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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS
April 1988
Editor: Reed Brody

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 counter serious inroads into the independence of the judiciary and the legal profession by:

- promoting world-wide the basic need for an independent judiciary and legal profession;
- organising support for judges and lawyers who are being harassed or persecuted.

The work of the Centre is supported by contributions from lawyers' organisations and private foundations. 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 provide the financial support essential to the survival of the Centre.

Affiliation

The affiliation of judges', lawyers' and jurists' organisations is welcomed. Interested organisations are invited to write to the Director, CIJL, at the address indicated below.

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CASE REPORTS

CHILE

Judge threatened for investigating torture cases

Chilean Judge René García Villegas has received numerous death threats as a result of his investigations into allegations of torture committed by the *Central Nacional de Informaciones* (CNI – state security police).

In the 15 years of military rule in Chile no member of the police or security forces has been convicted of the torture of a political detainee in spite of overwhelming evidence of such practices and the many official complaints submitted to the courts. The refusal of CNI agents to obey orders to appear in court, their use of false names, and the blindfolding of victims during interrogation make identification difficult. Amnesty International reports that some agents under investigation have been transferred to distant places by higher officers, apparently to obstruct court appearances.

Judge García, whose 20th District Criminal Court in Santiago included within its jurisdiction the CNI's main detention centre, is one judge who has vigorously pursued the accusations made by victims and their relatives. He is currently investigating some 36 complaints presented by current and former political detainees.

For one year, Judge García Villegas was also in charge of investigating complaints of torture brought by 25 detainees arrested in August – September 1986 and accused of smuggling arms into the country. Defence lawyers for the prisoners say that in 19 of the 25 cases court medical officers confirmed signs of beatings and other ill-treatment. His investigations were hampered by constant delays by the police and military in carrying out judicial orders. It took five months, for example, before the military courts dealing with the trials of the detainees gave permission for them to appear before the judge. The judge persevered, however, and identified two of the CNI agents responsible for one of

the cases of torture. In response to his order that they appear before him, the head of the CNI refused to allow their presence and in August 1987 the Supreme Court transferred the case to a military court. Judge García argues that it is improper to transfer a case during the investigation stage. "I am required by law to establish the facts and identify the guilty parties before another court can remove me from the case."

In the cases still under his control, officials have hampered his investigation. "Not one police officer will follow my orders to arrest a CNI agent," García told a journalist for *Latinamerica Press* (18 February 1988). At higher levels, "when I ask the Defense Minister for something he tells me to ask the Interior Minister and vice-versa. It's like playing ping-pong."

Because of his persistent investigations and because of his public statements that these investigations have conclusively established the use of torture by the CNI, the 70-year old judge has received constant threats over the past 18 months. His wife receives threats, too. According to Judge García, he had just left for work one morning when a caller asked his wife, "You're alone. You wouldn't want to be that way for the rest of your life, would you?" Last November after unknown intruders broke into his house, took pictures and cut the telephone lines, he asked for, and received, 30-day police protection from the Court of Appeals. Nevertheless, he continued to receive threats. One anonymous voice warned, "The police guard does not matter. We will silence you."

The CIJL issued a circular letter asking lawyers' and judges' organisations to write to Chilean officials expressing concern over the threats and urging the government to cooperate with Judge García in his investigations.

Lawyers receive threats

Numerous lawyers undertaking political cases have also received threats.

In October 1987 the car belonging to Enrique Palet, executive secretary of the *Vicaría de la Solidaridad*, one of the main human rights

organizations in Chile, was sprayed with a red substance resembling blood.

Lawyers at the offices of CODEPU (People's Rights Defence Committee) in Valparaiso received bomb-threats by telephone on March 8, 1988. A box was found in the office containing a fake bomb. Two days later further calls reminded them of the earlier incident, and one on 14 March warned them to "watch out". On the night of 14/15 March the office of one of the lawyers who works with CODEPU, Celia Morgunovsky, was raided and ransacked for the second time this year. On 15 March, four men in civilian clothing attempted to abduct Miguel Angel Alfaro, Administrative Secretary of CODEPU, as he was leaving a meeting in Santiago. Earlier, in December 1987, CODEPU workers Miguel Alfaro, German Oschensius and Jose Galiano had been threatened.

Several members of the *Comisión Chilena de Derechos Humanos* (Chilean Human Rights Commission) in Santiago and Valparaiso have also been threatened. The offices of Maximo Pacheco, vice-president of the Comisión, were broken into in October 1987. Photographs of his children and grandchildren were taken away.

EL SALVADOR

Human Rights lawyer killed

On October 25, 1987, Herbert Ernesto Anaya Sanabria, 33, Coordinator of the El Salvador Human Rights Commission (CDHES), was shot six times in the back and head and killed when he left his house, to take his children to school. While the two plainclothes gunmen have not been identified, human rights groups hold the Armed Forces and the security forces responsible. Anaya is the seventh CDHES official to be slain or disappeared in the last seven years.

Earlier in October, CDHES member Maria Victoria Hernandez Gonzales was arrested along with her mother as they were leaving Mariona prison after visiting political prisoners there. She was released 12 days later, after being interrogated about the members of the Com-

mission. While in detention she was reportedly told that Herbert Anaya was to be killed.

Anaya himself had been detained in May 1986 along with several other members of the CDHES and other human rights workers. In prison, he was forced to remain standing and was refused food or water for 3 days until he required medical attention. While in prison, he conducted interviews with his fellow inmates and subsequently prepared a report recording systematic torture of detainees. After he was released following 9 months of detention in February 1987, he received a series of anonymous death threats. These became more frequent following the detention of Iris Galan, another human rights worker, who was tortured by the Armed Forces. During her detention, members of the police told her that they "will finish with everything related to human rights."

Ernesto Anaya's father, Rafael Anaya Garcia, was arrested by the Armed Forces on March 4, 1987, and interrogated for two days about the human rights work of his son. He was then released.

Throughout the summer, while Anaya resumed his work with the Commission, the military press office instigated a campaign including media advertisements linking Anaya with the F.M.L.N. guerrillas.

After Anaya's killing, Salvadorean President José Napoléon Duarte promised a full investigation. In December 1987, the Salvadorean police arrested a student, Jorge Alberto Miranda Arévalo, on other charges. After 12 days of virtual incomunicado detention, Miranda stated to the security forces that he had participated in the killing of Anaya, on behalf of the Revolutionary People's Army, an armed opposition group. Later, however, Miranda retracted the confession, telling a judge that "the actions taken against me and my family pressured me into taking responsibility for actions I did not commit." Miranda's family has stated that they were offered money to support their son's confession and were forced to sign a statement which falsely stated that the police had recovered arms from their house. There is evidence that Miranda was subject to ill-treatment, including sleep deprivation, while in detention.

Numerous human rights groups have requested that the government allow an impartial and independent inquiry into the Anaya killing.

ISRAELI-OCCUPIED TERRITORIES

The CIJL has been following the attempt by West Bank lawyers to form their own bar association (see CIJL Bulletin No. 17). The Israeli High Court of Justice has recently issued a major ruling in that controversy. Below, we reprint a commentary on that ruling prepared by the ICJ's affiliate in the West Bank, Al-Haq/Law in the Service of Man:

West Bank Bar Association

On 16 September 1987, the Israeli High Court of Justice passed judgment concerning the issue of the formation of a West Bank Bar Association. The decision follows a petition submitted by a number of West Bank lawyers in 1984 to the Israeli High Court requesting that the authorities be ordered to show cause why a bar association should not be permitted. This petition came after numerous requests were made by practicing lawyers on the West Bank to the military authorities to permit them to establish a Bar Association as provided under the Jordanian law, but all those requests were either rejected or ignored.

A Bar Association has long been needed to fill the void left after the June War of 1967, when the Israeli Officer in Charge of the Judiciary of the West Bank seized the powers of the Jordanian Bar Association with regards to the West Bank. In 1967, 150 practicing lawyers in the West Bank, members of the Jordanian Bar Association, went on strike in protest against several actions taken by the Israeli authorities that they considered illegal. These actions included the annexation of Jerusalem and the changes made in the legal system in the West Bank, including the appropriation of the Court of Appeal building in Jerusalem. Over the years 70 of these striking lawyers have resumed their practice in response to the need of residents of the West Bank for legal services for both security and civilian matters, and as a result of this they have been struck off the Jordanian Bar Association Register. In addition to these lawyers who have resumed their practice, another 110 lawyers have been licensed to practice by the military government in the area since 1967.

Although the Jordanian Law 11 of 1966, which establishes a Bar Association, is still part of the law in force in the West Bank the practising lawyers have not been allowed to organise themselves into any professional society since the seizure of the powers of the bar association by the Israeli military authorities. Lawyers have on many occasions expressed their concern about the negative consequences that have arisen due to the absence of a Bar Association. They also lodged many complaints with the military authorities about the system of justice, including unnecessary delays, poorly trained judges, and lack of facilities. They emphasised that, without an organisation to pursue these complaints and to protect the interests of the lawyers, few changes could be expected.

The Jordanian law, under whose provisions the West Bank lawyers wished to establish their Bar Association, sets out a thorough structure for the functioning of such a society. It outlines the functions of the lawyers, their rules of ethics, and their rights and obligations. It provides that the chairman and members of the council of the society be elected by a general meeting. The council is authorised to manage the property of the society, to formulate the budget, and to collect dues. In addition, the Association enjoys financial independence, has the status of legal entity, and is empowered to take the steps necessary to manage the society's finances.

In February 1986, whilst the petition submitted in 1984 was still pending, the Military Commander of the West Bank issued Military Order 1164, purporting to set up a Lawyers Council Bar Association under the direction of the Civil Administration. The Order stipulated that the members of the council, including its chairman, would be appointed by the Civil Administration. The order provided that in certain matters final approval of the council's decisions had to be given by the Head of the Civil Administration. All financial matters as well as the convening of association meetings were to be regulated by the Civil Administration. The order further stipulated that a disciplinary committee was to be appointed by the council, which was to consider disciplinary action in any case where a lawyer violates conduct "regarding a military court or any of the authorities of the Israeli Army or if the conduct offence had to do with the security of the area". In addition to suspension, fines or revocation of the lawyer's licence to practice, possible disciplinary measures included banning a lawyer temporarily or per-

manently from representing clients before a military court and also before any Israeli military authority, including at the time of arrest or interrogation. The decisions of the disciplinary committee were to be subject to review by an Objections Committee. This disciplinary procedure would be set in motion on a complaint made by the Legal Advisor to the Military Authorities in the area.

Al-Haq intervened, in April 1986, with the Minister of Defence, requesting that the order be cancelled. We expressed our distress at the issuing of the order, as it violates legal regulations and norms since the case was still before the court, and pointed out that the military order regulates the legal profession in a way that infringes on its independence.

The West Bank lawyers also opposed the order and refused to withdraw their petition to the High Court, arguing that the order did not fulfill any of the requirements of an independent bar association. They further argued before the High Court that the setting up of a independent association did not harm any legitimate military interest and was consistent with international law requiring an occupying power to normalise the life of the local population.

The Military Commander responded by stating that elections to a professional association did pose a danger to security since, in his view, all elections in the West Bank are based on the political orientation of the candidates and as such expedite the attempt of 'hostile' organisations to enhance their influence over the population. The occupation authorities, he states further, did not have to accept the creation of an official body with wide powers over an entire population that would be subject to the influence of an unlawful organisation.

Justice Eliezer Goldberg delivered the judgment of the three-member court, the other judges concurring. He emphasized that the right to organise is a basic right that applies even under military occupation, but at the same time it is not an absolute right, and that it could only be exercised with due regard to social order and the security of the state. Justice Goldberg in addition pointed out that the Military Commander had to preserve as far as possible the situation that existed at the beginning of the occupation and he referred to the Hague Regulations, annexed to the Fourth Hague Convention of 1907, on this point. He

maintained that therefore a balance had to be struck between the restrictions necessary to resist the reasonable possibility of danger on the one hand, and, depending on the extent of such anticipated danger, the preservation of the normal life of the community on the other.

The Judge concluded by stating that the Military Commander had not demonstrated that the independence of a Bar Association, with respect to the issue of the election of council members and control over the council's budget, would threaten security. Moreover, assuming that a "reasonable likelihood" of danger existed, the commander, on the evidence, had not properly weighed the factors involved. Neither had he considered alternative ways of dealing with the anticipated danger while at the same time maintaining, as far as possible, the independence of the new organisation. The court ordered the Military Commander either to modify the existing order in accordance with the court's recommendations or to set aside the order in its present form and to reconsider the issue on the basis of the judgment.

Al-Haq for a long time has been concerned about the non-existence of a Bar Association in the West Bank. In accordance with our beliefs in international human rights principles and norms and the rule of law, we see the independence and the proper functioning of the legal profession as an essential cornerstone to the realisation of these standards. A fair and equitable system of administration of justice and the effective protection of rights and freedoms of citizens depends upon the contribution of lawyers and judges. Accordingly, it is necessary that there be an independent Bar Association that would actively work to protect its members, to defend the role of lawyers in the society, to set up and uphold their professional ethics, to promote and support law reform, to work for improvements in the administration of justice, and to ensure the provision of legal services to all sectors of society. A Bar Association such as that set up in the military order referred to above, that totally lacks independence and neutrality, would be unable to fulfill those functions. A Bar Association needs to be free from governmental interference and from fear of adverse consequences for its actions and criticisms on the administration of justice. Al-Haq sees this interference by the military authorities in the formation of a Bar Association in the West Bank as a violation of the basic rights of association and a hindrance in the promotion of human rights principles and the rule of law.

Al-Haq welcomed the statement in the ruling that the right of association is a basic right even during a military occupation. We were also pleased to note that the Military Commander's argument was not accepted at face value and that the Court looked into the issue of whether, in exercising his authority and his discretion, the Military Commander has weighed the relevant considerations. This is a fundamental principle of administrative justice and its absence should be ground for setting aside an administrative action upon judicial review. However, although we welcome certain *obiter dicta* of the judgment, we found the judgment itself very disappointing. The petitioners had asked for a order nisi, that, unless the Military Commander could show good cause to the contrary, he should be ordered to allow a Bar Association to be formed as provided in the Jordanian law, and this was not granted.

Despite the apparent favourable decision, it is by no means a victory. The matter rests in the Military Commander's hands and to date no action has been taken. Al-Haq continues to monitor the case with great interest for we feel that the establishment of an independent Bar Association will be an important step towards the enhancement of the rule of law in the Occupied Territories.

ITALY

Judges' liability enacted

At the end of a heated campaign, Italians voted overwhelmingly in an 8 November 1987 referendum to abolish the laws limiting the civil responsibility of judges for errors committed in their judicial duties.

As the government, according to Italian procedure, had 120 days to promote the adoption of a new law on the subject, the CIJL and the ICJ wrote to the Italian Minister of Justice drawing his attention to the Basic Principles on the Independence of the Judiciary which were unanimously adopted by the Seventh United Nations Congress on Crime Prevention and Control in 1985 and endorsed by the General Assembly (A/Res/40/32), which called on governments "to respect them and take them into account within the framework of their national legislation and practice" (A/Res/40/146).

Principle 16 provides that: "Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omission in the exercise of their judicial functions."

In the event, the Italian government proposed, and the legislature adopted, over the objections of the judges and their associations, a law providing that a citizen who believes that he was unjustly damaged by a judicial error may bring suit against the state which, in turn, can recover up to one-third of the judge's salary if the latter is found negligent.

The CIJL believes that provisions of immunity are not for the protection of corrupt or malicious judges but for the benefit of the public whose interest it is that judges should exercise their functions independently and without fear of the consequences. See *Scott* v *Stansfield* (United Kingdom 1868) L.R. 3 Ex. 220, 223 by Kelly, C.B.; Montreal Universal Declaration on the Independence of Justice, art. 2.24 (CIJL Bulletin No. 12); Noto Draft Principles on the Independence of the Judiciary, art. 17 (CIJL Bulletin No. 8). Nevertheless, in many civil law countries judges are subject to civil liability.

KENYA

Lawyer released

CIJL Bulletin 19/20 reported on the case of Gison Kamau Kuria, one of Kenya's few human rights lawyers, who was detained without charge on 26 February 1987 shortly after he had informed the government of his intention to bring suit on behalf of detainees for poor prison conditions and torture.

After over nine months in detention, Mr. Kamau Kuria was unconditionally released on 12 December by order of President Daniel arap Moi. It is widely believed that pressure by international human rights groups – including Amnesty International, the Lawyers Committee for Human Rights and the CIJL – was instrumental in bringing about his release.

In an interview following his release, Mr. Kamau Kuria thanked those who worked for his release and promised to continue his work on behalf of victims of human rights violations.

MOROCCO

Lawyer convicted for plea

In a December, 1987 pleading before a Tetouan court, lawyer Abdallah Zaidy told the tribunal that his student client had a bright future in front of him and that "the man whom you are judging could become a high official, perhaps even head of state." Two days later Zaidy was arrested and on 14 December he was convicted and sentenced by the Court of First Instance of Tetouan to 3 years in prison for "offense towards sacred institutions." He has appealed the conviction.

The Council of the Association of Bar Associations of Morocco has protested the conviction which, it said, was "based on an absolutely erroneous interpretation of the plea which [Zaidy] made in the accomplishment of his professional duty to defend his client" and has demanded his rapid release. The CIJL wrote to the Moroccan authorities in January 1988 but has received no response.

PARAGUAY

Lawyer detained for three months

On 7 November 1987, Paraguayan police seized lawyer Eduardo Morales and his wife, Miriam Ferreira de Morales, also a lawyer, in the town of Presidente Stroessner in Alto Parana Department.

Initially, no warrants were presented for their arrests and the two were held in incomunicado detention for two days when Mrs. Morales was released uncharged. As Dr. Morales' detention continued, several habeas corpus petitions on his behalf were rejected. Finally, on 17 November, Morales was formally charged under Law 209, "Defence of

Public Peace and Personal Freedoms" – the catch-all provision which is routinely used against political opponents of President Stroessner.

According to human rights groups in Paraguay, the reason for Dr. Morales' detention was his representation of an association of street vendors whom the local government wanted to evict from the town's market area. Morales was eventually charged with "incitement to violence" on two occasions – once for leading a demonstration of the vendors and once for organizing a student musical festival which had been banned by the authorities for its "political connotations." Morales denied both charges, explaining that his work with the vendors was strictly as legal advisor and that he attended the music festival as a spectator only. The Paraguayan Bar Association strongly critised the detention and Amnesty International urged Dr. Morales' release as a prisoner of concience. The CIJL sent telexes to the Paraguayan authorities expressing its concern over the detention and was told that "Dr. Morales is no more than a simple lawyer who is being tried under Law 209 of the national constitution and not for defending any cause."

On 5 February 1988, Dr. Morales was released pending trial.

PHILIPPINES

Two human rights lawyers murdered, others harassed

In recent months, human rights lawyers in the Philippines have been subject to mounting pressure. Two lawyers have been shot dead and numerous others have received death threats.

David Bueno, killed on 22 October, 1987, was the only lawyer active in human rights in Ilocos Norte. He was shot outside his home in Laoag City, reportedly by two men wearing military uniforms who have not yet been identified. Mr. Bueno was the Chairman of the Laoag City, Ilocos Norte Human Rights Organisation, an affiliate of the nationwide human rights network, Philippine Alliance of Human Rights Advocates (PAHRA) and worked with the Protestant Lawyers League of the Philippines (PLL). He had recently served as mediator in the release of hostages held by the insurgent New People's Army.

On the morning of 6 February 1988 Attorney Vicente Mirabueno, the Provincial Coordinator of the respected Free Legal Assistance Group (FLAG) was murdered at the public market of General Santos City in South Cotabato. Mr. Mirabueno had received continuous death threats before his murder. One of the suspected gunmen has been arrested and the governmental Commission on Human Rights reports that the killing was not motivated by Mirabueno's human rights activities, "but more likely as a result of the position he had taken as a lawyer in one civil case that would have severely prejudiced the interests of the opposing party."

Bernadette Encinareal, a FLAG lawyer who is acting mayor of Tudela, Misamis Occidental, is now the target of persistent death threats from local paramilitary groups. Among these groups is Kuratong Baleleng, a vigilante organisation which reportedly receives arms from the Southern Command of the Philippine Army. In a July radio broadcast, its leader, Octavio Parohinog, denounced FLAG lawyers, naming seven in particular including Mayor Encinereal as "enemies". They appear to have targeted Encinereal because of her role as a FLAG lawyer in publicising human rights abuses committed by members of Kuratong Baleleng. Mayor Encinareal's home has been monitored by armed members of Kuratong and military sources have confirmed to her that the group is "after her".

Another lawyer whose life has been threatened is Alfonso Surigao, a labour and human rights lawyer in Cebu associated with FLAG and the PLL. When Surigao's office was bombed in August 1986, military investigators took two hours to come from their office only 600 meters away. When they did come, they spent the bulk of their time going through Surigao's files in a major human rights case he was handling. Surigao suspects that the Regional Security Unit (RSU), headed by Major Rico Palcuto, was responsible. The day after Surigao had visited a detained client, a note appeared on the RSU bulletin board saying "arrest Al Surigao", and Major Palcuto has reportedly threatened to detain and torture him. Surigao has recently received death threats over the local private radio and believes his movements are being followed.

Other incidents reliably reported to the CIJL include:

- On the evening of 21 January 1988, a molotov cocktail was thrown in front of the parked car of human rights lawyer Amedo Valera in an apparent assassination attempt. Valera has represented victims of the Mendiola massacre and may have been targeted because of his work on this case.
- On 22 December 1987, attorney Oscar P. Musni of Cagayau de Oro City, FLAG Regional Coordinator, received a death threat accompanied by a live bullet. FLAG reports that it has reason to believe that the threat emanates from the local military or civilian groups supported by the local military.

The CIJL sent a circular letter to lawyers' associations concerning the case of David Bueno and Bernadette Encinareal and later intervened with the Philippine government concerning the other cases. The Commission on Human Rights has assured the CIJL that investigations are underway in all the cases.

SINGAPORE

Defence lawyers jailed

In April and May 1988, the government of Singapore detained four lawyers, at least three of whom were active in political cases.

Twenty-two persons were detained by the International Security Department of Singapore in May and June 1987 under the Internal Security Act. Twenty-one of them were released in stages in June, September and December 1987.

On 18 April 1988, 9 of the detainees, including lawyer Teo Soh Lung, an active member of the Singapore Law Society and lawyer Tang Lay Lee, released a joint statement denying the Government's accusation that they had been "involved in a Marxist conspiracy to subvert the existing social and political system in Singapore," retracting their televised "confessions" of Marxist inclinations and complaining that they were coerced by beatings, intimidation and deceit.

On 19 April 1988, 8 of the 9 signatories were re-arrested and detained. Also arrested and detained was Patrick Seong, 34, one of the few

lawyers who agreed to act for the detainees. The reason for his arrest was unclear but it is beleived he may have been detained for representing the eight during their earlier detention.

On 6 May 1988, Francis Seow appeared in court to make an application for habeas corpus on behalf of lawyers Teo Soh Lung and Patrick Seong. After the hearing, he went with his assistant to the detention center where his clients were held to take further instructions from them. While waiting for them in the interview room, he was taken into custody. His office was searched by a dozen officers who removed files, correspondence and "a van load of documents" according to Seow's son. When the son asked the officers what they were looking for, they replied "subversion."

Mr. Seow is now being held, like the others, without charge or trial under the Internal Security Act. According to the government, he is being detained "for purposes of investigation into foreign interference in Singapore's internal affairs."

Mr. Seow is a former Solicitor General of Singapore and former President of the Law Society of Singapore. According to ICJ Trial Observer, Jill Spruce, he was one of the few advocates prepared to test the legality of the detentions and his arrest left some of the detainees without counsel. A man of 59, he suffers from a heart condition and diabetes.

The CIJL issued a circular letter asking lawyers' and judges' organisations to contact Singapore officials, urging that an investigation be carried out into the allegations of ill-treatment and urging that the attorneys be released unless they were charged with specific criminal offenses and promptly brought to trial.

SOUTH AFRICA

"Wrong" lawyer abducted

Three men claiming to be members of the South African police bungled their attempt to abduct a prominent Transkei lawyer on 5 December 1987 when they kidnapped the wrong man.

The three men stopped advocate Joseph Mzwakhe Miso's car in Umtata in the Transkei "homeland" and forced him into their own car. They then drove out of town. Only after having beaten Mr. Miso and caused him facial injuries did the abducters learn that he was not the lawyer they were looking for – Dumisa Ntsebeza.

Ntsebeza is the president of the National Association of Democratic Lawyers (NADEL) and one of the few lawyers in the Transkei prepared to act on behalf of victims of human rights violations. The NADEL has campaigned for the recognition of captured guerillas as political prisoners and for the abolition of the death sentence for political prisoners. Ntsebeza began receiving death threats several years ago after he began to investigate the case of his adoptive brother, a student activist, who was publicly killed by the Transkei police.

The CIJL wrote to the South African authorities expressing concern over the treatment of Mr. Miso and preoccupation for the safety of Mr. Ntsebeza.

Advocate remains detained

Raymond Suttner, a leading advocate of the Freedom Charter, the most popular human rights document in South Africa, has been held in emergency detention since June 1986. Since 11 June, 1987, he has been held in isolation, separately from all other State of Emergency detainees.

The CIJL believes that Mr. Suttner is being held because of his legitimate activities as a lawyer and advocate for the Rule of Law. His continued detention without charge supports this belief. The CIJL has called on the South African authorities to release him. The authorities responded by saying that Suttner had been involved in setting up "peoples courts" which have carried out executions of black citizens and that his release could not be considered.

ACTIVITIES OF LAWYERS' ORGANISATIONS

Netherlands – Stichting Advocaten Voor Advocaten (Lawyers for Lawyers)

In cooperation with the Dutch Bar Association, the Dutch affiliate of the International Commission of Jurists (Nederlands Juristen Comitee voor de Mensenrechten), and the Netherlands Institute of Human Rights (SIM), Dutch lawyers established the Foundation 'Lawyers for Lawyers' in May 1986 in Utrecht, Netherlands. The initial funding was provided by the Dutch section of Amnesty International.

The Foundations objectives are:

- the promotion of the freedom of the lawyer in the exercise of his/her profession, and
- the promotion of the rule of law.

The Foundation 'Lawyers for Lawyers' seeks to implement these aims firstly by supporting, financially or otherwise, lawyers whose right to exercise their profession has been violated; and secondly by the promotion of an international statue for the independence of lawyers.

As the Foundation's name suggests, its funds are raised by donations from lawyers. The Foundation supports lawyers working for the protection of human rights, both in the classical and in the social sense, and who therefore face related problems. The financial assistance can be given directly to the lawyers, or the organisation of lawyers (legal aid centre), whether it is to finance salaries or office equipment or other costs within the exercise of the legal profession. The Foundation also funds trial costs or bail applications, should they fall within the ambit of the Foundation's objectives.

In January 1988 it organized a fundraising campaign among Dutch lawyers, which raised Dfl. 150,000 to support Colombian human rights

lawyers organized in the Corporación Colectivo de Abogados (CCA) over a period of three years.

It is currently looking for more projects to support during the following years.

The secretariat of Lawyers for Lawyers can be contacted through Frederiek de Vlaming, Oudezijds Voorburgwal 225, 1012 EX Amsterdam, Netherlands, Telephone: 020-27 09 72.

ARTICLES

1987: "The Year of the Judges" in France ?

by Philippe Texier*

It is now exactly 7 years since Louis Joinet wrote an article in this Bulletin on "The Difficult Relationship of the Judiciary with the Executive and Legislative Branches in France" (CIJL Bulletin No. 7). He described the limits on the independence of the judiciary, the interference of the executive in the careers of judges, the relativity of their guarantee of stable tenure, the calling into question of the powers of the penal judge and of his discretion, particularly in matters of sentencing, and the reinforcement of disciplinary control over lawyers. He denounced, moreover, the bill proposed by some deputies to curtail the freedom of magistrates by providing that "the obligation of reserve is binding not only on magistrates but also on groups, associations and unions of magistrates."

This bill did not pass and the disciplinary proceedings were suspended for 5 years, between 1981 and 1986, but have we evolved towards a firmer affirmation of the independence of judges? Surely not.

At the institutional level, these 7 years saw the election of a Socialist President and a left-wing government. Five years later, the election of a right-wing parliamentary majority, produced the famous "cohabitation" of a President and a government designated by the opposition. After 2 years of this system, the French are preparing to return to the polls to elect a new President, or extend the term of the current one.

In the general field of human rights, France, since 1981, has carried out reforms essential for a country still proud to have proclaimed, in 1789, the "Declaration of the Rights of Man and of the Citizen." The death

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penalty was abolished, the covenants on civil and political rights and on economic, social and cultural rights were ratified, the jurisdictions of exception (the State Security Court and Permanent Tribunals of the Armed Forces) were abolished, and individual petitions to the European Human Rights Commission were authorised. In a general manner, all the repressive texts have been sufficiently amended so as to render them more "presentable" to the international community. It was time!

Regrettably, however, as regards the status of judges nothing fundamental has changed. The arrival of a government concerned with liberty, human rights and social questions gave us hope that serious reform would be undertaken with regard to the status of judges and in particular to the Superior Council of the Magistrature (C.S.M.), still designated by the head of state and still devoid of real power concerning the management of the corps and careers of magistrates. One day, it will be necessary to tackle this problem, if we really want a more independent system of justice.

What is the situation then, in April 1988, on the eve of a new Presidency?

Several newspapers called the year 1987 "The Year of the Judges" but the appropriateness of this label is questionable. The year 1987, and the first months of 1988, marked in reality a desire, maybe never achieved, to divert the judge from his mission or, when his mission was embarassing to the powers that be, to remove the "natural" judge through various procedural avenues.

It has been the year of scandals *("affaires")*. The common factor in these scandals has been that judges have not been allowed to exercise their full powers where they affect someone considering himself above the law. In the Crossroads of Development ("Carrefour du Développement") scandal, which implicated the former Minister of Overseas Cooperation, Mr. Nucci, and his chief of cabinet, Mr. Chalier, an Investigating Judge *(Juge d'Instruction)* tried, for many months, to discover the entire truth, that is to say, the real role of each of the protagonists. It was established that the main defendant, Chalier, was able to escape to Brazil with a "real-false" passport delivered by

the authorities at the request of the Minister of the Interior, at the time when Chalier was sought after by the Investigating Judge.

To allow a delinquant to escape justice constitutes a crime punishable by penal law. However, when the judge wanted to further investigate this particular aspect of the affair, he was blocked by the claim of "Defence Secret" as if the fact of delivering a false passport granted by the Minister of the Interior to an individual of doubtful character, could in one way or another jeopardize our national defence! Nobody believed it, justice was discredited and the truth could not be established.

When another Parisian Investigating Judge indicted Mr. Michel Droit, a member of the National Commission on Communication and Freedom (C.N.C.L. – which oversees the media) and of the *Academie Française* of abuse of authority, he raised an outcry in the press and the judge was accused of all manner of sin by several politicians. Nevertheless, as the judge had before him a complaint by the representatives of a non-commercial radio station which claimed that it had been the victim of discrimination by Mr. Droit in his role as member of the C.N.C.L., he had no choice but to proceed with the case. Mr. Droit's lawyer immediately brought a petition for "legitimate suspicion," *["requête en suspicion légitime"]* a complex procedure to obtain the recusal of a judge who is suspected of lacking objectivity or impartiality.

With uncommon speed, the Court of Appeals after heated debate removed the Parisian judge from the case and sent it to the Grand Jury in Rennes – 500 kilometers from Paris. Another victory for the *"raison d'Etat."*

But things went further: a law was voted upon in great urgency in order to create a new legal figure; the "assisted witness," *(témoin assisté)* thus sparing other Michel Droits, the horrors of an indictment and enabling them, as witnesses, to gain access to the file and to be represented by a lawyer. The idea is not necessarily bad, but the circumstances surrounding the adoption of this law can only render it suspect.

The last chapter of this affair: within the framework of another case, the Investigating Judge discovered that there were serious derelictions of duty on the part of Mr. Droit who, while charged with guaranteeing

the neutrality of the means of communication, continued to receive payments from his former employer at the daily *Le Figaro*. The officials of the Public Prosecutor's office of Paris did all they could to prevent the judge from proceeding with the case against Mr. Droit – a parallel investigation carried out directly by the police, a new attempt to remove the case from the judge, pressure upon him, until finally on Friday 6 May 1988, 2 days before the second round of the presidential election, the go ahead was finally granted by the Federal Procurator in Paris to allow the investigations. (One suspects that it was not coincidental that all the polls showed that François Mitterrand, from the opposite political camp as Mr. Droit, was going to win.)

As a result of these two spectacular cases, there has been a multiplication across France of petitions of "legitimate suspicion" and the forced recusal of Investigating Judges. One sometimes gets the impression that it is sufficient to have some political weight in order to choose one's own judge.

These two examples are only illustrative of many others which would also demonstrate a dangerous pattern concerning our judicial institutions. Some of this, of course, may have been due to the precariousness of the government from 1986-1988, its general tendency to intervene in all areas of administration and the particular personalities in key positions in the Ministry of Justice. I believe, however, that the phenomenon is more structural than conjunctural and that the political powers will never support a fully independent judiciary. We must thus undertake a serious reform which would guarantee, at a minimum, a more subjective method of judicial appointment which would assure them a more protected status and shelter them from political turbulence. Several methods are worth exploring, such as a reform of the Superior Council of the Magistrature and of its composition and powers, a certain disassociation between rank and function, and a greater respect for the rule of the "natural judge." This should be one of the important tasks of the new government.

Above all, however, it is essential that we adopt a healthier respect for the separation of powers.

The Lawyers' Strike in Gaza

by Mona Rishmawi*

Since 27 December 1987, a few weeks after the start of the current Palestinian uprising in the Occupied Territories, the lawyers in Gaza have been conducting a professional strike, boycotting the military and regular courts. This unprecedented position was taken in protest against several actions of the Israeli authorities during the uprising which violate the basic human and legal rights of the Palestinians in the Occupied Territories. These actions caused the lawyers to feel that they were unable to fulfill their professional and legal duties. The Gaza Bar Association sent a letter to the Israeli military authorities notifying them of the strike and its reasons. These reasons included:

1. the mass and arbitrary arrest of Palestinians conducted by the Israeli military authorities in Gaza;
2. the severely sub-standard conditions under which the detainees in the military detention centres, especially in that known as Ansar 2, are living, and the systematic beatings and humiliation from which they suffer: and
3. the unjust practices and procedures before the military courts.

Palestinians who have been arrested during the uprising have been either picked up off the street by soldiers, or arrested from their homes in the middle of the night by large army forces, or summoned to a military government building for questioning and then arrested. Due to the wide powers granted to Israeli soldiers – who may arrest without warrant or court order for up to 18 days – arrest is often arbitrary. In many cases the detainees report that they were beaten by soldiers following their arrest.

The conditions in Israeli prisons, and procedures before the Israeli military courts in the Occupied Territories have been issues of great

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concern throughout the occupation. Since the beginning of the Palestinian uprising, these matters have become even more acute.

Detainees in Ansar 2 Military Detention Centre suffer from overcrowding, lack of proper toilet facilities and necessities to maintain personal hygiene, isolation and other problems. But perhaps above all, the detainees suffer from the brutal treatment to which they are subjected at the hands of Israeli soldiers, including severe beating and humiliation.

Israeli military orders established military courts in the Occupied Territories, granting jurisdiction not only over security offences but also over regular criminal matters [see CIJL Bulletin 19-20]. The orders allow the military judges to deviate from the rules of evidence. There is no appeal against the decisions of these courts.

Following the mass and arbitrary arrests conducted during the uprising, the Israeli authorities announced that they were resorting to summary trials. Such trials are premised on the detainee pleading guilty before the court, after which the detainee is convicted and sentenced immediately. To encourage the detainees to plead guilty, the military judges are doubling or tripling the sentences of those who plead otherwise. The detainees pleading not guilty would be given the chance to bring defence witnesses. In almost every case, however, the military prosecution's evidence would be believed and the Palestinian detainee found guilty irrespective of the weight of the evidence. Applications for release on bail are not granted. The military judges are also reported to have refused to register the physical condition of detainees in the court record, especially if there were marks of beatings.

In one reported case, a Gazan lawyer requested that his client, who was accused of participating in a demonstration and of stone throwing, be released on bail on humanitarian grounds as the accused was brought to the court with a broken arm resulting from the beatings of the Israeli soldiers. The military judge rejected the application adding that he wished that the arm had been cut off instead of broken.

The accumulation of many similar cases led the lawyers in Gaza to start the strike, which continues to date.

In the West Bank, summary trials were also conducted, and there were similar complaints about the conduct of the court, though the situation was less serious. The lawyers who appear before the military courts in the West Bank also started a strike but it was suspended 3 weeks later at the request of their clients.

In an attempt to intimidate the lawyers in Gaza, on 18 January 1988, advocate Raji Sourani was brought before the Gaza Military Court and charged with contempt of court as he had not appeared before the court because of the strike. The court, which had been notified officially of the lawyers' position, found Sourani guilty and fined him 1,500 I.S. (equivalent to US$1,000) or 15 days imprisonment. Mr. Sourani refused to pay the fine. The sentence of imprisonment was not activated, but a few weeks later, Sourani, together with two other lawyers one of whom is the Vice-Chairman of the Gaza Bar Association, were put under 6 months administrative detention. Other actions taken by the military against lawyers include a raid on the offices of the Gaza Bar Association.

F.B.I. Harassment of the National Lawyers Guild

by Michael Krinsky*

Founded in 1937 as the first interracial bar association in the United States, the National Lawyers Guild today counts approximately 10,000 members operating in over 200 chapters. In its first five decades, it has become known for its legal support of the civil rights, peace and other dissident movements. In addition, it has been in the forefront of the legal struggle to guard against government misconduct and the curtailment of civil rights and liberties. In a message to the Guild's recent 50th Anniversary celebration, United States Supreme Court Justice William J. Brennan Jr. lauded "the Guild's meaningful contribution to the enforcement of the precious guarantees of liberty and freedom enshrined in [the U.S.] Constitution."

During most of its existence, however, the Guild was the target of a massive covert Federal Bureau of Investigation (F.B.I.) campaign of surveillance, infiltration and intimidation designed to silence the association and to deprive its often outspoken clients of legal representation.

In 1977, the Guild brought suit against the federal government for spying and harassment.[1] Still pending in federal district court in New York after eleven years, the action has compelled the release of over 400,000 pages of F.B.I. files on the Guild and on a sampling of its leadership. This documentation exposes for the first time the F.B.I.'s pervasive covert campaign against the Guild.

The immediate catalyst for the Guild's suit was its inadvertent discovery that the F.B.I. had approached a hotel clerk for the names of Guild members attending a national executive board meeting. The Guild was shocked and, as it turned out, it was also naive. This sort of

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1 *National Lawyers Guild* v. *Attorney General*, 77 Civ. 999, U.S.D.C., S.D.N.Y.

thing and much worse had been going on for forty years on a systematic basis. During that period the F.B.I. used the full gamut of its spy techniques against the Guild, including:

1. Burglaries by F.B.I. agents of the Guild's offices. Between 1940 and 1951, F.B.I. agents surreptiously entered the Guild's offices at least 13 times to copy membership lists, correspondence, minutes of meetings, and plans on projected Guild activities. After 1951 the use of this technique became more sporadic but continued on occasion until at least 1962, sometimes with the connivance of the local police.

2. Burglaries of the law offices of prominent Guild members. Through this means, the F.B.I. not only obtained information on the Guild as such but on the defense strategy of Guild lawyers in cases of importance to the government.

3. Trash covers on the Guild and Guild lawyers. Barely distinguishable from burglaries was the F.B.I.'s use of "trash covers", a surveillance technique by which the F.B.I. went through discarded copies of correspondence, minutes and so forth left for disposal as unnecessary garbage. In one prime example, the F.B.I. maintained a trash cover from 1955 to 1962 on the principal Guild lawyer in Washington D.C.

4. Use of informants to obtain confidential membership lists. After 1951 it was no longer necessary for the F.B.I. to burglarize the Guild offices in order to obtain membership lists and other basic information it desired on the Guild. The F.B.I. found easier and more prudent access in the form of informants at the commercial firms used by the Guild to mail out publications and other literature to its membership. These informants regularly provided the F.B.I. with the Guild's mailing list throughout the 1950's and 1960's.

5. Wiretaps on the Guild and Guild lawyers. Probably as early as 1940 but definitely no later than 1947 and continuing through at least 1951, the F.B.I. maintained a continuous wiretap on the Guild's national office without any judicial warrant. During the same time, the F.B.I. wiretapped the home of the Guild's national director. There were at least occasional wiretaps on the offices of Guild members through the mid-1960's, also without judicial warrant.

6. Third party informants. From 1940 to 1972, the F.B.I. would regularly visit the banks at which the Guild kept its accounts and copy the records of all Guild transactions, including the identity of payees on checks drawn by the Guild. It similarly obtained information from medical insurance carriers, janitors, and convention centers on a regular basis.

7. Informant penetration of the organization. The F.B.I. used informants within the Guild throughout the course of its "investigation" of the Guild from 1940 to 1975. Interestingly, the F.B.I. use of informants increased precisely as its reliance upon burglaries and wiretaps of the Guild decreased. This was perhaps because the legal restrictions on surreptious entries and wiretaps were clearer than the restrictions on informants. From the viewpoint of the Guild, informant penetration of the organization was the most egregious form of spying, since it not only invaded the organization's privacy but it affected its autonomy. A government informant necessarily becomes a participant in the Guild's affairs and helps shape its program.

Since United States law still protects the identity of informants, a full accounting of informant activity in the Guild has not yet been achieved. Nonetheless, some of its contours have emerged. At a most conservative estimate, there were probably thirty informants or so over the years who were officers, members or employees of the Guild, or who regularly attended Guild meetings. There were informants on the national executive committee of the Guild and on the staff of Guild chapters. One informant who served as an officer of the Guild in an unknown position provided the F.B.I. with reports on general strategy discussions conducted by the Guild with respect to Guild litigation against the F.B.I.. Another informant took care to prepare the minutes of fifteen Guild meetings over a three year period and provide them to the F.B.I. An F.B.I. informant worked during the Vietnam War with the Guild's Selective Service Law Committee, which discussed legal strategy in pending draft cases. Still another informant reported on Guild plans for the representation of persons charged with civil disobedience.

The F.B.I. operated informants in the private offices of individual Guild attorneys as well. Most striking, perhaps, was the partner of the lawyer serving as Co-Chair of the Guild's Committee For Legal

Assistance in the South in the mid-1960's, at the height of the civil rights movement. A secretary in the office of the organization's President furnished an endless stream of material. An employee of another Guild lawyer provided reports on the political affiliations of individuals who visited the lawyer. An employment service placing temporary clerical personnel in law offices was also recruited.

These revelations of spying on an organization of lawyers would be serious enough, particularly as the Guild was never accused of a crime by the F.B.I., even in its own internal files. Nor was it ever listed as a subversive organization by the administrative bodies created during the Cold War to safeguard the United States national security.

More disturbing, however, is what the F.B.I. files show to have been the purpose of all this information-gathering on the Guild: to push the Guild out of the public arena and, if possible, to destroy it. The F.B.I. conceived of this goal in 1940 and never deviated from its pursuit for 35 years until, in 1975, the temper of the times had changed and Congressional pressure forced the F.B.I. to drop its less defensible investigations.

From 1940 to 1953, F.B.I. Director J. Edgar Hoover used the information he obtained from the F.B.I.'s 13 or more burglaries of the Guild office in a sustained effort to persuade successive Attorneys General (within whose Justice Department the F.B.I. operates) to place the Guild on the "Attorney General's List of Subversive Organizations"; membership in a listed organization was deemed by law a presumptive bar to employment by the federal government. Hoover recognized that listing the Guild would have nothing to do with the security of federal employment, the purported rationale of the Attorney General's List, but would have everything to do with the survival of the Guild – that the Guild as a professional organization of lawyers could not survive being officially characterized as subversive and, indeed, probably could not survive even the initiation of listing proceedings.

Hoover first began his campaign in 1941 but was rebuffed by Attorney General Biddle. After the war, Hoover made four additional approaches through the end of the Truman Administration, preparing elaborate reports for successive Attorneys General based upon the burglarized files of the Guild office and, to a lesser extent, on

information derived from the continuous wiretap he had placed on the Guild's national office. Attorney General Tom Clark in 1948 rejected one of Hoover's approaches by stating that "I have many friends in it [the Guild] and would give them a hearing before" listing the organization as subversive. Clark's real point could not have been lost on the F.B.I., as, at the time, there was no provision for affording organizations a hearing prior to being listed.

In 1949, Hoover redoubled his efforts when he learned through the wiretap on the Guild office that the organization had convened a committee of its most prominent members to draft a report criticising the F.B.I. for unconstitutional conduct. For once the Bureau was on the defensive, the fragmentary disclosures in the *Coplon* espionage case of F.B.I. spying on citizens' political activities having become front-page news, and Hoover feared the impact of this high-level Guild report. He followed the Guild committee's work closely through repeated burglaries of the Guild office. With this advance information, Hoover was able to prepare a counterattack even before the report was issued, rebutting the as yet unstated charges within the Justice Department and urging the Attorney General to take action to characterize the Guild publicly as a subversive organization.

Although the Attorney General did indeed reject the Guild's forthcoming report even before its issuance, he still would not take the ultimate step of listing the Guild as a subversive organization. Hoover arranged for the next best thing, a public branding of the Guild as a subversive organization by a Congressional committee. On the very eve of the Guild's release of its report criticizing the F.B.I., Hoover had then-Congressman Richard Nixon publicly call for a House Committee on Un-American Activities (HUAC) investigation of the Guild, thereby diverting the press' attention from the Guild's criticism of F.B.I. practices. Hoover then had his agents draft the document which HUAC several months later issued as a committee report, "The National Lawyers Guild-Legal Bulwark of the Communist Party" (September 1950). Again using advance information on Guild plans from his wiretaps on the Guild office, Hoover moved to blunt the Guild's efforts to fight back against the HUAC report in the Congress and in liberal circles.

Still, the organization survived and Hoover wasted no time when a receptive Attorney General finally took office upon Eisenhower's election as President. Hoover persuaded the new Attorney General, Herbert Brownell, to announce before the 1953 convention of the American Bar Association his conclusion that the Guild was controlled by the Communist Party and his initiation of formal proceedings to place the Guild upon the Attorney General's List of Subversive Organizations. The material Hoover had put before the Justice Department to move Brownell to this step had come overwhelmingly from the F.B.I. burglaries of the Guild's office.

Two years prior to Brownell's announcement, Guild attorneys had won a significant Supreme Court victory requiring an administrative hearing before the Attorney General could list an organization as subversive.[2] It is one of the great lessons of the Guild's history that this Supreme Court victory, achieved in the representation of others, proved critical to the Guild's own survival.

Largely because of its base in professional members able to eke out livings in independent practices, the Guild survived initiation of the listing proceedings to exercise its right to a hearing, and ultimately prevailed. To be sure, the organization was all but crippled; it lost over 700 members in the first few weeks after Brownell's announcement and its membership plummeted to a mere 500 by 1955. Still, the Guild was able to fight back, both in affirmative litigation to stop the listing proceedings,[3] and in the administrative proceedings once they went forward. True to form, the F.B.I. had an informant on the Guild's Executive Committee at the time who was privy to confidential deliberations by the Guild with its counsel.

The proceedings dragged on until 1958. Then, when Justice Department attorneys for the first time carefully reviewed the mounds of F.B.I. materials on the Guild to marshall the government's evidence for the administrative hearing, they concluded that the government could not

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2 *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

3 *National Lawyers Guild* v. *Brownell*, 215 F.2d 485 (D.C. Cir. 1954), on remand 126 F. Supp. 730 (D.D.C. 1954), *aff'd* 225 F. 2d 552 (D.C. Cir. 1955), *cert. denied* 351 U.S. 927 (1956).

win the case on the merits. The Justice Department then dropped its efforts to list the Guild.

The F.B.I. then changed tactics. Even though 18 years of investigation had failed to provide a case of communist domination sufficient even to go to an administrative hearing, the F.B.I. secretly continued as before. Without a pause, Hoover continued – indeed, intensified – F.B.I. spying on the organization, instructing field offices to develop additional informant coverage of the organization. And, as before, the F.B.I. put all the information about the Guild's plans and personalities it acquired to the end of destroying the organization.

As the Justice Department's reluctance to proceed with the listing hearing against the Guild became apparent to it in 1958, the F.B.I. developed the first "COINTELPRO" action against the Guild, and there followed a steady stream of COINTELPRO and similar covert disruption efforts for the next 17 years. COINTELPRO, which has been condemned by United States courts as unconstitutional and undemocratic,[4] was a secret F.B.I. program whose stated purpose was to disrupt and, if possible, destroy the targeted organizations.

Adapting its tactics to the nature of the organization under attack, the F.B.I. through a variety of techniques sought to deprive the Guild of its "prestige" and "aura of respectability," in the words of one early COINTELPRO document concerning the Guild. The F.B.I. moved to defeat Guild members seeking elected judicial office, to deny Guild members faculty appointments, to deny the organization the same use of civic facilities as others. It urged the American Bar Association, the "mainstream" bar association in the United States, to attack the Guild and fed the ABA information from supposedly confidential F.B.I. files. It similarly fed friendly press contacts with information to attack the organization. It sent anonymous mailings to create dissension in the organization and to drive a wedge between the organization and other groups. It used the same technique to inflame tensions among members of an important Guild law firm. Informants in the organization created or exacerbated tensions.

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4 *See,* for example, *Hobson v. Wilson,* 737 F.2d 1 (D.C. Cir. 1984).

Perhaps most significant was the F.B.I.'s apparently systematic relationship with the various committees charged by state judicial officials with the task of determining the suitability of applicants for admission to the practice of law. Using the National Conference of Bar Examiners as its liaison, the F.B.I. regularly provided information on the Guild membership and other political activities of applicants, with the anticipated result of their facing increased difficulties in obtaining admission to the bar.[5]

Then there was the F.B.I.'s ultimate COINTELPRO plan. Ignoring the limitations of the Emergency Detention Act of 1950,[6] the F.B.I. evolved an elaborate plan to round up dissidents on the occasion of an undefined national emergency, to place them in camps and to defy any court order for their release. To be held in indefinite detention were both those the F.B.I. considered subversive and those whom the F.B.I. thought would be effective in leading protests against the detention program. Much of the F.B.I.'s spying efforts against organizations was undertaken to identify individuals for inclusion on the "Security Index" of persons to be rounded up under this program.[7]

Throughout, leadership in the Guild, past or present, and even at times simply active membership, was sufficient for inclusion on this Security Index and its various permutations. Guild members placed on these lists were subjected to intensive and continuous F.B.I. surveillance and became as well targets of opportunity under the COINTELPRO program.

In 1972, the Justice Department began to pressure the F.B.I. to justify its far-flung intelligence operations against United States citizens. Reviewing the F.B.I. files on the Guild for the preceding five years,

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[5] The Universal Declaration on the Independence of Justice (Montreal Principles) provides that entry into and practice in the legal profession shall not be barred even where the attorney is convicted of an offense "for exercising his internationally recognized civil or political rights." 3.08. See CIJL Bulletin No 12.

[6] Act of September 23, 1950, § 101(14), 64 Stat. 1019 (repealed by Pub. L. No. 92-128, § 2(a), 85 State 348 (1971).

[7] For a more general description of the program, *see*, e.g., *Lamont v. Department of Justice*, 475 F. Supp. 761 (S.D.N.Y. 1979).

the Justice Department concluded that there was insufficient evidence of the Guild being a communist front or a communist infiltrated organization to justify even an investigation and, further, that this had been so for as far back as the Justice Department review went. Thus, on the two occasions when the Justice Department undertook a serious analysis of the F.B.I. files on the organization – in 1958 and in 1972 – the conclusion was that the stated rationale of the F.B.I.'s activities against the Guild had no factual support.

As in 1958, the Justice Department conclusion in 1972 did not deter the F.B.I. in its pursuit of the Guild. It continued to place Guild members on the ADEX, the successor to the Security Index; it targeted the Internal Revenue Service against the Guild and it took other disruptive actions. It also attempted to persuade the Justice Department to authorize a continued investigation of the Guild on theories ranging from the Guild being a "Marxist-Leninist" organization to the Guild fomenting prison rebellions. Finally, in March 1975, the F.B.I. ran out of time and Attorney General Edward Levi ordered a close to the "internal security" investigation of the Guild.

The F.B.I.'s long effort to destroy the Guild is easily explicable. Congressional investigations into F.B.I.'s practices have revealed a sustained effort by the F.B.I. over four decades, sometimes under the COINTELPRO program and sometimes on a more *ad hoc* basis, literally to destroy all organizations considered radical by the F.B.I.'s Director.[8] Swept within this assault on basic liberties were such notable targets as the Rev. Martin Luther King, Jr. and almost all of the civil rights movement; the anti-war movement of the 1960's; the New Left; the Communist Party and those who defended its rights under the Constitution. The Guild could not be avoided, for it provided legal representation in all of these areas for more than four decades. As a legal organization, it criticized the practices of the federal and local governments infringing upon civil liberties and perpetuating racial discrimination, often long before other organizations took up those issues. Equally important, it organized and trained generations of lawyers willing and able to represent the more radical trade unions of

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8 Rept. No. 94-755, Senate Select Committee to Study Governmental Operations With Respect To Intelligence Activities, 94th Congress, 2d Session (1976).

the 1940's, the victims of the McCarthy witch hunts of the 1950's, the civil rights movement of the 1960's and the anti-war movement of the 1960's and early 1970's. Often, the Guild was the sole source of representation for beleagered social movements.

The obsessive quality to F.B.I. Director Hoover's focus upon the Guild is also readily explicable. For decades, the Guild was the only organized sector of the legal profession to criticize the F.B.I. and its Director. Indeed, the very first document in the massive F.B.I. files on the Guild concerns a speech made by a Guild member criticizing F.B.I. practices in rounding up and deporting Spanish loyalists in 1940. Guild President Thomas Emerson, Professor of Constitutional Law at Yale Law School, launched the first scholarly review of F.B.I. practices in the late 1940's. The Guild's 1950 report on F.B.I. practices was a pioneering effort and remained the leading critique of the F.B.I. for more than 20 years. Rather than folding under the weight of the Attorney General's listing proceedings, the Guild in the 1950's fought in the courts that thinly disguised instrument for the repression of dissident movements. In the 1960's and 1970's, the Guild was active in advising politically active citizens of their constitutional right to refuse to talk to F.B.I. agents, much to the chagrin of the Bureau.

The litigation which yielded this wealth of information is still pending. In addition to attacking the F.B.I.'s practice of spying on dissenters and acting as a political police, the Guild challenges, *inter alia*, the government's ability to determine who is entitled to effective legal representation and who may practice law and its violations of the attorney-client privilege. Remarkably, the federal government has maintained that there simply are no legal remedies for the conduct described here since the F.B.I. acted in the name of national security. In United States law, at least, this is an unprecedented assertion of governmental immunity and one which, in the view of scores of organizations who have filed *amicus curiae* briefs in the case, threatens a dangerous departure. If accepted, the arguments of the Justice Department would not only deny relief to the targets of unconstitutional actions but would effectively preclude judicial review of government operations undertaken, however unreasonably or disingenuously, in the name of national security.

DOCUMENT

South Africa – The Administration of Justice and the Judicial System

In 1987, the International Commission of Jurists sent a mission to South Africa to study the Rule of Law and the structures of apartheid. The mission found, inter alia, that the supposed state interest in suppressing the anti-apartheid opposition is used to justify the wholesale abrogation of human rights.

The 160-page report of the mission is available from the ICJ. We reprint below the chapter on the administration of justice and the judiciary.

The judiciary

Until recently, the South African judiciary enjoyed a high reputation for independence from the Executive. The government has been condemned for imposing discriminatory laws and a repressive legal order, whereas the judiciary has been singled out as being 'a liberal institution in an illiberal community'.[1] One judge told us that the South African judiciary did not need an introduction as they were regarded world-wide as being 'the strongest bastion of human rights'.[2] However, since the 1950s, reservations have been expressed about the independence of the South African judiciary, and in 1968 the International Commission of Jurists declared that they were 'as establishment-minded as the Executive'.[3]

The 1950s saw a period of confrontation between the new National Party government and the judiciary. The response of the government to judicial opposition was to 'pack' the courts with its own supporters rather than appointing the most senior advocates to the bench, as had previously been the tradition. The size of the Appellate Division was increased from five to eleven judges for the hearing of constitutional

cases,[4] thus providing an instant government-supporting majority in the Division. As a result of this action, the court took a much more pro-government stance during the 1950s and 1960s. The judiciary, however, retained the good reputation of their predecessors, and gave the appearance of being surrounded by an 'aura of infallibility'.[5]

From 1962 onwards, the government reverted to the traditional method of appointing judges on merit. At the same time, however, the government introduced more laws to limit the powers of the judiciary, and thus, as one commentator suggested, 'could afford the luxury of political opponents on the bench'.[6]

We were constantly reminded by the judges whom we met that 'we declare what the law is, we do not make it'.[7] The South African judiciary has a strong tradition of positivism, and the constitutional system, which makes Parliament supreme, allows no judicial review of legislation passed by Parliament. The judges said that they saw their role as giving effect to the true intention of the legislature as expressed in statutes. The judges deny that they have any choice, and they claim that they merely do what the legislature has commanded them to do through legislation.

We accept that the South African judiciary operate under limitations, that in many cases they have no choice and merely enforce the clear terms of the law. However, it is clear that in many cases the judges have a choice, and it is seldom that the court retains no power at all. There is invariably some 'residue of jurisdiction'[8] and freedom of judicial action. The judges are free to interpret legislation (as distinct form reviewing it) in the light of the common-law rules of interpretation, which embrace presumptions in favour of liberty and equality. Administrative powers can be reviewed in accordance with the principles of natural justice, and the judges can review subordinate legislation and test it by common-law standards of reasonableness and certainty. The common law can be developed so as to keep pace with contemporary society, and the judiciary retain a wide discretion in sentencing. Through the use of these powers, a judge can still mitigate the harshness of the system.

In recent times judges, especially in Natal, have demonstrated that they do have choice in many cases. A judge can choose one

interpretation rather than another, or elect to adopt one precedent and distinguish another. A judge cannot be said to mechanically declare the law where there are competing interpretations, precedents and authorities. The judge has a choice, and in making that choice he creates a new precedent and develops a new law.

It is important to mesure the performance of the South African judiciary bearing in mind the limitations that are placed on them by the Executive, but ignoring self-imposed limitations. Given the evident intention of the government of South Africa to deny human rights to the majority of its citizens, the question we must ask is how far do the judiciary exercise their freedom of choice and powers, albeit limited powers, to mitigate the harshness of the system and to protect human rights?

The judges see themselves as belonging to the same tradition as the English and American judges, in which a high degree of technical competence and independence from the Executive are valued. Their positivist approach to their functions leads them to exclude overt political influences and to assume an obligation to give effect to the intention of Parliament, regardless of their personal view of its wisdom or morality.

Two recent academic studies of the Appellate Division from 1910 to 1980 have criticized its excessive readiness to support the policies of the government at the expense of individual freedom.[9] The studies found that, although the courts seldom associated themselves with government policy directly, the decisions of the court substantially facilitated the implementation of government policy by failing to keep the Executive within the law. The authors conclude that the court has abandoned its role as guardian of individual liberty against the might of the state. In most cases, the judges preferred harsh and pro-Executive interpretations even where there were persuasive legal grounds for a more liberal interpretation.

Perusal of the South African Law Reports for the years 1960 to 1982 reveals a large number of cases where the Appellate Division decisions were very Executive orientated. In many of these cases there was a clear judicial choice open to the judges, but generally the judges chose the course most favourable to the government. The cases are too

numerous to set out in full, but we feel that a few examples illustrate the point clearly, though we acknowledge that they are highly selective:

(1) Where a statute was silent on the right of a detainee to receive reading and writing materials, the Appellate Division said that these articles were 'luxuries' and were to be impliedly excluded because they would alleviate the tedium of solitary confinement, and thereby interfere with the purpose of the statute, which was to induce detainees to talk.[10]

(2) The Appellate Division has refused to allow a detainee to testify in court on the grounds that it would interfere with the interrogation process and 'negative the inducement to speak'. The statute was silent on the matter and the court held that his jurisdiction to interfere had been implicitly excluded.[11]

(3) The Supreme Court has accepted the evidence of a detainee who had been detained in solitary confinement for over 500 days, and thereby failed to recognize the coercive effect of long-term detention on the voluntariness of a statement.[12]

(4) Even where the Appellate Division has rejected confessions as being inadmissible on the ground that there was clear evidence that the accused had been tortured, the Division did not comment adversely on the torture by the police, and thus, while they may have done justice between the parties, they did not stem the tide of widespread police abuse and torture.[13]

Many judges do not apply any presumption in favour of personal freedom when the release of detainees is sought. Indeed, the Appellate Division has in effect told them not to do so.[14] Moreover, it is quite obvious from the expressed attitudes of many judges that they support apartheid and the policies of the government towards those who oppose it. Thus a claim to independence is not wholly justified. We accept that judges are now more generally appointed on merit, but the predominance of Executive-minded judges ensures that the court will generally reach decisions which accord with the government's wishes.

Even where there are judges on the Bench who give decisions adverse to the Executive, the government can ensure that their impact in the security area is kept to a minimum by appointing only government

supporters to the position of Judge President. The Judge President is the administrative officer of each division and organizes the allotment of judges to the various courts. He is thus in a position to ensure that only government supporters hear security cases. A large number of lawyers to whom we spoke felt that Judge Presidents deliberately assigned security cases to government supporters. However, the judges that we spoke to said that this could be equally explained by the fact that such cases were allotted to the most senior judges on the Bench. The most senior judges on the Bench are also those who were appointed during the era when mainly government supporters were appointed to the Bench. But no matter what the explanation, the result is the same. The notable exception seems to be the Judge President in Natal, Mr Justice Milne, who was appointed in 1982 and who shows no partiality towards the government. This is one reason why we see so many decisions adverse to the government coming from Natal. It has recently been announced, however, that he is to be promoted to the Appellate Division.

Once judges are appointed, they have the potential to be totally independent, because they cannot be dismissed. Recently, there has been a tendency, especially in Natal towards more overt opposition by the judges to curbs on individual freedom. The following are examples of court decisions which, at least temporarily, have reduced the impact of the emergency and security laws:

(1) The Natal Supreme Court, whose decision was affirmed by the Appellate Division, ruled that a police officer's decision to arrest and detain indefinitely for the purpose of interrogation is subject to judicial review. Leon J., at first instance, held that there must be a factual basis for the police officer's reason for arrest, and that the objective existence of such a jurisdictional fact was justiciable in a court of law. In the appellate Division, Rabie J.A., held that it was most unlikely that the legislature could have intended that the reason that was required for an arrest under Section 29 of the Internal Security Act need not be found on reasonable grounds.[14]

(2) The Appellate Division upheld two previous Natal decisions in holding that the Minister for Law and Order was required to furnish proper reasons for the preventive detention of individuals. Rabie J.A. said that it was the legislative intent

that a defendant should have a fair opportunity of dealing with the Minister's reasons for detaining him, and it was consequently not sufficient merely to repeat the statutory reason for detention.[15]

(3) The Natal Supreme Court has ruled that the regulations purporting to inhibit a detainee's access to a lawyer were invalid. This decision has, however, been overruled by the Appellate Division. The court also held that the emergency regulations did not prevent the court from considering whether regulations (which are subordinate legislation) are void for vagueness.[16]

(4) The Cape Supreme Court has held that the power of arrest under the emergency regulations is not an unfettered power which may be exercised capriciously or arbitrarily. Marais J. said that an honest opinion must be held that the detention is necessary and not merely desirable. The exercise of the power of arrest was held to be justiciable. The court held that the ouster clause in the regulations did not apply where an act was not done in accordance with the legislation. If the detention is not in accordance with the regulations, the court can review it.[17]

We noted much ingenuity by lawyers in South Africa in using the law to challenge the Executive. The interdict (or injunction) has been used to restrain police from torturing detainees and is a doubtful clog on abuse of police powers. The Supreme Court has also held that torture victims may have the right to search police stations for torture equipment without notice to the police concerned.[18] In June 1986 the Cape Supreme Court granted an Anton Piller order to four alleged torture victims to search two police stations where they had been held, and held that an inventory of items found therein was to be filed in court.[19]

Unfortunately, some of these liberal decisions have been reversed by the Appellate Division, and others have been reversed by the government amending the law. It seems that the government would not allow an adverse decision to stand if it inhibits its freedom to detain whoever it wishes to detain. One judge said to us that the judiciary has acted as *ad hoc* legal advisers to the Executive, in that each time the judiciary strike out a particular act or regulation, it is improved by the government.[20] It is therefore obvious that judges, however courageous and independent, can mitigate only marginally the impact of the security laws. However, many of the judges that we spoke to believed that their decisions could make an impact. One judge that we spoke to

said that the pit was bottomless and that he only had a small shovel, and whereas he could never fill the pit in, he would do what he could.

We were impressed by the assurances by judges that we spoke to that they would in no circumstances be prepared to accept instructions from the government, except in the form of enacted legislation. We were also impressed by their obvious awareness of the fundamental injustice of the system of which they were a part. All the judges felt that they were justified in continuing on the Bench, and they emphasized that questions of individual liberty were not a regular part of their work.

Most of the black lawyers and political leaders with whom we spoke thought that "the liberal" judges should resign, but it was generally acknowledged that resignation would have little impact unless it was accompanied by a public exposure of the reasons for resigning. Two judges are believed to have resigned in recent years in protest against the government action, but have not acknowledged this publicly. Other leading advocates are believed to have refused judicial appointments. However, whether or not a judge should continue to hold office under the present South African regime is a moral question for each individual and we express no conclusions on the issue here.

Many South African judges are open to criticism not only on account of their participation in a legal system which denies basic rights of personal liberty, but also on the ground that, in administering the ordinary laws, they have made decisions which seem inhuman and have imposed excessively harsh sentences, especially in relation to children who are charged with public violence. It may be that the climate of violence and repression, interacting with deep-rooted racism and fear which virtually all white South Africans must be prone to, has made it extremely difficult (if not impossible) for a white judge to regard a black person with objectivity.

In conclusion, we were not impressed by the argument that the judges are powerless in the face of government restrictions in the security area. We recognize that the judiciary are operating in a climate of severe government restrictions, but we believe the judges can choose to make an impact. If a judge remains on the Bench in such a repressive regime, there can be no excuse for failing to exercise his choice in favour of individual liberty, and whereas some judges have done justice in such

cases in recent times, the majority of the South African Bench have failed to do so. We feel that it is as a result of this failure that the South African judiciary are open to the criticism of their fellow jurists in other countries.

The magistrates

The lower courts in South Africa are staffed by magistrates who are appointed from the ranks of the civil service. They undergo a course of training at a Magistrates' School and are then appointed initially as prosecutors, and are subsequently promoted to the Bench. Once appointed to the Bench, there is the possibility of further promotion to the position of senior magistrate, eventually the possibility of an appointment to the Bench in the Regional Magistrates Courts. The magistrates are government servants and they are not independent of the Executive in the sense that the judges are. The magistrate is often regarded as biased in favour of the state. Magistrates have been said to be "products of their upbringing and captives of the bureaucracy".[21]

In South Africa, as in most countries, the vast bulk of court work is done in the Magistrates Courts, and if these courts are executive-minded and unfair, huge injustice will result. It seems to be accepted widely in South Africa that the magistrates are not independent and that they will usually decide in favour of the government.

The judges that we spoke to said that the lack of independence of the magistrates did not have serious effects due to the "safety valve" that was operated in the review procedure. Any decision of a District Magistrate in a criminal case where a fine of R.100 or a term of imprisonment of more than four months is imposed automatically goes on review to the Supreme Court. Potentially, this procedure can rectify any mistakes made in a Magistrates Court, but this does not happen in practice. Decisions of magistrates who have gained enough seniority do not go on review. The most serious of the cases that come before the magistrates, and in particular charges of public violence, will go before the most senior magistrates.

Legal aid

The rule of law depends not only on the availability of fair legal procedures and independent judiciary and laws which recognize basic human rights, but also requires that citizens have access to the law to defend these rights. This means that those who do not have the means to pay for legal representation in matters where their liberty is at stake must be provided with such representation at the expense of the state.

The provision of legal aid in South Africa is wholly inadequate and the money supplied by the government for this purpose falls far short of the sums provided in comparable legal systems. The need for legal aid is particularly marked in South Africa, where a large number of trials are continuously taking place in which the accused, if found guilty, can face long terms of imprisonment and even the death penalty. The antiquated *pro deo* system provides for legal representation of indigent accused in capital cases. Under this system, junior advocates in their first years at the Bar can take on the case for a nominal fee, which is paid by the Bar. Ironically, most advocates in South Africa have their first experience of conducting criminal cases by defending black people charged with murder. Many advocates claim they are too occupied with other cases to undertake *pro deo* work. Other impoverished defendants must rely on the help of those who are able to represent them without charge or who can be paid from charitable sources, usually from outside the country.

Detention and harassment of lawyers

The Legal Resources Centre, which has offices in the major cities in South Africa, together with a number of attorneys and advocates in private practice, do a huge amount of work in representing persons who do not qualify for legal aid and who cannot afford to litigate by themselves. All these lawyers are willing to risk harassment and even detention to ensure that proper defences are prepared at least in political cases. A measure of the risk involved is that at least five lawyers whose cases were brought to our attention had been detained during the present emergency while engaged in their professional work. One attorney we spoke to was arrested, along with the advocate he

was instructing, in a magistrates court when an argument developed with the police as to the right of access to their client. Further, the magistrate was prevented by the police from phoning the Attorney-General to inform him of the situation. After a period in detention, the charges were later dropped, but only after the papers of both lawyers were gone through by the police [see CIJL Bulletin No. 19-20]. The harassment of lawyers so as to discourage them from carrying out their duties is manifestly improper and itself undermines the rule of law.

Particular difficulties are experienced by those who are faced with prosecution in rural areas. There are few lawyers practising in such areas, and those that do exist are dependent on the white property owners for their income. Consequently, they are unable or unwilling to represent black people apparently in conflict with the established order. The progressive lawyers who are prepared to represent black persons in such communities are almost all based in the major cities. Lawyers whom we spoke to said they were prepared to travel large distances to rural areas but they found it very difficult to deal with the obstructions that were put in their way by prosecutors, the police and even the magistrates. Defence lawyers complained of discourteous treatment, being made to wait for local lawyers to have their cases dealt with first, and being summoned to court to make formal applications which could have been dealt with by way of correspondence. Also, when defence lawyers seek to instruct local lawyers to act as agents, they often decline to do so on political grounds. There have also been complaints that attempts to establish local advice centres in rural townships were thwarted by the police, and advice workers have been detained under the state of emergency.

Legal services in rural areas

Because of the fact that most lawyers live in the city, inhabitants of rural areas find it extremely difficult to get legal representation. There have been moves in recent years to establish advice centres in rural areas, and these have proved to be very successful. In general, organizations such as the Legal Resources Centre and the Black Lawyers Association have trained para-legals in the type of law that is most sought after in the townships. These para-legals opened advice centres in the townships, and they can deal with the vast majority of

the queries that are brought to those centres. The parent organizations, however, are always available to these centres to give legal advice, and lawyers will travel around to visit these centres periodically. The advantage of the para-legal system is that the most important cases can be filtered out and placed before the lawyers, without the lawyers having to waste their valuable time on preliminary matters. When a para-legal identifies a case as requiring the attention of a lawyer, the case is passed on to the lawyer, and he will deal with any court proceedings that are necessary for that particular client.

The Legal Resources Centre tries to concentrate on what it calls "impact litigation", which is litigation which is aimed at having an effect on the community at large rather than only the parties. The Legal Resources Centre tries to locate patterns of abuse, and then to litigate to prevent this. The Centre in Johannesburg services twenty-three rural offices within a radius of 350 kilometres of the city, and their lawyers saw about 15,000 people last year. The Black Lawyers Association has recently established an African Law Review and has reserved two pages to giving information to the advice centre workers and to giving guidelines on the law.[22] The demand for legal services, however, vastly exceeds the supply.

Abuse of the prosecuting process

When an accused person is charged before a court in South Africa, he can apply for bail, and should get it provided that he can satisfy the court that he will turn up for his trial and will not interfere with witnesses. The mere fact that the state opposes bail will not mean that it won't be granted, although the Attorney-General can veto the granting of bail under the Internal Security Act.

A number of lawyers pointed out to us that the prosecuting process was being abused by fixing bail at a sum in excess of that which an accused can afford. Bail in one case of public violence was fixed at R.3,000 for a person under 18, though more usually bail is fixed at between R.100 and R.300. However, this is still greater than the average monthly income of most families in the townships. The lawyers claimed that people were being charged with offences, and bail is set at a figure greater than that which they can afford, and thus they are remanded in

custody pending the trial. When the case comes up, in many cases the prosecution offers no evidence against the accused, or their case collapses. In other cases, even where a conviction is secured, a non-custodial sentence is imposed. By abusing the process, the state can ensure that people are kept out of circulation without proving a case against them, or without detaining them under the state of emergency.

This form of harassment by process is a cause for concern. Bail should not be more than the accused can afford; otherwise it is a denial of bail. This is merely a further constraint on the right to individual liberty in a system which places little value on that right.

Alternative courts

The lack of confidence in the court system among black people in the townships of South Africa has led to the creation or development of alternative courts. There is also a strong desire among many black people to challenge and replace official government structures which are identified with the apartheid system. In Soweto, for example, in 1985 the people set up their own form of alternative government as a form of protest against the new tricameral parliamentary system. In addition to the civic associations, which the people set up as their public representative body, there were also set up law and order committees, among whose function was the prevention and punishment of petty crime. The usual form of punishment imposed by the Tribunal was a whipping, though more serious forms of punishment could be imposed. The government re-acted harshly to the introduction of these committees in an attempt to eradicate them. Initially, persons involved in the carrying out of the punishments imposed by the Tribunal were charged with assault, but more recently are being charged with the more serious offence of sedition.

Notes

1. J. Dugard, Human Rights and the South African Legal Order, Princeton, NJ, 1978, p. 279.
2. Interview with a Supreme Court judge, Ciskei, 17 February 1987.
3. The International Commission of Jurists, Erosion of the Rule of Law in South Africa, Geneva, 1968, p. iv.
4. The Appellate Division Quorum Act, no. 27 of 1955.
5. Corder, Judges at Work, Johannesburg, 1984, p. 2.
6. Dugard, p. 285.
7. Interview with Transvaal Supreme Court judge, Johannesburg, 25 February 1987.
8. A. Mathews, "The South African Judiciary and the Security System", 1 SAJHR, p. 199 (July 1985).
9. Corder; Forsyth, In Danger for Their Talents, Johannesburg, 1985.
10. Rossouw v. Sachs 1964 2 SA 551 (A).
11. Schermbrucker v. Klindt 1965 4 SA 606 (A).
12. S v. Gwala (1977) NPD unreported.
13. S v. Mogale reported in Riekert, "Police Assaults and the Admission of Voluntary Confessions", 1982 99 SALJ 125.
14. Hurley v. Minister for Law and Order 1986 4 SA 709 (N) and 1986 3 SA 508 (A).
15. See Dugard and others "Focus on Omar" 3 SAJHR pp. 295-337 (November 1987).
16. Nkondo v. Minister for Law and Order 1986 2 SA 256 (A).
17. MAWU v. State President 1986 4 SA 358 (A).
18. Dempsey v. Minister for Law and Order 1986 4 SA 530 (1). See also Basson, "Judicial Activism in a State of Emergency", 3 SAJHR p. 28 (March 1987).
19. Ex Parte Matshini. 1985. EPD, unreported. "Anton Piller" is a reference to an English case in which powers of search were granted as a preliminary step in legal proceedings.
20. Interview, Johannesburg, 25 February 1987.
21. J. Dugard, "Judges in a State of National Crisis", p. 9.
22. Vol. 1, no. 1 (Jan. 1987).

BOOKS

"The Persecution of Human Rights Monitors: December 1986 to December 1987," Human Rights Watch, 36 West 44 Street, New York, N.Y. 10036. $5.00.

On Human Rights Day, 10 December 1987, the Human Rights Watch (Americas Watch, Asia Watch and Helsinki Watch), compiled the first list of all known attacks by governments and para-governmental groups against human rights defenders. The report, which deals only with a twelve-month period, discusses the persecution of nearly five hundred human rights monitors in thirty-nine countries. The forms of persecution range from threats, harassment and denials of the right to practice their profession to imprisonment, torture and, in ten cases, killings and in another two cases, disappearances.

Those killed in the period were:

Anatoly Marchenko, a member of the Moscow Helsinki Group, died in Chistopol prison in the Soviet Union at the age of 48 on December 8, 1986. He had been mistreated in prison.

Sotero Escobar, President of the Human Rights Committee in Tame, Colombia, was killed on January 5, 1987.

Paulo Cezar Fonteles de Lima, a lawyer for the National Rural Workers Organization, was killed on the road form Belem to Capanema, Brazil on June 11, 1987. (See CIJL Bulletin 19-20).

Jose Francisco Ramirez Torres, a lawyer and legal advisor to peasant organizations, was killed in Valledupar, Colombia on June 29, 1987.

Carlos Celin Tinoco, a lawyer, was killed in Valledupar, Colombia on July 8, 1987.

Dr. Hector Abad Gomez, President of the Human Rights Committee of Antioquia, Colombia and national Vice President of the Permanent Committee for the Defense of Human Rights in Colombia was killed in Medellin, Colombia on August 25, 1987.

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Dr. Leonardo Betancur Taborda, also a member of the Human Rights Committee of Antioquia and of the Permanent Committee, was killed with Dr. Abad in Medellin, Colombia on August 25, 1987.

David Bueno, a lawyer and chairman of the Laoag City Human Rights Committee in the Philipppines, was killed on October 22, 1987. (See this Bulletin).

Herbert Ernesto Anaya Sanabria, president of the non-governmental Human Rights Commission of El Salvador, was killed in San Salvador on October 26, 1987. (See this Bulletin).

Rene Joaquin Cardenas Vargas, director of the San Miguel office of the governmental Human Rights Commission of El Salvador, was killed in San Miguel on December 9, 1987.

Those "disappeared" were:

Jose Vazquez Huayca, a lawyer and a member of the Association of Democratic Lawyers in Peru, was seized in the Palace of Justice in Lima, Peru on October 28, 1986. He was subsequently seen in the custody of an anti-terrorist division of the police but has not been seen in a least a year. Efforts during 1987 to discover his whereabouts by habeas corpus have not succeeded.

Basilio Tuiz Ramirez, brother of a member of the Group for Mutual Support in Guatemala, disappeared after he was kidnapped in Solola, Guatemala on December 18, 1986.

According to the authors, the report "is a measure of the extent to which citizens to repressive countries all over the world have taken up the effort to monitor their own government's human rights practices. It is also, unfortunately, an indication of the grave risks that they run in doing this."

Human Rights Watch intends to publish these reports annually on or about Human Rights Day. The CIJL, which takes up the cases of judges and lawyers persecuted for fulfilling their professional duties, welcomes this new effort to defend the cause of those who monitor human rights.

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South Africa and the Rule of Law

Report of an ICJ Mission to South Africa by Geoffrey Bindman, Jean-Marie Crettaz, Henry Downing and Guenter Witzsch.
Published by Frances Pinter Ltd., London, 1988. 160 pp. Cloth.
Available in English. Swiss Francs 50, plus postage.

The report gives a detailed and comprehensive account of the elaborate legislation with which, over the years, the South African government has undermined the human rights of the black and coloured population.

★★★

Indonesia and the Rule of Law – 20 Years of 'New Order' Government

A study by the ICJ and SIM. Published by Frances Pinter Ltd., London, 1987.
Available in English. ISBN 0 86 187 919 8. 220 pp. Cloth. Swiss Francs 50, plus postage.

This study sets out the constitutional provisions and legislation relating to human rights and assesses their application in practice and compliance with international human rights norms. The detailed chapter on criminal law and procedure fills a gap that existed even in the Indonesian language.

★★★

Pakistan: Human Rights After Martial Law

Report of an ICJ Mission to Pakistan by Judge G. Petrén, Mrs. Helen Cull, Mr. Jeremy McBride and Mr. D. Ravindran. Published by the ICJ, Geneva 1987.
Available in English. ISBN 92 9037 033 5. Swiss Francs 10, plus postage.

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South Asia: The Independence of Judges and Lawyers

Report of a Seminar held in Kathmandu from 1 to 5 September 1987.
Convened by the CIJL, ICJ and Nepal Law Society.
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This report contains speeches by ICJ members Justice Dorab Patel and Fali Nariman and Justice Abdur Rahman Chowdhury on the Independence of the Judiciary, and the working papers and the conclusions and recommendations of the seminar.

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