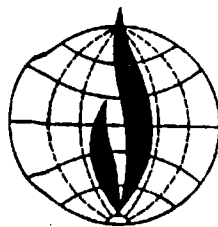


# CIJL BULLETIN



## N° 22

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**CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS**

**October 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. 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.

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## EDITORIAL

The past six months have been difficult ones for those who look to an independent judiciary and a free and fearless legal profession as the best guarantees of human rights under the rule of law. The leaders of the deeply respected judiciary of Malaysia have been ignominiously dismissed. Courageous judges and lawyers have been murdered in El Salvador, Haiti, and the Philippines.

The hardest blow for the CIJL was the assassination of Alfonso Surigao in the Philippines (see article in this issue). He was one of the most committed, capable lawyers we knew. In the finest tradition of the legal profession, he endured threats, the loss of clients and the bombing of his office to represent, free of charge, victims of human rights abuses whom no one else would have defended - and who are now without representation. The son of an impoverished pastor, he never forgot his origins and why he had become a lawyer. Six days before he was murdered in his back-yard, he told us that his mother had been pleading with him to join her in California to get away from the constant threats on his life. "But my work, " he said, "is here."

After the murder, tributes poured in from all over the world. The New York-based Lawyers Committee for Human Rights described him as "a superb human rights advocate and a most cherished friend. His energies were devoted to the countless victims of human rights abuses whose suffering would have passed into the realm of anonymous statistics were it not for his tireless efforts on their behalf." Amnesty International called him "an outspoken and courageous defender of human rights." The Evangelical Church in Germany praised him as "a committed Christian who was striving with legal and non-violent means for the basic rights and human dignity of his countrymen."

The CIJL and the CIJ, in an urgent message to President Aquino and in a press statement, called on the Philippine government to conduct a

thorough investigation of the murder. We then join with other groups in an emergency "International Lawyers Forum" to develop a common response to the killing and intimidation of human rights lawyers in the Philippines. The statement of that meeting is printed in this issue.

Al Surigao died leaving little money for his family - his clients were farmers, labourers, fishermen and the urban poor who paid him in a different currency. Some of Al's friends have established a fund to help provide for his widow Rebecca and the education of his daughter Kitchy. Friends of his, or those who admired his work, can make contributions to the Lawyers Committee for Human Rights, 330 Seventh Ave., New York, NY 10001 USA for the "Surigao Educational Fund."

# CASE REPORTS

## EL SALVADOR

### Judge killed

On 11 May 1988, Jorge Alberto Serrano 45, judge of the first Military Court in San Salvador, was shot 7 times and killed in front of his house as he returned from leaving his children at school.

Judge Serrano, a civilian lawyer attached to the military, was to give a decision in the next few days on whether military officers jailed for involvement in a prominent kidnapping - for - profit case would be released under the amnesty for crimes related to the civil war, which was passed as part of El Salvador's compliance with the Central American peace agreements. The suspects, who allegedly posed as leftist guerillas and extorted millions of dollars from the wealthy Salvadorans they kidnapped, are associated with the rightist Arena party and suspected of "death-squad" activity as well.

Judge Serrano had told reporters that he would not grant amnesty in the case, but he had not yet made a final decision public. The amnesty law specifically excludes from its terms kidnapping and extortion. Previously, the judge had reportedly rejected bribe offers from individuals connected to the defence.

No arrests have been made in the case, but human rights groups believe that Judge Serrano's murder was connected with the kidnappers' amnesty case. According to Americas Watch, which has closely monitored the situation, when the initial arrests were made in April 1986 it was "to be the case that proved that the Salvadoran justice system worked. Instead, it has been the case that proves it cannot." Several military officers implicated in the case escaped prosecution under questionable circumstances. One of them, Lieutenant Colonel Joaquín Zacapa, fled the

country shortly before the arrests began. Another, Lieutenant Colonel Roberto Mauricio Staben, the powerful commander of the Arce Battalion, was released and cleared of all charges in spite of the testimony of two participants implicating him. According to press accounts, he was released after presenting President Duarte with a letter from former U.S. General Richard Secord praising Staben's work on behalf of the Nicaraguan "contras". Two others charged in the case were killed while in police custody and another in a reported fire-fight with the authorities. The house of Judge Miriam Artiaga, who handled part of the case, was machine-gunned twice within a three-week span in March 1987, prompting her to withdraw from the case.

In a separate case, Serrano had ruled in January 1988 that three leftist rebels charged with killing four U.S marines and nine others in 1985 were eligible for amnesty and should be freed. This decision was eventually overruled by President José Napoleon Duarte, however, after the U.S. threatened to withhold aid to El Salvador.

## GUATEMALA

### Judge kidnapped

On 20 July 1988, Judge Julio Anfbal Trejo Duque, who was presiding over the trial of a band of Treasury Policemen accused of numerous kidnappings and murders, was himself kidnapped by ten heavily armed men. The judge was blindfolded and taken to a location outside of Guatemala City where his hands and feet were tied while he was interrogated for two days before being released.

The kidnapping occurred one week after the judge ordered the preventive detention of 16 agents implicated in the case. Shortly after his abduction, however, the judge released the suspects. While prosecution of the crime ring had been a major priority for the former Interior Minister Juan José Rodil and for the former police chief, who had personally arrested several of the Treasury agents, the two were transferred to placate hard-line

elements in the military and the new Interior Minister Roberto Valle Valdizan has announced the case closed.

Also on 20 July, Salvador Moran Amaya, a registered plainclothes police agent and friend of Judge Trejo's, was beaten to death and his body found near the place where the judge's car was located after the abduction. It is considered possible that Moran was killed when he tried to warn the judge of the pending abduction.

## HAITI

### Human rights lawyer murdered

Maître Lafontant Joseph, lawyer and Executive Director of the Center for Promotion on Human Rights, was found murdered in his car on 11 July, 1988. Maître Joseph was a leading human rights activist in Haiti, who provided legal assistance to peasants and workers, and co-founded the Haitian League for Human Rights. The circumstances strongly suggest that he was killed because of his human rights activities.

Maître Joseph had received a number of death threats, as well as a threat to the life of his son. At the time of the aborted elections of 29 November 1987, in which he was a candidate for the Senate, his home was attacked. Shortly before his death, around the time his organization called for a return to "institutional standards" and a respect for "constitutional norms," Maître Joseph received a phone call in which he was told that he would not "see the end of the month." The labor confederation CATH reported that Maître Joseph and his wife (who is head of the Women's Committee Against Torture) had both appeared on a "death list," along with other individuals "to eliminate before July 29." Maître Joseph's body showed signs of violent beating, as well as stab wounds and a gunshot wound in the back. It was discovered on a road leading to the airport outside Port-au-Prince, in an area where many killings have taken place.

## **KENYA**

### Amendment weakens judicial tenure

In August 1988, Kenya's parliament passed The Constitution of Kenya (Amendment) Bill, 1988, repealing the constitutional provisions guaranteeing security of tenure for High Court and Court of Appeal judges. The amendment allows the president ("with the advice of the chief justice in the case of a puisne judge and in accordance with his own deliberate judgement in the case of the chief justice") to suspend a judge from office. It then gives him wide discretion to appoint, from amongst the judges in Kenya or the Commonwealth, a tribunal to recommend whether the judge should be removed for inability or misbehaviour.

Publication of the proposed amendment - very similar in substance to the provisions used to oust three Supreme Court justices in Malaysia (see article in this issue) - raised local and international concern. The Law Society of Kenya pointed to the report of the Kenya Constitutional Conference in 1962 which stated that, "An independent judiciary is of fundamental importance. The necessary provision should be made by way of a judicial service commission to ensure the appointment of impartial judges, and provision should be made for their security of tenure once selected."

The ICJ and CIJL sent a telex to Attorney General Matthew Muli expressing concern over the proposed amendment and drawing his attention to the UN Basic Principles on the Independence of the Judiciary which provide that judges shall have guaranteed tenure and be subject to removal only for misbehaviour or incapacity in accordance with established standards of professional conduct.

Only five days after first publication, however, the measure was rushed through parliament.



### Lawyer refused passport

CIJL Bulletins 19/20 and 21 reported on the case of Gibson Kamau Kuria, who was detained for nine months without charge or trial after he announced his intention to bring suit on behalf of detainees for alleged ill-treatment.

Since his release, Mr. Kuria has received several invitations to speak abroad. In May 1988, the American Bar Association invited him to honor him for his work "in promoting respect for and observance of the rule of law." In September 1988, he was chosen for the prestigious Robert F. Kennedy Human Rights Award. He has also received invitations from the Lawyers Committee for Human Rights and Human Rights Watch. He has been unable to leave Kenya, however, as the authorities there have refused to return his passport.

According to the *New York Times*, an official in the Ministry of Foreign Affairs was quoted as saying "Those who come out of detention have to wait. They do not automatically get their passport back." In September, Mr. Kuria filed suit with the High Court for a return of his passport, arguing that as he was never charged with a crime the government had no legal basis for withholding his passport.

Article 13(2) of the Universal Declaration of Human Rights, as well as Article 12 of the International Covenant on Civil and Political Rights, of which Kenya is a party, provide that everyone has the right to leave and return to his own country.

## ARTICLES

### Malaysia: Justice Hangs in the Balance\*

by Geoffrey Robertson, Q.C.

Tomorrow, the five most distinguished judges of Malaysia's highest court will stand trial in Kuala Lumpur in secret for doing justice against the interests of the Government. This is the latest development in the appalling destruction of the judiciary's independence by a Prime Minister prepared to sacrifice the rule of law for political advantage.

Until a few months ago, Malaysia's Supreme Court stood high in international repute. Its Lord President, Tun Salleh Abas, was respected for his integrity, while at least one of its judges, Mr. Justice Abdoolcader, had as formidable a legal mind as could be found in any court in the Commonwealth. Although final appeal to the Privy Council in London had been abolished, litigants could be reasonably certain of a fair hearing in matters involving the Government's vested interests.

Thus when Prime Minister Mahathir Mohamad expelled two journalists from the *Asian Wall Street Journal* on bogus grounds of 'national security' (they had, in fact, exposed the dubious financial dealings of a Cabinet Minister) the Supreme Court, presided over by Salleh Abas, quashed the deportation orders. Its judgement, written by Abdoolcader, has become a leading precedent on the right to due process and protection from government abuse of power.

This judgement was the first of several decisions in favour of the liberty of the subject to provoke the Prime Minister into making vicious and unjustified public attacks on the judges. These reached such a pitch that last March Salleh Abas, at the urging of his fellow judges in Kuala

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\* Reprinted with permission from *The Observer*, 28 August 1988.

Lumpur, wrote a dignified private letter to King Mahmood expressing sorrow at the Prime Minister's 'accusations and comments' which were shaming to them but to which they would not reply, given their constitutional position.

Nothing came of this for more than two months, until a case of vital significance to Mahathir's continuance in office, the UMNO appeal, was due to be heard by the Supreme Court. (Last February, Mahathir's party, the United Malays National Organisation, was declared illegal by the High Court, due to irregularities in last year's elections.)

Salleh Abas, with complete propriety, listed the case, 'the UMNO appeal', for a hearing before all nine Supreme Court judges. A few days later Mahathir informed him that he was suspended from office and would be tried by a tribunal for 'misbehaviour' in sending a letter which had displeased the King.

Salleh Abas asked for a tribunal which would hear his case in public and be comprised of people of equal standing to his own. Neither request was granted. The tribunal sat in secret and the Government appointed several lesser judges as its members. Its chairman was Mahathir's friend, Sri Hamid Omar, who had a direct personal interest in the outcome, as he was the Lord President's deputy and likely successor. The Bar Council called on him to stand down, but to no avail. The UMNO appeal was postponed.

Events now moved swiftly. The tribunal sat, with Hamid stating that it would complete its deliberations within a few days. Salleh Abas sought to stop it, on the grounds that it was improperly constituted and procedurally unfair. His case was heard by a single judge on a Friday and adjourned to the Saturday morning, when it was adjourned again.

Fearing that the tribunal would present its report before the hearing to stop it resuming on the Monday, Abas' lawyers appealed to the Supreme Court, whose five senior judges (including Abdoolcader) convened on the Saturday afternoon and issued an injunction against the tribunal.

By this time, of course, Hamid was acting Lord President as well as tribunal chairman and first defendant in the action. He used his new powers in a desperate attempt to stop the Supreme Court judges from hearing the case to which he was a party. He ordered court staff to lock the court doors and stay away, and forbade the Registrar from placing the Court's seal on the injunction. The five Supreme Court judges refused to be intimidated, and their senior member himself sealed the order.

Hamid then rushed to Mahathir, and had the five judges suspended for 'gross misbehaviour'. A rump court was hastily convened to discharge the injunction, Hamid's tribunal issued its report recommending the dismissal of Salleh Abas, and the Government announced that another tribunal would be set up to investigate the 'misconduct' of the five judges.

The tribunal's report recommending the sacking of Salleh Abas is among the most despicable documents in modern legal history. It records no evidence of corruption or incompetence, or any conduct marking a judge as unfit for office in a democratic society.

It finds 'misbehaviour' and 'misconduct' in Salleh Abas' dignified defences of the independence of the judiciary – in a university lecture and in the letter to the King – asserted against the background of the Prime Minister's vitriolic attacks on the judiciary.

His following statements, according to Hamid's tribunal, were 'most unfair and improper' and justified his dismissal:

- 'In a democratic system, courts play a prominent role as an agent of stability but they can perform this function only if judges are trusted';
- 'The judiciary is the weakest of the three branches of Government. It has no say in the allocation of funds – not even in determining the number of staff needed for the running of its own system.'

Such statements are commonly made by judges throughout the common-law world when speaking in public. Yet the Lord President's crime, according to the tribunal, was to 'go on the offensive and criticise the Government publicly'. It was 'misbehaviour' to ask for a public hearing

and trial by his peers because this amounted to 'politicising the issue to gain sympathy for himself'.

What makes this report intolerable as a matter of law is its unprincipled attitude to the refusal of Salleh Abas to participate in its proceedings. It accepts all the Government's allegations against him for no better reasons than that they are uncontradicted. Having recommended his dismissal, it adds the extraordinary conclusion:

'Needless to say that had we had the benefit of a plausible explanation from the respondent in regard to the several issues which were presented to us for our consideration, our decision may well have been different.'

In a matter of such gravity, to acknowledge that the man found guilty of misbehaviour may well be innocent is an approach which exhibits a deplorable disregard for proper legal standards of proof.

The loss of a judge as distinguished as Salleh Abas, in such circumstances, is an international outrage.

The prospective loss of five further senior judges accused of misbehaviour for doing justice on a Saturday is even more outrageous. They face a similar 'trial' in secret and before a tribunal much less distinguished than themselves in Kuala Lumpur this week. This time, however, they intend to participate in the proceedings, and it is rumoured that Abdoolcader will defend himself – a lion against legal chameleons.

On any view of the matter, the actions of the five judges were courageous and correct. A court has an overriding obligation to do justice, and should do it on a Saturday if by the Monday it may not be done at all.

Hamid's conduct, on the other hand, in trying to sabotage a case to which he was a party, is a classic example of misbehaviour in judicial office and the Bar Council has called for his removal. But Hamid is Mahathir's man, and is expected to be confirmed in the position of Lord President from which, on his recommendation, Salleh Abas was ousted. One of his first

decisions was to preside over the makeshift court which this month airily dismissed the delayed UMNO appeal.

Politicians like Mahathir will always want to subordinate the rule of law to the rule of their own thumb. In a letter to the British Law Society a few weeks ago, he denounced the five judges for 'unethical' behaviour.

They have a political axe to grind. It is they who have 'undermined the credibility of the judiciary,' he ranted with memorable hypocrisy. It seems that he may shortly have the judges that he, alone, can trust.

\* \* \*

[By a divided vote, the secret tribunal on 6 October recommended the dismissal of two of the Supreme Court justices – Tan Sri Wan Suleiman Pawan Teh and Datuk George Seah – for absenting themselves without the permission of acting Lord President Hamid from a scheduled sitting of a Supreme Court chamber in order to hear Salleh Abas' appeal. The King immediately dismissed the judges. However, the tribunal unanimously absolved all 5 judges – including Abdoolcader – of "gross misbehaviour" for convening the emergency sitting without Hamid's permission.

On 9 October, the Malaysia Bar Council protested the sackings and repeated its call for Hamid's resignation. It pointed out that the justices could not have sought Hamid's permission as Hamid was the chairman of the tribunal investigating Salleh Abas and therefore a respondent in Salleh's action challenging the tribunal. "Accepted norms," it recalled, mandate "that a litigant should not be consulted about any matter relating to his own case."

The ICJ, which protested the suspensions, was refused permission to send an observer to the tribunals. – Ed.]

# The Protection of Judicial Independence in Latin America\*

by Keith S. Rosenn\*\*

*(Editor's Note: "Latin American judiciaries have been criticized frequently for lacking independence" writes the author. In the first three parts of this essay, he explains that "judicial independence is a concept fraught with ambiguities and unexamined premises" and describes the difficulties in attempting to quantify judicial independence. In the two parts of the essay reprinted here, he explores legal measures that have been used in Latin America to attempt to ensure judicial independence and reviews the methods by which that independence has been undermined.)*

## I. Legal Measures Guaranteeing Judicial Independence

The constitutions of all Latin American countries provide for independent judiciaries. Some do so in formalistic fashion, simply declaring that the judiciary shall be independent.<sup>1</sup> Others contain a panoply of measures

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\* Extracted from 19 *Interamerican Law Review* 1-35 (1987) with author's permission.

\*\* Professor of Law, University of Miami School of Law.

<sup>1</sup> Constitución Política del Estado, art. 117 (Bol. 1967) ("Judges are independent in the administration of justice and are subject only to the Laws."); Constitución de la República de Cuba, art. 125 (1976) ("The Judges, in their function of administering justice, are independent, and owe obedience only to the Law"); Constitución de la República Dominicana, art. 4 (1966) ("These three branches [the legislative, executive, and the judiciary] are independent in the exercise of their respective functions."); Constitución de la República de Guatemala, art. 203 (1985) ("The magistrates and judges are independent in the exercise of their functions and are exclusively subjected to the Constitution of the Republic and the Laws."); Constitución Política de la República de Nicaragua, art. 165 (1986) ("In their judicial activity, Supreme Court Judges and other Judges are independent and must obey only the Constitution and the Law..."); Constitución Política de la República de Panama, art. 207 (1983)

designed to insure the independence of the judiciary. Analytically, these prophylactic measure can be divided into two broad overlapping categories: (1) protection of the integrity of the judicial decision-making process from outside pressures, and (2) protection of the personal independence of the judge.

#### A. *Measures to Protect the Integrity of Judicial Decisions*

##### 1. Guaranty of Noninterference with Judicial Proceedings

One of the most common measures to insure the integrity of the judicial process is a constitutional prohibition against any interference by other branches of government with judicial proceedings. Perhaps the most explicit statement of this form of guaranty is found in Peru's 1980 Constitution:

Art. 233. The following are guarantees of the administration of justice:

... 2. Independence in its exercise. No authority may assume jurisdiction in cases pending before the judiciary or interfere in the exercise of its functions. Neither can court cases that are *res judicata* be unenforced, ongoing court proceedings be cut off, judgments modified, not their execution delayed. This provision does not affect the right to a pardon.

The constitutions of Argentina, Chile, and Paraguay contain similar guarantees preventing their presidents or congresses from exercising judicial functions or interfering with judicial decisions.<sup>2</sup>

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("Magistrates and judges are independent in the exercise of their functions and are subject only to the Constitution and the Law."); La Constitución Paraguaya, art. 199 (1967) ("The independence of the judicial power is guaranteed.").

<sup>2</sup> Constitución de la Nación Argentina, art. 95 (1853); Constitución Política de la República de Chile, art. 73 (1980); La Constitución Paraguaya, art. 199 (1967).



## 2. Jurisdictional Monopoly

Latin America has a long tradition of creating special tribunals to decide certain classes of cases, particularly those involving labor disputes, military justice, agrarian reform, subversives, administrative law and electoral disputes.<sup>3</sup> Such practice undermines judicial independence when these special tribunals are exempt from any form of control by the regular judiciary.<sup>4</sup> A related technique that also undermines judicial independence is the transfer of jurisdiction normally exercised by the regular courts to specially created *ad hoc* tribunals. Rarely do Latin American constitutions restrict such practices in the interest of safeguarding judicial independence. The Peruvian Constitution of 1980 is an exception, for it provides for the unity and exclusivity of the judiciary's jurisdiction and denies the other branches the power to establish any other independent jurisdiction except for the military and arbitral tribunals.<sup>5</sup> More common in Latin American constitutions are provisions specifying that only the judiciary may decide disputes of a litigious nature,<sup>6</sup> or that only tribunals established by law may decide criminal or civil cases.<sup>7</sup>

## 3. Requiring a Reasoned Opinion

A third technique to protect the integrity of the decision-making process is requiring judges to write reasoned opinion explaining their decisions.<sup>8</sup> This requirement does not immunize judges from bribes and political pressures. Nevertheless, by exposing judicial decisions to public scrutiny, this requirement makes it more difficult for judges to rationalize

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<sup>3</sup> See H. Clagett, *Administration of Justice in Latin America* 55-6 (1952).

<sup>4</sup> See *infra* notes 72-73 and accompanying text.

<sup>5</sup> Constitución Política del Peru, art. 233(1) (1980).

<sup>6</sup> La Constitución Paraguaya, art. 199 (1967).

<sup>7</sup> Constitución Política de la República de Chile, art. 73 (1980); La Constitution Haitienne, art. 173-1 (1987). The Honduran variation provides that the judging of cases and the enforcement of judgments is the exclusive province of the courts. Constitución de la República de Honduras, art. 314 (1982).

<sup>8</sup> Constitución Política del Peru, art. 233(4) (1980); Código de Procedimientos Civiles, arts. 81-86 (Costa Rica 1982 ed.). Código Judicial de Panama, art. 1034 (1986 rev.).

“corrupt” rulings. Additionally, a reasoned opinion improves the judicial process by insuring that courts decide in accordance with the law.

#### 4. Requiring Public Trials

Publicity can also effectively curb judicial arbitrariness and corruption. It is easier to “fix” cases that are never exposed to public scrutiny. Accordingly, several Latin American countries require that certain cases be decided in open court. For example, Peru requires that all cases in which the defendants are public officials, those involving press crimes and those involving fundamental rights guaranteed by the constitution be tried in open court.<sup>9</sup>

### *B. Measures Protecting Personal Independence*

#### 1. Irreducibility of Judicial Salaries

Several Latin American constitutions have followed the example of the United States in attempting to protect a judge's independence by providing that his compensation may not be diminished during his term of office.<sup>10</sup> The underlying policy is to protect judges from financial retribution for rendering decisions that displease the legislature or the executive. Originally, Article 127 of the Mexican Constitution of 1917 went one step further and also prohibited the raising of salaries of Supreme Court members during their term in office. This idea, which originated in the original draft of the Compensation Clause of the U.S. Constitution, was designed to promote judicial independence by insulating

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<sup>9</sup> Constitución Política del Peru, art. 233(3) (1980). Cf. La Constitution Haitienne, arts. 180-1 and 180 (1987), which require that all political and journalistic offenses be tried in open court, and that all hearings in other cases be open unless public order or morality dictates a closed trial.

<sup>10</sup> Constitución de la Nación Argentina, art. 96 (1853); Constituição Federal Da República Federativa do Brasil, art. 113 (III) (1967); Constitución Política de Colombia, art. 160 (1886); Constitución de los Estados Unidos Mexicanos, art. 94 (1917).

judges from the blandishment of salary increases.<sup>11</sup> In 1982, severe inflation forced Mexico to replace this prohibition against salary increases with a provision calling for adequate compensation to be determined annually in an equitable manner.<sup>12</sup>

An alternative formulation of this aspect of the protection of judicial independence can be found in Peru's Constitution, which guarantees its judges "a compensation that insures for them a life worthy of their mission in the hierarchy."<sup>13</sup> Standing alone this vague provision would appear to provide little protection for judicial compensation. It is more meaningful, however, because it is coupled with a constitutional provision guaranteeing the judiciary a minimum percentage of the country's budget.<sup>14</sup>

Uruguay maintains one of the most effective guaranties of judicial salaries in a chronically inflationary environment. Since 1981, the salaries of the members of the Supreme Court (which in practice determine the salaries of the rest of the judiciary), cannot be less than those of Ministers Secretaries of State.<sup>15</sup> Since the Ministers are well paid, this measure has assured adequate judicial compensation in Uruguay.<sup>16</sup> A similar measure has been adopted in Panama.<sup>17</sup>

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11 The Framers of the U.S. Constitution rejected the prohibition of judicial salary increases for the protection of judicial independence because increased caseloads and inflation might decrease the real value of judicial compensation, and alterations in the state of society might require more attractive judicial salaries in order to maintain the same calibre of personnel. Rosenn, *The Constitutional Guaranty against Diminution of Judicial Compensation*, 24 UCLA L. Rev. 308, 312-18 (1976).

12 Decreto de Reformas y Adiciones al Título Cuatro, D.O. 28 de diciembre 1982.

13 Constitución Política del Peru, art. 242(3) (1980).

14 See *infra* note 20 and accompanying text.

15 Acto Institucional No. 12, art. 6, 10 de Noviembre 1981, (Uru.).

16 Vescovi, *Uruguay*, in *Judicial Independence: The Contemporary Debate* 374, 377 (S. Shetreet & J. Deschenes eds. 1985).

17 Constitución Política de la República de Panama, art. 210 (1983).

## 2. Guaranteeing the Judiciary a Fixed Percentage of the Government's Budget

A second technique for assuring financial independence is a constitutional requirement that a fixed percentage of the country's total budget be allocated to the judiciary. The most generous of these provisions is that of Costa Rica, which grants the judiciary no less than six percent of the nation's ordinary annual receipts.<sup>18</sup> Honduras assures the judiciary an annual appropriation of at least three percent of the nation's annual receipts, excluding loans and grants,<sup>19</sup> while Peru guarantees the judiciary two percent of the current budget of the Central Government.<sup>20</sup> Guatemala and Panama combine the Costa Rican and Peruvian approaches, constitutionally mandating that the judiciary's budget will be at least two percent of the nation's ordinary annual receipts.<sup>21</sup>

Unfortunately, these constitutional guarantees have sometimes been honored in the breach. Moreover, in many countries, substantial percentages of governmental expenditures are not included in the budget. Nonetheless, such guarantees still perform a useful function in providing the judiciary with valuable leverage at budget time. The lack of similar constitutional guaranty has had drastic consequences for the Argentine and Bolivian judiciaries.<sup>22</sup> Complaints about the inadequacy of judicial salaries in Latin America are widespread.<sup>23</sup>

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18 Constitución Política de la República de Costa Rica, art. 177 (1949).

19 Constitución de la República de Honduras, art. 306 (1982).

20 Constitución Política del Peru, art. 238 (1980). Unfortunately, this guaranty has never been enforced. The judiciary received .34% of the national budget in 1980, .69% in 1981, .70% in 1982, .81% in 1983, and .78% in 1985. *Report Condemns Peru's Judiciary*, Lat. Am. Weekly Rep., Feb. 22, 1985, at 6.

21 Constitución Política de la República de Guatemala, art. 213 (1985); Constitución Política de la República de Panama, art. 211 (1983).

22 In 1900, Argentina devoted 3.8% of its national budget to the federal judiciary. That figure has fallen steadily, and by the end of 1984, only 0.79% of the federal budget was allocated to the judiciary. Serra, *Poder Judicial: Su Presupuesto*, 1985-C L.L. 1230-31 (1985) (Argen.). Article 119 of the 1967 Bolivian Constitution simply provides that each year the nation's budget will allocate a fixed and sufficient, albeit unspecified, amount to the judiciary. This provision has worked badly, effectively leaving the judiciary with insufficient resources and at the mercy of the other branches of government. *See*

### 3. Tenure in Office

A third technique to insure personal judicial independence is the constitutional guaranty of tenure in office. Argentina and Mexico follow the model of the U.S. Constitution, assuring federal judges lifetime tenure pending good behavior.<sup>24</sup> The constitutions of several other Latin American countries protect tenure in office pending good behavior until a specified retirement age.<sup>25</sup> Such measures can be nearly as effective as a guaranty of lifetime tenure only if the judicial retirement system is satisfactory. Unfortunately, chronic inflation has wreaked havoc with many retirement programs, thereby undermining these guarantees of judicial independence. It is more common in the majority of Latin American countries to limit the terms of office of members of their Supreme Courts to four to ten years.<sup>26</sup>

Removal of a judge for cause is generally entrusted to other members of the judiciary, often in the form of an appellate court or a council of magistrates.<sup>27</sup> Chile has a review system in which all judges below the

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Exposición de Motivos, *Hacia la Reforma Constitucional*, in Corte Suprema de Justicia de la Nación, *Labores Judiciales* 45-46 (1981).

23 See *infra* notes 85-88 and accompanying text. See also *Explanation of Motives for a Draft Judicial Reform Bill* in I. Burgoa, *El Juicio de Amparo* 1011 (1981); H. Fernandez-Sandoval, *Bases para una Reforma Integral de la Justicia* 22-23 (1986) (transcript of speech); Ovalle Favela, *La Independencia Judicial en el Derecho Mexicano*, 49 *Bol. Mex. Der. Comp.* 55, 68-70 (1984).

24 Constitución de la Nación Argentina, art. 96 (1853). Mexico's slight variation provides that Supreme Court justices hold office for life pending good behavior, whereas Circuit and District Court justices initially have a four-year term; if re-elected or promoted, they acquire lifetime tenure. Constitución Política de los Estados Unidos Mexicanos, arts. 94, 97 (1917).

25 Constituição Federal Da República Federativa Do Brasil, art. 113 (I) & (III) par. 2 (1969) (tenure until retirement age of 70); Constitución Política de Colombia, art. 148 (1886) (members of the Supreme Court and the Council of State have tenure until the age of compulsory retirement, fixed by statute at age 75); Constitución Política de la República de Chile, art. 77 (1980) (Tenure until retirement age of 75); Constitución Política del Peru, art. 242(2) (1980) (tenure until retirement age of 70).

26 See *infra* notes 42-45 and accompanying text.

27 Constitución Política de la República de Costa Rica, art. 165 (1949) (Supreme Court justices can be removed only by the secret vote of two-thirds of the

level of the Supreme Court are graded annually by the Supreme Court. Those whose performance is deemed sub-standard for two consecutive years and those graded unacceptable for a single time are automatically dismissed, regardless of their tenure.<sup>28</sup> Argentina and Mexico follow the U.S. model of impeachment by the legislature.<sup>29</sup> Brazil, Haiti and Paraguay provide for impeachment by the Senate for members of the highest court, while other members of the judiciary are tried before the Supreme Court in Brazil and Paraguay, and before the regular courts in Haiti.<sup>30</sup> At least in theory (although not necessarily in practice), no Latin American country permits the executive to remove or transfer judges.

#### 4. The Selection and Reappointment Processes

The selection process is critical in assuring an independent judiciary. If entrusted to the executive without constraints on its exercise, the risk of appointment of unqualified candidates or persons selected primarily on the basis of political or personal loyalty becomes exceedingly high. Consequently, most Latin American countries have set forth minimal qualifications for membership on the Supreme Court.<sup>31</sup> Many Latin American countries have created career judiciaries with entry based on competitive examinations and comparison of credentials, evaluated by the judiciary itself.<sup>32</sup> Brazil, which has a career judiciary, nevertheless

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members of the Supreme Court); Constitución Política del Peru, art. 248 (1980) (Supreme Court has the investigative responsibility over the official conduct of judges).

28 Código Orgánico de Tribunales, arts. 275-77 (7th ed. 1977) (Chile).

29 Constitución de la Nación Argentina, arts. 45, 51, 52 (1853); Constitución Política de los Estados Unidos Mexicanos, art. 110 (1917).

30 Constituição Federal Da República Federativa Do Brasil, art. 42(II) (1969); La Constitution Haitienne, arts. 177, 184-1, 185 (1987); La Constitución Paraguaya, arts. 151(3), 196 (1968).

31 A typical set of qualifications can be found in Panama's Constitution. To be a member of the Supreme Court, a candidate must: (a) be a native-born Panamanian; (b) be at least 35 years-old; (c) be in full enjoyment of his political and civil rights; (d) possess a duly registered law degree; and (e) have at least ten years experience as a practicing lawyer, judge, or law professor. Constitución Política de la República de Panama, art. 201 (1983).

32 Constitución Política de Colombia, art. 162 (1886) and Estatuto de la Carrera Judicial y del Ministerio Público, Decreto-Ley No. 250 of 1970, Vol. CVI, No.

reserves a certain percentage of lateral appointments on appellate courts for practicing lawyers or state attorneys in order to provide varied legal perspectives on its top courts.<sup>33</sup>

Members of the highest courts in Latin America are generally selected according to one of the following four models: (1) free executive selection with some form of legislative or judicial approval as a check, (2) free executive selection, (3) executive selection from a list of pre-screened candidates prepared by the judiciary or the legislature, or (4) legislative selection. Curiously, popular election of judges is eschewed on the ground that such a measure would compromise judicial independence by forcing judges to engage in political activity.

The presidential selection system (modeled on the U.S. Constitution) is used in Argentina, where the president appoints all the federal judges with the consent of the Senate.<sup>34</sup> Paraguay has adopted a similar model, albeit with an important variation: the President, with the consent of the Senate, appoints the Supreme Court, but only for a five-year term. The President also appoints the other judges, with the consent of the Supreme Court.<sup>35</sup> Until this year, Haiti was the only country in Latin America that formally granted its President unfettered discretion to appoint the judiciary.<sup>36</sup> Haiti's new Constitution now limits such discretion by requiring the President to choose members for ten year terms to the highest court, the Court of Cassation, from a list of three candidates prepared by the

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33023 Diario Oficial 809 (28 de marzo 1970) (Colom.); Constitución Política de la República de El Salvador, arts. 182(9), 186; Constituição Federal Da República Federativa Do Brasil, arts. 113 (III par. 1), 136 (I) and (II), *as amended* by Emenda No. 7 de 13 de abril 1977, Ley de Organización Judicial, arts. 207.216 (1972 ed.) (Bol.); Acto Institucional No. 12, art. 1, 10 de Noviembre 1981 (Uru.). *See also* Quintero, *La Independencia Judicial*, 10 Anuario de Derecho 15, 25-27 (1972) (Pan.).

33 Tacito & Barbosa Moreira, *Judicial Conflicts of Interest in Brazilian Law*, 18 Am. J. Comp. L. 689, 690-91 (1970).

34 Constitución de la Nación Argentina, art. 86(5) (1853).

35 La Constitución Paraguaya, arts. 180(8), 195 (1968).

36 La Constitution Haitienne, art. 114 (1983).

Senate.<sup>37</sup> Chile has adopted a presidential selection model in which the President fills vacancies on the Supreme Court and the Courts of Appeals from a list of names proposed by the Supreme Court itself.<sup>38</sup> The Mexican President, with the approval of the Senate, appoints the members of the Supreme Court, which in turn selects the Circuit Court and District Court judges.<sup>39</sup> In Panama, the Cabinet Council (the President and his Cabinet Ministers) appoints members of the Supreme Court for ten-year terms. The Supreme Court appoints the appellate courts, which in turn appoint the judges immediately lower in the hierarchy.<sup>40</sup> The Peruvian President appoints the judges from the recommendation of the National Council of the Magistracy.<sup>41</sup>

In a majority of Latin American countries members of the highest courts must win legislative approval to continue in office. It is common for the legislature to elect members of the Supreme Court for terms of office that vary between four and ten years.<sup>42</sup> In Costa Rica, a justice is automatically

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37 La Constitution Haitienne, at arts. 174, 175 (1987). The president appoints lower court judges for seven year terms from a list of three candidates prepared by the relevant Departmental Assembly.

38 Constitución Política de la República de Chile, art. 75 (1980).

39 Constitución Política de los Estados Unidos Mexicanos, arts. 96, 97 (1917).

40 Constitución Política de la República de Panama, arts. 200, 206 (1983).

41 Constitución Política del Peru, art. 245 (1980).

42 The Supreme Court of Bolivia is elected for ten-year renewable terms by the Chamber of Representatives from lists of three candidates prepared by the Senate. District Court judges have six-year terms, while other judges serve for only four years. Constitución Política del Estado, arts. 125, 126 (Bol. 1967). Members of Costa Rica's Supreme Court are elected by the legislature for eight-year terms. Constitución Política de la República de Costa Rica, arts. 157, 158 (1949). Cuba's Supreme Court consists of 26 professional judges elected by the National Assembly for five-year terms. There are also 156 lay judges elected by the National Assembly as co-judges on the Supreme Court, each serving two months per year during a thirty month term. Berman & Whiting, *Impressions of Cuban Law*, 28 Am. J. Comp. L. 475, 479 (1980). The Dominican Supreme Court and all lower court judges are elected by the Senate for four-year terms. Constitución de la República Dominicana, art. 23 (1966). Supreme Court Justices in Ecuador are appointed by the National House of Representatives for renewable six-year terms. Constitución del Ecuador, art. 101 (1979). The Supreme Court of Justice of El Salvador is elected by the Legislative Assembly for a five-year term. Constitución Política de El Salvador, art. 186 (1983). Members of the Supreme Court in Honduras are elected by the legislature for



reelected to an additional eight-year term unless at least two-thirds of the legislature vote affirmatively for removal.<sup>43</sup> A similar system exists in El Salvador, where Supreme Court members automatically remain in office for renewable five-year terms unless the legislature expressly votes them out.<sup>44</sup> In contrast, members of Uruguay's Supreme Court may not be reelected after they have completed a ten-year term until a five-year waiting period has elapsed.<sup>45</sup> Such measures leave judges vulnerable to legislative pressures. Since Latin American legislatures are often themselves dominated by the executive, a legislative approval system may still leave Latin American judges vulnerable threats or blandishments by the executive.

## 5. Transferability of Judges

Some Latin American constitutions protect judges against involuntary transfers.<sup>46</sup> Others bestow upon the highest court unrestricted power to

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four-year renewable terms. Constitución de la República de Honduras, art 305 (1982). Guatemala has a six-year term for members of its Supreme Court – four members of the Supreme Court are elected directly by the Congress, and five are elected by the Congress from a list of thirty names submitted by a committee of law schools deans, representatives of the bar association, and a representative of the judiciary selected by the Supreme Court. Constitución Política de la República de Guatemala, art. 215 (1985). The Supreme Court of Justice of Nicaragua is elected for a six-year term by the National Assembly from slates of three candidates submitted by the President of the Republic. Constitución Política de la República de Nicaragua, art. 163 (1987). The Supreme Court of Uruguay is elected by the Council of the Nation for ten-year terms. Constitución de la República Oriental del Uruguay, art. 2 *as amended* by Acto Institucional No. 12 art 2, 10 de noviembre 1981 (Uru.). The Supreme Court of Venezuela is elected by the legislature for nine-year terms. La Constitución de la República de Venezuela, art. 214 (1961).

43 Constitución Política de la República de Costa Rica, art. 158 (1949).

44 Constitución Política de la República de El Salvador, art. 186 (1983).

45 Acto Institucional Act No. 12, art. 2, 10 de noviembre 1981 (Uru.).

46 Constituição Federal Da Republicam Federativa Do Brasil, art. 113 (II) & (III) (1969) (judges transferable only by a secret two-third vote of a higher tribunal); Constitución Política de la República de Panama, art. 208 (1983) (magistrates and judges transferable only for reasons provided by law). *See also* Ley de Organización Judicial, art. 19 (1972) (Bol.) (a judge not transferable without his express consent).

transfer judges.<sup>47</sup> Because an involuntary transfer can be punitive and is often regarded as tantamount to an invitation to resign, the lack of constraints on transference can seriously compromise personal judicial independence.

## 6. Avoidance of Conflicts of Interest

It is common practice in Latin America to prohibit judges from engaging in any other form of economic activity, other than writing or teaching, in order to avoid conflicts of interest.<sup>48</sup> Many countries also prohibit judges from engaging in political activities.<sup>49</sup> Brazil bars judges from participating in commerce or acting as a director or administrator of any business firm,<sup>50</sup> while Chile prohibits judges from owning mining interests within the judge's territorial district.<sup>51</sup>

## 7. Judicial Immunity

Judicial independence can be threatened by vexatious lawsuits by litigants who claim they have been injured by judges who have either maliciously or negligently applied the law. The Anglo-American approach is to accord judicial immunity from such lawsuits; France immunizes its regular

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47 *E.g.*, Constitución Política de los Estados Unidos Mexicanos, art. 197 (1917).

48 Constituição Federal da República Federativa do Brasil, art. 114 (1969) (prohibits judge from engaging in any other professional or political activity except university teaching or serving on the electoral court); Constitución Política de Colombia, art. 160 (1886) (prohibits judges from holding any other paid office or from practicing law, but permits university teaching); La Constitución Haitienne, art. 179 (1987) (prohibits judges from all salaried employment except teaching or being a diplomat-at-large); Constitución Política del Perú, art. 243 (1980) (prohibits judges from engaging in any other professional or political activity except university teaching, and prohibits judges from unionizing or striking).

49 Constitución del Ecuador, art. 104 (1979); Constitución Política de la República de Panamá, arts. 205, 209 (1983) (prohibition on all political activity and any other employment, with the exception of university teaching).

50 Lei Orgânica da Magistratura Nacional, Lei Complementar No. 35, art. 36 (I) & (II) (14 de março 1979) (Braz.).

51 Código Orgánico de Tribunales, art. 322 (7th ed. 1977) (Chile).

judiciary from civil suits, but permits victims of judicial negligence to sue the state. Italy makes its judges personally liable, but also imposes liability on the state.<sup>52</sup> In Latin America, however, one does not generally find a well-developed notion of judicial immunity from such lawsuits. On the contrary, most Latin American countries regard judges as citizens fully exposed to criminal and civil liability for maliciously or negligently applying the law.<sup>53</sup>

## II. Forms of Interference with Judicial Independence

Some countries, such as England and Israel, have managed to achieve independent judiciaries without written constitutions.<sup>54</sup> Although it does not permit the courts to declare laws unconstitutional, France has not only an independent judiciary, but also an independent system of administrative courts that are technically part of the executive.<sup>55</sup> In contrast, a number of Latin American countries with elaborate constitutional guarantees of judicial independence have subversive judiciaries. The sad reality is that the citadel of judicial independence has been perennially besieged in Latin America. On occasion, the citadel has been seized, and the judges sacked.

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52 See Blom-Cooper, *Independence of the Judiciary*, in Council of Europe, *Judicial Power and Public Liability for Judicial Acts* 19, 24 (1986); Morozzo della Rocca, *The Different Forms of Personal Liability of the Judge*, in *id.* at 54, 59, 61-62.

53 Lei Orgánica da Magistratura Nacional, Lei Complementar No. 35, art. 49 (14 de março 1979) (Braz.); Código Orgánico de Tribunales, arts. 324-331 (7th ed. 1977) (Chile). See generally J. Bustamente Alsina, *Teoría General de la Responsabilidad Civil* 383-84 (2d ed. 1973); L. Colombo, *2 Culpa Aquiliana* 54-55 (1965).

54 This does not mean that England and Israel are without constitutions. Neither country has a single document called the "Constitution", but parts of their so-called "unwritten constitutions" can be found in written documents. Thus, one finds the English Constitution in documents such as the Magna Carta, the Petition of Rights, the Bill of Rights, the Habeas Corpus Act, and the Parliament Act. A. Goodhart, *The British Constitution* 1 (1946). The emerging Israel Constitution is found in five "basic laws". See Sager, *Israel's Dilatory Constitution*, 24 *Am. J. Comp. L.* 88, 93-99 (1976).

55 R. David, *French Law: Its Structure, Sources, and Methodology*, 24-25 (M. Kindred trans. 1972).

### A. *Formal Abrogation of Judicial Independence*

Interference with judicial independence takes many forms. The most obvious is the formal abrogation of judicial independence. In 1977, a *de facto* military regime in Uruguay, a country that had previously enjoyed a well-deserved reputation for judicial independence, promulgated an astounding Institutional Act that overtly abolished the independence of the judiciary.<sup>56</sup> The Act discarded the theory of a tripartite separation of powers, debunking it as “a thesis incorrectly attributed to Montesquieu”, and eliminated the judiciary as a separate branch of government. The Uruguayan courts were placed at the mercy of the Executive, which for four years was granted discretion to dismiss any judge for any reason. All court administrative functions were transferred to the Ministry of Justice, which was granted full authority to set judicial salaries. Not only did the Act drastically diminish the powers of the Supreme Court of Justice, it even removed “Supreme” from the court’s name.

Since 1960, Cuba has also formally abrogated judicial independence. Castro’s displeasure with the acquittal of forty-five members of Batista’s air force on a charge of genocide led to the convening of a special panel to reverse the acquittal (over protests from the bench and bar), and the reliance on “revolutionary courts” for political trials.<sup>57</sup> Judicial independence was formally abolished by the Judicial Organizational Law of 1973, which explicitly subordinated the judiciary to the Council of Ministers.<sup>58</sup> That subservience was confirmed by the 1976 Constitution and the 1977 Judicial Organization Law.<sup>59</sup> The National Assembly elects

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<sup>56</sup> Acto Institucional No. 8, 1 de julio 1977 (Uru.). *See generally*, L. Cortiñas-Peláez, *Poder Ejecutivo y Función Jurisdiccional* (1982). For a detailed analysis of the military’s destruction of judicial independence in Uruguay, *see* The Lawyers Committee for International Human Rights, *Uruguay: The End of a Nightmare?* 43.54 (1984).

<sup>57</sup> Salas, *The Judicial System of Postrevolutionary Cuba*, 8 *Nova L.J.* 43, 45 (1983).

<sup>58</sup> Ley de Organización del Sistema Judicial, Ley No. 1250, art. 3, No. 13 *Gaceta Oficial* 57 (23 de junio 1973) (Cuba).

<sup>59</sup> Constitución de la República de Cuba, art. 122 (1976); Ley de Organización del Sistema Judicial, Ley No. 43 de 10 de agosto 1977, art. 4; No. 31 *Gaceta Oficial* 299 (12 de agosto 1977) (Cuba).

the Supreme Court, and People's Assemblies elect their respective local courts. Judges must give accounts of their work to the bodies responsible for their election, and the judges are subject to recall.<sup>60</sup>

### B. *Bypassing the Ordinary Courts*

A second technique for undermining judicial independence in Latin America is to transfer jurisdiction of the ordinary courts over national security offenses to military or special tribunals. Exceptionally, a courageous court might declare the trial of civilians by military courts unconstitutional, as the Colombian Supreme Court did recently.<sup>61</sup> In many countries, however (particularly those ruled by *de facto* military governments), civilians accused of terrorism or subversion have been tried before special or military tribunals rather than by ordinary courts. Frequently, the ordinary courts have been denied jurisdiction to issue writs of *habeas corpus* or *amparo*, or to review the proceedings on appeal. Brazil began this process in 1965, enacting by military fiat an Institutional Act that permitted military tribunals to try civilians accused of national security crimes.<sup>62</sup> The Brazilian courts were effectively prevented from invalidating the extension of military jurisdiction by a provision (which became boilerplate in all subsequent Institutional Acts) excluding from judicial review all governmental actions based upon the First and Second Institutional Acts. Institutional Act No. 5 of 1968 made *habeas corpus* inapplicable to cases where detention was ordered pursuant to charges based upon the National Security Law, crimes against the social and economic order or crimes against the popular economy. Institutional Act No. 6 reduced the Supreme Court's jurisdiction to hear ordinary appeals from cases denying *mandado de segurança* (writ of security) and eliminated ordinary appeals from decisions of military tribunals trying

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60 Comment, *Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 Tulane L. Rev. 1223, 1275-6 (1981).

61 Decision de 5 de marzo 1987, (Colom.) Sala Plena in 16 Jurisprudencia y Doctrina 492 (May 1987).

62 Acto Institucional No. 2, 27 de outubro 1965 (Braz.).

civilians for violations of national security.<sup>63</sup> Recent research into the archives of the Superior Military Tribunal reveals that torture of defendants was commonplace and routinely ignored by the military courts.<sup>64</sup>

In 1982, the military government in Guatemala enacted a decree-law that provided for Tribunals of Special Jurisdiction to deal with people accused of violating the state of siege or participating in other subversive activity. Procedure was summary, with no opportunity for appeal. Judges could be army officers with no formal training, and the death penalty was mandated for certain offenses.<sup>65</sup> Similar legislation has been passed in Argentina,<sup>66</sup> Chile,<sup>67</sup> Colombia,<sup>68</sup> El Salvador<sup>69</sup> and Uruguay.<sup>70</sup>

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<sup>63</sup> See K. Karst & K. Rosenn, *Law and Development in Latin America* 214-219 (1975). See also Nadorff, *Habeas corpus and the Protection of Political and Civil Rights in Brazil: 1962-1978*, 14 *Law. Am.* 297 (1982). Paradoxically, the Superior Military Tribunal appeared to display significantly greater independence in dealing with those accused of subversion than did the packed Supreme Court. "A lei respeitada: O STM e a missão de julgar processos políticos," *Veja*, Dec. 21, 1977, at 20, 22-26.

<sup>64</sup> Torture in Brazil 78 (J. Dassin ed. 1986); Wechsler, *A reporter at Large: A Miracle, a Universe*, *The New Yorker*, May 25, 1987, at 69, and June 1, 1987, at 72.

<sup>65</sup> Decreto-Ley No. 46-62, Vol. CCXIX, No. 7, *Diario de Centro América Antes El Guatemalteco* 171 (1 de julio 1982) (Guat.). For harsh criticism of the operation of this law, see Americas Watch Report, *Human Rights in Guatemala: No Neutrals Allowed* 85-99 (1982); Moyer & Padilla, *Executions in Guatemala as Decreed by the Courts of Special Jurisdiction in 1982-83: A Case Study*, 6 *Human Rts. Q.* 507 (1984).

<sup>66</sup> Ley No. 21.461, XXXVI-D A.D.L.A. 2895 (19 de noviembre 1976) (Argen.).

<sup>67</sup> Decreto Ley No. 5 de 1973, No. 28.657 *Diario Oficial* (22 de septiembre 1973) (Chile); Ley No. 18.314 de 15 de mayo 1984, No. 31.873 *Diario Oficial* 2354 (17 de mayo 1984) (Chile).

<sup>68</sup> Decreto-Legislativo No. 2260 de 1976, Vol. CXIII, No. 34676 *Diario Oficial* 481 (17 de noviembre 1976) (Colom.); Decreto-Legislativo No. 1923 de 1978, Vol. CXV, No. 35101 *Diario Oficial* 1033 (21 de septiembre 1978) (Colom.). But see Decisions of the Sala Plena of the Colombian Supreme Court declaring recent decrees creating Special Tribunals to try certain serious crimes unconstitutional. 16 *Jurisprudencia y Doctrina* 813, 829 (Aug. 1987).

<sup>69</sup> Decreto No. 507, Vol. 269, No. 228 *Diario Oficial* 18 (3 de diciembre 1980) (El Sal.).

<sup>70</sup> Ley No. 14.493 de diciembre 1975, Vol. 282, No. 19682 *Diario Oficial* 19-A (13 de enero 1976) (Uru.); Acto Institucional No. 8, 1 de julio de 1977 (Uru.); Acto Institucional No. 12, 10 de noviembre 1981 (Uru.).

The Argentine Executive openly performed judicial duties in 1955 after the overthrow of Juan Perón. Judicial functions were exercised by the National Commission of Investigations, which, under the leadership of the Vice President, was set up to deal with the rectification of the irregularities of the Perón regime. Additionally, a National Board for the Recuperation of Patrimony was granted judicial powers, including the power to confiscate property without judicial proceedings.<sup>71</sup>

Two related jurisdictional problems have been the proliferation of special administrative courts and the development of a broad political question doctrine. Many Latin American countries have developed special administrative tribunals outside of the control of the regular judiciary and have delegated a substantial portion of normal judicial jurisdiction to these special tribunals. The most common special courts have been labor courts, and tax and election tribunals. Colombia, Ecuador and Uruguay have gone even further by setting up separate systems of administrative courts following the French model.<sup>72</sup> In situations where administrative judges lack the guarantees of independence of the ordinary judiciary, the transference of jurisdiction diminishes judicial independence.<sup>73</sup>

Many Latin American judiciaries have voluntarily relinquished important aspects of their jurisdictional authority through the development of an exceedingly broad political question doctrine. Many of the issues regarded as political questions are simply political acts of the executive that are treated as nonjusticiable solely because of judicial timidity. While the political question doctrine has been narrowed substantially by the United States Supreme Court in the past twenty-five years,<sup>74</sup> Latin American

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<sup>71</sup> P. Ramela, *Derecho Constitucional* 781-82 (3d ed. 1986).

<sup>72</sup> See Fix Zamudio, *Función del Poder Judicial en los Sistemas Constitucionales Latinoamericanos*, in UNAM, Instituto de Investigaciones Jurídicas, *Función del Poder Judicial en los Sistemas Constitucionales Latinoamericanos* 9, 21-25 (1977).

<sup>73</sup> For discussion of this phenomenon in the context of Argentina, see J. Dromi, *El Poder Judicial* 105-26 (1982).

<sup>74</sup> See *Baker v. Carr*, 369 U.S. 186 (1962); *Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Nixon*, 418 U.S. 683 (1974).

courts have been generally reluctant to contract their broad view of nonjusticiable political questions.<sup>75</sup>

### C. Wholesale Dismissal of Judges

Perhaps the most devastating attack on judicial independence has been the wholesale purging of courts pursuant to institutional acts issued by *de facto* regimes. Although most courts are left intact after a *golpe*, this general rule has conspicuous exceptions, most notably Argentina, Brazil, El Salvador and Peru. Despite a constitutional guaranty of lifetime tenure, the Argentine Supreme Court has been replaced *en masse* six times in the past thirty-one years. In 1946, all but one of the Court's members were removed by a Perón-dominated Congress on trumped up impeachment charges. In 1957, the military regime that had ousted Perón two years earlier summarily dismissed the entire Perón-appointed Supreme Court. In 1966, another military takeover resulted in the replacement of the entire Supreme Court. After the election of a Peronist regime in 1973, all members of the Supreme Court resigned. In 1976, the entire Supreme Court was once again ousted after yet another military takeover.<sup>76</sup> The Junta that assumed power in 1976 suspended the tenure of all federal judges, permanently removing twenty-four of them from office, as well as discharging the judges of the provincial supreme courts. Finally, in 1983, the return of democracy resulted once again in the replacement of the entire Supreme Court.<sup>77</sup>

The Brazilian Supreme Federal Tribunal, whose independence in granting habeas corpus was a major irritant to the *de facto* military regime, has been treated like a suitcase. In 1965, the military government issued an

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<sup>75</sup> See Fix-Zamudio, *supra* note 72, at 38-39. See also Ovalle Favela, *supra* note 23, at 784; Garro, *The Role of the Argentine Judiciary in Controlling Governmental Action under a State of Siege*, 4 Hum. R.L.J. 311 at 326-36 (1983); Pérez Guilhou, *La Corte y el Gobierno de Facto Argentino*, in II Congreso Iberoamericano de Derecho Constitucional, 9 UNAM Anuario Jurídico, 811 (J. Carpizo ed. 1982).

<sup>76</sup> See Rosenn & Katz, *Book Review*, 68 Calif. L. Rev. 565, 573 n. 30 (1980).

<sup>77</sup> See Garro, *supra* note 75, at 314-15.



institutional act permitting it to pack the Tribunal by increasing its size from eleven to sixteen judges. Three years later, it was unpacked by the forced retirement of three highly independent judges, the resignation (under protest) of the Chief Justice, and an age-induced retirement. At this time, another institutional act reduced the size of the Court from sixteen to eleven judges.<sup>78</sup>

The military junta that took power in El Salvador in 1979 replaced the entire Supreme Court with appointees sympathetic to the regime.<sup>79</sup> In 1969, Peru's military government dismissed all of the judges of the Supreme Court and replaced them with judges more sympathetic to the aims of the military.<sup>80</sup> The new government also formed a military-dominated National Council of Justice, assigning it the power to appoint all judges.<sup>81</sup> The same statute that created the Council also dismissed the entire Supreme Court, permitting the military-dominated Council to appoint judges more congenial to the government. In 1973, at the instigation of President Velasco, the Council dismissed the entire criminal division of the Supreme Court because Velasco was unhappy with the outcome of a case. During the course of the Velasco regime, the judicial retirement age was often modified to permit the appointment of new judges or to replace those jurists deemed unacceptable to the military government.<sup>82</sup>

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<sup>78</sup> See K. Karst & K. Rosenn, *supra* note 63, at 214-215.

<sup>79</sup> Americas Watch Committee & ACLU, Report on Human Rights in El Salvador 45 (Supp. July 20, 1982). For a chilling depiction of the collapse of the administration of justice in El Salvador, see DeWind & Kass, *Justice in El Salvador: A Report of a Mission of the Association of the Bar of the City of New York*, 38 Rec. A.B. City N.Y. 112 (1983).

<sup>80</sup> Decreto-Ley No. 18060 de 23 de diciembre 1969 (Peru); Decreto-Ley No. 18061 de 23 de diciembre 1969 (Peru).

<sup>81</sup> Decreto-Ley No. 18060 de 23 de diciembre 1969, arts. 7-9 (Peru); Decreto-Ley No. 18831 de 13 de abril 1971 (Peru).

<sup>82</sup> S. Rose, *The Peruvian Revolution's Approach: Investment Policy and Climate - 1968-1980*, 321 (1981).

#### D. *Transference or Reassignment of Judges*

Another method of interference with judicial independence has been the transference or reassignment of judges. In some countries, judges who have made politically unpopular decisions have been reassigned to less desirable posts as punishment for their assertions of independence. For example, in El Salvador after Judge Bernardo Rauda Murcia courageously sentenced five members of the National Guard to long prison terms after a jury found them guilty of the 1980 murders of four American nuns, the Supreme Court reversed the convictions and transferred Judge Rauda to northern Chalatenango Province. This is an area of frequent clashes between leftists guerrillas and army units and requires a four hour round-trip bus ride from the Judge's home in San Salvador, a commute occasionally enlivened by rebel ambushes and army sweeps.<sup>83</sup> Certainly, in some circumstances transfers may be necessary for administrative reasons, but it is important to differentiate between transfers that are in accordance with sound administrative practices and those that are plainly punitive.

#### E. *The Illusory Guaranty of Irreducible Salaries*

In most Latin American countries, constitutional guarantees of the irreducibility of judicial salaries have been rendered illusory by chronic inflation. Consequently, the chronically low level of judicial salaries in many Latin American countries often has been cited as a principal source of judicial corruption.<sup>84</sup> In 1985, the average annual inflation rate in Latin

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83 Le Moyne, *The Case of a Salvadoran Judge: Does Valor Pay?* N.Y. Times, May 3, 1985, at A2, col. 1-4. The background of this case and the enormous effort required by U.S. representatives to force prosecution are set out in Posner & Greathead, *Justice in El Salvador: A Report of the Lawyers Committee for International Human Rights on the Investigation into the Killing of Four U.S. Churchwomen*, 14 Colum. Human Rts. L. Rev. 191 (1983).

84 Venezuela's President recently urged all sectors of society to unite in a campaign to drive out judges who "enrich themselves in illegal ways" in Venezuela's corrupt, overloaded and underfunded judicial system. *Lusinchi Condemns Corrupt Judges*, Latin Am. Reg. Rep. Andean Group Rep., July 30, 1987, at 2, col. 1.

America (excluding Cuba) was an astonishing 704.8%. (This rate falls to 91.6% if one excludes Bolivia, whose inflation rate of 11,743% substantially distorts the picture.)<sup>85</sup> At times Argentine inflation so reduced the real economic value of judicial salaries that restaurant waiters in Buenos Aires were earning more than the President of the Supreme Court.<sup>86</sup> Many Argentine judges have resigned for economic reasons. In recent years the Argentine Supreme Court has publicly requested that the Executive and the Legislature substantially increase judicial compensation to keep pace with inflation.<sup>87</sup> In 1985, the Argentine Supreme Court finally decided that the constitutional guaranty against the nondiminution of judicial salaries must be interpreted in real, rather than nominal, terms, thereby affirming a lower court decision requiring monetary correction of judicial salaries in order to compensate for real losses caused by inflation.<sup>88</sup> Even in the United States, where inflation has been far less chronic and severe than in most countries of Latin America, the value of judicial salaries has declined sharply in real terms, resulting in a substantial number of judicial resignations, as well as lawsuits by judges challenging the constitutionality of Congressional failure to raise salaries.<sup>89</sup> Only if the constitutional guaranty is interpreted to require the maintenance of the real, as opposed to the nominal, value of judicial salaries can it be a meaningful safeguard of judicial independence in an inflationary economy.<sup>90</sup>

#### *F. Failure to Enforce Judicial Decisions*

Alexander Hamilton elegantly made the point that the judiciary, possessing neither the power of the sword nor of the purse, must ultimately depend

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<sup>85</sup> Computed from Inter-American Development Bank, *Economic and Social Progress in Latin America 1986 Report* 22 (1986). Only two Latin American countries, Panama and Honduras, had single digit inflation rates in 1985.

<sup>86</sup> De Onis, *Isabelita's Terrible Legacy*, N.Y. Times Magazine, Mar. 21, 1976, at 15.

<sup>87</sup> Acordada No. 30, 12 de junio 1985, 1985-D L.L. 170 (Argen.); Acordada No. 6, 1984-D L.L. 425 (Argen.); Acordada No. 55; 1984-D L.L. 572 (Argen.).

<sup>88</sup> Bonorino Peró v. Estado Nacional, 116 E.D. 321 (Nov. 15, 1985) (Argen.).

<sup>89</sup> See Rosenn, *supra* note 11, at 310.

<sup>90</sup> *Id.* at 339-42.

upon the executive to enforce court decisions.<sup>91</sup> Refusal of the executive to enforce judicial decisions that it does not agree with seriously undermines the independence of the judiciary. Because the cost of such refusal is generally a breakdown in law and order, most regimes deem the price too high to pay. A conspicuous exception occurred in Chile under the Allende government, which adopted the policy of ignoring court decisions ordering the return of illegally occupied land and illegally seized factories.<sup>92</sup> In May 1973, the Supreme Court of Chile sent an official letter to Allende, stating:

This Court must protest to you, as it has done innumerable times in the past, about the illegal acts of the administrative authorities who are illicitly interfering with the proper exercise of judicial power, and who are preventing the police force from carrying out criminal sentences duly emanating from the criminal courts... These acts signify a decided obstinacy in rebelling against judicial sentences and a total lack of concern about the alteration that these attitudes and omissions have produced in the juridical order. All of this no longer means a simple crisis of state under the rule of Law... but a preemption or imminent rupture of the country's legality.<sup>93</sup>

Allende rejected the Supreme Court's charges in a long letter severely critical of the Court for preferring claims of the rich to claims of the poor. He continued to insist upon the right of the executive, "as warrantor of peace and public order," to review every judicial decision and make an independent determination of which should be enforced. A few months later Allende was ousted by the military, which stated that one of the primary reasons for its taking power was the reestablishment of the constitutional and juridical order.<sup>94</sup>

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91 The Federalist, No. 78 at 465 (A. Hamilton) (C. Rossiter ed. 1961).

92 Velasco, *The Allende Regime in Chile: An Historical and Legal Analysis, Part II*, 9 Loy. L.A.L. Rev. 711, (1976), at 723-26; Comment, *Chile under Allende: The Decline of the Judiciary and the Rise of a State of Necessity*, 9 Loy. L.A. Int'l & Comp. L.J. 693, 700-01 (1987).

93 Cited in Velasco, *supra* note 92, at 726.

94 Comment, *supra* note 92, at 706-07.

## G. *Executive Domination*

Despite the constitutional configurations providing for three coequal branches of government, historically, Latin American countries have been dominated by the executive. The checks built into the system are far from being equally balanced. Consequently, any judge who attempts to frustrate the will of the executive does so at great peril to his job security. The examples of strong Latin American executives running roughshod over the courts are legion. Trujillo, who ruled the Dominican Republic with an iron fist, reportedly held undated letters of resignation from each member of the Supreme Court and filled in the date whenever he was displeased with any decision.<sup>95</sup> In 1964, Papa Doc Duvalier summarily dismissed Douyon, the Chief Justice of the Supreme Court, and chastised the remaining justices because the Supreme court had been too slow to praise the President-for-Life. For many years, Haitian judicial decisions were required to conform strictly to the wishes of the Duvaliers.<sup>96</sup> In Paraguay, the courts still are dominated totally by President Stroessner.<sup>97</sup> Former Ecuadorean President Velasco Ibarra's response to the Supreme Court's invalidating several controversial executive decrees was to abrogate the 1967 Constitution, reform the Supreme Court, and seize dictatorial

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95 H. Wiarda, *Dictatorship and Development: The Methods of Control in Trujillo's Dominican Republic* 64-65 (1968).

96 Verner, *The Independence of Supreme Courts in Latin America: A Review of the Literature*, 16. *J. Lat. Am. Stud.* 643, (1984).

97 Although theoretically the Paraguayan Supreme Court has the power to declare statutes and presidential acts unconstitutional, it has never dared to exercise that power since Stroessner has been president. Judges are appointed for terms of only five years, and renewal depends upon currying presidential favor. Moreover, no constitutional provision prevents the Stroessner-dominated Congress from reducing their salaries during their term in office or from impeaching them. P. Lewis, *Paraguay Under Stroessner* 110-11 (1980). *See also Americas Watch Report, Rule by Fear: Paraguay After Thirty Years under Stroessner* 45 (1985).

98 J. Martz, *Ecuador: Conflicting Political Culture and the Quest for Progress* 80 (1972).

### III. Conclusions

The lack of judicial independence is a chronic problem in Latin America. A recent assessment by two eminent Mexican jurists concluded that Costa Rica is the only Latin American country where the judiciary is truly independent.<sup>99</sup> Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru and Venezuela were considered to have independent judiciaries but subject to interference by the executive, while Guatemala, Honduras, Panama, Paraguay and Uruguay were regarded as definitely lacking judicial independence.<sup>100</sup> One can take issue with many of the conclusions in this incomplete impressionistic survey. Nevertheless, the underlying message – that Latin America as a region suffers from a judicial independence deficiency – seems undeniable. Yet this does not mean that Latin American judiciaries are corrupt, incompetent, or poorly trained. Nor does it mean that the majority of cases will not be resolved on the merits in accordance with the judge's proper application of the governing law. As a rule, Latin American judges are dedicated, scrupulous professionals. Indeed, many Latin American jurists deservedly enjoy high international esteem for their scholarship and dedicated work on international legal projects.

Any attempt to explain the reasons for the lack of judicial independence in Latin America must be tentative. One has to take into account the substantial differences between the governmental systems of the twenty countries comprising the region. One must also consider that the degree of judicial independence has differed significantly over time. Nevertheless, certain important structural aspects of Latin American legal culture and political experience seem to be critical for the region as a whole.

First, Latin America is heir to the civil law tradition, in which the judge has historically been a weak figure. In no civil law country do judges have the power, prestige, and deference enjoyed by judges in the United States,

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<sup>99</sup> Carpizo & Fix-Zamudio, *La Necesidad y la Legitimidad de la Revisión Judicial en América Latina: Desarrollo Reciente*, 52 Vol. Mex. Der. Comp. 31, 50 (1985).

<sup>100</sup> *Id.*

particularly at the federal level. Unlike his common law counterpart, a civil law judge does not have the power to punish the defiance of his orders by jailing the recalcitrant party for contempt of court. Civilians have tended to regard judges as expert technicians whose sole function is to apply the law to the facts. An independent, creative role for the judge in the civil law tradition has long been denied.<sup>101</sup> Yet virtually all Latin American countries have grafted the institution of judicial review on this civil law trunk.<sup>102</sup> Judicial review presupposes a strong judiciary with the independence, prestige, and experience to perform the delicate balancing of individual and societal interests that goes into constitutional adjudication. Most Latin American courts are staffed by career judges with no independent political base or contacts and with relatively narrow experience. Asking them to perform this function (particularly in the context of exercising the power to declare statutes unconstitutional *erga omnes*) is to plunge them into a political role for which they are ill-prepared by both temperament and experience.

Second, the legitimacy of the judiciary, like that of the legal order, stems from the constitution. Unfortunately, Latin American constitutions are notoriously short-lived and often violated. Since gaining their respective independence, the twenty Latin American republics have promulgated 267 constitutions, an average of 13.4 per country. Each *golpe* ruptures the preexisting constitutional order, leaving the judiciary in the unenviable position of trying to maintain a *de jure* institutional authority in a *de facto* regime. Any regime that comes to power by extraconstitutional means is unlikely to brook any active interference with the exercise of the extraordinary powers it has assumed, and even less so from a hold-over from the *ancien régime*. Revolutions generally wreak havoc with judicial independence, and revolutions have abounded in Latin America since 1808, when Napoleon initiated Latin America's chronic legitimacy crisis by placing his brother Joseph, a commoner, on the throne of Spain.<sup>103</sup> One ineluctably clear lesson from the Latin American experience is that

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101 J. Merryman, *The Civil Law Tradition* 36-39 (1st ed. 1969).

102 See Rosenn, *Judicial Review in Latin America*, 35 *Ohio St. L. J.* 785, (1984), at 785.

103 See K. Karst & K. Rosenn, *supra* note 63, at 184-86.

constitutional guarantees of judicial independence do not by themselves produce an independent judiciary.

Third, Latin American constitutions provide for the suspension of many important constitutional guarantees during states of emergency.<sup>104</sup> The most abused of these states of emergency is the state of siege.<sup>105</sup> Although they are supposedly temporary juridical situations reserved for times of great emergency, states of siege have been maintained for years in a number of Latin American countries despite the absence of any external threats. Declaration of a state of siege does not necessarily prevent a judiciary from functioning independently, but its practical effect is to reduce considerably the judiciary's sphere of action in protecting constitutional rights from governmental abuse. Consequently, long-term usage of the state of siege or its functional equivalents has substantially hindered judicial independence in many Latin American countries by making the protection of individual constitutional rights impossible.

Fourth, Latin American culture and political tradition are heavily authoritarian. The pattern of executive domination is not accidental. Rather, it reflects the Roman law tradition of granting autocratic powers to the emperors and *paterfamilias*, the corporativism and patrimonialism of colonial rule, and the hierarchical structure of the Catholic church.<sup>106</sup> Despite extensive constitutional rethoric, the principle that the government should be subject to the rule of law does not come naturally to most of Latin America. The underlying notion that the government is above the law does not bode well for judicial independence.

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104 See generally International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983).

105 Inter-American Commission on Human Rights (OAS). *Preliminary Study of the State of Siege and the Protection of Human Rights in the Americas* 1, 5-8 (1963).

106 Wiarda, *Toward a Framework for the Study of Political Change in the Iberic-Latin Tradition: The Corporate Model*, 25 *World Politics* 206, 210-212 (1973); Wiarda, *Law and Political Development in Latin America*, 19 *Am. J. Comp. L.* 434, 438-47 (1971). See also Rosenn, *A Comparison of Latin American and North American Legal Traditions*, in *Multinational Corporate Interaction with Host Governments* (L. Travis ed., forthcoming Notre Dame Univ. Press).



Fifth, corruption is an endemic problem in many Latin American judicial systems.<sup>107</sup> In some countries, court personnel, particularly the clerks, are so poorly paid that the acceptance of bribes has become a regular practice that badly distorts the decision-making process.<sup>108</sup> Judicial independence ceases to exist when the quality of justice is dependent upon the wealth of the briber.

Sixth, although the formal legal systems of Latin American countries are universalistic and egalitarian, the true commitment to equality under the law is quite superficial. The courts are arenas where elites have been zealously fighting rearguard battles in order to preserve their power and privileges against attacks from groups that would also reject a universalistic legal system and an independent judiciary if they ever were to come to power. Absent a spirit of moderation and a willingness to compromise with conflicting societal groups, establishment of a truly independent judiciary will be difficult.

Overcoming these structural obstacles to judicial independence is not easy, but as the example of Costa Rica indicates, the task is not impossible.<sup>109</sup> On the other hand, Costa Rica not only has a long tradition of effective democratic government without military interference and a long history of respect for the rule of law, but it also has abolished the military. Because these conditions are not readily replicable in most of Latin America, the path to judicial independence is likely to continue to be slow and tortuous.

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107 See generally Helfield, *Law and Politics in Mexico* in *One Spark From the Holocaust: The Crisis in Latin America* 81, 91 (E. Burnell ed. 1970). See also Cooper, *Law and Medicine in Peru*, 24 *Chitty's L.J.* 56 (1976); Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 *Fla. Int'l L.J.* 1, 36 (1984).

108 See, e.g., Rosenn, *supra* note 107, at 35-37; *Report Condemns Peru's Judiciary*, *Lat. Am. Weekly Rep.*, Feb. 22, 1985, at 6.

109 For a thorough study of the Costa Rican judiciary, see C. Gutierrez, *El Funcionamiento del Sistema Juridico* (1979). For a recent study of judicial review in Costa Rica, see Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 *U. Miami Inter-Am. L. Rev.* 249 (1986).

# **Philippines: The Killing and Intimidation of Human Rights Lawyers**

**by Amnesty International  
August 1988**

## **1. INTRODUCTION**

During the government of President Ferdinand Marcos lawyers came to play an increasing role in the defence of human rights after the abolition of martial law in 1981. In several important decisions civilian courts freed political detainees, dismissed subversion or rebellion charges, or obliged military officials to account for the safety of detainees in their custody. As the courts took an increasingly prominent role, so the risks for human rights lawyers grew, particularly for lawyers associated with the largest human rights lawyers' network, the Free Legal Assistance Group (FLAG), which provides free legal aid to political prisoners and other disadvantaged groups. In the last two years of the Marcos government four FLAG lawyers were murdered. For only one of these murders was anyone brought to court: an army lieutenant who was charged with the murder in September 1984 of Attorney (Atty) Zorro Aguilar. In other cases, while circumstantial evidence suggested military or paramilitary involvement in the killings, the gunmen were never identified. In the same period five other human rights lawyers were arrested and detained on subversion charges. Three of them were released only after President Corazon Aquino came to power in February 1986.

Under the new government in 1986 many human rights lawyers were appointed to significant positions in the new administration from the cabinet down to local government. The chairman and founder of FLAG, Jose W. Diokno, was appointed as head of the Presidential Committee on Human Rights (PCHR), which was to investigate reports of human rights abuses and recommend measures for human rights protection in the future. He was also named as a government representative in negotiations with the National Democratic Front (NDF), the banned coalition which includes the

Communist Party of the Philippines and its armed wing the New People's Army, for an end to its seventeen year insurgency.

As peace talks with the NDF culminated in a 60-day ceasefire in late 1986, distrust between the armed forces and human rights lawyers returned. The military accused some human rights lawyers of being sympathetic to the NDF. In response to complaints that some military officers were obstructing the work of the PCHR, the then Chief of Staff of the Armed Forces of the Philippines (AFP), General Fidel Ramos, issued in August 1986 a set of guidelines on human rights matters which ordered military commanders to cooperate with the PCHR, to give detainees full rights of access as laid down in the law, and to "be circumspect in making unsubstantiated public statements that allude to certain individuals or groups as communists or any other derogatory label". Nevertheless continued criticism of the influence of human rights lawyers led to the resignation from government office of several such lawyers.

Antagonism between the armed forces and human rights lawyers intensified after the breakdown of peace talks in early 1987 and the reopening of armed hostilities. During 1987 an increasing number of people were arrested on charges of involvement with the NPA and several of their lawyers were accused by soldiers or members of military-backed civilian "vigilante" groups of supporting the NPA. FLAG complained formally about harassments and threats against their lawyers during a meeting with the then Secretary of National Defense Rafael Ilet and senior officers of the armed forces on 26 October 1987. Following this meeting, General Ramos issued an additional set of guidelines to military commanders on relations with FLAG. These guidelines acknowledged that there were cases where "some AFP operating elements were involved in deplorable acts", and ordered regional commanders of the Philippines Constabulary (PC) to function as contact points with FLAG, to institute regular dialogues with FLAG at all levels, to cooperate with FLAG lawyers on reports of human rights abuses and to invite FLAG lawyers to give seminars in military camps. While there have been regions where dialogues between military commanders and FLAG lawyers have been successfully initiated, such dialogues have not taken place throughout the

country. It is not clear what steps have been taken by the armed forces leadership to ensure that these guidelines are enforced.

Despite such guidelines, the number of lawyers reporting death threats or other harassments increased sharply during late 1987 and early 1988, possibly as a result of the highly publicized arrest of several alleged NPA leaders during this period. In December 1987 FLAG Chairman J.B.L. Reyes wrote to Defence Secretary Iletto listing some of the harassments reported by FLAG members. In reply General Ramos assured FLAG that the armed forces were investigating their complaints and stated "We shall continue to support and cooperate with all sectors having to do with the investigation and prosecution of abuses of human rights from whatever quarters." Another nationwide lawyers' network active in human rights and legal aid work, the Protestant Lawyers' League of the Philippines (PLLP), also complained to the authorities about attacks on its members.

None of the assurances of the AFP leadership prevented further murders and threats against human rights lawyers. In the six months after October 1987, four human rights lawyers were murdered.\* In two of these incidents, military or police personnel have been identified as the chief suspects; in the other two cases circumstantial evidence suggests involvement by either military or paramilitary forces. Many others have received death threats, have felt they were under surveillance, or have been advised to give up their human rights work for their own safety.

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\* At least two other lawyers were killed in this period, but the circumstances suggest that human rights work might not have been the motive for their killing. Alex Marteja, legal counsel for Dr Nemesio Prudente, a left-wing university head in Manila, was killed in an apparent assassination attempt on Dr Prudente on 10 November 1987. A government agency reported that Manila policemen were the principal suspects in the murder but no one had yet been charged. Attorney Vicente Mirabueno, the FLAG coordinator for Southern Cotabato, was shot dead in General Santos City on 6 February 1988. A former vice-governor and an activist in leftwing politics, Atty Mirabueno began receiving death threats after handling a logging case in December 1987. An early report of his murder (*Manila Chronicle*, 9 February 1988) said that the local military had blamed the murder on the NPA. Nevertheless, a former soldier now acting as a military agent was arrested for his murder but later escaped.

## **2. HUMAN RIGHTS LAWYERS WHO HAVE BEEN KILLED**

### **The Killing of David Bueno**

Attorney David Bueno, the only human rights lawyer in the northern province of Ilocos Norte, was shot dead outside his law office in Laoag City on 22 October 1987 [see CIJL Bulletin No. 21].

Aged 31, David Bueno was a member of FLAG and PLLP and chairman of the Ilocos Norte-Laoag City Human Rights Organization, which functioned from his office. In addition to defending prisoners accused of involvement with the NPA, he had taken a public stand criticizing the armed forces for human rights abuses in the province and had spoken out against moves to set up an anti-communist "vigilante" group in Laoag City. He played a prominent role in negotiations with the NPA for the release of prisoners of war. In October 1987 he was able to secure the release of a former Ilocos Norte provincial board member, Florencio Sales, on payment of a ransom. Before his murder David Bueno told his family that he had been receiving death threats.

On 22 October 1987 Atty Bueno had been meeting with a client and a personal secretary at a restaurant next to his law office. At about 6.20 pm he was leaving the restaurant and about to get into his car when he was shot dead by two gunmen on a motorcycle who then quickly sped away. According to an initial police report of the murder, one gunman was wearing a military fatigue uniform. The gunmen, who were equipped with automatic M-16 rifles, shot Atty Bueno eight times in the chest. He died before reaching the hospital. Two soldiers on guard duty near the scene of the murder were said to have vanished soon after the shooting.

The PLLP immediately conducted a fact-finding investigation into the murder, identifying witnesses and taking statements. They visited the Laoag City police station and supplied officials there with the names of witnesses, but said that the police told them that they were facing a blank wall in their inquiries. The PLLP attempted to interview the two soldiers who had been near the scene of the crime but the soldiers stated that they

had noticed nothing and that they needed clearance from their superiors before answering any questions. When the PLLP returned later, the soldiers were no longer available for interviewing.

Within a few days of the murder, the Criminal Investigation Service (CIS) of the Philippines Constabulary (PC) began an investigation. Their investigating team interviewed witnesses but were unable to identify the gunmen. Their report to the Chief of Staff's office on 28 October described David Bueno as "allegedly known as a leftist, radical and a sympathizer of the NDF in Ilocos Norte" and concluded that further investigations should give "special preference on the theory of power struggle among human rights members" and to an alleged feud over the distribution of ransom money paid to the NPA. The CIS investigation said that it had been unable to interview the family and reported a leading church figure as saying that the government should send instead a civilian fact-finding team as the people in the area would not cooperate with the military. The government's National Bureau of Investigation (NBI) later announced that it was sending a team to investigate Atty Bueno's death, but the results of the NBI investigation are not known.

The family and friends of David Bueno have charged that the official investigations have been insufficiently thorough. They have complained that although David Bueno was shot dead in the centre of Laoag City and the murder was immediately reported to the police, it took the local police thirty minutes to arrive on the scene of the crime. They have also alleged that the local PC command has been partisan. They said for example that the local PC provincial commander claimed on radio that the family were being uncooperative and only retracted this claim when the mother of David Bueno called the radio station to deny it. The family have said that they have not been contacted by the NBI.

### **The Killing of Ramos Cura**

Attorney Ramos Cura, defence counsel for a leading communist prisoner, was shot dead in Angeles City, Pampanga, on 18 June 1988.

Ramos Cura was sifting sand, together with his father, outside his house at 6 am on 18 June when two men in civilian clothes who had been waiting at a store across the road from his house called out to him and then shot him at close range. His father, who threw sand at the gunmen, was shot at also. The gunmen fled away in a red Toyota car.

Ramos Cura, aged 46 and married, was a well-known human rights lawyer in Angeles City. He was the defence counsel for Rodolfo Salas, the alleged leader of the NPA, and for others suspected of involvement in the NPA. He was active in several regional groups such as the Movement of Young Attorneys of Pampanga (MYAP), *Mananggol Para sa Karapatan ng Tao* (MAKATAO – Movement of Lawyers for People's Rights), and the left-wing political party *Partido ng Bayan*. Since his death other lawyers in Angeles City have reportedly received death threats.

Following his murder the red car in which the gunmen escaped was seen again in the area. Mrs Cura has also reported having since been followed. A neighbour, Dr Patricio Santiago, the doctor to whom Ramos Cura was taken immediately after the shooting, was himself shot dead by unidentified gunmen on 30 June.

Although the killers of Atty Cura have not been identified, local residents believe that he was killed by an anti-communist "vigilante" group in retaliation for the deaths of five people killed in the city in June by members of an NPA assassination squad. There are several armed civilian anti-communist groups active in Angeles City who have killed alleged NPA members or supporters in retaliation for NPA killings. These "vigilante" groups are reported to be heavily armed and well funded. While the local military has officially denied any connection with the civilian groups, local residents believe that the "vigilantes" cooperate closely with the military in their counter-insurgency operations.

The family of Ramos Cura have claimed that official investigations have been insufficiently thorough. One military officer is reported to have stated that Ramos Cura was probably killed by the NPA, even though the NPA itself apparently condemned the killing in a publicly distributed leaflet. Another officer is said to have stated that the military had no leads in their

inquiries. The authorities, however, appear to have taken no steps to ensure the safety of possible witnesses. Neighbours of Ramos have received threats and the family is reported now to be unwilling to pursue their complaints regarding his murder out of fear for their own safety.

### **The Killing of Alfonso Surigao**

Attorney Alfonso "Al" Surigao, a leading human rights lawyer in Cebu City, was shot dead by armed men on Friday 24 June 1988.

According to reports, three armed men burst into his home in Pardo, Cebu City, about 7.40 pm, while Atty Surigao was feeding his pigs at the back of the house. Two of the armed men held his wife and a visitor to the house at gunpoint while the third man rushed to the back and shot him dead with a .38 caliber handgun in front of his five-year-old daughter. According to witnesses the two accomplices were armed with automatic UZI rifles. Within a few hours of the killing, a former human rights lawyer in Cebu City, Democrito Barcenas, received a telephoned death threat.

Al Surigao, aged 47 and married, was regional FLAG coordinator for the central Visayas islands, PLLP chairman for the Visayas and a national board member of the Philippine Alliance of Human Rights Advocates... Al Surigao actively defended the rights of political prisoners and other victims of human rights abuses in Cebu and Leyte provinces. In 1988 he was involved in the defence of the 26 farmers from Leyte who were arrested in Manila in November 1987, accused of being NPA supporters and brought to trial in Cebu City. The farmers themselves maintained that they had been arrested for their activities in publicizing human rights abuses in Leyte.

Several factors initially suggested that military personnel may have been involved in the killing of Al Surigao. Atty Surigao had been involved in the prosecution of two military agents from Cebu who were charged in connection with the "disappearance" of the Redemptorist priest Father Rudy Romano in Cebu City in July 1985. In the middle of their trial his law office was bombed in August 1986, and a group who called



themselves "Soldiers Against Communism" publicly claimed responsibility. In March 1987, following a protest by Atty Surigao about the treatment of detainees held by the Regional Security Unit 7 (RSU 7), a PC intelligence agency based at the Regional Military Command in Cebu, a notice calling for his arrest was reportedly posted on the RSU 7 office noticeboard. During the attempted coup in August 1987, which received significant support from the Cebu military, Atty Surigao's offices were raided by RSU agents. A case he had filed against the RSU for the arbitrary detention in April 1988 of a local journalist was to have come to court in Cebu City on Monday 27 June 1988.

From early 1987 Atty Surigao reported being followed by a car believed to be linked to the local military. Both he and his wife said they were being harassed by military personnel and that they received death threats throughout 1987 and early 1988. These threats were repeated in the week before the killing, and shortly before he died Al Surigao said that he seldom visited his law office for fear for his life.

[In their report "*Lawyers Under Fire: Attacks on Human Rights Attorneys in the Philippines*", October 1988, the Lawyers Committee for Human Rights and Asia Watch describe the developments in the Surigao murder as follows:

"Within hours of Surigao's death, two other human rights lawyers in Cebu, Deolito Alvarez and Democrito Barcenas received anonymous telephone calls stating that Surigao was only the first of three Cebu human rights lawyers targetted for killing, intimating that they would be the next victims. Attorney Vic Balbueno, co-counsel in the Leyte evacuee case, reported being followed by members of the military.

"Fearing for their safety, Surigao's widow, Rebecca, and her daughter left their home and went into hiding, continually moving from one place to another. Rebecca Surigao believes that she and her daughter are being kept under surveillance because the same car used to keep surveillance of her husband has been spotted outside homes where she was staying.

"Two days after the murder, Philippine Constabulary chief Major General Ramon Montano publicly described the killing as an 'inside job' committed by NPA rebels, who wanted to make Surigao a 'sacrificial lamb'. He said he based his statement on intelligence reports of the Philippine Constabulary in Cebu. Yet on the following day, a local police officer stated that they would need more 'hard evidence' before they could identify the killers.

"On July 11, Allan Climaco turned himself in to the Visayas regional military command [following a public statement by his father naming him as the killer]. In a sworn statement to the National Bureau of Investigation, Climaco said he was a former NPA soldier and 'sparrow' hitman who had been captured by the military in 1986. After his capture, he had become a 'spotter' (an informer) for Major Rico Palcuto. Because of his services for Major Palcuto, Climaco said he considered himself a regularly employed military man.

"In his sworn statement, Allan Climaco narrated the events leading up to Surigao's murder as follows:

"Sometime in May 1988, I received instruction from Major Palcuto to monitor the movement of Attorney Surigao. On June 23, 1988, I was at the office of the RSU ... and Major Palcuto asked me, "Patay na ba?" [Is he dead yet?"] Then I answered him in the dialect, "Wala pa sir." ["Not yet, sir."] At about 5:30 in the afternoon of June 24, 1988, I spotted the car of Attorney Surigao near his house. I went back to fetch my companions. I briefed them to accompany me to the house of Surigao and for them to pose as lookout [sic] while I will do the shooting.

"Climaco said he received 500 pesos (about 25 U.S. dollars) from Major Palcuto for killing Surigao. He identified his two accomplices as Saturnino, a neighborhood policeman in the Pardo District, and Effren alias 'Kirat.' To date, both men remain at large.

"On July 11, 1988, Visayas Command chief Brig. Gen. Jesus Hermosa relieved Major Palcuto of his duties, placed him under 'technical arrest,'

and transferred him temporarily to General Hermosa's office at Camp Lapu-Lapu.

"Murder charges were filed against Allan Climaco on July 13, 1988. Charges against Major Palcuto were filed with the office of the AFP Judge Advocate General's Regional office, RECOM 7. Climaco has not been incarcerated in a civilian prison, but instead is residing in an officer's house at Camp Lapu-Lapu, and is free to move around the camp. He has also since retracted his confession to the murder, now claiming that the NPA was responsible. On August 29, he pleaded not guilty to the charges against him.

"Relatives of Alfonso Surigao and others have petitioned President Aquino to waive court-martial jurisdiction under Presidential Decree (P.D.) 1850 so that Major Palcuto could be prosecuted in a civilian court. P.D. 1850, originally decreed by President Marcos, prevents military personnel, policemen, firemen and jail guards from being tried in civilian courts, even for acts outside the scope of their duties. In a July 19 meeting with representatives of Amnesty International, President Aquino stated that she would be willing to issue a waiver of P.D. 1850 in the Surigao case... Meanwhile, Major Palcuto has informally resumed his duties as head of RSU 7."

On 28 September, President Aquino formally waived P.D. 1850 so that Major Palcuto could be prosecuted before civilian courts. - Ed.]

### **The Killing of Emmanuel Mendoza**

Attorney Emmanuel "Noel" Mendoza, a human rights lawyer who defended slum dwellers and youth activists, was shot dead in a Manila street on 2 July 1988.

Atty Mendoza, aged 57, a former law professor at the Polytechnic University of the Philippines (PUP), was a member of the Union of Lawyers and Advocates for Peoples' Rights (ULAP) and other activist groups. The chairman of the Manila chapter of the leftwing political party

*Partido ng Bayan* (PnB), he stood as a PnB candidate in the national congressional elections of May 1987.

On the morning of 2 July 1988, Emmanuel Mendoza had been at the Western Police District (WPD) headquarters to attend the case of one his clients, a policewoman. He left the station together with the policewoman, dropped her off on the way, and drove home. Shortly before reaching his house, he was shot at close range by two gunmen on a BMW motorcycle while waiting at a traffic light in Sampaloc, Manila. He died in hospital.

According to news report on 4 July, the policewoman said that she felt that they were being followed as they drove away from the WPD headquarters on United Nations Avenue (*Manila Chronicle*, 4 July). The policewoman went into hiding, however, immediately after the killing. According to unpublished sources, she told friends of Atty Mendoza that she saw two men get onto a motorcycle as they were leaving the WPD headquarters. According to a later report, the government NBI agency has now identified as suspects two members of the Metro Manila police force. The NBI announced in an interview that they were "just waiting for the right time to arrest them" (*Manila Chronicle*, 30 July).

A few days before the killing of Atty Mendoza, one of his close friends, the PUP president Dr Nemesio Prudente, was ambushed in Manila. Three of his bodyguards were killed, and four others, including Dr Prudente, were injured. Five WPD patrolmen were later charged with murder and attempted murder in connection with the attack.

Some friends of Emmanuel Mendoza have linked his murder to his role in the lawyers' organization ULAP. Earlier in 1988 ULAP filed a petition for *habeas corpus* before a Manila court concerning the "disappearance" of a 16-year-old activist, Angelito Joaquin, who was abducted in March 1988. Witnesses reportedly accused a WPD patrolman of his abduction, but when police officers denied any knowledge of the abduction in court on 14 April, the petition for *habeas corpus* was dismissed. On 14 June, while the family of Angelito Joaquin were holding a vigil for him, the policeman accused of his abduction was shot dead in Tondo, Manila. An NPA

"sparrow" (assassination) squad reportedly claimed responsibility for the murder.

Before his killing Emmanuel Mendoza had received death threats, and, according to one report, a clerk of the courts had noticed two policemen following him at court appearances. He employed his own bodyguards, but stopped them shortly before his murder as he feared for their safety. To protect his family, he did not allow them to travel with him. The afternoon of the murder, a colleague and FLAG lawyer, Atty Procopio Beltran, received a phone call saying that he would be "next".

### **3. OTHER HUMAN RIGHTS LAWYERS WHO HAVE BEEN THREATENED**

Several other human rights lawyers have received threats or other forms of intimidation since the beginning of 1987. In many cases these threats have been anonymous. Sometimes, however, lawyers have privately learned that local soldiers or members of military-backed armed civilian groups, have targeted them as enemies because of their perceived support for the NPA. The following represent a selection of such cases.

**Solema Jubilan**, a FLAG and PLLP lawyer in Kidapawan, North Cotabato who acted as legal counsel for the local NDF during the ceasefire negotiations of late 1986 and who defended several prisoners accused of rebellion or subversion, found the message "It would be nice to kill you" inscribed on her office door in early 1987. At the time she was handling a highly publicized case where several church figures who had been active on human rights were accused of rape; the charges were later dismissed as malicious. Later in 1987 Atty Jubilan reported hearing that soldiers in a local military camp, who branded her as "Commander Sol" because of her alleged support for the NPA, had threatened to punish her.

**Henrick Gingoyon**, a FLAG and PLLP lawyer also active on labour cases in Cebu City who acted as legal counsel for the local NDF during the ceasefire negotiations in late 1986 and who defended alleged NPA members in the courts, heard that he had been threatened with death in

June 1987. According to a sworn statement by him, after being refused permission to see a client detained in the PC metropolitan district command headquarters in Cebu, a PC major told the lawyer "So you depend on your lawyer, huh? Where is your lawyer as we will kill him too!". During the August 1987 coup attempt his house was raised and ransacked by military personnel who said they wanted to take him to their camp. In 1987 Atty Gingoyon's name was also seen on a death list of an anti-communist "vigilante" group KADRE, whom residents report are supported and armed by the 347th PC company. Because of these threats, Atty Gingoyon left his practice and took up a post as assistant city fiscal (a public prosecutor) in Cebu City.

**Wenifredo Orcullo**, a FLAG lawyer in Cebu City and legal counsel for a trade union involved in successive labour disputes at the Atlas Mining company in Toledo City, Cebu, was told by a relative in 1987 that his name was on the KADRE death list together with Atty Gingoyon. Following this, Atty Orcullo lodged a complaint of harassment with the provincial government of Cebu and the regional military commander, but received no information about any action taken as a result.

**Archie Baribar**, a FLAG lawyer in Bacolod City, Negros Occidental, who acted as legal counsel for the NDF in the ceasefire talks of late 1986 and who has been an active member of *Partido ng Bayan*, received a handwritten death threat "Your Days are Numbered" at his law office in July 1987. The threat was signed in the name of an right-wing "vigilante" group KKK-CCGFI who were reported to have been carrying arms and mission orders supplied by the local military. Atty Baribar had filed a petition for *habeas corpus* against military commanders in Negros in connection with the "disappearance" of three young activists in May 1987, and shortly afterwards he had been told that his name had been put on a military "order of battle", a list of military targets. Following the killing of a number of policemen and soldiers by the NPA that year, a leading police officer was reported to have said that if another policeman was killed, they would kill a lawyer. In August 1987 his secretary resigned, saying that she had herself received threats. In November 1987 Atty Baribar left the Philippines out of fear for his safety. He has since returned.

**Bernadette Encinareal**, [see CIJL Bulletin No. 21].

**Ernesto Clarete**, a FLAG lawyer and mayor of Plaridel, Misamis Occidental, has said that just before the local elections in January 1988 a local army commander publicly announced that he considered Atty Clarete as an enemy because, he claimed, Atty Clarete mixed with NPA members. Atty Clarete had previously aroused resentment among the local military because the municipal government of Plaridel refused to organize paramilitary forces known as Civilian Home Defence Forces (CHDF). In July 1988 he was told that unknown men were looking for him and he has since taken a police bodyguard.

**Efren Mercado** and **Manuel Goyena**, two FLAG lawyers in Manila who have been defence counsel for three alleged NPA members who said they were tortured after their arrest in February 1988, reported being followed in March. Attys Mercado and Goyena have testified that on 6 March, as they left a hearing about the torture allegations with the military before the government-appointed Commission on Human Rights, they saw men in plainclothes whom others present identified as military men follow them out of the building. As they drove away they noticed two cars full of armed men following their car and at one point apparently attempting to ambush it at a traffic light. On reporting this to former AFP Judge Advocate General, now Commissioner on Human Rights, Samuel Soriano, they were told that he suspected that this was a military tactic to frighten them.

**Romeo Capulong**, legal counsel for the national negotiating panel of the NDF during the ceasefire talks of late 1986, a senatorial candidate for PnB in May 1987, and defense counsel for several of the most prominent alleged CPP and NPA detainees, has reported being under surveillance during 1988. In the two months after taking on several highly-publicized cases in March, he said that his house was watched so often by men with walkie-talkies that he was forced to move. On the day after a press conference in April, which criticized the military's alleged failure to account for a large quantity of money seized during the arrest of his clients, Atty Capulong and one of his colleagues, Atty Arno Sanidad, reported being followed by a car without number-plates full of armed men

in civilian clothes. After the discovery of mass graves in a south Manila cemetery in June 1988, which human rights groups claimed might be the graves of victims of "salvagings" (killings by military agents), he said he was followed again. He also reported seeing armed men waiting for him outside the office of the Ecumenical Movement for Justice and Peace, of which he is chairman, where he was attending a meeting. Shortly before the killing of Atty Emmanuel Mendoza, with whom Romeo Capulong had worked, two armed men visited his house, on the pretext of inquiring whether the house next door was available for rent. Atty Capulong has suggested that these men fitted the descriptions of the two killers of Atty Mendoza.

Other FLAG members who have received anonymous death threats include the Cebu lawyers **Armando Alforque**, who has been active on labour issues, and **Deolito Alvarez**, who has defended several alleged NPA members accused of killing policemen, and **Oscar Musni** in Cagayan de Oro City.

#### **4. AMNESTY INTERNATIONAL'S CONCLUSIONS**

Amnesty International is seriously concerned about the many incidents in 1987 and early 1988 in which human rights lawyers in the Philippines have been intimidated or killed, in circumstances which suggest involvement by individuals or units of the security forces or agents acting under their command. Amnesty International has not found any evidence of an orchestrated campaign by the Philippines Government or the armed forces against human rights lawyers as a whole. The Philippines Government has not condoned any of the crimes or abuses against human rights lawyers, and has responded to complaints by publicly recognizing the need for investigations and, when offenders are identified, punishment. Amnesty International is, however, concerned that without effective action by the authorities further human rights lawyers may be killed or threatened, in violation of their fundamental rights.

In the light of the gravity of the current situation facing human rights lawyers in the Philippines, Amnesty International representatives visited



Manila in July 1988 to express the organization's concern about the recent killings and threats directly to government and military officials. Its representatives met with President Corazon Aquino, Secretary of National Defense Fidel Ramos, other members of the government, senior officers of the armed forces and representatives of non-governmental organizations. In these meetings Amnesty International welcomed the progress made towards a solution of one of these killings, that of Atty Surigao, and the measures taken by the government to provide protection for some lawyers who have been receiving death threats. Amnesty International also welcomed the government's intention to allow military or police personnel accused of human rights offences to stand trial in civilian courts.

Amnesty International remains concerned, however, that existing measures taken by the government to protect human rights lawyers may not be adequate. It has been particularly concerned that several military spokesmen have identified human rights lawyers and defenders in the Philippines as "subversives" which has led to their becoming targets for threats and attacks. The Secretary of National Defense, Fidel Ramos, in a speech in New York in April 1988, referred to "so-called human rights advocates who were only after destroying the image of the AFP and picturing it as a gross violator of human rights... those who shoot at us with bullets have cohorts who attempt to weaken us with other tactics." A Manila police commander apparently accused a FLAG lawyer who obtained bail for one of his clients, an alleged NPA member, of complicity in NPA killings. Often lawyers have been attacked or threatened in apparent retaliation for the killing of soldiers or policemen by the NPA. In several cases the lawyers have been defending prisoners accused of serious violent crimes, and Amnesty International believes that it is the Philippines Government's responsibility to make it known among its agents that such acts of retaliation can never be justified. The existing guidelines issued by the armed forces headquarters on relations with FLAG in October 1987 have not been sufficient to prevent individual soldiers, policemen or their civilian agents targeting human rights lawyers as enemies or to prevent the attacks which have followed.

Amnesty International believes that the initial military or police investigations into these killings have been inadequate. In three out of the four murders of human rights lawyers described above, military officers have apparently failed to look seriously at any possible involvement by the armed forces in the crimes and instead blamed the murders on the NPA, despite the lack of any evidence to support such allegations. (The same happened apparently after the killing of Atty Mirabueno for which a former soldier was later arrested, see above.) In some cases the police have stated that they were facing a blank wall, even though there were important leads still to be followed up. In the two cases where suspects have been identified or charged, it has only been following the intervention of the civilian agency the National Bureau of Investigation.

Even if suspects are identified, the procedures for judicial investigation and prosecution are cumbersome and unlikely to lead to conviction. Amnesty International knows of no military or police officer convicted of any serious human rights offence under the Aquino government. The organization is also concerned that some of the perpetrators of the grave crimes detailed above may never be brought to justice. Even in the case of the army officer accused of the murder of a FLAG lawyer in 1984, as of mid-1988 his trial before a civilian court had not yet begun. During such protracted trials there is ample opportunity for complainants or witnesses to be intimidated, arrested or even killed themselves. Amnesty International is therefore concerned for the safety of Mrs Surigao, Mrs Cura, and members of their families, given the reports of surveillance by military or paramilitary agents.

Amnesty International is also concerned that the government may not be giving sufficient attention to investigating the full extent of the involvement of the armed forces in the attacks and intimidations against human rights lawyers. A number of the accounts of surveillance and intimidation reported above suggest that several military men were involved and also suggest a relatively sophisticated use of military intelligence and surveillance. Nevertheless it is not known, for example, if even the other officers named in testimonies as involved in the killing of Atty Surigao have been charged or whether there has been a thorough investigation by

an independent team of inquiry into the responsibility of other PC personnel in that crime.

Amnesty International therefore believes:

- that leading government figures and senior armed forces officers should make clear public statements underlining the legitimacy of human rights work, even when such work investigates or criticizes the actions of the government or the security forces;
- that the government should ensure that all the reports of security force involvement in the killing and intimidation of human rights lawyers are thoroughly investigated by a body which is indisputably independent of the individuals or units allegedly responsible for the human rights violations, and that all complainants and possible witnesses are given effective protection;
- that the authorities should publicly state their support for legislative proposals which would amend or repeal Presidential Decree 1850 (which protects soldiers and policemen from trial in civilian courts) so that all prosecutions of military or police personnel for human rights offences may be heard in civilian courts;
- that the armed forces leadership should order regional military commanders to report publicly, for example to regional peace and order councils (combined civilian and military bodies which review developments in the national security and law and order situation), on what steps they have taken to implement existing guidelines on promoting close cooperation between the military and human rights lawyers.

Amnesty International believes that if the Philippines authorities were to carry out these actions, it would lessen the risk of further attacks on human rights lawyers and clearly demonstrate the government's determination to uphold the fundamental rights guaranteed to all citizens under the Philippines Constitution.

# STANDARD SETTING

## 1. United Nations Crime Branch

### a. IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

The 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted by consensus "Basic Principles on the Independence of the Judiciary."<sup>1</sup>

The Congress documents were "endorsed" by the UN General Assembly (A/RES/40/32, 29 November 1985), which later specifically welcomed the Basic Principles and invited governments "to respect them and to take them into account within the framework of their national legislation and practice" (A/RES/40/146, 13 December 1985).

The Economic and Social Council (ECOSOC) (Res 1986/10, 21 May 1986, section V) then invited states to inform the Secretary-General every five years, beginning in 1988, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into national legislation, and the problems faced in their implementation. This information would be included by the Secretary General in reports to the Committee on Crime Prevention and Control and the 8th UN Congress.

Pursuant to these resolutions, on 31 December 1987 the Secretary-General sent states a note verbale and a questionnaire on the implementation of the Basic Principles. As of September 1988, 49 states had replied. The CIJL calls on associations of judges and lawyers to urge their governments to

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<sup>1</sup> See *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No E 88.XIV.1), p. 265. Reprinted in CIJL Bulletin No. 16.

respond to the questionnaire and, of course, to implement the Basic Principles where they have not already done so.

At the same time, an International Expert Meeting on the United Nations and Law Enforcement, held under the auspices of the United Nations in Baden, Austria, in November 1987, and attended by the Secretary-General of the International Commission of Jurists and the Director of the CIJL, formulated draft "Procedures for the Effective Implementation of the Basic Principles." These procedures have now been endorsed, with amendments, by the Committee on Crime Prevention and Control at its Tenth Session in Vienna from 22 - 31 August 1988.

The draft Procedures, which will now be sent to the ECOSOC for approval, call upon states to publicize the Basic Principles, translate them into the main language of the country and make the text available to members of the judiciary. They also set up regular UN reporting procedures for monitoring implementation of the Basic Principles and ask the Secretary-General to provide technical co-operation to governments requesting assistance in improving their judicial systems.

#### b. DRAFT BASIC PRINCIPLES ON THE ROLE OF LAWYERS

The 1985 Crime Congress also adopted a resolution on the role of lawyers which highlighted the importance of an independent legal profession to the protection of rights and freedoms and recommended to states that they "provide for protection of practising lawyers against undue restrictions and pressures in the exercise of their functions." The resolution also requested that work begin on a document concerning the role of lawyers (See CIJL Bulletin No. 16).

Accordingly, the Baden expert meeting prepared draft "Basic Principles on the Role of Lawyers," with substantial input from the ICJ and the CIJL. This draft was submitted by the UN Secretariat, with modifications, to the Committee on Crime Prevention and Control, which endorsed it. The 22 draft Basic Principles provide guidelines on access to lawyers, special guarantees for detained persons, principles on qualifications and training,

guarantees for the functions of lawyers, and provisions on professional associations of lawyers and disciplinary proceedings. The draft will be discussed in five regional preparatory meetings in Helsinki (24-28 April 1989), Baghdad or Cairo (29 May - 2 June 1989), Addis Ababa (5-9 June 1989), Bangkok and San José before being submitted to the 8th Congress in August 1990.

The CIJL strongly welcomes this document and shall work towards its adoption at the next Congress. Anyone wishing a copy of the draft Principles may request it from the CIJL. Judges or lawyers wishing to attend the regional preparatory meetings on behalf of the ICJ should contact the CIJL.

## **2. United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities**

At its 40th Session in August 1988, the Sub-Commission transmitted to the Commission on Human Rights the draft "Declaration on the Independence of Justice" prepared by Special Rapporteur L.M. Singhvi of India. The draft first presented in 1985 (E/CN.4/Sub.2/1985/18/Add.5) was based on the results of expert meetings convened by the CIJL and ICJ in Siracusa (CIJL Bulletin No. 8) and Noto (CIJL Bulletin No. 10) and, in particular, on the Montreal Declaration on the Independence of Justice (CIJL Bulletin No. 12). It was then twice amended, first in response to the comments of several members of the Sub-Commission and then to take into account governmental comments.

The 106-point draft (E/CN.4/Sub.2/1988/20/Add.1) sets out detailed guarantees for the independence and impartiality of judges, jurors and assessors and the independence of lawyers. Indeed, some experts felt that the draft was too detailed and oriented towards common-law systems. Nevertheless, the consensus was that the draft should now be debated in an inter-governmental forum. The CIJL will work at the Commission to meet criticisms of the draft in an effort to ensure its eventual adoption.

# DOCUMENTS

## **Statement of the International Lawyers Forum Quezon City, Philippines, July 22 1988**

We, the participants in the International Lawyers Forum, view with the utmost concern and dismay the recent killings, threats, and harassment of human rights lawyers in the Philippines. We strongly condemn these acts.

The rule of law is essential to a civilized society. It requires that lawyers zealously defend the constitutional and legal rights of all people regardless of the nature of the accusations against them and regardless of their political ideology. All individuals have a right to effective counsel. It is vital not to attribute a client's views or acts to lawyers who are obligated to protect legal rights.

The judiciary and bar associations have a special responsibility to uphold the rule of law, including the protection of their colleagues who are engaged in human rights work.

To achieve the foregoing, we recommend the following:

1. The Philippine government, at the highest civilian and military levels, should publicly and unambiguously express its commitment to the protection of human rights lawyers and its condemnation of the killings, threats and harassment. This commitment would be consistent with its accessions to such international instruments as the International Covenant on Civil and Political Rights, the Convention Against Torture, and Protocol II to the Geneva Conventions.
2. The Philippine government must take concrete steps to ensure that all persons whatsoever who kill, threaten and harass human rights lawyers, including "vigilantes" and those who arm and supervise them, are vigorously investigated and prosecuted.

3. Investigations into reported human rights violations, including those involving members of the security forces or civilian groups operating in conjunction with them, should be conducted by impartial agencies independent of the security forces.
4. Any member of the military or police accused of human rights offences should be tried by a civil court. Accordingly, Presidential Decree 1850 should be repealed. Until it is, the President should waive military jurisdiction in cases involving alleged human rights abuses.
5. The Government should adopt additional methods to ensure fair proceedings and remedies against alleged human rights violators, including:
  - a. independent prosecutors;
  - b. effective measures for protecting witnesses and other participants in the judicial process;
  - c. effective sanctions against military or police officers who fail to enforce the law in human rights cases; and
  - d. education in human rights for military and police personnel.
6. The Philippine Government should publicly condemn, and take action to halt or curb, the illegal acts of any groups or individuals, including "vigilante" groups, that interfere with the ability of human rights lawyers to perform their professional obligation to represent their clients pursuant to the rule of law.
7. The organized Bar should raise its voice against all human rights violations, including the killings, threats and harassment of human rights lawyers, and the judiciary should take all appropriate steps to ensure the protection of human rights lawyers and witnesses in human rights cases.

The signatories to this statement pledge themselves and their organizations to continue their efforts to assure the full protection of human rights in the Philippines.



Adopted this 22nd day of July 1988, at Quezon City, Philippines.

**Justice P.N. Bhagwati**  
(Former Chief Justice  
Supreme Court of India)  
International Commission  
of Jurists  
Centre for the Independence of  
Judges and Lawyers

**Prof. Norman Dorsen**  
Lawyers Committee for  
Human Rights, USA  
Association of the Bar of the City  
of New York  
International League for Human  
Rights, USA

**Justice Dorab Patel**  
(Former Justice  
Supreme Court of Pakistan  
Commission member of the  
International Commission  
of Jurists)  
Asian Human Rights Commission

**Prof. Nadine Strossen**  
Asia Watch, USA

**Mr. Minoru Ishimaru**  
Keiyo Culture and Education  
Centre, Inc., Japan  
Asian Legal Resource Center

**Mr. David Pierce**  
Asia Watch, USA

**Mr. Guido Hildner**  
(Institute of International Law,  
University of Bonn, FRG)

**Mr. Wood Foster, Jr.**  
Minnesota Lawyers  
International Human Rights  
Committee, USA

**Atty. Mamerto Alciso**  
International Association  
of Democratic Lawyers

**Atty. Pablito V. Sanidad**  
Free Legal Assistance  
Group, Philippines

**Atty. Samuel Matunog**  
Protestant Lawyers League  
of the Philippines

**Atty. Arno V. Sanidad**  
Movement of Attorneys  
for Brotherhood,  
Integrity and Nationalism,  
Inc. Philippines

**Atty. Hector Soliman**  
Sentrong Batas Pang-Tao,  
Philippines

**Atty. Joseph Sedfrey Santiago**  
Structural Alternative  
Legal Assistance for  
Grassroots, Philippines

## **Bangalore Principles on the Domestic Application of International Human Rights Norms**

A high-level judicial colloquium on the Domestic Application of International Human Rights Norms was convened in Bangalore, India from 24-26 February 1988.

The colloquium was administered by the Commonwealth Secretariat on behalf of the Convenor, the Honorable Justice P.N. Bhagwati (former Chief Justice of India), with the approval of the Government of India.

The participants were:

- Justice P.N. Bhagwati (India) (Convenor)
- Chief Justice E. Dumbutshena (Zimbabwe)
- Judge Ruth Bader Ginsburg (U.S.A.)
- Chief Justice Muhammad Haleem (Pakistan)
- Deputy Chief Justice Mari Kapi (Papua New Guinea)
- Justice Michael D. Kirby (Australia)
- Justice Rajssoomer Lallah (Mauritius)
- Mr. Anthony Lester, Q.C. (Britain)
- Justice P. Ramanathan (Sri Lanka)
- Lord President Mohammed Salleh (Malaysia)
- Justice Chandrakantaraj Urs (India)

There was a comprehensive exchange of views and full discussion of expert papers. The Convenor summarised the discussion in the following paragraphs:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.

3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers, generally.
4. In most countries whose legal systems are based upon the common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.
6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
7. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes – whether or not they have been incorporated into domestic law – for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligations of the State concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the remarkable and comprehensive developments of statements of international

human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges, lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.

10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

*Banglore, Karnataka State, India  
26 February 1988.*

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