

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 Efraín Ríos 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, has 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 Organism (*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 Organism 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 Institucional 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 was 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' 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, presumably from a gang of common criminals and their accomplices. Mr. Recinos reported the threats in January 2000.