a court system. The bicameral national assembly holds legislative power and is composed of a 500-seat Chamber of Deputies and a 128-seat Senate. The President of the Republic is at the same time the head of the government. He holds the power to appoint the Attorney General and the justices of the Supreme Court.

Governmental elections were held in the state of Mexico, the most populous in the country, in July 1999 and resulted in the victory of the ruling Revolutionary Institutional Party (PRI). Political parties also began preparations for the presidential election scheduled for the year 2000.

HUMAN RIGHTS BACKGROUND

During 1999 most of the problems regarding the protection of human rights persisted in Mexico despite significant improvements in certain areas. The general inefficacy of the judicial system to promptly prosecute and try offenders is enhanced by the culture of impunity prevailing in almost all public offices.

In 1999 Mexico's human rights record continued to be under the spotlight of the international community. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions visited the country between 12 and 24 July 1999. The UN High Commissioner for Human Rights,

Mrs. Mary Robinson, also visited Mexico in November 1999. A Memorandum of Understanding for a Technical Co-operation Programme was signed by the High Commissioner and the Mexican Government. The UN Human Rights Committee examined Mexico's report and adopted its Concluding Observations on it on 27 July 1999. Mexico's periodic report pursuant to the provisions of the International Covenant on Economic, Social and Cultural Rights was examined by the respective monitoring Committee on 08 December 1999. For its part the International Commission of Jurists (ICJ) sent a mission to the country between 9 and 19 March 1999, focusing on the human rights situation in the Federal District and the states of Chiapas, Guerrero and Oaxaca, as a follow up to their previous visit in April 1994.

Human rights groups and defenders continue to be the target of harassment by officials of different government agencies. Taking as a pretext the campaign against the booming common criminality, government officials accused human rights organisations of defending and protecting criminals. At the same time the government continued to maintain its tight regulations on visa arrangements for foreigners who want to carry out observation or other human rights-related activities in the country. This has reportedly caused serious inconvenience to the work of these groups and is arguably designed to prevent them from carrying out their task of defending human rights. In what constitutes a positive sign, during September and October a total of thirteen foreigners summarily expelled in 1998 won a judicial battle and their expulsion was revoked.

In late November Mexican police, with the support of the US federal police, discovered mass graves at a ranch near Ciudad Juarez on the border with the US. As they dug they found some of the 100 bodies they expected to find in the grave, which were identified as FBI informants who were killed, presumably, by the Juarez drug cartel. More bodies are expected to be found as the investigations continue.

Impunity

The human rights situation in Mexico continued to be precarious, although some improvements have been made. In what constitutes one of the few positive steps taken to put an end to the impunity enjoyed by police officers who commit human rights violations, twenty people were convicted by a Federal Court for the December 1997 massacre of forty-five people near the village of Acteal. Federal prosecutors have also taken up thirty-four cases from the state level in relation to the Acteal massacre. A number of people have been charged with murder, kidnapping and torture. This includes several state prosecutors for failure to prosecute cases in which enough evidence existed. However, human rights groups said that much

more needs to be done in this case to effectively provide justice to the victims. The fact that the intervention of the federal judicial authorities was necessary to carry out the investigations and the trials, highlighted the inability of the states' judiciary to function effectively and independently.

In another positive development, the National Human Rights Commission (*Comisión Nacional de Derechos Humanos*), created in 1990 originally as an agency within the Ministry of Home Affairs, was granted a higher degree of autonomy, as recommended by a number of national and international human rights groups. Although a 1992 constitutional amendment gave this commission an autonomous status, the Commission's chairman and the other commissioners continued to be appointed by the President with the consent of the Senate and its powers were limited to matters not related to labour, judicial or electoral issues.

The bill amending Article 102 of the Constitution - still to be approved by the states' legislatures - was passed towards the end of 1998. The National Human Rights Commission will still be prohibited from intervening on matters related to the federal judiciary and, according to the amendment, this prohibition will encompass the activities of the states' judiciary as well. Another important change is in regard to the appointment procedure for the members of the Commission and its chairman. They all will now be appointed by the Senate, by a two thirds majority vote. The serving term of the Commission's chairman will be a renewable five-year period. The Commission has also been granted autonomous legal personality for economic and management purposes. Finally, the Commission will present a periodic report to parliament. However, its findings and recommendations will remain of a non-binding character.

There is also a draft for a federal law for the prevention and sanction of forced disappearances which was presented during the second part of 1999 in the Chamber of Deputies and is still pending for discussion and approval. If passed this law will provide a useful instrument in the fight against impunity for perpetrators of forced disappearances in the country.

Notwithstanding the few positive developments stated above the main problems that prevent the judiciary from imparting effective justice to the victims of human rights violations still persist. The judicial system fails to provide victims and all citizens with effective protection and adequate recourse for the protection of their rights. The most outstanding failure of the ordinary justice system is in regard to the impunity granted in practice to military officers who have committed common crimes against civilians. The Military Code of Justice establishes that the military tribunals have jurisdiction over common crimes committed by military officers "while on duty or for reasons related to their own duty" (Article 57). This vague formulation gives, in practice, wide powers to the military tribunals to try not

only on-duty offences properly related to military functions, but also any other common crime committed by any military officer. This sweeping jurisdiction given to the military courts has already been observed by the UN Special Rapporteur on Torture in his report on his visit to Mexico in 1997, and has recently been highlighted again by the UN Special Rapporteur on Extra-judicial, Summary and Arbitrary Executions when she concludes:

> The ineffectiveness of the justice system has given rise to violations of human rights. Their lack of jurisdiction to try members of the armed forces for violations of human rights committed against civilians erodes the independence of the ordinary courts.

The Special Rapporteur recommended that the Mexican Government "initiate reform aimed at ensuring that all persons accused of human rights violations, regardless of their profession, are tried in ordinary courts".

The intervention of federal prosecutors and tribunals to bring effective justice and put an end to impunity in the Acteal massacre highlighted the poor record of the judiciary at the state level to prosecute and try perpetrators of human rights violations. Poor training, corruption and peer influence among judges and prosecutors are some of the main problems which, matched with political pressure and violence, have accentuated the traditional impunity in the inner country. The ICJ mission found that disrespect for the due process of law and a correct administration of justice is more serious at the local and state level as magistrates are more vulnerable to pressure from local authorities and politically powerful groups. The mission also reported that the provisions of human rights instruments ratified by Mexico are not reflected in judicial decisions in general, and in particular at the state level, despite Article 133 of the Constitution. This article provides that "the state judges shall conform to the Constitution, laws and treaties notwithstanding contrary provisions in state's constitutions and laws".

Apart from the limitations on the ordinary courts as regards trying military officers, there are a number of other factors that limit the ability of the judiciary to impart effective justice and protect citizens' rights. Judges continue to accept tampered evidence and declarations obtained by torture in application of a questionable understanding of the "principle of immediacy", which normally requires them to be present at the moment the evidence is produced. Instead, many judges have been interpreting the principle as assigning greatest evidential weight to the first statement made by the suspect or accused, normally before the police and without the presence of his or her attorney.

Additionally, the number of arrest warrants issued by the judicial authority and not carried out by the police is still very high. This reveals the extent of the impunity existing in Mexico (*see Attacks on Justice 1998*).

The Concluding Observations of the UN Human Rights Committee

The UN Human Rights Committee expressed satisfaction at the adoption during past years of a series of positive steps, amongst them: the establishment of National Programmes for the Protection of Human Rights, the promulgation of the Federal Public Advocacy Act for the Prevention and Punishment of Torture and the granting of more independence to the National Human Rights Commission.

The Committee, however, expressed concern about the fact that "no institutionalised procedures exist for the investigation of allegations of violations of human rights presumed to have been committed by members of the armed forces and by the security forces, and that as a consequence those allegations are frequently not investigated".

The Committee observed that the criminal procedure established and applied in Mexico constitutes an obstacle to the implementation of trials before a judge, in the presence of the accused and at a public hearing. It should be further noted that among the last constitutional reforms adopted there was originally an additional one regarding Article 20 of the Constitution that would allegedly have permitted trials in absentia. This proposal was not approved in the end.

The Committee also expressed concern at the extension of the number of circumstances in which a person can be arrested without a warrant from a judge. Furthermore, the person arrested in "flagrant delict" can be held in custody by the prosecutor from 48 to 96 hours before they are presented to a judge. The Committee deplored that "arrested persons do not have access to legal counsel before the time when they have to make a formal statement to the Office of the Public Prosecutor" (paragraph 10). *(For further development see below).*

The Judiciary

The federal judiciary is composed of the Supreme Court, the Electoral Tribunal, the Circuit Tribunals, the one-judge Circuit Tribunals, the District Courts, the Federal Council of the Judiciary, a federal jury and the tribunals of the states and the Federal District (Article 1 of the 1996 Law of the Judiciary).

Structure

The Supreme Court is composed of eleven justices and works as a plenary assembly or in two chambers. As a plenary, it has the power, *inter alia,* to deal with constitutional disputes and petitions of unconstitutionality, to review decisions by lower courts on constitutional matters and to review decisions of lower courts on petitions of *amparo* (Article 10). The Supreme Court in plenary session also elects its president from among its members. The President serves in office for a term of four years.

The Law of the Judiciary entrusts to the Plenary of the Supreme Court the task of watching over the autonomy of the organs of the federal judiciary and of their members (Article 11). It also has the responsibility of approving the annual budget of the Supreme Court. The President of the Supreme Court sends it to the President of the Republic who in turn passes it on to parliament for final approval. The President of the Supreme Court is also in charge of administering the budget.

The Federal Council of the Judiciary is in charge of the administration, supervision, discipline and organisation of the judicial career of the whole judiciary, except the Supreme Court and the Electoral Tribunal. The Council is composed of a total of seven members appointed as follows: the President of the Supreme Court who acts as its head, two members appointed by the Senate, one appointed by the President of the Republic and the rest appointed by circuit and district courts.

The Council is also tasked with the preservation of the autonomy of the organs of the judiciary and the independence and impartiality of its members. It prepares and presents the budget of the judiciary - except the budget for the Supreme Court - to the President and parliament for their approval.

Appointment Procedure and Security of Tenure

The President of the Republic enjoys wide power to prepare a list of candidates for justices of the Supreme Court, which is submitted to the Senate that makes the final choice. The presidential power in this regard has been pointed out as a probable source of undue influence on the functioning of the highest tribunal. The President can also instigate the procedure for removal or dismissal of justices of the Supreme Court. They are appointed to serve renewable periods of 15 years.

Judges of lower tribunals and courts are appointed by the Federal Council of the Judiciary. The judges of Circuit Tribunals and one-judge District Courts are appointed for a probationary period of 6 years and then subjected to a ratification procedure. They will enjoy security of tenure only if ratified in their posts, or otherwise if promoted to a higher tribunal.

The six-year periods for which the judges are appointed may not be suitable for guaranteeing their independence, especially if after such a period they have to submit to a ratification procedure. In general, judges avoid ruling against the authorities in very sensitive cases. When they do so or refuse to abide by pressure from outside while performing their duties, they are, reportedly, harassed. The well-respected non-governmental organisation (NGO), Mexican Commission for the Defence and Promotion of Human Rights, has reported the case of Judge Claudia Campuzano, accused of obstruction of justice by the Public Prosecutor in the Federal District of Mexico because she ordered the release of a prisoner who was being held on foot of a declaration obtained by torture as the sole evidence, as an example of what is reportedly a common practice.

The resources of the judiciary come from the national budget, but it is the President who has the power to prepare and send to the legislature the proposal for the budget for every year. The President also has the power to instigate the amendment or total reform of the Law of the Judiciary (*Ley Organica del Poder Judicial*).

The Independence of the Public Prosecutor

The Office of the Public Prosecutor is an agency of the federal executive (*Ley Orgánica de la Procuraduría General de la República de 1996*). The Attorney General (*Procurador General*) is appointed jointly by the President of the Republic and the Senate, but the institution is part of the structure of the executive branch on which it depends for financial and personnel resources. This dependency has been pointed to as the source of the lack of independence of prosecutors in the taking of decisions on whether to prosecute or not any given offender.

According to Article 21 of the Federal Constitution the prosecutor holds a monopoly over investigations and the prosecution of offences. Until the constitutional reform of 1994 there was no possibility for the victim to legally challenge the prosecutor's decision should the latter decide not to prosecute an alleged offender. The 1994 constitutional amendment of Article 21 provides that "the prosecutor's decision not to prosecute or desist from the prosecution of an offence can be judicially challenged as determined by law". However, the necessary legislation to develop the constitutional provision was never enacted which has led to its practical lack of implementation. Some sought to implement the provision by using the procedure of *amparo* petitions (a special remedy to protect individual constitutional rights) before the ordinary courts which resulted in diverse and conflicting jurisprudence on the matter. While some judges clearly supported the idea of using *amparo* procedures to protect victim's rights and

willingly granted the petition ordering the prosecutor to reopen investigations, others thought otherwise. This conflicting jurisprudence was overcome by a Supreme Court decision, following the recommendations made by the Inter-American Commission on Human Rights, adopting the view that *amparo* petitions were suitable for use in these cases. The Supreme Court's decision also established that ordinary criminal courts have jurisdiction to hear these kinds of petitions. Although this decision was very much welcomed, it has widely been seen as insufficient given the intrinsic limitations of *amparo* petitions. It has been reported that prosecutors are now avoiding taking any formal decision whether to prosecute or not for a given offence, causing the investigations to slow down and continue until the Statute of Limitations applies in the case.

The excessive discretionary power of the prosecutor to decide whether or not to prosecute in criminal cases, and the lack of legal guarantees for the victim to take action independently from the prosecutor amounts in many cases to a virtual denial of justice. As the UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions observed in her report of her 1999 visit to Mexico:

> The practice and conduct of federal and state prosecutors' offices fall short of the guidelines laid down in paragraphs 12 and 13(b) of the Guidelines on the Role of Prosecutors adopted by the Eight United Nations congress on the Prevention of Crime and the Treatment of Offenders. These guidelines provide that prosecutors shall perform their duties fairly, consistently and expeditiously, respecting and protecting human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. In the performance of their duties prosecutors shall protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances...In the cases examined by the Special Rapporteur in this report, the investigations were compromised, *inter alia*, owing to lack of transparency, deliberate cover-ups, selectivity in apprehending suspects and peer pressure among the legal establishment. The discretion placed with the Public Prosecutor to decide whether an investigation can be initiated in a criminal matter has resulted in gross injustice, resulting in impunity for perpetrators of human rights violations.

The Special Rapporteur recommended in this regard that Mexico "take measures to strengthen the independence of the Offices of the Public Prosecutors, from the federal to the local level" and to "grant the victims of human rights violations or their families a legal mechanism by which they

can file criminal complains, independent of the Public Prosecutor's Office".

The powers of the prosecutor have also been widened in recent years under pressure to achieve effective results in fighting against the perceived growing criminality. These powers were widened to the detriment of the protection of the human rights of suspects or accused persons and further constitute an invasion of judicial functions by the Public Prosecutor who, after all, depends on the executive power. Certain powers given to the prosecutor may be construed as limiting the judge's powers during trials. For example, judges of criminal tribunals cannot order the production of evidence they think necessary in order to establish the individual responsibility of a suspect or accused. They cannot either start the proceedings without the prior instigation of the prosecutor or continue the case if the prosecutor has withdrawn charges. Although the prosecutor's decisions can be judicially challenged, as described above, the available procedure is not quick enough to be an effective recourse.

The prosecutor also enjoys wide powers to arrest persons suspected of having committed an offence during the pre-trial investigations stage. Before 1993 the arrest of a person was not permitted except pursuant to an arrest warrant issued by the judicial authority, except in flagrant cases or urgent circumstances, when no judicial authority existed in the locality. In all cases, the arrested person should be presented before the judge without delay. Now, however, the Public Prosecutor can also order the arrest of a person without a judicial order in "urgent cases", "serious cases" and to prevent the suspect absconding from justice. The laws give the prosecutor and police officers wide latitude to arrest persons merely on the fear that the suspect in question may abscond from justice.

A law passed in April 1999 widens the meaning of "flagrant situations" in which the arrest of a person without a judicial order can be made the moment he or she commits the crime or immediately afterwards. The 1999 law permits the arrest of the person in question even 72 hours after the offence is committed without an arrest warrant, thus facilitating the detention of persons on the initiative of the prosecutor. Further, in "flagrant" and "urgent" cases the prosecutor can hold the detainee for 48 hours before presenting him or her to a judge. This period is doubled when it is a suspect of organised crime who is concerned and this facilitates the violation of the rights of the detainee who cannot see his or her attorney during that period of time.

A number of legislative measures adopted in recent years, purportedly to facilitate the fight against common and organised crime, have resulted in the curtailing of the rights of the accused. A 1996 constitutional amendment limits the right to release on bail when the prosecutor argues that the accused in question has been convicted in the past for a serious crime, or

that given the accused's past behaviour his or her release will constitute a danger for the society. A 1998 amendment also modified the requirements for an arrest warrant to be served by the judge upon request of the prosecutor. In the past the prosecutor had to show that the crime has actually been committed and that it can probably be attributed to a given suspect. Following the amendment the prosecutor only needs to show that the crime has probably been committed and can probably be attributed to the person for whom the arrest warrant is requested.

The reforms described above have been criticised for their alleged negative impact upon the respect for citizen's human rights. Human rights organisations have said that this would enhance the already existing and widespread practice of tampering documents and fabrication of evidence, as well as the practice of torture and coercion to obtain confessions from the suspect or accused.

CASES

Digna Ochoa {lawyer}: Ms. Ochoa is the head of the legal division of the Miguel Agustin Pro Juarez Centre for Human Rights (PRODH) and as such she has been the subject of a series of threats and attacks throughout 1999 by individuals reportedly linked with governmental agencies. The first attack occurred on 9 August 1999 when she was abducted for several hours, beaten up and documents related to her work were stolen by unidentified assailants. Several consecutive attacks occurred during September and October, including bomb threats to her offices at PRODH. The most serious attack was carried out against Ms. Ochoa in her Mexico City home on 28 October 1999. During nine hours she was blindfolded, tied up, threatened, interrogated and pressured to sign papers and was ultimately rendered unconscious by at least two unidentified individuals. She was persistently questioned about her professional activities as a lawyer in southern Mexico and there is strong evidence that the attacks constitute a retaliation for her work as a human rights lawyer. In November the Inter-American Court of Human Rights issued precautionary measures in favour of Ms. Ochoa asking the government to provide her with the necessary security protection.

The harassment of Ms. Ochoa is closely related to her work in PRODH, a non-governmental organisation (NGO) that litigates, domestically and internationally, cases of torture, execution and arbitrary detention. PRODH started to be the target of threats and attacks in 1995 when its lawyers took up a number of cases of individuals allegedly involved with the insurgency in Chiapas and whose due process rights had been violated. The periodic threats include death and bomb threats, monitoring and

break-ins in PRODH's offices by anonymous individuals which continue to occur despite governmental assurances to investigate them and pledges to provide PRODH's premises and staff with further security.

Israel Ochoa Lara {lawyer}: Mr. Ochoa works in the southern state of Oaxaca, mainly defending peasants who are unjustifiably accused or whose due process rights are violated. In August 1998 he was accused of having links with the Popular Revolutionary Army because he was defending individuals allegedly involved in the activities of this rebel group. On 25 June 1999 an arrest warrant was issued against him, this time in connection with criminal charges filed against him in 1997 pursuant the Article 232 of the Federal Penal Code that prohibits lawyers from sponsoring two parties with conflicting interests at the same time. In the case at issue one of Mr. Ochoa's clients had involved, in his confession to the authorities, another client of Mr. Ochoa in some criminal activity. Mr. Ochoa immediately withdrew from representing the latter client.

Mr. Ochoa challenged the arrest warrant and a court suspended it temporarily, but the charges were not dropped. In September 1999 the Lawyers Committee for Human Rights issued an alert stating that the criminal proceedings against Mr. Ochoa had been terminated after a judge declared them invalid and the Attorney General's office did not appeal the judge's decision.

Miguel Angel de los Santos Cruz {lawyer}: Mr. Santos Cruz works for the Mexican Commission for Human Rights and has been litigating cases for indigenous people in the Chiapas state. In March 1999 the state government issued a public communiqué in which Mr. Santos Cruz is mentioned as one of the instigators of a confrontation between two political factions in the municipality of Nicolas Ruiz which led to the expulsion of PRI (the ruling party) supporters from the village. The government communiqué also stated that an arrest warrant had been served against Mr. Santos Cruz. Following this, and taking the announcement of an arrest warrant as a threat against his personal freedom and integrity, Mr. Santos Cruz lodged an *amparo* petition which was granted by the judicial authorities.

MYANMAR (BURMA)

The judicial system is subject to the military regime and is used to support a policy of repression. The Judiciary Law does not contain any provisions regarding security of tenure or protection from arbitrary removal and the military government has a clear role in appointing judges to the courts. During the last few years many lawyers have had their licences withdrawn for their alleged involvement in politics.

From 1988 until November 1997, power in Myanmar was centralised in the ruling military government, referred to as the State Law and Order Restoration Council (SLORC). On 15 November 1997, SLORC was dissolved and reconstituted as the State Peace and Development Council (SPDC). The purpose was said to be to "Ensure the emergence of an orderly or disciplined democracy" and to establish a "peaceful and modern state...in the interest of all the national peoples". Human rights violations, however, have only increased throughout 1997 and 1998 and the situation deteriorated even further in 1999.

The ruling military government strengthened its rule through a security apparatus led by the Directorate of Defence Services Intelligence (DDIS). The government justifies its security measures as necessary to maintain order and national unity. Members of the security forces reportedly commit serious human rights abuses.

In the elections of 1990 the National League for Democracy (NLD) won 60% of the votes and 82% of the parliamentary seats. The government-sponsored party obtained only 10 of the 485 seats. The SLORC responded by attacking the coalition of winning parties and their leaders through intimidation, detention and house arrest. According to Declaration No. 1/90, the sole responsibility of the elected representatives is the drafting of a new Constitution for a democratic Myanmar.

Declaration No. 11/92 created a National Convention to draft a new Constitution. NLD members have boycotted the meetings of the Convention in protest against the lack of any democratic process in its operations. The SLORC consequently banned the 86 NLD delegates from the National Convention. The National Convention has not convened since then.

The NLD established a ten-member Committee Representing Parliament (CRPP), which serves as a parliamentary body, but the

creation of this committee was criticised by some NLD members. In response, the NLD Central Leadership accused this group of promoting disunity within the party.

Human Rights Background

Throughout 1999, the military government continued to seriously violate human rights. Arbitrary detention, serious restrictions on the freedoms of expression, assembly and association, extrajudicial killings, disappearances of political opponents and torture all occurred frequently.

Furthermore, Myanmar's ethnic and religious minorities such as the Karen, Karenni and Shan tribes, are involved in an internal conflict with the army, and suffer severe abuses, including arbitrary arrest, killings and forced labour in the army. There were also, however, credible reports of human rights abuses committed by insurgents.

The military government continues to use the 1950 Emergency Provisions Act and the 1975 State Protection Law to arrest and sentence persons for their peaceful political activities. It is estimated that in 1999 there were approximately 3,000 political prisoners in Myanmar.

Human rights organisations or other civil liberties movements are not permitted in Myanmar. In addition, foreign human rights activists are banned from the country and several of them were arrested in 1999. On 6 May 1999, the International Committee of the Red Cross (ICRC) resumed its work in the country however.

The Burmese authorities have not acceded to important human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

In 1992, the United Nations Commission on Human Rights created a Special Rapporteur for Myanmar to examine the human rights situation in the country. Since his appointment in 1996, the current Special Rapporteur, Justice Rasjoomer Lallah, has sought the co-operation of the government of Myanmar and has requested their authorisation to travel to the country, but they have refused to cooperate (*see also Attacks on Justice* 1998).

In his report of 24 January 2000 to the annual meeting of the UN Commission on Human Rights which took place in Geneva from 20 March - 28 April 2000, the Special Rapporteur noted that:

> No concrete progress, most unfortunately, can be reported on the general situation of human rights in Myanmar. On the

> contrary, repression of political and civil rights continues in Myanmar, including summary or arbitrary executions, abuse of women and children by soldiers and the imposition of oppressive measures directed in particular at ethnic and religious minorities, including the continuing use of forced labour and relocation.
>
> Persecution of the democratic opposition, in particular members of the NLD, continues as in previous years, including long prison sentences and the use of intimidation and harassment.
>
> Well-documented reports and testimonies continue to be received by the Special Rapporteur which indicate that human rights violations continue to occur, as in the last decade. These include extrajudicial, summary or arbitrary executions, torture, portering and forced labour, particularly in the context of the "development" programmes and of counter-insurgency operations in ethnic areas.
>
> With regard to the exaction of forced or compulsory labour, the Special Rapporteur reiterates, as in his previous reports, that information he has received from refugees and displaced persons indicates that the practice of forced labour continues, although there is an official order directing that the offending provisions of the Village Act and the Town Act should not be enforced. No law has been passed to make forced labour an offence and no prosecution against those exacting forced labour is possible. Impunity remains a serious problem.

The UN Secretary-General's special envoy, Mr. Alvaro de Soto, has visited Myanmar several times in the past (*see Attacks on Justice* 1998). He carried out a "good offices" mission to the country from 14 to 18 October 1999. During this visit, Mr. de Soto held consultations with many officials, as well as with General-Secretary Daw Aung San Suu Kyi of the League for Democracy (NLD), representatives of the Shan Nationalities League for Democracy and representatives of some ethnic minority groups.

Several issues were discussed during the visit, such as the restoration of democracy and human rights in Myanmar, freedom for political parties to conduct normal political activities, the release of political prisoners, the visit of the Special Rapporteur of the Commission on Human Rights, access to prisoners by the International Committee of the Red Cross (ICRC) and the practice of forced labour.

In his report, of 27 October 1999, to the UN General Assembly, the Secretary-General stated:

> I welcome the visits by the ICRC to prisons and places of detention, something which the General Assembly has repeatedly asked the Government of Myanmar to allow to take place. However, I am unable to report concrete progress on other issues which the international community has raised time and again in successive resolutions of the General Assembly and the Commission on Human Rights. It is my very strong desire to see the government take action on these other issues as well. I hope the Foreign Minister's indication that "serious consideration" would be given to a visit by the Special Rapporteur will translate into the setting of a date very soon.

International Labour Organisation (ILO)

The persistent failure of the Burmese Government to implement ILO Convention No. 29 against forced labour (*see Attacks on Justice* 1998) led to a report of the Commission of Inquiry in August 1998. The report concluded that:

> the obligation to suppress the use of forced or compulsory labour is violated in Myanmar in national law, as well as in actual practice, in a widespread and systematic manner, with total disregard for the human dignity, safety, health and basic needs of the people.

An updated report by the ILO Director-General, Juan Somavia, examining new evidence of the situation concluded that an order issued by the government of Myanmar on 14 May 1999 does not exclude the imposition of forced labour, in violation of the Convention. "In actual practice, forced or compulsory labour continues to be imposed in a widespread manner."

On 17 June 1999 the 87th International Labour Conference of the ILO adopted an unprecedented resolution against Myanmar for violating the Forced Labour Convention. The resolution, *inter alia*, states that the government of Myanmar should cease to benefit from any technical cooperation or assistance from the ILO, except for the purpose of getting direct assistance in the immediate implementation of the recommendations of the Commission of Inquiry. The resolution will stay in force until Myanmar has revised its legislation, particularly the Village Act and Towns Act, so that it is in line with the Forced Labour Convention.

In March 2000, for the first time in its history, the ILO invoked Article 33 of the ILO Constitution as the Governing Body recommended that the International Labour Conference in June 2000 "take such action as it may

deem wise and expedient to secure compliance" by Myanmar with the recommendations of the 1998 Commission of Inquiry.

Article 33 is designed for use only in the event of a country failing to carry out the recommendations of an ILO Commission of Inquiry, which is itself a procedure reserved for grave and persistent violations of international labour standards.

The Judiciary

During 1999 there was no major change with regard to the situation of the judiciary in the country. Myanmar's court system was inherited from the United Kingdom and subsequently restructured. The Rule of Law in Myanmar has malfunctioned since the military government began its rule in 1988.

The administration of justice is based on several judicial principles. For example, under Section 2(a) of Law No. 2/88, justice is required to be administered "independently, according to law." In reality, however, the judiciary is far from being independent, due to the suspension of the Constitution and the numerous decrees which restrict freedoms.

Without the permission of the intelligence organs, judges cannot even let the family or counsel of the accused know what sentence has been passed. In many cases, the accused is kept in ignorance of the provision of law under which he is charged. There have been instances where the military intelligence has passed sentences orally, at the time of arrest before any trial had taken place.

In his report of 4 October 1999 to the UN General Assembly the Special Rapporteur noted that:

> the Rule of Law cannot be said to exist and function, as the judicial system is subject to a military regime and serves only as handmaiden to a policy of repression.

Structure of the Courts

In September 1988, SLORC issued Law No. 2/88, the Judiciary Law, according to which there shall be a Supreme Court composed of a Chief Justice and "not more than five judges". Lower courts, the State or Division and Township Courts, were to be formed by the Supreme Court. Military tribunals, established in 1989 for the purpose of trying martial law offenders under special summary procedures, were abolished in September 1992.

Appointment and Dismissal

The SPDC appoints the judges of the Supreme Court. The Supreme Court selects judges for the lower courts, with the approval of the SPDC. The Supreme Court is, moreover, in charge of the supervision of all courts. The Judiciary Law does not contain any provisions regarding security of tenure and protection from arbitrary removal, thus leaving such issues in the hands of the military government.

In addition to the military government's unfettered role in appointing judges to the courts, it also directly influences the administration of justice, reportedly by manipulating the courts to secure an outcome which will serve its political ends. This is particularly obvious in cases concerning persons alleged to be involved in political activities.

Lawyers

When the SLORC seized power on 18 September 1988, the activities of individual lawyers and lawyers' associations in Myanmar were suppressed and silenced. Since 1989, the Bar Council has no longer been independent and is, instead, supervised by the Attorney General and staffed by government officials.

Some basic due process rights, including the right to a public trial and to be represented by a defence attorney, are seriously undermined in political cases. Defence attorneys are permitted to call and cross-examine witnesses, but their primary role is to bargain with the judge to obtain the least severe sentence possible for their clients.

During the last few years many lawyers have had their licences withdrawn for their alleged involvement in politics.

In last year's edition of *Attacks on Justice* we reported on numerous cases of lawyers who had had their licences withdrawn for their alleged involvement in politics. Due to the deteriorating situation in Myanmar, and in order to protect the safety of human rights activists both in Myanmar and Thailand, it was impossible for the CIJL to obtain reliable information on new cases of harrassment of judges and lawyers or updates on the cases we reported last year.

NIGERIA

Human rights concerns and problems with the administration of justice still exist, as Nigeria remains a country in transition. However, a new Constitution provided appropriate safeguards for the independence of the judiciary and they were respected in practice. Military courts and special tribunals were disbanded and there was more respect for due process and the Rule of Law. The human rights situation improved substantially with the democratic election of a civilian government.

Nigeria underwent a radical change in 1999, moving to a popularly elected civilian government for the first time in sixteen years. Nigeria had been led by General Abdusalam Abubakar in an transitional military government formed after General Sani Abacha's death in June 1998. In presidential elections held in February 1999, retired General Olesegun Obasanjo won 62.8% of the vote and was inaugurated as President on 29 May 1999.

The 1999 Constitution of the Federal Republic of Nigeria created a federal system of government consisting of 36 states and established a separation of powers between the arms of government. Section 4 vested the legislative powers of the federation in a National Assembly consisting of a Senate and a House of Representatives. The Senate consists of three popularly elected senators from each state and one from the Federal Capital Territory of Abuja. The House of Representatives contains 360 popularly elected members. The National Assembly sits for a period of four years.

The executive power of the Federation is vested in the President, who is assisted by the Vice President and the other Ministers of Government. The President is directly elected by the populace at the same time as the elections for the National Assembly. Each state is represented by its own assembly and executive, which have the limited powers set out in the federal Constitution.

TRANSITION TO CIVILIAN RULE

ELECTIONS

Elections were conducted at the local, state and national levels in December, January and February respectively. After the local elections

three parties, the Peoples Democratic Party (PDP), All Peoples Party (APP) and the Alliance for Democracy (AD), qualified to contest the elections at the state and national level. In the state and national elections the centrist PDP registered the majority of the vote, obtaining 57% in the House of Representatives and 54% in the Senate.

There was some regional violence during the elections, and widespread allegations of vote buying by all parties, as well as other electoral irregularities. However, despite these irregularities reports from the election stated that the vote represented the popular wishes.

The Constitution

The responsibility for the development of a new constitution was placed under the control of the Constitutional Debate Co-ordinating Committee(CDCC). This committee, consisting of members appointed by General Abubakar and chaired by Justice Tobi, was responsible for piloting the debate and co-ordinating and collating the receipt of views and recommendations of members of the Nigerian public. The CDCC did not make any recommendations of its own. The debate generally agreed that the new constitution should be based primarily on the 1979 Constitution, subject to certain amendments.

The draft 1999 Constitution was then finalised by a panel appointed by General Abubakar and adopted by the military Provisional Ruling Council on 5 May 1999. This final drafting process was largely unconsultative and untransparent, the panel not having any obligation to incorporate the views of the public expressed in the CDCC report.

In September 1999 the Senate announced that its Judicial Committee was to undertake a review of the 1999 Constitution. The President also created an inter-party committee to conduct a review of the 1999 Constitution. This inter-party committee consists of seven members from each political party chaired by a representative of the executive. This committee has widely consulted with members of the public, judiciary, politicians and other concerned groups with the view to drafting a bill recommending amendments to be made to the Constitution.

Revocation of Military Decrees and Release of Political Prisoners

Prior to the departure of the military government, it announced that all military decrees that were inconsistent with the new Constitution were revoked. The Constitution of the Federal Republic of Nigeria (Certain Consequential Repeals) Decree No 63 of 1999 revoked numerous decrees

violating fundamental human rights, including the State Security (Detention of Persons) Decree No. 2 of 1984, Treason and Other Offences (Special Military Tribunal) Decree No. 2 of 1987, Civil Disturbances (Special Tribunal) Decree No. 2 of 1987, Treasonable Offences Decree No. 29 of 1993, Robbery and Firearms (Special Provisions) Decree No. 5 of 1984 and the Legal Practitioners (Amendment Decree) No. 21 of 1994.

During this period the military government released many political prisoners including those that had been detained in various treason trials in 1990, 1995 and 1998. These prisoners had all been tried in specially established tribunals appointed by the military government and not accorded the due process of law.

Human Rights Background

During the years of military rule, human rights were systematically violated. The military government promulgated many decrees which deprived Nigerians of the enjoyment of their human rights and acted in contravention of Nigeria's regional and international obligations. These included decrees that allowed indefinite detention in the interests of security; created special military tribunals that tried civilians and did not guarantee due process or allow judicial review; and decrees that limited the freedom of the press, association, expression and movement. Political prosecutions, torture, extra judicial executions and widespread violations of economic, cultural and social rights also occurred.

Under the transition regime, human rights violations decreased. Many of the decrees violating human rights ceased to be used and were repealed before the handing over to civilian control. General Abubakar's government also released all political prisoners, and arrested members of the previous regime suspected of crimes. However, human rights violations continued. Security forces continued to operate utilising excessive force and torture. These violations of human rights were also committed by the regular police forces. Prison conditions also remain life threatening. Unrest in Delta State has resulted in many extra judicial killings.

With the assumption of power by the Obasanjo government, the human rights situation continued to improve. The revocation of certain military decrees and the removal of restrictions on the freedom of movement and association constituted steps towards an improvement in conditions. The government appointed a national prison reform committee to investigate the conditions in prisons and also released 1400 prisoners. In July the Court of Appeal held, in *Chima Ubani v Inspector General of Police*,

retrospectively that the State Security (Detention of Persons) Decree of 1984 No. 2 violated the African Charter on Human and Peoples' Rights.

However, excessive use of force and arbitrary detention by police continued and prison conditions remained life threatening. It has also been stated that between 60 and 74% of the estimated 41,000 persons held in Nigerian jails are awaiting trial. Many of these have been held for longer periods than they would have been subject to if convicted.

Ethnic violence continued, particularly in Delta State, and towards the end of 1999 religious and ethnic violence increased in northern states due to attempts by state governments to implement Islamic law. Women suffer physical abuse and discrimination. Marital abuse is common and is not an offence if permitted by customary law, and marital rape is not a crime.

The 1999 Constitution, in Chapter IV, contains certain fundamental rights. These include the right to life, the prohibition of torture and discrimination, and the freedoms of expression, association and movement. These rights can be enforced through the High Court of a state. However, Section 45 of the Constitution provides an exception to some of these rights by providing that they shall not invalidate any law that is reasonably justifiable in a democratic society in the interests of defence, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedoms of other persons. Chapter IV of the Constitution can only be amended by a four fifths majority of the parliament and approved by a resolution of the Houses of Assembly of two thirds of all the states.

The government also inaugurated, on 14 June 1999, the Human Rights Violation Investigation Panel of Nigeria, headed by Justice Oputa, a retired Supreme Court judge, to investigate cases of mysterious deaths and other human rights violations perpetrated by anyone that have occurred since 1963 and to make recommendations to the government.

Nigeria is a party to the Convention on the Elimination of All Forms of Discrimination against Women; the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. It has also signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Regionally, it is a party to the African Charter on Human and Peoples Rights.

National Human Rights Commission

The National Human Rights Commission (NHRC), established by Decree 22 in 1995, continued to operate but no provision was made for it in

the 1999 Constitution. The NHRC is governed by a council chaired by a retired justice of the Supreme Court, Court of Appeal or state High Court and fourteen other members representing government, NGO s, the legal profession and the public. The members are appointed by the President on the recommendation of the Attorney General. Members of the council can be removed by the President if s/he is satisfied that it is not in the interest of the public that the member remain in office. The NHRC is responsible for monitoring and investigating alleged cases of human rights violations, promoting and undertaking studies on human rights and assisting the government in the formulation of human rights policy.

Although the NHRC operated relatively independently during the military regime of General Abacha and has continued to do so under the current government, its independence could be strengthened. The NHRC should be completely separated from the government, in particular members should be appointed for a specific period and not subject to arbitrary removal by the President. The institution could also be strengthened through a redrafting of its enabling law improving its investigatory powers, making it accountable to the National Assembly and entrenching its powers and functions in the Constitution. This would recognise the fundamental importance that such an institution plays in maintaining respect for human rights in society.

The Judiciary

The legal system in Nigeria is primarily based on English common law, with customary law and sharia law applied in particular disputes. Section 6 of the Constitution of the Federal Republic of Nigeria 1999 vests the judicial power in the courts created by the Constitution. This section also provides that the National Assembly or State Assembly can establish courts with a subordinate jurisdiction to that of a High Court. The federal government has exclusive competence to legislate for the criminal justice system and all authorities, persons and subordinate courts are obliged to enforce the decisions of the superior courts contained in the Constitution. Section 150 of the Constitution creates the position of Attorney General as chief legal officer of the Federation.

The judicial system, under the previous regimes, had suffered extensively from delays, insufficient funding and some elements of corruption. The situation was improved somewhat by the appointment of six justices to the Supreme Court and 24 justices to the Court of Appeal by the Provisional Ruling Council during the transition to civilian rule. Since the inauguration of the new democratic government, funding for the judicial system has improved markedly, although delays remain a problem.

The Supreme Court of Nigeria sits at the head of the court structure. It has original jurisdiction in any dispute between the Federation and a state or between states if that dispute involves any question on which the existence or extent of a legal right depends, and any other jurisdiction that the National Assembly may confer on it. The Supreme Court has exclusive competence to hear appeals, as of right or with leave, from the Court of Appeal.

The Supreme Court consists of the Chief Justice and fifteen other judges and cases are usually heard by a bench of five justices. However, in appellate cases regarding the interpretation of the Constitution or a question as to whether any of the fundamental rights contained in Chapter IV of the Constitution are, or are likely to be, violated the court shall be constituted by seven justices.

The Court of Appeal, created by Section 237 of the Constitution, has exclusive jurisdiction to hear appeals from State and Federal High Courts and Sharia and Customary Courts of Appeal. The court has original jurisdiction to determine questions regarding the validity of the appointment or term of office of the President or Vice-President. Appeal is available as of right in the matters outlined in Section 241 of the Constitution which include, *inter alia*, appeals involving a question of law, the interpretation of the Constitution or where a sentence of death has been imposed. The Court of Appeal consists of a President of the court and at least 49 other justices. Cases are usually heard by a bench of three judges.

The Constitution also creates State and Federal High Courts. The Federal High Court has wide jurisdiction in civil cases and matters outlined in Section 251 of the Constitution. These include matters relating to, *inter alia*, government revenue, taxation, intellectual property, immigration, and mines and minerals. The court also has such civil and criminal jurisdiction as may be conferred upon it. The Federal Capital Territory of Abuja and each state has a High Court which has criminal and civil jurisdiction to determine cases that arise in its territory or those that are referred to it under its appellate jurisdiction. The Chief Judge of each federal or state superior court can, subject to any act of a National or State Assembly respectively, make rules regulating the practice and procedure of their court.

Sharia and Customary Courts of Appeal exist in each state and in Abuja. The Sharia Court of Appeal has jurisdiction to determine cases and appeals involving any question of Islamic personal law regarding marriage, guardianship or probate, and where all parties to the proceedings request that the case be decided in the first instance in accordance with Islamic law. Cases are heard by three judges (*Kaɗi'ɔ*) who have considerable experience in Islamic law.

Customary Courts of Appeal have jurisdiction to hear appeals in civil proceedings involving questions of customary law, and any other jurisdiction that may be conferred upon it by the National Assembly. Cases are heard by a bench of three judges who have considerable experience in Customary law.

Several subordinate courts have been created in each state. These include Magistrate Courts, Area and Upper Courts and Customary Courts.

JUDGES

The provisions regarding the selection, removal and conditions of service of judges are contained in Chapter VII and the Third Schedule of the Constitution. The procedures generally provide for the independence of judges. All federal judges are appointed by the President upon the recommendation of the National Judicial Council. State superior court judges are appointed by the Governor on the recommendation of the National Judicial Council. In the case of the justices of the Supreme Court, and the heads of all other superior courts, i.e. the Presidents of the Courts of Appeal, the Chief Judges of the High Courts, and the Grand Kadi's of the Sharia Courts, the appointment process is subject to confirmation by the Senate or the House of Assembly of the State.

Supreme Court judges and justices of the Court of Appeal are required to retire at 70 years of age and all other justices at the age of 65. Section 84(3) and (4) guarantee that a judge's salary and conditions of service, other than allowances, will not be altered to their disadvantage after their appointment. Section 291(3) of the federal Constitution also guarantees that judges will be paid a pension upon retirement.

The Chief Judges of the federal or state superior courts can only be removed by the President or Governor acting on an address supported by a two thirds majority of the Senate or House of Assembly of the state respectively. In the case of any other judicial officer, they can only be removed by the President or Governor acting on the recommendation of the National Judicial Council. Grounds for removal consist of inability to discharge the functions of office or appointment, whether arising from infirmity of mind or of body, for misconduct or for contravention of the Code of Conduct. The Code of Conduct is contained in the Fifth Schedule to the Constitution.

National Judicial Council

The National Judicial Council (NJC) consists of 23 current or retired members of the judiciary and public representation. This includes, *inter alia:*

- five retired justices from the Supreme Court or Court of Appeal selected by the Chief Justice;
- five Chief Judges of states, appointed by the Chief Justice, who serve on a rotational basis;
- five members of the Nigerian Bar Association appointed by the Chief Justice of Nigeria on the recommendation of the National Executive Committee of the Nigerian Bar Association;
- two non-legal practitioners who, in the opinion of the Chief Justice, are of unquestionable integrity.

The NJC, in exercising its recommendatory appointment power, can act upon the recommendation of the Federal or State Judicial Service Commission, where applicable, or the Judicial Service Committee of the Federal Capital Territory, Abuja.

The NJC also has the power to:

- recommend to the President or the Governor of a state the removal of a judge and to exercise disciplinary control over them;
- collect, control and disburse all money for the judiciary;
- advise the President or Governor on any matter referred to them by such parties, pertaining to the judiciary;
- appoint, dismiss and exercise disciplinary control over members and staff of the Council, and disburse all moneys of the Council;
- deal with all other matters relating to broad issues of policy and administration.

Judicial Service Commission

The Federal and State Judicial Service Commissions consist of the Chief Judges of their respective courts, the federal or state Attorney General, two legal practitioners and two other non-legal practitioners recommended by the President or Governor who are of unquestionable integrity. These bodies advise the National Judicial Council in nominating persons for federal and state superior judicial office and can also recommend the removal of judicial officers.

The Federal Judicial Service Commission also can appoint, dismiss and exercise disciplinary control over Chief and Deputy Chief Registrars of the federal courts and all other members of staff of the judicial service of the Federation. The State Judicial Service Commission can appoint, dismiss and exercise disciplinary control over the Chief and Deputy Chief Registrars of the state courts, magistrates, judges and members of Area Courts and Customary Courts, and all other members in the judicial service of a state.

PAKISTAN

On 27 January 2000, the new Musharaf government gave instructions to judges in Pakistan to take a fresh oath of allegiance to the unconstitutional army-led administration. Chief Justice Said-uz Zaman Siddiqi and about 20 other judges, including five Supreme Court judges, have refused to take the new oath. Harsh measures were taken against these judges and the Chief Justice himself was replaced. The CIJL is aware of at least 34 judges and lawyers who were murdered in Pakistan during the last three years.

The 1973 Constitution of the Islamic Republic of Pakistan provides for a federal state and a parliamentary system. Federal legislative power is vested in the parliament, which is composed of two houses: the National Assembly (lower house) and the Senate (upper house). The National Assembly is composed of 207 Muslim members and ten additional members of other religions, all elected for a five year term. The Senate is composed of 87 members, elected for a term of six years. The President is the head of state. The Prime Minister, who is the head of the government, is elected by the National Assembly in a special session. The Constitution permits a vote of "no confidence" against the Prime Minister by a majority of the entire National Assembly, provided that it is not during the annual budget session.

According to the 1973 Constitution, the President, after consulting with the Prime Minister, appoints provincial governors, who act on the advice of the Cabinet or chief minister of the province.

On 12 October 1999, the government led by Prime Minister Nawaz Sharif was overthrown by the Pakistani armed forces, under the leadership of General Pervez Musharraf. The coup came after months of mounting tension between Mr. Sharif and the military and general public dissatisfaction with his government, especially after he cracked down on political opposition.

Mr. Musharaf declared himself Chief Executive Officer. He suspended the Constitution and all political offices except the office of the President, held by Mr. Muhammad Rafiq Tarar. He also abolished the National Assembly. Mr. Musharaf formed a civilian-military National Security Council and appointed a civilian Cabinet. After the coup Pakistan was suspended from the British Commonwealth.

The International Commission of Jurists (ICJ)/Centre for the Independence of Judges and Lawyers (CIJL) was highly critical of the manner in which the ousted civilian government of Mr. Sharif operated, and primarily of its undermining of the Rule of Law and its violations of judicial independence. The ICJ/CIJL stance remains, however, that there can be no solution outside the framework of constitutionalism and democracy.

Human Rights Background

The human rights situation remained poor in 1999. Sectarian violence remained a problem throughout Pakistan, especially between Shia and Sunni Muslims. The blasphemy law is also a cause of great concern among human rights activists, as it is often used to persecute religious minorities. Religious minorities such as Christians and Ahmadiyya were prosecuted under the blasphemy laws and *'fatwas'* were spoken out against them.

Journalists faced severe harassment when the Sharif government was in power. Those critical of the regime faced financial difficulties, detention, torture and even murder.

Non-governmental organisations (NGO s) suffered from severe restrictions in 1999, mainly in the provinces of Punjab and Sindh. The authorities imposed registration restrictions on numerous NGO s. Many organisations were shut down and financial support from abroad was supervised by the authorities or even forbidden.

Several members of the opposition were arrested by the Sharif administration after they formed the Grand Democratic Alliance (GDA) and called for a protest rally in September. Some of them were kept in detention although most were released.

Killings in the Name of Honour

The death of Samia Imran, who was murdered in an "honour killing", drew international attention and condemnation (*see also under Cases below*). The legal system condones killings in the name of honour. Such killings are carried out if women are perceived to put shame on their family by seeking divorce, having an illicit relationship, refusing to marry a man that is chosen by their family or even when they are raped. Allegations are sufficient to justify an "honour killing". The tradition of honour killings is supported by a large part of the Pakistani population. The government tolerates these killings on religious or traditional grounds. As a result, the perpetrators often go unpunished. Even when the perpetrators are

punished they only receive a very light sentence as judges are often gender biased.

The judiciary is also often reluctant to punish the perpetrators of the "honour killings" because they do not want to intervene in what is considered a family affair. Part of the problem of "honour killings" is that the police profit from the killings in that they often receive bribes for not investigating cases.

The successive governments of Pakistan did not take adequate action to combat this practice that is forbidden by law. The Senate even refused to discuss the issue of honour killings by blocking a draft resolution condemning violence against women.

Torture

Torture in Pakistan is only a crime when it is inflicted on a person to extract information. Pakistan has not ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

In his report to the 1999 Commission on Human Rights the UN Special Rapporteur on Torture advised the government of information on individual cases. In addition he noted with regret that the government did not yet provide him with information on the steps taken to implement the recommendations contained in his 1996 mission report.

Detention of Officials of the Sharif Government

Several officials of the Sharif government were detained after the coup on 12 October 1999 without being informed of the grounds of their detention and without being assured access to a lawyer. In these cases the government used the term "protective" detention, eventhough there is no provision in the Constitution for this type of detention.

Nawaz Sharif was detained on 12 October 1999 and the military filed a complaint against Mr. Sharif accusing him of criminal conspiracy, hijacking, kidnapping and attempted murder. Mr. Sharif appeared before a Special Anti-Terrorist Court in Karachi in November 1999 without formally being charged with a crime and was only officially charged with hijacking, kidnapping, attempted murder and plotting to wage war against the state on 8 December 1999. On 12 December 1999, the Anti-Terrorist Court of Karachi adjourned the trial until 12 January 2000.

THE JUDICIARY

The Constitution of the Islamic Republic of Pakistan provides for an independent judiciary. However, the judiciary is influenced by the executive. Very little respect for judicial independence was provided for under the Sharif government. On 27 January 2000, the new Musharaf government made very clear that it does not respect the independence of the judiciary when the military gave instructions to judges in Pakistan to take a fresh oath of allegiance to the unconstitutional army-led administration.

The Judges Order 2000 that instructs judges in Pakistan to take a fresh oath of allegiance to the military-imposed Provisional Constitutional Order, is a cause of deep concern. Chief Justice Said-uz Zaman Siddiqi and about 20 other judges, including five Supreme Court judges, have refused to take the new oath. Harsh measures were taken against these judges and the Chief Justice himself was replaced.

The International Commission of Jurists (ICJ) and its Centre for the Independence of Judges and Lawyers (CIJL) voiced their concern in a press release.

The UN Special Rapporteur on the Independence of Judges and Lawyers expressed his grave concern also on 28 January over the issuance of the Oath of Office (Judges Order 2000) calling upon all judges to take a fresh oath of allegiance to the Provisional Constitutional Order. An independent judiciary cannot be obedient to the executive and therefore the issuance of the Oath of Office is in clear violation of the principle of independence of the judiciary.

In its reaction to last year's edition of *Attacks on Justice* the government stated that "Both judiciary and the executive are the principal organs of the state. They operate in cooperation and coordination with each other. The independence of the judiciary is ensured through appointment, security of assignment and financial independence".

The rules regarding appointment, qualifications, tenure and discipline were described in last year's edition of *Attacks on Justice*. In light of the replacement of the Chief Justice because of his refusal to take the new Oath of Office and the dismissal of other judges it is feared that the Musharaf government will show further disrespect for the independence of judges.

In his report to the 1999 Commission on Human Rights, the UN Special Rapporteur on the Independence of Judges and Lawyers reiterated his wish to visit Pakistan. No invitation has to date been offered to the Special Rapporteur.

Shari'a Law

In October 1998, the National Assembly voted 151-16 in favour of a constitutional amendment to replace the legal system with Shari'a law. Criticism of the amendment focuses primarily on the article which gives the government the right to "prescribe what is right and forbid what is wrong" according to Islam, as this gives the government extraordinarily broad powers. In its reaction to last year's edition of *Attacks on Justice* the government stated that "the proposed 15th constitutional amendment (sharia law), does not provide for arbitrary interpretation".

Court Structure

The judicial system is composed of a Supreme Court of Pakistan, a High Court for each province and, at the lower levels, Civil and District Courts for civil proceedings, and Magistrate and Session Courts in the criminal system. There is also a Federal Shariat Court and there are Special Terrorism Courts.

The Supreme Court enjoys original jurisdiction in every dispute between the federal government and the provincial governments and appellate jurisdiction "from judgements, decrees, final orders or sentences of a High Court". The High Courts' jurisdiction is extensively detailed in the Constitution.

Federal Shariat Court

The Federal Shariat Court has the power to examine and decide if a law or its provisions comply with the injunctions of Islam. In addition, the Federal Shariat Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of Hudood. Appeals against the decision of the Federal Shariat Court are heard by a bench of the Supreme Court, known as the Shariat Appellate Bench.

The eight Muslim members of the Federal Shariat Court are appointed by the President for a renewable term of three years. The President has the power to "(a) modify the term of appointment of a judge, (b) assign a judge to any other office, (c) require a judge to perform such other functions as the President may deem fit".

The renewable term and ability to transfer judges violates the UN Basic Principles on the Independence of the Judiciary.

Special Terrorism Courts

In violation of the Constitution and international standards, the Sharif government enacted the Anti-Terrorist Act (ATA) in August 1997 to "provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto". Eleven courts were set up under the ATA in Punjab and presiding judges for these were appointed, after consultation with the Chief Justice of the Lahore High Court. In May 1999 several courts were set up in Karachi. Ironically, Mr. Sharif himself is now being tried before these court.

In May 1998, the Supreme Court ruled that a number of provisions of the ATA are unconstitutional. These include: the lack of appeal in Anti-Terrorist Courts, the far reaching powers of the police, and the right of the police to shoot to kill.

Military Courts

Two people were sentenced to death by a Military Court in Karachi in November 1998. However, the Supreme Court decided in January 1999 to halt the executions pending the review of the legality of the establishment of these Military Courts.

In February, the Supreme Court ruled unanimously that the establishment of the Military Courts in Karachi were "unconstitutional, without lawful authority and of no legal effect" and that the pending cases should be transferred to Anti-Terrorist Courts. The judgement was accepted by the Sharif government and the Anti-Terrorism Act was amended accordingly.

Cases

The CIJL is aware of at least **34** judges and lawyers who were murdered in Pakistan during the last three years. Many more lawyers face harassment ranging from administrative provocation to physical abuse. The protection of lawyers cannot be effective in the absence of the Rule of Law and an independent and impartial judicial system that guarantees it.

Rana Bhagwandas (judge of the High Court of Sindh): On 1 September 1999, the Chief Justice of the Sindh High Court ordered a full bench to hear a petition challenging the appointment of a non-Muslim to the superior judiciary. The petitioner had filed an appeal before a Division Bench of the Sindh High Court challenging the order of the Income Tax Appellate Tribunal in Karachi, but this appeal was dismissed. The Division

Bench which heard the case was presided over by Justice Rana Bhagwandas and Justice Sabihuddin Ahmed. The petitioner then filed a constitutional petition (No. 1069/1999) against the Government of Pakistan and Judge Bhagwandas to declare the bench unconstitutional as Judge Bhagwandas is a Hindu and only Muslims can be appointed to the superior judiciary.

The case was heard on 22 September 1999 and then postponed until 19 October 1999 but it had not yet taken place by the time of writing.

Asma Jahangir {lawyer and chairperson of the Human Rights Commission of Pakistan} and **Hina Jilani** {lawyer}: The two lawyers received death threats from religious extremists as a result of their defence of Ms. Samia Imran, who sought their help in divorcing her husband. Ms. Imran was shot dead by a hired gunman in front of Ms. Hina Jilani in their office in Lahore. The killer was later shot dead by a policeman when he took a colleague of the two lawyers, Shahtaj Qizalbash, hostage after the murder. Ms. Qizalbash was later released. This so-called "honour killing" was carried out on the orders of the family of Ms. Imran.

The influential father of the victim, President of the Peshawar Chamber of Commerce, used his power to issue death threats against the two lawyers and to prevent the arrest of the ones who ordered the killing. On 8 April, the family of the victim organised a meeting of members of the Peshawar Chamber of Commerce who support Samia's murder as being in keeping with traditional laws. This meeting also issued *fatwas* denouncing Asma Jahangir and Hina Jilani as *kafir*, and asking that they be punished according to tribal law. In addition they accused the law firm of Asma Jahangir and Hina Jilani (AGHS) of being responsible for Samia's death and organised a public demonstration of businessmen and religious extremists on 9 April 1999 in Peshawar where statements were issued that they will take the law into their own hands and kill Asma Jahangir and Hina Jilani.

The killer, the father, mother and uncle of the victim were named in the First Information Report (FIR) lodged by Hina Jilani immediately after the murder and were fully identified by witnesses. Nobody, however, was arrested and the family of Ms. Imran was allowed to leave Lahore. The investigation in the case did not proceed further than the collection of evidence from the site of the murder and recording the statements of eyewitnesses of the occurrence in the office of AGHS. The police failed to investigate and procure statements of important witnesses. Only on 30 April 1999 did the police obtain warrants for arrest of the accused.

Iqbal Raad {lawyer}: Mr. Raad, who was one of the lawyers for Mr. Sharif, was gunned down on Friday 10 March 2000 by unidentified men in broad daylight in his Karachi office.

PALESTINIAN AUTONOMOUS AREAS

The Palestinian judiciary is largely underfunded, suffers from neglect and is subjected to frequent political attacks. State Security Courts remain the primary concern, with trials occurring at night and without appropriate safeguards for ensuring a fair trial. The absence of a clear body of law, the failure of President Arafat to assent to laws regarding the judiciary and the lack of a Judicial Council to regulate appointments and promotions also hampers the development of an independent judiciary.

The 1993 Declaration of Principles on Interim Self Government Arrangements (the Oslo Accords), signed by Israel and the Palestinian Liberation Organisation (PLO), which led to the establishment of the Palestinian Autonomous Areas, left five main issues related to Jerusalem, refugees, settlements, security arrangements, borders and international relations to be resolved in a final status agreement. In September 1999, the Sharm el-Sheikh Agreement established a new timetable for the conclusion of the negotiations. The agreement required both parties to make a "determined effort" to conclude a Framework Agreement on all permanent status issues by September 2000.

The series of agreements signed since the Oslo Accords establishes the current constitutional structure in the areas that have been returned to Palestinian control. The scope of the power, granted to the Interim Palestinian Self-Government Authority (Palestinian Authority (PA)), is limited both functionally and territorially. In the West Bank territory returned to the PA is divided into three categories. In areas A and B the PA has full civil powers and responsibilities, whilst in area C the PA has civil powers and responsibilities not relating to territory. Furthermore, in area A the PA is responsible for internal security and public order and in area B responsible for public order of Palestinians. Israel has an overriding responsibility for security. Even after the completion of redeployments as specified in the Sharm el-Sheikh agreement, only approximately 18% of the West Bank will be under full Palestinian control. In the Gaza Strip, Israel retains full control over 38% of the territory, in what are referred to as yellow areas. There is no joint control over territory in the Gaza Strip.

The 1995 Interim Agreement on the West Bank and the Gaza Strip (the Interim Agreement) invested the Palestinian Council (PC) with the executive and legislative powers of the PA. The PC delegates its executive

powers to an executive authority composed of members of the PC. The President is elected separately and heads the executive authority and may appoint other persons, who are not council members, of an amount not exceeding 20% of the total membership of the executive authority. The PC does not have powers or responsibilities in the sphere of foreign relations, external security or for the security of Israelis. The PLO is entitled to conclude agreements with states or international organisations in certain specified economic areas.

Despite this apparent legal structure, the executive authority, in particular President Arafat, wields most power and continues to act with relative impunity. President Arafat is able to issue new laws and create new institutions through presidential decrees, transfer cases from civil courts to the state security courts, and the executive authority routinely refuses to enforce judicial decisions and harasses members of the legislative council. President Arafat's continued refusal to sign the Basic Law effectively stops the development of clear government structure based on democratic principles, the separation of powers and the Rule of Law.

The International Commission of Jurists (ICJ) and its Centre for the Independence of Judges and Lawyers (CIJL), conducted a mission to the Palestinian Autonomous Areas from 15-25 January 2000. The mission met with various members of the Palestinian Authority, members of the judiciary, lawyers and human rights groups.

Human Rights Background

Under Article XIX of the 1995 Interim Agreement the PC and the executive authority are required to exercise their powers with due regard to internationally accepted norms and principles of human rights. However, human rights in the Palestinian territories have been routinely violated, generally for political expediency. Palestinian security forces often resort to physical violence, and the freedom of expression and association are significantly curtailed.

The Palestinian police and security forces regularly detain suspects in prison for long periods of time without charges and without bringing them before a properly constituted court. This is particularly so with suspected members of *Hamas* or the *Islamic Jihad,* and other perceived threats to the peace process. Suspects are arrested without a judicial warrant and subjected to beatings and torture whilst in custody.

Members of the PC have also been subject to police assaults. On 16 December 1999 members of the general intelligence services assaulted

Abdil Jawad Saleh, a member of the PC. He had been protesting outside the Jericho Detention Centre about the detention of some colleagues who had signed a petition protesting against corruption in the institutions of the Palestinian Authority. He was summoned by the security forces to see the director of the detention centre and, while waiting, was beaten and whipped with a hose. He had to be transferred to a hospital. Assaults of PC members also occurred in July 1998.

The present confusion regarding applicable laws and the jurisdictions of various Palestinian institutions makes it difficult for the judicial system to protect individuals from actions of the state that violate their rights. In the absence of new laws promulgated by the PC, many of the existing laws in the Gaza Strip date from the early twentieth century, a time period when human rights were not sufficiently protected in domestic laws. In the West Bank, the laws date primarily from the 1950's and 1960's. Also significant changes were made to these laws by Israeli military orders during occupation, in a manner restictive to human rights.

The State Security Court, which tries a range of offences not limited to security, violates fundamental human rights. Trials in these courts often occur at night and behind closed doors. They are conducted quickly and summarily, after which the sentence is passed and executed immediately. Often a sentence of death is imposed and is carried out within hours of the trial. From these courts there is no right of appeal, and no right for the accused to have legal representation or to have time to prepare an adequate defence. Even in cases determined in regular courts, the executive authority routinely ignores court orders to release people who have been illegally detained, or re-arrests them immediately after their release. For example, Dr Abdel Aziz Al-Rantisi, whose release was ordered by the High Court on 4 June 1998, is still being illegally detained.

Palestinian Legal History

The legal system in the occupied territories derives from a variety of sources. Each successive administration applied the previous administration's laws, and then progressively modified them throughout their tenure. Therefore, in the occupied territories, the laws derive from Ottoman, British, Egyptian, Jordanian, Israeli and Palestinian Authority origins. In Law 5 of 1995 the Palestinian Authority confirmed that all laws in force in the West Bank and Gaza Strip on 19 May 1994 would remain in force. Various revolutionary codes that regulate the activities of the PLO are applied in State Security Courts and Military Courts to members of the military and to civilians.

In the Gaza Strip the majority of laws date from the British Mandate and derive from the common law tradition. The British Emergency Law of 1945 is still in force in this area. In 1950, the West Bank was unified with Jordan and in the following period a new set of legislation based on the civil law tradition was introduced, to unify the West Bank and Jordanian legal systems. British Mandate and Ottoman law continued to apply until abrogated by the new unified law. Both systems were further modified by Israeli military orders following occupation.

The 1993 Oslo Accords regard the Gaza Strip and West Bank as a single territorial unit. Therefore, the legislative and executive acts of the PA apply to the two banks uniformly. In the absence of specific legislation from the PC the court must determine which laws from previous administrations still apply. Also, the executive will often base its actions on a law from the Gaza Strip or the West Bank, but the executive decision will apply to both areas equally. As it is often unclear which laws are in effect, courts frequently accede to assertions by the executive as to the appropriate basis for their action.

Draft Laws

Since 1996, the PC has promulgated a series of laws establishing the principles, structure and rules that the government will be based on in the self-governing territories. The most important of these is the Draft Basic Law. The Draft Basic Law provides that the governmental system rests on the principles of parliamentary democracy, the Rule of Law and the separation of powers. Chapter 6 of the Basic Law secures the independence and impartiality of the judiciary, and the Basic Law also requires the PA to act in accordance with basic human rights treaties. The Judicial Authority Law, passed by the PC in December 1998, sets out in greater detail the structure of the Palestinian court system, each court's jurisdiction and the procedures for the appointment and selection of judges. The Law on the Independence of the Judiciary, passed in February 2000, guarantees the financial independence of the judiciary.

The Basic Law, Judicial Authority Law and Law on the Independence of the Judiciary are yet to be signed by the President. The executive authority asserts that because of the failure to complete this procedural requirement these laws are not in effect. The 1995 Interim Agreement grants legislative and executive power to the PC, and allows the PC to pass laws to regulate its procedure. Article 71 of the Standing Orders of the PC states that if there is a failure by the President to sign a law within one month, the President must return the law with comments or the reasons for rejection. The law shall then be re-discussed and if approved by an absolute majority of the parliament the law takes affect. The application of these

laws should not be thwarted by the refusal of the President to return the draft legislation.

THE JUDICIARY

The judicial system, inherited by the PA after more than 26 years of Israeli occupation, was severely damaged through neglect and a lack of support from the Israeli Military Government. The court system suffers from a severe lack of funding, judges and administrative staff. Many court buildings are in a dilapidated condition and overburdened with cases. Court decisions are not recorded systematically to develop a body of case law.

During the occupation, the Israeli Military Government routinely modified laws and removed cases from Palestinian courts' jurisdiction to its military courts, irrespective of whether or not they related to security concerns. The judiciary was subjected to executive pressure as judicial appointments were carried out through a committee appointed by the Israeli Military Area Commander.

President Arafat, on 20 June 1999, appointed Zuheir Sourani as civilian Attorney General, a position that had been vacant since May 1998. This is a welcome change as the Attorney General represents the judiciary's interests in the executive and acts as a defender of the judicial system. Sourani had previously been a judge of the High Court of Justice, the head of the Criminal Court, and the head of the Election Appeals Court.

REGULAR COURTS

Article IX(6) of the 1995 Interim Agreement requires the PC to have an independent judicial system composed of independent Palestinian courts and tribunals. This requires the creation of a unified judicial system. As the Draft Basic Law and the Judicial Authority Law have not been signed by President Arafat, the court system remains unchanged.

The court structure in the self-governing areas, despite the different legal traditions, is relatively similar. The regular court structure consists of Magistrates Courts, District Courts or courts of first instance, the Courts of Appeal and the High Court of Justice. Religious Courts, both Moslem and Christian, deal with matters of personal status. Magistrate Courts deal with minor offences and small civil claims and District Courts deal with more serious crimes and larger civil claims. Currently there are 2 District and 6 Magistrate Courts in the Gaza Strip, and 4 District and 9 Magistrate Courts in the West Bank.

The Court of Appeal hears appeals in civil and criminal matters from lower courts, and the High Court of Justice reviews decisions of executive authorities and deals with final appeals from the Court of Appeal. Both of these courts are situated in Ramallah and Gaza City. Article VIII of the 1995 Interim Agreement provides that any person or organisation affected by any act or decision of the executive authority or the *Ra'eed* (the President), and believes that it is *ultra vires* or otherwise incorrect in law or procedure, may apply for a review of the decision to the relevant Palestinian court of justice.

Israeli Military Courts

Israeli military courts have full jurisdiction in areas that have not been returned to Palestinian territorial control. This includes the yellow areas in the Gaza Strip, and the settlements and military installation areas and Area C in the West Bank. In Area B, in the West Bank, Israel has the overriding responsibility for security for the purpose of protecting Israelis and confronting the threat of terrorism. This gives Israel concurrent jurisdiction with the PC in Area B and entitles the military to arrest and detain suspects in crimes involving security. If the detained suspect is a Palestinian the suspect should be turned over to the Palestinian police force. However if the crime was committed against Israel or Israelis, the military can detain the suspect until an appropriate forum for prosecution can be determined. The Israeli military determines whether the crime involves Israel's interests.

The Israeli military court structure consists of Military Courts of First Instance and the Military Appeals Court. The Court of First Instance can try all cases connected with security, including criminal offences that may become security offences. Article 2 of the Jurisdiction in Criminal Offences Order of 1967 gives military courts jurisdiction over all criminal offences by deeming them to be security offences. Military Appeals Courts will only hear appeals from cases involving a sentence of more than 5 years. Persons convicted by a single-judge military court can petition for leave to appeal, whilst those convicted by a three judge panel can appeal as of right. It is possible to petition the Israeli High Court of Justice from these courts for a procedural review of a decision.

The State Security Court and Military Courts

State Security Courts

President Arafat established a High State Security Court, with seats in Gaza and Jericho, by Decree 7 of 1995, before a duly constituted

legislative body had been elected. The legal basis given for these courts were Articles 23 and 59 of the constitutional law of the Gaza Strip and Order #55 of 1964 of the Egyptian Administration. These laws, in turn, were based on powers granted to the British Governor under the British Emergency Law of 1945. The court is constituted, on an ad hoc basis, by a high ranking officer and two officers of a lesser rank. It does not sit in session permanently and only forms at the President's discretion. The court is competent to hear crimes that affect both internal and external security.

President Arafat changed the structure of the security courts and their jurisdiction by Order #15 of 1998. This order created two other types of security courts, Partial Courts and Integral Courts. The jurisdiction of these courts is limited to cases involving crimes committed in violation of Articles 428 and 433 of the Jordanian Penal Code #16 of 1960. These articles involve crimes relating to violations of the laws regarding public health and the pricing, weighing and quality of foodstuffs. Partial Court cases are heard by one judge and involve crimes where the maximum penalty does not exceed three years. Integral Court cases are composed of three judges and deal with all other crimes. These courts can try civilian or military personnel.

Despite the legal structures establishing these courts, frequent abuses of jurisdiction and human rights are involved. The state security court system exists entirely separate from the regular civil court system and is unacceptably subject to the influence of the executive. The court is constituted by the President, and judges of the court are selected by the executive for each particular hearing. Accused that appear before the court are not entitled to due process, which includes being denied adequate legal advice and the right to appeal. Defendants are usually represented by lawyers appointed directly by the court, who are provided with little information about their client or the case.

As noted earlier, cases are often convened on short notice, at night, and do not allow the proper consideration of the facts and law applicable to the case. The executive also brings many crimes within the court's jurisdiction by adding a security element to the charge.

On 1 November 1999, President Arafat appointed Khalid Al Qudrah as Attorney General to the State Security Court. Al Qudrah had been removed from the position of civil Attorney General in 1998 on corruption charges.

Palestinian Military Courts

A series of military courts have also been estabhshed. These courts try members of the PLO military forces and members of the Palestinian

security services that operate in the self-governing areas. The court also tries members of the civilian population where a military connection is established.

The structure of the court system and the rules of procedure are derived from the 1979 PLO Revolutionary Code of Penal Proceedings. The code authorises the creation of a District Court, a Permanent Military Court and other special courts. The District Court is presided over by one judge and can only hear crimes committed by enlisted soldiers and where the penalty does not exceed imprisonment for one year. The Permanent Military Court is presided over by three judges and hears all cases involving crimes except those explicitly excluded by law. A Special Court hears all cases that it assumes jurisdiction for and crimes involving officers of the rank of major and higher.

These courts are formed upon the decision of the Supreme Commander, President Arafat, and apply the 1979 Revolutionary Penal Law. Currently there are 3 District Military Courts and 3 Permanent Military Courts in the Palestinian territories. Judges are selected from a separate military judiciary and prosecutors come from the Military Public Prosecution headed by the Attorney General for the military courts.

Two cases illustrate the problems with the security and military courts. On 25 February 1999 Colonel Ahmad Atiya Abu Mustafa was tried by a military court for the rape of a six year old boy on 19 February. The case was held in the evening and reportedly lasted for one hour. He was sentenced to 15 years imprisonment for rape and to be executed for "causing public disorder". The later charge was presumably in relation to public disturbances that occurred after his name was released to the public. He was executed on the 26th early in the morning. Concerns were raised after his execution about whether he had committed the crime.

On 28 August 1999, the High State Security Court was convened on order of President Arafat to hear the case of Ayman Mohammad Ibrahim Abu Sa'da. The case resulted from the death of Lieutenant-Colonel Abu-Zeineh on 25 August 1999 after he intervened in a family dispute involving Ayman. The court convened on the evening of the 28th and a sentence of death by firing squad was issued and carried out the following day.

The ICJ/CIJL mission to the Palestinian Autonomous Areas in January 2000 visited the state security and military courts and recommended that the State Security Court be immediately abolished and that the jurisdiction of military courts be limited to trying military personnel for offences committed while on duty.

JUDGES

In the West Bank, prior to 1967, the High Judicial Council was responsible for the appointment of judges. This consisted of the head of the Court of Cassation, located in Jordan, two senior judges of that court, the Attorney General, the heads of the Courts of Appeal in Amman and Jerusalem and the Minister of Justice. Since 1967, the West Bank judicial system has been isolated from the court system in Jordan, and therefore from the High Judicial Council responsible for the appointment of judges. During the Israeli occupation the power to appoint judges was given to a committee appointed by the Israeli Military Area Commander. In the Gaza Strip, following the common law tradition, judges were appointed by the executive, after consulting with the Chief Justice.

Under the Palestinian Authority, members of the judiciary have been directly appointed in the same manner that applied in the Gaza Strip. Judges are appointed, transferred or removed at the discretion of the Minister of Justice, or President Arafat for more senior positions. This has led to judges being removed unjustly from office by the executive. For example, in January 1998, **Chief Justice Qusi El Abadallah** of the High Court of Justice of the Gaza Strip was "retired" from office by the executive.

The Draft Basic Law and the Judicial Authority Law guarantee the independence of the judges within the Palestinian territories. Articles 88-97 of the Draft Basic Law incorporate some of the UN Basic Principles on the Independence of the Judiciary ensuring that judges will be independent in their judicial function, and mandates the creation of an independent Higher Judicial Council (HJC) to ensure that independence. The Draft Judicial Authority Law guarantees the judiciary an independent budget and gives the HJC the power to nominate judges for appointment to the judiciary. It also guarantees members of the judiciary a secure tenure.

On 14 June 1999, Radwan Al Agha was appointed as Chief Justice of the High Court of the Gaza Strip by President Arafat, a position that had been vacant since January 1998. On 19 September 1999, President Arafat, by presidential decree, transferred the management of the judiciary from the Minister of Justice to the Chief Justice of the High Court of Justice in the Gaza Strip. The Minister of Justice had exercised this power in the absence of any other body responsible for judicial management.

The extent of powers granted to the Chief Justice is uncertain, as was the extent of powers the Minister of Justice actually legally held. The decree stated that the Chief Justice is mandated to grant judicial vacations and to arrange the conditions of the judiciary. The exact scope of the power to arrange the conditions of the judiciary is uncertain and possibly subject to executive interference. The Palestinian Authority should have

established an independent Judicial Council, as specified in the Draft Basic Law, with clearly defined powers to carry out this function. On 10 October 1999, Chief Justice Al Agha transferred several judges between courts in the West Bank, not involving any demotions, without consulting the judges concerned. In response to this move a group of West Bank judges went on strike to protest this decision.

Lack of resources and inadequate training still pose problems for the effective administration of justice. In the absence of a High Judicial Council responsible for the appointment of judges there has not been a sufficient creation of new judgeships to meet the growing caseload. As of January 1999 the judiciary comprised 65 judges, 30 in the Gaza Strip and 35 in the West Bank. This consisted of 9 Gaza Strip and 3 West Bank High Court judges; 21 judges presiding over Magistrate and District Courts in the Gaza Strip and 32 presiding in the West Bank. However, in Magistrate Courts in the Gaza Strip alone in 1998 the volume of cases processed was 75,000. In most courts there is a substantial backlog of cases. Judicial salaries are also very low, increasing the difficulties in appointing new judges. Judges are generally appointed for 10 year terms.

The dilapidated condition that the court system is in is illustrated by the events of 6 February 2000. The Court of First Instance in Bethlehem was attacked by a mob of people, who stormed the court and locked the judges inside the building. The protestors were demanding that the conviction and fifteen year sentence imposed on two men be withdrawn. As a result of this action the judges declared a strike.

Furthermore, the executive routinely ignores judicial decisions, particularly those that order the release of arbitrarily detained individuals. The judicial system also suffers from a lack of funds and appropriate infrastructure for efficient judicial administration.

LAWYERS

Lawyers in the self-governing territories face similar problems as members of the judiciary. They are frequently subject to executive interference in the performance of their duties, and suffer from lack of training and funds to develop an efficient and unified legal profession. During the year, lawyers in the West Bank and Gaza Strip conducted several strikes to protest the current conditions of the judicial system.

Prior to the Israeli occupation, West Bank lawyers were members of the Jordanian Bar Association. As a result of the actions taken by the Israeli Military Government during the occupation, lawyers went on a

permanent strike. However, some members of the legal profession returned to representing clients in order to provide protection for those resident in the occupied territories. These lawyers were dismissed from the Jordanian Bar and their pension rights removed. The lawyers who continued to strike, who were eventually in minority, maintained their pension rights and membership of the Bar, but this was subject to them not returning to representing clients in the West Bank. Since 1993 all lawyers have returned to active participation in the legal system.

Several other lawyer's associations, in response to the occupation, began to operate in the occupied territories. In 1979 an Arab Lawyers Committee was set up consisting of lawyers from Jerusalem and the West Bank, and in 1980 the Lawyers Union in the Gaza Strip was established for lawyers practising in that territory.

In order to facilitate the formation of a unified bar association, President Arafat mandated the formation of the Council for the Union of Palestinian Lawyers. The Interim Ruling Council was appointed directly by President Arafat on the advice of the Minister of Justice. The Council consisted of nine members: three members representing lawyers from the Gaza Strip, three members representing the lawyers who had participated in the strike during occupation and three members representing the Arab Lawyers Committee. This council was invested with the responsibility for implementing a project for the unification of the Bar Association. The appointed Council serves until 9 May 2000. The Bar Association Law was passed by the PC and signed by President Arafat in November 1999. This law requires the holding of elections for an independent Bar Council.

During 1999, lawyers conducted several strikes to protest the condition of the legal system. Lawyers also went on strike in November to protest Bar Association Law #3 of 1999. This law stipulated that lawyers must accompany their clients to a public notary and have their client sign a power of attorney in the presence of three parties: the lawyer, the client and the public notary. A lawyer is not able to represent their client unless this procedure is followed. The effect of this law is that if a lawyer is unable to represent their client another lawyer cannot quickly replace them and protect the client's interests. This increases the potential that a client will be without legal representation before Palestinian courts. This law was amended shortly after, due to the protest by lawyers.

The Palestinian executive authority also developed a policy in June 1999, denying human rights lawyers access to their clients incarcerated in Palestinian prisons. This was reported to be because Palestinian human rights groups falsely described the actions of Palestinian police. This is a serious violation of a lawyer's duty to their client and the inherent right that clients have to ensure that their human rights are protected. The right

to have access to a lawyer is also included in the Prison Law, which entered into force in 1998.

CASES

Iyad Alami, Hanan al Bakri, Hanan Matar, Ashraf Nasralla, Khader Shkirat, Ibrahim Sourani, Raji Sourani, Fouad Tarazi {lawyers, members of the human rights groups LAW, Palestinian Centre for Human Rights (PCHR), and the Women's Legal and Social Counselling Center}: On 10 and 14 May 2000 the Palestinian Bar Association removed these lawyers from the list of practising lawyers. The Acting Bar Council based its decision on Article 7 of the Palestinian Bar Association Law which prohibits, *inter alia*, the combining of the practice of law with the holding of public or private employment.

This action was taken without due process and at the end of the Acting Council's tenure in office. Elections for a new council were due to be held by 9 May 2000. On 17 May 2000, the Palestinian High Court of Justice, in a preliminary decision, suspended the Acting Council's decision.

Ahmad Yasin {lawyer}: Ahmad Yasin was arrested on 18 July 1999 under an order from the Jenin prosecutor. He was charged with collaborating with the enemy in contravention of Article 127 of the 1960 Jordanian Penal Code 16. Ahmad Yasin had drafted a contract in December 1997 for the sale of land between two parties, one of which was an Israeli. Yasin's defence was that the contract had been annulled and was void. Yasin had previously published articles complaining about police harassment. He was released on 18 August 1999.

PANAMA

The main problems affecting the judiciary are related to excessive delays in the commencement of trials, the extensive practice of pre-trial detention, political manipulation and corruption.

The Constitution of the Republic of Panama was originally adopted in 1972 and successively amended in 1978, 1983 and 1994. The Constitution provides for the separation of powers between the executive, legislative and judicial branches of government. The executive power is vested in the President of the Republic. A legislative assembly holds legislative power and a court system holds judicial power.

Ms. Mireya Moscoso won the last presidential elections, held on 2 May 1999, becoming the first woman to hold the post in Panama's history. She ran for the Union for Panama, a coalition led by her own party, the Arnulfist Party (PA), and won 44.9% of the votes, against 37.6% for Mr. Martin Torrijos from the New Nation, a coalition led by the ruling Democratic Revolutionary Party (PRD). In parallel parliamentary elections for the 72-seat national legislature (*Asamblea General*) the parties forming the New Nation coalition won a majority with 46 seats. Ms. Moscoso was sworn into office on 01 September 1999.

After losing the general elections the ruling party engaged in far-reaching legislative changes in an attempt to limit the margin of manoeuvre of the future government of President Moscoso.

During the year 1999, Panama prepared for the handover of the Panama canal from United States control, to be carried out on 31 December 1999. In preparation for this event the US authorities closed, in May 1999, the airforce base from which anti-drug operations had been carried out, and another military base was returned to Panama in November 1999. The closing of these bases was made in accordance with the 1977 Panama Canal Treaties. On 31 December 1999, the US officially handed over sovereignty and control of the Panama canal and its adjacent zone to Panama. The event marked the end of a long period of military and effective US control over the canal zone since a treaty was signed between Panama and the US in 1903, whereby the US was given the right to build and operate the waterway and to exercise autonomous control over the adjacent zone where it installed a number of military bases. However, there subsist some fears about Panama's ability to ensure the security in the canal zone considering the fact that Panama itself has no army and the

increasing threats posed by the guerrilla and paramilitary groups of neighbouring Colombia.

Human Rights Background

There were instances of kidnapping, disappearance, torture and arbitrary detention in the country. The perpetrators have been identified as members of the Panamanian national police or the judicial police, and some non-state actors such as guerrillas or paramilitary groups coming from neighbouring Colombia.

There were also a number of disappeared persons or persons otherwise tortured or killed during the dictatorship between 1968 and 1989. Some of these cases were under investigation, although the actual convictions have been few.

Conditions inside prisons are very poor and even life-threatening. Overcrowding is severe, although the number of prisoners without conviction has been diminishing in recent years. Numerous inmates were injured or even killed during violent confrontations between groups of prisoners. Prisons are poorly managed and prison personnel lack sufficient training. Prison wardens, sometimes members of the national police, were pointed to as responsible for abuse against inmates.

The Constitution provides for the right of every person not to be detained without a warrant duly issued by a judge, and if detained to be brought before a judge within 24 hours. However, detainees are often held in detention longer than permitted before they are brought before a judge. The police preliminary investigations are also lengthy and the judges are reportedly flexible with regard to the respect of terms and deadlines. Detainees have the right to see an attorney during the investigations. This is hampered, however, by the fact that most are destitute and free legal aid schemes are insufficient. All these factors create a serious problem of long pre-trial detention. Of all prisoners approximately 60% are awaiting trial, and of those already standing trial only a small proportion have been already convicted.

The legislative assembly created, in 1996, an Office of the People's Defender (human rights ombudsman), that did not begin operating until January 1998 when it was provided with the necessary funding. Its powers were soon curtailed with regard to investigations into cases dealt with by the judiciary.

The judicial police helps the prosecutor in criminal investigations and with the enforcement of court's rulings, but it has become a semi-autonomous institution after a 1998 law shifted the power to appoint

its Director General from the Attorney General to the Supreme Court. The judicial police, as well as the national police, are frequently accused of corruption and abuse of power. A 1994 anti-narcotics law allows prosecutors to wiretap suspects during investigations. The former Supreme Court Chief Justice, Arturo Hoyos, criticised the Attorney General for the wiretapping of a judge in March 1999.

On 3 September 1999, the incoming President Moscoso revoked a decree passed by her predecessor in August 1999, pardoning former governor Eduardo Herrera, who was being accused of abuse of authority, and repealed another decree pardoning 33 former collaborators of General Noriega.

Former military ruler of Panama, General Manuel A. Noriega, continued serving the 40-year prison sentence he received in Miami, USA. In March 1999, a judge in Miami reduced by ten years his prison term when he argued that he deserved credit for helping the USA to pursue its interests in Latin America while he was in power.

The Judiciary

The judiciary (*órgano judicial*) in Panama is organised under the provisions of the Constitution and the Law of the Judiciary. There is also a law on judicial career. Article 207 states that judges and magistrates are independent while carrying out their duties and they are not subject except to the law and the Constitution, as well as to the decisions of higher courts in the exercise of second instance jurisdiction. However, in practice, the judiciary is often subject to political manipulation.

Structure

The Panamanian judiciary is composed of an ordinary court system with a Supreme Court as the highest judicial authority, High Courts (*Tribunal Superior*) as appellate bodies, and District Courts (*jueces de distrito*) and Municipal Courts at the lowest level. There is also a specialised justice system with tribunals for labour, minors and family, and commercial matters. The Supreme Court, sitting in plenary session, exercises jurisdiction over constitutional matters, thus performing the role of a Constitutional Tribunal. There is also a Public Ministry (*Ministerio Publico* - Office of the Public Prosecutor) headed by the Attorney General (*Procurador General de la Nación*).

The Supreme Court exerts jurisdiction over the entire country, whereas the High Courts exert jurisdiction over a limited area called a judicial

district. There are five High Courts in the country, distributed among five judicial districts. District Courts, as well as Municipal Courts, are located within the judicial districts and their decisions can be appealed to the respective High Court.

The Supreme Court is organised into four different chambers for civil, criminal, administrative and business matters. In July 1999, the outgoing government of President Pérez Balladares passed into law a bill creating a fifth chamber to deal with appeals on matters of constitutional guarantees (*Habeas Corpus* and *amparo*). However, the incoming government of President Moscoso repealed this law in October 1999.

Appointment and Security of Tenure

The Supreme Court is comprised of 10 justices, including the President. All of them are appointed by the executive branch of government, meeting as a Cabinet Council (Article 195 of the Constitution), and with the consent of the legislative assembly, for a non-renewable period of 10 years. Together with the judges, the Cabinet Council also appoints an equal number of alternates. Article 200 of the Constitution establishes a system of renewal for Supreme Court judges: every two years two judges will be appointed to replace those who have already served 10 years. According to a 1998 law, Supreme Court judges should retire at the age of 75. This law was apparently designed to force Justice José Manuel Faundez to retire. The 82-years old judge had stayed in office despite the various failed attempts to impeach him in the legislative assembly. The law, which was challenged as unconstitutional during the year, was upheld by the Supreme Court.

The Attorney General is also appointed following the same system as for the Supreme Court justices.

Magistrates of high tribunals are appointed by the Supreme Court, and judges of lower courts are appointed by the high tribunals (Article 206 of the Constitution). Judges are selected through public competitive examinations by a commission composed of representatives from the Supreme Court or High Courts and the personnel department, which prepares a list of selected candidates that is submitted to the Supreme Court or respective High Court.

Justices of the Supreme Court are subject to impeachment procedures before the legislative assembly which can lead to dismissal for serious misconduct (Article 154 of the Constitution). This system, although effective in preventing interference from outside, permits, nevertheless, the control of lower court judges by the hierarchical superior which has many times undermined their independence.

Resources

Article 210 of the Constitution stresses that salaries for Supreme Court judges should not be less than for ministers. Article 211 grants the judiciary and the Public Ministry the right to elaborate their respective budgets, to be submitted to the legislative assembly for discussion and approval. It also provides that both their budgets together shall not be less than 2% of the normal revenue of the central government.

Corruption is widespread within the judiciary however. The lower level judges' salaries are low and this fuels the practice of bribary within the magistracy and the court staff.

Judicial Reform Programme

In May 1998 the Inter-American Development Bank approved a loan to Panama to carry out a judicial reform programme which started to be implemented in 1999 under the name "Programme of Improvement of the Judiciary". The programme, with a total cost of 27 million US dollars, of which 70% comes from the Inter-American Bank, comprises two sub-programmes: one for the judiciary and the Office of the Attorney General, and the second for the procurator of the administration. The control and the task of overseeing the implementation of the whole programme has been given to a Commission for the Improvement of the Justice Administration (COMAJ), composed of the President of the Supreme Court, the Attorney General and the procurator of the administration.

The objectives of the reform in respect to the judiciary and the office of the Attorney General are stated as follows: the guarantee of the due process of law, increasing public access to justice and the speeding up of proceedings. To achieve these objectives the programme has adopted a plan of action on six items: clearing the backlog of civil cases, strategic planning, training and judicial career, reorganisation and management of services, procedural reforms and enhancement of public access to justice, and citizen participation.

Although the programme has recently begun operating and it is too early to risk an evaluation, some voices have risen the issue of whether the objective of preserving and enhancing the independence and impartiality of judges and prosecutors has been incorporated into the programme as a valid and primary objective. According to some reports this has not been the case so far.

The Creation and Elimination of a Fifth Chamber of the Supreme Court

On 23 July 1999, the legislative assembly passed into law a bill creating a fifth chamber within the Supreme Court (Law 32/99) with jurisdiction to review at last instance petitions of *Habeas Corpus* and *amparo* (which are special remedies to protect constitutional rights). In the following weeks the government, with the consent of the legislature, appointed three new judges for this new chamber of the Supreme Court, together with their alternates. The measure was criticised by the political opposition which had won the general elections in May and was waiting until September to assume control of government, on the grounds that it was for the new government to adopt such a measure. The opposition then accused President Pérez Balladares of making a political manoeuvre to take over control of the Supreme Court.

The new government of Ms. Mireya Moscoso revoked a number of measures taken by her predecessor, Mr. Pérez Balladares, among them the creation of the fifth chamber. On 24 October 1999, the legislative assembly passed Law N° 49 that repeals Law N° 32 of July 1999. Article 28 annuls the appointment of the three judges of the new chamber (*see below*). Critics have observed that the new law is unconstitutional since, according to the Constitution, Supreme Court judges duly appointed can only be dismissed by the legislature after an impeachment procedure is carried out. The affected judges have petitioned the Supreme Court itself to declare Law N° 49 unconstitutional and by the end of the year the issue was still being debated.

The creation and abrogation of the fifth chamber within the Supreme Court highlights the political manipulation of the judiciary in Panama. Both the incoming and outgoing governments have taken decisions on the basis of political calculations. In this way they have severely undermined the independence of the Supreme Court as well as the rights of the three judges duly and lawfully appointed to the posts.

Cases

Elitza Cedeño, Oscar Ceville and Mariblanca Staff (judges in the Supreme Court): Judges Cedeño, Ceville and Staff were dismissed by application of Law 49 of October 1999 which eliminated the fifth chamber of the Supreme Court created just a few months before. Dismissal of judges of the Supreme Court through a law is not permitted by the Constitution or the laws of the land. The Constitution provides that justices can be dismissed only through impeachment proceedings in the legislative assembly.

PARAGUAY

Paraguay experienced a year of political instability that served as a framework for continuous attacks on the judiciary, especially on members of the Supreme Court. During the year, the Inter-American Commission on Human Rights visited the country. The government has not yet put in place all the constitutional institutions necessary to guarantee all human rights in the country. The failure to appoint the People's Defender is one of the major factors that amount to the lack of protection of human rights.

The Republic of Paraguay is a constitutional democracy. The Constitution adopted in 1992 establishes the Rule of Law and the division of power between three branches of government. The executive comprises the President of the Republic who serves a non-renewable term of five years. The President is the head of state and governs with the help of a Council of Ministers. The legislature is composed of a bicameral assembly (the Chamber of Deputies of 80 seats and the Senate of 45 seats). The Constitution provides for an independent judiciary.

In 1989 Paraguay ended a period of 35 years of dictatorial rule under Mr. Alfredo Stroessner. In the following years the country began an encouraging phase marked by the reconstruction of the state and the establishment of democracy and the Rule of Law. The 1992 Constitution was the result of initiatives taken during this time with the aim of restoring fundamental freedoms and human rights in the country through the creation of a number of institutions to ensure their adequate protection. The People's Defender (*Defensor del Pueblo*, a sort of human rights ombudsman), the Human Rights Commissions within the houses of parliament and a Human Rights General Directorate inside the Ministry of Justice, were some of the institutions resulting from the legal reforms undertaken. However, Paraguay inherited a heavy burden from its past: chronic political instability and the pending investigations into human rights abuses during the Stroessner dictatorship. The political instability lies at the heart of frequent violations of human rights and of a chronically weak, politically influenced and inefficient judiciary.

In 1996 General Lino Oviedo tried to carry out a *coup d'etat* against the government of then President Wasmossy. The coup failed because of strong opposition on the part of the international community, notably Paraguay's associates in the MERCOSUR trade agreement and the

members of the Organisation of American States. An exceptional military court (*tribunal militar extraordinario*) convicted General Oviedo to a ten-year term in prison which was being served until a political ally of General Oviedo, Mr. Raul Cubas, came to power in August 1998. Given the special character of the military tribunal that convicted General Oviedo, he lodged a petition before the Inter-American Commission on Human Rights alleging a violation of his rights of due process. On 27 September 1999, the Inter-American Commission dismissed the petition.

President Cubas initiated a period of confrontation with parliament and the Supreme Court, mainly as a result of his attempts to free General Oviedo. As soon as he took office President Cubas issued a decree reducing General Oviedo's prison sentence to the period already served. Parliament opposed the move. In September 1998, the Supreme Court again confirmed the ten-year prison sentence for Oviedo, invalidating the ruling by a newly designated special military tribunal which had cleared General Oviedo. It also ordered a lower ordinary court to start proceedings against this special tribunal. In November 1999, the court declared admissible the petition from parliament to have the decree pardoning General Oviedo declared unconstitutional and on 2 December 1998 the court so declared the decree.

In February 1999 the court ordered President Cubas to send General Oviedo back to prison to finish serving the sentence for his failed *coup d'etat* in 1996, but President Cubas refused. The Attorney General, Anibal Cabrera, then determined that an impeachment proceeding against Mr. Cubas should be initiated in parliament. In response, the government escalated its campaign against those who opposed and resisted General Oviedo's coup by urging a military tribunal to speed up criminal proceedings against some of those military officers.

On 23 March 1999, a serious constitutional crisis originated when Vice-President Luis Maria Argaña, the main contender of President Cubas in the ruling party and General Oviedo's foe, was murdered. Opposition parties blamed then President Cubas and General Oviedo of being the "moral instigators" of the killing, an allegation they denied. People took to the streets demanding President Cubas' resignation and confronted supporters of Mr. Cubas and General Oviedo, while trade unions called for an indefinite strike. On 24 March 1999, the Chamber of Deputies decided to move forward the consideration of impeachment proceedings against President Cubas, which had been initiated at the beginning of the month on charges of disobeying the Supreme Court's ruling to send General Oviedo back to prison. Meanwhile, as demonstrations continued in the streets, police and General Oviedo's supporters opened fire against the demonstrators and killed at least 7 and injured dozens more. On 28 March 1999, hours before parliament's final vote on the impeachment against him, President Cubas resigned and fled the country to Brazil where he was

granted political asylum. On his part General Oviedo also fled to Argentina where he also obtained asylum. Paraguay sought during the year, without success, his extradition to serve a prison term for his participation in the failed 1996 coup and to face further prosecution for recent events. In April 1999, the Senate voted to lift the immunity of Mr. Cubas so that he could stand trial for his alleged participation in the March events. An arrest warrant was issued following this decision of the Senate by an ordinary judge and a request for extradition was also sent to Brazil where President Cubas was enjoying asylum status.

After President Cubas's resignation parliament swore in the President of the Senate, Luis Gonzales Macchi, as the new President of the Republic. Mr. Gonzales Macchi immediately initiated talks with opposition groups and set up a government of "national unity". On 27 April 1999, the Supreme Court ruled confirming that President Gonzales Macchi could remain in office until 2003 when the constitutional term of resigned President Cubas would end. However, the court ordered fresh elections for the post of Vice-President left vacant by the killing of Mr. Luis Maria Argaña.

In November 1999, 14 military officers were arrested on charges of insubordination as persistent rumours of a failed *coup d'etat* circulated throughout the country and obliged President Gonzalez Macchi's early return from the Ibero-American summit.

Human rights Background

Serious human rights violations occurred in Paraguay during 1999, as well as before. Most of these violations were not investigated and their perpetrators have not been brought to justice.

Some of the violations are related to the events of March 1999, mentioned above. In October 1999, the government confirmed the arrest of one of the alleged perpetrators of Vice-President Argaña's killing and the identification of two others. Another suspect had been killed in July by the police.

In July 1999, the Inter-American Commission on Human Rights carried out an on-site visit to the country and issued a preliminary report at the end of the mission.

The Inter-American Commission expressed concern at the failure on the part of the Paraguayan parliament to appoint the People's Defender created by the 1992 Constitution. Article 276 of the Constitution establishes the Office of the People's Defender and tasks it with the

defence of human rights, the canalisation of people's claims and the protection of community interests. According to Article 277 the People's Defender is appointed by the Chamber of Deputies upon a proposal by the Senate.

The Inter-American Commission (ICHR) also observed that although Paraguay has enacted laws to investigate and punish those responsible for serious human rights violations during the long Stroessner dictatorship, as well as to compensate the victims or their relatives, these laws have hardly ever been put in practice, "creating in this way a serious situation that tends to characterise a factual impunity" (paragraph 34). The Commission praised Paraguay for the enactment of a law establishing that the Statute of Limitations does not apply to serious human rights violations. However, this and other laws have not yet been effectively enforced.

Only a few cases of alleged perpetrations of arbitrary detentions, torture and killings during the dictatorship have resulted in convictions with final judgements, although many more suspects are in detention waiting to be tried or are actually being tried. One of these few cases is that involving the torture and extra-judicial execution of Mr. Mario Schaerer in which a final sentence was issued by the Supreme Court in June 1999. In relation to reparations to victims or their relatives the ICHR found that the failure to implement the existing law is linked to the failure to appoint the People's Defender who is, according to the law, the one in charge of receiving the petitions and deciding thereon. With regard to impunity for past human rights violations the ICHR recommended that:

- The Paraguayan judiciary should adopt the necessary measures to speed up the trials involving human rights violations committed during the dictatorship and also to provide reparation to the victims or their relatives;
- An investigative commission, independent and impartial, to elaborate a report on the deaths, disappearances, torture and other human rights abuses committed during the time of the dictatorship should be created. The ICHR called upon all persons and institutions having relevant information on those abuses to hand them over to the authorities.

The ICHR also requested the authorities to institute a thorough investigation and prosecution of those responsible for the murder of Vice-President Argaña in March 1999 as well as for the deaths and injuring of people that resulted from the repression of the public demonstrations during the constitutional crisis of March.

The ICHR also found instances of arrest and detention of people by the police without a judicial order or other requirement of law. It stated that lengthy trial procedures and the lack of adequate legal counsel for the

defendants caused an overpopulation in prisons with a high rate of prisoners without conviction.

The Commission hailed the positive attitude of Paraguay to settle amicably a number of individual cases brought before the Inter-American Commission, as well as its outstanding role in preparing and bringing to the consideration of the Organisation of American States a draft resolution on "Human Rights Defenders in the Americas: Support to the Tasks Developed by Persons, Groups and Organisations of Civil Society for the Promotion and Protection of Human Rights in the Americas", which was adopted by the OAS General Assembly in June 1999.

The enactment of a new Penal Code and a Code of Criminal Procedure that introduces some basic elements of an adversarial system to replace the existing system, based mainly in written documents and the concentration of powers in the investigative judge (*juez de instrucción*) at all stages of the procedure, was also applauded by the ICHR. However, the ICHR regretted that some of the provisions of the new laws preclude any positive consequences for some time. It underlined Article 15 of Law 1444/99 regulating the transitional period to the new criminal system which postpones the appointment of new judges of penitentiary execution, who are those in charge of supervising the prison regime.

The Judiciary

The Constitution defines the judiciary as its guardian. Article 248 guarantees the independence of the judiciary and provides that those interfering with such independence will be banned from holding public office for five years in addition to other civil and criminal responsibility incurred.

Although the Constitution guarantees the independence of the judiciary, this is frequently manipulated and interfered with for political purposes. In the context of the political confrontation between the then President Cubas and other branches of government that led to the constitutional crisis of March 1999, *ad hoc* military tribunals were set up. Supreme Court rulings were often ignored by the government of President Cubas and its members suffered harassment and physical attacks. The CIJL intervened before the Paraguayan Government when Supreme Court Justices **Elixeno Ayala** and **Raul Sapena** were attacked by unknown persons, presumably supporters of General Oviedo, on 27 January 1999. The perpetrators threw molotov cocktails and shot at the homes of the two magistrates only days after the Supreme Court ordered President Cubas to send the General back to jail.

Structure

The Paraguayan judiciary comprises an ordinary court system, with the Supreme Court at the apex, high tribunals and lower courts, the Council of the Magistracy (*Consejo de la Magistratura*), the Public Ministry (*Ministerio Público*) and electoral tribunals. There is also a system of military justice.

The Supreme Court is composed of nine members and has jurisdiction over the whole country. It is organised into specialised chambers, one of them being the constitutional chamber that deals with petitions to declare laws unconstitutional and to review judicial decisions to ensure their consistency with the Constitution.

The Council of the Magistracy is the body charged with the selection and preparation of lists of nominees for appointment as justices of the Supreme Court and as judges and prosecutors at lower levels. It is composed of eight counsellors: one from the Supreme Court, one from the executive branch, a senator and a deputy, two lawyers elected by their peers and two professors of law, also elected by their peers. An impeachment jury for magistrates (*Jurado de Enjuiciamiento de Magistrados*), composed of two justices of the Supreme Court, two from the Council of the Magistracy, two senators and two deputies, exercises disciplinary authority, including the power to dismiss judges and prosecutors.

Appointments and Security of Tenure

All justices of the Supreme Court are appointed by the Senate with the consent of the executive branch of government from lists prepared and submitted by the Council of the Magistracy. The Council also prepares and submits to the Supreme Court lists of nominees for appointment as judges and prosecutors of lower tribunals.

Article 261 of the Constitution states that the justices of the Supreme Court can only be dismissed through an impeachment procedure before the Senate, upon an accusation brought by the Chamber of Deputies. The Senate should reach its decision with the favourable vote of two thirds of its membership (Article 225 of the Constitution). With regard to judges of lower courts, Article 252 guarantees them security of tenure during their term in office. Judges are appointed for renewable terms of five years subject to confirmation. Those who have been confirmed for two consecutive terms acquire life tenure until the age of retirement. According to the same article no judge can be transferred or promoted without his or her consent.

Judges and other magistrates can only be dismissed for the commission of an offence or misconduct in carrying out their duties by a decision of an

impeachment jury. The Supreme Court has the power to suspend the questioned judge until a final decision is reached.

Resources

The Constitution grants the judiciary autonomy in handling its budget and fixes at 3% of the national general budget the minimum amount to be allocated to it each year. However, the general budget needs to be approved by parliament and its execution is overseen by the Controller General.

PERU

The Rule of Law and democracy further deteriorated in Peru where the judiciary is often politically manipulated and judicial proceedings, especially those before military tribunals, offer few guarantees of due process of law. The independence of judges at all levels is seriously undermined as up to 80% do not enjoy security of tenure.

The Constitution provides for the division of powers between an executive, the legislature and a judicial branch of government. The executive power is exercised by the President of the Republic with the help of a Council of Ministers whose members are appointed and dismissed at will by the President, Mr. Alberto Fujimori, who was re-elected for a second term in 1995, and continued in office during 1999. The legislature is composed of a 120-seat unicameral parliament in which the ruling party enjoys a majority. The judicial branch comprises the ordinary judiciary, a Constitutional Court and the Public Ministry (*Ministerio Público*).

1999 was dominated by political issues related to the pre-electoral campaign for the general elections to be held in April 2000. In December President Fujimori officially confirmed his long-predicted decision to run for a third term in office despite the constitutional prohibition in that regard and strong public criticism. This decision prompted a wave of public protest from the opposition and strong criticism from human rights organisations. The Constitution allows only two consecutive terms in office. Mr. Fujimori's decision was legally challenged before the National Electoral Board without success. The Fujimori administration has frequently been accused of using public resources to support his bid for a third term in office and to fix the rules of the electoral game to ensure his re-election.

HUMAN RIGHTS BACKGROUND

Although the human rights situation has somewhat improved as a result of the ending of anti-terrorist campaigns, recent years, and especially 1999, have seen new violations, this time related to the electoral campaign. There were credible allegations of harassment and even physical attacks against opposition political groups, journalists and human rights defenders. The security forces, in particular the intelligence service, were singled out as being responsible for the harassment.

There were frequent allegations of violations of freedom of expression in the form of harassment and attacks against independent journalists. The government controls part of the written press and open television channels, using them to harass opposition leaders. It also uses the judiciary to persecute journalists who publish information that does not please the government. On 15 May two judges who had initiated criminal proceedings against Mr. Hector Faisal for libel against seven journalists were transferred to other posts and had to drop the case (*see Cases below*).

Prison conditions remain extremely poor and special concern has been raised about those prisons specially designed to host people accused or convicted of terrorism or treason. The treatment and facilities provided for prisoners are inconsistent with international human rights standards on the matter.

Thousands of peasants with outstanding arrest warrants remained in an uncertain legal situation despite some positive steps taken by the Supreme Court which established a "mobile chamber" to try them in their own villages. Most of the defendants were reportedly accused with the testimony of informants as the only evidence. The Office of the Ombudsman believes that their number reaches 5,000, out of which only a handful have been acquitted so far by this "mobile chamber".

According to human rights organisations there still remain hundreds of innocent people in prison convicted for terrorism under the emergency laws enacted in 1992 to combat the terrorist phenomenon. These laws provided for summary trials which did not respect the minimum guarantees of the due process of law.

The withdrawal of Peru from the compulsory jurisdiction of the Inter-American Court of Human Rights constituted one of the most important and controversial events during the year (*see analysis below*). Throughout 1999 various international non-governmental organisations (NGO's) visited the country illustrating the international community's deep concern about the human rights situation in Peru. Among these organisations are, *inter alia,* the International Federation of Human Rights (FIDH), the Inter-American Press Society (SIP) and the Carter Centre.

In November the UN Committee against Torture (CAT) examined Peru's third report and issued its Concluding Observations. The CAT showed concern at "the lack of independence of those members of the judiciary who have no security of tenure", "the use of military courts to try civilians" and "the use of amnesty laws which preclude prosecution of alleged torturers...". The CAT reiterated its recommendations issued in 1998, including:

The state party should consider repealing laws which may undermine the independence of the judiciary, and take account of the fact that, in this area, the competent authority with regard to the selection and careers of judges should be independent of the government and the administration

The Judiciary

The Constitution provides for the independence of the judiciary (Articles 139 and 146), but in practice it is continually subjected to gross interference by the executive and legislative branches. This interference dates back to 1995 when the judiciary was declared to be in "reorganisation" and ad hoc commissions – the so-called "Executive Commissions" - appointed by the government and parliament, were tasked with carrying out the reform of the judiciary and the Public Prosecution Service, and were given extensive powers to this effect.

Structure

The Peruvian judiciary is composed of a Supreme Court as the highest judicial authority in the country, High Courts in each of the 25 different judicial districts and lower courts (first instance judges and Justices of the Peace). There are also specialised tribunals on minors. The military justice system is a separate judicial branch and virtually independent, although its decisions are subject to review by the Supreme Court. Serious offences relating to terrorism and drug-trafficking are dealt with by a specialised chamber (*Sala Corporativa*) which was created in 1997. There is a Constitutional Tribunal and a Public Prosecution Service (*Ministerio Publico*) which are constitutionally independent and autonomous.

In 1995 two "Executive Commissions" were created to carry out and oversee the reform programme for the judiciary and the Public Prosecution Service respectively. The Executive Commission of the judiciary is made up of four Supreme Court judges and an Executive-Secretary, all appointed by the government and parliament. The composition of the Executive Commission for the Public Prosecution Service follows the same lines. These commissions have powers not only with regard to organisation and management of resources within the judiciary, but also regarding appointment, transfer and dismissal of judges and prosecutors working on a temporary basis. They can create and merge tribunals, or create specialised tribunals or chambers for certain kinds of offences. Politically sensitive cases are frequently sent to some courts and not to others, or assigned for prosecution to prosecutors commissioned on an ad hoc basis for that

purpose. The exercise of judicial power by the ordinary courts is continually interfered with by these decisions.

A specialised chamber on terrorism and drug-trafficking was set up to replace the "faceless tribunals" in existence until 1997 in the civilian jurisdiction. "Faceless judges" in the system of military justice were also eliminated at the same time and have been replaced by ordinary military tribunals. The jurisdiction of this specialised chamber covers the entire country. It works in two separate chambers which move across the country. In April, the work of this tribunal was questioned by the State Procurator (attorney who represents the state in suits of law) for its alleged leniency in releasing suspected terrorists. This gave rise to an investigation by a parliamentary committee on abuse of power.

In June the specialised chamber adopted the decision to discontinue criminal proceedings, or otherwise annul convictions already passed by the former civilian "faceless tribunals" against a number of alleged terrorists who have already been convicted in military tribunals. This decision illustrates how frequent cases of double jeopardy were, and still are, in the Peruvian criminal courts. Given the vague definition of crimes such as terrorism and treason, many cases are tried simultaneously by the military courts as treason offences and by civilian courts specialised on terrorism-related offences.

According to Law 27009, published on 5 December 1998, the terms of the two Executive Commissions for the judiciary and the Public Prosecution Service were extended until 31 December 2000. During the year judicial authorities reiterated assurances that these Executive Commissions will cease to exist at this date as the judicial reform programme, for which they were created, will also end on that date.

The Constitutional Tribunal is the judicial body in charge of controlling the constitutionality of laws and other norms of a general character. It is also the last instance of review of sentences on petitions of *Habeas Corpus* and *amparo* (special remedies to protect constitutional rights). In 1997 three of its seven members were dismissed by parliament on the alleged grounds of misconduct and usurpation of functions as the three judges voted to declare unconstitutional, and therefore non-applicable, the law permitting President Fujimori to run for a third term in office. The three magistrates brought a complaint to the Inter-American Commission on Human Rights which issued a resolution recommending Peru to reinstate the judges. After Peru refused to abide by this resolution, the Commission presented the case to the Inter-American Court of Human Rights which has already started an examination of the merits, despite the alleged withdrawal of Peru from its jurisdiction (*see below*).

Meanwhile the Constitutional Tribunal has been unable to perform its duties with regard to the control of the constitutionality of laws. In statements to the press, the acting President of this body recognised that at least 16 petitions challenging laws for unconstitutionality are waiting since May 1997. The tribunal cannot make decisions on them because according to its statutory regulations it needs six votes out of seven to take a decision on the matter whereas it is working with only four members at the moment.

Appointment and Security of Tenure

The Supreme Court is composed of 37 justices who should be, according to the Constitution, appointed by the Council of the Judiciary. The rest of the judges of the high courts and lower courts should also be selected, appointed and ratified by the Council from among those candidates who have graduated from the Judicial Training Institute (*Academia de la Magistratura*). In practice, the Council has not appointed anyone since the time it came into being in 1997 due to various factors, most notably the continuous transfer of its powers to other bodies (in particular, the Executive Commissions described above).

The National Council of the Judiciary is the organ in charge of the selection, appointment, ratification and dismissal of judges and prosecutors at all levels (Articles 150 - 154 of the Constitution). As to the powers to appoint judges and prosecutors, the Executive Commissions of the judiciary and the Public Prosecution Service are empowered, by law, to appoint, remove and dismiss judges and prosecutors serving on a temporary basis, which constitute the vast majority of all judges and prosecutors. The Council cannot appoint tenured judges or prosecutors until the candidates have received the necessary minimum training in the relevant judicial training institution.

Under Law 27009 of December 1998, extending the terms of the Executive Commissions until December 2000, it was restated that the Executive Commissions can decide "without any limitation, the end of the terms of all temporary judges and prosecutors". Law 27147, published on 25 June 1999, grants to the Executive Commission of the Public Prosecution Service the power to decide whether or not a criminal proceeding should be initiated, including the immediate arrest, against High Court judges and prosecutors for crimes committed whilst on-duty. If the Executive Commission so decides, it will instruct the corresponding public prosecutor to proceed with the criminal investigations or, if it considers that only a disciplinary fault has been committed, it will forward all the evidence to the corresponding disciplinary body. Observers have underlined that this power granted to the Executive Commission should normally be exercised by the Attorney General, who is the nominal head of the Public Prosecution Service.

According to the Andean Commission of Jurists, which quotes official figures released during the year, 80% of judges at all levels are working on a temporary basis. Of the 37 justices of the Supreme Court 24 are temporary and, therefore, they do not enjoy security of tenure and can be removed or transferred at any time by a decision of the Executive Commission of the judiciary. Article 146 of the Constitution guarantees the judges' independence and provides that no judge will be transferred without his or her consent, but this only applies to tenured judges.

The National Council of the Judiciary has been unable, so far, to appoint tenured judges due to a number of reasons which hampered its work. The Council can only select and appoint candidates who have already graduated from the Judicial Training Institute. The first training programme ended in April 1998 with 366 graduates. The Council then began preparations for the public competitive examinations for available posts of judges and prosecutors to be filled from amongst these graduates. However, the Executive Commission of the judiciary decided that the training period should be extended up to two years (one theoretical and one practical). In this way the training programme for the first group of candidates for tenured judges and prosecutors is due to end in August 2000. Observers have noted that the decisions of the Executive Commission in this regard are politically motivated and aimed at preventing the Council from appointing tenured judges and prosecutors.

The Council of the Judiciary's powers to ratify and dismiss tenured judges have been either diminished or transferred to the Executive Commissions. Since the creation of the Council no period of seven years has yet elapsed to carry out the ratification process of the few existing tenured judges and prosecutors. As for the power of dismissal, it has also been limited since the Council can only dismiss justices of the Supreme Court and prosecutors working at the same level, upon the request of the Executive Commissions *(see Attacks on Justice 1998)* in open contradiction with Article 154 of the Constitution.

The splitting of the Council's powers has led to conflicts between the Council and the Executive Commissions on the one hand, and between the Council and the Judicial Training Institute on the other. In September the President of the Council, Mr. Carlos Hermoza – a former Minister of Justice who took office when the former President and members of the Council resigned in 1998 in protest against the curtailing of the Council's powers *(see Attacks on Justice 1998)* - declared that these commissions were taking decisions in regard to the suspension and dismissal of temporary judges and prosecutors without any co-ordination with the Council, which is entrusted with the task of selecting and appointing tenured judges and prosecutors under the Constitution. The lack of co-ordination may lead, in Mr. Hermoza's opinion, to the absurd situation in which a judge who has

been dismissed by the Executive Commission can try again to apply for the post through the Council's process of selection.

The Council's relationship with the Judicial Training Institute, which is dependant on the Executive Commission of the judiciary, has also been marked by conflict. The plans by the training institute to start a training programme for judges and prosecutors to make them fit for promotion to higher positions generated friction as it was revealed that this programme was intended also for those judges and prosecutors working on a temporary basis. By law, both tenured and temporary judges and prosecutors have equal rights (*see Attacks on Justice 1998*). This plan was opposed by the Council of the Judiciary on the grounds that this may lead to distortions in the judicial career and that only tenured judges and prosecutors are entitled to promotion to higher tenured posts. In December the Executive Commission for the judiciary finally made it clear that the training programme will be addressed to all judges and prosecutors, but will only entitle tenured ones to promotion to higher posts. Those who are temporary will be entitled only to apply for a tenured post at lower levels.

During the year some progress with regard to combating corruption was made by the governing bodies of the judiciary, although mainly at the normative level. Law 27197, published on 8 November 1999, modifies Article 196 of the Law of the Judiciary relating to prohibitions on magistrates. It forbids magistrates from accepting gifts or donations of any kind from the parties to the proceedings or their attorneys. This norm aims at strengthening the anti-corruption efforts of the government within the judiciary.

Judicial Reform and Modernisation Programme

As to the reform and modernisation programme itself, it suffered a severe blow in 1998 when the World Bank loan providing the necessary funding was first suspended, and then cancelled. The decision came as a reaction to the laws curtailing the powers of the Council of the Judiciary (*see Attacks on Justice 1998*). During the year authorities of the Executive Commission of the judiciary repeatedly requested the administration to transfer the 22.5 million dollars necessary to continue with the reform and modernisation programme. The government had promised that amount to the judiciary to fill the financial gap left by the cancellation of the World Bank loan. The failure to provide adequate funding to the programme is putting at risk the few positive aspects of the initiative, such as the improvement of infrastructure and the provisions of technical facilities.

The Withdrawal from the Jurisdiction of the Inter-American Court

On 8 July 1999 the Peruvian parliament passed a resolution by which it decided the immediate withdrawal of Peru's declaration accepting the Inter-American Court's compulsory jurisdiction issued in 1981. Notification of the resolution was then given to the courts' secretariat. This decision intended to take Peru from within the jurisdiction of the only regional jurisdictional body for the protection of human rights and deprives its citizens of the additional guarantee of their rights by this international protection mechanism. Human rights organisations and many foreign governments have criticised this decision of Peru.

Peru's decision came as a result of successive adverse rulings against Peru adopted by the court in cases of violations of the provisions of the American Convention on Human Rights. The case that provided the instant excuse for the government was the decision of the court in the *Castillo Petruzzi and Otros Case* (four Chileans convicted for treason by a military "faceless" tribunal). In its judgement in the case (4 June 1999) the court ordered Peru to provide a new trial for the claimants, this time in full respect of the due process of law, and to reimburse the expenses incurred by their relatives in taking the case to the court. The judgement was received by the government with strong criticism and a defamatory campaign against the court started soon afterwards, accusing the judges of the court of complicity in terrorism. President Fujimori publicly declared that Peru would not enforce the court's decision in the case as it would jeopardise its anti-terrorist policy. On 13 June 1999 the Supreme Council of Military Justice declared the Inter-American Court's ruling in the *Castillo Petruzzi case* as non-enforceable.

Peru's decision to withdraw from the compulsory jurisdiction of the Inter-American Court was widely seen as a pre-emptive move in light of the many very sensitive cases Peru still has pending before the court. Among these cases is the that of three judges of the Constitutional Tribunal who were dismissed in 1997 (*see Attacks on Justice 1996*) and whose reinstatement was recommended by the Commission before submitting the case to the court. Peru has the highest number of cases pending in the Inter-American system of protection of human rights at the moment: the number of cases before the Inter-American Commission reaches 21 and the cases pending before the court is 11.

The validity of the Peruvian unilateral withdrawal was assessed by the court in the context of its decision on jurisdiction in the *Constitutional Tribunal Case* and the *Baruc Ivcher Case* in September 1999. The court held the view that states, by declaring their acceptance of the court's jurisdiction under the facultative clause, become bound by the treaty in its entirety.

Having regard to the absence of a provision in the American Convention permitting the withdrawal of such a declaration, and considering also the object and purpose of the Convention as a human rights treaty, the court concluded that "The state party can only withdraw from the court's jurisdiction by denouncing the Covenant as a whole" (paragraph 45). Consequently, the court considered itself as having jurisdiction on the two cases in question and declared the Peruvian declaration of withdrawal as inadmissible.

The government of Peru reacted angrily to the decision of the court and President Fujimori declared that future decisions of the court in cases involving Peru will be irrelevant and without any legal effect in the country. However, Peruvian authorities will continue as defendants in cases admitted by the court before Peru unilaterally declared its withdrawal.

The Continuing Expansion of the Military Courts' Jurisdiction over Civilians

The Constitution (Article 173) limits the jurisdiction of the military justice system to crimes committed by members of the armed forces whilst performing their functions, and to the crimes of treason and terrorism committed by civilians. This provision includes, nevertheless, the recognition of a *de facto* extension of military courts' jurisdiction over civilians in the aftermath of the 1992 *coup d'etat*. The 1992 decrees on terrorism and treason granted military courts jurisdiction over civilians who had committed these crimes. Parts of these decrees were repealed in 1997, primarily provisions regarding the institution of "faceless judges", but the jurisdiction of the military justice system was boosted again in 1998 when several legislative decrees were passed to combat the growing common criminality. On that occasion a new crime was added to the list of vague and poorly defined crimes of terrorism and treason: the crime of so-called "aggravated terrorism" (*see Attacks on Justice 1998*). In December 1999 a new law (Law 27235) repealed some of the provisions of these decree laws, re-labelling the crime as "special terrorism" (*terrorismo especial*) but without substantially changing the definition of the crime, which remains vague. It also transferred jurisdiction to try these crimes from military tribunals to a new civilian special tribunal on gangs (*Sala Corporativa Nacional de Bandas*), but the cases which were already started before the military tribunals will continue there.

The procedures before military tribunals are characterised as being very summary. Military commanders take pride in saying that they can pass convictions within less than two months. Additionally, several, if not all, guarantees of the due process of law are restricted or simply not

respected. This entails a severe limitation on the work of lawyers (*see below*) as well as the virtual elimination of any freedom of appreciation on the part of the military prosecution or the investigating judge. To start with the investigation is carried out by a military prosecutor, hence limiting the powers of the civilian prosecution which has no role to play in the procedure. Legislative Decree 897 makes it compulsory for the military prosecutor to issue an indictment, even if there is not enough evidence. Likewise, the military investigating judge is obliged to grant authorisation to the police to keep a suspect under arrest for investigation and to order the detention of the accused while awaiting trial. In both cases the discretion inherent in the prosecutorial and judicial functions is curtailed.

This legislation has permitted military tribunals to try numerous civilians in recent years. According to official figures published in the official gazette on 12 August 1999, since 1992 military tribunals have heard 1284 trials of civilians for the crime of treason and handed down 429 convictions with life imprisonment as a sentence. Further, between May 1998 and August 1999 the same military tribunals have tried 283 civilians for "aggravated terrorism" handing down 66 convictions with life imprisonment.

Apart from the sweeping powers given to it by law or decree law, the military system of justice has assumed de facto additional powers to try retired military officers for crimes other than terrorism, treason or "aggravated terrorism" - in other words, for ordinary offences such as fraud and robbery in prejudice of the armed forces.

In February 1997 Captain (retd.) Eduardo Cesti Hurtado was arrested and criminal proceedings were instituted in a military court. His relatives presented a *Habeas Corpus* petition which was granted by a civilian tribunal, but was disregarded by the military court. Mr. Cesti Hurtado then petitioned the Inter-American Commission on Human Rights which, in January 1998, recommended Peru to stop the proceedings against Mr. Cesti Hurtado in the military courts and to release him and provide him with adequate compensation. As this recommendation was disregarded also the Commission lodged the corresponding complaint before the Inter-American Court which, on 29 September 1999, took a decision on the case, declaring that by trying Mr. Cesti Hurtado in a military tribunal Peru has violated his right to a hearing by a competent tribunal as provided for in Article 8.1 of the American Convention (paragraph 151 of the sentence). The court resolved, therefore, that the trial of Mr. Cesti Hurtado in a military tribunal was incompatible with the American Convention on Human Rights and ordered Peru to annul the trial, and to carry out the *Habeas Corpus* granted by an ordinary civilian court in favour of the complainant (paragraphs 1 and 8 of the decision).

Obstacles to the Exercise of the Legal Profession

Defence lawyers face multiple and serious obstacles in carrying out the tasks related to their profession. Suspects held in detention are frequently prevented from seeing their attorneys before or during interrogation by the police, or at any time at all. The prosecutor, who is supposed to take care that the rights of the suspect are fully respected, is generally absent from the police station. This situation leaves the police with wide powers to pursue the interrogation of the suspect and to abuse him in order to obtain self-incriminatory declarations.

However, the most serious obstacles for defence lawyers are in regard to the prison regime applying to those convicted of terrorism and treason. Most of them are placed in Maximum Security Prisons which are located in inaccessible, distant areas. Others, those who have not been convicted yet, are placed in overcrowded and poorly equipped prisons. Defence lawyers, especially those linked to human rights groups, have repeatedly reported systematic and serious restrictions on their work and the rights of their defendants.

Lawyers can see their clients only for 15 minutes, and very often only after a waiting period of many hours to obtain the authorisation to do so. Any visit, by a relative or legal counsel, has to be notified to the prison authorities some days in advance and can be refused. This is particularly so in the case of the Challapalca prison - located over 4,000 metres above sea level - to which access is extremely difficult and requires many hours, and even days, to reach to see a prisoner. Often relatives and defence lawyers travel all the way just to have their request to see a prisoner refused when they arrive. Lawyers from the human rights non-governmental organisation (NGO), the Ecumenical Foundation for Peace (FEDEPAZ), reported instances when they were denied access without apparent reason, or otherwise found, at the moment of getting to the prison, that the regulations for visits had changed without the corresponding rule being published in the official gazette.

Appropriate places for lawyers and defendants to meet are sometimes unavailable. When such a room does exist, in general it is inappropriate and unequipped to serve the needs of a proper defence. Light is poor and no facilities are available. Lawyer and defendant are separated by a thick sheet of glass and can hardly see, or much less hear, each other. Furthermore, a warden remains at a close distance throughout so that any confidentiality is precluded.

Hearings are often carried out inside prisons. Each prison has a room that can serve as a court room. This practice is overtly inconsistent with recognised standards regarding the publicity of trials. Lawyers and relatives have often been denied entry to the prisons to attend such hearings.

The rights of the defence are further limited when the tribunal does not permit the defence counsel direct communication with his or her client during the hearings.

Lawyers also face serious restrictions in relation to access to the dossiers of their clients. These restrictions are more serious in military tribunals, but there are also problems in civilian ones. Very often lawyers are only allowed to see the dossier immediately before the hearings take place and only for a very short period. This obstacle becomes even more serious in the cases dealt with by the specialised chamber on terrorism matters.

This situation is incompatible with the principles and standards of the UN Basic Principles on the Role of Lawyers, the American Convention on Human Rights and the International Covenant of Civil and Political Rights.

Attacks on the Bar Association

On October 15 1999 the Lima Bar Association revealed that its bank accounts had been frozen following an order issued by a local authority. The measure was allegedly motivated by the failure of the Bar Association to pay its overdue property taxes, but the Dean of the Bar Association denounced the move as being a politically motivated measure, taken in retaliation for the critical and independent stance adopted by the Bar Association in defence of the Rule of Law and the constitutional order in the country. In a public communiqué the Bar Association said that the government was using the local authorities to intimidate its members. The freezing of the bank accounts forced the Bar to cancel the Second Conference of Bar Associations of Latin America and the Caribbean to be held in November.

Cases

Manuel Aguirre, Delia Revoredo, Guillermo Rey Terry (judges of the Constitutional Tribunal): The three judges were dismissed in May 1997 by parliament on charges of ussurpation of authority. They had declared that a law allowing President Fujimori to stand for a third consecutive term in office was inapplicable, thus barring Fujimori from running in the 2000 elections. The Inter-American Commission on Human Rights recommended that the state of Peru reinstate the three judges in office, but its recommendation was disregarded by the Peruvian Government. The Commission then presented the case to the Inter-American Court of Human Rights which is still dealing with the merits of the case, after having decided in

September 1999 that it has jurisdiction over the case despite Peru's withdrawal of its acceptance of the jurisdiction of the court.

Ivan Bazán (lawyer): Mr. Bazán is lawyer and director of the NGO Ecumenical Foundation for Peace (FEDEPAZ). He works for the defence of people accused of terrorism, treason or "aggravated terrorism", and often pleads cases before military tribunals. On 8 July 1999, he was denied access to the Maximum Security Prison of Yanamayo where some of his clients are detained, despite the fact that he had requested such access in due time and following the existing regulations. He was told that the prison regulations had changed. The new regulation in question, however, was not published in the official gazette and later, when Mr. Bazán wrote to the authorities asking for information about the new regulations and why they had not been published in the official gazette, he was given a photocopy of it.

Juan Carbone Herrera (judge): Mr. Carbone works as a judge of the First Instance Criminal Court in Lima. He was dismissed from his post, reportedly for his denunciation of cases of undue influence and extortion within the judiciary. The decision to dismiss Judge Carbone was made by the President of Lima's High Court of Justice who is in charge of discipline. The judges denounced by Judge Carbone have been suspended and are facing criminal proceedings. Judge Carbone has reported repeated acts of harassment and reprisal against him.

Elba Minaya (judge): In May 1999 Ms. Minaya was removed from her post, first as a result of her initiating criminal proceedings against Mr. Héctor Faisal, who was reportedly working for the intelligence service and publishing libel on the internet against independent journalists. Then, later in the year, she was denied permission by the Executive Commission of the judiciary to comply with a summons to testify before the Inter-American Court of Human Rights in Costa Rica. The decision came after she had already left the country. On her return Judge Minaya faced investigations and threats of dismissal for misconduct (leaving the country without formal authorisation). After this she resigned from her post but the disciplinary proceeding against her continued, allegedly as a reprisal for her collaboration with the IACHR. Later in the year, her candidacy for a seat in parliament was successfully challenged, without apparent legal grounds.

David Pereira Flores and **Marcial Ruelas Flores** (lawyers): Mr. Pereira and Mr. Ruelas work as defence lawyers for the NGO Association for the Defence of Human Rights (*Asociación de Defensa de Derechos Humanos* - ADDEHT) in the southern city of Tacna. On 4 December 1999, they tried to get access to the Maximum Security Prison of Challapalca (in Tarata, located at 4000 metres above sea level) to meet some of their clients, but they were denied such access. At the time a

number of inmates were carrying out a hunger strike. The two lawyers left the prison without meeting their clients and on 9 December they lodged a petition before the Inter-American Commission on Human Rights (IACHR) to issue a precautionary measure in favour of the inmates. The government has alleged before the IACHR that the prison authorities acted pursuant to existing legal provisions when they denied access to the prison to the lawyers. However, the Code of Prison Enforcement (*Código de Ejecución Penal*) states that "The prisoners have the right to meet in private with their attorney and in an adequate environment. This right cannot be suspended...".

Antonia Saquicuray (judge): In May Ms. Saquicuray was transferred without her consent to an administrative post within the judiciary, allegedly in retaliation for her instigation of criminal proceedings against Mr. Hector Faisal, who was accused of libel against seven journalists. Until the date of her transfer Judge Saquicuray was working as a criminal judge in Lima and enjoyed security of tenure. Her transfer was carried out in open disregard for the constitutional provisions that require the judge's consent for any transfer.

Godofredo Sihuay (lawyer): Mr. Sihuay was arrested and is currently being held in prison facing criminal proceedings on charges of treason, before a military tribunal. Mr. Sihuay is charged with treason because of his work defending persons accused of having committed the same offence. His trial is due to be held during the first months of the year 2000.

PORTUGAL (INCLUDING THE MACAO SPECIAL ADMINISTRATIVE REGION)

The Portuguese judiciary was declared to be in a state of emergency due to the large backlog and the inability on the part of prosecutors and judges to speed up trials before the procedural terms elapsed. At the end of 1999 Portugal handed over its former colony, Macao, to Chinese control. Despite the agreements between the two countries, which provide for a series of guarantees and rights for the Macao people, there is a well-grounded concern about the lack of sufficient guarantees for the independence of the judiciary in Macao.

Portugal is a republic organised under a Constitution adopted originally in 1976 and amended four times since. The last amendment was made in 1997. Article 2 of the Constitution defines Portugal as a democratic state that is based upon the Rule of Law, the sovereignty of the people, the respect and guarantee of fundamental rights and freedoms and the separation of powers.

The Constitution allocates executive power to the President of the Republic who serves a five-year term, renewable only once and a Prime Minister who effectively runs the government with the help of a Council of Ministers. The Prime Minister is appointed and dismissed by the President of the Republic, but the installation of his government requires a vote of confidence from parliament. A unicameral Assembly of the Republic exercises legislative power and its members are elected by electoral districts in periodic general elections.

Parliamentary elections for the 230-seat Assembly of the Republic were held on 10 October 1999, resulting in the ruling Socialist Party returning to power. It won 115 seats and Mr. Antonio Guterres, a historical socialist leader, came back to power, appointing a new Cabinet of Ministers.

HUMAN RIGHTS BACKGROUND

The Portuguese Constitution and the law grant Portuguese citizens the right to a fair trial within a reasonable time and the right to be assisted by a lawyer before any authority. Many of the guarantees of due process of law during criminal proceedings were introduced by the constitutional amendments of 1994. These guarantees include the right to be presumed innocent

until proven guilty, the right of defence and the right not be tried twice for the same crime. These rights are generally respected, although an alarming rate of cases undergo lengthy proceedings and this enhances impunity.

The Constitution and the law guarantee physical integrity. However, there are instances of police abuse during the arrest of people, as well as inside prisons. Immigrants are especially affected by these abuses.

There are also problems of child labour, as well as trafficking of women and forced prostitution. On 21 December 1999, the International Commission of Jurists (ICJ) issued a press statement on the adoption by the Committee of Ministers of the Council of Europe of a resolution following the complaint the ICJ had lodged against Portugal on child labour, under the European Social Charter. Meeting at deputy level, the Committee of Ministers, political body of the Council of Europe, took note of the report submitted on 10 September 1999 by the European Committee of Social Rights, composed of independent experts. This Committee found a breach by Portugal of Article 7(1) of the European Social Charter, which prohibits the employment of children under 15. The European Committee of Social Rights observed, on the basis of the evidence submitted by the ICJ and as confirmed by a survey carried out by the Portuguese Ministry of Labour itself and the ILO, that several thousand children under 15 worked in breach of both the Charter and Portuguese law. The Committee noted that the 25,000 children performing unpaid work as part of helping out the family, mainly in agriculture and the catering sector, must be taken into account under the Charter. The Committee acknowledged that despite the measures adopted by Portugal to combat child labour, it is clear that the problem has not been resolved.

The ICJ, however, deplored that, contrary to the specific prescription of Article 9 of the 1995 Additional Protocol to the European Social Charter, the Committee of Ministers did not adopt a clear-cut recommendation following the conclusion of the European Committee of Social Rights, according to which Portugal was not in conformity with the Charter. Instead, it limited itself to adopting a resolution referring back to the recommendation it adopted in 1998 against Portugal for its breach of Article 7(1). The ICJ also deplored that the Committee of Ministers did not award it compensation in respect of costs incurred in preparing and submitting the complaint.

The Judiciary

The judiciary is organised under the terms provided by the Constitution, the Statute of Judicial Magistrates (*Estatuto dos Magistrados*

Judiciais - Law 21 of 1985) and the Law of Judicial Tribunals (*Lei Orgânica dos Tribunais Judiciais* - Law 3 of 1999 which modifies the Law of 1987). Article 204 of the Constitution declares that the courts are independent and subject only to the law. The Constitution also provides for public court hearings and trial by jury at the request of the prosecution or the defence in the most serious cases.

The judiciary, however, is understaffed and underfunded. The consequence of this is a severe slowness in dealing with cases that has resulted in the virtual collapse of judicial activities and has undermined public confidence, as well as enhancing effective impunity.

Structure

The Portuguese judiciary is composed of a Supreme Court (*Supremo Tribunal de Justiça*), Appeals Courts (*Tribunais de 2° Instância ou da Relaçao*) and a lower court system. There are also a Supreme Administrative Court and Fiscal Courts, as well as a Court of Audit. The Constitution (Article 209) prohibits the establishment of exceptional courts to try specific categories of offences, although there are special courts to deal with labour matters, offences against public health and minor offences, as well as Justices of the Peace.

The Supreme Court is the highest judicial authority in the country, except on matters for which the Constitutional Court has jurisdiction. The Courts of Appeal function as second instance courts for cases heard before first instance courts. The Constitutional Court has jurisdiction on matters involving questions of a legal or constitutional nature.

Public prosecutors have the power to investigate and initiate prosecutions against offenders in defence of the public interest. They are grouped in the Office of the Attorney General, are hierarchically graded, and can be transferred, suspended, retired or dismissed only under the circumstances provided by law. The Office of the Attorney General is headed by the Attorney General who serves a term of six years.

Appointment and Security of Tenure

Article 216 of the Constitution guarantees security of tenure for all judges. They may be transferred, suspended, retired or removed from office only as provided by law, and may not be liable for the content of their decisions.

Authority over appointment, assignment, transfer and promotion of judges is given to the High Council of the Judiciary, which also has

disciplinary power. The Council is composed of two members appointed by the President of the Republic, seven members elected by the Assembly of the Republic and seven judges elected by their peers by a system of proportional representation. There is also a High Council of the Public Prosecution that holds the same powers over all public prosecutors. The composition of the Council of the Judiciary permits the possibility that a majority of its membership be appointed by political bodies. The old wording of the Constitution before the 1997 amendment provided that one of the two members appointed by the President of the Republic should be a judge. The High Council of the Judiciary is headed by the President of the Supreme Court.

The Constitutional Court is composed of thirteen judges, ten of whom are appointed by the Assembly of the Republic. They remain in office for a non-renewable period of nine years. The judges of the Constitutional Court enjoy the same guarantees of independence and security of tenure as judges of ordinary courts.

The Collapse of the Portuguese Judiciary

In late December and early January 2000 the government implemented a series of exceptional measures to tackle a judicial emergency. The Minister of Justice, Mr. Antonio Costa, recognised in a press statement that approximately one million cases are pending before the courts and that each year at least 100,000 more go into the system. It was reported that the judiciary has no possibility to deal with such a backlog and that this has frequently caused the closing of cases due to the application of the Statute of Limitations. Various observers have stressed that the application of the Statute of Limitations to cases is far from being exceptional in the Portuguese judicial system, and that this is a sign of its collapse.

A study by the Ministry of Justice recognised that between 1993 and 1998 a total of 38,531 criminal complaints did not proceed until the trial stage because the legal terms for investigations had been exhausted. In 1998 alone such cases amounted to 12,000 and the situation is getting worse each year.

The cases closed by application of the Statute of Limitations include outstanding cases involving members of parliament (the so-called "false trips" cases) and the death of two children in an aquatic park in Lisbon (*see below*).

In January 2000 the President (*bastonario*) of the Bar Association underlined as the causes for the impunity in many outstanding cases the misuse of the criteria of opportunity and the non-respect for the terms of investigations and indictments on the part of the prosecutor which leads

to delays, as well as the difficulties in lifting the confidentiality and secrecy of bank accounts. He also stressed that is necessary to put an end to the negligence and lack of responsibility displayed by judges and prosecutors.

In September 1999, the High Council of the Magistracy reported that the system needed at least 55 additional judges and 100 prosecutors. Many of the judicial districts created by law in January 1999 have not yet been installed due to a lack of judges and magistrates. In Lisbon alone, of 15 new courts foreseen by the law, only 12 have started their work and not all 10 supposed to work in the judiciary's headquarters are already functioning.

The measures announced by the government in January 2000 include: empowering the High Council of the Magistracy to exceptionally hire retired judges as advisers in pending cases, as well as to appoint lawyers as first instance judges for a period of three years to deal with the backlog. The Council would also be allowed to hire lawyers working in the public administration. Additional measures will involve a law reducing the training period within the Centre for Judicial Studies and the establishment of special incentives for those persons who agree to settle their disputes - mainly law suits on debts - outside the courts.

On his part, the President of the Supreme Court, as President of the High Council of the Magistracy, suggested enlarging the terms for investigation and preparation for trials in cases involving murder and other serious offences. He also proposed a review of the system of recourse and appeals available before the Supreme Court and the Constitutional Court.

Aquaparque Case

The case of Aquaparque, in which two children were sucked down by a water fountain in a recreation ground and died, was closed due to the application of the Statute of Limitations. The case had raised much concern among the population, as well as expectation that those responsible will be adequately punished.

The High Council of the Magistracy opened investigations into allegations of negligence on the part of the investigating judge who spent four years in the investigative stage. This disciplinary investigation prompted Mr. Orlando Afonso, the President of the Association of Portuguese Magistrates, to declare that adequate conditions for judges to carry out their duties were no longer in place and that the independence of the judiciary was threatened by the pressure to deal with cases quickly.

Judge Orlando Afonso emphasised the lack or insufficiency of resources in the judiciary as the cause for the alarming rate of unsolved cases within the legal terms.

However, other factors, such as inadequate laws and a lack of adequate training for judges, also contribute. In addition, there is a certain legal culture of abuse of procedural recourses before the courts (such as delaying tactics by the defence counsel) on the part of litigants and their legal counsels.

MACAO

On 20 December, Macao, an area comprising a portion of peninsular mainland and the islands of Taipa and Coloane, recognised by Portugal and China as Chinese territory under Portuguese administration, was handed over by the administering power to Chinese sovereignty. The handover poses a series of domestic and international law concerns, notably with regard to the legal system of protection of human rights and the independence of the judiciary.

Macao had been living with a considerable degree of autonomy from Portugal with regard to administrative, financial and legislative matters since 1976 when an "Organic Statute for Macao" was promulgated by Portugal. Under this basic legal instrument the Governor was appointed by the Portuguese President and a legislative assembly was set up. One third of the members of the assembly were elected directly by the people, the other two thirds being appointed by social and economic groups.

In 1987 Portugal and China signed a "Joint Declaration on the Question of Macao" whereby they declared Macao to be Chinese territory and provided for China to resume the exercise of sovereignty over it as of 20 December 1999. Under the terms of the Joint Declaration China undertook a series of basic policies following the principle of "one country, two systems". These undertakings include the establishment in Macao of a Special Administrative Region (Macao SAR) of the People's Republic of China which will be under the direct authority of the Chinese Central Government and will enjoy substantial autonomy, including executive, legislative and "independent judicial power, including that of final adjudication". China also undertook to respect the current social and economic system in Macao as well as the laws and the life-style, which are to remain in place for 50 years.

China's obligations under the Joint Declaration were further elaborated in an annex, whereby it was established that legislative authority will be vested in the legislature of the Macao Special Administrative Region and that most of the legislature members will be elected by popular vote. The

legislature will have the power to enact laws in accordance with the provisions of the Basic Law of the region, amending or repealing any previously existing law. There is also a provision for all laws previously in force to be maintained unless amended by the legislature. Judicial power is vested in the courts of the Macao SAR (*see below*).

Additionally, paragraph eight of the annex to the Joint Declaration provides that international agreements to which the People's Republic of China is not a party, but which are implemented in Macao may remain in force in the Macao SAR.

In March 1993 the Chinese legislature passed a bill enacting the "Basic Law of the Macao SAR of the People's Republic of China". In this Basic Law which works as a Constitution for the region, rights and guarantees for the Macao residents, as well as the political structure of the region, were developed. Article 36 entitles all Macao residents to resort to law, and have access to the courts and to lawyer's assistance for the protection of their rights and interests, including the right to institute legal proceedings before the courts against the acts of the executive authorities and their personnel. Article 40 further develops the provisions of the 1987 Chinese-Portuguese Joint Declaration by establishing that the provisions of the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and international labour conventions which applied to Macao will remain in force and be implemented in the Macao SAR.

The Macao SAR Basic Law, in accordance with the Chinese-Portuguese Joint Declaration, provides for a Chief Executive to hold executive power in the Macao SAR. This Chief Executive will be elected by a 300-member Election Committee, composed of representatives elected by economic and social interests groups, and will hold office for a renewable five-year term (Annex I to the Basic Law). However, the first Chief Executive was appointed directly by the Chinese Central Government in accordance with a decision of the Chinese legislative assembly on "The Formation of the First Government, the First Legislative Council and the First Judiciary of Macao SAR". This decision aimed at establishing a special transitional period in which the first Chief Executive would be elected by a 200-member Selection Committee, which in turn was chosen by a Preparatory Committee of 100 members elected by the Chinese legislative assembly to oversee the handover. This decision also governs the election of the first legislature of Macao. The first legislative assembly is to be composed of 23 members of which only 8 are directly elected by the people. Eight are elected by interest groups and seven are elected by the Chief Executive of the SAR. All of them will serve until October 2001 when a new legislative assembly will be elected. The number of legislators will increase in successive terms: the second legislature will be composed of 27

members (of which 10 will be directly elected) and the third of 29 (12 elected directly). This decision of the Chinese legislative assembly also provides for the organisation of the first judiciary after the handover by the Preparatory Committee (*see below*).

Edmund Ho Hau Wah was elected in May 1999 to be the first Chief Executive after the handover takes place. In September the Chief Executive-elect appointed six new legislators to serve after the handover in December.

The Judiciary

The organisation of the Macao judiciary, as well as guarantees of judicial independence, after the handover of sovereignty over Macao to the People's Republic of China are a major subject of concern.

Until June 1999 Macao's judiciary was structured following the lines of the Portuguese administration. The Portuguese Supreme Court and Constitutional Court sitting in Lisbon were the highest judicial authorities in Macao, and a High Court sitting in Macao itself used to work as an appeals court for cases heard by first instance courts within the territory. The High Court was composed of 6 magistrates sitting in panels of three. In some cases the appeals of cases heard initially by a three-judge panel were re-heard by the whole bench of six judges, including those who had already heard the case. It was contended that this was inconsistent with the standards on impartiality of judgement.

In June 1999, Portugal adopted measures to sever the ties of the Macao High Court with the Portuguese Supreme Court and Constitutional Court as part of the transition. All cases that formerly had to go to Lisbon were to be heard by the Macao High Court itself. As the case load increased provisions were taken to increase also the number of judges.

Since the handover in December 1999 the organisation of the courts is governed by the provisions of the Basic Law. Article 83 establishes that the courts of Macao SAR shall exercise judicial power independently. Article 84 establishes first-level courts, intermediate courts and a final appeals court in the Macao SAR, the power of final adjudication being vested in the Court of Final Appeal. Other provisions establish administrative courts for fiscal and administrative matters.

Appointment and Security of Tenure

Article 87 of the Basic Law provides that all judges will be appointed by the Chief Executive on the recommendation of an independent

commission composed of local judges, lawyers and eminent persons. No rules as to the composition and the method of appointment of this independent commission are provided in the Basic Law and reports say that its members are in fact appointed by the Chief Executive himself.

The same article provides that judges can only be removed from office for inability to discharge their duties or for behaviour incompatible with the post, by the Chief Executive acting on the recommendation of a tribunal appointed by the President of the Court of Final Appeal and composed of not less than three local judges. In the case of the justices of the Court of Final Appeal, their removal may only be decided by the Chief Executive following a recommendation of a review committee composed of members of the legislature.

Article 88 provides for the appointment of the presidents of all tribunals by the Chief Executive of Macao SAR. By the end of 1999 there were no laws or regulations to further preserve the independence of Macao's judiciary and the system provided for in the Basic Law seems to be insufficient and even prejudicial to such independence. The excessive power granted to the Chief Executive to appoint all judges and to dismiss them following recommendation by committees that he himself appoints or controls indirectly collides with international standards and principles on independence of the judiciary, as provided in the UN Principles. The power to appoint all presidents of tribunals in the region seems also to be incompatible with the necessary independence and impartiality that such judges should have in discharging their functions.

UN Human Rights Committee's Concluding Observations

On 4 November 1999 the UN Human Rights Committee adopted its Concluding Observations following the examination of Portugal's (Macao's) periodic report. The Committee expressed its satisfaction with the Chinese-Portuguese agreement of March 1998 on the principles underlying the organisation of the legal system, which guarantee the non-removability of judges and the autonomy and independence of the judiciary. It also reiterated its view that human rights treaties devolve with territory and that states continue to be bound by the obligations under the covenants entered into by the predecessor state (Paragraph 3).

Among the subjects of concern and recommendations mentioned by the Committee are the following:

- It still remains unclear, at the date, which laws, including human rights laws, will be held incompatible with the Basic Law of the Macao SAR and therefore will be invalid after 20 December 1999.

- The paucity of judges, lawyers and interpreters that might adversely affect the administration of justice, and recommended that further efforts should be made to train lawyers and interpreters and give them specialisation in human rights.
- That Law 6/97/M on promoting, founding or supporting a secret association, creates a vague and insufficiently defined offence and the imposition of an increased sentence or conviction on the basis that the person is an "habitual offender" or is likely to repeat such an offence. The Committee recommended that these provisions should be brought into line with the provision of the International Covenant on Civil and Political Rights that prohibits double jeopardy and bans laws with retroactive effect.
- The Committee also expressed concern at the paucity of human rights organisations and the fact that their establishment is not being encouraged.

THE RUSSIAN FEDERATION

The Russian judiciary remains subject to executive, military and private influence and corruption. The lack of resources is so overwhelming that it prevents the judiciary from working properly. Defence lawyers are increasingly becoming the targets of police harassment.

The Russian Federation consists of 89 territorial units, which include 21 republics, one autonomous region, 49 administrative units, six provinces, ten autonomous districts and the cities of Moscow and St. Petersburg, which have federal status.

The legislative power is vested in the Federal Assembly, which comprises two chambers. The lower house, the *Duma*, consists of 450 deputies, 50% of whom are elected in single mandate constituencies, with the other 50% being elected by party lists. The Federation Council (upper house) has 178 members, half of whom are the Chief Executives of the regional administrations (many of whom have been appointed by the President), and the others being the 89 chairpersons of the regional legislatures.

The executive consists of an elected President who is the head of state and a government headed by a Prime Minister. The President is elected for a term of four years. The President, with the consent of the *Duma*, appoints the Prime Minister.

The Constitution provides the President with substantial powers. According to Article 80, the President is the guarantor of the Constitution and of human and civil rights. Article 84 of the Constitution enables the President to introduce draft laws in the *Duma* and Article 90 empowers the President to issue decrees and executive orders. The Federal Assembly cannot annul these decrees, it can only advise on them. The President may also veto legislation from the Assembly.

Moreover, Article 85 gives the President the right to suspend acts by organs of the executive power, pending the resolution of the issue in court, if such acts contravene the Constitution of the Russian Federation and federal laws, the international obligations of the Russian Federation, or violate human and civil rights and liberties.

The year 1999 was a turbulent year for Russia with the war in Chechnya, bomb explosions in Moscow, the sacking of two governments within 3 months, several attempts to impeach the President and the poor health of President Boris Yeltsin which triggered speculations about his succession.

On 31 December, Boris Yeltsin resigned from office. According to the Constitution, the Prime Minister, Mr. Vladimir Putin, became acting President. Elections were held in March 2000 and Mr. Putin was voted in as President. Mr. Putin has been the driving force behind Russia's military campaign in Chechnya and has reiterated on numerous occasions Russia's commitment to defeating the separatist rebels.

Elections for the *Duma* took place in December, in addition to elections for the post of mayor of Moscow and elections for regional governors in eight regions. Yury Luzhkov from the Fatherland Party (OVR) was elected mayor of Moscow. The pro-government party, Unity, was the main victor in the elections for the *Duma* and because of the alliance with the Union of Rightist Forces (SPS), pro-government parties won the majority in the *Duma*. Because of the war in Chechnya no elections could be organised there and consequently the one seat in the *Duma* for Chechnya was not filled.

CHECHNYA

On 12 March 1992, the Constitution of the Chechen Republic was adopted by the Chechen parliament. The self-proclaimed Chechen Republic is, however, not recognised by Russia or the United Nations. A brutal war erupted in 1994 which ended in 1996 with a peace agreement. According to this accord an agreement on Chechnya's constitutional status was postponed until 2001. When Russia was admitted to the Council of Europe it promised that "those found responsible for human rights violations will be brought to justice - notably in relation to events in Chechnya" (Opinion 193 (1996) on the Russian Federation's request for Membership of the Council of Europe, paragraph 17 vii). Few, if any, of the perpetrators, however, have been brought to justice.

On 12 May 1999, President Yeltsin and the Chechen President, Aslan Maskhadov, signed a peace treaty in which Russia agreed not to use force to settle disputes. This agreement was, nevertheless, broken in September 1999. In August and September several bombs exploded in Russia killing about 300 people. Islamic militants from the Northern Caucasus were blamed for these attacks, it being supposed that they were in revenge for actions of the Russian military in the Northern Caucasus against Islamic militants who were invading Dagastan from Chechnya. Nobody, however, claimed responsibility for the bomb attacks.

After the explosions, several Russian cities launched a campaign against temporary residents who were forced to re-register with the authorities, despite the fact that the Constitutional Court had earlier ruled that these local regulations were unconstitutional. Caucasians were the main

target of the authorities and many of them faced expulsion or harassment.

The Moscow-based ICJ affiliate, the International Protection Centre, reported numerous cases of police harassment and human rights abuses against persons from the Caucasus throughout the Russian Federation. The Centre said that the entire Chechen population in the Federation was being subjected to harassment and discrimination.

In response to the unrest in the North Caucasus and the bomb explosions, at the end of September 1999 the Russian Government launched a campaign of air strikes, combined with ground attacks, against Chechnya. By November the indiscriminate bombings carried out by the Russian forces in Chechnya had resulted in the death of an undisclosed number of non-combatants, with around 200,000 refugees having fled to neighbouring Ingushetia and many civilians remaining trapped in the battered city of Grozny, the capital of Chechnya.

It became evident that the Russian military was using disproportionate violence against Chechnya, which violated, on a large scale, international human rights and humanitarian law. Various Russian and international non-governmental organisations (NGO s) and journalists reported summary executions of civilians, torture, arbitrary detention, rape and other serious human rights violations. On 6 December 1999, the Russian Government gave the civilian population of Grozny until 11 December 1999 to leave or face death. This ultimatum was criticised severely by the international community. Meanwhile, it was also recognised that the Chechen rebels were also committing serious human rights violations.

Several NGO s, among them Amnesty International, reported on the existence of so-called "filtration camps" in which Chechens whose names were on lists of suspected terrorists, including women and children, were detained and reportedly tortured and ill treated. In the 1994-1996 war between Russian and Chechnya these camps had also existed.

The ICJ, in a press release on 14 October 1999, called upon the government of the Russian Federation to refrain from the use of indiscriminate force against civilians, to bring the actions of its agents into conformity with international standards and to find a peaceful resolution to the conflict. The ICJ condemned the use of force by the Russian army against civilian targets in and around Grozny. The ICJ stated that:

> By bombing civilian targets, the Russian army violates the right to life of unarmed civilians. International humanitarian law provides that non-combatants are protected and that there can be no justification whatsoever for the use of force against them. Common Article 3 of the 1949 Geneva Conventions provides that "Persons taking no active part in

> the hostilities...shall in all circumstances be treated humanely...." Article 3 also expressly prohibits "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture....".

Foreign and Russian journalists who reported on the situation in Chechnya were not allowed to enter the Republic, were monitored in their work and were threatened by the Russian authorities with withdrawal of their accreditation.

The UN High Commissioner for Human Rights, Mrs. Robinson, visited Russia from 11 to 18 June 1999, but was refused access to the northern part of Chechnya which was under the control of Russian troops. Mrs. Robinson had criticised the serious violations of human rights by Russia in several statements. Other international organisations, such as the Organisation for Security and Co-operation in Europe (OSCE) were also denied access to the northern part of Chechnya.

On 13 December, the Secretary-General of the Council of Europe requested the Russian Federation to give an explanation for the human rights violations in the war in Chechnya with regard to Russia's obligations under the European Convention on Human Rights. The request was made in accordance with Article 52 of the Convention.

NGO s were already calling in December 1999 for an independent commission of inquiry to investigate violations of international law by the Russian forces in Chechnya. From 31 March to 4 April 1999 the High Commissioner for Human Rights visited Moscow, Ingushetia, Dagastan and Chechnya and reported on her findings to the 2000 session of the UN Commission on Human Rights. The Commission consequently adopted a resolution on Chechnya calling upon the Russian Federation:

> to establish urgently, according to recognized international standards, a national, broad-based and independent commission of inquiry to investigate promptly alleged violations of human rights and breaches of international humanitarian law committed in the Republic of Chechnya in order to establish the truth and identify those responsible, with a view to bringing them to justice and preventing impunity.

The resolution also requested the relevant UN special rapporteurs to undertake missions to Chechnya and the neighbouring republics.

Applicable Law

On 3 February 1999, President Maskhadov declared Shari'a law to be applicable in Chechnya and signed several decrees to bring local legislation

in line with it. In addition, the President ordered the drafting of a new Constitution and criminal code based on Shari'a law, but at the time of writing this was not yet completed.

In March 1999 public executions took place in Chechnya, receiving strong condemnation from the Council of Europe's Parliamentary Assembly as the executions were in clear violation of the obligations of membership of the Council of Europe. More such sentences have reportedly taken place in Chechnya since February 1999.

Human Rights Background

The human rights situation remained poor in 1999 with human rights abuses being perpetrated by both sides in the war in Chechnya, particularly attacks on journalists, police torturing with almost impunity and administrative harassment of numerous non-governmental organisations.

Contrary to the opinion of the Russian Ombudsman for Human Rights *(see below)*, freedom of the press was not guaranteed in Russia during 1999. Journalists were harassed and intimidated when they voiced critical views of the government and newspapers were pressured to publish material in accordance with the opinions of politicians. Many internet providers suffered from administrative harassment when they refused to install surveillance hardware.

Anti-Semitism mounted in Russia with several attacks on synagogues and anti-Semitic language being used by politicians. The UN Special Rapporteur on Racism and Racial Discrimination stated in his report to the 1999 UN Commission on Human Rights:

> there are strong ties between political elites and the ultra-nationalist movements, which often leads to discrimination against Jews in the public economic sector. More direct attacks on the Jewish community receive little attention, either from the press or the judicial system.

Death Penalty

When it joined the Council of Europe in February 1996, the Russian Federation had to commit to the suspension of all executions, pending the full abolition of the death penalty within three years. On 16 April 1997, Russia signed the sixth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms which bans capital punishment. However, it was only on 12 February 1999, that the

Russian Government issued a formal moratorium on the death penalty, just two weeks before the deadline. At the time of writing the sixth Protocol had not yet been ratified.

On 3 June 1999, President Yeltsin singed a decree that pardoned all prisoners on death row and commuted their death sentence to prison terms ranging from 25 years to life imprisonment. The decision was made on the recommendation of the Presidential Pardons Commissions. The death penalty, however, has not been removed from the Russian Criminal Code.

On 2 February 1999, the Constitutional Court suspended executions in Russia as legislation was about to be introduced which would allow the death penalty to be imposed only after trial by jury. Only nine out of the 89 territorial units have a jury system.

Torture

Torture is forbidden by Article 21 of the Constitution, but has not been defined in the Criminal Code and therefore it is difficult to charge perpetrators. Instead, police can only be accused of "exceeding" granted authority.

Torture by the police in order to extract confessions is systematic in the Russian Federation. In addition, prosecutors often use coerced confessions in court and fail to investigate torture allegations promptly and adequately.

Human Rights Watch, a non-governmental human rights organisation, reported in its 2000 World Report the appalling case of Aleksei Mikheev who was detained on misdemeanour charges, but was subsequently questioned on charges for murder and rape. After being tortured by the police, Mr. Mikheev confessed to the murder and when the police forced him to confess five more murders, he jumped out the window of the interrogation room, breaking his spinal cord. Several days later, the women who Mr. Mikheev supposedly had murdered appeared to be alive. The Prosecutor then obstructed the investigation into Mr. Mikheev's torture allegations.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides for the setting up of an international committee empowered to visit all places where persons are deprived of their liberty by a public authority. Russia ratified the Convention on 5 May 1998, which was followed by the first mission of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) to Russia, from 16 to 30 November 1998. The CPT's delegation focused its attention on pre-trial detention and the treatment of persons deprived of their liberty by the militia.

The CPT carried out a second mission to Russia from 30 August to 15 September 1999 within the framework of its periodic visits. In accordance with Article 11 of the Convention, the information gathered by the CPT during its visit to the Russian Federation and its consultations with the authorities are confidential. The government can decide to publish the findings but as to date the Russian Government did not make public any document.

Pre-Trial Detention

Defendants often spend much time in pre-trial detention without being allowed to consult a lawyer. Judges can also send back cases several times for investigation which makes the pre-trial detention period even longer. The penal system in general is overloaded, with poor and sometimes life threatening conditions for the prisoners.

The police are allowed, by presidential decree, to detain a person suspected for organised crime for up to 10 days without official charges. Investigations often drag for many months and suspects can be in pre-trial detention for longer then their official sentence. Prosecutors can extend the period of criminal investigation to 6 months in complex cases and even until 18 months in exceptional cases. The court system is overloaded and as a result suspects can be in pre-trial detention even longer.

Aleksandr Nikitin

In last year's edition of *Attacks on Justice* the case of Aleksandr Nikitin, a retired naval officer and environmental activist of the Bellona Foundation, was described. Mr. Nikitin was arrested and charged with treason under Article 64 of the Russian Criminal Code. The UN Working Group on Arbitrary Detention took up the case because the principle of due process had been severely violated, and the arrest was part of a pattern of persecution of environmental activists from the Bellona Foundation. The European Union, the Council of Europe and the OSCE had also expressed concern about the trial of Mr. Nikitin.

The government maintained that Mr. Nikitin was not charged with treason in relation to environmental issues, but rather in relation to state secrets. On 29 December, Mr. Nikitin was cleared of treason after he had been in prison for 10 months and under house arrest almost 3 years.

Visit by Human Rights Ombudsman to the ICJ

The Russian Federation complied with the Council of Europe's obligation to create a human rights ombudsman when the *Duma* passed a law in

1997 providing for such an institution. The post, however, remained open until May 1998 when Oleg Mironov, a Communist Party deputy for the *Duma* who was not known for any human rights work, was appointed.

On 16 December 1999, Mr. Mironov met with the ICJ and the CIJL in Geneva. The Ombudsman stated that his office receives 2,000 complaints per month. The subject of the complaints are the following:, 31% of the complaints are civil law problems such as housing, 30% of the complaints are criminal law problems such as unlawful detention and failure to sue when rights are violated, 15% of the complaints are labour law problems and in particular non-payment of salaries, 3% of the complaints are complaints from the military and their families, and the remainder of the complaints come from refugees and internally displaced persons.

The Office of the Ombudsman is funded from the federal budget and has 115 staff. The Ombudsman may initiate civil and criminal action, ask the *Duma* to investigate violations of human rights and send reports to the President and the Prime Minister

With regard to prison visits, the Ombudsman is said to visit regularly mental clinics, orphanages and refugee camps. The Ombudsman acknowledged that pre-trial conditions are very poor mainly because the pre-trial detention centres are overcrowded. Prison conditions are supposedly much better, but food and medication shortages exist, due to the bad economic situation.

When questioned about his actions with regard to the war in Chechnya, the Ombudsman refused to accept that the Russian forces commit serious human rights violations. He only stressed that the rebels commit human rights violations in Chechnya.

The Judiciary

Although the Constitution provides for an independent judiciary, in practice it has encountered difficulties securing its independence. While formal supervision of the courts is assigned to the Supreme Court of Justice, executive organs play an important role in relation to the judiciary and the judiciary remains subject to executive, military and private influence and corruption.

The tradition of the Soviet era, which regarded the judiciary as an administrative function, continues to prevail. Reforms in the 1990's have focused on strengthening the independence of the Russian judiciary. However, the system continued to permit significant political influence

through the appointment of judges due to the lack of resources allocated to the judiciary. In addition, the judges themselves have as yet failed to understand the concept of judicial independence.

A 1996 law separated the courts from the Ministry of Justice and placed them within a separate part of the Judicial Department. The Ministry of Justice previously exercised extensive control over the judiciary. In the 1998 and 1999 budgets, this department was funded independently from the Ministry.

Court Structure

The Russian judicial system comprises courts of general jurisdiction, which include a Supreme Court and lower ordinary District and Municipal Courts (*rayoniye*) from which decisions are appealed to the Regional and City Courts (*oblastniye*). There are also arbitration courts that consider disputes between business entities and arbitration courts that decide on economic disputes brought against the government.

Military courts are organised into a special branch of the judiciary. They are regulated by a special statute and were criticised in 1995 by the United Nations Human Rights Committee with regard to their jurisdiction over civil cases.

Article 125 of the Constitution provides for a Constitutional Court which consists of 19 judges. The judges are nominated by the President and then appointed by the Federal Council. The Constitutional Court of the Russian Federation reviews the constitutionality of the law applied in a specific case in accordance with procedures established by federal law. It interprets the Constitution of the Russian Federation and rules on requests of the Federation Council, in compliance with established procedures, when charging the President of the Russian Federation with state treason or other grave crimes.

The 1993 Constitution empowers the Constitutional Court to arbitrate disputes between the executive and legislative branches and between Moscow and the regional and local government. The court is also authorised to rule on violations of constitutional rights, to examine appeals from various bodies and to participate in impeachment proceedings against the President. The July 1994 Law on the Constitutional Court prohibits the court from examining cases on its own initiative and limits the scope of the issues the court can hear. The Constitutional Court has assumed an active role in the judicial system since it was re-established in early 1995 following its suspension by President Yeltsin in October 1993 (*see Attacks on Justice 1996*).

The Supreme Court is established by Article 126 of the Constitution. The Supreme Court is the highest judicial body on civil, criminal and other matters heard by general jurisdiction courts, and has judicial supervision over their activity in line with federal procedural forms. It can also offer explanations on judicial practice. The Supreme Arbitration Court is regulated by Article 127 of the Constitution. It is the highest judicial body resolving economic disputes and other cases considered by arbitration courts, it also carries out judicial supervision over their activities in line with federal legal procedures and offers explanations of judicial practice.

Appointment, Qualification and Tenure

Article 83 and Article 128 of the Constitution state that judges of the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation are appointed by the Federation Council following nomination by the President of the Russian Federation. Judges of other federal courts are appointed by the President of the Russian Federation in accordance with procedures established by federal law.

According to Article 119 of the Constitution a judge must be at least 25 years old, must have a higher education in law and must have at least five years experience in the legal profession. The federal law may establish additional requirements for judges in the courts of the Russian Federation.

The Law on the Status of Judges then requires a judicial candidate to take a qualifying examination administered by the Examination Commission, which is composed of executive appointees who are approved by the Qualifying Collegium of Judges. The Qualifying Collegium is charged with reviewing applications of candidates for posts in federal courts; if they approve a candidate, the President reviews the application for final approval or rejection. The President thus has the power to veto candidates selected by the Qualifying Collegium.

Judges of the Supreme Court are required to have ten years of experience and are selected directly by the President of the Russian Federation. The Federation Council then confirms the nomination.

Courts of first instance in civil and criminal matters consist of one professional judge and two so-called "people's assessors", who have all the powers of the professional judge. They are elected for a term of two years and they cannot be called for more than two weeks during the year.

Discipline

The Qualifying Collegia are in charge of the discipline and supervision of the judiciary. The Qualifying Collegia are composed of judges elected by the Congresses of Judges at the district, regional and federal levels. The Constitution establishes that a judge may not have his powers terminated or suspended except under procedures and on grounds established by federal law. Articles 13 and 14 of the Law on the Status of Judges establish the conditions for the suspension of a judge, as well as the grounds for removal.

Article 13 of the Law on the Status of Judges establishes that a judge may be suspended for involvement in criminal activity, undertaking activities incompatible with his post or for medical reasons. Suspensions may be appealed.

Resources

Due to low judicial salaries many judicial posts remain vacant, and in addition trigger corruption (*see Attacks on Justice 1998*). In 1998, the Supreme Court successfully challenged the budget cuts of 26% before the Constitutional Court, but courts did not, however, receive full funding.

According to the Constitution, the federal government should finance the courts. However, due to budget cuts, the courts are often dependent on funding from local governments, which increases the risk of improper political influence. The lack of resources is so overwhelming that it prevents the judiciary from working properly. There are reports of courts functioning without telephone, electricity and other vital services. Some courts cannot even send orders to witnesses to attend trials because of a lack of envelopes and stamps, etc.

Lawyers

According to Dmitriy Baranov, Vice-President of the Association of Lawyers of Russia, defence lawyers are increasingly becoming the targets of police harassment. This is confirmed by other professional associations and applies for the whole of the Russian Federation.

NGO's have reported that in many cases investigators deny access to lawyers. In addition, if defendants have to rely on court-appointed public defenders the quality of the service provided is often poor.

In March, the Supreme Court ruled that defence attorneys are allowed to appeal the actions of the Procuracy and investigative officials to a court

and declared Articles 218 and 220 of the Criminal Procedure Code unconstitutional. These articles had allowed appeals during pre-trial detention only to a supervising procuracy, not a court.

Prosecutors are extremely powerful in the criminal procedure system and judges are said to tend to refer cases for additional investigation when no guilt is proven rather than face confrontation with a prosecutor. In April 1999, the Constitutional Court ruled that several provisions of the Criminal Procedure Code that allow judges to return criminal cases for further investigation are unconstitutional.

CASES

Tatyana Loktionova {Chair of the Primorskiy kray Arbitration Court}: In July Ms. Loktionova announced that the governor of Primorskiy kray, Mr. Yevgeniy Nazdratenko, had been interfering in the court's activities and that consequently, she and her colleagues feared for their safety. Mr. Nazdratenko had apparently blamed the court for causing enterprises in the region to go bankrupt and damaging the economy, and launched an investigation into the functioning of the Arbitration Court for illegal conduct.

Vasiliy Rakovich {human rights lawyer and Chairperson of Krasnadar Regional Association for Human Rights}: In last year's edition of *Attacks on Justice* it was mentioned that Mr. Rakovich was attacked and severely beaten on 23 October 1998.

At that time Mr. Rakovich was appearing as defence counsel in the trial of Vasiliy Chaikin, a human rights activist, before the City Court of Stanitsa Leingradskaya, in the Krasnodar region. It is suspected that the attacks were linked to the Chaikin case as Mr. Rakovich had called for a criminal case to be opened into allegations that witnesses' testimonies were obtained under duress by the Chief Investigator, Mr. Tsaturyan. The Leningradksy District Department of Internal Affairs has opened a criminal investigation into the attack on Mr. Rakovich, but at the time of writing no progress was known.

In March 1999, Mr. Rakovich was detained for 3 days on a charge of "disrespect for the court".

Yury Skuratov {Prosecutor-General}: Mr. Skuratov resigned on 2 February 1999, officially for health reasons. On 17 March, the Federation Council, however, refused the resignation in a vote. It then became clear that Mr. Skuratov was pressured to resign from his post by the presidential administration. Allegedly the Prosecutor-General was forced to resign

because he had discovered a corruption scandal that involved the head of the Presidential Administration Office, Mr. Borodin, and the Swiss construction company Mabetex that had carried out reconstruction work in the Kremlin.

On 23 February, Mr. Skuratov began an official investigation into the allegations of corruption regarding Mabetex and Mr. Borodin. Swiss prosecutors revealed in July that a criminal investigation was launched against Mr. Borodin on corruption charges.

In April, Mr. Berezovsky, a tycoon with strong ties to the Russian presidential entourage, was arrested in a money laundering scandal. Mr. Skuratov was apparently preparing a case against him.

On 2 April, Mr. Skuratov was suspended by decree by Boris Yeltsin pending charges in a sex scandal and, consequently, submitted again his resignation, which was again refused by the Federation Council in a vote. Mr. Skuratov, however, remained suspended. On 13 October, the Federation Council refused for the third time to accept Mr. Skuratov's resignation.

The Federation Council then put the case before the Constitutional Court and on 1 December the court ruled that the President had the right to suspend Mr. Skuratov pending charges in a sex scandal. The court, however, also ruled that Mr. Yeltsin could not overrule the Federation Council in its decision not to accept the resignation of Mr. Skuratov.

SOUTH AFRICA

There have been several controversies over judicial appointments as the judiciary is faced with the challenge of developing itself to represent the modern South Africa. Calls were also made during the year to increase judicial accountability. Substantial efforts are being made to correct the injustices of the past, however, serious human rights violations still remain. However, the respect for human rights remains fundamental to South Africa's new constitutional system. The judiciary is independent and has issued several landmark judgements on human rights.

In April 1994 South Africa held its first democratic and universal elections. This marked the end of the era of apartheid that had subjected non-white residents of South Africa to a policy of systematic discrimination and segregation. The elections were the culmination of a process that commenced in 1990 with the legalisation of the African National Congress (ANC), the Pan Africanist Congress (PAC), the South African Communist Party (SACP) and the release of political prisoners by the then President, F W de Klerk. Mr Nelson Mandela was elected as the President and the ANC obtained 62% of the vote. Elections were held again in 1999, where the ANC extended their majority in the National Assembly and Mr Thabo Mbeki was elected as the new President.

The 1997 Constitution of the Republic of South Africa contains an extensive bill of rights and is based on the principles of democracy, human rights and the Rule of Law. It creates a government structure based on a separation of powers between the legislature, the executive and the judiciary.

Although the Republic of South Africa is not a federal state the Constitution creates three levels of government, national, provincial and local. The National and Provincial levels share legislative power. The main legislative power is vested in the parliament, consisting of the National Assembly and the National Council of Provinces. The National Assembly contains four hundred members elected in popular proportional elections for a term of five years. The National Council of Provinces contains ten delegations from each of the nine provinces. These delegations consist of the Premier of the province or a member of the provincial legislature, three special delegates and six permanent delegates. The permanent delegates cannot be members of the provincial legislature. Legislation requires the assent of both houses of parliament and the President before it enters into effect.

Each province has a legislature that is competent to pass a Constitution for its province and legislation in certain limited areas, generally related to issues that are purely of concern to the province. It is also elected for a period of five years.

The executive authority of the Republic of South Africa is vested in the President. The President is elected by the National Assembly for a term of five years and can only hold office for a maximum of two terms. The Cabinet, consisting of members of the National Assembly, are appointed by the President and assists he or she in exercising this power. The executive authority of the provinces is vested in the Premier assisted by a provincial executive council. In cases of conflict between national and provincial action, national action takes precedence. Local governments have some executive power over municipal issues.

Human Rights Background

After decades of systematic discrimination against the non-white population of South Africa the country has moved forward into a new period where the respect for human rights takes a pre-eminent position within the social and political context. The 1997 Constitution contains an extensive Bill of Rights and places the protection and promotion of human rights as the "cornerstone of democracy" within South Africa.

Chapter 2 of the Constitution contains the Bill of Rights which protects many fundamental civil, political, economic, social and cultural rights. A positive responsibility is placed on courts to develop the common law to give effect to rights contained in the Constitution, to the extent that they are not effectuated through legislation. In giving effect to these rights courts are required to consider international law and must promote the spirit, purport and object of the Bill of Rights.

The Constitution creates several institutions to ensure the promotion and protection of human rights. The Human Rights Commission (HRC), created by Chapter 9, Title 2 of the Constitution, is responsible for the promotion and monitoring of human rights issues and is empowered to investigate and to take steps to secure appropriate redress where human rights are violated. Under the terms of Section 38 of the Constitution, the HRC can take legal action on behalf of a person to ensure that their rights are enforced. Two other commissions have been created for specific rights issues, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission on Gender Equality.

The government has ratified many of the basic human rights treaties. In December 1998, the government ratified the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All forms of Racial Discrimination; the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Regionally, South Africa is a party to the African Charter on Human and Peoples' Rights. It also has signed the Statute of the International Criminal Court.

Despite this structure for the protection of human rights, violations are still prevalent and are of concern. The police and security forces use excessive force and commit extra-judicial killings. The Independent Complaints Directorate (ICD), which investigates complaints against the police, reported that 450 deaths occurred in 1999 because of police action, with 192 of those occurring in police custody. The ICD also reported that between April and November 1999 there were 24 cases or torture and 8 cases of rape by police and security forces. Political violence between the ANC and the IFP also continues to be a problem.

Crime also continues to be a serious problem. There are high levels of murder, theft and assault. Women routinely face discrimination and violence. Incidents of female rape are extraordinarily high, with the South African Police Service reporting that between January and June 1999 there were 23,900 reported cases of rape. Also, although the official policy of apartheid has ended, massive social and economic inequalities resulting from that era still exist between the white and black populations.

The Judiciary

The structure of the South African judicial system is set out in Chapter 8 of the Constitution. Section 165 guarantees the independence of the courts and requires the organs of the state to assist and protect the courts to ensure their "independence, impartiality, dignity, accessibility and effectiveness." Chapter 2 of the Constitution, in Articles 34 and 35, guarantees everyone the right to have a dispute or trial heard by a fair, impartial and independent court. There is a single national prosecuting authority responsible for the institution of criminal proceedings on behalf of the state. It is headed by the Director of Public Prosecutions who is appointed by the President. The Constitution provides that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. The Judicial Service Commission is empowered by Section 178(5) of the Constitution to advise the national government on any matter relating to the judiciary or the administration of justice.

The judiciary was not reconstituted along with the other organs of state at the end of the apartheid era. The judges that were appointed under an official policy of apartheid continued to serve as members of the judiciary and perform their functions under the new Constitution. This has led to a certain lack of faith in the judicial system and efforts to achieve a more equal racial balance, as there is a popular belief that the judiciary does not properly reflect post apartheid South Africa.

The court structure consists of the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrate Courts and any other court established by an act of parliament.

The Constitutional Court

The Constitutional Court is the highest court in constitutional matters and was established in 1994 under the interim constitution and continued to operate under the 1997 Constitution. Its jurisdiction is limited to constitutional matters and issues connected with decisions on constitutional matters, i.e. any issue involving the interpretation, protection or enforcement of the Constitution. However, the court has the final power in determining whether a relevant subject matter concerns a constitutional question. In exercising this power it can, *inter alia*:

- decide on the constitutionality of any bill or legislation at the national or provincial levels: s164(4)(b) and (c)
- decide disputes between organs of state at the national or provincial level on issues concerning constitutional status, or powers and functions: s164(4)(a)
- decide that the parliament or the President has failed to fulfil a constitutional obligation: s164(4)(e)
- decide on the constitutionality of any amendment to the Constitution: s164(4)(d)

In any constitutional matter decided by a lower court, the Constitutional Court is required to confirm an order for invalidity issued by that court. The court consists of eleven judges headed by a President and Deputy President and any matter must be heard by at least eight judges. Judges of this court are appointed for a non-renewable term of 12 years but must retire at the age of 70. The current President of the court is Justice Arthur Chaskalson.

The court has gained international recognition with its landmark decisions in a number of human rights matters, including the death penalty and the area of economic, social and cultural rights.

The Supreme Court of Appeal

The Supreme Court of Appeal, created by Section 168 of the 1997 Constitution, is the highest court of appeal, except in constitutional matters. It replaced the Appellate Division of the Supreme Court. Its jurisdiction only covers appeals and issues connected with appeals and any other matters assigned to it by an act of parliament. The decisions of this court are binding on all courts lower than it. Civil cases are heard by five judges and criminal cases by a minimum of three. The court is headed by a President and Deputy President and as many other judges of appeal as determined by an act of parliament. Currently there are nineteen appellate judges, headed by Chief Justice Ismail Mahomed. Its seat is in Bloemfontein.

High Courts

The High Court is created under Section 169 of the 1997 Constitution. It has jurisdiction in any constitutional matter except those exclusively reserved to the Constitutional Court and in any other matter not assigned by an act of parliament to another court. This court usually exercises its general residual jurisdiction in civil or criminal cases of a serious nature not assigned to Magistrate or Regional Courts. Former provincial or local divisions of the Supreme Court of South Africa became High Courts under the 1997 Constitution. Currently there are 10 provincial High Court divisions and three local divisions.

A Commission on the Rationalisation of the Provincial and Local Divisions of the Supreme Court (the Hoexter Commission) was formed to reshape court structures and areas of jurisdiction. As a result of this commission legislation has been proposed to rearrange the geographical boundaries of the High Courts and to provide that appeals in the first instance shall be made to a provincial Court of Appeal. These courts shall be staffed by High Court judges and act as an intermediate appellate step to the Supreme Court of Appeal.

Magistrate Courts

Magistrates Courts are the courts of first instance and decide all matters as provided for by an act of parliament, but may not decide on the constitutionality of any legislation or on any conduct of the President. These courts have jurisdiction in civil matters where the value of the claim does not exceed 100,000 South African rand and in criminal matters where the sentence does not exceed three years imprisonment or a fine of 60,000 rand. A Magistrates Court cannot hear the offences of treason, murder or rape. There are 432 Magistrates Courts served by 1,453 magistrates.

Other Courts

Regional courts are created under the Magistrates Court Act and are divisions of Magistrate Courts consisting of a number of Magistrate Court districts. These courts hear cases involving serious criminal offences except treason. Cases are heard by a single regional magistrate who may impose a prison sentence of up to fifteen years imprisonment. There is no right of appeal from a Magistrate Court to this court.

When a person is charged with an offence relating to the security of the state or the maintenance of public order, a Special Superior Court may be constituted to hear the case. This court can only be formed if the Minister of Justice is of the opinion that the interests of justice or of public order would be better served if the accused were tried in such a court. The court will then be constituted by the President and a bench of three judges from the High Court appointed by the judge President of the Court. These courts have rarely been created, usually only for the offence of treason, and no such court has been constituted since the 1950's.

Several other courts exist to hear specific subject matters. The Land Claims Court was established in 1996 to hear disputes arising from the Restitution of Land Rights Act 1994 and the Land Reform (Labour Tenants) Act of 1996. The court decides appropriate forms of restitution for people who have been dispossessed of their land under racially discriminatory laws and practices, and protects labour tenants from eviction without an appropriate court order. This court has the same status as a High Court and appeals lie from it to the Supreme Court of Appeal. Other courts, such as Labour Courts and Small Claims courts, also exist.

Judges

Varying procedures exist for the appointment of judges, depending on the court and seniority of the position, but the President, as head of the executive, officially appoints all judges. Section 178 of the Constitution creates a Judicial Service Commission to assist the executive in the appointment of judges. This commission consists of 23 representatives from the judiciary, the legal profession, parliament and other members designated by the executive. Members of the Commission are selected by the respective bodies that they represent which generally ensures that the Commission is independent and bipartisan. There is also a constitutional requirement, in Section 174, that when a judicial officer is appointed consideration must be given to the need for the judiciary to broadly reflect the racial and gender composition of South Africa.

The President appoints judges to the Constitutional Court after consulting the leaders of the parties in the National Assembly and the President of the Constitutional Court. The Judicial Services Commission supplies the President with a list of nominees from which the President may make an appointment. The President and Deputy President of the Constitutional Court are appointed by the President, after consultation with the Judicial Service Commission, and the leaders of the parties represented in the National Assembly. The Chief Justice and Deputy Chief Justice are appointed by the President after consultation with the Judicial Service Commission. The judges of all other courts are appointed by the President on the advice of the Judicial Service Commission.

The tenure and remuneration of judges is guaranteed by Section 176 of the Constitution. All judges, except for Constitutional Court judges, hold office until discharged from active service under the terms of an act of parliament. Constitutional Court judges hold office for non-renewable terms of 12 years. A judge may only be removed if the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct. The President may also remove a judge on the basis of a resolution adopted by at least two thirds of the members of the National Assembly.

Controversial Appointments

There has been a perception by some members of the judiciary that less qualified candidates are being appointed before more senior members of the judiciary. As noted earlier, there is a constitutional requirement that the judiciary broadly reflect the ethnic and gender diversity of South Africa and that this should be considered during the appointment process. Due to the policy of apartheid the current judiciary does not fulfil this criteria, although progress is being made. This approach often conflicts with the traditional policy of promotion based on seniority.

In 1997, during the selection process for the Chief Justice, many judges came out publicly in favour of Justice Van Heerden, the most senior judge in the Court of Appeal. The main alternate nomination was Deputy President of the Constitutional Court, **Justice Mahomed**, who was supported by President Mandela. It appeared that many regional judges had called meetings to encourage support for Justice Van Heerden. A judge of the Court of Appeal, Justice Hefer, also publicly called for **Justice Mahomed** to withdraw his candidature.

In April 1998, several judges from the KwaZulu-Natal bench petitioned the JSC to appoint Justice William Booysen over **Justice Tshabalala** alleging that the latter judge would fail to command the respect

of the other judges due to a lack of experience. On 1 June 1999 it was also reported that Deputy President Mbeki, who was to be appointed as President on 11 June 2000, vetoed the appointment of **Justice Erwin Cameron** to the Constitutional Court in favour of **Justice Sandile Ngcobo.**

A perception that less qualified candidates are being appointed has also led to some judicial retirements. In 1996 Justice Rex Van Schalkwyk resigned citing the policy of affirmative action as having a deleterious effect on the bench. Justice Piet van der Walt announced his retirement in October 1998 after a less senior judge was appointed over him to be President of the Transvaal High Court.

MAGISTRATES

The Magistrates Act 1999, in Sections 2 and 4, establishes a Magistrates Commission responsible for, *inter alia*:

- ensuring that the appointment, promotion, transfer or discharge of, or disciplinary steps against, judicial officers in the lower courts takes place without favour or prejudice;
- ensuring that no influencing or victimisation of judicial officers in the lower courts takes place;
- carrying out investigations and making recommendations to the Minster of Justice regarding disciplinary action of judicial officers in the lower courts;
- advising, or making recommendations to the Minister of Justice, regarding the requirements for appointment and the appointment of judicial officers;
- advising or making recommendations to the Minister of Justice on any matter which, in the opinion of the Commission, is of interest for the independence and efficiency in the dispensing and administration of justice.

The Commission is composed of a judge of the Supreme Court (now the High Court), a representative of the Department of Justice, two Regional Court Presidents, two Chief Magistrates, the Chief Director of the Justice College, one magistrate, one advocate, one attorney and one legal academic. The members of the Commission are officially appointed by the President but are nominated by their respective constituencies. The President may withdraw an appointment at any time, after consultation with the Commission if in his opinion there are sound reasons for doing so.

Section 10 of the Magistrates Act 1993 provides that the Minister of Justice appoints magistrates after consultation with the Commission. They hold office until the age of 65 years, and can be removed from office for misconduct, continued ill health, incapacity to carry out his duties of office efficiently, or in order to effect a transfer and appointment as contemplated by the Public Service Act 1994. The Minister can suspend if the Commission recommends to that affect and a report regarding the reasons for suspension is laid before parliament. If the parliament passes a resolution recommending removal, or fails to act, the Minister can remove the magistrate from office.

Magistrates are paid a salary according to rank as determined by the Minister of Justice, and publicly notified in the Gazette. A magistrate's salary can only be reduced by an act of parliament. Section 15 prohibits magistrates from performing other paid work without the consent of the Minister for Justice.

Draft White Paper on the Reform of the Judiciary

In July 1999, the policy unit of the Department of Justice produced a draft white paper on the reform of the judiciary. The white paper contained several proposals, including a removal of the distinction between magistrates and judges. This would enable magistrates to be directly promoted into higher judicial ranks. The proposal was greeted with some reservations due to a perceived lack of appropriate qualifications of magistrates for judicial office, concerns about funding and questions regarding the independence of the magistracy.

Threats to the Independence of the Judiciary

President of the Republic of South Africa and Others v South African Rugby Football Union and Others

On 4 June 1999, the Constitutional Court delivered its written judgement in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (Case CCT 16/98)*. The decision was regarding a recusal application, filed by Dr Louis Luyt, against five of the judges hearing a case on the constitutional validity of two notices issued by President Mandela. These notices established a commission of inquiry into the South African Rugby Football Union (SARFU) and gave it the power to subpoena, call witnesses and obtain documents.

Dr Luyt made several allegations against the entire court and specific allegations addressed to **Chaskalson P, Langa DP, Sachs J and Yacoob** J. The application against Kriegler J was withdrawn during argument. The petition for recusal contained numerous allegations generally related to a perceived close relationship between the members of the court and the President or the ANC. The court, in deciding on the application, applied the test of "whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case."

The court, in dismissing the application unanimously, stated that whilst litigants have the right to apply for recusal this "does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour." The court also stated that "Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers."

Judicial Accountability

In October 1999, there was publicity surrounding an "invitation" by the Joint Monitoring Committee on the Improvement of the Quality of Life and Status of Women of the parliament, to **Judge John Foxcroft** of the Cape High Court to explain his reasons for a decision that he had given. The decision to question the judge had initially been widely reported as a summons. In response to the furore, the Chief Justice of South Africa and the President of the Constitutional Court issued a statement explaining that "a member of the judiciary cannot be properly summoned or even otherwise be required to explain or justify to a member of the legislature or the executive any judgement given in the course of his or her judicial duties" as this would clearly breach the separation of powers. The UN Basic Principles on the Independence of the Judiciary are clear that judicial decisions by the courts shall not be subject to revision.

In October 1999, the Department of Justice tabled before the JSC a document regarding the establishment of a judicial complaints mechanism. Section 180 of the Constitution provides that national legislation can be enacted on this issue, and the JSC had been considering this issue since 1997. Some judicial officers raised concerns in the press at the time that the mechanism would threaten judicial independence. The JSC has appointed a committee to ascertain the views of members of the judiciary and the matter will be further considered by the JSC in April 2000.

Problems in the Administration of Justice

The lower levels of the court system suffer from a lack of adequate funding. This is evidenced by concerns regarding the level of security in the court system. In January 2000, the Department of Justice reported that at the Phoenix Magistrate Court in Durban, four armed men held up a magistrate, a prosecutor and several members of the public. The men were able to bring weapons into the court as a weapons scanner had failed and sufficient funds had not been available to fix it. Adequate funding is essential to maintain the independence of the judiciary and to safeguard the judicial process from any inappropriate or unwarranted interference. The UN Basic Principles on the Role of Lawyers also requires that authorities must adequately safeguard the security of lawyers if it is threatened as a result of the discharge of their functions.

SRI LANKA

Tamil litigants and lawyers face serious language problems, particularly in Colombo: interpreters are not available, few judges can function in Tamil, and publication of legislation and emergency regulations in Tamil is not up to date and law reports and text books are not available in Tamil. In the areas held by the LTTE a court system has been developed by the LTTE which does not function at all as an independent judiciary. The conflict between the LTTE and the government continues to claim both combatant and civilian lives.

On 4 February 1948 Sri Lanka, known then as Ceylon, was granted its independence and became a member of the Commonwealth. The original Constitution was to a large extent a codification of the British parliamentary system, and created a unitary state.

Under the 1972 Constitution the name of the country was changed from Ceylon to Sri Lanka and it became a republic, while remaining within the Commonwealth. The office of President replaced that of Governor General but it is a largely ceremonial office, with effective power remaining in the hands of the Prime Minister.

Sri Lanka has had a democratic political system ever since independence. The conflict in the north and east of the country, however, continues to undermine respect for human rights. Politics have been dominated by two main parties, the United National Party (UNP) and the Sri Lanka Freedom Party (SLFP). Historically, the UNP has been associated with a market or mixed economy and the SLFP has been associated with socialist economic policies, but with the collapse of socialism as an economic theory there is now little ideological difference between the two parties.

A new constitution, based on the French constitutional system, was adopted in 1978. This constitution, with some later amendments, is the present Constitution of Sri Lanka. The President is the head of state and the head of the government, and is directly elected. In August 1994 the parliamentary elections were won (by a majority of one) by the People's Alliance (PA), a coalition consisting of the SLFP together with some small parties. The PA leader, Chandrika Bandaranaike Kumaratunga, was appointed Prime Minister. In November 1994 Ms. Kumaratunga was elected President and in December 1999 she was re-elected.

The 225 members of the unicameral parliament are elected by proportional representation. Amendments to the Constitution require the supporting votes of two thirds of the total number of members of parliament and, in certain cases, approval by referendum as well. A new Constitution is being drafted, a project that began in 1994. The division in the parliament makes it, however, unlikely that the two third majority necessary to adopt it will be possible.

The Conflict Between the Sri Lankan Government and the LTTE

For sixteen years a conflict between the Sri Lankan Government and the Liberation Tigers of Tamil Eelam (LTTE), who fight for a separate state, has continued, mainly in the north and the east of the country. LTTE bombs occasionally explode in the capital Colombo. A state of emergency has been in force in all or part of Sri Lanka since 1971.

The Sinhalese make up 74% of the total population of Sri Lanka, and the Tamils 18%. Following independence, the Tamil community became increasingly concerned with the oppressive use of majority power by the Sinhalese, such as the declaration of Sinhala as the official language, changes in the system of admission to universities which reduced the proportion of Tamil students and the promotion of Buddhism and Buddhist symbols.

Tamil politicians, alienated by the failure to achieve a settlement of their grievances by negotiation, moved from campaigning for federalism to campaigning for independence for a separate state of "Tamil Eelam" in the north and east of the island. In the 1977 elections a separatist party, the Tamil United Liberation Front (TULF), won all the seats in Tamil majority areas. In 1978 a number of militant separatist groups began to emerge, notably the Liberation Tigers of Tamil Eelam (the "Tamil Tigers" or LTTE).

The Sixth Amendment to the Constitution, which came into effect on 8 August 1983, made it a criminal offence to advocate the establishment of a separate state within the territory of Sri Lanka. The Amendment also introduced an oath, to be sworn by members of parliament (MPs) and holders of official posts, which included a promise not to support the establishment of such a state within Sri Lanka. The Amendment, in so far as it criminalised peaceful support for separatism and excluded supporters from public office, involved a breach of Articles 19 (2) (freedom of expression) and 25 (right to take part in public life) of the International Covenant on Civil and Political Rights.

The Thirteenth Amendment to the Constitution established nine provinces (the Northern and Eastern ones have Tamil majorities) and

created elected Provincial Councils with powers over an extensive list of devolved matters. However, considerable powers of control over the Provincial Councils were reserved for the Governors of the Provinces, who are appointed by the President. The Amendment also gave the Tamil language, in law, equal status with Sinhala.

The Indian Government agreed in 1987 to send a Peace-Keeping Force (the IPKF) to take control of the Tamil areas of Sri Lanka and to restore order. The agreement sparked off a serious uprising by the Janatha Vimukthi Peramuna (JVP) in the Sinhalese areas in objection to the Indian intervention in the internal affairs of Sri Lanka. The JVP, at that time an extremely violent organisation, used tactics of terror and assassination which led to reprisals and counter-terror by the government. Many thousands of people were killed by each side. Estimates of the numbers killed range from 30,000 to 60,000. The JVP now exists as a legitimate political party and has some strength in local government and is no longer violent.

The government resumed negotiations with the LTTE and on 8 January 1995 a cease fire agreement came into force. However, on 18 April 1995 the LTTE denounced the cease fire and resumed hostilities. In the latter part of 1995 government forces undertook a campaign to regain control of Jaffna and its peninsula. Jaffna fell to them on 5 December. There remain, however, some areas which are controlled by the government by day but by the LTTE by night. The LTTE does not have universal support among Tamils.

State of Emergency

A state of emergency has been in force in all or part of Sri Lanka since 1971. The government has relied mainly on Emergency Regulations made under the Public Security Ordinance 1947. Part I of the Ordinance confers on the President power to proclaim a state of emergency in all or part of Sri Lanka if a public emergency exists or is imminent. When an emergency has been proclaimed, Part II of the Ordinance confers on the President power to make such emergency regulations as appear to her to be necessary or expedient in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community. As shown, the President has enormous powers under the Emergency Regulations and parliamentary control is lacking.

Emergency regulations may override existing laws. Neither the existence of an emergency nor an emergency regulation nor an order, rule or direction made under such a regulation may be called into question in any court. No action or prosecution lies against any person for any act in good

faith done in pursuance or supposed pursuance of an emergency regulation or an order or direction made under it. This creates an opportunity for abuse and impunity.

The Emergency Regulations and the Prevention of Terrorism Act (PTA) may, among other things, authorise the detention of persons without court approval. With regard to confessions the normal rule in Sri Lanka is that confessions to police officers are not admissible as evidence; confessions are only admissible if made before a magistrate. However, confessions to a police officer of the rank of Assistant Superintendent or above are admissible in the trial of offences under the act. The admissibility of confessions in such cases encourages the use of torture. The defendants in PTA cases even have to prove that the confessions were made under coercion. In 1999 there were no cases under the PTA or the ER that came to trial, although there were more than 1,000 cases pending.

Human Rights Background

Sri Lanka is a state party to all the six UN human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Sri Lanka's reports to the treaty monitoring bodies, however, are all overdue.

Massive human rights violations occur routinely in Sri Lanka, such as killings, disappearances and rape. The conflict between the LTTE and the government continues to claim both combatant and civilian lives and has, over the years, claimed thousands of victims. In addition, the conflict results in internally-displaced peoples (IDPs) and refugees which are specifically vulnerable groups. The humanitarian situation of the IDPs worsened in 1999 because of the obstruction by the LTTE of the work of humanitarian organisations.

Both sides in the conflict commit serious human rights abuses such as arbitrary detention, torture, arbitrary execution and enforced or involuntary disappearances. The conflict is complicated by the role of paramilitary actors that fight on the side of the government and against each other. Fatal attacks on politicians, lawyers and human rights defenders, such as Neelan Tiruchelvam (*see Cases below*), occur frequently and are also committed by both sides to the conflict.

No freedom of the press is guaranteed in Sri Lanka. The government uses national security grounds to justify its restriction on the freedom of speech and expression. Journalists have been arrested and even killed for covering the events in the north and east of the country.

In general the security forces can commit their human rights abuses with impunity. In 1999, however, there were some positive developments as the government held the security forces in some cases accountable for their abuses, or at least started to investigate complaints:

- A new Presidential Commission on Disappearances was established in 1998 to investigate the thousands of disappearances since the start of the conflict until 1994. In January 1999, an interim report was released. As many cases are still pending, its mandate was extended.
- A former soldier claimed to know the location of mass graves in Chemanni, near Jaffna and in June 1999 the exhumation began. The exhumation is being handled by a team of Sri Lankan and foreign forensic experts and so far several bodies have been exhumed.
- In several cases government officials were convicted for human rights abuses.
- Although criticised for lack of authority, a national Human Rights Commission operated throughout the year, with 11 offices in the country.

Disappearances

It is widely believed that since the beginning of the conflict tens of thousands of people have disappeared in Sri Lanka due to actions of the security forces.

The UN Working Group on Enforced or Involuntary Disappearances expressed concern in its report to the 1999 UN Commission on Human Rights that the Sri Lankan Government has not made any amendments to the Prevention of Terrorist Act (PTA). The PTA allows for up to 18 months of detention on administrative order, under three-monthly renewable detention orders. It also said that the procedures laid down in the Emergency Regulations for post-mortems and inquests into deaths resulting from actions of security force personnel continue to facilitate extrajudicial executions by the security forces.

There are also allegations that detainees are held in secret places of detention and that safeguards relating to the maintenance of registers of detainees, including a central register of detention, provided for within the framework of the Human Rights Commission of Sri Lanka and presidential directives to the security forces, are not being fully implemented. Furthermore, families of disappeared persons face intimidation if they inquire about their relatives.

The Working Group on Enforced or Involuntary Disappearances conducted a mission to Sri Lanka from 25-29 October 1999. The mission's report was, however, not yet available to the public at the time of writing of this publication.

Torture

As stated above, torture is committed by all parties to the conflict: the security forces, pro-government Tamil groups and the LTTE. The Convention against Torture Act makes torture an offence only under specific circumstances. So far, however, security personnel have not been prosecuted under criminal law for acts of torture but have only been fined under civil law. Nobody has yet been convicted under the act and torture by security forces can be committed with almost complete impunity.

In his report to the 1999 UN Commission on Human Rights, the Special Rapporteur on Torture stated that he had received information indicating that torture and other forms of ill-treatment are employed on a widespread basis by members of the security forces, particularly against Tamils held in detention. Despite judicial pronouncements against these practices, various methods of torture were said to continue to be used in police stations and other detention centres where individuals are forced to confess that they are LTTE members or sympathisers. Worse forms of torture and ill-treatment are believed to be inflicted on persons arrested under the Prevention of Terrorism Act and detained in police stations or army camps.

Harassment of Human Rights Defenders: the Trial of Dr. Jayawardena

Dr. Jayalath Jayawardena, a qualified medical officer, was charged in 1998 with drawing a salary from the state for three years without performing duty. This refers to the time that Dr. Jayawardena served as a medical officer to two former presidents. He resigned in 1994 to enter parliament for the opposition United National Party (UNP). Dr. Jayawardena was also charged with cheating in respect of public property. It is widely believed that these charges were brought against Dr. Jayawardena because of his humanitarian work in the north and east of Sri Lanka.

Dr. Jayawardena is known to be a courageous human rights defender. It seems that he is being pursued because he provides basic medical assistance to people irrespective of their ethnicity. The International Commission of Jurists (ICJ) and other international organisations sent observers to the trial of Dr. Jayawardena. The trial was, however,

postponed several times on the request of the prosecution. The International Bar Association raised the issue with the Attorney General of Sri Lanka, expressing the fear that the delays were made to prevent the proceedings from being observed by independent observers. At the time of writing the trial still had to be concluded.

A Red Cross driver, Mr. Duraisamy Padmanathan, who took Dr. Jayawardena to the northern Wanni district in June 1998, was arrested, held for 10 days and threatened with assault and torture in order to make him confess that Dr. Jayawardena had had meetings with the LTTE. The Supreme Court has ordered the release of the driver, stating that the arrest was illegal, and ordered a payment of compensation to him. Dr. Jayalath Jayawardena received death threats after he was publicly accused of facilitating contacts between the UNP and the LTTE.

The Judiciary

Article 105 of the Constitution establishes a Supreme Court, a Court of Appeal and a High Court. Lower courts are established by acts of parliament. The Judicature Act No. 2 of 1978, as amended by the Judicature (Amendment) Act No. 16 of 1989, established District Courts, Magistrates Courts and Small Claims Courts.

Supreme Court and Court of Appeal

According to the Constitution the Supreme Court consists of the Chief Justice and not less than six or more than ten other judges. It is the final court of civil and criminal appeal. In a matter which involves a substantial question of law an appeal can be made from the Court of Appeal to the Supreme Court, in which case either court can grant leave for appeal. If the question to be decided is of public or general importance leave has to be granted.

The Supreme Court also has original jurisdiction in several important matters. The most significant of these is the court's exclusive jurisdiction to hear actions relating to the infringement by executive or administrative action of any fundamental right declared by Chapter III of the Constitution. Cases involving its fundamental rights jurisdiction take up about 75% of the time of the Supreme Court. The Supreme Court has also used its fundamental rights jurisdiction to gain some control over the exercise of the government's powers under the Emergency Regulations and the Prevention of Terrorism Act (PTA).

The Supreme Court also has jurisdiction to determine whether any bill is inconsistent with the Constitution and, in the case of a bill to amend the Constitution, whether it requires approval by a referendum under Article 83 of the Constitution. This jurisdiction can only be invoked by a petition filed within one week of the bill being placed on the Order Paper of parliament. Apart from this procedure, the Supreme Court has no power to declare a bill or act of parliament to be unconstitutional. The Supreme Court has exclusive jurisdiction to determine questions relating to the interpretation of the Constitution, and if any such question arises in a lower court it must be referred to the Supreme Court for determination.

The Supreme Court has consultative jurisdiction on questions referred to it by the President, and original jurisdiction in relation to certain election petitions, breaches of parliamentary privilege and any other matters determined by parliament.

The Court of Appeal consists of a president and not less than six or more than eleven other judges. It has jurisdiction to hear appeals on matters of fact or law from courts of first instance or tribunals, and to hear applications for judicial review and most election petitions. It has original jurisdiction to issue writs of *Habeas Corpus*, though the court may (and usually does) refer applications for *Habeas Corpus* to a court of first instance to inquire and report to the Court of Appeal on the facts of the case.

Both the Supreme Court and the Court of Appeal are based in Colombo and sit in divisions, normally of three judges in the Supreme Court and two in the Court of Appeal, though in cases of exceptional constitutional importance there may be a larger panel. For example, the case concerning the Thirteenth Amendment to the Constitution Bill was heard by nine judges.

High Courts

The High Courts are the courts of first instance for serious criminal cases. They also have jurisdiction as civil courts of first instance in commercial matters. They hear appeals from Magistrate's Courts and Small Claims Courts and they have jurisdiction to make orders of *Habeas Corpus* in respect of persons illegally detained within the relevant province and to exercise judicial review in certain circumstances.

There is a separate High Court in each province. The functioning of the High Courts is difficult in the northern and eastern provinces. Most trials of defendants from the northern and eastern provinces charged with serious offences take place in Colombo, which is very inconvenient for them and their families, particularly in the case of defendants from the

Jaffna peninsula as overland travel to the south is still impossible. There are now seven High Courts sitting in Colombo.

District Courts, Magistrate Courts and Small Claims Courts

District Courts are the main first instance courts for civil actions, and also act as family courts. Magistrates' Courts deal with all criminal offences except those tried in the High Court. Small Claims Courts have a very limited civil jurisdiction, mainly concerned with small debt cases.

Appointment

Appointments to the offices of Chief Justice, President of the Court of Appeal and judge of the Supreme Court, the Court of Appeal or the High Court are made by the President. Judges of the Supreme Court have constitutional tenure until the age of 65, and judges of the Court of Appeal until the age of 63.

District Court judges and magistrates are appointed and may be transferred, dismissed or disciplined by the Judicial Service Commission. This commission consists of the Chief Justice and two judges of the Supreme Court, appointed by the President for renewable five-year terms. The secretary of the Commission is appointed by the President.

The majority of senior judicial appointments are made by promotion, normally on the basis of seniority, from judges of the court of the next lower level. However, a certain number of appointments are made directly from lawyers of appropriate seniority, who are members of the Attorney General's department and other government lawyers. When there is a vacancy in the office of the Chief Justice or of the President of the Court of Appeal, the next senior judge of the court is normally appointed to the office, but by convention the Attorney General may be appointed to fill a vacancy in the office of Chief Justice.

Appointments are occasionally made from lawyers in private practice, and in one case (former Chief Justice Neville Samarakoon) the Chief Justice was appointed directly from private practice. However, successful lawyers in private practice earn far more than judges and are reluctant to accept such an appointment. By convention the President consults the Chief Justice before making such appointments.

As mentioned above, judges of the lower courts are appointed by the Judicial Service Commission. Appointments are usually made from relatively junior lawyers.

Removal

Judges of the Supreme Court and Court of Appeal can only be removed from office by an order of the President, made after an address of parliament, and with the support of a majority of the total number of MPs for such removal on the grounds of proved misbehaviour or incapacity. The procedure for investigation and proof of the alleged misbehaviour or incapacity is governed by Parliamentary Standing Orders. Only one attempt has been made so far to remove a judge under this procedure.

Judges of the High Court are removable by the President, on the recommendation of the Judicial Service Commission. Dismissal and disciplinary control of the judges of lower courts is a matter for the Judicial Service Commission.

Language Problems

Sinhala is officially used as the language of the courts except in the parts of Sri Lanka where Tamil is the language of administration, in which case it is also the language of the courts. Parties and their lawyers who do not understand the language of the court are entitled to use the other language in court and to the services of an interpreter provided by the state. The Minister of Justice may authorise the use of English in any court. In practice, the proceedings of the Supreme Court and the Court of Appeal are conducted in English.

Tamil litigants and lawyers face enormous problems in this respect, particularly in Colombo. The right to the services of an interpreter is not observed because interpreters are not available. In addition, few judges can function in Tamil, publication of legislation and emergency regulations in Tamil is not up to date and law reports and text books are not available in Tamil.

Case Challenging the Appointment of Mr. Sarath Silva as Chief Justice of Sri Lanka

Mr. Sarath Silva, the former Attorney General, was appointed by the President as Chief Justice of Sri Lanka on 15 September 1999, after the term of the former Chief Justice, Mr. G.P.S. de Silva, ended. His appointment was challenged before the Supreme Court in three separate cases on the grounds that it was unconstitutional. At the time Mr Sarath Silva was appointed Chief Justice two cases against him were pending before the Supreme Court which seek to dismiss him as a lawyer for gross misconduct.

One petition against Mr. Sarath Silva is being inquired into by Justice Asmeer Ismail and the other is being inquired into by Justice Shirani

Bandaranayake. The first petition was filed against Mr. Sarath Silva by Mr. Jayasekera, whose wife had an extra-marital affair with Mr. Sarath Silva. He is accused of threatening the lawyer of Mr. Jayasekera and obstructing the divorce case while holding the position of the President of the Court of Appeal, and abusing power for his personal benefit.

The second petition was lodged against Mr. Sarath Silva by Mr. Victor Ivan, editor of Ravaya, a Sinhala weekly newspaper. He accused Mr. Sarath Silva of covering up a rape and the embezzlement of funds by Mr. Lenin Ratnayake, a magistrate and alleged relative of Mr. Sarath Silva, by suppressing documents and providing false information.

The bench of the Supreme Court decided to request the Chief Justice to refer the cases to an appropriate larger bench due to the importance of the matter. The Chief Justice directed the matter and on 7 and 8 February the cases were heard on the preliminary objection of challenging the constitution of the full bench. Two of the counsels have raised objection to the participation of three of the judges on the ground of bias. The cases were adjourned until 26 and 27 June 2000.

LTTE Courts

In the areas held by the LTTE a court system has been developed by the LTTE which does not function at all as an independent judiciary. The system does not follow a specific code or rules of procedures. Young law graduates from within the LTTE serve as judges. During the year there were several reports of executions upon decisions of these courts, after which the bodies were disposed publicly.

Cases

The LTTE has threatened to kill the judicial and other public officials serving the courts in Jaffna and other areas.

Kumar Ponnambalam {lawyer and leader of the All Ceylon Tamil Congress}: Mr. Ponnambalam was killed on 5 January 2000, allegedly out of revenge for a suicide bomb explosion that had killed 11 people and wounded 29 some days earlier. Mr. Ponnambalam was a lawyer and leader of the All Ceylon Tamil Congress. On 17 December 1998 the CIJL sent a letter to the Attorney General to inquire about the situation of Mr. Ponnambalam following a television interview he gave on 17 November 1998 and upon which there were reports that he would face charges upon return to Sri Lanka.

Neelan Thiruchelvam {lawyer, human rights activist and Member of Parliament}: Dr. Neelan Thiruchelvam, a prominent constitutional lawyer and a moderate opposition member of parliament, was killed on 29 July in a suicide attack. Dr. Thiruchelvam was also the founder and head of the International Centre for Ethnic Studies and the Law and Society Trust.

Dr. Thiruchelvam was a strong believer in constitutional reforms and actively supported the devolution process as one of the means for ending the ethnic and political conflict. He is believed to have been killed by a LTTE suicide bomber in Colombo.

Percy Wijesiriwardena {judicial officer}: On 23 October 1998, Mr. Wijesiriwardena was sent on compulsory leave. On 8 March 1999, the Judicial Service Commission (JSC) proposed to Mr. Wijesiriwardena that he take retirement as an alternative to instant dismissal. Later that month, Mr. Wijesiriwardena received a letter form the JSC that he was to take compulsory retirement.

The action of the Commission was prompted by a police report, the contents of which was not made available to Mr. Wijesiriwardena. In addition, no criminal proceedings commenced against him.

SUDAN

The Sudanese judiciary remains under the control of the government and lawyers face routine interference in the performance of their professional duties. The new Constitution states that the judiciary shall be independent but it largely acts in accordance with the government's wishes. During the year, lawyers were frequently subjected to harassment and prevented from engaging in the advocacy of human rights and the Rule of Law. Sudan's civil war continued to result in massive violations of human rights and the central government also violated human rights in areas outside the conflict. Although the government permitted the registration of political parties this year, it still suppressed active political dissent.

Sudan gained independence from the British in 1956 and has since suffered under several military regimes and large scale violations of human rights. An on going internal conflict, based on ethnic and religious differences, continues to debilitate the country.

In 1989 the military, headed by General Omar Hassan El-Bashir, with the unofficial support of the National Islamic Front (NIF), lead by Hassan al-Tourabi, took control of the Sudanese government in a military *coup d'état*. Presidential and parliamentary elections were held in 1996. In these elections, widely described as unfair, Hassan al-Tourabi was elected Speaker of the National Assembly and General El-Bashir was elected as President for a five year term.

A new constitution was promulgated in 1998 and accepted in a referendum by the general population in June 1998. Some doubts were expressed over the confirmation process. The Constitution places Islam in a central position within the state. The Constitution creates a federal system of government consisting of a President, Council of Ministers and a unicameral parliament at the federal level. At the state level there is a similar structure consisting of a Governor, State Assembly and a Council of Ministers.

Section 47(2) of the Constitution vests federal executive power in the Council of Ministers, presided over by the President. Members of the Council are appointed by the President, and each minister is jointly responsible to the President, Council of Ministers and the National Assembly. The President is elected by the general population and serves for a term of five years. An elected president can serve for a maximum of two terms.

Section 67(1) vests legislative authority in an elected National Assembly. Membership of the National Assembly consists of 75% elected by general direct suffrage, and 25% chosen indirectly to represent states or a national electoral college. Where it is not possible to conduct an election in a particular constituency, due to compelling security considerations, the President can appoint a person to occupy that position pending the conducting of elections. Due to the continuing crisis in many parts of the country, this gives the President quite a substantial power to influence the membership of the assembly. The National Assembly sits for a term of four years.

In December 1999, General El-Bashir declared a three month state of emergency, and dissolved the National Assembly and Council of Ministers. This was widely seen to result from a power struggle between General El-Bashir and leader of the National Congress (formerly the NIF), Hassan al-Tourabi.

Human Rights Background

The 1998 Constitution protects some fundamental human rights, including the right to life, freedom from slavery, torture and freedom of religion. Article 30 provides that a person cannot be arrested, detained or confined except by law, with the requirement that the charge and the duration of the detention be stated and that proper respect for dignity of treatment be maintained. Sudan is also a party to the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention for the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of the Child. Sudan has signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. International law requiries that it not act in a manner that would defeat the object and purpose of the treaty before its entry into force.

Despite the constitutional safeguards, human rights continue to be systematically and massively violated in Sudan. Most violations result from the continuing armed conflict and the central government's oppression of any political or religious dissent. In 1999, it was reported by the UN Special Rapporteur for Sudan (E/CN.4/1999/38/Add.1) that approximately 1.9 million people have been killed as a result of sixteen years of armed conflict.

Sudan has the largest population of internally displaced people (IDP's) in the world, and one of the largest populations of refugees. Figures state that the amount of IDP's is approximately four million. The majority of the

people are displaced due to conflict, natural disasters, or to avoid looting, recruitment or abduction by the armed forces. Severe famine devastated Bahr Al-Ghazal state in 1998-1999 increasing the number of those displaced. Many IDP's attempt to establish temporary settlements in Khartoum, but these are demolished by the government who then force the people to relocate into camps outside the city. Conditions in camps remain inadequate with continuous disease outbreaks and insufficient supplies of food.

Slavery continues to be a serious problem. Armed militias in the southern, western and eastern areas of the country abduct women and children to engage in forced labour or to fight in their armies. Much of the slavery is perpetrated on an ethnic and religious basis by the *murabeleen*, a militia backed by the government. The Sudanese Government routinely denies allegations of slavery, claiming that the practices are merely abductions carried out by opposing sides.

Government security and armed forces commit extra-judicial killings and arbitrarily detain and torture political opponents. Islamic punishments, such as amputation, flogging or crucifixion are used. The freedoms of assembly and expression are routinely restricted. (*see section on Lawyers*). Political parties are now permitted under the Political Organisation and Political Parties Act 2000, but the government frequently attacks members of the opposition. The government also harasses religious opposition, Christian and Islamic.

The National Security Law allows detention without warrant or charge for three month periods. The detention is renewable if it is affirmed by a judge, however this requirement is ignored. The 1998 Constitution guarantees the right to a prompt and fair trial and the right to select a person to represent you in defence. In practice this right is routinely violated. Those accused of crimes are denied legal access and subjected to torture in order to obtain confessions. The courts refuse to sanction members of police and security forces for the denial of these rights, creating a culture of impunity.

Internal Armed Conflict

A continuing internal conflict has undermined the stability of Sudan since independence. Fighting takes place in various locations between the government and militia groups, and between militia groups themselves, and is mainly concentrated in the south of the country. The main opposition militia in the south is the Sudan Peoples Liberation Army (SPLA) led by Dr John Garang, and in the west the National Democratic Alliance (NDA), an alliance of militia groups including the SPLA. The majority of

militia groups are fighting for a secular Sudanese state, with regional autonomy in the south. Several developments occurred in the peace process during the year.

In February 1999, a peace agreement was signed between the Neur and the Dinka, the two largest southern tribes and the main source of inter-militia fighting. In November 1999, the government signed a peace agreement with the Umma Party. The agreement envisaged a four year transitional period to end the civil war, which would then be followed by a referendum in south Sudan on the issue of self determination.

A peace agreement was signed between the government and six opposition factions in 1997 leading to the establishment of a Southern States Co-Ordination Council (SSCC) led by Mr Riak Machir, a former rebel leader, and the promise of a referendum on the issue of self determination in four years. Riak Machir resigned from the SSCC in January 2000, in response to the imposition of a state of emergency by President Bashir. It was reported after his resignation that his forces had launched several attacks in southern Sudan and that he had met with SPLA.

A cease-fire between the SPLA and the government began in July 1998, in the south-west of the country due to a famine in that region. That cease-fire was extended during 1999, at various times covering all major conflict areas in southern Sudan. Despite this, localised fighting still occurs in these areas. Negotiations continued between the Sudan Peoples Liberation Movement (SPLM), the political arm of the SPLA, and the government under the auspices of the Inter-Governmental Authority on Development, to establish a more permanent settlement. In July 1999, an IGAD secretariat was established in Kenya to carry out negotiation efforts on a permanent basis.

An agreement was concluded in December 1999 between the Sudanese Government and the SPLM at the third meeting of the Technical Committee on Humanitarian Assistance convened by the UN. The parties agreed to provide free access for all humanitarian agencies to war effected populations, and to guarantee the protection of the human rights of the beneficiaries of the humanitarian assistance. This latter obligation was undertaken by both the government and the SPLM.

THE JUDICIARY

The Sudanese legal system was originally based upon English common law, but since 1983 has been influenced greatly by Islamic law *(Sharia)*. In 1983 a series of laws known as the "September laws" were introduced implementing Islamic punishments *(Hudud)*, such as amputation, flogging

and crucifixion. The 1983 Law of Judicial Sources also requires judges to interpret the law in conformity with Islamic law. In 1991 the National Salvation Revolutionary Command Council (NSRCC) adopted a new penal code, which applied Islamic law in the northern states. Section 65 of the Constitution of the Republic of Sudan 1998 states that Islamic law, the consensus of the nation as determined by referendum, the Constitution and custom shall be the sources of legislation. Legislation contrary to these fundamentals is not permitted. The southern states were exempted from the application of Islamic law, and usually apply tribal law and customary law. However, the armed conflict in southern Sudan inhibits the operation of an effective justice system.

The judiciary is regulated by Part V of the Constitution of 1998 and the Judiciary Act of 1986. The Constitution vests judicial competence in a judiciary, which is responsible for the performance of its work to the President. The judiciary is subject to substantial executive influence. The Constitution guarantees the independence of judges in the performance of their duties and states that they shall not be influenced in their judgements.

Court Structure

Section 103 of the Constitution creates a court structure consisting of a Supreme Court, Appeal Courts and Courts of First Instance. The Constitution also creates a Constitutional Court. High Courts hear civil and criminal cases and appeals from lower courts. Tribal and Family Courts have also been established. The Code of Criminal Procedure permits the Chief Justice to establish special courts, to determine their jurisdiction and to conduct trials in absentia. Under this power the Chief Justice has created Public Order Courts which hear cases summarily, and can have their sentences immediately executed, even though there is a right of appeal to higher courts.

Special military and security courts have also been established to hear cases involving civilians and military personnel. Presidential Decree No. 2 of 1989, which established Revolutionary Security Courts, is now invalid in accordance with Article 137(1) of the Constitution. The Constitutional Court ruled in July 1999 that military courts have jurisdiction to try cases involving civilians. The decision when to institute cases is left to the discretion of the Minister of Justice.

The SPLA has its own legal code known as the Sudan Peoples Revolutionary Laws, SPLM/SPLA Punitive Provisions 1983. This code creates three levels of courts, Peoples General Courts-Martial, Peoples District Courts-Martial and Peoples Summary Courts-Martial. These courts mostly conduct trials involving military personnel.

Chapter V of the Constitution creates the Public Grievances and Corrections Board *(The Hisba and Mazalim)*. This board, without prejudice to the jurisdiction of the judiciary, has the authority to resolve grievances and to assure efficiency and purity in the practice of the state. The Board can also extend justice after the final decision of a court. All members of the board are appointed by the President, with the approval of the National Assembly, from persons of efficiency and propriety. This board has a wide jurisdiction, is separate from the regular court structure and there is no requirement that those appointed to the board have judicial training. There are no guarantees for its independence and it has the extraordinary power of being able to review the final decisions of other courts.

Constitutional Court

The Constitutional Court is regulated by Chapter II, Part IV of the Constitution and the Constitutional Court Act 1998. The court has jurisdiction to determine any matter relating to the following:

- the interpretation of constitutional and legal provisions submitted to it by the President, National Assembly, or half of the Governors or half of the State Assemblies;
- claims from any aggrieved person to protect the freedoms, rights and sanctities contained in the Constitution;
- jurisdictional conflict between the state and federal organs;
- criminal procedures against the President or the state Governors;
- any claims of infringements of the constitutional federal system, or constitutional freedoms, rights and sanctities, by actions of the President, the Council of Ministers, or any Federal or National Minister;
- review of the constitutionality of judicial procedure, orders and judgements.

The Constitutional Court Act 1998 requires the aggrieved person to exhaust all domestic remedies before applying to the court. Criminal proceedings cannot be instituted against the President or a governor without the permission of the National or State Assembly. If permission is granted, a judge is selected by the court to conduct an investigation into the allegations, who will then submit the results of the inquiry to the court. The investigating judge is still entitled to participate in the trial.

The court consists of the President, Deputy President and five other judges who are appointed by the President, with the approval of the National Assembly. Section 3(3) of the Constitutional Court Act provides that judges of the court hold office for renewable five-year terms.

Constitutional Court judges can be removed from office by the President on the grounds of loss of capacity, health infirmity or for a conviction by a competent court in a manner inconsistent with honour and honesty.

JUDGES

The independence of judges has been seriously undermined since the 1989 *coup d'état* and continues to be under the new Constitution. After the *coup d'état* the NSRCC systematically removed its opponents and other non-Moslem members from the judiciary. Many young fundamentalist lawyers were appointed as judges by the new government.

Judges are appointed by the President upon recommendation of the Supreme Council of the Judiciary (SCJ). The SCJ consists of the Chief Justice, as an *ex officio* member, the Deputy Chief Justice, the Attorney General, the President of the Bar Association and the Dean of the Faculty of Law of Khartoum University. In effect, the government's ability to appoint judges is unfettered as government attacks on the judiciary have resulted in a SCJ that acquiesces to the government demands.

The SCJ is also responsible for the planning and general supervision of the judiciary, the preparation of the general budget, providing opinions on bills regarding the judiciary, and providing recommendations to the President for the appointment, promotion and removal of judges. Section 104(4) of the Constitution states that judges cannot be removed except through disciplinary measures upon a recommendation of the SCJ.

LAWYERS

Since independence, lawyers have acted as an independent body against illegality and violations of fundamental human rights. After the 1989 *coup d'état*, they have been increasingly subjected to attacks and repression by the government. They are arbitrarily arrested and detained, tortured, denied the freedom of expression and association, and subjected to interference in the performance of their professional duties by members of the security and police forces.

In 1993 the military government amended the Advocates Act to reduce the status of the Bar Association from an independent self-governing body to a trade union subject to the control of the Minister of Labour and the Registrar of Trade Unions. In 1997 the Bar Association was instructed at short notice to hold elections for a new Bar Council. The election process

suffered from many irregularities and illegalities and was cancelled. The Bar Association remains controlled by a government appointed board.

During 1999, lawyers were frequently prevented from assembling to conduct seminars or meetings to discuss issues relating to the protection of human rights, the Rule of Law and the promotion of democracy. Force was often used to disperse such meetings, and many lawyers were arrested and detained because of these activities. Principle 25 of the UN Basic Principles on the Role of Lawyers guarantees lawyers the right to participate in the discussion of matters concerning the law, the administration of justice and the protection and promotion of human rights, without suffering professional restrictions resulting from their lawful actions.

CASES

Mustafa Abdu {lawyer}: On 31 July 1999, Mr Abdu was abducted from outside his offices by an unknown armed group. No details of the membership of the armed group have been attainable. Members of his family contacted the security forces, but they denied all knowledge of his whereabouts.

Ishraka Adam, Sumayya Ali Isshak, Mo'awad Awad, Ezz El-Din Othman, Satia Mohamed El Hag, Mamoon Faroug, Mohamed Ibrahim, Nazik Mahgoub, Afaaf Othman, Ameer Soliman, Ghazi Suleiman {lawyers}: On 17 November these lawyers were attending a press conference being conducted by the Democratic Forces Front at the offices of lawyer Mr Suleiman. The security forces broke into the offices and dispersed the meeting with tear gas and the use of force. Several lawyers were beaten with clubs and kicked by members of the security forces. The office suffered a large degree of damage.

These eleven lawyers were arrested and detained until the evening when they were released until the completion of investigations. The following day they were charged with holding a meeting without prior consent. The Khartoum Criminal Court ordered their release pending trial.

Ali Ahmed Alsayed {lawyer}: Mr Alsayed is required by the security forces to report daily to security headquarters. During time spent at this location he has been subjected to ill treatment. He has reportedly been left to stand out in the sun for long periods of time, or been required to perform humiliating exercises, such as rabbit jumping.

Nasr El Din, Satia Mohamed El Hag, Mohamed Elzeen El Mahi, Mohamed Abdulla El Nago, Wagdi Salih El Taieb Idris, Mamoon Faroug, {lawyers}: On 9 April 1999, these lawyers were arrested and

charged with attempting to gain entrance to the building containing the Bar Association office's using force. On 10 April the court dropped the charges against these lawyers and they were released.

Satia Mohamed El Hag {lawyer, member of the National Alliance for the Restoration of Democracy}: Mr El Hag, a lawyer in Khartoum, was arrested and detained on 3 October 1999. He was released but ordered to return to security headquarters the following day.

Khaled Abdallah Hamed {lawyer}: Mr Hamed, a lawyer in Khartoum, was reportedly arrested and detained on 30 September 1999. He was detained at least until 4 October 1999 and no further details have been attainable.

Issam Mohammed Farah Shourbagi {lawyer}: Mr Shourbagi, a lawyer from the city of Kareemeh, was reportedly arrested and detained on 26 September 1999. He was still in detention on 4 October 1999 and no further details have been attainable.

Ghazi Suleiman {lawyer, leader of the Coalition for the National Alliance for the Restoration of Democracy, head of the Sudanese Group for Human Rights}: Mr Suleiman was arrested and detained on several occasions throughout the year. On April 9, Mr Suleiman was jailed for 15 days for disturbing the police and trying to hold an illegal assembly. He had attempted to conduct a seminar at the lawyer's union, despite being banned from entering the premises for three months. Members of the government controlled Bar Council summoned the police forces to prevent Mr Suleiman and other lawyers from entering the building. It was reported that clubs were used to disperse the meeting.

On 7 November police entered the legal offices of Mr Suleiman to disperse a conference being conducted by the Democratic Forces Front and other opposition parties with members of the foreign and local press.

On 17 November 1999 Mr Suleiman and 9 other lawyers were arrested and charged with holding a meeting without prior permission. Mr Suleiman was beaten during the police action and required medical treatment afterwards.

TOGO

The judicial system in Togo continued to be subject to gross interference from the executive throughout 1999. Magistrates are recruited, and their career is administered, on the basis of their political allegiance rather than on professional merit. There is a widespread practice of impunity for human rights violations which greatly contributes to public distrust in the judiciary.

Togo is a republic and attained independence from France in 1960. According to its Constitution, the country is led by an elected President as the head of state, a Prime Minister, drawn from the parliamentary majority, as head of the government, and a Council of Ministers, appointed by the President and the Prime Minister together.

General Etienne Gnassingbé Eyadéma has been President of Togo since a military *coup d'etat* in 1967. On 21 June 1998, presidential elections were held and were won for the second time since 1993 by General Eyadéma. The results were contested with allegations of serious irregularities. On 24 June 1998, the Minister of the Interior usurped the National Electoral Commission's legal authority to validate election results and declared Mr. Gnassingbé Eyadéma officially elected. The President's party, the Togolesse People's Rally (*Rassemblement du Peuple Togolais* - RTP), continues to dominate political life in Togo, despite the fact that political opposition was legalised in 1991.

Legislative power is exercised by a unicameral National Assembly (*Assemblée Nationalé*), whose deputies are elected for a five-year term and may be re-elected. On 21 March 1999, legislative elections were held, but were boycotted by the opposition parties and a majority of voters because of procedural irregularities and widespread fraud.

On 29 July 1999, the government and opposition parties signed the Lomé Framework Agreement (*Accord-Cadre de Lomé*), aimed at breaking the political deadlock which had existed since the 1998 presidential elections. According to the terms of this agreement, President Eyadéma would respect the Constitution and not run for another term as President in 2003 pursuant to Article 59 of the 1992 Constitution. The agreement also outlines a compensation plan for victims of political violence, but it does not provide for concrete measures to put an end to impunity for human rights violations. Moreover, the Amnesty Law of December 1994 is not challenged. This law offers impunity to those responsible for human

rights violations and denies the victims and their families truth and justice (Article 2).

Human Rights Background

Togo has ratified a number of international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the African Charter on Human and Peoples' Rights.

Nevertheless, the human rights situation in the country is characterised by systematic violations. Impunity is widespread in Togo, particularly regarding officials close to President Eyadéma. Members of the armed forces (FAT), controlled by the President, continue to commit serious human rights violations including extrajudicial killings, beatings, arbitrary arrests and detention, as well as restricting the freedoms of speech and the press, assembly, association and movement, and carrying out repeated harassment and intimidation. Perpetrators of gross violations of human rights are rarely brought to justice in Togo.

Prison conditions are extremely severe, with serious overcrowding, poor sanitation and a lack of proper medical care. Prolonged pre-trial detention is common: an estimated 50% of the prison population are pre-trial detainees. Arbitrary detention of journalists and human rights defenders is common.

The Judiciary

Although Article 113 of the Constitution establishes the judiciary as an independent authority, the executive power interferes with matters that are within the competence of the judicial system.

Structure of Courts

Togo's Constitution states that the judicial system is composed of a Supreme Court, two Courts of Appeal and Tribunals of First Instance. At the local level, the village chief or council of elders may try minor criminal and civil cases.

Located at Lomé, the Supreme Court is the highest jurisdiction in the

country, with two chambers, one for judicial (*chambre judiciaire*) matters and one dealing with administrative (*chambre administrative*) issues. Organic Law 97-05 of 6 March 1997 states that the Supreme Court is chaired by a judge, appointed upon the proposal of the High Council of the Magistracy (*Conseil Supérieur de la Magistrature*). According to Article 9 of this law, judges cannot be pursued, arrested, detained or tried for opinions expressed in their judgement.

There exists only one Court of Appeal in Togo as the second one is not functioning. There is also a High Court of Justice which is the only competent jurisdiction to deal with cases against the head of state and crimes of high treason. The President, the Presidents of the chambers of the Supreme Court and four deputies, elected by the National Assembly, constitute the court. The deputies are also competent to try crimes committed by members of the Supreme Court.

The Constitutional Court is composed of seven members, several of whom belong to the ruling political party. Its main function is to rule on the constitutionality of laws. However, in Decision E-004/98, handed down on 2 July 1998, the court infringed the principle of the separation of powers by delivering a verdict legitimising illegal action by the Ministry of the Interior regarding electoral matters, rather than finding a breach by the Ministry of Article 71 of the Electoral Code. According to the court, the inaction of the Ministry may have blocked the evolution of the electoral process, so the court decided to validate the results of the elections which were generally accepted as being unfair and irregular.

There also exists a Military Tribunal for crimes committed by security forces. Trials before this are not public.

Court Administration

According to Organic Law 97-04 of 6 March 1997, the High Council of the Magistracy is composed of nine members: three judges from the Supreme Court, four from the Courts of Appeal, a deputy from the National Assembly and a person chosen by the President based on his/her experience. The Council is headed by the President of the Supreme Court. All the members are appointed for 4 years, renewable only once.

A majority of the members of the High Council of the Magistracy are supporters of President Eyadéma. Judges who belong to the pro-Eyadéma Professional Association of Togo Magistrates (APMT) reportedly receive the most prestigious assignments, while judges who advocate an independent judiciary and belong to the National Association of Magistrates (ANM) are marginalised.

The Minister of Justice, following the advice of the CSM, chooses judges in accordance with Organic Law 96-11 of 21 August 1996. According to Article 3 of this law, judges' terms are fixed. However, there have been some cases where judges have been illegally "appointed" and because they protested against this they were sanctioned by the Minister of Justice who withheld their salary for several months.

Resources

The judiciary is understaffed and does not ensure defendants' rights to a fair and expeditious trial. There are approximately 100 judges in Togo. This is insufficient for an efficient running of the judiciary. There are hundreds of cases pending before each judge. Some detainees wait years to be tried. Other factors aggravate this situation, such as the problem of poor training and low remuneration. Judges are not paid on time. Consequently, delays in the judicial process are frequent and corruption, which is very common, encourages impunity.

The independence and impartiality of the judiciary is not guaranteed at all. The rare number of judges who have complained about political interference in the judicial system did not dare to do so in public.

Appointment and promotion

Judges are recruited and appointed according to their political preference or their ethnic origin more than for their professional capacity. On 21 August 1996, a law that gives the judiciary more independence and increased resources was passed. However, this law is not yet in force. Judges' careers, including promotion, are under the control of the High Council of the Magistracy.

Due to a climate of terror and of a growing lack of confidence in the judiciary, official complaints are not even submitted regarding human rights violations. All these characteristics illustrate the serious lack of credibility and inefficiency of the Togolese justice system.

TUNISIA

Throughout 1999 the lack of independence of the judiciary in Tunisia was very apparent. This was particularly true in political trials, despite the fact that there were international observers present at many of them. The lack of regard for the rights of the defendant and for the due process of law was evident. Lawyers, and particularly human rights lawyers, were frequently subjected to persecution and attacks.

Tunisia has a strong presidential system with the President of the Republic being the chief executive of the country. He or she has substantial powers over the Cabinet and the armed forces.

The President nominates the Prime Minister and, on his or her suggestion, the other members of the government are chosen (Article 50 of the Constitution of Tunisia). The President's role is also to determine national policy. S/he may delegate all or part of his or her general regulatory power to the Prime Minister.

Tunisia's Constitution was revised in 1988 to allow the President to serve for three five-year terms. S/he is elected by universal and direct suffrage. The Presidential elections were held in October 1999. President Zine el-Abidine Ben Ali, who has been ruling the country since 7 November 1987, ran unchallenged for a third term in office, and won the elections.

The National Assembly (legislature) elections took place the same day and were won by the ruling Constitutional Democratic Rally of President Ben Ali. According to the 1991 Constitution, the unicameral legislature is elected by universal suffrage for a five-year term. The deputies vote on legislation and the budget. However, the President of the Republic has an equal prerogative regarding the presentation of legislation, and bills presented by the President of the Republic have priority (Article 28-1).

HUMAN RIGHTS BACKGROUND

During 1999, the government of Tunisia continued its policy of persecution of political opponents and their families, as well as the practice of press manipulation. Torture and ill treatment remained widespread and systematic and the judicial system continued to fail to properly investigate

allegations of these crimes. Human rights defenders, including lawyers, continued to be subjected to harassment and intimidation.

Torture and Ill-treatment

Hundreds of political prisoners, including prisoners of conscience, continued to be held in Tunisian jails throughout 1999. In May and December 1999, many prisoners carried out hunger strikes in protest against the poor prison conditions. On 6 November 1999, several hundred prisoners were conditionally released, including presumed members of the Islamist party, Annahdah, and the Tunisian Communist Workers Party known as PCOT.

Although it is prohibited by the Penal Code, torture is practised by the police and security forces. Under international pressure, the government amended the Penal Code in August 1998 and adopted a definition of torture that conforms with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It also increased the maximum penalty for those convicted of committing acts of torture from 5 to 8 years. In practice, however, torture remains common and the perpetrators continue to go unpunished as the judicial power simply ignores allegations of such practices.

The case of Imane Darwiche is illustrative of the attitude of the authorities and the judiciary towards allegations of torture. In July 1999, Ms. Darwiche was convicted with others for belonging to the illegal organisation PCOT. During her appeal of 6 August Ms. Darwiche tried to testify that while in detention prison guards had attempted to rape her. However, the presiding judge refused to record references to torture and rape, saying that such statements were irrelevant to the case. When she insisted, the judge ordered her removal from the courtroom.

Facilitating the use of torture and ill treatment by the police and security forces is a lack of adequate independent supervision of detention facilities and prisons. Although there is a national human rights official who inspects the prisons, his reports are generally not made public. The government does not allow prison visits or monitoring by independent organisations or media bodies. Although the government had promised the country's main human rights organisation, the *Ligue Tunisienne pour la Défense des Droits de l'Homme* (LTDH), that it would be allowed to visit some prisons in December 1999, by the end of the year the organisation had still not been admitted to see a single one.

Also in response to international pressure, on 2 August 1999 the government of Tunisia shortened the maximum period of pre-arraignment incommunicado detention from 10 to 6 days. However, after consideration of the second periodic report in November 1998 regarding

the implementation of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Committee against Torture had recommended the reduction of police custody in Tunisia to a maximum of 48 hours. The police are also now required to inform a detainee's family of his or her arrest at the time of the arrest.

These legal guarantees are not always respected in practice however. Reportedly, members of the police continue to falsify their records concerning dates of arrests so as to circumvent the regulations regarding arrest and detention. Furthermore, judges often do not entertain lawyers' arguments that the police falsified the dates of detention of the accused. This attitude of Tunisian judges makes them accomplices to these abuses.

Freedom of Opinion and Expression

There are serious problems concerning freedom of expression in Tunisia. The UN Special Rapporteur on the Freedom of Expression and Opinion visited Tunisia from 6 to 10 December 1999. This is the first time that a thematic rapporteur of the UN Commission on Human Rights has been authorised to visit the country. In his report the Special Rapporteur states that despite commitments to reform the Press Code, the most basic rights relating to the effective enjoyment of freedom of opinion and expression are continuously curtailed, under the pretext of maintaining stability and order in society.

The Special Rapporteur observed that the Tunisian press is characterised by a uniformity of tone, unfailingly presenting national news in a positive light and filtering subjects that are considered taboo. Government censorship and even self-censorship is practised. Journalists or publishers are subjected to pressure, as in the case of Mr. Taoufik Ben Brik, a correspondent for the French newspaper, *La Croix,* who has often been harassed, and was even violently beaten in the street by police officers on 20 May 1999. There is also the case of Ms. Sihem Bensédrine, a publisher and human rights activist, who has been harassed and whose office was broken into twice in December 1999 by individuals thought to be members of the political police.

The broadcasting media are under strong state influence. New technologies have been widely adopted in Tunisia, but access is limited and certain internet sites are permanently blocked, especially those of non-governmental organisations and foreign press.

The Special Rapporteur also observed that the repression and control exercised by the government against opponents and persons criticising the regime is disproportionate in a country in which violence has been

decreasing, almost disappearing, in fact, in recent years. There is an absence of political pluralism. Although legal opposition exists in Tunisia, it is said that in practice it enjoys little autonomy of action vis-à-vis the power exercised by the RCD (the party in power). Political parties have difficulties organising freely, since the Minister of the Interior has discretion to grant or withhold his or her approval of political parties. Many supporters of the Islamist Party are still often imprisoned and their relatives subjected to harassment. The Tunisian Worker's Communist Party (PCOT) is currently banned and one of its leaders, Hamma Hammami (who is the husband of lawyer Radhia Nasraoui) has been imprisoned many times for his political activities.

One positive step that came after the visit of the Special Rapporteur is the ending of the house arrest of Mr. Mouadda, former leader of the MDS (Social Democrats' Movement) who had been subjected to constant harassment over recent years and sentenced to several years in prison.

Human Rights Defenders

Human rights defenders continue to be arrested, threatened, intimidated, and their passports withheld. Human rights groups have also been subjected to numerous attacks.

The activities of non-governmental organisations (NGO's) are regulated by the Associations Act of 7 November 1959, which has been amended several times. The law grants excessive powers to the Minister of the Interior to approve or refuse the registration of societies and lays down harsh penalties for any person found guilty of membership of an illegally established association.

On 2 March 1999, the Ministry of the Interior refused to register a new NGO, the National Council for Freedom in Tunisia (CNLT). Its leaders, well-known human rights activists Dr. Moncef Marzouki and Mr. Omar Mistiri, continue to be frequently harassed. In July 1999, legal action was brought against them for having continued to issue press releases on behalf of the "illegal" CNLT, expressing their concern at the increasing limitations on the freedom of expression and opinion in Tunisia. It was also reported that the head of the Tunisian Association of Young Lawyers was interrogated by the police because he received CNLT members in his office.

Dialogue between the government and the LTDH, Tunisia's foremost human rights group, which is an ICJ affiliate, resumed in April 1999. Since August 1997, the government had refused to respond to LTDH petitions, prevented them from holding meetings and censored their press releases. Although the April 1999 meeting resulted in improvements as the

government returned some of the passports they had confiscated from members of the LTDH, promised to allow the LTDH to carry out visits to detention centres and allowed it to hold meetings, LTDH members continue to be subjected to harassment and intimidation. LTDH Vice-President, Khemais Ksila, convicted in February 1998 on charges of defamation, was released on 22 September 1999, but was interrogated again on 3 February 2000 because of an open letter addressed to the Minister of Justice regarding continued assaults on political activists which had not been investigated. Other LTDH members also reported that they were subjected to additional methods of intimidation such as the damaging of their property, the illegal entry and search of their homes, and the denial of passports.

In July 1999, the government arrested Abderraouf Chammarri, the brother of human rights activist Khemais Chammarri, who is currently in exile in France after repeated harassment. He was charged with defamation and the spreading of false information (in the form of a joke that Chammarri denied making) which linked a former minister to corruption. It was widely believed that the arrest was intended to put pressure on his brother, Khemais Chammarri. Abderraouf Chammarri was sentenced to 12 months imprisonment, although he was released on 30 August 1999 after appealing to the President of the Republic on health grounds.

The Arbitrary Deprivation of Passports

Political opponents and human rights defenders are often deprived of their passports. This is to prevent them from establishing contacts with foreign organisations or personalities. Human rights lawyers have been particularly targeted by this practice (*see Attacks on Justice 1998*).

Under strong international pressure, the 1975 law on passports, which granted wide powers to the Ministry of the Interior to withhold passports, was amended in 1998. The amendment gives judges the competence to withdraw a passport from a citizen. The Office of Immigration, *Direction Générale des Frontières et des Etrangers* (DGFE), still, however, sometimes delays issuing passports to Tunisians who are not favoured by the government.

The Judiciary

The Constitution provides for an independent judiciary (Article 65), outlining the fact that magistrates, in the exercise of their functions, are not subject to any authority other than the law. However, the executive branch strongly influences the judiciary.

Court Structure

The Judicial system in Tunisia is composed of ordinary courts, an administrative court and military courts. The ordinary courts include Magistrate Courts, Courts of First Instance and Courts of Appeal. All these courts are subject to the authority of a single body, the Court of Cassation in Tunis. The administrative court system is incomplete, as there is only one Administrative Tribunal of a single level.

There is also a Constitutional Council, which, unlike many civil law countries, does not function as a court. This is a consultative body in charge of examining draft legislation submitted by the President of the Republic. The Council does not review the constitutionality of laws after their enactment, however.

Parallel to the civil system are the Military Tribunals, within the Ministry of Defence, which are competent to try military personnel and civilians accused of national security crimes. The decisions of these courts can be appealed before the Court of Cassation. They are composed of one civilian judge and four military judges.

Appointments, Promotion and Transfer

The Higher Council of the Judiciary, a body headed by the President, and composed of appointed and elected judges, supervises the appointment, promotion, transfer and discipline of judges. However, the President is also the head of the Council. This situation places undue pressure on the work and independence of judges who render decisions in politically sensitive cases. The Council is also strongly dominated by the Ministry of Justice, which acts as its secretariat. Judges fear transfer when they issue judgements conflicting with the interests of the executive.

The Administration of Justice

Throughout 1999 the lack of independence of the judiciary was very apparent. This was particularly true in political trials, despite the fact that there were international observers present at many of them. The lack of regard for the rights of the defendant and for the due process of law was evident in many trials. In such cases, the task of defence lawyers was made increasingly difficult by various restrictions, for example the difficulty in obtaining copies of judicial documents and the practice of granting visiting permits to lawyers but refusing to recognise them on the day they visit the prison to see their clients.

One of the most illustrative cases was the trial of twenty students, in July 1999, who had been held in detention for several months after

attending a peaceful demonstration in protest against working conditions at the university, and in which lawyer Radhia Nasraoui was involved (*see Cases*). They were charged with belonging to a terrorist group, holding unauthorised meetings and slandering the judicial power.

The defendant's claim that they were subjected to severe torture and were constantly refused medical examinations, which are specifically provided for under Article 13 bis of the Code of Criminal Procedure. The judges simply ignored the students' allegations of torture and claims that they had signed their confessions under pressure. Although the demonstration was non-violent, the defendants were given prison sentences ranging from 15 months to 9 years.

LAWYERS

Lawyers, and particularly human rights lawyers, are often the subject of persecution and attacks. Furthermore, they are frequently obstructed from carrying out their professional duties. Among the obstacles they face in carrying out their work is an inability to meet the judge of instruction (*juge d'instruction*). In February 2000, hundreds of lawyers protested against their working conditions in a large demonstration.

CASES

Jameleddine Bida {lawyer}: This human rights lawyer has his passport confiscated. In 1999, he began a hunger strike in an attempt to get his passport back when his official request for a passport was unanswered.

Nejib Hosni {lawyer}: Mr. Hosni was released in 1996 after he had served a two and a half year sentence in prison on questionable charges. In January 2000, he was still being prevented from practising his profession. He is prohibited from leaving Tunisia and his passport is being withheld.

Anouar Kosri {lawyer, human rights defender, and member of the Bizerte section of the LTDH}: For the past three years Mr. Kosri has been the subject of harassment and pressure from the police (*see the past three issues of Attacks on Justice)*. He has been deprived of his passport and is permanently followed. His office is strictly watched, as is his home. His, now rare, clients are also subjected to intimidation and harassment. Since January 2000, a policeman has been guarding his home.

Radhia Nasraoui {lawyer}: Ms. Nasraoui is a highly respected lawyer who represents numerous clients in sensitive human rights cases. In 1998

her offices were burgled. Some weeks later, on 30 March 1998, Ms. Nasraoui was called to the office of the *juge d'instruction*. She was then informed that 11 charges were being pressed against her. These included membership in a criminal and terrorist organisation; organising and attending unauthorised meetings; inciting rebellion; offending the President; distributing false information with the purpose of disturbing public order; defaming the authorities; and distributing leaflets.

The judge then issued a restriction order, prohibiting her from travelling outside the country and limiting her right to move inside Tunisia to only three districts. The charges against Ms. Nasraoui, which are formulated in vague terms, could lead to her imprisonment for up to 25 years.

The CIJL believes that the charges and restriction order were aimed at preventing Ms. Nasraoui from carrying out her duties as a defence lawyer. They were also aimed at intimidating her from taking up human rights concerns in Tunisia. Not only Ms. Nasraoui, but also her family, have been under constant surveillance by the security services.

In early February, Ms. Nasraoui received the sudden news of the death of her mother-in-law, who lived in a different district. Ms. Nasraoui apparently telephoned the office of the *juge d'instruction* informing him of the situation and of her need to travel outside the three authorised districts to attend the funeral.

Ms. Nasraoui was called to appear before *le juge cantonal de Tunis* on 11 February 1999. She was represented by about 100 lawyers. She was, nevertheless, convicted for defying the restriction order and sentenced to two weeks imprisonment and was given a $4800 fine. The prison sentence was suspended.

On the 6 August 1999, the Court of Appeal of Tunis confirmed the sentence passed by the *sixième chambre correctionnelle du Tribunal de Première Instance de Tunis* imposing a six months suspended sentence on advocate Radhia Nasraoui. The International Commission of Jurists (ICJ) and its CIJL sent Mr. Olivier Cramer, Advocate at the Geneva Bar, as an observer to attend two hearings before the *chambre correctionnelle*. Mr. Cramer submitted two reports, which demonstrate that the trial was unfair.

Ms. Nasraoui was accused of "assisting in the holding of meetings that incite hatred". The charge relates to the non-violent political work that Ms. Nasraoui's husband has been accused of. Twenty other individuals were also charged along with Ms. Nasraoui - many of them being university students. Several defendants, including Ms. Nasraoui's husband, Mr. Hamma Hammami, have been forced into hiding. On 6 August 1999, the defendants were sentenced to 15 months imprisonment, with those in hiding being sentenced to nine years.

Although Ms. Nasraoui was not under arrest when charged, several others were. Those detained said that they were subjected to torture during their detention. One female student said that a policeman attempted to rape her. In the final court session of 6 August 1999, she said that she was able to provide his name. The court, however, refused to listen. When she insisted, the court ordered her outside the room. She was taken by the security police. The other defendants and their lawyers protested demanding that she be returned back. The court refused. The defence lawyers withdrew in protest. This behaviour is representative of how the entire trial proceedings have been handled.

The allegations of torture, and the inadequate manner in which all the judicial authorities examined the case, marred the proceedings. The accused did not have the opportunity to effectively express their views. At the level of investigation, which is a crucial stage in Tunisia's inquisitorial criminal law system, the accused were denied the right to bring witnesses to testify in their favour; they were denied proper medical examination despite serious allegations of torture; they were denied access to the official detention registry which ascertains the exact time of their detention; and the sentences they received were both excessive and disproportionate. The defence lawyers were repeatedly interrupted and silenced. In one case, threats were made against the defence. Based on these reports, the ICJ and its CIJL concluded that the trial was manifestly unfair.

Mukhtar Trifi (lawyer, member of *Fédération Internationale des Ligues des Droits de l'Homme* (FIDH), and member of Amnesty International in Tunisia): As defence counsel in several politically sensitive cases, Mr. Trifi has been under surveillance. His law offices are systematically observed and his phone and fax lines are tapped. Throughout 1999, severe pressure was exerted on members of his family and on his employees.

Najet Yakoubi (lawyer and human rights activist): Ms. Yakoubi is an active lawyer and member of the Tunisian Association of Democratic Women and of the Young Lawyers Association. In *Attacks on Justice 1998* we reported how she was harassed by the Tunisian authorities in 1998. She was, *inter alia,* put under surveillance. In 1999, she was again put under police surveillance. On 23 February 2000, her office was burgled and ransacked while she was attending a meeting abroad.

TURKEY

Despite constitutional guarantees of judicial independence, judges in Turkey are not truly free to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law. Both judges and public prosecutors face restrictions, influence, pressure, threats and interference in the exercise of their professional duties. Lawyers in Turkey are sometimes subjected to harassment, intimidation and violence merely for providing legitimate professional legal services to their clients.

According to the 1982 Constitution, Turkey is a republic with a parliamentary form of government. The President is the head of the state and shares executive powers with the Council of Ministers, consisting of the Prime Minister and other ministers. The President is elected by the Grand National Assembly (GNA) for seven years and cannot be re-elected. National elections are held every five years through a system of proportional representation, and every citizen of 18 years and over has the right to vote. The GNA consists of 550 members and carries out legislative functions.

The 1982 Constitution was adopted during military rule by the last military regime which seized power in 1980. It established the National Security Council (NSC) which functions as an advisory body for the President and the Cabinet. According to Article 118 of the Constitution the NSC is composed of the Prime Minister, the Chief of the General Staff, the Ministers of National Defence, Internal Affairs and Foreign Affairs, the Commanders of the army, navy and the air force, and the General Commander of the gendarmerie, under the chairmanship of the President of the Republic.

In 1995, the Constitution was amended and the preamble, in addition to twenty provisions expressing the people's will to accept military rule, were abolished. In practice, however, the military in Turkey continues to have far-reaching powers and a tremendous influence over the government.

The April 1999 elections resulted in the formation of a majority coalition under Prime Minister Ecevit. This has finally brought the prospect of some political stability to the country. The new government rests on a three-party coalition that covers a broad range of the political spectrum: the Democratic Left Party (DSP), the Motherland Party (ANAP) and the Nationalist Action Party (MHP). The coalition has a solid majority in parliament: 352 out of a total of 550 seats.

For more than fifteen years now, an armed conflict between the government and the Kurdish Worker's Party (PKK) has been in effect in Turkey. The aim of the PKK is to establish a separate state, Kurdistan, in the south-east of Turkey. In October 1997, the state of emergency that was declared in nine provinces in south-eastern Turkey in 1987 was lifted in three provinces (Batman, Bingol and Bitlis), but remained in effect for the six others. The state of emergency gives the regional governor far-reaching powers, *inter alia,* giving him authority over the ordinary governors of the provinces and the power to restrict freedom of the press.

In February 1999, Abdullah Öcalan, leader of the PKK, was forcefully transferred from Kenya to Turkey. The ICJ condemned the forced transfer of Mr. Öcalan from Kenya to Turkey in violation of international law. Mr. Öcalan was sentenced to death on 29 June 1999, after a State Security Court found him guilty of the charges of "treason and separatism" under Article 125 of the Turkish Penal Code (TPC). Following his arrest, Mr. Öcalan called for an end to the armed conflict. On 25 November 1999, the death sentence was upheld by the High Court of Appeals. Pending Mr. Öcalan's case before the European Court of Human Rights, the sentence has not been carried out.

State of Emergency

The state of emergency, still in effect in six provinces, gives the regional governor far-reaching powers under decrees enacted under Law no. 2935 on the State of Emergency (25 October 1983), giving him authority over the ordinary governors of the provinces, the power to put restrictions on the press and the ability to remove people from the province who are a threat to public order.

Decree 285 (as amended by Decrees Nos. 424, 425 and 430) modifies the application of the Anti-Terror Law in those areas which are subject to the state of emergency. Hence, the decision to prosecute members of the security forces is removed from the Public Prosecutor to local administrative councils. These councils are composed of civil servants under the influence of the regional or provincial governor, who is also the head of the security forces. Consequently, impunity remains a major problem in the south-eastern provinces.

Article 8 of Decree No. 430 of 16 December 1990 provides as follows:

> No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no

> application shall be made to any judicial authority to this end. This is without prejudice to the rights of individuals to claim indemnity from the state for damage suffered by them without justification.

This article enlarges the risk of impunity for the deeds of the governors. The governors have extensive powers to evacuate villages, to impose resident restrictions and to enforce the transfer of people to other areas.

On 27 October 1995, Article 8 of the 1991 Anti-Terror Law was amended. Despite the amendment, the provisions still define terrorism in vague terms, and many of those accused before the State Security Courts are charged under it. The amendment to Article 8 removed from the text the phrase "regardless of method, aim and ideas behind them". As a result, it is now necessary to prove before the court the intent to damage "the indivisible unity of the State".

Several provisions concerning the state of emergency in Turkey were the subject of review by the European Court of Human Rights in 1997 and 1998. In two cases, the court ruled that Article 5 (right to liberty and security) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) was violated, eventhough Turkey was derogating from this provision under Article 15 (state of emergency). While recognising the difficulties faced by Turkey, the court affirmed that "Article 15 authorises derogations from the obligations arising from the Convention only to the extent strictly required by the exigencies of the situation".

Following the judgement of the European Court of Human Rights in the case of *Aksoy v. Turkey* (18 December 1996), Turkey amended its detention procedures on 6 March 1997. This amendment was announced as a measure to combat torture and ill-treatment. The amendment reduced the maximum term of police detention from 30 days to 10 days in provinces under state of emergency legislation, and from 14 days to seven days throughout the rest of the country.

The amendment also aimed at improving access to lawyers in accordance with the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. However, in state of emergency regions, this right only comes into effect after an extension from the judge has been granted, that is, after 96 hours (four days). Once a detainee has been charged with an offence, he or she has the right to meet with his or her legal counsel at any time. The new law, in effect, amounts to a denial of the right of access to a lawyer (for up to 4 days) to detainees who have not yet been charged.

The European Court also criticised the village guard system. In provinces where the state of emergency legislation applies, a village guard system exists. The village guards are forces of Kurdish villagers armed and paid by the government to fight the PKK. The local population in the south-eastern provinces are pressured by the government to join the village guards, and face reprisals if they do not. On the other hand, the PKK punishes those who do join the village guards.

In *Akdivar v. Turkey* (16 September 1996) and *Mentes v. Turkey* (28 November 1997) the European Court of Human Rights found the Turkish Government in violation of the European Convention for the actions of the security forces who burnt houses to force the evacuation of villages in the south-east that refused to join the village guard system. In 1998, the court found the Turkish Government in violation of the Convention in *Ergi v. Turkey* (28 July 1998) because it failed to protect a Turkish citizen's right in the context of an operation by the security forces, and subsequently did not carry out an adequate and effective investigation.

In 1999, the court found the Turkish Government in violation of Article 2 in *Ogur vs. Turkey* (20 May 1999) *(see European Court of Human Rights)*.

Human Rights Background

The armed conflict in the south-east decreased in intensity but both government forces and the PKK continued to commit serious human rights violations. The government forcibly displaced non-combatants, failed to resolve extrajudicial killings, tortured civilians and restrained freedom of expression. The PKK, meanwhile, continued to execute civilians they suspected of co-operating with the security forces, targeting village officials and other perceived representatives of the state.

The climate in Turkey regarding respect for human rights seemed to improve during 1999. Nevertheless, despite commitments from the government and a public debate on human rights, grave violations of rights and freedoms continued to take place in Turkey. Extrajudicial killings continued, as well as death in detention due to torture and abuses by the security forces.

Torture

Despite widespread reports of torture, especially in cases involving enforcement of the Anti-Terror Law, investigation, prosecution and punishment of members of the security forces is rare. The failure of successive

Turkish governments to enforce domestic and international prohibitions on torture has led to a climate of official impunity that encourages abuse of detainees during the detention period.

International Obligations

Turkey is a state party to several universal and regional human rights treaties, including the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Article 90 of the Turkish Constitution establishes that international treaties ratified by the government and approved by the Turkish Grand National Assembly have the force of law.

As a state party to certain of these conventions, Turkey has to submit periodic reports to monitoring bodies. However, Turkey's second periodic report under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was due on 31 August 1993 and the third periodic report was due on 31 August 1997. Turkey's initial report under the Convention on the Rights of the Child was due on 3 May 1997 and was only submitted on 7 July 1999. Turkey has submitted its second and third periodic reports under the Convention on the Elimination of All Forms of Discrimination against Women as one document. This report was considered in January 1997. The fourth report was due on 19 January 1999.

European Court of Human Rights

The European Convention for the Protection of Human Rights and Fundamental Freedoms is the primary international convention to have been ratified by Turkey. Turkey has been a state party to the European Convention since 1954, and on 22 January 1990 recognised the jurisdiction of the European Court of Human Rights. On 11 July 1997, Turkey ratified Protocol No. 11 to the Convention regarding the establishment of a new court system. The new European Court of Human Rights came into operation on 1 November 1998. This court is a single, permanent court, as opposed to the old system with the Commission on Human Rights and a part-time court.

In 1997 and 1998, the "old" European Court of Human Rights delivered 26 judgements regarding complaints lodged against Turkey. In 20 of

these cases the court established that one or more violations of the Convention had occurred. In 1999, the "new" European Court of Human Rights delivered 18 judgements regarding complaints against Turkey. Violations of the Convention were established in all of the 18 judgements.

- Emergency Law

Several provisions concerning the state of emergency in Turkey have been the subject of review by the European Court of Human Rights *(see State of Emergency)*.

In 1999, the court found the Turkish Government in violation of Article 2 (right to life) in *Ogur vs. Turkey* (20 May 1999) when a night-watchman of a mining company was killed when security forces carried out an armed operation in the province of Siirt where the state of emergency still applies. The government was condemned as violating Article 2 because of the disproportionate, unnecessary use of force and because no effective investigations capable of leading to the identification and punishment of those responsible for the events were conducted.

- Torture

In 1999, Turkey was found to be in violation of Articles 2, 3, 5 and 13 in the case of *Cakici v. Turkey* (8 July 1999). The European Court of Human Rights held unanimously that there had been a violation of Article 2 (right to life) of the European Convention in respect of the death of the applicant's brother, who had disappeared after being detained by the security forces, and in respect of the inadequate investigation carried out by the authorities. The court also held unanimously that there had been a violation of Article 3 (prohibition of torture, inhuman or degrading treatment or punishment) in that Ahmet Çakici had been tortured during his detention. There had also been a violation of Article 5 (right to liberty) in respect of the unacknowledged detention of Ahmet Çakici in the complete absence of the safeguards required by that provision. The court also ruled that there had been a violation of Article 13 (right to an effective remedy) in that the applicant had not been provided with an effective remedy in respect of these complaints.

- Freedom of Expression

Fourteen of the eighteen judgements of the European Court of Human Rights in 1999 concerned a violation of the right of freedom of expression.

On 8 July 1999 the European Court of Human Rights delivered judgement in the following thirteen cases: *Arslan v. Turkey, Baskaya and Okcuoglu v. Turkey, Ceylan v. Turkey, Erdogdu and Ince v. Turkey, Gerger v. Turkey, Karatas v.*

Turkey, Okcuoglu v Turkey, Polat v. Turkey, Sürek and Ozdemir v. Turkey, Sürek v. Turkey (no. 1), Sürek v. Turkey (no. 2), Sürek v. Turkey (no. 3) and Sürek v. Turkey (no. 4).

The court held that there had been a violation of freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights, in 11 of the 13 cases. Further, in 9 of the 13 cases it was found that the applicants had been denied the right to have their cases heard by an independent and impartial tribunal within the meaning of Article 6 para.1 of the Convention because they had been tried by National Security Courts, in which one of the bench of three judges was a military judge. The court pointed out that in its judgements in *Incal v. Turkey* (9 June 1998) and *Ciraklar v. Turkey* (28 October 1998) it had noted that, although the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality, certain aspects of these judges' status made their independence and impartiality questionable: for example, the fact that they were servicemen who still belonged to the army, which in turn took its orders from the executive; the fact that they remained subject to military discipline; and the fact that decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army. The court saw no reason to reach a conclusion different from its decision in those cases and held that there had also been a breach of Article 6 para. 1 in the nine cases before it

On 28 September 1999 the court decided in the case *Öztürk v. Turkey* that Article 10 of the Convention had been violated by the government when Mr. Öztürk was convicted for helping to publish and distribute a book which described the life of Ibrahim Kaypakkaya. Mr. Kaypakkaya was one of the founder members of the Communist Party of Turkey, an illegal Maoist organisation.

- The Judiciary

On at least two occasions, the European Court found the judicial system in the south-eastern provinces to be ineffective. In several cases, the government pleaded before the European Commission of Human Rights, as well as the court, that the applicant did not exhaust domestic remedies before filing the complaint. However, the court was of the opinion in the cases of *Mentes and Others v. Turkey* and *Selcuk and Asker v. Turkey* that while the rule relating to the exhaustion of domestic remedies referred to in Article 26 of the Convention obliges those seeking to bring their case against a state before an international judicial or arbitral organ to first use all remedies provided by the national legal system, there is no obligation under Article 26 to have recourse to remedies which are inadequate or ineffective. In addition, according to "generally recognised rules of international law" there may be special circumstances in which the applicant is

absolved from the obligation to exhaust the domestic remedies at his disposal - one such reason being the failure of the national authorities to undertake an investigation or offer assistance in response to serious allegations of misconduct or infliction of harm by state agents.

In several of the above-mentioned cases the court was of the opinion that special circumstances existed and that, as a result, the non-exhaustion of domestic remedies did not preclude the complaint procedure before the Commission and the court. The court stressed, however, that this should not be interpreted as a general statement that remedies are ineffective in the south-east of Turkey or that applicants are absolved from the obligation under Article 26 to have normal recourse to the system of remedies which are available and functioning.

- State Security Court

The State Security Court's (SSC) jurisdiction over civilians before 18 June 1999 was a violation of international approved standards. The European Court of Human Rights indeed ruled in two cases in 1998 that the composition of the State Security Court violated Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms *(see State Security Court under The Judiciary)*.

- Harassment of lawyers

In two cases before the European Court it was established that applicants or their lawyers had been harassed because they submitted complaints to the European Commission on Human Rights, and, therefore, that Article 25 (right to an individual petition) had been violated. In the case of *Kurt v. Turkey*, the court stated that it was not for the authorities to interfere with proceedings before the Commission, which had been set in motion by an applicant, through the threat of criminal procedures against an applicant's representative. Eventhough there was no follow-up to the threat to prosecute the applicant's lawyer, the threat in itself must be considered an interference.

THE JUDICIARY

The principle of judicial independence is laid down in Article 138 of the Constitution of Turkey: "judges shall be independent in the discharge of their duties". Despite constitutional guarantees of judicial independence, judges in Turkey are, however, not truly free to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law. In reality, both judges and public prosecutors

face restrictions, influence, pressure, threats and interference in the exercise of their professional duties.

Structure of the Courts

The judicial system is composed of general law courts (civil, criminal and administrative courts), military courts, a Constitutional Court and State Security Courts.

According to Article 148 of the Constitution the Constitutional Court examines the constitutionality of laws, decrees having the force of law and parliamentary procedural rules. It may do so at the request of either the President of the Republic or one fifth of the members of the Turkish Grand National Assembly.

The Constitutional Court, in its capacity as the Supreme Court, also has exclusive jurisdiction to try the President of the Republic, members of the Council of Ministers and members of the judiciary for offences relating to their functions. Any challenge to the constitutionality of a law must be made within sixty days of its promulgation. Decisions of the Constitutional Court require the vote of an absolute majority of all its members, with the exception of decisions to annul a constitutional amendment, which require a two thirds majority. Decisions of the Constitutional Court on the constitutionality of legislation and government decrees are final.

The High Court of Appeals is the only competent authority for reviewing decisions and verdicts of lower-level judicial courts, both civil and criminal.

According to Article 155 of the Constitution, the Council of State is the final instance for reviewing decisions and judgements given by lower administrative courts. It also has jurisdiction to consider original administrative disputes, and, if requested, give its opinions on draft legislation submitted by the Prime Minister and Council of Ministers, examine draft regulations and the conditions and contracts under which concessions are granted.

The Jurisdictional Conflict Court is empowered to determine disputes between general courts of law and administrative and military courts concerning their jurisdiction.

Military Courts

Military courts of first instance hear cases involving military law and members of the armed forces. In addition, however, they hear cases in which civilians are alleged to have, for example, impugned the honour of

the armed. The Military High Court of Appeals reviews decisions and judgements issued by Military Courts of First Instance. The High Military Administrative Court of Appeals is the first and last instance for the judicial supervision of disputes arising from administrative acts involving military personnel or relating to military service.

State Security Courts

According to Article 143 of the Constitution Turkey has a system of special courts, known as State Security Courts (SSCs). These courts are concerned solely with the adjudication of political and serious criminal cases deemed to threaten the security of the state. Most of the offences tried relate to the use of violence, drug smuggling, membership of illegal organisations, or espousing or disseminating prohibited ideas. SSCs sit in eight cities across Turkey.

State Security Courts are comprised of a president, two regular and two substitute members, one public prosecutor and a sufficient number of deputy public prosecutors. On 18 June 1999, the Turkish parliament decided to amend Article 143 of the Constitution so as to exclude military judges from all SSCs. In light of this amendment, all members of the judicial panel are now civilian. All SSC members are appointed for a period of four years, although upon expiry of this period they may be re-appointed for a further term.

The competent authority to examine appeals against verdicts of the State Security Courts is the High Court of Appeal, through a department dealing exclusively with crimes against state security.

Prior to June 1999, SSC panels consisted of two civilian judges and one military judge. The presence of a military officer, exercising jurisdiction over civilians appearing before the court, had, since the court's inception, been a target for sustained criticism from both internal and international bodies. Such criticism focused on the fact that the presence of a military judge on the SSC panel was contrary to the fundamental requirement of an independent and impartial tribunal.

Serious and legitimate concern in this regard centred primarily on the manner and term of appointment of military judges. Military judges, even while sitting on a SSC, remained under the supervision of their military superiors. (*see Attacks on Justice 1998*).

Both the European Commission on Human Rights and the European Court of Human Rights found that the presence of a military judge on the State Security Court panel violated a defendant's right to an independent and impartial tribunal. On 9 June 1998, the European Court of Human

Rights concluded that the presence of a military judge on the State Security Court panel violated the principle of the independence and impartiality of the judiciary as safeguarded by Article 6(1) of the European Convention. In its verdict in *Incal v. Turkey*, the court stated:

> [i]t follows that the applicant could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case...In conclusion, the applicant had legitimate cause to doubt the independence and impartiality of the Izmir National Security Court. There has accordingly been a breach of Article 6(1).

On 8 July 1999, the European Court of Human Rights delivered judgement in the following thirteen cases: *Arslan v. Turkey, Baskaya and Okcuoglu v. Turkey, Ceylan v. Turkey, Erdogdu and Ince v. Turkey, Gerger v. Turkey, Karatas v. Turkey, Okcuoglu v. Turkey, Polat v. Turkey, Surek and Ozdmir v. Turkey, Surek v. Turkey (no. 1), Surek v. Turkey (no.2), Surek v. Turkey (no.3) and Surek v. Turkey (no.4)*.

The court held that in 9 of the 13 cases the applicants had been denied the right to have their cases heard by an independent and impartial tribunal within the meaning of Article 6(1) of the Convention because they had been tried by State Security Courts, in which one of the bench of three judges was a military judge.

The court pointed out that in its *Incal v. Turkey* judgement of 9 June 1998 and its *Ciraklar v. Turkey* judgement of 28 October 1998 it had noted that the status of military judges sitting as members of State Security Courts put their independence and impartiality into question: for example, the fact that they were servicemen who still belonged to the army, which in turn took its orders from the executive; the fact that they remained subject to military discipline; and the fact that decisions pertaining to their appointment were to a great extent taken by the administrative authorities and the army. The court saw no reason to reach a conclusion different from its decision in those cases and held that there had been a breach of Article 6(1) in the nine cases before it.

Appointment, Promotion and Discipline

Article 159 of the Turkish Constitution establishes the High Council of Judges and Public Prosecutors (High Council), a body of executive and judicial personnel that oversees the judiciary. The High Council is responsible for the appointment of all judges and public prosecutors to criminal, civil and administrative courts, including State Security Courts. It is also

authorised to transfer, promote and discipline judges and prosecutors.

The Minister of Justice is the President of the High Council and his Under-Secretary is an *ex-officio* member. Of the rest of the High Council, the President of the Republic appoints three members from a list nominated by the High Court of Appeal from its ranks and two members from a list nominated by the Council of State. All appointments are for four-year terms but members may be re-elected at the end of their terms of office. Once appointed, members cease to preside over courts of law, and instead devote themselves solely to their duties on the High Council.

In terms of appointment, promotion and discipline, the careers of all judges and prosecutors in Turkey are determined by the High Council. However, the potential for the exertion of undue political influence by the Ministry of Justice within the High Council gives rise to a wide scope for partiality and prejudice in decisions relating to personnel.

Articles 146 to 155 of the Constitution establish a Constitutional Court, the nation's highest court. It consists of eleven regular and four substitute members. The President of the Republic is charged with appointing two regular and two substitute members from the High Court of Appeal, two regular and one substitute member from the Council of State, and one member each from the Military High Court of Appeal, the High Military Administrative Court and the Audit Court. The President of the Republic also appoints one member from the teaching staff of the higher education institutions and three members and one substitute member from among senior administrative officers and lawyers.

Members of the High Court of Appeal are appointed by the High Council of Judges and Public Prosecutors from among first division judges and public prosecutors of the ordinary civil and criminal courts. The First President, first deputy presidents and heads of division are elected by a Plenary Assembly of the High Court of Appeals from among its own members, for a term of four years. They may be re-elected at the end of their term of office.

Three-quarters of the judges of the Council of State are appointed by the High Council of Judges and Public Prosecutors from among first grade administrative judges and public prosecutors. The remaining one-quarter of the member judges are appointed by the President of the Republic. The President, Chief Public Prosecutor, Deputy President and heads of division of the Council of State are elected by a Plenary Assembly of the Council of State from among its own members for a term of four years. They may be re-elected at the end of their term of office.

Members of the Military High Court of Appeal are appointed by the President of the Republic from among three candidates nominated for each

vacant office by a Plenary Assembly of the Military High Court of Appeal, from among first grade military judges. The President, Chief Public Prosecutor, second presidents and heads of division of the Military High Court of Appeal are appointed according to rank and seniority from among the members of the court itself.

Trial of Abdullah Öcalan

In February 1999, Abdullah Öcalan, leader of the armed opposition group, Kurdistan Workers' Party (PKK), was forcefully transferred from Kenya to Turkey. The ICJ condemned the forced transfer of Mr. Öcalan from Kenya to Turkey. Mr. Öcalan was sentenced to death on 29 June 1999, after a State Security Court found him guilty of the charges of "treason and separatism" under Article 125 of the Turkish Penal Code (TPC). Following his arrest, Mr. Öcalan called for an end to the armed conflict. On 25 November 1999, the death sentence was upheld by the High Court of Appeal. The sentence will not be carried out pending the case Mr. Öcalan has submitted to the European Court of Human Rights.

The last executions in Turkey took place in October 1984 and the Turkish President, Süleyman Demirel, has pledged several times to abolish the death penalty and, pending that, to uphold the existing moratorium on executions. There is, however, real fear that the death penalty issued against Mr. Öcalan could be carried out.

Lawyers

In two cases before the European Court it was established that applicants or their lawyers had been harassed because of their submission of complaints to the European Commission on Human Rights, and that, therefore, Article 25 (right to an individual petition) was violated (*see under European Court of Human Rights*).

The guarantee of a fair trial depends, *inter alia*, on the ability of lawyers to provide effective legal representation to and on behalf of their clients. In Turkey, however, numerous obstacles serve to seriously undermine the extent to which members of the legal profession are able to perform their professional duties. This is true both during the pre-trial interrogation phase and during the trials themselves.

An initial obstacle faced by Turkish lawyers in fulfilling their professional duties is that many detainees remain ignorant of their right to legal representation. For detainees suspected of offences within the jurisdiction of the State Security Courts, the situation is even worse. According to

Turkish law, the authorities are under no obligation to inform them of their rights and no information sheet is made available. In practice, persons detained on suspicion of, for example, terrorism or drugs smuggling are routinely not informed of the fact that they possess the right to be assisted by a lawyer.

Detainees are frequently psychologically and physically mistreated by members of the security forces. This creates an environment in which it is easy to discourage a detainee, who may be ignorant of his rights under the law, from insisting on access to a lawyer. In Turkey, even if a detainee is aware of his right to legal advice and representation and is not discouraged from wishing to exercise that right, he may be precluded from doing so if he cannot afford the services of a suitably qualified lawyer.

If a person detained on suspicion of an ordinary crime is not able to appoint a lawyer, then the Bar Association must, by law, provide free counsel when such a request is made to the court. Costs are borne by the Association. However, this duty to provide a lawyer does not extend to detainees and defendants in State Security Court cases.

In SSC cases, even if the detainee is both aware of his right to legal representation and able to afford the services of a suitably qualified lawyer, postponed pre-trial incommunicado detention without access to legal counsel remains a major problem. The Turkish Penal Code permits an initial period of detention without charge in SSC cases of four days.

After the first four days of incommunicado detention in SSC cases, the judge, at the request of the prosecutor, may approve an extension of the detention period. At that point, the detainee is permitted to contact a lawyer. However, even once this stage in the proceedings is reached, lawyers throughout Turkey face obstacles in providing effective legal advice and representation.

Lawyers face further problems beyond the difficulties encountered at the pre-trial detention stage. The ability of lawyers to conduct an effective defence is restricted by the fact that State Security Courts routinely limit the period of time in which trial preparation may be undertaken. For example, even in a trial involving several defendants, the defence may find themselves limited to 15 days preparation. If they fail to meet this deadline they loose the right to put forward a defence. Additionally, defence lawyers are unable to examine witnesses themselves. Instead, they may only suggest possible questions to the judge. The judge may then decline to ask the question at all, or else ask it in such a way as to negate its effectiveness in establishing the defence's case.

Lawyers in Turkey are sometimes subjected to harassment, intimidation and violence merely for providing legitimate professional legal services

to their clients. Lawyers who repeatedly conduct defence cases before the State Security Courts are sometimes considered to share the political views of their clients and may be called "terrorist lawyers" by the police, the public prosecutors and the courts. Lawyers who appear in trials before the State Security Courts in cases of torture and extra-judicial killings can be qualified as "public enemies". Lawyers who publicly comment on the human rights practices of Turkey, or the Kurdish situation tend to be regarded, in some official circles, as enemies of the state and marked separatists.

At its most severe, the systematic harassment and intimidation of lawyers takes the form of arrest and detention. Lawyers may be deprived of their liberty for prolonged periods of time. During this period they may be subjected to physical and emotional abuse and torture. Equally as concerning is the fact that lawyers may be exposed to prolonged and repeated criminal prosecution for their work. They are also subject to other types of harassment, such as disrespectful or threatening treatment while performing their duties by members of the security forces, including unnecessary searches, verbal abuse and interception of telephone calls.

Cases

Gazanfer Abbasioglu, Sebahattin Acar, Abdullah Akin, Arif Altinkalem, Sedat Aslantas, Meral Danis Bestas, Mesut Bestas, Mehmet Biçen, Ferudun Celik, Niyazi Cem, Fuat Hayri Demir, Baki Demirhan, Tahir Elçi, Vedat Erten, Zafer Gür, Nevzat Kaya, Mehmet Selim Kurbanoglu, Cabbar Leygara, Hüsniye Ölmez, Arzu Sahin, Imam Sahin, Sinan Tanrikulu, Sinasi Tur, Fevzi Veznedaroglu and **Edip Yildiz** (the Diyarbakir 25 Lawyers' trial): In 1993, these lawyers were accused of anti-government activities in the province of Diyarbakir, after defending alleged members of the outlawed PKK. They were charged under the Anti-Terror Law with acting as couriers for the PKK. Originally 16 lawyers were indicted; the number was later increased to 25. The first hearing was on 17 February 1994, followed by hearings throughout the year, and in 1995-1996. Subsequently, the number of lawyers indicted decreased to 20.

A hearing held on 21 January 1997 was adjourned to 8 April 1997 because the military judge of the court had been replaced and his successor was not yet familiar with the case. On 8 April 1997, the hearing was again adjourned because four defendants were added to the list. They were: **Abdullah Akin, Fevzi Faznedaroglu, Cebar Leygara** and **Edip Yildiz**. The trial is still pending.

Sixteen of these defendants submitted applications to the European Commission on Human Rights in relation to complaints of torture while in detention (*Elci and Sahin v. Turkey,* application No. 23145/93). An admissibility hearing was held *in camera* on 2 December 1996 and the applications were declared partially admissible. All of the applicants' complaints in relation to the lawfulness of their detention have been declared admissible. In those cases where a breach of Article 8 (respect for private and family life) and Article 1 was argued, the Commission declared the complaints to be admissible. Nine complaints in relation to ill-treatment were admissible. The seven others were inadmissible because the information was not submitted within the six months time limit (*see Attacks on Justice 1996 and 1998*).

In October 1999, the Public Prosecutor declared his opinion that nine of those accused of being members of the PKK should be sentenced to 20 years imprisonment. For the rest, he called for a minimum of four and a half years in prison for supporting the PKK. Generally, when a prosecutor expresses an opinion on sentencing, the actual sentence passed by the judge is about the same. After six years, the trial continues.

Sedat Aslantas and Husnu Ondul {lawyers}: The two lawyers and members of the Human Rights Association were arrested for publishing "A Cross-Section of the Burnt Out Villages" which allegedly contained separatist propaganda. They were tried on 19 December 1994 and acquitted on 11 January 1995. The State Security Court in Ankara asked for a retrial, but the acquittals were confirmed in May 1995. The prosecution filed a complaint under Article 159 of the Turkish Penal Code, claiming that security officers had been insulted by statements made in the book. Mr. Aslantas has brought the case before the European Commission on Human Rights and the case was declared admissible on 15 September 1997.

The Aydin Lawyers: On 21 April 1998, a trial in which members of the security forces were charged with killing Zenfel Kaya during a ten-day period of detention concluded in the town of Aydin. The court sentenced the accused police officers to six years imprisonment for the killing.

Throughout the trial, the lawyers in the case suffered serious episodes of intimidation. As the case against the policemen accused of murdering Zenfel Kaya proceeded, the lawyers were subjected to harassment by police officers and other sympathisers present at the hearing.

As soon as the sentence was declared, 44 off-duty police officers who had been sitting in the public gallery stood up and began to shout. They entered the body of the courtroom and proceeded to viciously attack both the lawyers and the judge. The police also beat the journalists in the courtroom and stopped them from recording by smashing their cameras. After some time, official security forces in uniform entered the courtroom. The uniformed police drove the lawyers into a corner of the room where they

were beaten. Three or four lawyers managed to jump into the area where the judge was sitting but the rest were beaten as they were forced out of the courtroom. Both uniformed and off-duty officers beat the lawyers.

The disorder continued outside the courtroom and because the lawyers could not leave the Palace of Justice, they asked the Prosecutor to protect them. The Prosecutor escorted the lawyers to awaiting cars in an attempt to shield them from further attacks. Nevertheless, while getting into the cars, both uniformed and off-duty police officers continued to attack the lawyers. One of the uniformed police officers hit the Prosecutor. The Prosecutor turned back and saw the man who had hit him. The Prosecutor ordered other police to detain the man but they refused.

The Izmir Bar Association brought a complaint in order to obtain permission to prosecute the officers concerned. Permission was granted for only six of the 44. The trial, which is presently closed to the public, has to date taken 2 years and is still continuing. Meanwhile, the accused police officers remain on duty.

Akin Birdal {lawyer}: Since 1995, Mr. Birdal, chair of the Human Rights Association in Ankara, has been prosecuted in over 21 cases. He has been convicted in three cases. The Konya State Security Court sentenced Mr. Birdal to one year of imprisonment under Article 312 of the Turkish Penal Code for a speech he made in a meeting during a "1995 Peace Week" held in Mersin. Additionally, he has been sentenced to three months in prison in connection with a poster discussing a campaign against disappearances. This sentence was subsequently commuted to a fine. In July 1998, the Ankara State Security Court sentenced Mr. Birdal to a further term of one year imprisonment for "inciting hatred" in a speech he made in 1996 calling for a peaceful end to the Kurdish conflict. The Court of Appeal affirmed this conviction on 28 October 1998. Mr. Birdal was released on 25 September 1999 for medical reasons but he was again arrested on 28 March 2000 to serve the remainder of his sentence.

In addition to these three convictions, Mr. Birdal has been acquitted in a further seven actions. Individually, he has been tried and acquitted in connection with a written statement made in a book published by the Human Rights Association (HRA), a speech made on 10 December 1996 during Human Rights Week, a speech made on 17 June 1997 in Ankara and a speech made in connection with the "Peace Journey" in Golbasi on 2 September 1997. Mr. Birdal has also been tried and acquitted along with three other HRA members in connection with the HRA's 1993 Regional Report entitled "A Cross-Section of the Burnt Out Villages". Along with 17 members of the HRA's executive board, Mr. Birdal was also tried and acquitted in connection with a special edition of a bulletin entitled "The Sole Solution is Peace". Finally, on 23 February 1998, together with

10 members of the HRA, he was acquitted of charges of disseminating separatist propaganda and inciting racist and ethnic enmity for speeches made during Human Rights Week in which he condemned human rights violations. There are several other charges still pending against Mr. Birdal, all related to his writings and public speeches.

Murat Celik {lawyer}: Mr. Celik was beaten by police officers during the funeral of Serpil Polat, who had set herself on fire, at Sakarya Prison on 17 February 1999. On 18 February 1999, while he had been carrying out the funeral proceedings, a police officer had taken him to the office of Atilla Cinar, punched him and said "Why do you deal with these funeral things? Can a dead person have a lawyer?" Murat Celik said that later seven or eight police officers inside the room, including Anti-Terror Branch Director, Sefik Kul, had attacked him, and added that he had been taken out of the building while being beaten.

Kemal Kirlangic {lawyer}: On 7 February 1999, the Izmir Public Prosecution Office launched a trial against Mr. Kirlangic under Article 159 of the Turkish Penal Code on allegations that he had "insulted the laws" in his book "Sanik Yasular" (Laws on Trial). The Izmir State Security Court Prosecution Office had previously launched an investigation against the book, and had decided not to prosecute Mr. Kirlangic. Meanwhile, the Izmir Public Prosecutions Office reportedly applied to the court to confiscate the book, but this demand was rejected.

THE UNITED KINGDOM

The year was marked by developments that could constitute a fundamental change in the judicial system. The diverse role of the Lord Chancellor came increasingly into question and accepted judicial appointment procedures were challenged. The majority of political attention was focused on the Pinochet case and the affirmation by the House of Lords of his lack of immunity for certain crimes. Northern Ireland remained in a transitory stage. There were several developments that improved the focus on human rights, but lawyers remain under serious threat.

The United Kingdom of Great Britain and Northern Ireland (UK) is a constitutional monarchy with a democratic, parliamentary government. It does not have a single written constitution, rather its constitutional law is made up of a combination of statute, common law and unwritten practices and traditions called conventions.

The UK system of government is based on the principle of parliamentary sovereignty. The parliament consists of the monarch, the House of Commons and the House of Lords, however most power lies with the House of Commons. The House of Commons is a directly elected chamber consisting of 659 members who serve for a five-year term. The House of Lords is an unelected chamber which can initiate and revise legislation and also examines government activities. Most legislation originates in the House of Commons and usually requires the assent of both houses of parliament and the monarch. By convention the House of Lords, at a second or third reading, will not vote against a government bill contained in the government's election manifesto.

The executive authority is vested in the monarch and is exercised on behalf of the monarch by the government. The monarch appoints the Prime Minister, who by convention is always the leader of the party with the majority in the House of Commons, and other members of the Cabinet on the recommendation of the Prime Minister. Most ministers are members of the House of Commons, although the Lord Chancellor, the head of the judiciary, is always a member of the House of Lords. The monarch's role in the constitutional system is largely symbolic.

A bill abolishing hereditary peers in the House of Lords was passed in November 1999. The bill reduced membership of the House of Lords to 670 members, consisting of 92 former hereditary peers elected in internal House

of Lords elections, and all former life peers and clergy members. The interim chamber, now consisting of approximately 700 members, will sit pending final reform, which is likely to be based on the report of the Wakeham Royal Commission. The Wakeham Commission published its report in January 2000. Broadly it recommended that the House be given certain extra responsibilities and that it be made more representative of British society through a combination of elected members and other members appointed by an independent commission.

Much of the political attention in 1999 focused on the devolution of powers from the UK Parliament to regional parliaments and assemblies in Wales, Scotland and Northern Ireland. Devolved powers were formally transferred to the Welsh and Scottish administrations on 1 July 1999, and to the Northern Ireland administration on 2 December 1999, although this was later revoked. The devolution process has resulted in a complicated network of competences shared between the national and regional parliaments and assemblies.

The Home Secretary, Mr Jack Straw, decided on 2 March 2000 not to extradite General Augusto Pinochet to Spain to face charges of torture, due to unfitness to stand trial. *(see chapter on Chile)*

The Judiciary

Three legal systems operate within the UK governing the areas of England and Wales, Scotland, and Northern Ireland, all following the common law tradition. Laws passed by the UK parliament can apply to these areas uniformly, or may apply to one or more specified areas individually. With the devolution of powers, regional parliaments and assemblies also have the power to legislate in specific areas. The UK's membership of the European Union also shapes the development of the legal system. The Lord Chancellor, a member of the executive and the Speaker of the House of Lords, is the head of the judiciary in England and Wales.

The European Courts

As parties to the treaties of the European Communities and the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), the United Kingdom is subject to the jurisdiction of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). These courts hear cases alleging violations of the provisions of the treaties of the European Union and the Convention, respectively. Individuals can directly petition the ECHR, however, the

ECJ only hears cases referred to it by domestic courts for a determination of the law. Individuals asserting violations of the Convention must first exhaust domestic remedies.

With the expected coming into force of the Human Rights Act 1998 in October 2000, most of the fundamental rights contained in the Convention will be able to be directly invoked in UK courts.

The House of Lords

The House of Lords is the final court of appeal for all the legal systems of the United Kingdom. In England, Wales and Northern Ireland appeals can be heard in civil and criminal matters from the Court of Appeal, and in criminal matters from the Divisional Court of the Queens Bench Division of the High Court and the High Court in Northern Ireland. Appeals can be heard from the Scottish Court of Session only in civil matters. Leave to appeal must be given by the House of Lords or by the previous court whose order is being appealed. Cases are heard by an Appellate Committee of the House of Lords consisting of five Law Lords (Lords of Appeal in Ordinary) or in cases of exceptional difficulty, seven Law Lords.

England, Wales and Northern Ireland

The court systems in England, Wales and Northern Ireland are relatively similar. The Magistrates Court is the court of first instance and hears the majority of minor criminal cases and other minor family and administrative cases. Cases in this court are heard by a panel of at least two lay magistrates, members of the public without legal qualifications, who are assisted by a legal clerk who advises them on points of law. Cases can also be heard by a stipendiary magistrate, who has a legal qualification, sitting alone. Appeals from this court lie to the Crown Court and, in England and Wales, on matters of law to the Divisional Court of the Queens Bench Division of the High Court.

The Crown Court hears trials for serious criminal offences and appeals from summary decisions of Magistrates Courts. Trials in this court are heard by a single judge and a jury, and appeals, on facts and law, lie to the Criminal Division of the Court of Appeal if either court grants leave.

County Courts deal with minor civil matters. These are cases involving a civil claim of less than £25,000 (£15,000 in Northern Ireland), or a personal injury claim of less than £50,000 (£15,000 in Northern Ireland). The cases are heard by a single judge. Decisions of the County Court can be appealed to the High Court.

The High Court and the Court of Appeal, together with the Crown Court, constitute the Supreme Court. The High Court deals mostly with substantial civil claims in contract, tort, property or family matters. The court is divided into three divisions; the Family Division, the Chancery Division and the Queens Bench Division. Cases are heard by a single judge. A divisional court of the Queens Bench Division, usually composed of two judges, hears applications for judicial review. The Court of Appeal is divided into civil and criminal divisions and hears all cases on appeal from lower courts. The court can give leave to appeal to the House of Lords.

Scotland

The existing Scottish court system was preserved under the Act of Union 1707, and continues to exist independently. Scotland is divided into 6 Sheriffdoms and the courts in these areas operate as the main court of first instance and hear civil, criminal and commissary (probate) cases. The court hears civil cases involving claims of less than £1,500 and can deal with criminal offences summarily or by jury trial. Cases are mostly heard by a single sheriff and appeal lies from this court to the High Court of the Justiciary in criminal matters, or to the Court of Session for civil matters. Appeals in civil matters can initially be heard by the Sheriff Principal.

The High Court of Justiciary hears serious criminal cases, such as murder or armed robbery, and criminal appeals from lower courts. Trials in these cases are heard before a judge and a jury. The Court of Session is divided into an Outer House and Inner House. The Outer House hears larger civil claims, whilst the Inner House mostly hears civil appeals from lower courts or from the Outer House. Cases in the Outer House are usually heard by a division of three judges. Appeals lie from this court to the House of Lords.

Judges

Judges are generally independent and free to decide cases impartially without any improper influences, threats or interferences. The UK constitutional system does not guarantee the independence of the judicial body as a whole through the doctrine of separation of powers, but rather it provides guarantees for the independence of individual judges through their tenure and conditions of work. Responsibility for the judiciary lies with the Lord Chancellor who is a judge, a minister and a member of the House of Lords. In accordance with the Act of Union 1707, the Scottish courts have their own judicial bench, although senior members of the Scottish bench may be appointed as Law Lords in the House of Lords.

Appointment

Judges are appointed by the monarch on the recommendation of either the Prime Minister or the Lord Chancellor. Lords of Appeal in Ordinary, the Lord Chief Justice, Lord Justices of Appeal, the Master of the Rolls, the President of the Family Division and the Vice Chancellor are appointed by the monarch on the advice of the Prime Minister who receives advice from the Lord Chancellor. Other members of the judiciary such as High Court judges, Deputy High Court judges and Recorders are appointed by the monarch on the advice of the Lord Chancellor. Magistrates are appointed directly by the Lord Chancellor. Although formally appointment requires the consent of the monarch, by convention this consent is always given. Effectively, the Lord Chancellor exercises direct influence and control over which candidates are appointed.

The preliminary selection procedure for judicial candidates is conducted by the Lord Chancellor's Department. The Judicial Group within the Lord Chancellors department is responsible for the administration of the appointments system, but the final decision to nominate or appoint is made by the Lord Chancellor. The Lord Chancellor is guided by the principles that appointment should be strictly on merit; part time service is a prerequisite for full time appointment; and that significant weight will be placed on the independent views of others regarding suitability for appointment. The selection procedure involves interviews, consultation with individual barristers and solicitors and their respective professional associations, and other senior members of the judiciary.

The Lord Chancellor's reliance on independent opinions, often gathered informally, for appointments to higher courts, results in a selection process that lacks transparency. This prevents an independent evaluation of the credibility of those opinions that are sought, the factual basis for the opinion or of the relative reliance that the Lord Chancellor placed on the guiding criteria. An inquiry established by the Lord Chancellor, headed by Sir Leonard Peach, recommended in December 1999 that an Independent Commissioner for Judicial Appointments be established and that there be increased transparency in the selection procedure. The terms of reference of the Peach Commission excluded consideration of the feasibility of an independent appointments system.

In the Scottish Courts, appointments are governed by Section 95 of the Scotland Act 1998. The Lord President of the Court of Session and the Lord Justice Clerk are appointed by the monarch on the recommendation of the Prime Minister. The Prime Minister is required to recommend only those that have been nominated by the First Minister of Scotland for appointment. Other members of the Court of Session, sheriff's and sheriff's principals are appointed by the monarch upon recommendation of the First

Minister. During the selection process the First Minister is required to consult the Lord President and the Lord Justice Clerk. Authority to appoint temporary sheriffs is granted to the Secretary of State for Scotland by the Sheriff Courts (Scotland) Act 1971. In practice, the Lord Advocate is responsible for the evaluation and nomination procedure and by convention the responsible parties always act upon the advice of the Lord Advocate.

Removal

The Act of Settlement 1701 provides that judges are to hold office on the condition of good behaviour. Judges can only be removed by the monarch, acting on advice of ministers, either following a conviction for a serious offence or official misconduct, or upon an address to both houses of parliament. This provides judges with life tenure and enables them to exercise the judicial function free from executive interference. Members of the lower judiciary, to the level of Circuit Court judge, can be removed for misconduct by the Lord Chancellor.

The Lord Chancellor is also empowered to make temporary appointments, such as deputy High Court judges, assistant recorders, acting stipendary magistrates, and members of various judicial tribunals. These appointments do not have life tenure and, as will be discussed later, are more subject to executive influence and may constitute a violation of the right to an independent and impartial tribunal.

Human Rights Act

The Human Rights Act 1998 is expected to come fully into force in October 2000. Currently only Sections 18, 19, 20 and 21(5) are in force. None of these provisions provide for the invoking of the rights contained in the Convention within the United Kingdom domestic legal system. However as a result of the devolution process, the Convention rights can already be invoked in domestic proceedings in Wales, with respect to actions of the Welsh Assembly, and in Scotland with respect to actions and legislation of the executive and the assembly.

The ability to rely on rights contained in the Convention in domestic proceedings has implications for the current structure of the judiciary within the United Kingdom. In particular, Article 6(1) of the Convention entitles everyone to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The European Court of Human Rights (ECHR) in *McGonnell v The United Kingdom* (8 February 2000) reaffirmed the requirements for

independence and impartiality contained in its decision in *Findlay v The United Kingdom* (25 February, 1997). For a tribunal to be regarded as independent regard must be given to, *inter alia:*

- the manner of appointment of its members and their term of office
- the existence of guarantees against outside pressures
- the question whether the body presents an appearance of independence

For the requirement of impartiality,

- the tribunal must be subjectively free of personal prejudice or bias
- and it must also be impartial from an objective viewpoint, that is it must offer sufficient guarantees to exclude any legitimate doubt.

Therefore, the criteria for independence and impartiality consist of both subjective and objective factors. A tribunal must not only be actually independent, it must also appear to be independent. These requirements have implications for the current appointment procedure for judges and for the unique position of the Lord Chancellor within the United Kingdom constitutional system.

Temporary Appointments

As stated earlier the Lord Chancellor plays a central role in the nomination and appointment of judges. These powers extend to the making of temporary appointments. Section 57(2) of the Scotland Act 1998 provides that a member of the Scottish executive has no power to perform an act insofar as it is incompatible with any of the Convention rights, i.e. those rights contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms that will be given effect through the Human Rights Act 1998.

In *Starr and Chalmers v Procurator Fiscal, Linlithgow* (Nos. 1798/99, 1799/99, 2006/99, 11 November 1999), a decision of the Appeal Court of the High Court of the Justiciary in Scotland, the court ruled that a temporary sheriff was not an independent and impartial tribunal as required by Article 6(1) of the Convention. Section 11(2) of the Sheriff Courts (Scotland) Act 1971 allows the Secretary of State for Scotland to appoint a person to act as a sheriff for any reason that it appears expedient to do so, to avoid a delay in the administration of justice.

Although the act refers to the Secretary of State, now the responsibility of the First Minister due to the devolution of powers, a critical role is played by the Lord Advocate. The Lord Advocate decides that temporary sheriffs are required; assesses applicant suitability with respect to certain

criteria, including whether the applicant is suitable for a permanent appointment; consults other officials including the Lord President, and then provides a list of candidates to be appointed. Appointments are made for one year, and as a general rule are renewed for successive periods of a year. However, the Lord Advocate can at his/her discretion choose not to renew if the temporary sheriff did not serve for a minimum of twenty days per annum, or for reasons of illness or misconduct, or can simply refuse to use the person as a matter of administrative practice. Reasons are usually not given. However, the Lord Advocate has no control over where a temporary sheriff hears cases.

The court found that the lack of security of tenure of temporary sheriffs, and the unfettered power of recall, does not constitute a sufficient appearance of independence and impartiality. The Lord Justice Clerk stated that "the use of the one year term suggests a reservation of control over the tenure of office by the individual" and that "the power of recall under Section 11(4) is incompatible with the independence and the appearance of independence of the temporary sheriff." Lord Reid reasoned that "the system of short renewable appointments creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the executive when his appointment comes up for renewal: in short, a relationship of dependency."

This identifies that the issue is not only that the executive may seek to directly influence a person who has been appointed for a temporary period, but that the shortness of tenure can result in the exertion of more subtle, indirect influences over the exercise of judicial power.

This case is equally applicable to the use of temporary appointments by the Lord Chancellor in England and Wales, such as deputy High Court judges, assistant recorders and acting stipendary magistrates. The Lord Chancellor clearly states in his selection criteria that part time service is a prerequisite for a full time appointment. Equally, periods of temporary service will be important for a future career in the judicial service.

The Lord Chancellor's central role in the appointment process and the fact that he is a senior member of the executive increases the perception that a person appointed for a temporary period may be influenced by extraneous considerations and is not sufficiently independent. The fact that the Lord Chancellor does not seek to influence temporary members of the judiciary is not sufficient to ensure an independent and impartial tribunal. The point is neatly summarised by Lord Reid in his judgement in *Starr and Chalmers v Procurator Fiscal, Linlithgow:*

> The adequacy of judicial independence cannot appropriately be tested on the assumption that the executive will always behave with the appropriate restraint: as the European Court

of Human Rights has emphasised in its interpretation of Article 6, it is important that there be guarantees against outside pressures.

Temporary appointments to tribunals by other persons could equally violate Article 6(1). Lay members of the Employment Appeals Tribunal are appointed by the Secretary of State on a short term basis. In *Secretary of State for Trade and Industry v Mr T. Smith (11/10/99)*, the Employment Appeals Tribunal held that once the Human Rights Act is in force "there is a real and troubling question as to whether employment tribunals may properly and lawfully adjudicate on claims made against the Secretary of State."

On 4 April 2000, the Scottish Court of Session, in *Clancy v Caird (No 0199/6/97)*, ruled that the use of temporary judges did not necessarily violate Article 6(1) of the Convention. In that case, the court found that the judges' three year period of appointment was not unreasonably short; the judges were not vulnerable to dismissal in the course of their employment; they enjoyed the same status as other judges and were subject to the same procedures; and they did not sit in sensitive cases involving the state.

The Lord Chancellor announced, on 12 April 2000, new rules regarding the service of part-time judicial office holders. The rules apply to a wide range of part-time appointments made by the Lord Chancellor to courts or tribunals, and appointments made by the Secretary of State for Social Security and the Chancellor of the Exchequer. Part-time appointments will now be for a minimum period of 5 years and will be renewed automatically except in the case of, *inter alia*, misbehaviour, incapacity, persistent failure to comply with sitting requirements without good reason or due to a reduction in numbers because of changes in operational requirements. Part-time appointees can also be removed on the same basis. The decision to remove or not to renew an appointment will be taken by the Lord Chancellor only with the concurrence of the Lord Chief Justice, following an investigation by a judge.

The Lord Chancellor

In the case of *McGonnell v the United Kingdom* (8 February 2000), the European Court of Human Rights ruled that Article 6(1) of the Convention had been violated as the Bailiff of Guernsey's position within the constitutional framework of Guernsey was sufficient to cast some doubt on his judicial impartiality.

The Bailiff of Guernsey plays a central role within most government institutions and is effectively head of the legislature, the executive and the judiciary. As President of the States of Deliberation, the legislative body,

the Bailiff is responsible for advising the legislature on constitutional matters, participating in debates and has a casting vote if the chamber is evenly divided. As head of the judiciary the Bailiff is President of the Royal Court and President of the Court of Appeal. The Bailiff hears cases and advises lay jurats on questions of law who then decide the case. The jurats are elected by the States of Election, of which the Bailiff is also President. The European Court stated, without advocating any particular constitutional doctrine, that

> any direct involvement in the passage of legislation, or of executive rules, is likely to be sufficient to cast doubt on the judicial impartiality of a person subsequently called on to determine a dispute over whether reasons exist to permit a variation from the wording of the legislation or rules at issue. (paragraph 52)

In a concurring judgement, Sir John Laws stated that a violation had taken place only because the Bailiff had presided over the passage of the legislation that was at issue in the judicial proceedings. This view is also expressed in the main judgement. He emphasised that he would firmly dissent from an interpretation of paragraph 52 that would place a violation of Article 6(1) "on any wider basis, having regard to the Bailiff's multiple roles."

The Lord Chancellor occupies a somewhat similar position within the UK constitutional system. As head of the judiciary the Lord Chancellor is the head of the Supreme Court of England and Wales and is the Presiding Chairman of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. He delegates the responsibility of selecting Law Lords to hear individual cases to the senior Law Lord, but has the final deciding power. The Lord Chancellor can sit on any cases he chooses, only subject to common law requirements of fairness, although he rarely does so.

The Lord Chancellor is also the Speaker of the House of Lords and introduces and speaks in support of legislation on behalf of the government. He has full voting rights within the House of Lords. Finally, the Lord Chancellor is a senior minister within the executive with responsibility for the administration of justice. The Lord Chancellor has no security of tenure and holds office at the discretion of the Prime Minister.

Whilst not arguing that the Lord Chancellor acts in a biased manner, objectively, his executive and legislative responsibilities conflict with the exercise of judicial power and the maintenance of the independence of the judiciary. The lack of any security of tenure, and his central role within the executive fail to provide any objective guarantees that the Lord Chancellor will be free from improper influences in exercising his judicial functions.

Although by convention the executive does not attempt to influence the judicial process or members of the judiciary, this is not a "sufficient guarantee" as required by the court in *Findlay v The United Kingdom* (25 February 1997). The participation of the Lord Chancellor in the judicial process is sufficient to raise a legitimate doubt that the tribunal is not impartial.

Although, due to changes in the operation of the House of Lords, it is rare that the Lord Chancellor sits in a judicial role, he makes the final decision whether to sit in any case. It is possible to rely on the Lord Chancellor to recuse himself when he perceives there may be a conflict of interests, but the absence of any specific guidelines or requirements as to when he should do so does not promote the appearance of independent and impartial decision making.

Furthermore, the participation of other Law Lords in the legislative process may be sufficient to cast doubt upon their objective impartiality in particular cases involving the interpretation of a piece of legislation. As members of the House of Lords they may be called upon to participate in debates, give opinions on legal matters and vote on legislation, and therefore are directly involved in the passage of legislation. This potentially gives them an advisory and a judicial function in respect of the same decisions. This may particularly be the case where there is a question of incompatibility with Convention rights as defined in the Human Rights Act 1998. This doubt may be vitiated by the fact that at least five Law Lords will hear a case before the House of Lords, so one judge will not be solely responsible for the interpretation of a law.

On 2 March 2000, the Lord Chancellor announced that he would take care not to sit in cases that would violate Article 6 of the Convention, and recommended that Law Lords exercise circumspection when participating in debates in the House of Lords. Furthermore, in April 2000 the Lord Chancellor announced the creation of a new post of Senior Law Lord, to head the Appellate Committee of the House of Lords, to which the Lord Chief Justice was appointed.

Pinochet Case

Concerns have been raised about the potential ramifications of the judgement by the House of Lords in *In Re Pinochet*. It was not clear from the judgement what kinds of activities would be sufficient to ground a claim of judicial bias. The response to this has been an increase in the number of challenges by litigants to the independence and the impartiality of the court in their proceedings. This has led to a wider public debate regarding the situations in which a judge's personal interest would be sufficient to disqualify them in a particular case. Some concerns have been raised that judges will

be excluded from participating in a range of activities, such as human rights, that may increase the potential for allegations of bias. In a recent decision by the Court of Appeal, *Locabail v Bayfield Properties and others (17/11/99)*, it was held that judges should only recuse themselves if there is a "real danger or possibility of bias."

Access To Justice

As part of the government's program of modernising the justice system in the UK, the Access to Justice Act 1999 was passed on 27 July 1999 *(see Attacks on Justice 1998)*. This act contains substantive reforms to the legal aid system, replacing the Legal Aid Board with a Legal Services Commission (LSC). The LSC will manage the bodies directly responsible for the provision of services, the Community Legal Service and a Criminal Defence Service. The act will eventually limit the provision of legal aid services to lawyers employed directly by one of the services or other lawyers contracted to the Legal Services Commission.

Lawyers in the UK have been particularly concerned by the extent of control that the Lord Chancellor has over the determination of priorities, access and maximum costs that can be charged under the new system. The ability to set priorities allows the Lord Chancellor to limit the funding of cases in sensitive areas such as immigration, asylum and public law in general. Further, the exclusive contracting system inhibits the provision of legal aid services by new firms and the development of new areas of law. These provisions allow the Lord Chancellor's Department to influence the type, extent and quality of the legal service that lawyers can provide.

Section 47 of the act also allows the Lord Chancellor to make an order to amend Section 11(3) of the Solicitors Act 1974, which allows the Law Society to use the fees raised from the profession for any of its purposes. Under the current arrangements fees paid to the Law Society for obtaining a licence to practice law and from those lawyers who become members of the Law Society are pooled into the same fund. Section 47 will allow the Lord Chancellor to specify that licence fees can only be used for the purposes of regulation, education and training, or any other such purposes that the Lord Chancellor considers appropriate. Concerns were raised that this would inhibit the ability of the Law Society of England and Wales to represent the profession's interests.

The Lord Chancellor responded to a letter from the International Bar Association regarding these concerns, stating that he felt it was "wrong in principle that solicitors should be compelled to pay for activities which they do not support, which relate to the Law Society's representation or trade

union activities, or which have no wider public interest." He further stated that he would consult with the Law Society and that no order would be made under this provision for at least eighteen months.

NORTHERN IRELAND

In Northern Ireland, after protracted negotiations regarding the establishment of power sharing institutions and a timetable for weapons decommissioning, a Cabinet was formed on 29 November 1999. The Cabinet consisted of four Ulster Unionist Party, four Social Democratic and Labour Party, two Democratic Unionist Party, and two Sinn Fein members. On 2 December 1999 the UK parliament formally transferred powers and the 1998 Good Friday Agreement was enacted between the UK and Irish Governments. The North-South Ministerial Council and the Council of the Isles, established under the Good Friday Agreement, held their inaugural meetings on 13 and 17 December 1999 respectively (*see Attacks on Justice 1998*).

In February 2000 after a report by General John de Chastelain, head of the Independent International Commission for Decommissioning, noting the failure of the IRA to decommission any weapons, the institutions established under the devolution process were suspended.

HARASSMENT OF LAWYERS

Attacks on Justice has reported on the systematic harassment of lawyers by RUC officers in Northern Ireland since 1989. The Special Rapporteur on the Independence of Judges and Lawyers concluded in his report of the 5 March 1998 (E/CN.4/1998/39/Add.4) that harassment resulted from the RUC identifying lawyers who represent those accused of terrorist related offences with their clients' causes. The harassment ranges from interference with the solicitor/client relationship, to physical violence, and death threats. In two cases, lawyers have been murdered by unknown assailants. The tragic murders of **Rosemary Nelson** in March 1999 and **Patrick Finucane** in February 1989 still remain unsolved.

The developments in the peace process and the introduction of audio recording have led to a decrease in cases of harassment of lawyers. However, harassment still continues in Northern Ireland. It has been reported that police continue to issue threats outside the interview procedure and even when recording is taking place. As a result of continuing harassment some lawyers have sought protection under the Key Persons Protection Scheme provided by the Northern Ireland Office. This scheme

had several faults, including a risk assessment by the RUC, the people often responsible for the threats. The system has been improved in some respects, with a home security assessment, part of the evaluation for eligibility, now carried out by a private security firm, rather than by the RUC.

Although some lawyers have been granted protection under the scheme, others continue to be denied access, despite them being active in defending those accused of violent activities. Governments are required to safeguard lawyers when their security is threatened in the discharge of their functions. With the obvious threat to the lives of lawyers in the Northern Ireland criminal justice system, protection should be granted under the scheme.

The Independent Commission on Policing and the Criminal Justice Review

The Independent Commission on Policing for Northern Ireland, established under the 1998 Good Friday Agreement, delivered its report in September 1999. The Commission, chaired by Mr Chris Patten, was mandated to formulate proposals for future policing arrangements and to develop policies to encourage widespread community support. The report was welcomed by the Secretary of State for Northern Ireland, the Rt. Hon Peter Mandelson, who indicated that the government would implement the majority of the report's recommendations.

The report stated that the fundamental purpose of policing should be the protection and vindication of the human rights of all and recommended a program of action to focus policing on a human rights based approach. This included recommendations for a new police oath and code of ethics, human rights training for police officers and that a lawyer with specific expertise in the field of human rights be appointed to the staff of the police legal service. The Commission also recommended the renaming of the police force from the Royal Ulster Constabulary (RUC) to the Northern Ireland Police Service.

However, the report failed to explicitly address police harassment of lawyers. Lawyers in Northern Ireland have been subject to verbal and physical harassment, stemming from improper association with their clients' causes. It is important that police officers be educated about the role that lawyers play in protecting their clients' interests and upholding human rights values. All accused have the right to legal assistance and lawyers must be able to perform their tasks free from hindrance. Greater consultation should be encouraged between lawyers and police as a means of increasing awareness of human rights issues.

In October 1999, Ms Nuala O'Loan was appointed as Police Ombudsman. This office will replace the Independent Commission for Police Complaints. Ms O'Loan will be responsible for investigating complaints regarding the conduct of police officers.

The *Review of the Criminal Justice System of Northern Ireland (March 2000)* addressed the harassment of lawyers and emphasised that legal assistance is a primary measure of ensuring the protection of the human rights of people accused of criminal offences. The review also stated:

> that government has a responsibility to provide the machinery for an effective and independent investigation of all threats made against lawyers and note the role of the Police Ombudsman if such allegations relate to the actions of police officers ... (and) that training seminars should be organised to enable police officers and members of other criminal justice agencies to appreciate the important role that defence lawyers play in the administration of justice and the nature of their relationship with their clients.

The International Commission of Jurists (ICJ) and the Centre for the Independence of Judges and Lawyers (CIJL) organised a workshop on the criminal justice review in June 1999. The workshop was a closed meeting attended by members of the Criminal Justice Review Group, the Special Rapporteur on the Independence of Judges and Lawyers, Lord William Goodhart (House of Lords), Justice Michael Kirby (High Court of Australia), and representatives of various ICJ sections.

Human Rights Mechanisms

The Good Friday Agreement mandated the establishment of a Northern Ireland Human Rights Commission (NIHRC), which was established on 1 March 1999, consisting of commissioners appointed by the Secretary of State for Northern Ireland. The NIHRC is mandated to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights, to assist individuals in bringing cases to enforce their rights, and in limited circumstances it can institute proceedings itself. The NIHRC also is to play a central role in the development of a Bill of Rights containing rights supplementary to the Convention reflecting the particular situation in Northern Ireland. However, considering the scope of its functions, the Commission is inhibited from a full and effective performance due to a limited annual budget of £750,000.

Audio Recording of Interviews

In May 1999, a code of practice regulating the audio recording of police interviews of suspects held under emergency laws was introduced. The code applies to persons detained under Sections 14(1)(a) or (b) of the Prevention of Terrorism (Temporary Provisions) Act 1989. The code sets out detailed recording procedures for interviews ensuring that the entire interview is recorded, that all people present in the interview identify themselves and that the recordings cannot be tampered with. However, it does grant the interviewing officer the discretion to not record the interview when it is impracticable to do so, or they consider on reasonable grounds that the interview should not be delayed. This potentially leaves the system open to abuse, without proper guidelines of what are reasonable grounds.

On 13 December 1999, the closure of Castlereagh Holding Centre was announced. The CIJL had frequently called on the UK Government to close this centre, as it had been the site of many human rights violations by the police and security forces, including the making of threats against the safety of lawyers. However, two other detention centres in Derry and Armagh remain open. Audio and video recording equipment has been installed at these locations.

Terrorism

The government introduced a new Terrorism Bill into the House of Commons on 2 December 1999. This bill is intended to replace the Prevention of Terrorism (Temporary Provisions) Act 1989, the Northern Ireland (Emergency Provisions) Act 1996, and Sections 1 to 4 of the Criminal Justice (Terrorism and Conspiracy) Act 1998. The new legislation will be permanent once enacted and will apply uniformly throughout the UK.

The bill defines terrorism as the use or threat, for the purpose of advancing a political, religious or ideological cause, of action which involves serious violence against any person or property; endangers the life of any person; or creates a serious risk to the health or safety of the public or a section of the public. The new bill applies to acts of terrorism throughout the world.

In light of the continuing terrorism problems in Northern Ireland the government included in Part VII of the bill special provisions relating to that area. Clause 111 of the bill specifies that this part will cease to have effect one year after coming into force, but it may be renewed for twelve month periods by the Secretary of State for Northern Ireland for up to five years. Part VII continues the operation of the Diplock Courts which deny those accused of scheduled offences of trial by jury. The provisions

regarding detention without warrant have been improved, only allowing an initial period of detention for 48 hours. Any extension of detention must then be authorised by a judicial authority. However, there is no provision for access to legal counsel during detention, except in the case of persons detained in Scotland.

The Criminal Evidence (Northern Ireland) Order 1988, which allows negative inferences to be drawn from the accused's silence, was modified by the Criminal Evidence (Northern Ireland) Order 1999. Article 36 provides that these negative inferences may not be drawn if the accused was not allowed an opportunity to consult a solicitor prior to questioning. However, under emergency laws, there is still no right for the suspect to have access to legal counsel during questioning.

Cases

Patrick Finucane {lawyer}: Mr Finucane was murdered in front of his family on 12 February 1989 (*see Attacks on Justice 1990 onwards*). The Deputy Commissioner of the London Metropolitan Police, Mr John Stevens, was placed in charge of the reopened murder investigation in March 1999. Mr Stevens had already headed two previous investigations into Mr Finucane's murder. As a result of the reopened investigation, eleven suspects were arrested, with four being eventually charged.

Mr William Stobie, one of those charged, was arrested in June 1999 and charged with murder. During his arraignment Mr Stobie stated that at the time of Mr Finucane's death he was a police informer for the Special Branch, as well as a member of the Ulster Defence Association, and on the night of the murder had given the Special Branch information that a person was to be shot. These allegations were detailed in an article in The Sunday Tribune by Ed Moloney on 27 June 1999. The article stated that Mr Moloney had first met Mr Stobie in 1990, and has met him on three further occasions since that time.

Mr Stobie alleges that a week before the murder of Mr Finucane he informed the Special Branch that someone was to be killed, and that the commander of the operation was well known to the police. On the night of the murder he also informed Special Branch of the provision of guns for the murder and that he believed it to be imminent. He further alleges that after the murder an RUC Special Branch operation watched the disposal of the murder weapons without taking action. He believes this to be strong evidence that the RUC colluded in the murder of Mr Finucane.

News reports of 23 January 2000 state that six members of the Ulster Defence Association suspected of the murder of Mr Finucane have been identified and their case files delivered to the Director of Public Prosecutions for further action.

The CIJL, along with other human rights organisations, the NIHRC and the Special Rapporteur for the Independence of Judges and Lawyers has called for an Independent Judicial Commission of Inquiry into the circumstances of Mr Finucane's death.

Rosemary Nelson {lawyer}: Rosemary Nelson was murdered in a car bomb attack on 15 March 1999 *(see Attacks on Justice 1998)*. Responsibility was claimed by The Red Hand Defenders, a dissident loyalist group. Ms Nelson had received death threats in the years preceding her murder, and many of her clients reported that members of the RUC had made threats against her safety.

On 10 January 2000, the Northern Ireland Office informed the Special Rapporteur on the Independence of Judges and Lawyers that, after consideration of the report of Commander Mulvihill, it had decided not to prosecute allegations of threats against Ms Nelson due to insufficient evidence.

Ms Nelson's murder investigation is being headed by Colin Port, Deputy Chief Constable of the Norfolk Constabulary in England. There are serious concerns about the independence of the investigation of Mr Port as he must report to the RUC Chief Constable. The investigation is also being carried out in RUC offices in Lurgan, where many threats were made against Ms Nelson, and makes use of members of the RUC. Although later efforts were made to reduce RUC involvement in the investigation, the initial stages were carried out almost entirely by RUC officers.

In December 1999, *British Irish Rights Watch* published a report regarding the murder of Ms Nelson. This report was strongly critical of the failure to provide adequate security, and provided evidence indicating official collusion in the murder of Ms Nelson. In light of this report, and the threats issued by the RUC against Ms Nelson, it is essential that an independent body be established to investigate the circumstances surrounding her murder.

The CIJL, along with other human rights organisations has called for an independent Judicial Commission of Inquiry to investigate the circumstances of Ms Nelsons death.

UNITED STATES OF AMERICA

The United States has a wide range of judicial selection procedures. At the state level there are three main selection methods, by the legislature or executive, by an independent body, or through popular election procedures. Partisan election processes raise some concerns. A large percentage of funding for these campaigns comes from special interest groups or attorneys. These practices are not adequately safeguarded by appropriate disclosure or contribution limits. The American Bar Association has long been a supporter of merit selection by an independent body.

The United States of America (USA) is a federated union of states. The Constitution of the USA embodies the principle of the separation of powers and was ratified by the several states of the Union in 1788. In 1791 the first ten amendments to the Constitution, known as the Bill of Rights, were ratified, containing many fundamental civil rights. Since the formation of the Union the USA has had a long history of respect for the principles of parliamentary democracy.

Article I of the Constitution vests the legislative power in Congress which consists of a House of Representatives and a Senate. The members of the House of Representatives are elected every second year by popular election, and the members of the Senate every sixth year by popular election. The Congress has the power to legislate on the subjects enumerated in Article I, section 8 of the Constitution. Among these are the collection of taxes, the establishment and maintenance of armed forces and to define and punish offences against the law of nations. All citizens eighteen years or older of the United States of America are entitled to vote, but it is not compulsory. Article II of the Constitution vests the federal executive power in the President of the United States of America who is elected by a popular vote for a term of four years. The federal judicial power of the United States of America is vested by Article III of the Constitution in the Supreme Court and in such inferior courts as Congress may establish.

The states have a system of government similar to that of the federal government consisting of a legislature, executive and judiciary. The head of the executive at the state level is the Governor, who has varying levels of power depending on the state. State governments have the power to make laws with respect to any subject that has not been specifically granted to the federal government. In some instances however, states can also make laws in areas granted to the federal government.

The Judiciary

The Federal Judiciary

The federal judicial system is established and regulated by Article III of the Constitution and Title 28 of the United States Code. The federal court structure consists of the US Supreme Court, the 13 Circuit Court of Appeals and the 94 District Courts. Other specific subject matter courts, such as the US Court of International Trade, the US Court of Federal Claims and the Military Courts also form part of the federal judiciary.

The federal courts have jurisdiction over all cases arising under the Constitution or federal laws and treaties, cases between states or individuals and states, and disputes involving the United States of America. The District Court is the court of first instance and the Circuit Court of Appeal is the court of first appeal, and these courts deal with the preliminary stages of federal disputes. The US Supreme Court consists of a Chief Justice and 8 other justices and has final appellate jurisdiction in all federal matters. For almost all cases the Supreme Court decides for itself which cases it will accept for review.

Federal Judicial Appointments

Federal judges are granted tenure for life and are guaranteed a compensation that cannot be reduced during their term in office by Article III of the Constitution. Judges in federal courts hold their offices during good behaviour and can only be removed through the impeachment mechanism in Article II, section 4 of the Constitution.

Potential candidates for the federal courts are nominated by the President with the advice and consent of the Senate. The judiciary has no formal role to play in the nomination of new candidates, although members of the judiciary can be consulted in an ad hoc manner to determine appropriate candidates. Senators and the federal Attorney General can also recommend nominees for the District Court and the Circuit Court of Appeal. These candidates are then referred to the Senate Judiciary Committee which gathers information on the candidates, conducts hearings and presents a formal recommendation to the Senate. The recommendation must then be confirmed by the Senate.

The scope of the Senate's role in providing advice and consent in the selection of judges is undefined, enabling procedures to be used, such as litmus tests, that are not consistent with judicial impartiality. A litmus test involves questioning a candidate as to how he or she would decide a

particular case if appointed to the bench. Common questions include those on capital punishment or on the right to abortion. Such questioning indicates that a candidate's integrity, honesty or legal knowledge is not being evaluated, but rather how they would decide particular cases. However, candidates often refuse to answer such questions on the basis that the issues may come before them in court.

Recently, deliberations by the Senate Judiciary Committee have been characterised by partisan politics, as the Republican Party controlled Judiciary Committee has attempted to slow down judicial appointments of judges with a perceived Democratic Party political ideology. As of 1 February 2000, there were 79 judicial vacancies in the federal courts with several positions remaining vacant for up to 6 years. The delays in the appointment of judges to fill vacancies, or the failure to create new judgeships reduces the ability of the court system to provide efficient justice. Further, the provision of adequate resources to the judiciary is a basic duty of the state to enable the effective functioning and to safeguard the independence of the judicial system.

The State Judiciary

Each of the 50 states of America has its own Constitution which establish the legislative, executive and judicial branches. All states have a court system similar to the federal system consisting of a final court of appeal and several levels of subordinate courts at appeal or trial level. The procedures for the appointment of judges and the characteristics of their tenure vary considerably between states. Generally, judges at the state level are selected for a limited time period after which their tenure is subject to renewal through a variety of mechanisms, such as executive or legislative reappointment, retention elections or by running for re-election.

State Judicial Selection Methods

The initial selection mechanism for judges can be divided into three broad categories: selection by the legislature or executive, merit selection, and popular election. Each state may have a different selection method for the various levels of state judiciary. The selection method may also vary within a judicial office, for example appointment by the executive followed by public retention elections at the end of each term. Due to the complexity and variety of procedures amongst the states and within their judiciaries, reference in this section is only to the initial selection process for final appellate court judges.

Selection by the Legislature or Executive

In some states judicial selection is undertaken by the executive or the legislature. Where selection is undertaken by the executive, the Governor, as head of the executive, will determine which candidates will be selected for official nomination. The actual candidate evaluation process is usually carried out by a delegate, with the Governor responsible for the final selection. A list is prepared based on certain criteria, usually including the judges' qualifications or experience, evidence of good character and, potentially, the candidate's political alignment, and then a selection is made. Other bodies may be consulted, such as bar associations, but there is no legal requirement to do so and no obligation to follow their recommendations. Nominations by the executive for judicial office are then appointed by the Governor or may be subject to further approval by the legislature. Alternatively, the entire selection process can be carried out by the legislature.

In the states of Maine, New Jersey, and Delaware members of the judiciary are selected and appointed by the Governor with the consent of the Senate. In New Hampshire candidates are selected and appointed by the Governor with the consent of the executive council. In Virginia candidates are selected by a Senate committee and then approved in a vote by the majority of members elected to each house of the General Assembly. Initial appointment may be followed by a re-appointment by the legislature or a re-election or retention procedure at the end of the judicial term, or next general election.

The state of California utilises a method of judicial selection that combines selection by the executive with evaluation by an independent body. Article VI, section 16 of the Constitution provides for the election of judges. A candidate is nominated by the Governor who submits the name to the Judicial Nominees Evaluation Commission. This commission evaluates the candidate and then reports its findings to the Governor. The Governor will then officially nominate the candidate, and that nomination will be reviewed by the Commission on Judicial Appointments created by Article VI, section 7 of the Constitution. This commission, consisting of the Chief Justice of the Supreme Court, the Attorney General and the presiding justice of the Courts of Appeal must confirm or reject the nomination. If the Commission confirms the nomination the candidate is sworn into office and is subjected to voter approval at the next gubernatorial election. After the expiration of the judge's term in 12 years the judge will then be subject to a retention election. California is classified under this selection method as the determination as to which candidates are to be submitted for evaluation is made exclusively by the executive.

Selection entirely by the executive or the legislature may not adequately provide enough objective safeguards to protect against judicial appointments for improper motives.

Merit Selection

Merit selection currently takes place in 21 states. Merit selection involves potential candidates being selected and evaluated by an independent, non-partisan nominations body established by law, and then appointed by the Governor or state assembly. The executive or legislature is bound to appoint judges from those candidates provided by the nominations body. This body can consist of members of the judiciary, members of the state assembly, citizens and representatives of the state bar association. The members of the body are usually appointed by various persons, for example bar associations or the Governor, to promote independent decision making. In many states, for example Connecticut, Tennessee, Missouri and Colorado, persons holding state offices or political party offices are excluded from being members of the commission, providing extra safeguards that the commission will act in an non-partisan manner. Alternatively, there may be requirements that an equal balance of political affiliation amongst the members of the body be maintained.

The nominations body evaluates candidates' qualifications based on their qualifications and experience, integrity, legal knowledge and other criteria, and provides a list of acceptable candidates to the state governor or state assembly, who will then decide whom to appoint. Generally, the selection criteria will be enumerated in law. This system is similar to selection by the executive or legislature, but it has the advantage of separating initial evaluation and nomination from the political process. At the end of their term the judges' performance is evaluated and a determination is made whether they are to be retained, either by an independent commission, the executive or legislature, or by the public in retention elections. In retention elections judges are subject to a yes/no vote by a non-partisan ballot. These elections are intended to increase judicial accountability by allowing the public to evaluate a candidate's performance during their tenure in office.

States under this system often limit the initial appointment periods of those judges selected. In these states judges face retention elections at the next general election after the expiry of a certain time period. If they are retained in those elections they then serve the full appointment period. In the states of Iowa, Kansas, Maryland, Florida, Missouri and Wyoming judges face retention elections after the expiration of a minimum of one year; in Colorado, Indiana and Arizona after two years; and in Alaska, Nebraska, South Dakota and Utah after three years. In the states of New

Mexico, Oklahoma and Tennessee judges appointed to fill vacancies are evaluated at the next general election. In Oklahoma and Tennessee this is by a retention election and in New Mexico this is by a partisan election. After re-appointment, in these states, the judges hold office for the unexpired tenure of the office to which they were appointed before again contesting a retention election to be able to serve a full term.

There is a concern that the shortness of initial appointment, which may amount to a probationary period, will subject judges to elections based on the quality and popularity of their judgements over a short time frame. This leaves the judiciary particularly susceptible to campaigns by political groups focusing on a particular decision or a single issue, rather than a history of judicial practice.

Judicial Elections

Judicial elections for final appellate court judges take place in 22 states. This process involves candidates for judicial positions being directly elected by the public in popular elections. The election procedure can involve an evaluation of unopposed judges purely on their judicial record or may require members of the judiciary to compete against each other for available vacancies. In 13 states members of the judiciary are elected by a non-partisan ballot, but in the states of Alabama, Arkansas, Illinois, Louisiana, North Carolina, Pennsylvania, Texas and West Virginia, candidates are elected by a partisan ballot. In New Mexico candidates are elected by a partisan ballot after initial appointment by an Appellate Judges Nominating Commission.

Studies into campaign financing in states that conduct partisan elections show that the majority of funding comes from attorneys, with other funding coming from special interest or single issue groups. Funding from law firms that may appear in court before the candidate, or from special interest groups, increases the potential that members of the judiciary will be subject to pressure, mental and physical, from those that appear before them in court. It also diminishes the judiciary's appearance of impartiality and the public's confidence that justice is being performed.

Most of the states in which partisan elections are conducted have reporting requirements for all contributions and a further requirement that contributions over a certain level, usually around $50, be itemised. This requires candidates or their fund-raising committees to state, *inter alia*, the contributor's name, address and the amount of funds contributed. Limitations can be placed on the length of time before an election that money may be contributed or solicited, on those that may contribute, or on direct solicitation or contribution to the judicial candidate. In the latter

situation fund-raising and receipt of contributions is carried out by a committee established for that purpose. A state may also limit, or prohibit entirely, the amount that may be contributed in a particular form, such as in cash or anonymously. The states of Arkansas, North Carolina, Texas and West Virginia limit the amount that can be contributed. In Arkansas contributions of more than $100 per individual and $2500 per political party or political action committee are prohibited. In North Carolina contributions from individuals or political committees to a candidate or their committee are limited to $4000 and in Texas the limit is $5000 for state-wide judicial offices. In West Virginia contributions are limited to $1000 per statewide election. However, in Texas compliance with the contribution limits established under the Judicial Campaign Fairness Act is voluntary.

Texas is the only state, out of those that conduct partisan elections, that has provisions limiting contributions from lawyers and law firms; no more than $50 from an individual lawyer and up to $30,000 in aggregate from a law firm for a state-wide election. None of the states which conduct partisan elections have a mandatory recusal requirement for a judge where they have received excessive contributions from a party that is appearing before them. Only Alabama provides that a party to a case can request that the presiding judge be removed when the other party has donated more than $4000 to the judge's campaign.

Popular election procedures, whilst they are consistent with the principles of judicial independence, must safeguard against improper motives and methods. Partisan elections are particularly a concern as they expose judicial candidates to improper influences that can threaten their decisional independence once they are in office. The need to raise funds also increases the appearance of dependence on those that contribute. Principle 10 of the UN Basic Principles on the Independence of the Judiciary states that in the selection of judges there shall be no discrimination against a candidate on the basis of a political or other opinion. Therefore, a judge's political belief should not be a criterion relevant to their election to judicial office.

The issue of undue influence is particularly a concern in states where the death penalty can be imposed. Of the states which conduct partisan elections, all except West Virginia can impose the death penalty. Final appellate court judges in these states must remain free from any external influence in deciding whether a death sentence was legally imposed in any individual circumstance. Judges in these cases are frequently targeted by pro-death penalty organisations, threatening a campaign to remove the judge from office at the next election unless the death sentence is supported. As voting in the United States of America is voluntary, and the percentage of qualified voters voting is often low, judicial elections can be distorted

by well organised, single issue committees who do not represent the general public's opinion of a judge's performance. This is not to say that a member of the judiciary would place the preservation of their career over the life of the appellant. However, these influences threaten the independence and impartiality of the judiciary, and distract the judge concerned from a proper determination in the case.

American Bar Association

The American Bar Association (ABA) has various programs focusing on judicial independence, and it established a Standing Committee on Judicial Independence in 1997. In June 1999 the Standing Committee established a Commission on Judicial Selection Standards to investigate judicial selection methods and to develop appropriate standards for selection processes. The Commission conducted hearings in late 1999, and will make final recommendations to the ABA House of Delegates in July 2000.

The policy of support for the merit selection of judges was reaffirmed by the ABA House of Delegates at the ABA Annual Meeting in 1999. At this meeting the report of the Ad Hoc Committee on Judicial Campaign Finance was also submitted. This committee was formed in 1998 to review the recommendations contained in Part II of the Task Force on Lawyers' Political Contributions formed in 1997. The Ad Hoc Committee's report issued the following recommendations:

- that the ABA re-emphasise, as a first order of priority, the merit selection of judges;
- the organised Bar should support efforts to educate the public about the desirability of merit selection procedures, and to inform the public generally about the nature of judicial responsibilities and the critical importance of judicial independence;
- amendments to the ABA Mode Code of Judicial Conduct, including limiting judges' appointments of lawyers who have contributed over a certain amount to their campaigns; a requirement for judges to disqualify themselves in a proceeding in which the judges' impartiality might reasonably be questioned; the limitation of campaign contributions and increased disclosure of the source of campaign contributions.

The recommended amendments to the ABA Mode Code of Judicial Conduct were adopted by the ABA House of Delegates. The Ad Hoc Committee also recommended that the issue of public funding for judicial campaigns be further evaluated.

Report of the ABA Commission on Separation of Powers and Judicial Independence

In July 1997 the Commission on Separation of Powers and Judicial Independence of the American Bar Association issued its report "An Independent Judiciary." The Commission was assigned the task of examining the state of the independence of the federal judiciary in light of recent events which had threatened that independence. During its inquiries it also gathered evidence on judicial independence concerns in various states and developed a model program of response for state and local associations to unjust criticism of judges.

The Commission gathered evidence from US senators and representatives who chair committees that have jurisdiction over the courts, from federal and state judges, bar leaders and academics. The Commission concluded:

> Maintaining the appropriate balance between independence and accountability of the federal judiciary is of critical importance to our democracy. Current mechanisms for promoting accountability and preserving independence are essentially sound; and efforts to modify them are subjects of concern.

The report recognised that, although at the time of publication there had been recent extensive criticism of judges, this was no worse than at any other time in the nation's history. However, the report made the important distinction between criticism of the judicial decision and a threat that the judge will be removed if the case is not decided favourably. Criticism of the latter type must be condemned as it threatens the independence of the judiciary and is effectively an attempt to improperly influence the judicial process. Judges should be subject to criticism for decisions made contrary to law, as they are not fulfilling their judicial function, and that form of criticism is protected by the first amendment to the Constitution. Criticism that amounts to personal attacks diminishes public confidence in the judiciary and is an attempt to breach the separation of powers.

Included in the report is a model program for state and local bar associations to respond to judicial criticism. This is a welcome recommendation, as the independence of the judicial office requires that members of the judiciary do not respond directly to criticism of their actions. It is necessary that independent groups associated with the judicial system take an active role in defending the decisional independence of the judiciary as this will maintain public confidence in the system as a whole. Also welcome in this area would be a response by the state or federal Attorney General as a display of political support for the independence of the judiciary. Unfortunately, there has not been a substantial response by state and local

bar associations to the model program. Few have set up official processes to respond quickly to criticism, and most only respond on an *ad hoc* basis or not all.

VENEZUELA

A new constitution was approved by plebiscite at the end of the year. A radical restructuring of the judiciary, following serious denunciations of corruption and inefficiency, provided the backdrop for attacks on its independence and the suspension or dismissal of at least 229 judges in the country.

In December 1998, Mr. Hugo Chavez won the presidential election, taking office as President of the Republic at the beginning of 1999. In his campaign Chavez had severely criticised the existing parliament and the judiciary for their corruption and inefficacy in facing the acute national problems. He promised a new constitution. In March 1999, President Chavez called for a referendum to have his plan for the election of a Constituent Assembly to draft a new constitution approved by the people. At the same time he publicly announced the legal powers that the new body would eventually have. The most controversial amongst them was the "full and original power" the Constituent Assembly would enjoy with regard to the existing political institutions and the judiciary. The proposal raised strong concern as it would place the new body above all other institutions and, at the same time, it would not be bound by the Constitution. In mid-March the Supreme Court ruled that the referendum on whether a Constituent Assembly would be elected or not was lawful but its powers should be limited only to the reform of the Constitution.

On 25 April 1999, the referendum was carried out and a wide majority of 85% of voters, with a turnout of only 39.1% of all those legally entitled to vote, backed the plan of electing a Constituent Assembly. People were called to the polls to elect the members of the Assembly on 25 July, and President Chavez's Patriotic Front obtained 121 of the 128 seats (three others were reserved for representatives of indigenous peoples). The Constituent Assembly, which was to draft a new constitution within six months, convened in August and immediately declared itself as enjoying "original and full powers", meaning the assumption of legislative and disciplinary powers together with the power to redraft the 1961 Constitution.

Two resolutions adopted by the Assembly, one declaring a "legislative emergency" and another declaring a "judicial emergency" (*see below*) provoked a constitutional crisis that was partially solved through an agreement brokered by the Catholic Church on 6 September 1999. By virtue of this agreement the resolution declaring the "legislative emergency", which would have practically dissolved the parliament, was repealed and parliament was

to resume its work, although with limited powers, until the new Constitution was approved and entered into force. The other resolution declaring the "judicial emergency" and appointing a special commission was maintained.

Under the insistence of President Chavez, the Constituent Assembly rushed to draft a new constitution that was put to the vote in a national referendum on 15 December 1999. Again, a sweeping majority approved the constitutional text.

The Judiciary and the Decrees of Judicial Emergency

The National Constituent Assembly started its work in August 1999 in the midst of high expectations, and repeatedly denounced corruption and attacks on other institutions. A draft resolution to intervene directly in the judiciary and declare an emergency was presented immediately and debated during two weeks. The Supreme Court reacted to the proposal by convening a plenary session where, by 8 votes to 6, it decided, under pressure, to support the Constituent Assembly's initiative. Chief Justice **Cecilia Sosa Gómez** resigned on the same day (23 August 1999).

Once all opposition from the Supreme Court was overcome, the Constituent Assembly passed a decree re-organising the judiciary (25 August 1999) whereby it declared that:

- The judiciary was in a state of emergency and a special Commission on the Judicial Emergency (CJE) was to be appointed to carry out a programme of reform (Articles 1 and 2).
- Among the powers of this commission are the following: To elaborate the budget for the emergency reform, to give instructions to the Council of the Judiciary and to prepare a plan for the evaluation and selection of judges (Article 3).
- Article 4 provided that the CJE would immediately, within 20 days, evaluate the work of the Supreme Court, the Council of the Judiciary and other judicial institutions.
- The Council of the Judiciary and the Inspector-General of the Judiciary were placed under the direct jurisdiction and orders of the CJE. It was also provided that the CJE would propose to the Constituent Assembly the dismissal of those members of the Council or the Inspector-General who did not follow its instructions (Article 5).
- Article 6 provides that: "The Commission on Judicial Emergency will decide the immediate suspension, without salary benefits, of all judges,

attorneys, and other officers of the Council of the Judiciary, the judicial districts and tribunals, who are facing judicial proceedings for corruption. The decision will be immediately enforced by the Council of the Judiciary in accordance with the instructions given by the Commission on Judicial Emergency".

- Article 7 grants the CJE the power to order the Council of the Judiciary to immediately dismiss a judge involved in serious procedural delays or when the judge's judgements have been often overturned.
- By Article 9 the Constituent Assembly declared itself as the only instance for appeals regarding suspensions or dismissals of judges. The appeal should be made within five days.
- Under Article 10 the Constituent Assembly assumed the power of governing body in the judiciary with the responsibility to organise the selection of judges and to fill the posts left vacant by the process of "reorganisation".

This decree, which is inconsistent with the international obligations assumed by Venezuela, deprives the legitimate institutions of their powers, concentrates all powers in one single institution that has placed itself over all others and even above the Constitution, and violates the individual rights of judges and prosecutors to due process, a number of whom have been suspended or dismissed. The decree subjects the appointment, security of tenure and judicial career of judges and prosecutors to a political body that should normally limit itself to the drafting of a constitution, depriving the legitimate body, the Council of the Judiciary, of these powers. According to some observers the declared objectives of the measure, the need for urgent reforms to combat corruption and inefficiency, are unlikely to be achieved by these means which imply the breach of the Rule of Law and the practical elimination of safeguards for the independence of the judiciary.

The conduct of the CJE during the rest of the year confirms this assertion. Reports say that the CJE made decisions to suspend or dismiss judges without due respect for the right of defence or other guarantees of the due process of law. On 13 September 1999, Ms. **Normarina Tuozzo**, Chairperson of the Council of the Judiciary, resigned from her post in protest against the curtailing of the Council's powers and decisions being taken by the CJE without hearing the Council's opinion.

Many judges - around 230 by the end of the year - were dismissed or suspended from their posts as a result of the application of the emergency decree, or after a summary and flawed procedure was carried out before the CJE. Human rights organisations expressed concern over the fact that decisions were taken on the basis of the judges' political allegiance.

Frequent and direct interventions by members of the Constituent Assembly in decisions on whether or not a judge should be dismissed were also reported. Further interference was also reported, even on juridical matters. For instance, two judges in an appeal court were dismissed for having adopted a decision that the President of the Constituent Assembly disliked.

Shortly after the resignation of the Chairperson of the Council of the Judiciary, the Chairperson of the CJE itself (Mr. **Alirio Abreu**) also decided to resign.

As to the procedure and criteria followed by the CJE to fill the vacant posts resulting from the dismissals and suspensions, Mr. Manuel Quijana, the new Chairman of the CJE, declared in October that consultations with academics and jurists were under way to choose the most competent candidates. The judges filling the vacant posts would serve on a temporary basis and be appointed without public competition as the law of the judicial career mandates (*see Attacks on Justice 1998*).

By the end of August 1999, a petition was filed before the Supreme Court to have the decree on the re-organisation of the judiciary declared unconstitutional and abrogated. The petition was supported by the political opposition and some human rights organisations. In October the Supreme Court dismissed the petition.

The New Constitution

The new Constitution, drafted by the Constituent Assembly and ratified by the people in a referendum held on 15 December 1999, contains provisions concerning rights and guarantees of due process of law, as well as provisions relating to access to courts that did not exist in the former Constitution. The text of the new Constitution guarantees free, accessible, impartial, competent, transparent, autonomous and independent justice (Article 26), and provides that human rights violations and crimes against humanity shall be investigated and tried in ordinary courts and cannot be the subject of pardon or amnesty (Article 29). Further, the guarantees of due process of law, such as presumption of innocence, rights of the defence and the right to be tried by an ordinary tribunal, are all spelt out in detail (Article 49). The same provision prohibits the institution of faceless judges. Controversially, it includes as a part of the due process the right to reparation for miscarriages of justice, opening even the possibility of holding judges personally and criminally responsible for miscarriages of justice (Article 49.8 and Article 255).

With regard to the division of powers the new Constitution extends even further the already large powers of the President of the Republic,

giving him the power to appoint and dismiss his Vice-President and ministers at will, as well as to decide on the promotion of military officers over the rank of colonel (Article 236).

The Constitution provides for a broad definition of the justice system. This is composed of the Supreme Tribunal of Justice (*Tribunal Supremo de Justicia*) and other tribunals to be determined by law, the Public Prosecutor's Office, the Defender-General (*Defensoría Pública*), criminal investigation bodies, assistants, the prison system, the alternative means of justice, citizens participating in imparting justice and practising lawyers (Article 253).

Article 255 establishes that the appointment or promotion of judges shall be made through public competitions in which circuit juries will make the selection. Formerly, the selection and appointment of judges was the responsibility of an independent Council of the Judiciary, an institution that does not exist under the new Constitution. The actual appointment of judges is to be carried out by the Supreme Tribunal but this function is symbolic and limited to rubber-stamping decisions that have already been made. Article 258 provides for the popular election of Justices of the Peace in the communities.

By Article 256 judges, prosecutors and public attorneys are prohibited from carrying out any other activity, except teaching, with the aim of preserving their impartiality and independence. Further, judges are forbidden from forming associations.

The Supreme Tribunal

The Supreme Tribunal is to replace the Supreme Court. Apart from the change of name the new Constitution contains far-reaching and controversial provisions with regard to the powers and organisation of this highest tribunal. A new Chamber of Constitutional matters was created with the power of, *inter alia*, declaring invalid federal or state laws on the grounds of unconstitutionality, and deciding over conflicts of competence between the constitutional branches (Article 336).

Article 264 establishes a general procedure for the selection and appointment of justices of the Supreme Tribunal leaving the details to be developed by law. It sets out a three-stage process whereby candidates apply first to a Committee of Applications that makes a preliminary selection and passes it on to a newly-created body called the Citizen Power (the National Ombudsman, the Prosecutor-General and the Comptroller-General acting together as a Republican Moral Council, Article 273) which makes a second preliminary selection. Finally, the National Assembly (the legislative power) makes a third and definitive selection. The same

provision allows citizens to challenge or object to the candidates at any stage of the process.

Justices of the Supreme Tribunal are appointed to serve for a non-renewable period of 12 years and can be removed or dismissed by the National Assembly with the vote of two thirds of its membership, and only in cases of serious misconduct previously qualified as such by the Citizen Power.

The new Constitution also contains some transitory provisions, among which there are some that directly concern the future organisation and independence of the judiciary. The fourth transitory provision mandates that the new national assembly, to be elected following the provisions of the new Constitution, shall discuss and pass all legislation related to the judicial system during the first year of its work. The ninth transitory provision grants the Constituent Assembly the power to appoint the National Ombudsman.

The constitutional provisions on selection and appointment of judges for the Supreme Tribunal may leave room for political considerations and interests in the process and do not seem to comply with the international standards guaranteeing independence and impartiality of the judiciary. Later developments in the appointment of judges and other magistrates have confirmed this fear. In effect, after the Constitution was approved in referendum in December 1999, and during the holidays at the end of the year the Constitutional Assembly appointed, allegedly on a temporary basis, the members of the new Supreme Tribunal, the Prosecutor-General, the Comptroller-General and the Ombudsman. It also appointed a "temporary congress" to perform the legislative tasks in the transition period to the full implementation of the provisions of the new Constitution. The appointments were made without following the process set out in the new Constitution itself.

The Process of Judicial and Legal Reform

The process of legal and judicial reforms, initiated some years ago, continued with the entry into force of important laws such as the new Code of Criminal Procedure (*Código Orgánico de Procedimiento Penal* - COPP) in July 1999. This law followed two other important laws which had already entered into force at the beginning of the year: the Law of the Judicial Career and the Law of the Council of the Judiciary. However, the future of the process looks uncertain since new legislation needs to be passed to implement the provisions of the new Constitution and many of the positive and innovative institutions in these laws, such as the Council of the

Judiciary, were eliminated by it. A new stage in the reform process is starting in the midst of uncertainty.

The implementation of the COPP was preceded by a preparation stage in terms of training and dissemination of the new code among judges, prosecutors and auxiliaries (*see Attacks on Justice 1998*). However, the implementation faced strong resistance, especially from the Prosecutor's Office and some auxiliary bodies. The pre-implementation stage has also meant an increase in the number of judges and tribunals, although many of the posts are still vacant and the appointment procedure is yet to be developed by a new law in accordance with the new Constitution.

The Law of the Council of the Judiciary, which entered into force in January, increased the number of counsellors in this body from five to eight: four to be appointed by the former Supreme Court, two by the executive branch and two by parliament. However, only the Supreme Court complied with the established deadline. The delay incurred by the other two institutions to appoint the other four counsellors has caused further delays in the work of the justice system. Later, when the Chairperson of the Council resigned (*see above*) she was replaced by a person appointed by the Supreme Court. As a whole the role and even the existence of this body is under question since the new Constitution assigns the powers that formerly belonged to it to other bodies. It seems that the Council will continue to function until a new law laying down the rules for selection, appointment and training of judges and prosecutors is enacted.

The position of the Public Prosecutor has also been the target of undue intervention by the executive and the Constituent Assembly. Following the existing legal provisions parliament appointed a new Prosecutor-General in April 1999. The person elected by parliament did not please President Chavez who harshly criticised the appointment. By the end of the year, the Constituent Assembly appointed a new temporary Prosecutor-General.

Reform of the Military Justice System

The system of military justice constituted the only court system that remained untouched by the criticisms of corruption, inefficiency and slowness launched against the rest of the ordinary judicial system. It was also left outside the radical reorganisation programme implemented during the year by the Constituent Assembly. However, the military justice system continues to be the focus of criticism from human rights organisations and institutions for its continuing extended jurisdiction over civilians, in certain cases, and over all cases involving an active military officer.

The new Military Code of Justice contains several provisions that are inconsistent with international norms on due process and enhance impunity

for military officers who commit human rights abuses. In this regard, some controversial provisions of the old code have not been abrogated but, instead, were reproduced or even widened. For instance, Article 54 of the old code grants wide powers to the President of the Republic to intervene in criminal proceedings before the military tribunals. The President can order criminal proceedings to start or can stop them in the "interest of the Nation". The new code has further extended this power to stop proceedings at any stage.

The powers traditionally enjoyed by the military justice system, which are enshrined in the law amending the Military Code of Justice that entered into force in July 1999, are now in question since they collide with explicit prohibitions in the new Constitution. Article 29 of the constitutional text provides that human rights violations and crimes against humanity shall be investigated and tried in ordinary tribunals.

The critics of the amended Military Code of Justice underlined the fact that no part of this law develops the guarantees and principles of a due process of law, amongst them the independence of judges and prosecutors and the rights of the accused, leaving the impression that the system of military justice should not abide by these principles. Likewise, the provision of a military Prosecutor-General (Article 70) has been questioned as it collides with the principle of unity of the Prosecutor's function.

THE INTER-AMERICAN SYSTEM AND LEGAL DEVELOPMENTS

President Hugo Chavez visited the headquarters of the Inter-American Commission on Human Rights, in Washington, on 22 September 1999. This was the first time ever that a President of any country had visited the Commission at its own headquarters. During the meeting, President Chavez invited the Commission to carry out an *in situ* visit to Venezuela with the aim of becoming more closely acquainted with the events there. The invitation was accepted and the visit will probably take place during the year 2000.

CASES:

Cecilia Sosa Gómez {Chief Justice of the Supreme Court}: She resigned her post on 23 August 1999 after the plenary of the Supreme Court decided to back the Constituent Assembly's initiative to declare an emergency and re-organise the judiciary.

Normarina Tuozzo {Chairperson of the Council of the Judiciary}: Ms. Tuozzo resigned her post on 13 September 1999 as a protest against the curtailing of the Council's powers by the action of the Constituent Assembly and the Commission on Judicial Emergency.

A first group of judges were suspended by the Inspector-General of Tribunals following instructions from the Commission on Judicial Emergency established pursuant to the Decree on Judicial Emergency of 25 August 1999. The judges, against whom there were serious complaints of corruption, were not afforded due process since they were suspended by a body established on an exceptional legal basis and through procedures which were established *ad hoc*.

97 judges were suspended from their posts, allegedly for the accumulation of 7 or more complaints against them, in October 1999. They are the following:

Aida Alvarez Alvarez
Gisela Aranda Hermida
Evelinda Arraiz Hernandez
Pedro Bello Castillo
Alfredo Bolivar Perez
Zuly Julieta Boscan Rincon
Pedro Botero Baselice
Joel Braschi Santos
Saul Bravo Romero
Carmen Teresa Brea Escobar
Francisco Cabrera Bastardo
Alexis Cabrera Espinoza
Felix Cardenas Omaña
Pedro Cardenas Zamudio
Haydee Carrizales
Miguel Angel Caseres Gonzales
Lilia Castillo Rodriguez
Manuel Castro Rausseo
Hugo Contreras Suarez Grecia Coronado de Tovar
Militza Curiel Hernandez
Nemesio Diaz Montaner
Cesar Dominguez Agostini
Arnoldo Echegaray
Maritza Espinoza Baptista
Maria Estaba Gonzales
Manuel Estrada Toro
Alexis Febres Chacoa
Olga Teresa Fortoul de Grau
Nelson Francia

Victor Galindez Yarza
Elsa Gomez Walder
Virginia Gonzales Cisneros
Horacio Gonzales Hernandez
Gloria Gonzales Montero
Maria Gonzales Rodriguez
Luis Angel Gramcko
Isnelda Gravina Alvarado
Carlos Rafael Guia Parra
Ismael Gutierrez Ruiz
Enrique Hernandez Ibarra
Vilma Hulet Story
Rafael Inciarte Bracho
Maritza Lopez Conde
Loida Marcano de Diaz
Juan Carlos Marin Fernandez
Tomas A. Mariño Chacon
Luis Rafael Matute Romero
Adela Medina de Gonzales
Simon Mejias Morachini
Amilcar Merono Garcia
Fanni Millan Boada
Luis Moncada Izquierdo
Ana Morales Langer
Iris Morante Hernandez
Hugo Moreno Perez
Zoraida Mouledos Morffe
Mary Moya de Padilla
Rafael Jesus Mujica
Luis Antonio Nahim Pacha
Maria Oporto de Manrique
Luis Oronoz Bordonez
Maria Otaiza
Ana Paredes Marquina
Carmen Penachio
Francisco Peña Barrios
Jose Antonio Peñaranda
Pedro Perez Alzurut
Nancy Perez Bistochette
Radegungis Perez Zambrano
Carmen Poletti Aguirre
Tito Abel Ramirez
Cristobal Ramirez
Sinsun León Ramirez

Jaime Reis D'Abreu
Gonzalo Rincon Perez
Gonzalo Risquez Amengual
Maria Celeste Rivas Diaz
Thays Rivera Colombani
Jose Rodriguez Avilan
Mary Rodriguez Herrera
Ligia Rodriguez de Peña
Oscar Romero Azevedo
Francisco Russo
Elizabeth Salas Duarte
Ana Yajaira Salazar
Alberto Serrano Pirela
Rafael Solorzano Escalante
Olimpia Suarez de Algarra
Aura Suarez de Contreras
Raquel Subero de Quiñones
Nadeska Torrealba
Flor Maria Tortolero de Salazar
Raul Valbuena Quevedo
Carmen Teresa Vargas Cedeño
Angel Albino Vasquez Madera
Luis Alberto Villasmil
Soraima Vivas Macero

A second group of 63 judges was suspended by the Inspector-General under the same circumstances, without respect for the due process of law and on the instructions of the Commission on Judicial Emergency, in November 1999.

Seventeen were suspended due to the gravity of complaints against them:

Lubin Aguirre
Antonio Andreani Pieretti
Marjorie Bello
Luis Beltran Sanchez
Gimmi Bittar Mardelli
Ivan Escalona
Roberto Gonzales Luque
Edison Lozano
Pedro Marcano Urriola
Clodulfo Marquez
Carmen Perez
Edoardo Petricone

Mercedes Ponce Delgado
Antonio Reyes Sanchez
Deyanira Russian
Maria Simonovis
Jorge Villamizar

The following forty-seven judges were also suspended for serious procedural delays, in November 1999:

Nelida Acosta de Rincon
Hector Albarran
Brady Aranbulo Torres
Laudelino Aranguren
Auxiliadora Arias
Juan Floriano Balza
Ismael Barreda
Eglee Barrios
Omar Belandria Vera
Haydee Borges
Luis Jose Camaripano
Elzy Canizales
Vilma Chaparro
Ana Colmenares
Jose Ramon D'Alessandro
Belkis Alda Garcia
Leopoldo Gonzales
Francisco Gutierrez
Miguel Guzman
Morelia Hernandez
Francisco Lamus
Moraima Look Roomer
Pedro Maldonado
Margarita Marin
Rosa Martinez de Pohl
Luisa Maria de Martinez
Jesus Mata Cacharuco
Josefina Melendez
Teresa Mendez de Quintero
Danilo Mojica Monsalvo
Virginia de Montesinos
Sonia Motta Navarro
Neyla Negron
Rosario Nouel
Pedro Jose Ochoa

Mario Popoli
Diomedes Potentini
René Ramirez Contreras
Freya Rodriguez
Pedro Jose Rodriguez
Sonia Rosales
Teresa Santana
Ana Teresa Solorzano
Olimpia Suarez
Jose Manuel Sue Machado
Fernando Torres Angel Vasquez Madera

A third group of 67 jurists, including some lawyers who work at the legal aid office, was suspended by the Commission of Judicial Emergency itself, allegedly due to the gravity of the complaints against them, on 13 December 1999:

Rafael Albahaca
Angel Altuve
Maria Arias
Juan Balza
Amalia Blanco
Nancy Blanco
Jose Briceño Monzon
Jose Cabrices
Nancy Campos Silva
Tomas Castillo
Nelson Chacon Q.
Luis Contreras
Salvio Contreras
Francisca Daboin
Argenis Delgado
Tania Delgado
Leonardo D'Onofrio
Beatriz Frigueredo
Carmen Garcia
Felix Gomez Fermin
Elena Guanchez
Angel Jurado
Hernan Landinez
Raiza Lares
Illany de Lima
Aida Leon de Obadia
Josefa Mago
Osman Maldonado

Jose Gregorio Marrero
Humberto Mendoza de Paola
Danilo Mojica
Martina Molina
Victor Mora Contreras
Eliseo Moreno
Maria Rosario Paolini de Pal
Indira Paris
Maria Parra
Elis Pereira
Genaro Pereira
Carlos Andres Perez
Aristides Perez Ovallos {lawyer}
Frann Petit
Mercedes Ponce Delgado
Rolando Quintana Ballester
Idencio Ramirez
Hilarion Riera
Pedro Rivas
Tirsa Rivero
Carmen Elena Rodriguez
Aura Rojas
Juana Romero
Venezuela Rondon
Benito Salas
Freddy Sanchez
Maria Silveira
Luis Teneud
Miriam Torres Pacheco
Ilse Tosta
Pedro Troconis
Wenceslao Uzcategui
Dionis Velasquez
Carlos Velez
Jose Venero
Ligia Venero
Carlos Vizcarrondo
Salvio Yanez
Vicente Zevola

THE FEDERAL REPUBLIC OF YUGOSLAVIA (SERBIA)

Over 40 proceedings for dismissal of judges and presidents of courts were instituted because they were members of the Association of Judges of Serbia. The 1998 Act on Lawyers restricts the freedoms of lawyers because the lawyer's chambers at federal and republic level have strict control over the profession. In Kosovo the civil administration component of UNMIK is trying to rebuild the judiciary.

On 11 April 1992 Serbia and Montenegro proclaimed the Federal Republic of Yugoslavia (FRY) and together claimed to be the official successor of the former Socialist Federal Republic of Yugoslavia. The UN Security Council denied that Serbia and Montenegro was the sole successor to the former Socialist Federal Republic of Yugoslavia and required it to make a new application for admission.

Besides the two republics, Serbia and Montenegro, the Federal Republic of Yugoslavia has two autonomous provinces: Kosovo and Vojvodina. The province of Kosovo in Serbia, with a mainly ethnic Albanian population, was given almost complete autonomy by the 1974 Constitution of the former Yugoslavia. During the 1980's voices calling for Kosovo to be made a full republic became stronger, but in 1989 the President of Serbia reduced Kosovo to an administrative region of Serbia and the Albanian language and cultural institutions were suppressed. The Kosovo self government was dissolved by Serbia in 1991 after the ethnic Albanian leaders had proclaimed an independent "Republic of Kosovo".

In 1996 the Kosovo Liberation Army (KLA) emerged to fight for independence. An armed conflict between the Serbs and the Kosovo Albanians erupted when on 2 January 1999 an earlier truce between the Serb forces and the KLA was broken. The ethnic cleansing by Serb and Yugoslav forces that followed between January and June 1999 forced thousands of ethnic Albanians to flee.

Forced by the international community, negotiations started on 6 February in Rambouillet (France). When no peace deal could be brokered, on 24 March 1999 NATO began a daily air-strikes campaign, known as "Operation Allied Force", against military targets in FRY, followed by an EU oil embargo, beginning on 30 April 1999. Early in June 1999, the war was formally ended, the NATO bombing stopped and, according to UN Security Resolution 1244, the UN Interim Administration Mission in Kosovo (UNMIK) was established. Bernard Kouchner was appointed head

of UNMIK whose goal is to organise a civil administration, coordinate humanitarian assistance, promote democratisation and institution-building, and restore the economy. On 10 June 1999, NATO deployed a peacekeeping force, K-FOR, in the province as the Yugoslav military withdrew from Kosovo in accordance with the Military Technical Agreement.

On 27 April 1992, the Constitution of the Federal Republic of Yugoslavia came into force. According to Articles 96 and 97 of the Constitution the President of the Federal Republic is the head of state and cannot be from the same republic as the Prime Minister who is the head of the government. The President is elected for a four-year term and cannot be re-elected. Slobodan Milosevic is President of the Federal Republic of Yugoslavia, Momir Bulatovic is Prime Minister of the Federal Republic of Yugoslavia, Milo Djukanovic is the President of Montenegro and Milan Milutinovic is President of Serbia.

The 1990 Constitution of the Republic of Serbia has, to date, not been brought into conformity with the 1992 federal Constitution and this gives rise to abuse and confusion. According to Article 155 of the federal Constitution "the constitutions of the member republics...must be in conformity with the Constitution of the Federal Republic of Yugoslavia".

The Federal Assembly (*Savezna Skupština*) consists of the Chamber of Citizens (*Vece Građjana*) and the Chamber of Republics (*Vece Republika*). Deputies to the Chamber of Citizens represent the citizens of the Federal Republic, while deputies to the Chamber of Republics represent the member republic from which they were elected.

The Republic of Montenegro has distanced itself from the "ethnic cleansing" carried out by the *Milosevic* regime in Belgrade and is slowly moving towards independence. On 2 November 1999 Montenegro adopted the German mark as its official currency.

Human Rights Background

Kosovo

Thousands of Kosovo Albanians were killed, their houses were burned and women were raped in the "ethnic cleansing" by the Serb and Yugoslav forces between January and June 1999. International investigations into the events are currently undergoing. Thousands of Kosovar Albanians fled to Macedonia and Albania and later found refuge in other European countries.

On 27 May 1999 the UN International Tribunal for the Former Yugoslavia in the Hague indicted President Milosevic and four other Serbian leaders on charges of crimes against humanity. This was the first time that an acting head of state had been indicted for war crimes.

After the war ended Kosovo Albanians resorted to violence against Serbs, Roma, Bosniaks and other non-Albanians after their return to Kosovo, despite the presence of UNMIK and K-FOR.

In March 1999, a personal envoy to Kosovo was dispatched by the UN High Commissioner for Human Rights along with the Special Rapporteur on the Situation of Human Rights in Yugoslavia. The High Commissioner also created the Kosovo Emergency Operation in Albania, the former Yugoslav Republic of Macedonia and the capital of Montenegro, Podgorica. The purpose of these deployments was "to register concern for the human rights situation then prevailing in Kosovo and to gather first-hand information about those violations for the purpose of accountability". In addition, the High Commissioner conducted several missions to the region in 1999.

The reports of the Office of the High Commissioner confirmed the crimes of the Serbs against the Albanian population of Kosovo and also drew attention to the current attacks by Kosovo Albanians on the Serb, Roma and other minorities, despite the international presence in the region.

Serbia

The adoption of the Decree on the Proclamation of a State of War on 24 March 1999 by the federal government established the possibility for the passing of a spate of decrees restricting freedoms and rights of citizens. Only two weeks later the Decree on Enforcement of the Criminal Proceedings Act during a State of War (Official Gazette of the FRY, no. 21/99) was adopted (4 April 1999). Provisions of the act constitute changes to the Criminal Proceedings Act in force, directly restricting the freedoms and rights of citizens envisaged by the act and the republican and federal Constitutions, and determines terms of detention, bodies authorising detention and prerogatives of "competent bodies".

Press freedom was limited severely after the Serbian parliament adopted, in October 1998, the Law on Public Information which limits the scope of media coverage. In the course of 1999, and especially during the "ethnic cleansing", many journalists were harassed and even killed, such as the editor of Dnevni Telegraf, Slavko Curuvija, who was murdered on 11 April 1999, after having been openly critical of the FRY Government.

Human rights defenders could not work freely in Serbia in 1999 and many were convicted in unfair trails or detained in Serb prisons without trial. An example is the Kosovar Albanian paediatrician, Flora Brovina, who was convicted and sentenced to twelve years in jail for conspiring against the government to commit terrorist activities. She is the founder and head of the League of Albanian Women and provided help to Albanians during the war. According to information from Amnesty International, Ms. Brovina was denied the opportunity to have confidential meetings with her lawyer which is in clear violation of international standards.

Two Australian and one Yugoslav employee from the organisation CARE were convicted on 29 May 1999 by a military court of passing on military secrets and were sentenced to prison terms of between four and twelve years. They were tried behind closed doors. On 19 May 1999, the ICJ and CIJL mandated a lawyer from the Swedish section to observe the trial. The ICJ and other observers were, however, barred from the court room. The two Australians were later pardoned but the Yugoslav aid worker remained in prison.

UN Human Rights Treaties

The six UN treaty bodies on human rights, which monitor the obligations under the respective human rights treaties, are of the opinion that "successor states are automatically bound by obligations under international human rights instruments from their respective date of independence...". The Human Rights Committee, for example, noted in 1992 that it regarded:

> the submission of the report by the government and the presence of the delegation as confirmation that the Federal Republic of Yugoslavia (Serbia and Montenegro) had succeeded, in respect of its territory, to the obligations undertaken under the International Covenant on Civil and Political Rights by the former Socialist Federal Republic of Yugoslavia.

Except for an initial report to the UN Committee against Torture, however, no report to any of the treaty bodies has been discussed during the last few years, either because no reports were submitted or because the reports were not scheduled for consideration.

The UN Committee against Torture (CAT) discussed the initial report of the FRY in November 1998 after the report was submitted in January of that year with a delay of six years. The Committee expressed its concern over the "absence in the criminal law in Yugoslavia of a provision defining torture as a specific crime in accordance with Article 1 of the Convention"

and the numerous accounts of the use of torture by the state police forces, particularly in the districts of Kosovo and Sandjac. Furthermore the Committee voiced its grave concern:

> over the lack of sufficient investigation, prosecution and punishment by the competent authorities of suspected torturers...as well as with the insufficient reaction to the complaints of such abused persons, resulting in the *de facto* impunity of the perpetrators of acts of torture. *De jure* impunity of the perpetrators of torture and other cruel, inhuman or degrading treatment or punishment results, *inter alia*, from amnesties, suspended sentences and reinstatement of discharged officers that have been granted by the authorities.

The second periodic report to the CAT was due in October 1996 and has, to date, not yet been submitted to the Committee.

The Council of Europe

The Federal Republic of Yugoslavia asked to become a member of the Council of Europe on 18 March 1999 but "the lack of seriousness and credibility of the FRY government's application" led to the suspension of discussion of the issue.

The Judiciary

The court system at republic level consists of local, district and supreme courts. At the federal level a Federal Court and Federal Constitutional Court exist to which Supreme Court decisions may be appealed. The Federal Constitutional Court rules on the constitutionality of laws and regulations and on the conformity of the Constitutions of the member republics with the Constitution of the Federal Republic of Yugoslavia. The republics are responsible for enforcing the decisions of the Federal Constitutional Court. A military court system also exists.

Harassment of Members of the Association of Judges of Serbia

On 17 February 1999 the Supreme Court of Serbia dismissed the appeal of the Association of Judges of Serbia against the decision of the Ministry of the Interior in Serbia banning the association from entering the register of associations of citizens, and consequently obtaining the status of a legal person. The Supreme Court's decision was justified by the view that judges were not entitled to civil association and that retired judges could not be members of a professional association.

Under Article 44 of the Constitution of the Republic of Serbia:

> those associations planning to violently overthrow constitutional order, violate the territorial integrity and independence of the Republic of Serbia, breach the constitutionally guaranteed human and civil rights, and instigate national, racial and religious intolerance and hatred...cannot exercise the freedom of associating on the basis of their registering with a competent body.

The President of the Supreme Court of Serbia, Mr. Balso Govedarica, at a staff meeting of the Belgrade District Court, commented on the aforementioned decision of the Supreme Court and explained his own position on the issue:

> There is no need for the establishment of a separate association of judges...for only a small group of judges wants to form such an association with a view to representing their political engagement as a non-party one.

Despite the aforementioned decision, the Association of Judges continued its activities, such as drawing attention to the fact that judges are underpaid, often receive their salary several months late and are subjected to a lot of political pressure. The Ministry of Justice announced the introduction of sanctions against demonstrators demanding pay increases for judicial employees. The Ministry underscored that "the Act on Strikes bans strikes in state bodies" and that:

> any work stoppage or non-performance of duties represents a severe breach of work obligation...heads of judicial bodies are therefore requested to urgently inform the Justice Ministry of measures undertaken against employees breaking rules or working badly.

The CIJL wrote, on 27 October 1999, to the government of the Federal Republic of Yugoslavia expressing concern over the attacks against some Serbian judges and their denial of freedom of association. The President of the Supreme Court of Serbia, Mr. Balsa Govedarica, had threatened judges who are members of the Association of Judges of Serbia with removal from office unless they revoked their membership of the association.

All judges were asked to declare their membership or non-membership of the association at staff meetings, and those who admitted their membership were immediately dismissed. Over 40 proceedings for dismissal of judges and presidents of courts were instituted. These measures are in violation of international norms pertaining to the independence of the judiciary, and more specifically of Principles 8 and 9 of the 1985 UN Basic

Principles on the Independence of the Judiciary (*please refer to the Annex for the full text*).

Kosovo

According to UN Security Council Resolution 1244 (1999) UNMIK is composed of four segments: the United Nations (UN) leads the civil administration, the United Nations High Commissioner for Refugees (UNHCHR) is in charge of the humanitarian issues, the Organisation for Security and Cooperation in Europe (OSCE) leads the institution-building and the European Union (EU) covers the reconstruction. The Special Representative of the UN Secretary-General, Mr. Bernard Kouchner, is the head of UNMIK and the highest international civilian official in Kosovo.

The civil administration component created a Judicial Affairs Office that deals with the administration of courts, prosecution services and prisons; the development of legal policies; the review and drafting of legislation; and the assessment of the quality of justice in Kosovo, including training requirements.

According to UN Security Council Resolution 1244 (1999) all legislative and executive powers, including the administration of the judiciary, is vested in UNMIK. The laws of the Federal Republic of Yugoslavia and the Republic of Serbia are respected by UNMIK as long as they do not conflict with internationally recognised human rights standards or regulations issued by the Special Representative.

The Special Representative has the authority to appoint or dismiss any person in the interim administration, including the judiciary, and can issue regulations that will be in force until repealed by UNMIK or by the Kosovo Transitional Council. The Kosovo Transitional Council, headed by the Special Representative, was created with representatives of all the major political parties and ethnic groups in Kosovo, but some representatives left the Council for political reasons.

On 15 December 1999 all the political parties agreed to participate in the establishment by UNMIK of a Kosovo-UNMIK Joint Interim Administrative Structure. This will be composed of an Interim Administrative Council which will make recommendations for amendments to the law and regulations, as well as propose policy guidelines for administrative departments in applying the law.

Three decrees were issued with regard to the judicial system in Kosovo: one that established a Joint Advisory Council for judicial appointment, one that appointed the members of this council and one that appointed four

prosecutors, two investigating judges and a three-judge panel approved by the Judicial Panel.

The judiciary in Kosovo failed to function after the end of the conflict as almost all the Kosovo Serb staff had left and the Kosovo Albanian staff did not return to Kosovo. Before the conflict the Kosovo judiciary existed mainly of Serbian judges and prosecutors. During the Serb regime, out of 756 judges and prosecutors 30 were Kosovo Albanians.

Under the auspices of UNMIK the Supreme Court of Kosovo that was abolished in 1991 was re-established, as well as five District Courts and the General Prosecutor's Office. An emergency judicial system was initiated on 30 June 1999 with the opening of the District Court in Pristina. Other courts have been established in Prizren, Pec, Gnijlane and Mitrovica, in addition to mobile courts.

According to a report of the UN Secretary-General to the Security Council dated 23 December 1999, the Advisory Judicial Commission had recommended 328 judges and 238 lay judges for appointment, but only 47 judges and prosecutors were actually active in the Emergency Judicial System. Several Serb judges had resigned for security reasons and several other judges, prosecutors and lawyers belonging to ethnic minorities were threatened. This development has severely hampered the establishment of a multi-ethnic judiciary.

Applicable Law in Kosovo

A review of applicable law was conducted by the Council of Europe and recommendations were issued to bring legislation in line with internationally recognised human rights standards.

UNMIK Regulation No. 1999/1 of 10 June 1999 provides that the laws in force in Kosovo prior to 24 March 1999 should continue to apply in the province, insofar as they did not contravene internationally recognised human rights standards. This regulation was, however, amended by Regulations 1999/24 and 1999/25 that state that the applicable law in Kosovo will be those regulations promulgated by the Special Representative, including subsidiary rules, and the law in force in Kosovo on 22 March 1989. The reason behind these amendments is a sensitivity in applying Serbian criminal law which was used for the revocation of the autonomous status of Kosovo and the repression of the Kosovo Albanians.

Federal law is applicable in any situation where neither UNMIK regulations nor the law in force in Kosovo on 22 March 1989 can be applied. In criminal trials the defendant will have the benefit of the most favourable provisions of the laws in force in Kosovo between 22 March 1989 and the

date of issuance of a new regulation. Legal actions taken under UNMIK Regulation 1999/1 will remain valid.

Lawyers

The 1998 Act on Lawyers restricts the freedoms of lawyers because the lawyer's chambers at federal and republic level have strict control over the profession.

After the war in Kosovo ended formally in June 1999, some 2,000 Albanian political prisoners remained in prisons in Serbia. Albanian lawyers have to work under very difficult circumstances to provide assistance to these prisoners. Most of them are accused of committing acts of "terrorism" and of being members of the KLA. If the Kosovar Albanian lawyers cannot, for safety reasons, represent the prisoners, they have to rely on Serbian lawyers (*see i.e. the case of Teki Bokshi*).

According to information from the Lawyers Committee for Human Rights, Serbian courts are processing an enormous number of political trials in great haste, raising serious questions as to the fairness of these trials, which have already been tainted by unfair procedures and a lack of adequate representation.

Cases

Teki Bokshi {lawyer of the Humanitarian Law Center}: Mr. Bokshi, an Albanian lawyer who represents Albanian political prisoners, was abducted from his car by three plainclothes men while working in Serbia with the Humanitarian Law Center. Two of Mr. Bokshi's colleagues, Mr. Mustafa Radoniqi and Mr. Ibish Hoti, were ordered to stay in the car and were only able to leave several hours later. After ten days of detention, Mr. Bokshi was released when his family paid a ransom of approximately $60,000. There are strong suspicions that at least one of the kidnappers was a Serbian policeman.

Bajram Kelmendi {lawyer}: Mr. Kelmendi, a Kosovo Albanian human rights lawyer was killed on 25 March 1999 by the Serbian police, together with his two sons. The Serbian police forced their way into Kelmendi's house early in the morning of 25 March, ransacked the house and took Kelmendi and his two sons, age 16 and 30.

Milorad Marjanovic {judge of the Municipal Court in Leksovac}: Mr. Marjanovic was informed of the Supreme Court's decision to start dis-

missal proceedings against him, on 21 October 1999. This decision was explained in the following manner: "Mr. Marjanovic was engaged in activities incompatible with his judicial capacity, in the past three years he heard just a few cases and never achieved satisfactory work results". It was also pointed out that "Marjanovic is politically active in the so-called Association of Judges...within the scope of which his actions aim at constant disparaging of the judiciary position and the system as a whole".

S. Obradovic {judge of the Municipal Court in Valjevo}: On 6 October 1999, Mr. Obradovic submitted his resignation note to the Assembly of Serbia, asking for the acceptance thereof, in conformity with Article 45 of the Act on Courts of Law. The following reasons for his resignation were given: "...collapse of morale and basic social values and subjugation of courts to exclusive party interests led to degradation of our judiciary, and the criminal courts, under degraded conditions of criminal and legal protection of life, freedom and property, lost a part of its inherent legitimacy".

ANNEX 1

THE 1985 UN BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

The Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted the Basic Principles on the Independence of the Judiciary by consensus.

The Congress documents were "endorsed" by the UN General Assembly (A/RES/40/32, 29 November 1985) which later specifically "welcomed" the Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice" (A/RES/40/146, 13 December 1985).

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixty United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

INDEPENDENCE OF THE JUDICIARY

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all government and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or communication by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointment for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointment or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional Secrecy and Immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

ANNEX 2

THE UN 1990 BASIC PRINCIPLES ON THE ROLE OF LAWYERS

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27 August to 7 September 1990 adopted by consensus Basic Principles on the Role of Lawyers.

In its resolution 45/121 of 14 December 1990, the General Assembly "welcomed" the instruments adopted by the Congress and invited "Governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained therein... in accordance with the economic, social, legal, cultural and political circumstances of each country." In resolution 45/166 of 18 December 1990, the General Assembly welcomed the Basic Principles in particular, inviting Governments "to respect them and to take them into account within the framework of their national legislation and practice."

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia,* their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operation with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to Lawyers and Legal Services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organisation and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special Safeguards in Criminal Justice Matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

QUALIFICATIONS AND TRAINING

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognised by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

DUTIES AND RESPONSIBILITIES

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:
    (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
    (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
    (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the Functioning of Lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognised shall refuse to recognise the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of Expression and Association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation. In exercising these rights, lawyers shall always conduct themselves in

accordance with the law and the recognised standards and ethics of the legal profession.

Professional Associations of Lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall co-operate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognised professional standards and ethics.

Disciplinary Proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognised international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognised standards and ethics of the legal profession and in the light of these principles.

ANNEX 3[1]

POLICY FRAMEWOK FOR PREVENTING AND ELIMINATING CORRUPTION AND ENSURING THE IMPARTIALITY OF THE JUDICIAL SYSTEM

The integrity of the judicial system is central to the maintenance of a democratic society. Through the judicial system the Rule of Law is applied and human rights protected. Without an impartial judiciary the democratic character of society will be destroyed. To adequately fulfil this rule, the judicial system must be independent and impartial.

The independence of the judiciary is the cornerstone for ensuring that exercise of judicial power is impartial. Impartiality in the judiciary requires that cases be decided only according to evidence and the law. Any other influence on the decision-making process constitutes corruption.

The research carried out by the Centre for the Independence of Judges and Lawyers (CIJL) indicates that out of the 48 countries covered by its 9th annual report, *Attacks on Justice*, on the harassment and persecution of judges and lawyers between March 1997 and February 1999, judicial corruption is pervasive in 30 countries while in 6 countries the problem does not appear to be widespread. The CIJL did not have adequate information on 13 countries.

Recognising the negative effect of corruption on the maintenance of the Rule of Law and the legal protection of human rights, the CIJL organised this meeting with the aim of elaborating policies that could actively prevent

---

1 A group of 16 distinguished experts convened by the Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists (ICJ) met in Geneva - Switzerland from 23 to 25 February 2000. The meeting aimed at formulating a policy framework to prevent and combat corruption in the judicial system. The participants came from Australia, Bangladesh, Canada, Egypt, France, India, Indonesia, Malaysia, Nigeria, Palestine, Senegal, Sri Lanka, Uganda, and the United States of America. They included the UN Special Rapporteur on the Independence of Judges and Lawyers, former and current high judicial officials, distinguished lawyers, and representatives of international financial institutions. The meeting agreed to the policy framework.

and combat corruption in the judiciary. This policy framework addresses the judicial system and process as a whole with the intention that it would include judges and all other persons exercising judicial power, as well as all court staff. Court staff are included because they play an important part in creating and maintaining the conditions necessary for judicial impartiality. Further, while the focus of this policy framework is on corruption in the judicial system, it recognises that action in this area has to be related to other plans to control corruption generally both in government and in private enterprise.

Objectives

This policy framework aims at:

- preventing and eliminating the corrosive effect which corruption has on the achievement of impartiality and so increasing the accountability of the judicial system as the foundation of its independence;
- encouraging consideration of the corruption of judicial systems as an impediment to the protection of human rights;
- providing the judiciary, policymakers and others with a process by which to combat corruption of the judicial system and to ensure its integrity and impartiality;
- encouraging international, national and local organisations, including bar associations, to assist in preventing and eliminating corruption of the judicial system;
- increasing public awareness and providing encouragement to the public to participate in the process of exposing, preventing and eliminating corruption in the judicial system, and so to increase public confidence in the judiciary; and,
- creating a culture of intolerance of corruption of the judicial system.

Acts Constituting Corruption of the Judicial System

The judicial system is corrupted when any act or omission results or is intended to result in the loss of impartiality of the judiciary.

Specifically, corruption occurs whenever a judge or court officer seeks or receives a benefit of any kind or promise of a benefit of any kind in respect of an exercise of power or other action. Such acts usually constitute criminal offences under national law. Examples of corrupt criminal conduct are:

- bribery;
- fraud;
- utilisation of public resources for private gain;
- deliberate loss of court records; and
- deliberate alteration of court records.

Corruption also occurs when instead of procedures being determined on the basis of evidence and the law, they are decided on the basis of improper influences, inducements, pressures, threats, or interferences, directly or indirectly, from any quarter or for any reason including those arising from:

- A conflict of interest;
- nepotism;
- favouritism to friends;
- consideration of promotional prospects;
- consideration of post retirement placements;
- improper socialisation with members of the legal profession, the executive, or the legislature;
- socialisation with litigants, or prospective litigants;
- predetermination of an issue involved in the litigation;
- prejudice ;
- having regard to the power of government or political parties;

These acts may be the subject of various sanctions ranging from criminal law, to law relating to conflict of interest, bias, discrimination, abuse of power, judicial review or may be governed by codes of ethics.

For judicial corruption to occur, it is not necessary to establish that the judicial decision was made on the basis of a corrupting act. It is sufficient that an independent, reasonable, fair minded and informed observer is likely to perceive the judicial act as having been determined by the corrupting act.

Facilitating Public Awareness

Public participation in reporting and criticising corruption of the judicial system is a vital element in combating corruption. This requires the public to be informed concerning the deleterious effects that corruption and loss of impartiality in the judicial system have on them. Civil society coalitions, by a synergy of effort, have the potential to effectively combat and eliminate instances of corruption of, and loss of impartiality in, the judicial

system. The judicial system should therefore assume the responsibility, together with other arms of government where possible, of keeping the public informed in a way which enables it to identify and expose corruption.

The role of an independent and responsible media in increasing awareness is vital.

The judiciary should therefore formulate proposals for keeping the public, including the media, informed and educated concerning the operation of the judicial system.

Indicators of Corruption of the Judicial System

Public perceptions of the existence of corruption and loss of impartiality in the judicial system are important as indicators of a serious condition requiring attention. Firstly, they are damaging to the whole judicial system even if formed only in respect of particular persons. Secondly, they may suggest good reason to investigate the extent of alleged corrupt conduct. Social science provides some methodologies to investigate that conduct and identify appropriate indicators. Such methodologies may not yield exact measurement of the dimension of corrupt conduct and may not yield measurement according to legal standards of proof. Nevertheless, as indicators of public perception they can be important in motivating governments and judicial systems to reform. They can also be important in developing and mobilising public opinion against corruption of the judicial system.

National and International Legislation

International and regional recognition of the need for states to criminalise or discipline all forms of corruption of the judicial system will encourage the prevention and elimination of such acts. This could be achieved through ensuring that multilateral treaties addressing corruption in relation to the legislative and executive branches of government also cover corruption in the judiciary. International recognition could also be achieved by initiatives through the United Nations system.

National legislation should:

- criminalise conventional acts of corruption;
- require the disclosure of assets and liabilities of judges and other officers in the judicial system which is then independently monitored;
- provide for disciplinary or other proceedings against judges, in respect of a breach of a code of ethics, carried out by the judicial system; and

- provide for disciplinary or other proceedings against court officers consistent with any laws relating to their service.

The CIJL will examine present national legislative provisions with a view to identify acts beyond traditional criminal acts of corruption which have been criminalised.

Eliminating Contributing Causes to Corruption

Creating the proper framework and conditions for an impartial judicial system is an essential factor for preventing and eliminating corruption of the system. This requires that the selection and promotion of judges is based on merit and protects against appointments or promotion for extraneous reasons or improper motives. This necessitates that the independence of the judiciary be strengthened.

Improving the overall conditions of service in the judicial system will also help to bring change in individual conduct. The judicial system requires adequate funding by each state. Such funding must be determined following consultation with the judiciary and be a matter of budget priority. It should take the form of an overall amount allocated directly to the judicial system, which shall be responsible for its internal allocation and administration.

Statements of Judicial Ethics

A statement of judicial ethics, such as in the form of a code, can play an essential part in preventing or eliminating corruption of the judicial system. Such a code may explain the ethical aspects of appropriate conduct to judges and court officers, encourage informed public understanding of the judicial system, and inspire public confidence in the integrity of the judicial institution.

Consistently with the need for independence in the judicial system as a means of protecting impartiality in decision making, a code of judicial ethics should not be drafted by the legislature or executive. It should be drafted and revised by the judiciary with such advice as may be appropriate. In some countries it may be appropriate that the task be assumed by an independent national judicial commission which includes lay representation.

The imposition of sanctions for conduct in breach of a code may require legislative authority. This is particularly the case where the sanction requires the removal of a judge from office. It will then be appropriate for the imposition of the sanction to take place in accordance with any constitutional or legislative provision for such removal.

MEMBERS OF THE INTERNATIONAL COMMISSION OF JURISTS

President

Claire l'Heureux-Dubé	*Judge of the Supreme Court of Canada*

Vice - Presidents

Theo C. van Boven	*Professor of Law, Maastricht University, Netherlands*
Dalmo de Abreu Dallari	*Professor of Law, São Paulo, Brazil*
Enoch Dumbutshena	*Former Chief Justice of Zimbabwe*
Desmond Fernando	*Barrister; President, International Bar Association, Sri Lanka*
Lennart Groll	*Former Judge, Stockholm Court of Appeal, Sweden*

Members of the Executive Committee

Kofi Kumado (Chairperson)	*Professor of Law, University of Ghana*
Dato' Param Cumaraswamy	*Advocate; UN Special Rapporteur on the Independence of Judges and Lawyers, Malaysia*
Vera V. de Melo Duarte	*Judge at the Supreme Court, Cape Verde*
Diego García-Sayán	*Executive Director, Andean Commission of Jurists, Peru*
Lord Goodhart, Q.C.	*Member, House of Lords, United Kingdom*
Asma Khader	*Advocate, Jordan*
Jerome S. Shestack	*Former President, American Bar Association, USA*

Members of the Commission

Solomy Balungi Bossa	*Judge, High Court, Uganda*
Antonio Cassese	*Judge, President, International Tribunal for the former Yugoslavia, Italy*
Arthur Chaskalson	*Judge, President, Constitutional Court of the Republic of South Africa*
Lord Cooke of Thorndon	*Lord of Appeal, House of Lords, New Zealand*
Marie José Crespin	*Member of the Constitutional Council, Senegal*
Rajeev Dhavan	*Advocate; Professor of Law; Director, Public Interest Legal Support and Research Centre, India*
John Dowd, AO	*Judge, Supreme Court of New South Wales, Australia*
Jochen A. Frowein	*Director, Max Planck Institute for Comparative Public Law and International Law, former Vice-President of the European Commission of Human Rights, Germany*
Gustavo Gallon	*Ad Hoc Judge, Constitutional Court of Colombia; Professor of Law; Director, Colombian Commission of Jurists, Colombia*
Ruth Gavison	*Professor of Law, Hebrew University, Jerusalem; President, Association for Civil Liberties, Israel*
Asma Jahangir	*Advocate; UN Special Rapporteur on Summary (...) Executions; Chairperson, Human Rights Commission, Pakistan*
Maurice Kamto	*Professor of Public Law, Cameroon*
Ewa Letowska	*Professor, Institute of Legal Studies, Polish Academy of Sciences, Poland*
Gladys V. Li, Q.C.	*Former Deputy High Court Judge, Hong Kong*

Florence N. Mumba	*Judge at the International Tribunal for the former Yugoslavia, Zambia*
Adnan Buyung Nasution	*Advocate; former Member of Parliament, Indonesia*
Pedro Nikken	*Former Judge at the Interamerican Court of Human Rights; Professor of international law, Venezuela*
Manfred Nowak	*Professor of Public Administration, Austria*
Margarita Retuerto Buades	*Member, Human Rights Committee; Consejo General del Poder Judicial, Spain*
Hipólito Solari Yrigoyen	*Former Senator; President of the Organization New Human Rights, Argentina*
László Sólyom	*Judge, President, Constitutional Court of the Republic of Hungary*
Daniel Thürer	*Professor of International Law, Switzerland*
Yozo Yokota	*Professor of Law; Member of the UN Sub-Commision on the promotion and protection of human rights, Japan*
José Zalaquett	*Advocate; Professor of Law, Chile*

Honorary Members

Arturo A. Alafriz, *Philippines*
Boutros Boutros-Ghali, *Egypt*
William J. Butler, *USA*
Haim H. Cohn, *Israel*
P. Telford Georges, *Bahamas*
Alfredo Etcheberry, *Chile*
H.-H. Jescheck, *Germany*
P.J.G. Kapteyn, *Netherlands*
Michael D. Kirby, AC, CMG, *Australia*
Jean Flavien Lalive, *Switzerland*
Rudolf Machacek, *Austria*
Norman S. Marsh, *United Kingdom*
J.R.W.S. Mawalla, *Tanzania*
Keba Mbaye, *Senegal*
François Xavier Mbouyom, *Cameroon*
Fali S. Nariman, *India*
Sir Shridath S. Ramphal, *Guyana*
Joaquín Ruíz-Gìmenez, *Spain*
Lord Shawcross, *United Kingdom*
Tun Mohamed Suffian, *Malaysia*
Christian Tomuschat, *Germany*
Michael A. Triantafyllides, *Cyprus*

Centre for the Independence of Judges and Lawyers

Advisory Board

Chairman

P.N. Bhagwati	Former Chief Justice of India

Board Members

Perfecto Andres Ibañez	Judge (Spain)
Lloyd Barnett	President, Organization of Commonwealth Caribbean Bar Associations (Jamaica)
Amar Bentoumi	Secretary-General, International Association of Democratic Lawyers (Algeria)
lord Cooke of thorndon	Lord of Appeal, House of Lords, London (New Zealand)
Marie Jose Crespin	Member, *Conseil constitutionel* (Senegal)
Dato' Param Cumaraswamy	Advocate; UN Special Rapporteur on the Independence of Judges and Lawyers, Malaysia
Jules Deschênes	Former Chief Justice, Superior Court of Quebec (Canada)
Enoch Dumbutshena	Former Chief Justice (Zimbabwe)
Diego Garcia-Sayan	Executive Director Andean Commission of Jurists; Member, UN Working Group on Disappearances (Peru)
Stephen Klitzman	Chairman, Committee on International Human Rights, American Bar Association (USA)
Pablito Sanidad	Chairman, Free Legal Assistance Group (Philippines)
Beinusz Szmukler	President American Association of Jurists (Argentina)
Suriya Wickremasinghe	Barrister (Sri Lanka)

Director

Mona A. Rishmawi

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

THE TENTH EDITION OF ATTACKS ON JUSTICE, THE ANNUAL REPORT OF THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL) ANALYSES LEGAL STRUCTURES AND THEIR EFFECTS ON THE INDEPENDENCE OF JUDGES AND LAWYERS IN 49 COUNTRIES. IT CATALOGUES THE CASES OF 412 JURISTS WHO SUFFERED REPRISALS FOR CARRYING OUT THEIR PROFESSIONAL DUTIES FROM JANUARY 1999 TO FEBRUARY 2000. OF THESE, 16 WERE KILLED, 12 DISAPPEARED, 79 WERE PROSECUTED, ARRESTED, DETAINED OR EVEN TORTURED, 8 PHYSICALLY ATTACKED, 35 VERBALLY THREATENED AND 262 PROFESSIONALLY OBSTRUCTED AND/OR SANCTIONED.

THE CENTRE FOR THE INDEPENDENCE
OF JUDGES AND LAWYERS (CIJL)
P.O. BOX 216
81A AVENUE DE CHÂTELAINE
CH-1219 CHÂTELAINE
GENEVA - SWITZERLAND
TEL. (+ 41 - 22) 979 38 00
FAX (+ 41 22) 979 38 01
E-MAIL: INFO@ICJ.ORG
WWW.ICJ.ORG

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS