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## **THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)**

The Centre for the Independence of Judges and Lawyers was created by the International Commission of Jurists in 1978 to promote the independence of the judiciary and the legal profession. It is supported by contributions from lawyers organisations and private foundations. The Danish, Netherlands, Norwegian and Swedish bar associations and the Netherlands Association of Jurists have all made contributions of \$1,000 or more for the current year, which is greatly appreciated. The work of the Centre during its first two years has been supported by generous grants from the Rockefeller Brothers Fund, but its future will be dependent upon increased funding from the legal profession. A grant from the Ford Foundation has helped to meet the cost of publishing the Bulletin in english, french and spanish.

There remains a substantial deficit to be met. We hope that bar associations and other lawyers' organisations concerned with the fate of their colleagues around the world will decide to provide the financial support essential to the survival of the Centre.

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## C A S E   R E P O R T S

### B A N G L A D E S H

#### Martial Law Threatens the Independence of the Judiciary

Martial law was declared in Bangladesh on 24 March 1982. Since then a Chief Justice and three judges of the Supreme Court have been removed from office. The most recent removal, that of Justice Syed Muhammad Husain, was reported in CIJL Bulletin No. 13. All were removed under sub-paragraph 4 of paragraph 10 of the Proclamation (Amendment) Order of 1982, empowering the Chief Executive to remove or dismiss a Supreme Court judge without stating any reasons. Prior to the proclamation, judges on the Supreme Court had a guaranteed tenure and could be removed from office only by a Supreme Judicial Council. The problems facing the judiciary in Bangladesh are described in an article in this issue by Fali S. Nariman.

Parliamentary elections were due to take place in December, but have again been postponed, as the opposition refuse to take part in elections while martial law remains in force.

### N A M I B I A

#### Detained Lawyers are Released; Threats to the Independence of the Judiciary

Namibian lawyers Hartmut Ruppel and Anton Lubowski, detained by the authorities on 9 June 1984, were released on 5 July. They had been arrested with 35 others while attending a barbecue at a Catholic Centre north of Windhoek to celebrate the release of 55 persons from Mariental

internment camp. No specific charges were ever filed against them. The CIJL intervened with the Namibian authorities and had issued a circular letter on their behalf.

Both Mr. Lubowski and Mr. Ruppel are well-known for their defence of persons charged with security offences. They have been successful in bringing to light conditions within the Namibian prisons and exposing the extensive use of torture. Both have criticised the security laws and their effect on the Rule of Law. Under the security laws a person may be held incommunicado and may not challenge the legality of the detention in court. Mr. Lubowski is the first prominent white to have publicly joined SWAPO and was a member of its delegation at the Namibian independence talks in Lusaka in May 1984. The Bar Council of Namibia protested against their arrest.

One of the cases being handled by Mr. Lubowski's law firm was that of the Cassinga detainees in the Mariental internment camp. These detainees had been held in incommunicado detention since 1978 when they were taken by the South African Defence forces from the Cassinga refugee camp in Angola. Fifty-four of the Cassinga detainees and 20 other persons were recently released on 18 October 1984 by the Namibian authorities. The events leading up to their release demonstrate the negative effects the Namibian and South African security laws have had on the independence of the judiciary in Namibia.

On 5 March 1984 an application in the nature of a writ of habeas corpus was filed in the Namibian Supreme Court. The named defendants were the South African Minister of Defence, the Administrator-General of South West Africa (Namibia), the General Officer Commanding the South West Africa (Namibia) Territory Forces, and the Commander of the Mariental military camp.

The reaction of the South African government was to rescind the Namibian Supreme Court's jurisdiction to hear the application. This action was taken pursuant to South Africa's Defence Act which provides for the indemnity of government officials and members of the South African Defence Forces for any acts committed in any "operational area". The Act further provides for the discontinuance of proceedings instituted in any court of law against the state or any members of the South African Defence Forces "if ... the State President is of the opinion ... that it is in the national interest that the proceedings shall not be continued".

The State President's order to the Minister of Justice on 27 April 1984 to apply the Act was the first occasion on which it had been invoked, and led to protests in South Africa, Namibia and abroad. A resolution was passed by the U.S. Congress calling on the South African government to release the detainees. In an effort to stem the criticism, the Administrator-General for Namibia ordered the release of 55 detainees on 25 May.

Subsequently, the Namibian Supreme Court heard arguments concerning the validity of the revocation of its jurisdiction and the orders of detention; it determined that both were lawful. The Court then granted leave to appeal against the decision.

Now that the releases have taken place, the lawsuit is moot and no further challenge to the legality of the provisions of the Defence Act can take place. However, the threat to the independence of the judiciary remains. The judiciary cannot be considered independent when the executive retains the right to revoke a court's jurisdiction over certain classes of cases. Both the Draft Principles on the Independence of the Judiciary (CIJL Bulletin No. 8) and the Universal Declaration on the Independence of Justice (CIJL Bulletin No. 12) make clear that a fundamental precept

of judicial independence is that the judiciary shall have jurisdiction over all matters of a judicial nature and that there shall be no interference with its activities by the executive. This precept is not being adhered to in Namibia.

## P A K I S T A N

### Release of Several Detained Lawyers

CIJL Bulletin No. 13 reported on the arrest of several hundred lawyers during September and October 1983 because of their participation in peaceful demonstrations in which they demanded a return to the Rule of Law in Pakistan, the restoration of the Constitution and respect for the independence of the judiciary, including the abolition of martial law courts. Many of the lawyers had been released in late January or February but 80 to 90 continued to be detained.

The CIJL has learned that Messrs. Abdul Hafeez Lakho and Kazi A. Ghani have been released as have all lawyers arrested in Karachi. Some lawyers from the interior of Sind Province and from Punjab continue to be detained but the names of the detainees are not presently available.

Lawyers, lawyers' associations and judicial organisations have been invited to write to the Pakistan government welcoming the release of Messrs. Lakho and Ghani as well as the other lawyers from Karachi, and expressing their concern at the continued detention without trial of lawyers from the interior of Sind Province and Punjab for expressing their views on the need for legal reform and the effect such actions will have on the Rule of Law and the independence of the legal profession.

## Continued Detention of Lawyer Raza Kazim

A report on the arrest and subsequent incommunicado detention of lawyer Raza Kazim was published in CIJL Bulletin No. 13. Since then, it has been learned that he is being held in Attock Fort, about 50 miles from Rawalpindi, Pakistan. At the end of July he was transferred for several days to a military hospital; however, the precise nature of his illness remains unknown.

Raza Kazim's place of detention became known during the hearing of a petition filed by his wife, Nazeem Raza, challenging the legality of his detention. After the provincial government denied any knowledge of his arrest the federal government was ordered to appear before the court. The Deputy Attorney General stated that Raza Kazim had been arrested for "attempting to seduce armed forces personnel" under section 31(D) of the 1952 Army Act, and then argued that because of his arrest under the Army Act the court had no jurisdiction. At the end of the hearing the court concluded that the petition "stood abated", meaning that it had accepted the argument that it was without jurisdiction. Under martial law regulations in Pakistan, civilian courts do not have the authority to review detention orders issued by military authorities.

Despite this acknowledgement of his detention by military authorities, Raza Kazim has not been charged with any specific offence and no statement of reasons has been given for his arrest and detention. Nor has he had access to defence counsel and his family has had only limited access to him. They have not been able to visit him in his place of detention. Since 9 January, over ten months ago, they have been allowed to see him four times at a private home selected for the visit by military authorities. On each occasion the visits were closely supervised and no information could be obtained about the conditions of his detention. However, it is known that for most of the 10

months he has been held in solitary confinement. He has lost a considerable amount of weight since being in detention and during the visits his family observed that he was suffering from depression.

Raza Kazim's continued detention without charge or trial violates international standards for the treatment of persons under detention. In addition, both the Draft Principles on the Independence of the Judiciary (CIJL Bulletin No. 8) and the Universal Declaration on Justice (CIJL Bulletin No. 12) state that special tribunals, such as the military tribunals in Pakistan, should not have jurisdiction to try civilians, and that all tribunals should comply with internationally recognised principles of due process of law.

Lawyers, lawyers' associations and judicial organisations have been invited to write to the government of Pakistan expressing their concern about the continued detention without charge or trial of Raza Kazim, urging that he be given access to defence counsel, be allowed to receive visits from his family, and that if tried, he be tried without further delay before an ordinary court with all the recognised defence rights.



P E R U

State of Emergency Affects Rights of the Defence,  
the Independence of the Judiciary and the Rule of Law

The past few years have witnessed ever increasing levels of violence in the southern highlands of Peru, particularly the department of Ayacucho. More than 2,000 persons have been killed and more than 2,500 others have been made to disappear. A state of emergency was declared in the Ayacucho region in October 1981 and since then several other departments have been placed under a state of emergency.

An article in this issue by Diego Garcia Sayan describes the problems in the Ayacucho region since 1981, focussing on the inroads made into the rights of the defence, interference with the ability of the Public Minister (Ministerio Público) to perform his constitutional tasks of protecting human rights and upholding the Rule of Law, and interference with the functioning of the judiciary.

The right of detainees to contact and seek advice from a lawyer is being systematically violated as is the constitutional right to have a lawyer present whenever a detainee is required to make a statement.

Police and military authorities have obstructed the Public Minister's office from carrying out its duties, particularly with respect to its attempts to locate the disappeared. In February 1984, the Public Minister's office stated that in the previous 14 months it had received 1,500 complaints of forcible disappearances. In April 1984, the Fiscal Superior Decano (Prosecutor of the Department) of Ayacucho resigned because of the lack of military cooperation and stated that 641 reports of

disappearances had been received from the Huamanga province between 1 January and mid-April.

The Public Minister has tried to locate as many of the disappeared as possible and has also attempted to keep the families or legal representatives informed about the developments in the case. When complaints are filed a formal receipt is given to the petitioner or, in cases where they have interceded, to the Ayacucho Bar Association. Whenever letters of inquiry are sent to the Ayacucho Political Military Commander requesting information on the status of reported unacknowledged detainees copies are sent to the family or their legal representatives.

However, the investigations launched by the Public Minister's office have been hampered because of denial of transport, of clearance to enter some of the rural zones and of access to detention centres. In addition, the army has failed to provide the office with regular reports of arrests, and transfers and requests for information have gone unanswered. Representatives of the Public Minister's office in Ayacucho have complained about the situation, but thus far support for its efforts has not been forthcoming from the national authorities.

Despite these obstacles a few cases have been successfully investigated and the "disappeared" located. Another positive development is the insistence of the Public Minister that cases of official misconduct in the treatment of detainees be tried before the civilian courts and not the military courts. As noted in the Draft Principles on the Independence of the Judiciary (CIJL Bulletin No. 8) and the Universal Declaration on Justice (CIJL Bulletin No. 12) the removal of jurisdiction from the civilian courts is an implicit attack on the independence of the judiciary and undermines the functioning of the system of the administration of justice.

In one case, that of a mass execution which took place in the Huamanga hamlet of Soccos, the Public Minister's office made tremendous efforts to identify both those who had been killed and the perpetrators. Eyewitnesses to the killing testified that they were carried out by the Soccos Civil Guard. These allegations were denied by the authorities. Ballistic tests were conducted and it was determined that the weapons used belonged to 26 members of the Guard. The Civil Guard attempted to have the cases brought before a military court, arguing that the crimes related to official duties. The Public Minister's office insisted that the prosecution take place in the civil courts on charges of homicide. In October 1984 the Supreme Court ruled that the civil courts would have jurisdiction.

Another positive development has been the use of Article 23 of the Constitution in the case of Lidia Argumedo. Article 23 states that anyone can request a judge to order an immediate medical examination of a person deprived of his or her liberty if the prisoner is believed to have been the object of maltreatment. Ms. Argumedo had vanished for a period of time after her detention by the Marines. She was a witness in a case involving the death of several journalists and their guide; the judge in the case ordered her to be examined by a doctor and brought to court. Apparently the examination confirmed that she had been physically ill-treated.

It is to be hoped that these positive developments are a sign that the authorities have recognised the need to uphold the Rule of Law. In order for a further improvement in the situation to take place the national authorities must indicate their support for the efforts of the Public Minister and must impress upon the military authorities that they are to cooperate with the Public Minister's investigations and with the judicial authorities. As Mr. Garcia Sayan states in his concluding remarks, the consequences for the fabric of society of deviating from the Rule of Law are greater than those from being a little less efficient in curbing terrorist attacks.

## P H I L I P P I N E S

### Mission Conclusions

In January 1984, an International Commission of Jurists' mission visited the Philippines to inquire into the situation of human rights, economic and social as well as political and civil. The members of the mission were Virginia Leary, Professor of International Law, State University of New York; A.A. Ellis, Q.C., a leading New Zealand lawyer; and Dr. Kurt Madlener, an expert in comparative criminal law, Federal Republic of Germany.

The members were able to undertake their mission without interference and to travel freely throughout the country. They interviewed government officials, military officers, opposition leaders, lawyers and members of the judiciary, prisoners and other persons with first-hand information concerning human rights violations, community workers and members of the hierarchy of the Catholic Church, university professors, diplomats in foreign embassies, trade unionists and human rights activists.

The report of the mission contains 40 conclusions and recommendations, some of which concern the rights of the defence, the judiciary and the bar. These are reproduced below. Copies of the full report can be obtained from the ICJ, P.O. Box 120, 1224 Chêne-Bougeries/Geneva, Switzerland, at 10 Swiss Francs, plus postage.

#### Rights of the Defence

- Numerous offences have been created by Presidential Decree for political activities which are considered normal in any democracy, including organising or attending anti-government meetings or demonstrations, or printing, distributing or possessing anti-government leaflets, or other

propaganda materials, or even spreading 'rumours, false news and information or gossip'.

- Extremely severe penalties, including life sentences and death, can be imposed not only for armed insurrection or rebellion, but even for non-violent opposition to the government.
- The fact that these offences and penalties are at times not enforced is immaterial. To use the criminal law in this way as an instrument of terror and intimidation is incompatible with a democratic form of government.
- Safeguards under the Constitution and under the Rules of Court concerning arrest and detention have been completely set aside by Presidential Decrees. A person may be held indefinitely under a so-called Preventive Detention Action on the authority of the President, and he has no means of obtaining judicial redress even if his detention last for years.
- The claimed restoration of habeas corpus is of nominal effect as it is not available to persons detained for a whole range of 'security' offences.

#### The Judiciary and the Bar

- Widespread and serious criticism is directed against judges for being unduly pro-executive and failing in their duty to protect the citizens' fundamental rights contained in the Constitution and Bill of Rights.
- Letters of resignation demanded of judges during the martial law period, followed by the Judiciary Reorganisation Act of 1980 which abolished a number

of judicial positions, have created a sense of insecurity of tenure which militates against judicial independence and confidence.

- Up to the passing of the Judiciary Reorganisation Act of 1980 there was serious and justified criticism of the judiciary and fiscals (public prosecutors). Many were considered corrupt and incompetent. Many too were considered subservient to the Executive Government.
- Little or no action has been taken by the judiciary to purge its own ranks. It has been said that this is because no complaints have been made to them. This is a sad reflection on all those lawyers, judges, law officers and members of the public who have failed to take advantage of the Constitutional procedures available.
- Since the 1980 Act was implemented in early 1983 it is not possible to assess whether and to what extent the extensive purge of the judiciary has improved its integrity or independence. Most judges are not paid "above the corruption line" and many are still suspected of accepting bribes, especially at the lower levels of the bench. If the judges, lawyers and the community as a whole are unable to eradicate this form of corruption, the position will no doubt worsen and the trauma of the 1980 Act will have been in vain.
- The quality of justice is adversely affected by the lack of funds, personnel and facilities available to the courts.
- There are serious delays in bringing cases to a hearing (even habeas corpus proceedings) due to clogged dockets.

- On the positive side, there are many people on and off the bench who appreciate the problems and are willing to tackle them given the necessary means and support. A dictatorship in which constitutional and conventional restraints are ignored is a poor environment for improvement. The solution will involve a change in the political climate so that judges can deal with their cases with confidence and secure from interference.
- As in other countries, lawyers have an important rôle to play in maintaining and defending the independence of the judiciary.
- Many members of the bar, lately supported by the Integrated Bar of the Philippines, take a leading rôle together with the church agencies in the fight to obtain better treatment and justice for victims of the present political conflict in the Philippines.
- Some lawyers, including the fiscals (public prosecutors) are parties to and condone corruption, usually bribery, within the judicial system.
- Lawyers as a whole are now more actively involved in the issues involving human rights and the Rule of Law. In part this is a post Aquino assassination phenomenon, and not limited to the legal profession.
- Lawyers, including the Government Agency, CLAO, take a full and active rôle in providing legal aid throughout the country.

## JUDICIAL INDEPENDENCE IN PARAGUAY

Report of a Mission on behalf of the Association of Latin American Lawyers for Human Rights, The Centre for the Independence of Judges and Lawyers, and The International Commission of Jurists

Daniel O'Donnell

In February 1984, Mr. Daniel O'Donnell undertook a mission to investigate the independence of the judiciary in Paraguay. Mr. O'Donnell, presently working with a human rights organisation in San José, Costa Rica, is a member of the Bar of New York and former Secretary of the Centre for the Independence of Judges and Lawyers. The mission was sponsored by the Paraguayan Section of the Association of Latin American Lawyers for Human Rights (AALA) and co-sponsored by the International Commission of Jurists and Centre for the Independence of Judges and Lawyers.

During his stay of nine days in Paraguay, Mr. O'Donnell interviewed a large number of practicing lawyers, officers of the Bar, active and retired judges, law professors, human rights activists, representatives of the church and others. Among those interviewed were:

Eduardo da Costa López Moreira  
President of the Bar Association of Paraguay

Antonio Irigoitia Zárate  
Secretary of the Bar Association of Paraguay

Ernesto Velásquez  
Acting Dean, Catholic University School of Law  
and Diplomacy



Gustavo Becker Martínez  
Secretary-General, Catholic University School of Law  
and Diplomacy

Alexis Frutos Veasken  
Justice of the Supreme Court

César Garay  
Former Justice of the Supreme Court; Professor of Law,  
National University

M. Frachia  
Legal Advisor of the Conference of Bishops of Paraguay

Carmen de Lara Castro  
President, Paraguayan Commission for the Defence of  
Human Rights

Gerónimo Irola Burgos  
Vice-President of the Paraguayan Commission for the  
Defence of Human Rights; Professor of Criminal  
Procedure at the Catholic and National Universities;  
former prosecutor; former Judge of the Court of Criminal  
Appeals; former President of the Christian Democratic  
Party

Justo Prieto  
Professor of Constitutional Law, Catholic University  
School of Law and Diplomacy

Francisco de Vargas  
Professor of Criminal Procedure of the Catholic  
University and lawyer of the Inter-Church Committee  
for Emergency Aid

Miguel A. Saguier  
Practicing lawyer, Secretary-General of the  
Authentic Radical Liberal Party (PLRA)

José Félix Fernández Estigarribia  
Professor of Public International Law, Catholic  
University School of Law and Diplomacy; President of  
the Paraguayan Section of the Association of Latin  
American Lawyers for Human Rights and former President  
of the Bar Association of Paraguay

John P. Leonard  
First Secretary, Embassy of the United States.

## Introduction

Paraguay is a nation which has been singularly disfavoured by history. Independence from Spain in 1811 was followed closely by the first of the prolonged dictatorships the country has known, that of Dr. J. Francia, "El Supremo", who ruled from 1816 to 1840 and whose methods of government rival the inventions of Latin America's most gifted writers. The second important dictator, Carlos Antonio Lopez, assumed power in 1844 and ruled until 1862. Three years later, the "Triple Alianza" of Argentina, Brazil and Uruguay invaded and the war which followed devastated the country. The war lasted for five years, and, according to some sources, the country lost two-thirds of its population.

In this century Paraguay was again plunged into a bloody struggle, the 1932-35 Chaco War with Bolivia. The end of the war ushered in a tumultuous period, not unlike the period between the two wars, punctuated with coups, insurrections and short-lived dictatorships. It culminated with the installation of General Alfredo Stroessner as President in 1954, a post which he still holds today.

The thirty-year rule of General Stroessner has had far-reaching consequences in Paraguayan society and any study of the legal system as it functions in Paraguay today must necessarily take it into account. Uncontested leader of the conservative Colorado Party, formed late in the 19th century, General Stroessner was elected in popular elections in 1958, 1963, 1968, 1973, 1978 and 1983.\*

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\* Editor's note: General Stroessner has been in power longer than any other head of State in Latin America. Under the Constitution, re-election was possible only once, for a five-year term. However, to permit him to remain in power, the Constitution was amended from time to time and finally, in 1977, a Constituent Assembly made up exclusively of members of the government party (Partido Colorado) repealed Article 173 prohibiting successive re-elections. As the elections are held under a state of siege they are subject to restrictions on basic freedoms and the organisation of the election and counting of votes remains exclusively in the hands of the government and its supporters. ICJ Review No. 22, at p. 11.

Despite these elections and the fact that the Colorado Party has a real constituency of considerable strength, few if any observers deny that General Stroessner exercises absolute authority in Paraguay. In a cautious but incisive analysis the United States State Department, in its 1983 Report on Human Rights in Paraguay, identifies the most salient characteristics of the present system of government:

"Controlled election process in which government figures show he received over 90 per cent of the popular vote. As has been the case almost without interruption since 1929, the state of siege provision of the constitution remains in force and is freely used by President Stroessner's government to intimidate opponents of his régime. In practice, there is no effective challenge to his authority, and the situation in Paraguay continues to be characterised by the subordination of the judicial and legislative branches of government to the executive and the frequent violation of civil and political liberties. Although his rule has brought stability and economic growth to Paraguay, it has been at a considerable cost to political rights and individual liberties.

"Elections are held every five years, most recently in 1983, for the presidency and the national legislature. However, the opposition's ability to conduct an effective campaign is severely restricted by the government. Some opposition parties are not legally recognized and all, regardless of their status, are subject to varying degrees of harassment by the government authorities. The results of the 1983 elections were never in doubt, in part because of the government's control of the electoral apparatus and limitations imposed on the opposition such as only limited access to the media. There were also allegations of vote count irregularities. At the same time, the opposition suffered from a

lack of organisation and funds and, according to most observers, the Colorado Party enjoys substantial support. Nonetheless, the unchecked domination of the electoral process by the Colorado Party resulted in a seriously flawed election. Only members of the dominant Colorado Party can participate fully in the political process, and affiliation with the party is often a prerequisite for government employment and significant participation in Paraguay's economic activity. The legislative branch, in which President Stroessner's Colorado Party has a two-thirds majority, is almost completely responsive to his views on all important matters. The judiciary, while independent in theory, also does not challenge the power of the executive branch or serve as an effective check on its actions." (1)

In other words, Paraguay is not a democracy in any meaningful sense of the word, but a dictatorship in which the President enjoys unchecked personal control of all the instruments of government. General Stroessner does not have a great deal in common with the wave of military juntas which in quick succession assumed control of surrounding nations in the late 60's and 70's; he is, rather, the sole survivor of an earlier generation of autocratic rulers which included among others Duvalier in Haiti, Trujillo in the Dominican Republic and Somoza in Nicaragua, who ruled as much by corruption as by the gun.

Another factor which must be taken into consideration is Paraguay's longstanding state of siege. Although the 1967 Constitution recognises basic human rights, much of the force of these constitutional guarantees has been dissipated by the force of a state of emergency, first declared in 1929. Lifted in 1946 only to be reimposed two years later, the state of siege has been interpreted to give the Executive an unlimited right to detain without judicial review, and consequently an invaluable tool for

intimidation, retaliation, harassment or punishment of critics, opponents or reluctant allies. It has been in force ever since 1949, being suspended only for 24 hours once every five years to permit the elections to occur.

The noted Paraguayan constitutional scholar, Justo Prieto, has written:

"Few, whether lawyers or laymen, recall the causes which led to the declaration of the state of siege in its remote beginning, since subsequent decrees, designed to give it eternal life and sent to Congress for information only, simply incorporate the now distant progenitor by reference and only the renewal is published, in successive 90 day generations.

"Nevertheless, more than a few attribute a kind of omnipotence to the state of siege, finding it to give a green light to actions as diverse as detention of unlimited duration, massive nocturnal searches without probable cause, the closing of newspapers and the seizure of papers or posting of guards at the residences of one's relatives."<sup>(2)</sup>

These, then, are some of the factors inextricably linked to the question of judicial independence in Paraguay: the state of siege, patronage, corruption, the absence of real democracy and the subordination of the entire government to the will of one man.

#### The Constitution: Guarantor of Executive Control

The Constitution of Paraguay duly recognizes the principle of judicial independence. Article 199 states:

"The independence of the Judicial Branch is guaranteed. Only it can hear and decide matters of a litigious nature. In no case may the Congress,

the President of the Republic, Ministers or other civil servants assume judicial functions not expressly recognized by this Constitution, reopen closed cases, paralyze pending ones, nor in any way intervene in trials ..."

The Constitution further provides that any decision in a case in which judicial independence has been interfered with shall be null and void (Article 199), that judges may not be arrested unless caught in flagrante delicto (Article 201), and that individuals who attempt to interfere with judicial independence shall be barred from public office for five years, without prejudice to additional liability under the criminal law (Article 202).

Nevertheless, not only does the Constitution of 1967 fail to provide effective safeguards of judicial independence, it contains provisions which go far in establishing the subordination of the judiciary to the executive. The most significant of these is Article 194, which provides that the terms of office of all judges, from President of the Supreme Court to the lowliest magistrate, are five years. (This coincides with the executive's term of office.) Further, Article 195 provides that "The Executive Branch shall appoint all members of the Supreme Court and the courts, (all) judges and other magistrates of the Judicial Branch, by the procedure set forth in this Constitution." The procedure referred to is defined in Article 180(8) which provides that the President of the Republic shall name the members of the Supreme Court, with the approval of the Senate, and all other judges and magistrates with the approval of the Supreme Court.

Few systems of judicial appointment are more clearly designed to facilitate the control of the judiciary by the president of the nation. The entire judiciary is selected by the President personally and depends on him for re-appointment, after every presidential election, subject

only to the possibility that the Senate or Supreme Court choose to oppose the President's preferred candidate. That the Senate might act as an effective check on the will of the Executive in the appointment of the Supreme Court is simply foreign to all the implicit norms of the prevailing political system, as the above quoted State Department report makes clear. With respect to the remainder of the judiciary, the fact that the Supreme Court depends on Presidential appointment and reappointment hardly encourages it to incur executive displeasure by exercising a veto in the appointment of appellate or trial court judges.

The system of judicial appointment established by the Paraguayan Constitution is radically opposed to a recent trend in international law, evidenced by a series of international conferences that began with that sponsored by the International Commission of Jurists, the Centre for the Independence of Judges and Lawyers and the International Association of Penal Law in 1981, to consider security of tenure and pre-selection of judicial candidates by a non-political body as essential safeguards of effective judicial independence.<sup>(3)</sup>

### The Extent of Judicial Subordination

It is generally agreed that the deterioration of judicial independence has occurred by identifiable stages since the beginning of Stroessner's presidency in 1954. In the late 50's, and according to some, the early 60's, there was considerable independence. The first President of the Supreme Court under Stroessner, Dr. Umberto Salsa, is still remembered for having appointed jurists identified with the political opposition to the bench. The situation deteriorated with the appointment of a weak President in the mid-60's, and reached a nadir with the appointment of Dr. Juan Félix Morales, President of the Court until 1983. During these years judicial servility became so acute that

the Inter-American Commission on Human Rights was led to state, with unaccustomed bluntness:

"The Judiciary is not independent of the Executive Power, which is prejudicial to a sound and impartial application of justice and the right to due process of law. The remedies of Amparo and Habeas Corpus do not function under these circumstances and are manipulated through delaying tactics. The judges receive instructions from the authorities, among them the Chief of the Investigations Department of the Police of Asunción, considered to be the régime's political police, through the procedure known as 'justice by phone'." (4)

Several lawyers interviewed in the course of the mission reported personal experiences with the system which the Inter-American Commission describes as justice by telephone. Essentially, these experiences consist of frank admissions by the judge that he is powerless to give the lawyer the relief requested, or telling the lawyer that he would be better advised to seek what he wishes directly from the pertinent Minister or police or military official. Occasionally, the close ties between the police and the judiciary assume more threatening dimensions for the lawyer: in 1982 a lawyer who filed a pleading charging the police with torturing a client was visited later the same day by the Chief of Police who threatened the lawyer with death. He had with him the original copy of the lawyer's complaint.

Indeed, the habit of judicial subordination has become so deeply entrenched in the minds of the authorities that the very existence of the judiciary is disregarded by the executive. Defence lawyers report that detention without any legal order whatsoever is commonplace: an executive order authorising the detention under the state of siege is produced only if the legality of the detention is challenged. A lawyer who had spent some years in exile showed surprise



at being asked the grounds for such a measure: no order authorised his exile, he was simply taken to the border under armed guard and unceremoniously thrown out. Another lawyer reported attending a hearing in which the judge announced that he was prepared to order the release of several defendants, unaware that they were no longer in detention, having been released at police initiative without a court order.

To a foreign observer, the implications of such thorough submission to the executive often border on the absurd or the fantastic. A lawyer having an exclusively civil practice commented that it takes a special type of person to practice criminal law, because one must be resigned to the idea of practicing law without winning cases. A criminal lawyer who has abandoned the practice of law explained that he took the decision because: "The clients lose everything. They have no chance of winning." A former judge also admitted that he retired because of frustration with the lack of judicial integrity and independence.

The intrusion of political considerations in the administration of justice is so great that the lawyers' political beliefs are widely perceived as influencing the likelihood of success in a legal action of any kind. Clients gravitate towards lawyers seen as being on friendly terms with the governing party, and shy away from those too identified with the opposition, or who begin to defend unpopular causes. According to university sources, the importance of influence and connections in the "practice of law" has even led police officials to study law in their spare time because the special advantages they enjoy in the "handling" of criminal cases makes this a lucrative post-retirement career.

Representatives of human rights organisations also report that relatives of persons detained without charge are often reluctant to seek legal remedies, believing that one is more likely to secure their release through the unofficial intercession of well-connected relatives or friends.

The willingness of persons from different walks of life and all political persuasions to openly recognise the lack of judicial independence was one unexpected aspect of the mission. Dr. Eduardo da Costa López Moreira, President of the Bar Association of Paraguay, a bar which has an honourable history of defence of the integrity of the legal profession and the Rule of Law, stated: "There is absolutely no independence in the Judicial Branch."<sup>(5)</sup> Many others were unwilling to be quoted directly. One of them, a respected former judge and member of the ruling party, was asked: "To what degree is the judiciary independent?" He answered by quoting an anecdote, presumably apocryphal, attributed to a frontier politician appointed to the Supreme Court of a neighbouring country during the turbulent 19th century. Upon assuming office he is said to have announced to the crowd which gathered for the occasion:

"I will do everything I can to help our friends,  
to stop our enemies, and to do justice to the rest."

Unfortunately, in Paraguay nearly everyone is either a friend or an enemy.

### The System of Justice and Torture

The lack of judicial independence is revealed most dramatically in the treatment accorded to sensitive cases, such as charges of torture. Paraguay is without a doubt one of the countries where torture is most systematically employed. The visitor who establishes contact with the community of human rights activists is shocked and dismayed to find that almost everyone he meets has had personal experience with this practice, either in his own person or that of his family. Torture is not reserved for political activists: a legal aid lawyer estimated that 90% of defendants charged with serious common crimes such as rape, theft or assault are tortured while in police custody. The most common techniques are submersion in water, electric shock and beating with truncheons.

Despite the frequency of the practice, and the frequency with which it is denounced by defence lawyers, cases in which legal action has been taken against the responsible parties are almost unknown. The recent opening of official investigations in two cases involving the death of common criminals is considered by human rights activists to be an important sign of progress, even though their outcome is still uncertain. The way torture has been viewed in Paraguay in official circles and the sense of impunity which has prevailed among the police is perhaps best reflected by the following words offered in his own defence by one of the officers now under investigation in a pre-trial declaration:

"It's impossible that somebody touched him in the police station, because everybody knows he was just a common drunk known to everybody in the neighbourhood, a prisoner without the least importance. I mean, he wasn't political, or a robber or thief or somebody important who might eventually get that kind of treatment." (6)

This case concerns a drunk whose official cause of death was first listed as heart failure, but who later was found to have a skull indentation several centimetres in depth. The police allege that he must have suffered the injury in a fall.

The case of Joel Filártiga, which received world-wide publicity as a result of the decision by a United States federal court finding the Chief of Police of Asunción responsible for death under torture, provides a forceful example of judicial inaction. (7)

In spite of the judgment of the US court, the overwhelming evidence against the defendant and the persistence of the victim's father in pursuing legal remedies in Paraguay, the only results have been retaliation against the family and threats against their lawyers.

Judicial passivity in the face of the systematic practice of torture is unquestionably the most damning evidence of the lack of judicial independence in Paraguay.

### The Failure of Criminal Justice

The way in which the criminal courts function in general provides further evidence of the lack of judicial independence. They do nothing to ensure that a real system of criminal justice exists. Not only do they fail to protect the right of the accused to a fair trial, in a large majority of cases they do not even decide their guilt or innocence. A 1978 study of one Paraguayan prison revealed that 87% of the prisoners were released after having served the maximum period of imprisonment for the crime for which they were charged despite the fact that no final sentence of either acquittal or conviction, had ever been rendered. (8) Defence lawyers allege that the prevailing practice is to allow the prosecution to proceed to the point where a judicial determination is made as to whether pre-trial detention is warranted, and then, in all those cases where pre-trial detention is ordered, to file the dossiers, reviewing them periodically to identify defendants who have served their maximum sentence.

The allegation would seem not only incredible but extremely cynical were it not for the fact that there is important evidence from diverse sources to support it. A recent study by the United Nations Latin American Institute for the Prevention of Crime and Treatment of Offenders identifies Paraguay as the country having the highest percentage of untried prisoners in Latin America, with 94.25% of the inhabitants of its penal facilities still "awaiting trial". (9) Similarly, numerous sources, including defence lawyers and individuals who have been the object of criminal prosecutions, report that charges against persons not in pre-trial detention are often simply forgotten or left in a permanent state of suspended animation rather than being formally dismissed or brought to trial.

Such widespread paralysis of the system of criminal justice cannot be explained by mere interference by the executive in the workings of the courts. Excluding the hypothesis of extreme underdevelopment - for there is no doubt that Paraguay, while poor, possesses in ample numbers men and women having the qualities necessary for the operation of a modern and efficient system of justice - the only plausible reason for such failures in the administration of justice would seem to be that the system of judicial appointment, in addition to its intrinsic faults, has been employed in such a way as to select for judicial office individuals lacking the requisite integrity, dedication and professional excellence.

#### The Appointment of a New Court: A Fresh Start ?

The implementation of a system of justice where integrity has no place predictably had consequences going beyond the denial of justice in 'political' cases. Justice itself was put up for sale, as judges compromised themselves for personal gain as well as expediency or hope of political reward. Corruption spread throughout the entire system, facilitating inter alia a number of important frauds against European business interests. The problem reached the point that the national economic interest, that is, the confidence necessary for foreign investment to occur, began to appear threatened by the unpredictability of law enforcement.

This may have contributed to the decision, after the 1983 elections, to name a new President of the Supreme Court and conduct a rather extensive purge in the judiciary. It is also an open secret that the United States brought considerable pressure to bear in favour of changes in the judiciary in an example of the present administration's commitment to the use of 'silent diplomacy' to advance the cause of human rights.

The depths to which the administration of justice had descended are implicitly acknowledged even by members of the new Court. Dr. Alexis Frutos, considered by many to be one of the most honest and independent members of the new Court, stated in an interview that: "There is no direct interference now", and argued that the system of periodic reappointment of judges is necessary precisely to allow the kind of purge of bad judges undertaken after the recent elections. According to him, 40 to 50% of all trial court judges had been replaced at the time of the interview in February 1984, and the process had not yet been completed. Concerning the Supreme Court's constitutional rôle in approving President Stroessner's appointments of trial and appellate judges, Justice Frutos maintained that although the process of consultation is not made public, the Supreme Court had been able to prevent the appointment of individuals it believed lacked the requisite independence and honesty. He also emphasised that the new President of the Court, Dr. Luis Maria Argaña, considers it important to give the members of the judiciary the "security and confidence" necessary to resist undue pressures.

When asked what steps, if any, had been taken against the 40 to 50% of undesirable judges that had been replaced, he replied that no prosecutions had been initiated, but that internal disciplinary proceedings (acción administrativa) had been taken against some.

The interest which the United States attaches to the naming of Dr. Argaña as President of the Court and the ensuing purge of judges is reflected in the report of the State Department:

"In August 1983, a new President of Paraguay's Supreme Court was sworn in. He immediately launched a series of administrative reforms and changes in personnel in the judiciary system which have been widely praised and which many hope will significantly reduce the problem of corruption within the system." (10)

Nevertheless, the report also recognises "At the same time, many observers believe it most unlikely that the courts will become independent of the executive branch in politically sensitive cases."

Even declared critics of the government recognise that the changes in the judiciary have had important consequences. One impartial observer estimated that 80% of the worst judges had been removed from office, and a lawyer dedicated to human rights recognised that since the change in 1983 he had not heard of cases of judges advising lawyers to "go speak with" security authorities in order to secure their client's release. The fact that two cases against police officials charged with torture have been allowed to proceed may well be related to the changes in the judiciary, and the naming of the first judge in many years who is not a member of Stroessner's Colorado Party (he is not a member of the opposition, but is a lawyer without political affiliation) was also mentioned as a sign of progress in the independence of the judiciary. However, it can not be said that the changes are sufficient to create what would today be recognised as an independent judiciary.

It is universally agreed that any improvements resulting from the appointment of the new Court will be relative. Not even the most optimistic observers suggest that the judiciary will become entirely free from executive independence. Indeed, some have already voiced their disappointment at the limited nature and consequences of the changes made. For example, the replacement of judges was more thorough in civil courts than in criminal ones. This is interpreted as an indication that there is more concern with corruption than with submissiveness towards the executive in political matters, or for that matter the simple right of the accused to a fair trial.

The response of the Court, and in particular its President, to a recent petition for habeas corpus on behalf of one of Paraguay's oldest political prisoners has also

contributed to scepticism as to the real significance of the changes in judicial personnel. The case is described below.

### Ovando and His Lawyers - A Crucial Test of the New Court

Guillermo Escolástico Ovando, a non-commissioned officer in the Army, was arrested in 1962 and convicted by a military court of the homicide of a military cadet in connection with an attempted coup against General Stroessner. Some believe that he is innocent of the homicide and that the victim was actually a co-participant in the unsuccessful plot, who died in torture in custody. Ovando continues to maintain his innocence.

In any event, after completing his 15-year sentence in 1977, an executive detention order was imposed under the state of siege in force since 1949. The Constitution permits detention under emergency powers only "when there is evidence that an individual has participated in the events giving rise to the state of siege."<sup>(11)</sup> It is impossible that evidence of participation in any threat other than the original plot exists, the petition argues, because Ovando has spent the last 21 years in prison in near total isolation. Furthermore, his mental health is said to have suffered, and it is widely believed that the only reason for his continued detention is the President's unwillingness to forgive his involvement in a plot by the Armed Forces to overthrow him, or perhaps the desire to set an unmistakable example to others who would follow in the same direction.

Despite compelling legal and humanitarian reasons for his release, the Supreme Court, which has original jurisdiction over petitions for habeas corpus, denied relief.\* The decision rested on established case law to the

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\* Editor's note: Mr. Escolástico Ovando was released by the Executive on 21 May 1984.



effect that the courts have no jurisdiction to inquire into the sufficiency of the grounds for detention which is ordered by the executive pursuant to emergency powers. Ironically, the repudiation of this doctrine in England centuries ago marked an important step in the transition from absolute to constitutional monarchy, and constitutes one of the principle sources of the Western liberal concept of the judiciary as a separate and independent branch of government.

In its year's end review of human rights, Sendero, the official organ of the Paraguayan Conference of Bishops, commented on the public's disappointment with what was perceived as a crucial test of the independence of the new Court:

"The changes in the judiciary were greeted with joy by our citizens, who began to have faith in impartial justice free from extrajudicial pressures. But this illusion soon began to fade, and for many disappeared entirely with the Ovando case and the cases of others detained under the state of siege, for whom there is no justice."<sup>(12)</sup>

Supreme Court President Argaña's harsh reaction to criticism of the decision voiced by Ovando's two lawyers deepened the disillusionment, or rather strengthened the conviction that changes in the judiciary would stop short of matters involving the protection of human rights. Because of the controversy surrounding them, and to avoid quoting out of context, the lawyers' comments are presented at some length.

Miguel Saguier, who, in addition to being a practicing lawyer, is Secretary-General of the Authentic Radical Liberal Party, stated in an interview with the news daily, ABC:

"The case of Escolástico Ovando is pathetic for many reasons. After spending 15 years in jail, without so much as having set one foot outside, it turns out that he's suspected of having committed acts - exactly what

acts is not specified - which are related to the reasons for which the successive states of siege were declared. In other words, there is evidence of his participation during the last 6 years in a war, international conflict, invasion or internal disturbance. From a certain point of view, it's not only pathetic, it's fantastic, hallucinatory - and for this very reason, to continue to make legal arguments would be to fall into the same insanity ...

"Our men of laws have forgotten the exalted dignity of habeas corpus. They have forgotten that this noble legal institution was created, or rather won, in order to defend the weak against the abuses of the powerful, against the arrogance of despotism. That is precisely what the courts are for, to create bulwarks against the abuse of power.

"Speaking of men of laws, here the pathos of the Ovando case worsens. It becomes more pathetic because we are faced with the question: how is it possible that a legal scholar, a professor of law, could be so insensitive to such an example of justice? In an authoritarian State the torturer, the monster, he who torments the prisoner doesn't cause surprise, because we know they are inhuman. But a man of the law, a university professor, a father, who in some instances is Catholic ... how can he sleep at night? How can he go to the Church to pray! It is hard for me to understand such insensitivity." (13)

Francisco de Vargas, law professor and lawyer in an inter-denominational legal aid programme (Church Committee for Emergency Aid) was also outspoken in his criticism of the decision. In response to a journalist's question as to his opinion of it, he declared:

"Well, someone once said that the history of nations can be written studying the judicial decisions of various periods. In this sense, I think that the decision denying Escolástico Ovando his freedom is that which best represents Paraguay of the last 30 years. The duty that the members of the Supreme Court had to order his freedom is like a light so bright that, no matter how tightly they closed their eyes they will continue seeing it. It's time to say things clearly. This decision in the Ovando case will mark with fire those who signed it, the finger of history and the people will point them out as long as they live, and even after they die. Having denied freedom to a sick man, who for 21 years has not done one free act, on the basis of Article 79 of the Constitution adopted in 1967 is something which has marked them forever. They can do many things: they can silence me temporarily or permanently if they want to, under Article 79 or Law 209, they can do anything they want, because they are in power. But there is one thing they can never do, and that is become clean again and change the opinion that people have of them. One day God, the Nation, and their own children will call them to account for what they failed to do." (14)

Both Saguier and de Vargas are presently charged with defamation of a public official in a private criminal action brought by the President of the Court, Dr. Argaña.\* The charges are being brought under Law 209, a national security law which inter alia prohibits public criticism of specified high governmental officials and which has been criticised by the Inter-American Commission on Human Rights

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\* Editor's note: Subsequent to the writing of this report both lawyers were convicted of the charges and sentenced to 3 years imprisonment. The day following the sentencing, they were both pardoned. Mr. O'Donnell's comments on page 36 are based on these developments.

as a threat to freedom of expression. (15) Under this statute, Saguier and de Vargas, if convicted, face up to six years of imprisonment.

The lawyer's right to criticise the administration of justice, in general or in particular cases, is controversial and standards of conduct vary greatly from country to country. In Paraguay a very broad right to comment is recognised, including the right to give interviews to the press concerning the cases one is prosecuting or defending.

The President of the Bar Association, Dr. Eduardo da Costa López, stated that in his opinion while the 'form' in which the two lawyers expressed themselves was improper, the content of their criticism was within the range of acceptable comment in Paraguay.

The proper limits of a lawyer's right to criticise the administration of justice is not the real issue however, for the prosecution is not based on the special relationship between the bench and members of the bar but rather on a security statute designed to prevent the divulgation of subversive propaganda and criticism of ranking governmental officials. In addition, it should be recalled that the lawyer's remarks did not single out the President of the Court personally, and he alone, of the five members of the Court who signed the decision, felt that the matter merited such an extreme response. The Bar Association's offer to mediate has been rejected by Justice Argaña, and there is concern as to whether any trial court judge would be able to sit in judgment of this matter in a truly impartial manner.

The case assumes special significance because of the identity of the two lawyers. Miguel Saguier is Secretary-General of the Authentic Radical Liberal Party, the largest opposition party located in the centre of the political spectrum. Francisco de Vargas, a member of the same party,

is a professor of Criminal Procedure at the Catholic University Law School and staff member of the Church Committee for Emergency Aid. He is one of the leading defenders of human rights in Paraguay and, like other human rights activists, has paid heavily for his commitment to this cause. He has been imprisoned under the state of siege on fifteen different occasions for a total of nearly three years, and once left prison paralysed from the waist down because of an injury which, fortunately, did not cause permanent paralysis. During his last detention he was threatened with death, and the circumstances suggest that the threat probably would have been carried out had it not been for the prompt intervention of the then Ambassador of the United States, Robert White.

The number of lawyers in Paraguay willing to accept the defence of leaders of opposition parties, journalists, trade union leaders, community groups or any number of other causes viewed with disfavour is no more than a handful. The difficulties encountered by defendants in criminal cases having political overtones in particular were acknowledged by the President of the Bar Association, university professors and many others. Should these two lawyers be convicted and sentenced to prison, then, one consequence would be to reduce further the already small number of lawyers willing to defend the cause of human rights in the courts and the possibility of clients in such cases to find competent representation.

In addition, given the traditional subordination of the judiciary to the executive in Paraguay,<sup>(16)</sup> the use of a private prosecution by the President of the Supreme Court to imprison the Secretary-General of the principal opposition party and one of the leading human rights lawyers would seriously and perhaps irreparably damage the new Court's declared intention to restore confidence in the independence and impartiality of the judiciary.

The interest of the society in the withdrawal of the action would seem to far outweigh the interest in its continuance. It is to be hoped that the wisdom of this course of action will be appreciated before additional damage is done.

(1)

Further Observations

(2)

The release of Escolástico Ovando and the pardon of Saguier and de Vargas are positive developments from the humane point of view but cannot be considered an improvement in the functioning of the system of the administration of justice.

(3)

Escolástico Ovando's release can be interpreted as another instance where the executive has displayed its dominance over the judiciary and highlights the secondary rôle played by the judiciary.

The conviction of the two lawyers is of more importance in the long term than their pardon. For those lawyers defending the cause of human rights it represents a reminder that there are limits to the actions one can undertake, and if one passes those limits the consequences may be quite severe.

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NOTES

Country Reports on Human Rights Practices for 1983,  
U.S. Department of State, 1984, p. 659.

Justo José Prieto, "El Estado de Sitio en la Constitución Paraguaya", Estudios Paraguayos 1981, pp. 354-368.

Compare Draft Principles on the Independence of the Judiciary, CIJL Bulletin No. 8, October 1981, especially Articles 11 and 12; International Bar Association Minimum Standards of Judicial Independence, especially Articles 3(a) and 22(a), CIJL Bulletin No. 11, April 1983; LAWASIA Independence of the Judiciary - Principles and Conclusions, especially Articles 10 and 11, CIJL Bulletin No. 11, April 1983; and the Universal Declaration on the Independence of Justice, Articles 2.14(b) and 2.19(b), CIJL Bulletin No. 12, October 1983.

Annual Report of the IACHR, 1979-80, p. 117 (English version).

"Absolutamente no hay independencia en el poder judicial."

"Dentro de la comisaría nadie pudo haberlo tocado, pues se trataba de un ebrio consuetudionario que el vecindario y la población lo sabía y era un detenido sin importancia, o sea que no se trataba de un político, de un asaltante, de un ladrón o de una persona importante que eventualmente podría pasar por ese trance." ABC, 21 February 1984.

Filártiga vs. Peña-Irala 630 F2d 876 (1979) (on appeal); reprinted in part in Protecting Human Rights in the Americas. Buergenthal, Norris and Shelton, IIHR, San José, pp. 381-390. See also ICJ Review No. 25 at p. 62.

- (8) Población Penal Paraguaya, 1978, Comité de Iglesias, Asunción.
- (9) El Preso Sin Condena en América Latina y el Caribe, Carranza, Houed and Zafforani, ILANUD, San José, 1983, pp. 22-23.
- (10) Country Reports (supra, note 1), pp. 663-4.
- (11) Constitution of Paraguay, Article 79.
- (12) Sendero, No. 316, January 1984, p. 7.
- (13) El caso de Ovando es "patético, por muchas razones", Saguier señaló que "después de haber estado 15 años en la cárcel, y sin haber salido un solo paso de su prisión resultó sospechoso de incurrir en algunos de los hechos, no se especifica en cuál de ellos, que determinaron los sucesivos decretos de estado de sitio. Es decir, está indiciado desde hace seis años de participar en guerra o conflicto internacional, de invasión exterior y de conmoción interior. Es desde cierto punto de vista, mas que patético, un caso fantástico ... delirante, y por esto mismo seguir haciendo consideraciones jurídicas sería caer en la misma locura ...".

"Nuestros hombres de derecho olvidaron la altísima dignidad del Habeas Corpus; olvidaron que esta noble institución jurídica ha sido creada, se la conquistó mejor dicho, para defender al débil frente al atropello del poderoso, frente a la prepotencia del despotismo. Para eso están precisamente, los órganos jurisdiccionales, para poner vallas a los desmanes de poder."

"Al hablar de los hombres de derecho, aumenta el patetismo del caso Ovando. Digo aumenta porque nos asalta un interrogante: ¿cómo es posible que un jurisconsulto, un profesor de derecho, sea tan



insensible ante un caso tan injusto ? En una autocracia, la figura del cancerbero, la del torturador, del que suplicia al preso no causa asombro, porque los sabemos inhumanos. Pero un hombre de derecho, un profesor universitario, un padre de familia, y que en algunos casos es católico, ¿cómo hace para conciliar el sueño ? ¿para mirarle a la cara a sus hijos, a sus alumnos, para ir al templo a orar ? Me resulta difícil comprender tanta insensibilidad", ABC, 19 November 1983, p. 4.

- (14) "Bueno, alguien dijo alguna vez que la historia de los países puede ser escrita estudiando las sentencias judiciales de sus distintas épocas. En este sentido, creo que la sentencia que denegó la libertad de Escolástico Ovando es la que mejor representa al Paraguay de los últimos 30 años. La obligación que tenían los miembros de la Corte Suprema de Justicia de ordenar la libertad de Ovando es como una luz potente que por mas fuerte que cierren los ojos, igual la seguirán viendo. Es hora de decir las cosas bien claras. Este fallo, dictado en el caso de Ovando, marcará a fuego a quienes lo han firmado; el índice de la historia y del pueblo los señalará durante todo el tiempo que vivan, y aún despues de muertos. El haberle negado la libertad a un hombre enfermo, que desde hace 21 años no realiza un solo acto de libertad, en base a un Art. 79 de la Constitución Nacional, dictada en 1967, es algo que los ha salpicado para siempre. Muchas cosas podrán hacer; podrán silenciarme a mí si lo desean, temporal o definitivamente, aplicándome la Ley 209 o el Art. 79; podrán silenciar a los que despues de mí digan lo mismo o algo parecido; todo lo podrán hacer, porque hoy tienen el poder, pero hay algo que no podrán hacer jamás y ese algo es limpiarse y cambiar el juicio que un pueblo tiene de ellos. Algún día sus mismos hijos, Dios y la Patria les demandarán por lo que han dejado de hacer." ABC, 17 November 1983, p. 3.

- (15) Report on the Situation of Human Rights in Paraguay,  
IACHR, 1978, pp. 22-23, 77-79 (English version).
- (16) See generally Mbareté\*: The Higher Law of Paraguay,  
Helfeld and Wipfler, The International League for  
Human Rights.

\* Superior over others.

## A R T I C L E S

### THE JUDICIARY UNDER MARTIAL LAW REGIMES

by F.S. Nariman\*

It is now more than thirty years since the countries in the Asian region achieved independence. Over time the pattern of government has changed in many of them. Most started with a parliamentary system which still prevails in India, but in many parts of South and South East Asia there has been a shift to the presidential form of government. In theory this is also a democratic form of government since the presidential office is an elected one. Too often, however, the presidential form of government lapses into a civilian dictatorship. The temptations of absolutism are great and the task of an independent judiciary is a trying one. There is always the charisma of the national leader trying his best to relieve the poverty-stricken masses, only to be thwarted (so it is said) by a bench of non-elected judges who cannot gauge the real aspirations of the people.

Often presidential forms of government in this region have yielded to martial law régimes under which there is law and order (or an outward semblance of it) but no rule of law. Judges have been required to take an oath not to a Constitution but to a martial law order: to a firm man.

How does a judiciary relate to an autocratic non-elected régime ? If you are going through a period of revolution which has succeeded and a writ is filed, what do you do ? Resign ? Fly in the face of the martial law Administrator ? Or do you continue on and modify your

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\* Advocate, former Solicitor-General of India, member of the International Commission of Jurists.

decisions to face constitutional facts as they emerge ? Is it important for the judiciary to continue to function at any cost - even at the cost of its independence ?

Several non-governmental organisations have tried to set down principles conducive to an independent judiciary. The International Commission of Jurists and its Centre for the Independence of Judges and Lawyers, the International Bar Association and the Law Association for Asia and the Western Pacific (LAWASIA) have each attempted their own formulations, all of which proceed on the basis that there is a yardstick of minimum standards which can be applied to all functioning judicial bodies.

Their efforts were deliberated upon at the World Conference on the Independence of Justice held in Montreal in June 1983 which was attended by representatives of non-governmental organisations, the United Nations and members of international courts, including the President and other justices of the International Court of Justice. It is hoped that the document produced at Montreal will form the basis of a declaration by the United Nations on the Independence of Justice. But at the pace at which international forums function, we are unlikely to see the formulation of any such universally accepted Declaration in this decade.

In martial law régimes, even the sine qua non of an independent judiciary, a guaranteed tenure of office, is denied. The reason is the reluctance to govern by an objective set of laws, the tendency to frame rules to suit the whims of those in charge of the governmental machine. I remember the charming story related a few years ago at a seminar of the Indian Branch of the International Law Association by a sitting judge of the Supreme Court of a neighbouring country. He was a fearless judge and internationally recognised as such; it was he who was nominated to accept the Nobel Peace Prize on behalf of Amnesty International. He was very friendly with the man who later became President and Chief Martial Law Administrator of

his country. That President is no more and so one can relate the incident without causing offence. The President turned to his friend the judge and asked him to draft a Constitution for the country, the administration of which he had just taken over. The judge said:

"When I was a young boy at Calcutta, there was a famous playwright and two famous actors - each having a different theatrical style. Whenever the playwright was commissioned to write a scenario, he would ask for which one of the two actors it was intended, so that the play would suit the talent and ability of that actor. Do you want me to write a Constitution like that playwright wrote his plays?"

The President saw the point and asked someone else to do the drafting. It was only the smouldering memories of a past friendship that saved the judge's life.

Tailor-made constitutions imposed by force of arms are an impediment to the establishment of an independent judiciary. Bangladesh is a case in point.

When Bangladesh first became independent, it was provided by the Provisional Constitutional Order of 11 January 1972 that there would be a Supreme Court consisting of a Chief Justice and other judges appointed from time to time. The Constitution of Bangladesh came into force on 16 December 1972 and provided for a unitary form of government. Fundamental rights were guaranteed and made enforceable through the superior courts. No provision was made for a declaration of a state of emergency, and hence, no fundamental rights could be suspended. The Supreme Court had supervision and control over all tribunals and courts.

In 1975 the Constitution Fourth Amendment Act was passed, which allowed fundamental rights to be suspended and took away some of the supervisory functions of the Supreme Court. After 1975 the Supreme Court's supervisory

and control functions were restricted to courts subordinate to the high courts.

However, even after the promulgation of martial law in 1975 security of tenure continued to be guaranteed until the age of 62 years. Independence was secured by providing that judges could not be removed except by the President pursuant to a resolution of Parliament passed by a two-thirds majority on grounds only of proved misbehaviour or incapacity (Article 94(2)). By a subsequent amendment, the impeachment procedure was substituted by a provision for removal on a reference by the President to the Supreme Judicial Council composed of the Chief Justice and the next two senior judges.

The situation changed after the Proclamation of Martial Law on 24 March 1982. Although under that Proclamation the courts continued to function, all writ proceedings were declared to have abated. A few days later, on 11 April 1982, the Proclamation First Amendment Order of 1982 provided that a judge of the High Court (i.e. the High Court and Appellate Court divisions of the Supreme Court) could be removed by the Chief Martial Law Administrator. Paragraph 10(4) reads:

"A person holding any office mentioned in paragraph 3 (judges) and paragraphs 6, 7 and 9 may be removed from office by the Chief Martial Law Administrator without assigning any reason."

In the past few months, three judges of the Supreme Court of Bangladesh have been removed from office under paragraph 10(4) by the Chief Martial Law Administrator.

Under the Proclamation First Amendment Order of 1982 (11 April 1982), the Chief Justice of Bangladesh, whether appointed before or after the Proclamation, was obliged to retire from office if he had held office for a term of

three years - even if he had not attained the retirement age of 62 years (proviso to paragraph 10(1) of the Order of 1982).

The result was that Chief Justice Kamaluddin Hussain, who had been the Chief Justice for more than three years in April 1982, automatically demitted office. The way he went does little credit to the system. On 12 April 1982, the Chief Justice was hearing a group of cases in which several advocates were engaged. The Chief Justice was not impressed by the merits of the cases and was not inclined to grant relief to the clients of these advocates. The same would have been the fate of another client whose case was not in the group, but was listed for later that day. When it came on the advocate engaged in the case raised a new plea - coram non iudice. He said that it was reported in the newspapers that morning that the Chief Justice could not hold office for more than three years. The Chief Justice then sent for the Attorney General (since the gazetted copy of the Proclamation of Sunday, 11 April 1982 was not available) and asked him whether there was such a provision and whether it applied only prospectively or included the present Chief Justice. The Attorney General came and enlightened the Chief Justice that he had demitted office by reason of the Proclamation Order No. 1 of 1982. The Chief Justice rose, went to his Chamber, took off his judicial robes for the last time, and bade farewell to the advocates in the Bar Library.

The provision for compulsory retirement of the head of the judiciary in military régimes was not unknown in Pakistan. In September 1979, when Yakub Ali, the then Chief Justice of the Supreme Court of Pakistan, displeased the authorities by granting an interim order on Begum Bhutto's petition against her husband's detention, he was also made to go - by a presidential Order reducing the retirement age for a Chief Justice.

Some cynics say he deserved it. They cannot help but recall that it was the Supreme Court of Pakistan which, in

October 1958 (in Dosso's case\*) gave legal recognition to the martial law régime which abrogated the established Constitution. The judges with their fine intellectual attainments perceived what one author has wryly described as "constitutional contours in extra-constitutional actions". In fact, they legitimised tyranny. Dosso's case was over-ruled 14 years later by the same Supreme Court when the country was in the grip of another martial law régime. The Court ruled in Asma Jilani's case in 1972\*\* that martial law was illegal and that the military commander was a usurper. However, it was too late. Constitutional transgressions had long since been recognised as law and martial law had become part of the legal culture of the country.

All this is a pity. In the field of liberty, the highest courts in the two wings of Pakistan have had a distinguished record. They have held that in petitions for habeas corpus the question of the satisfaction of the detaining authority is always justiciable. As far back as in 1969 they had refused to follow the wartime majority judgment of the House of Lords in Liverside vs. Anderson delivered in November 1941. In addition, the Supreme Court of (East) Pakistan in judgments rendered in 1966 and 1967 had zealously upheld its right to scrutinise and pronounce upon the validity of every order of preventive detention. The Supreme Court of Bangladesh had inherited and preserved this tradition until the declaration of martial law.

The fear that has beset the judges in Bangladesh since the Proclamation of 11 April 1982 is apparent from the following events. About four months ago, in April this year, three successive Division Benches refused to hear a petition for a writ of habeas corpus, one judge saying in

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\* Dosso's case - State vs. Dosso, PLD 1958 SC 533.

\*\* Asma Jilani's case - Asma Jilani vs. Government of Punjab, PLD 1972



open court "my heart trembles". Ultimately another Bench agreed to hear the case. During arguments by petitioner's counsel, this Bench (undeterred by what Justice Cardozo called "the hydraulic pressure of events") expressed its opinion about the illegality of the detention. When its jurisdiction was questioned the judges pointed out to counsel appearing for the government that although the Constitution of the People's Republic of Bangladesh (which empowered courts to issue writs) was suspended by the March 1982 Proclamation of Martial Law, the power to grant habeas corpus under Sec. 491 of the Criminal Procedure Code remained. Counsel for the government wisely advised a retreat. Orders for the release of the detainee were issued and a confrontation avoided.

One of the basic problems in Bangladesh is the absence of any continuous constitutional tradition. During the twenty-five years when it was East Pakistan, the longest period during which a democratic constitution functioned, with entrenched rights and supervisory jurisdiction of superior courts, was a little over two years, from March 1956 to 7 October 1958. The only other period in this long history was when President Ayub's Constitution of 1962 with entrenched rights operated from 10 January 1964 until September 1965 when an emergency was declared.

In the People's Republic of Bangladesh itself, constitutional rule has been frequently interrupted by emergencies and martial law. The longest period in which the Constitution and entrenched rights operated was again a little over two years (16 December 1972 to 27 December 1974). In the twelve years of its existence, the period of constitutional government in Bangladesh has not exceeded four years. Happily, responding to public opinion, the Chief Martial Law Administrator has recently announced that military courts and tribunals will be abolished. National elections are scheduled to take place in December.\*

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In a recently published biography of Lord Atkin - the great champion of liberty who is particularly remembered for his dissent in Liversidge vs. Anderson - it is recorded that he once wrote to a friend that he believed that an impartial administration of justice "is like oxygen in the air; they (the people) know and care nothing about it until it is withdrawn". Wise words. Words to ponder over - not only for the people of Bangladesh and Pakistan but for the rest of us all in this great sub-continent.

In the end, the importance of a universally accepted set of principles for the independence of the judiciary is that it makes it a trifle easier for a national judge who is occasionally called upon (and is inclined to respond to that call) to summon up that quality which Napoleon once described as "four-o'clock-in-the-morning-courage". A Universal Declaration, or better still, a World Charter of Justice, will forge a bond amongst the judges of the world, a bond between those functioning under conditions where oxygen is in plenty and those labouring under conditions where it is scarce, where at times to breathe the air of liberty requires an effort.

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## AYACUCHO AND HUMAN RIGHTS

by Diego Garcia Sayan\*

In 1980 a constitutional government was re-established in Peru after twelve years of military dictatorship. The new Constitution was approved in 1979 by a Constituent Assembly which had been elected by the citizens of Peru. It gives critical importance to human rights, and not only guarantees an enumerated list of rights but sets out remedies available to citizens for the enforcement of those rights. One of the remedies guaranteed by the Constitution is the writ of habeas corpus. The language of the Constitution makes clear that it also protects those rights guaranteed in international instruments adhered to by Peru. Thus, in 1980, Peru seemed to be in a relatively positive situation with respect to the protection of human rights and the establishment of the Rule of Law.

However, at about this time Sendero Luminoso (Shining Path) began its armed struggle against the government in the southern highlands of Peru. Its activities were originally centered in the department of Ayacucho, then expanded to the neighbouring departments of Apurimec and Huancavelica, as well as the country's capital, Lima.

To understand the emergence and growth of Sendero Luminoso one must look at the social conditions of the areas in which they operate. The life expectancy in the

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\* Executive Secretary, Andean Commission of Jurists.

Ayacucho region is 11 years lower than that in the rest of the country. Despite the large percentage of the population which lives in poverty, government investment in the area is minute.

Since 1980-81 there have been more than 1,000 acts of sabotage of diverse magnitude. As the number of such incidents and the number of encounters between Sendero Luminoso and military forces have increased, the rural population has increasingly been caught in the cross-fire. The violence against the civilian population has assumed alarming proportions. There are now more than 2,000 dead. Both the military service and Sendero Luminoso are responsible for the deaths, but it has become increasingly clear that the military bears a greater share of the responsibility.

The government's response to the situation has been unfortunate. At first, specialised anti-guerrilla police troops (the "sinchis") were sent to the region, then in December 1982 the armed forces were sent. Actions taken by military personnel have sometimes resembled those undertaken by other Latin American countries in the so-called "dirty war", and have made substantial in-roads into the Rule of Law.

In times of emergencies even greater attention should be paid to the protection of human rights, yet observers of this situation generally agree that there have been serious abuses of human rights by those having political and military authority over the affected regions.

#### Infringements of the Rights of the Defence

There are only four rights in the Constitution which can be suspended: the inviolability of the home (Article 2(8)); freedom of movement (Article 2(10)), freedom of

assembly (Article 2(9)), and the right not to be detained without a warrant issued by a court (Article 2(20)(g)). All other rights guaranteed in the Constitution, the laws and international treaties on human rights, remain in effect.

The Constitution establishes the right of the arrested person to be informed immediately and in writing of the cause or reason for his detention. He has the right to communicate with and be advised by counsel of his own choice immediately after he is summoned or arrested by the authorities (Article 20(20)(h)). In addition, the Constitution guarantees the right to life and physical integrity. It also prohibits incommunicado detention except where it is indispensable to clarify the crime and only in the form and for the period established by law (Article 20(20)(i)). This same paragraph establishes that the authority "is obliged under penalty of law to indicate without delay the place in which the person is being detained".

Also applicable to the situation are Article 3 (the right to life, liberty and security of person) and Article 9 (the right not to be subjected to arbitrary arrest, detention or exile) of the Universal Declaration on Human Rights.

Reports from residents of the Ayacucho region indicate that some rights are routinely violated and that detainees are mistreated. Among the violations most commonly reported are:

- detention by unidentified members of the security forces, generally wearing hoods to hide their identity;
- transfer to an unknown centre of detention, and incommunicado detention with the arrest being denied to third persons;

- failure to inform the arrested person of the reasons for the arrest, and failure to allow him or her to communicate with a lawyer and failure to inform the Public Minister's office of the arrest;
- interrogations practiced without the presence of the Public Minister or a lawyer; and
- torture.

The actions of the military authorities are of great concern, because they seem to be responding to violence with another sort of violence, and violating the rights of citizens in the name of anti-subversive warfare. It would be enough if only one of the public accusations were true for the situation to be considered as extremely serious. Unfortunately, more than one of these accusations are true and the only conclusion that can be drawn is that there is systematic violation of human rights in the Ayacucho region.

The military authorities have also routinely abused the constitutional provision which permits an exception to the guarantee against incomunicado detention. This exception is not applicable with respect to a detainee's right to communicate with a lawyer and does not allow the exclusion of the lawyer or a representative of the Public Minister's office at an interrogation. In addition, incomunicado detention can only take place in the form and for the period established by law. Under Article 133 of the Code of Criminal Procedure, incomunicado detention is authorized only if notification is given to a judge and then only for a period of 10 days. Incomunicado detention which does not adhere to the Constitution or the law is itself a crime and an abuse of authority.

Similarly, torture is not only a violation of the rights contained in the Universal Declaration of Human Rights and the Constitution of Peru, but is also a crime under the Penal Code.

The result of these abuses is that the fundamental rights of the person incorporated in the Constitution and the Universal Declaration of Human Rights are in de facto suspension in the southern mountains and to some extent in the entire country. It is clear that the public authorities do not begin to understand the gravity of the phenomenon; history is full of examples of the destructive results of such policies. The logic of combating violence with state-derived violence and arbitrariness should not be accepted.

### Interference with the Duties of the Public Minister

According to the Constitution, a declaration of emergency can not interfere with the activities of the Public Minister as defender of the people, nor the right of citizens to seek redress for violation of their rights. The Public Ministry has the obligation to ensure the proper application of the law, guard the independence of the judiciary, defend human rights and keep watch over police investigations (to the extent authorised by the Constitution). The only restriction is that the Minister may not seek to enforce those rights by a constitutionally declared state of emergency.

The ability of the Public Minister to carry out these functions has been put in jeopardy. It has been difficult for the Minister to verify arrests because detainees are not being placed in ordinary prisons but in special detention centres created by the military. Although the Ministry is to be informed of arrests and has the right to be present at interrogations, the military has failed to do this. Given the situation, it is surprising that the Public Minister has not made use of his power to institute criminal actions to put a halt to this interference with his work.

## Threats to the Independence of the Judiciary

Military authorities have transferred the assignment of cases from one judge to another and have denied the necessary logistical support for the adequate functioning of the judiciary. When the investigation began in January 1983 into the deaths of 8 journalists in Uchuraccay, the military authorities ordered a judge from outside the jurisdiction in which the crimes took place to head the investigation. Unfortunately, the judge ordered to handle the case did so, subjecting himself to charges of subordination to the military.

The military authorities have not assisted judges in carrying out their functions in the terrorist affected areas and have not carried out arrest warrants. When autopsies are required under law the necessary notification to judges and coroners is not given. With the increase in the number of deaths, this refusal of the military authorities to obey the law is particularly troublesome. Accurate information is needed as to the identity of the victims and the circumstances of the deaths.

Also troublesome is the reluctance of the civil courts in the Ayacucho region to utilise their power of habeas corpus, which continues to exist under a state of emergency for the purpose of establishing a prisoner's whereabouts and physical condition. Despite a Supreme Court ruling upholding this power, it has rarely been used.

### Conclusion: Legality or Efficiency

The available facts make one question the existence of a Rule of Law in Ayacucho. Not all of the blame for this situation can be placed on Sendero Luminoso. One could argue that given the exigencies of the situation the deviation from the law is unavoidable and is the only



"efficient" means of eliminating Sendero Luminoso. There may, it could be said, be violations of "some" laws and articles in the Constitution, but that is the price to be paid to restructure social peace and affirm the Constitution itself and the laws presently suspended.

Presented with such logic, one must radically and emphatically disagree. There is not only an important and fundamental matter of principle. From the point of view of "efficacy", Latin American experience in the last decade is sufficiently revealing of the consequences to society when the machinery of the State exceeds the bounds of legality. First, a spiral of major violence is unleashed, with indiscriminate, open and systematic repression and a tremendously high human and social cost. The nearly 30,000 disappeared persons in Argentina are testimony to this. Next comes the gradual and progressive corrosion of the Constitution by the excessive power acquired by the armed forces, which may determine at a given moment that civilian power is to be dispensed with, not only in a department or province, but in the entire country. Lastly, the legitimacy and stability of the armed forces ends up being questioned, as its members destroy with their deeds the most elemental of human rights.

For the democratic and responsible citizen there is no way but to continue the fight so that the methods used by the State to establish social peace continue to be within the strict framework of international treaties on human rights, the Constitution and the law.

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