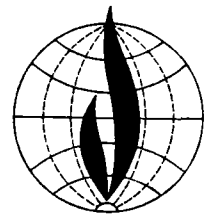
CIJL BULLETIN



N° 5

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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

April 1980

Editors: John Woodhouse, Daniel O'Donnell

INTRODUCTION

The Centre for the Independence of Judges and Lawyers, formed by the International Commission of Jurists in 1978, has now completed its second year of operation. John Woodhouse, has decided to return to practice law in New Zealand, and I am his successor. A member of the bar of the State of New York, I worked with the ICJ for a year in 1977/8.

Under Mr. Woodhouse's guidance the Centre has made considerable progress in its dual task of

- informing lawyers and lawyers' organisation throughout the world of the plight of their colleagues in many countries who are being harassed or persecuted for their professional work in upholding the principles of the Rule of Law, and
- mobilising these lawyers and lawyers' organisations, and encouraging them to take action in various ways in support of these colleagues.

This issue of the Bulletin bears witness to his efforts.

The "case reports" contain some positive developments, but the continuing influx of information concerning restrictions on the legal profession illustrate the need for continued of international action. This number contains an instructive article by Mr. Manfred Simon which should help lawyers trained in the common law system to understand better the organisation and role of the prosecution under the french based 'civil law' system. Another feature of this Bulletin is the four encouraging reports on measures taken by lawyers organisations to safeguard the integrity of the profession and, in consequence, the rule of law.

The CIJL is very grateful for the response to its appeal for funds from lawyers organisations. The Danish, Netherlands, Norwegian and Swedish bar associations, the Netherlands Commission of Jurists and the Union of Arab Jurists have all made contributions for the current year. These contributions are greatly appreciated. The work of the Centre during its first two years has been funded by generous grants from the Rockefeller Brothers Fund, but its future support is likely to be dependent upon increased funding from the legal profession. A grant from the Ford Foundation has made it possible for us to publish the

Bulletin in the future in three languages, english, french and spanish.

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

Individuals or law firms wishing to support the Centre by becoming contributors should complete the form below.

Daniel O'Donnell
Secretary - CIJL

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The Centre for the Independence of Judges and Lawyers publishes its Bulletin twice yearly in April and October. Contributors paying 20 Swiss Francs per annum will receive the Bulletin and any special reports issued by the Centre free of charge by surface mail. Those paying 30 Swiss Francs or more will receive them by airmail.

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CASE REPORTS

This section comprises a selection of cases concerning the independence of jurists in various countries which have been brought to the attention of the centre in the last six months.

ARGENTINA

Lawyer Assassinated: Juan Pedro Sforza

The assassination of a 26 year old lawyer, Juan Pedro Sforza, in September 1977 is described in a letter to the International Commission of Jurists by the parents of Patricia Dixon, who was present at the assassination and who was subsequently abducted by the assassins.

They relate that some time before the assassination, Mr. Sforza was warned by the military police that his life was endangered. On the morning of 5 September neighbours said they saw federal police cars draw up outside his residence. A number of persons in police uniform went into his house and arrested him and Ms Dixon. Whereupon they were dragged into the street and Mr. Sforza was shot. Ms Dixon's parents subsequently went to the federal police station to denounce the killing only to be told that they must not interfere, that the killing was a military operation.

This brings to 26 the number of cases brought to the attention of the Centre of lawyers or judges killed by Argentinian security forces or civilian vigilante groups working under them.

The CIJL has on a number of occasions protested to the Argentinian authorities about government sanctioned violence directed against jurists who have had the courage to engage in the defence of political prisoners. Apart from the alarming

number of killings a further 52 jurists [1] have simply disappeared after being abducted by the military or para-military fo ces. This is particularly disturbing. Pursuant to a law recently passed in Argentina in September 1979, disappeared persons who cannot be traced within a period of ninety days can be declared officially dead. This has the effect of allowing terrorist activities to be carried out with impunity.

The government claims that its new Law 22.068 merely amends Law 14.394, which provides for a judicial declaration of presumption of death in respect of anyone who has been absent for more than 90 days during the period. The familiy of the disappeared person may not oppose an application for such a declaration before the courts. The interests of the disappeared persons themselves are not represented at the hearing of the application. These procedural novelties conduce to a situation where, according to the contention of the families, there is no genuine attempt by the court to investigate the evidence of the disappearance.

In short, the new law provides for a judicial declaration of presumption of death on no other evidence than that of the state that a person has disappeared, evidence which cannot be contested by the family or otherwise on behalf of the disappeared. The government argues that the new law is needed to settle outstanding questions of property. The families' protests, however, have always been based on the deprivation of life or liberty. Most of the disappeared are young people with no property. No case is known in which a curator for any property has been requested. Nor has any spouse instituted civil proceedings for a decree of presumption of death to end a marriage.

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(1) In addition, 109 cases of lawyers or judges whose detention in civilian or military prisons have been acknowledged by the Argentinian authorities are noted in CIJL Bulletin Nos 1 and 2.

Argentine Lawyers Challenge the Disappeared Persons Law

The following report is taken from the English-language Buenos Aires Herald (November 13, 1979):

"A group of 19 lawyers yesterday challenged the new law 22.068 which allows disappeared people to be presumed dead, on the grounds that it is unconstitutional. They charged that unless the law is quashed it could lead to a situation in which 'the life and liberty of all Argentines would be subject to the volition of the government, which could impose a death sentence of a persecuted person for political reasons'.

Acting on behalf of the relatives of some 600 people, the lawyers put their demand before federal civil and commercial Judge Adolfo Armando Rivas, while also reserving their right to take the case to the Supreme Court.

The demand argues that the law, which went into effect when it was published in the Official Bulletin on September 12, violates the consitution by depriving missing people of the right to a trial by 'legitimizing' their disappearance by declaring them to be deceased. The demand questions the legitimacy of judges declaring someone dead after due process has failed to discover the whereabouts or the situation of disappeared people.

Article two of the law allows any relative up to fourth degree removed to initiate an action to have someone declared deceased as well as the state, through public attorneys, without any other relative being able to oppose the action. 'Law 22.068 seeks the juridical declaration of death of a disappeared person even against the wishes of a relative, who cannot even state his opposition in court', says the writ.

The demand argues that by such a declaration, judges would effectively end any investigation into what has happened to a disappeared person. It cites the Supreme Court ruling calling upon the government to act to safeguard individual liberties in the case of disappeared people. It criticizes the statement 'of

a high military chief ... who alluded to 'those who are absent for ever' and said there could be no explanation 'where there are none'. This statement preceded institutional moves aimed at closing off any avenue of investigation into the missing people.

The lawyers told the judge that most of those who have disappeared were kidnapped in the street or from their homes by people who appeared to have authority, were well-armed and equipped and sometimes wore uniform. Not a single habeas corpus writ had been effective in locating even one disappeared person, said the demand. The lawyers said that 'the kidnapped-disappeared' are at the mercy of those who are holding them and expressed concern that the law enabling missing people to be declared deceased may have ominous consequences."

ARGENTINA, URUGUAY and PARAGUAY

Defence Lawyers Released

The CIJL is pleased to report the release from South American prisons of three prominent defence lawyers. All three had been imprisoned in connection with their work in the field of human rights.

ARGENTINA - Carlos Mariano Zamorano

The CIJL recently learned of the conditional release from prison in August 1979 of the Argentinian defence lawyer Mr. Carlos Mariano Zamorano whose case was outlined in the first edition of this Bulletin [1]. Mr. Zamorano, a well-known advocate and Vice-President of the Argentinian Human Rights League, was arrested in December 1974 and detained without charge until his release last year. During his long incarceration he had undergone torture and frequent transfers from one detention centre to another in Buenos Aires. In response to a habeas corpus

(1) Bulletin No. 1, February 1978, p. 13 ("Attacks on the Independence of Judges and Lawyers in Argentina").

motion brought on behalf of Mr. Zamorano, the Federal Court of Appeal ordered his release in April 1977 but the order was disregarded by the executive.

It is understood that his release is conditional upon his living within a specified area and reporting regularly to the police.

URUGUAY - Luis Alberto Viera

Mr. Viera's case was reported in Bulletin No. 2 (September 1978). Further developments in this case illustrate the contemptuous disregard of the Uruguayan security authorities for the orders even of their own military courts. He was released in December 1979 after being detained without charge in military barracks near Montevideo since 24 May 1977.

Dr. Viera, aged 64, is an eminent advocate and professor of procedural law at the University of Montevideo and former member of the executive committee of the Uruguayan Bar Association.

For several months after his arrest the authorities denied that he had been arrested. During this time he was severely tortured. Finally in September 1977 his detention was acknowledged and his family was informed that a military magistrate had issued an indictment charging him with collaboration with an illegal political party. (1)

In December 1977 a military magistrate ordered his release pending trial. The authorities, however, refused to release him, telling his family that they must first find a country which would grant Mr. Viera asylum if he was released. The family found a country of refuge, but the authorities said that he must remain in custody until his trial. After two years, the authorities have at last obeyed the order of the magistrate, and

(1) It has been suggested by those who know Dr. Viera that his arrest was the result of his taking part in a legal conference organised by the Uruguayan and Argentinian Bar Associations in which the human rights record of the Uruguayan government was criticised.

in December 1979 Mr. Viera was released, but his release is still 'provisional' (equivalent to release on bail), and he has to remain in Uruguay to face trial before a military tribunal[2] on charges of 'collaboration'.

PARAGUAY - Dr. Amilcar Santucho

The CIJL has also learned with satisfaction of the release from prison in Paraguay of Dr. Amilcar Santucho, an Argentine defence lawyer. Dr. Santucho was forced to leave Argentina in 1975. On arrival in Paraguay he was arrested and detained without trial for over four years. The CIJL launched a campaign on his behalf and many lawyers' organisations made representations to the government of Paraguay. Dr. Santucho was released at the end of September 1979, and has now found asylum in Sweden.

Dr. Santucho, who has communicated to the ICJ and the CIJL his experiences whilst in detention, has attested to an established practice of complicity between the security forces in Argentina, Paraguay and Chile. He explained that during his detention he was interrogated and tortured first by Argentinian and Paraguayan police, and later successively by Argentinian and Chilean military officers. Questioning by the Argentinian security police revolved almost exclusively on matters in connection with the whereabouts and present activities of his brother, Mario Roberto Santucho, and others of his relatives, and also on matters relating to the Argentinian People's Revolutionary Army of which his brother was the leader.

During his interrogation by Chilean military officers, he was heavily drugged. The interrogation was carried out by Colonel Zeballos, head of the information services of the Chilean Air Force, and by an officer named Oteiza, who identified himself as a psychiatrist. Dr. Santucho alleged that the drug was so strong that he remained unconscious for four days. The day after he recovered consciousness, Oteiza came to his cell to

(2) These tribunals are described in Bulletin No. 2, September 1978, p. 7.

persuade him to cooperate with the Paraguayan and Chilean police as a condition for his release.

Dr. Santucho also mentions that a few days after this event, Zaballos returned to Chile with Jorge Fuentes Alarcon, a Chilean who had been detained by the Paraguayan police. His present whereabouts are unknown and the Chilean government denies that it is holding him.

These events, he maintains, are clear evidence of the unlawful collaboration between the Argentinian, Chilean and Paraguayan regimes, which has resulted in countless killings of persons who had previously been clandestinely delivered to the security forces of one of the three countries.

CZECHOSLOVAKIA

Human Rights Lawyer Sentenced to Ten Months Imprisonment

In the past year the CIJL has been campaigning on behalf of the prominent human rights lawyer Dr. Josef Danisz, who was expelled by the Association of Lawyers of Prague on March 12, 1979, inter alia, for insulting a public official by referring to allegations of police brutality during his defence of psychologist and Charter 77 spokesman, Professor Jaroslav Sabata. In June 1979, he was sentenced to three months imprisonment, suspended for one year, and disbarred again for three years for the same offence.

In a circular letter of June 8, 1979, to Bar associations and other organisations, the CIJL expressed the view that "the disbarment of Dr. Danisz is unjust and is bound to affect adversely the independence of the legal profession, and the right, and indeed duty of an advocate to present proper arguments in support of his client's case without fear of victimisation". These organisations were invited to join the Centre in expressing their concern to the Czech authorities.

Despite strong protest from the international legal community, the Czech authorities have seen fit to try Dr. Danisz a second time on charges of slandering the police and a district court judge. The charge of slandering the police is based on his having referred in court to alleged police brutality against Ivan Medek, a Charter 77 signatory. The charge of slandering a judge is based on a complaint about rude treatment of a client, human rights activist Jiri Chmela, by a presiding judge. The statement was not made during trial but long afterwards in the context of other judicial proceedings.

Dr. Danisz was convicted of both charges on 24 January, 1980 in the district court of Hradec-Králové, and sentenced to 10 months imprisonment and two years additional disbarment. The public, including two French lawyers who had hoped to observe the trial, were barred from the courtroom even though there was no formal ruling that the trial should be closed. Evidence which the defence considered essential to the defence of truth was not considered by the court. Other procedural irregularities are alleged to have occurred. During the course of the proceedings a fine was imposed on Dr. Danisz for allegedly disturbing the proceedings. The conviction and sentence were upheld by the Court of Appeals of Hradec-Králové on March 7.

The CIJL has invited jurist organisations to write and/or send telegrams to the Czech authorities pointing out that the punishment of Dr. Danisz is unconscionable in that it violates the spirit of Article 30 of the Czech Constitution which provides that no-one shall be prosecuted or punished except by due process of law. Implicit in Article 30 is the right of accused persons to conduct a proper defence. This presupposes the liberty of their legal counsel freely to prepare and conduct a defence corresponding to the requirements of justice. The imposition of criminal sanctions on advocates who choose to conduct a defence unpopular with the court or government authorities violates the notion of a free defence and freedom of expression.

FRANCE

Lawyer Suspended for "Délit d'Audience"

Maître Yann Choucq, who represented at trial and preliminary hearings a number of persons arrested during recent anti-nuclear demonstrations in Brittany, received a 10 days suspension for questioning the motives of a judge in freeing one demonstrator prior to trial. When this defendant finished giving testimony, Me Choucq arose and stated: "I do not want to believe that the family ties between the defendant and a member of the judiciary might have played any role in the fact that he has been set free." The prosecutor immediately arose and demanded the application of the law of 31 December 1971 on the profession of barrister. Article 25 of this law states:

> "Every transgression, every default with respect to the obligations imposed on him by his oath, committed by an advocate before the court can be immediately punished by the court in which he is appearing, at the recommendation of the prosecutor, if one is present therein, and after having heard the Chairman of the bar association or his representative."

The law also provides that the sanction imposed takes effect immediately, without appeal. The oath states, in pertinent part:

> "I swear ... not to say or publish anything contrary to the laws, rules, propriety or security of the State or the public peace."

Me Choucq was therefore obliged to cease practice of law immediately. His clients remained in detention during the ten day period of suspension.

The law of 31 December 1971 has been rarely invoked, and its application in this circumstance has been widely criticized. With regard to the detention of Me Choucq's clients, Maître Jean Couturon, Chairman of the Paris bar, stated: "This is the extremely repugnant consequence of a procedure which, it would seem, must be modified. It permits no retreat from the immediate incident, and the judges appear as both judges and parties."

"When a fault is committed by an advocate before a court",

he added, "we believe it is preferable that he be called - as occurs in every other case - before his natural judge, the bar association. If its decision does not satisfy the prosecutor he can, obviously, appeal to the court. But, as the law now is, the 'délit d'audience' today can be, at every moment, a grave menace for the defence." (Le Monde, 18 March 1980)

This incident has aroused widespread interest in the legal community in reform of this procedure, and a Deputy of the National Assembly announced his intention to sponsor such a reform in collaboration with the bar. In several centres lawyers' organisations led public demonstrations in support of Me Choucq or engaged in strikes.

The relevant portion of the oath itself has also come under attack as being too wide and capable of abuse for political purposes.

PAKISTAN

The Trial of Former Attorney-General Mr. Yahya Bakhtiar

Mr. Yahya Bakhtiar, a former Attorney-General of Pakistan, prominent advocate and defence counsel to the late Prime Minister, Ali Bhutto, is in the process of being tried for alleged election rigging during the 1977 general elections in Pakistan. His case is of particular concern in that it appears to be the only prosecution brought under Presidential Order No. 16, which in this case is being applied retroactively. It is also being brought before a special tribunal rather than before the civilian courts.

Mr. Bakhtiar was Attorney-General in the Bhutto government until it was overthrown by a coup by the present military ruler of Pakistan, General Zia-ul-Haq, in 1977. General Zia-ul-Haq announced that the object of the coup was to remedy the gross election rigging that had been carried out by Mr Bhutto's

government during the 1977 general elections, to re-establish democracy and to hold free and fair elections. The promised general election has repeatedly been postponed.

After the 1977 elections and before the military coup, approximately 16 cases of alleged electoral fraud, including Mr. Bakhtiar's , were considered by the Election Commission. Elections in some of the constituencies were declared void, but the jurisdiction of the commission to hear these cases was challenged in the High Court. Pending its decision the proceedings before the commission, including Mr. Bakhtiar's case, were suspended. After the military take-over, the Chief Martial Law Administrator appointed a new election commission and then promulgated Presidential Order No. 16 in November 1977 under which Mr. Bakhtiar is being prosecuted. Elected representatives convicted under this law are liable to be sentenced to up to seven years imprisonment and to be disqualified from contesting elections for the same period. Mr. Bakhtiar contends that this law conflicts with Article 255 of the Pakistan Constitution which provides that:

> "No election to a House or a Provincial Assembly shall be called in question except by an election petition presented to the Election Tribunal in such manner as may be determined by Act of Parliament."

The Act of Parliament referred to is the Representation of Peoples Act, 1976, which provides that:

> "No election shall be called in question except by an election petition made by a candidate for that election within 60 days (of the election) to the Election Commissioner."

Although Mr. Bakhtiar's opponent in the 1977 elections complained of election rigging, he is reported to have stated to the press that Mr. Bakhtiar was an honourable man and that his grievance was only against the election officials. It would appear, therefore, that if there had been a case against Mr. Bakhtiar, he should have been prosecuted under the Representation of Peoples Act of 1976 and not Presidential Order No. 16 passed after Mr. Bakhtiar had allegedly committed the election rigging offence.

The time to bring a prosecution under the former law has now expired.

Before and during this time, Mr. Bakhtiar was engaged in the defence of Mr. Bhutto in his murder trial before the Lahore High Court. On 18 March, 1978, after Mr. Bhutto was found guilty and sentenced to death, Mr. Bakhtiar held a press conference in which he appealed to all friendly countries, their governments and other humanitarian organisations to use their influence with the military regime of Pakistan to commute the sentence. He also criticised the judgment of the High Court. On the following day his appeal and criticism of the judgment appeared in newspapers throughout the world, and appeals for clemency and commutation of the death sentence were received in Rawalpindi from every part of the world.

From this time, and throughout the course of his argument in Mr. Bhutto's appeal before the Supreme Court in Rawalpindi, he complained that he had been kept under strict surveillance and shadowed and followed by the security police and generally harassed by government officials. He stated that he was threatened with arrest, subjected to lengthy interrogations by the security police and accused in the official press, television and radio of committing electoral malpractices and other irregularities. His hotel room in Rawalpindi was on one occasion raided by a police party and one of his secretaries, Mr. Ataur Rehman, was arrested and detained for one month without charge. His other secretary, Mr. Peter Jillani, was also arrested, detained without charge for several months and released only after Mr. Bhutto's appeal had been disposed of in the Supreme Court.

Within a week of Mr. Bakhtiar's appeal to the international press, the authorities revived the election rigging case against Mr. Bakhtiar.

It appears to be the only election rigging case pursued by the authorities despite allegations by the government that massive rigging of the 1977 elections had taken place. In an

application presently pending before the special tribunal set up to hear his case, Mr. Bakhtiar asked that the proceedings before it be declared void. After raising the issue of the constitutionality of Presidential Order No. 16, Mr. Bakhtiar argued, inter alia, that his case had again been taken up by the Election Commission whose powers had been restored to it by Martial Law Order No. 25 on 6 December, 1977. The commencement of proceedings before the special court, he said, obstructed and prejudiced proceedings before the Election Commission and subjected him to double jeopardy and could cause conflict in the judgment of the two courts. To date, the court has not made a ruling on Mr. Bakhtiar's application, although several hearings have been held. It appears that no non-official witness cited by the prosecution has given any evidence against him, including his opponents at the elections.

Faced with the trial court's refusal to rule on his application, Mr. Bakhtiar has sought collateral relief by applying to the High Court of Baluchistan for a writ of certiorari. The petition to the High Court is due to be heard in May. Upon notice of the petition, the trial court adjourned its hearings sine die. The High Court therefore has refused to grant a stay of proceedings, postponing consideration of the request for a stay until hearing on the merits in May.

The ICJ attempted to send an Indian advocate, Mr. A.G. Noorani, to observe the proceedings of the Special Court, but the Pakistan government have not responded to the application for an entry visa.

The attention of legal organisations throughout the world has been drawn to the creation of the special court to try Mr. Bakhtiar and the apparently discriminatory nature of the prosecution.

SOUTH AFRICA

Apartheid and Admission to Legal Practice

As a result of the so-called independence of the Transkei[1] and diverse other measures taken by South African authorities, a highly regarded Transkei barrister, Fikele Charles Bam, is prevented from engaging in the practice of law in South Africa.

Mr. Bam was born in the Transkei in 1937 and resided there until 1947 after which he took up residence in Johannesburg where he completed his primary and secondary education. In 1957 he moved to Cape Town to study law. During this period he became associated with a radical student group which advocated the abolition of apartheid in South Africa. As a result of these activities he was detained and convicted of subversion in 1964[2] and sentenced to ten years imprisonment on Robben Island, during which he continued his legal studies by correspondence. He was sent back to the Transkei upon his release in 1974 where he completed his studies in 1975 and commenced work as an articled clerk. He sought admission to the Cape Town Law Society but because of his Transkei residence he was turned down. In 1976 he was detained briefly by the Transkei administration because of his stand against its impending "independence" from South Africa.

In 1977 he received a second law degree and joined a firm of attorneys in Cape Town. Shortly afterwards his permit to reside there expired and the South African authorities refused him even a temporary renewal to complete his articles. This decision was communicated to him by the "department of foreign affairs" of Transkei.

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(1) The Transkei, a largely undeveloped region about the size of Wales on the east coast of South Africa, was recognised by South Africa as an independent state in October 1976, but such recognition has not been given by any other country.

(2) The basis of the charge was that he had assisted in the reproduction and distribution of certain documents and pamphlets and literature which would be used "to endanger public safety".

Upon returning to the Transkei to seek an extension of his residence permit he was detained by the Transkei authorities once more and held incommunicado for 88 days before being released. The reason given for his detention was that he had spoken at the funeral of Steve Biko. He was released on 2 February 1978, too late to be present at the hearing before the Cape Town Supreme Court in November 1977 of his second application for admission to the Cape Town Bar. This left him no alternative but to make application for admission as an advocate to the Transkei Supreme Court which was granted by the High Court in Umtata in December 1978.

He secured another temporary residence permit, this time in Johannesburg, in January 1979 where he did a pupillage with Mr. Rex van Schallkwyk, a South African advocate. At that time pursuant to the Admission of Advocates Act, Sec. 5 (1) (a), permanent residence in South Africa was a prerequisite for permission to practice in the courts of the Republic of South Africa. Efforts made by his pupil master and other South African barristers to obtain his admission to the bar were unavailing. He returned to the Transkei in August of 1979 only to be arrested the following day and detained until November 15. It is believed that he was arrested on this occasion because he had been briefed to act as junior defence counsel of Chief Dobin dyebo Sabata, leader of the main opposition party in the Transkei.

In January 1980 the South African government gazette named the Transkei a "designated country" under the Admission of Advocates Act, thereby permitting Transkei practitioners to appear in South African courts without satisfying the residency requirement.

With the publication of this decree, Mr. Bam is permitted, at least in theory, to practice in the courts of South Africa. The right to appear in court, however, does not include the right to open an office in the Republic. Moreover, in Mr. Bam's case the right to appear is frustrated by refusing him permission

to enter the country. Although people from Transkei are generally not required to have entry visas to enter South Africa, Mr. Bam was notified in 1979 by the South African Department of the Interior that a visa would be required each time he wished to enter. An application made in December 1979 had not received a reply by early March 1980.

Mr. Bam's predicament starkly illustrates the implications of South Africa's Bantustan policy whereby all blacks in South Africa, many of whom have lived all their lives there, will lose (or have already lost) their South African citizenship and will have forced upon them the citizenship of one of the African homelands.

When the Transkei was recognised by South Africa as an independent state in October 1976, three million blacks, over half of whom had lived and worked in "white" South Africa all their lives, were automatically dispossessed of their South African citizenship and forced to adopt Transkeian citizenship. Those Transkeians who remained in the "white" areas were thenceforward treated as aliens and their continued residence there was conditional upon their being granted residence visas by the South African authorities. Along with many other Transkeians Mr. Bam is eager to retain his South African residency because of the lack of opportunities in a region which is for the most part highly undeveloped. He will be deprived of the opportunity to receive a sound practical training in the law. In Umtata there are only three full-time advocates, all Juniors. In Johannesburg, the number is approximately 300, about 50 of whom are Senior Counsel. He has also received an offer of employment in Johannesburg which he is unable to accept for lack of a residence permit.

It is clear from the present case that the Bantustan policy is being used in a selective way against black South Africans whom the South African authorities view as politically undesirable. Mr. Bam campaigned against the racist policies of the

white regime and was imprisoned for 10 years. Since his release he has committed no offence. It is deplorable that he should, because of his former political activities, be prevented from engaging in legal practice in the country of which, in the eyes of the international community, he is still a citizen.

The CIJL invites those organisations and individuals who are in sympathy with Mr. Bam's plight to join with the CIJL and others in urging the South African authorities to permit him to reside in Johannesburg for the purpose of practising law. Letters should be addressed to the Minister of Cooperation and Development, Pretoria, South Africa, or to the South African Ambassador to the writer's country. Letters may also be sent to the President, Johannesburg Bar Association, 702 Innes Chambers, Prichard Street, Johannesburg, South Africa, expressing support for the efforts which have been made on behalf of Mr. Bam.

TAIWAN

An Apathetic Bar and Bench

A recent report by Proessor Laurie Wiseberg (1) on her mission to Taiwan in November 1979 reveals that the judiciary and legal profession enjoy little independence in a country which has been subject to martial law and the dictatorial rule of the Kuomintang for the past 30 years. Although the civil liberties of the Taiwanese have been severely curtailed throughout this period, Taiwanese judges and lawyers have for the most part been reluctant to press for a return to democracy and to condemn often reported violations of human rights. Indeed, at times, the judiciary has appeared to work actively against this objective.

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(1) Executive Director, Human Rights Internet (1502 Ogden Street, N.W., Washington, D.C. 20010, U.S.A.). Internet is a non-governmental organisation which exchanges information world-wide regarding human rights.

Professor Wiseberg visited Taipei from 15 to 20 November, and during this time met more than 60 Taiwanese and a number of organisations actively concerned with human rights. Her findings with respect to the judiciary and legal profession are as follows:

The Judiciary

"The concepts of the rule of law and an impartial judiciary are totally corrupted in Taiwan. Almost all judges are members of the Kuomintang so that the party is always represented in court. Each case is handled by a division comprised of three judges, the senior judge always being an old mainlander.(2) By contrast, most of the junior judges are young and inexperienced and their decisions are subject to the veto of their division chief. Since judges cannot resign without approval, anyone who dares challenge his division chief (senior judge) can be severely sanctioned: he can be shifted to another division, transferred to a remote province of Taiwan, be made a public prosecutor, or assigned the tedious job of approving tax penalties in the tax court. Moreover, since most judges are known to accept bribes to hand down favourable verdicts, and since the secret police maintains dossiers on most judges, a judge can always be blackmailed by the government to rule in its favour."

The Legal Profession

"Lawyers in Taiwan have been notable for their refusal to become involved with issues of human rights and very few lawyers will even consider accepting a political prisoner defence. The National Bar Association of Taiwan is similar to Taiwan's Legislative Yuan: the majority of its members were elected 30 years ago, on mainland China, and representativeness is therefore a sham. Passing the bar examination is exceedingly diffi-

(2) "Mainlanders" represent the 2 million Nationalist Chinese who left Mainland China and settled in Taiwan after the Communist revolution in 1949.

cult, for the profession is tightly controlled. Each year, some 1,000 candidates attempt the exam and only four to ten pass. (Last year a record was set when 20 were passed.) Therefore, those who have been admitted to the bar toe the line for fear of being disbarred and losing the high social prestige and material comfort that the profession brings. The best that a political prisoner can generally hope for is for his lawyer to plead for mercy before the judge. I was cited a case of a lawyer who actually dared to challenge the evidence: that is, he contended that the document in evidence, which was supposed to prove that his client was disseminating communist propaganda, was not communist propaganda. The judge cautioned the lawyer that such a defense could lead to the lawyer himself being charged with communist tendencies.

Legal Aid Centers are also relatively unknown in Taiwan, although a Taipei Center functioned for several years and has received some funding from the US based Asia Foundation. The few lawyers who committed time to the center became rapidly discouraged for they felt there was little they could do through the legal system. ... "

"... Under these circumstances, legal aid can be little more than a palliative and lawyers concerned with human rights have turned to politics to produce change."

Professor Wiseberg reveals that the very small number of lawyers who have done so have found themselves subject to harassment by officials. She refers to the cases of three human rights lawyers, Messrs Yao Chia-wen and Lin Yi-hsiung, and Ms Lu Hsiu-lien, whom she interviewed in November 1979 and who were subsequently detained. All three were arrested shortly after a mass demonstration in Kaohsiung in December 1979 against the continuation of martial law and violation of human rights in Taiwan. Approximately ten thousand people took part in the demonstrations which ended in violent clashes with the police and mass arrests.

Two of the lawyers, Yao Chia-wen and Lu Hsiu-lien were speakers at the demonstration. The third, Lin Yi-hsiung, did not play an active role in the event itself. All three are associated with the news magazine "Formosa", which has become the local point of the unofficial opposition to the Taiwanese government since June 1979. The magazine is advocating democratic freedoms in Taiwan by peaceful means.

Details of the Cases of the three lawyers are as follows:

Yao Chia-wen is a prominent lawyer and a member of Taiwan's Provincial Assembly. Yao was one of the few Taiwanese lawyers prepared to defend political prisoners. After he acted as defence counsel for the younger Yu in the political trial of Yu Teng-fa and his son [1], arrested in January 1979 and charged with collaborating with an alleged communist spy, he was dismissed from the University where he was teaching and an effort was made to disbar him. Lawyer Yao acted as legal adviser to "Formosa".

Lu Hsiu-lien is a graduate of Harvard Law School, a prominent organizer of women's liberation in Taiwan, a writer and an opposition candidate in the 1978 aborted election. In her campaign platform, Ms Lu stood for the promotion of women's welfare in Taiwan (including the legalisation of abortion and revision of marital property laws), establishment of a reasonable welfare policy for farmers and workers, promotion of the human rights

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(1) Yu Teng-fa, opposition leader and former magistrate, was sentenced by a military court in March 1979 to 8 years imprisonment for failure to report a communist agent and spreading propaganda beneficial to the Chinese communists. His son, Yu Jui-yen, arrested at the same time, was released from custody on the grounds of ill health and given a two year suspended sentence on the first charge.

The Centre recently learnt that Yu Teng-fa, who has been adopted as a prisoner of conscience by Amnesty International, has been released on bail to receive urgent medical treatment in hospital. He is 78 years old.

movement, and promotion of better general education in history and law. Because of her progressive stance and her feminist views, several of her books have been banned. Ms Lu is President of the Pioneer Publishing Co. and Vice-President and an editor of "Formosa".

Lin Yi-hsiung was elected to the Taiwan Provincial Assembly in 1977, and is currently legal adviser to "Formosa". Mr. Lin recently visited the United States at the invitation of the US Department of State.

The CIJL had written to the Taiwanese authorities in January expressing its concern that the three lawyers have apparently been detained for exercising their right to freedom of expression, pointing out that members of an independent legal profession should be able to carry out their professional duties free from outside pressure and control. It urged that charges be brought against the lawyers as soon as possible or that they be released forthwith. Legal organisations throughout the world were invited to make similar interventions.

On 18 February, 1980, approximately two months after arrest, the lawyers and five other members of the "Formosa" staff were charged with sedition. The trial occurred in late March, and verdicts are expected to be announced soon. During the trial the defendants alleged that "confessions" introduced into evidence were coerced by physical and psychological torture. The court's ruling on the defence motion to suppress the confessions has not yet been announced. Journalists and foreign legal observers were permitted to observe the trial and have stated that the defence was given considerable leeway in presenting its case. This is in marked contrast to the prior practice. This case is widely considered a critical test of the authorities' willingness to respect the integrity of the legal process and to permit a degree of democratic opposition.

COLOMBIA

The Judiciary, Legal Profession and the State of Siege

Recent developments in Colombia give cause for concern about the preservation of an independent judiciary and legal profession.

The country has been under a state of siege almost uninterruptedly since 1949. It was reimposed late in 1976 and has not since been lifted. Under the powers of the state of siege, the government issued a Security Statute (Decree 1923, of 6 September, 1978), which marked the beginning of a period of increased infringements of fundamental rights. The main changes brought about by the Security Statute are as follows:

- penalties attached to certain offences are increased;
- military courts are given an enlarged jurisdiction over civilians;
- police and armed forces commanders may arrest and detain for up to one year persons suspected of committing vaguely defined offences relating to public order. There is no right of appeal;
- radio and television stations are forbidden to broadcast news or commentaries about public order or strikes.

The government has maintained that the Statute and other measures are necessary to counter the threats posed by urban and rural guerrillas.

Allegations of torture to detainees have become widespread. There is no reason to believe that they are unfounded. Thousands of people have been arrested by military forces since mid-1978. Over 500 persons are currently facing trial by military courts.

In this oppressive environment, defence lawyers are encountering serious difficulties. Lawyers defending political

prisoners have been threatened, a few have been detained and many have been subject to constant harassment.

Under both the civil and military penal procedure codes, the defence advocate is entitled to be present at the investigation of his client by an examining magistrate (juez de instrucción). However, this rule is now being obviated by the armed forces by asking the President to sign an order under Article 28 of the Constitution which authorises detention for 10 days before the suspect is brought before the examining magistrate. During this time he is interrogated by the military authorities, without any defence lawyer being present. The interrogation is recorded and used in the subsequent trial proceedings.

It is becoming increasingly difficult for lawyers to conduct a defence in political cases. The trials are held in military premises. (1) The lawyer may be kept waiting for hours before he is admitted and by that time the case may have been disposed of. On other occasions, he may be told that the case has been adjourned to another day, because the judge has been called away upon other military duties.

One of the main reasons given for the extension of military jurisdiction to political cases was the alleged need to expedite justice. At the present time there are over 7,000 appeals from military tribunals awaiting hearing before the Superior Military Tribunal, some of them dating back four or five years. There is a further right of appeal on points of law to the civilian Supreme Court. Many of these appeals are successful owing to irregularities or errors by the military tribunals.

In October 1979, the government enacted Decree 2482 to suspend a provision of the military penal code requiring the

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(1) Sometimes marathon hearings are held, lasting from 7 a.m. until well into the night.

reading of the dossier during trials before the so-called "councils of war". Instead, the decree provided that lawyers could examine the dossier at the rate of 1,000 pages per day. Two months later, the Supreme Court ruled that the decree was unconstitutional since its provisions were unrelated to the restoration of public order and it violated defence rights.

Constitutional Amendment

While the civilian judiciary has been notably independent, as evidenced by its ruling in the case of Decree 2482, a constitutional reform adopted in December 1979 has introduced important changes. Previously, the Supreme Court and the Council of State co-opted its members. These, in turn, appointed the magistrates of states courts, which would then appoint district and municipal judges.

The constitutional amendment has created a Superior Judicature Council that will prepare lists for the appointment of all judges. The members of the Judicature Council were appointed by the President. The Supreme Court and the Council of State will continue to co-opt its members, but only on the basis of lists prepared by the Judicature Council. The Council will likewise submit lists to the Supreme Court and to the Council of States from which state court judges will be chosen. District and municipal judges will be chosen from lists submitted to state courts by the Council.

This raises the possibility that political qualifications will become the predominant consideration in filling vacancies. In 1957 the two largest polical parties, the Liberals and the Conservatives, reached a power-sharing agreement. One consequence of the agreement has been a monopolisation of important governmental posts by the two parties. If the new constitutional amendment is intended to facilitate the extension of this practice to the judicial branch of government, there is a danger that judicial appointments will be influenced more by political loyalties than by individual merit.

GUATEMALA

Assassination of Lawyers Continues

In January 1980, the world was shocked by the assault by the Guatemalan army on the embassy of Spain in Guatemala, contrary to the wishes of the Spanish Ambassador, which resulted in 40 deaths. The embassy had been occupied for less than 24 hours by a group of lightly-armed Indian peasants protesting against what they called "pitiless repression" in Quiche province, and seeking information about disappeared relatives. This action shows that the policy of repression described in the International Commission of Jurists' special report Human Rights in Guatemala (see back cover) continues.

In Bulletin No. 4 (October 1979) the persecution of lawyers, particularly labour lawyers, is described, including the assassination of six lawyers and two judges. Since then the assassination of three more lawyers has been reported. The details are as follows:

Ruben Ixcamparic was a labour lawyer and member of the political committee of the Frente Unido del Revolucion (FUR), a political party of social-democratic orientation. Most recently he had acted for the Indians involved in the occupation of the Spanish embassy. He was killed on 24 January, 1980, in the centre of Guatemala City, a short distance from a police station, after leaving a meeting of the FUR political committee.

Jorge Jimenez-Caja was a labour lawyer, vice-president of the executive board of FUR and professor of law at a regional centre of the University of San Carlos. He was machine-gunned in his office in Queyaltenango on 5 March, 1980. Responsibility for his death has been claimed by a clandestine right-wing group.

Rolando Malgar was a lawyer and legal adviser to the national university, the University of San Carlos. He was assassinated on 17 March, 1980.

BAR ASSOCIATION ACTIVITIES

THE COURT OF STATE SECURITY IN SYRIA

Syria is a country which has lived under a state of emergency in one form or another since 1948. The present declaration of emergency dates from 196 , before the present government came to power following a military coup.

Under the emergency legislation, criminal cases involving matters of state security are referred to a special military Court of State Security. Lawyers in Syria have been critical of the proceedings before this Court.

On 14 January 1980 the members of the Damascus Bar Association decided to call a one-day strike of its members in all courts in Syria on 31 January 1980. The purpose of the strike call was to give expression to the following demands:

- the termination of the state of emergency declared on 8 March 1963;
- the liberation of all detainees held under the state of emergency;
- the transfer of all other detainees to prisons under civilian control; and
- the abolition of the Court of State Security.

The Bar Association also decided to boycott the Court of State Security indefinitely; to call upon other bars of Syria and other professional associations to support their action; and to discipline any of its members who contravene the decision.

In announcing this decision the lawyers of Damascus referred to "the large number of political prisoners" held under a "continuing despotism over the rights of citizens and their fundamental freedoms" without being brought before a court.

Following this strike call, the government entered into discussions with representatives of the Damascus Bar Association and indicated that cases against civilians involving matters of state security would in future be brought before the ordinary civilian courts. Consequently, the Damascus Bar Association and the other professional bodies which had agreed to support them decided to suspend the projected strike action for two months and to await further developments. An encouraging development is that many of the political prisoners have been released from detention.

THE UNION OF ARAB LAWYERS

The Union of Arab Lawyers is a federation of all the national bar associations of North Africa and many more bar associations in the Middle East. It has been in existence for several years, and attaches great importance to the independence of the bar and to human rights questions in general. The Permanent Bureau of the Union at its January 1980 meeting adopted a resolution concerning the independence of lawyers which states in part:

> "The question of the independence of lawyers is of critical importance in the Arab world. The legal status and real situation of the lawyer vary from country to country. In some states, the profession of lawyer does not exist; in others, if there are lawyers, they do not have professional organisations which ensure respect for professional ethics and protect the members of the profession against external pressures. There is a third situation which is beginning to represent a threat: some relatively independent Bars are being subjected to various pressures, the most disquieting of which is the intention of a certain government to make lawyers a kind of civil servant."

The operative paragraphs of this resolution inter alia (1) recommend that all Arab states authorise the practice of law and work towards the creation of bar associations, (2) urge

all Arab states to allow free travel of lawyers for professional activities, (3) authorise the bar of Democratic Yemen to advise the legal communities of North Yemen, Somalia and Saudi Arabia regarding the creation of bar associations.

In order to emphasise its concern on this subject it was also decided that the 14th Congress of the Arab Lawyers Union in Rabat on 24 to 30 June, 1980, will have as its theme "The Independence of the Profession of Lawyer is the Basic Guarantee of the Rights of the Defence".

In a resolution on "the situation of human rights and fundamental freedoms in the Arab countries" the Bureau of the ALU defined a very active role for national bar associations including (1) creation of human rights committees, (2) mobilisation of public opinion against all emergency constitutions and legislation, (3) boycott of emergency jurisdictional bodies, (4) national and international publicity campaigns on behalf of individuals imprisoned or deprived of employment by reason of their political beliefs, and (5) observance of a Day of Solidarity with persons persecuted for their beliefs and a Day of Action for the abolition of emergency regimes.

The resolution also welcomed in particular the struggle of lawyers in Egypt, Syria and Libya against emergency legislation, restriction on the rights of the defence and attacks on the independence of the legal profession and the judiciary.

THE FORMATION OF AN INTER-AFRICAN BAR ASSOCIATION

An Inter-African Bar Association is in the process of formation. Two sub-regional bar associations have been in existence for some time: the Union of Arab Lawyers (see above) and the African Bar Association, a federation of English-speaking

Commonwealth African bar associations. In September 1978, a conference of francophone African bar associations led to the creation of a similar association uniting the bar associations of the francophone African countries. At the suggestion of the International Commission of Jurists contacts were established between these two associations. After further consultations with the Union of Arab Lawyers, to which all the arabic speaking African bar associations belong, the decision was taken to create a pan-African body.

An interim executive board has been created which has called for a constitutional congress to be held in Dakar on 21 to 24 May, 1980. Even at this early stage the Inter-African Bar Association has demonstrated the high priority it accords to human rights questions. The May congress will be divided into three working groups: one on the statutes and finances of the association, a second on the protection of human rights, and a third on the independence of the legal profession.

The creation of this body is very timely, since substantial progress has been made towards the creation of an African Commission of Human Rights, following the July 1979 OAU Heads of State Summit Meeting resolution calling for the preparation of an African Charter on Human Rights. The existence of a pan-African bar association with a committment to professional integrity and the protection of human rights will ensure that there is a competent and committed African non-governmental organisation which can cooperate constructively with any intergovernmental Human Rights Commission or other African institution which may be created by the Organisation of African Unity.

THE VII. CONGRESS OF LAWYERS OF THE PROVINCE OF BUENOS AIRES : A RESOLUTION

Since the military coup of March 1976 the repressive policies of the Argentine government have made the name of that country synonomous with systematic and gross violations of human rights. By conservative estimates the number of disappeared persons is now 15,000, and most of the missing are believed to be dead. Physical elimination of known and supected opponents or their sympathisers is the copestone of a far-reaching system of repression which includes the depoliticisation of national life, radical alteration of educational curriculae, re-writing the constitution via military decrees, and the abandonment of the concept of the separation of powers. Previous issues of the Bulletin have described attacks made on the independence of lawyers and judges. These include inroads into the competence of civilian courts such as the elimination of the power to review the constitutionality of emergency measures and partial suspension of the writ of habeus corpus, as well as measures taken against individual members of the bench and bar in consequence of their conscientious exercise of their professional duties.

In these circumstances it is greatly to the credit of Argentinian lawyers' associations that they continue to call for a return to democracy and respect for basic constitutional rights. In 1979 the Congress of Lawyers of the Province of Buenos Aires passed a resolution (1) whose preamble states that "the practice of law is a necessary condition for /the realisation of/ justice", and that "it is necessary that the rulers as well as the governed understand that the practice of law is possible only" under certain conditions. These conditions include the independence of the judiciary and giving effect to the rights and guarantees set forth in the consitution, particularly due process, the right

(1) As reported in Noticiero, No. 2, August 1979, published by the Argentinian Asamblea por los Derechos Humanos.

to conduct a defence, respect for precedent, separation of powers and respect for constitutional limitations on governmental power. The Preamble also notes that the elimination of emergency decrees is "a precondition to the attainment of a pluralistic, representative and stable democracy - an objective repeatedly expressed by the national authorities".

The substantive part of the resolution declares that all attacks and restrictions on lawyers are ... an impediment to the realisation of justice; that lawyers must not be identified with the alleged conduct or activities of their clients; that public authorities must respect the lawyer and defend his powers; that the guarantee of an impartial judge "necessitates the cessation of trials of civilians before military tribunals and special commissions which have ... intervened in matters outside their jurisdiction", and that the right to a freely chosen defence lawyer is indispensible. The resolution also calls upon public organisations to intensify their persistent efforts, both to gain freedom for lawyers who have been detained without trial and to clarify the circumstances surrounding the disappearances of lawyers.

THE ROLE OF THE PROSECUTION IN FRENCH CRIMINAL PROCEDURE

by

Manfred Simon
Président de Chambre Honoraire
à la Cour d'Appel de Paris

Historical Background

At the beginning of the French Monarchy, the Kings of France entrusted the defence of their patrimonial and fiscal interests before the Courts to ordinary lawyers called, when exercising these functions, "les procureurs et avocats du roi" or the "solicitors and advocates of the King".

While the judges of the bench were placed on a rostrum, these lawyers, when addressing the Court, stood in the well. Hence the name of "parquet" which they received and which continues to be used when designating the Prosecution as a whole or its members. Nowadays they are usually called the "ministère public".

In the course of time, with the increasing concentration of power in the hands of the Monarchy, the parquet was relieved of these private attributions to become "magistrates"(1) in charge, as their main function, of the defence of the general interests of society and of the State.

The lawgivers of the Revolution of 1789 crowned the evolution by the enactment of 16-24 August 1790 which designated

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(1) The generic term "magistrate" designates all members of the judiciary, whether judges of the bench or members of the prosecution.

the parquet "as the agents of the Executive at the Courts", (les agents du pouvoir exécutif auprès des tribunaux). The Constitution of the 8th year together with the above enactment, enunciated the fundamental rules concerning the organisation and functions of the prosecution (2).

The 5th Republic

By its Constitution of 4 October 1958 and the Ordinance No. 58-1270 of 22 December 1958 and its subsequent amendments, the 5th Republic codified the rules concerning the judiciary, the judges of the bench, and the prosecution (3).

Article 64 of the Constitution declares inter alia: "The President of the Republic is the guarantor of the independence of the judiciary ... judges of the bench are irremovable", This sentence is reproduced in article 4 of the above named ordinance, with the addition: "Consequently, judges of the bench may not, without their consent, be given a new assignment, even for the purpose of promotion"(4).

As for the parquet, article 5 of the Ordinance defines their position as follows: "The magistrates of the parquet act in accordance with and under the control of their superiors in rank and under the authority of the Keeper of the Seal, Minister of Justice. In open court, their speech is free".

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(2) See Henry Solus et Roger Perrot: Droit judiciaire privé, Tome I Sirey.

(3) Article 64 of the Constitution of 4 October 1958: "Le Président de la République est garant de l'indépendance de l'autorité judiciaire".

(4) Ordonnance No. 58-1270 du 22 decembre 1958, portant loi organique relative au statut de la magistrature, article 4. See code de procédure civile, Dalloz 1977, p. 515.

Despite these differences, judges of the bench and of the parquet belong to the same corporate body as a result of article 1 of the Ordinance, which states: "The judicial corps is composed of the magistrates of the bench and of the parquet of the court of cassation, of the courts of appeal and of the tribunals of first instance, as well as the magistrates seconded to the central administration of the ministry of justice. It includes furthermore the 'auditeurs de justice'"(5).

Belonging to the same corporate body they have the same training. After having obtained their law degree, they pass a competitive entrance examination to the "national school of the magistracy" (6). The school admits students annually limited in number to the vacancies in the ranks of the magistracy caused by death, retirement or resignation. The students are called "auditeurs de justice". Public officials in categories A and B, after five years of public service, may also pass this examination. The government may also appoint directly and exceptionally attorneys at law, public officials or "officers of the army whose competence and activity in the legal, economic or social domains qualify them for the exercise of judicial functions", as well as certain other categories of candidates.

Successful candidates are appointed "auditeurs" by decision of the Minister of Justice, thus becoming members of the judiciary.

In the course of their training they receive a salary and work inter alia in the courts as assistants to the titular magistrates. They are bound by professional secrecy.

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(5) Articles 1 and 5 ibid.

(6) ibid. Chapitre II: De la formation professionnelle des magistrats Loi organique No. 70-642 du 17 juillet 1970.

The normal duration of study is twenty-eight months. At the end of this period they are entered on a list qualifying them for judicial office - their position on the list determining their rank. The best are seconded to the Ministry of Justice, forming a special cadre of magistrates. The others are assigned by governmental decree to a court where a vacancy exists, either as members of the bench or of the prosecution.

Transfers from the bench to the parquet and vice-versa are customary at the request of the magistrate concerned and under certain conditions too numerous to specify here. The great majority of the judges of the bench have spent part of their career as members of the parquet.

The judiciary, as will have been understood from the foregoing is a career service. Promotion, according to merit and seniority, is pronounced by decree based on recommendations of a special commission composed of magistrates elected by their peers.

Disciplinary measures are taken with the advice of disciplinary commissions, composed of judges of the bench and members of the parquet.

Summary of the Organisation of the Judiciary

There exist in France four tiers of ordinary courts: 455 "tribunaux d'instance" which are roughly comparable to the British Magistrates' Courts, 172 tribunals of first instance ("tribunaux de grande instance"), 29 courts of appeal and finally crowning the edifice, the Court of Cassation. At each of these levels there are one or more criminal sections or chambers of the court, except at the level of the tribunal d'instance, which in criminal proceedings is called a 'tribunal de police'. Its jurisdiction is limited to petty

offences, called "contraventions" which are punishable by a fine and/or imprisonment for a maximum of one month, or two in the case of a second offence. There are five classes of "contraventions". The prosecution of the first four is in the hands of a senior police officer appointed by the chief prosecutor of the judicial district. For the fifth category a member of the parquet acts as prosecutor.

Attached to all other tribunals is a parquet composed, according to the size and importance of the district, of a greater or lesser number of members of the ministère public. Their head at the tribunal of first (grande) instance is called the procureur de la République, his assistants bearing the title of "substituts du procureur de la République".

Each Court of Appeal has jurisdiction over a district comprising several tribunals of first instance as well as a number of "tribunaux d'instance". The parquet consists of the procureur général, who is the Chief of Prosecution for the whole district and the hierarchical superior of the members of the ministère public operating at each of the tribunals of his jurisdiction. He is assisted by one or several "avocats généraux" and several substitutes, called "substituts du procureur général".

Finally, the parquet of the Court of Cassation is composed of the "procureur général près la cour de cassation", the highest ranking magistrate of the parquet, assisted by a "premier avocat général" and several "avocats généraux". Be it recalled that the Court of Cassation has jurisdiction over the whole of France and its dependant territories. It decides only questions of law and not of fact.

The Characteristics and Position of the Parquet

From the preceding exposé the following features concerning the parquet and its position within the judiciary as a whole will be inferred:

1. The parquet is part and parcel of the judiciary. Together with the judges of the bench they form a corporate body. The "unity" of the judiciary as a whole is legally established by article 1 of the Ordinance of 22 December 1958. This means, inter alia, that there is no obstacle to transfers from the parquet to the bench and vice-versa.

2. Although they are "magistrates" in the French sense of the word, they are public officials, also which lends a certain ambiguity to their position.

3. As public officials, they act under the supervision and control of their superiors, whose instructions they are bound to carry out. The Minister of Justice has authority to give orders, through the procureur général at the Court of Appeal of their district, concerning the requests they should make in their written submissions to the Court.

4. The Court does not have to give effect to these requests. On the other hand it cannot give orders to the parquet.

5. The parquet thus is not a judge of, but a party to, the proceedings. Its members do not participate in the decisions of the court and they are excluded from its deliberations, but they cooperate by their opinions and

submissions in the decision-making process [7].

6. In his capacity as a "magistrate", a member of the ministère public may if opposed to the instructions he has received, ask to be replaced by one of his colleagues. (The parquet being considered as a single body at each court, the individual members are therefore interchangable). He may submit the conflict to a general assembly of his parquet, which determines by a majority decision the sense to be given to the address. Finally he may, in his oral address contradict his written submissions. ("In open court, their speech is free").

7. Considering that the parquet is a career service and promotion depends on the Minister assisted by an advisory commission composed of magistrates, open resistance to a ministerial instruction is a rare occurence, but such instructions are not usual.

8. Finally, while judges of the bench are irremovable, a member of the ministère public may, provided certain statutory guarantees are respected, be given a new assignment without his prior consent, for instance by way of a disciplinary measure.

Duties of the Parquet

The principal duties and prerogatives of the parquet lie within the field of criminal proceedings.

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(7) In France, the bench, except that of the tribunal d'instance and that of the tribunal de police consists of three judges. After hearing the case, they withdraw to their chamber to deliberate in secret on the decision to be pronounced. The law forbids the parquet's presence during that stage of the proceedings.

1. Direction and control of the judicial police

In the majority of cases in England the police initiate criminal proceedings before the courts and conduct most of those in magistrates court; they then act as prosecutors.

In France the police have no such functions. A few words should be said about their role and the relations between the prosecution and its auxiliary, the police.

The police are divided into two main sections: the "administrative" and the "judicial" police. Only the latter have the right and duty to act in criminal matters. Its officers are appointed, after selection by a commission established for that purpose, by the procureur général at the Court of Appeal of the district where they will exercise their office. In principle their jurisdiction is limited to that district.

They act, according to article 12 of the code of criminal procedure, under the direction of the procureur de la République, head of the parquet of a tribunal of the first (grande) instance. They are furthermore placed under the supervision of the procureur général and the control of the "chambre d'accusation", a special section of court of appeal (article 13).

Their task is "... to ascertain infractions of the criminal law, to gather the relevant evidence and to trace the authors (of the offences) until such time as criminal proceedings are initiated. After such proceedings are initiated, they carry out the assignments referred to them by the examining jurisdictions and comply with the demands of the latter" (article 14). It should be added that certain members of the gendarmerie, also selected by a procedure established by law, have the capacity of "officers of the judicial police".

The police carry out these functions by undertaking, either ex officio or on orders of the parquet, a preliminary criminal investigation. After the initiation of criminal proceedings, they carry out the "rogatory commissions" of the examining magistrate (juge d'instruction) (8) in cases where this judge is in charge of the investigation.

The police will keep the procureur de la République and, as the case may be, the examining magistrate informed of the progress and results of their activities.

2. Initiation of criminal proceedings

In all criminal proceedings the parquet is a principal party. Its duty, according to article 31 of the code of criminal procedure, is to initiate criminal proceedings and to request the court to apply the law. The parquet is a part of all ordinary courts of the land; one of its members must be present at all trials. As said before, they are obliged to make written submissions to the court in accordance with instructions they may receive, while in their verbal address they may freely make requests to ensure, in their view, that justice is done. They alone have the right to initiate proceedings. They do this either by notifying the accused or by formal summons to appear at a certain date and hour in court, or finally by requesting the examining magistrate, to whom they submit a list of charges against a person or persons known or unknown, to investigate.

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(8) The "juge d'instruction" or examining magistrate is a member of the bench of the court concerned, appointed for a renewable period of three years to that office. He alone is in charge of the preliminary investigation of serious crimes, as soon as he has received the list of charges and the request of the parquet to investigate. From then on the police must defer to his requests. A "rogatory commission" is an order of the examining magistrate to the police or a request to a colleague in another area to undertake certain actions, such as hearing witnesses for instance. Within the limits of such a rogatory commission the police officer exercises the power of the examining magistrate.

The Minister of Justice has authority to inform the procureur général of the judicial district concerned of breaches of the criminal law which have been brought to his attention, and to order that criminal proceedings be initiated or stayed or the competent court seized of such requests as the Minister deems opportune. The same authority belongs to the procureur général as far as the members of his own court are concerned. He has authority over all members of the parquet attached to tribunals within the district over which his court of appeal has jurisdiction.

Another important function of the procureur de la République is to receive complaints and denunciations and to decide whether to initiate proceedings or not, a power comparable to that of the Director of Public Prosecutions in England.

To avoid arbitrary decisions, the procureur is obliged regularly to report on the state of all penal proceedings in his district to the procureur général. The latter will inform the Minister of Justice accordingly. Both have power to order proceedings to be undertaken or stayed. But the Minister, not being a member of the judiciary, cannot act in lieu of the parquet. Furthermore, french law does not know the nolle prosequi which can be entered by the english Attorney-General. Once a case has been committed for trial, the court alone has authority to decide.

3. Private prosecution

A further guarantee against an arbitrary refusal to prosecute, is the right granted by article 2 of the code of criminal procedure to the alleged victim of a criminal offence to lodge a complaint with the examining magistrate for the purpose of obtaining damages. The complaint, containing a detailed version of the facts, the offences alleged, and, if possible the name of the offender, will be transmitted to the procureur. The latter may ask the judge not to proceed on certain grounds specified in article 86 of the code. The

decision rests with the examining magistrate alone who, before taking it, is obliged by law to investigate the facts indicated by the complainant. This procedure, denominated "plainte avec constitution de partie civile", enables the victim to set the penal process in motion, even against the will of the prosecution. From then on the complainant is a party to the proceedings, associated, so to speak, with the parquet. In case of acquittal the complainant may be sued for false or slanderous accusation by the defendant.

4. Serious crime

A word should be said about the prerogatives of the parquet with regard to the examining magistrate.

French law distinguishes between "contraventions", "délits" and "crimes", according to the penalty attached by the penal code to the offence concerned: a fine and/or imprisonment up to two months are imposed for "contraventions"; imprisonment between two months and five years for "délits" and imprisonment for more than five years up to a life sentence or the death penalty for "crimes".

The examining magistrate's intervention is mandatory only in cases of a "crime" in the sense indicated above, but he may not act before he has considered the parquet's "réquisitoire" or list of charges. This contains the facts, the legal definition of the offence or offences according to the parquet, the name of the suspect, if known, and if not, a request to proceed with the investigation.

During the investigation, which is conducted by the examining magistrate on his own responsibility, the parquet will be kept informed of the progress made. At all stages of the proceedings so that he may address to the examining magistrate within

24 hours requests for action which in his opinion should be taken. Also, upon request, the member of the parquet in charge may be present at all interrogations of the defendant and confrontations, for example with witnesses or the "partie civile". Certain decisions of the examining magistrate such as refusing or granting bail, committing or not committing the case for trial (e.g. because there is no case to answer), have to be communicated to the parquet for his opinion before they are finally taken. The latter may appeal against any judicial decision (as opposed to an administrative decision) of the examining magistrate. The parquet may further request the presiding judge of the court concerned (who is not obliged to comply with the request) to replace the examining magistrate by another where there are several at the same court.

In fact, therefore, if not in law, the influence of the parquet during the entire course of the preliminary investigation prior to as well as during the examining magistrate's intervention is considerable.

Finally, in cases of "délit" or "contravention" the parquet may always request the intervention of the examining magistrate who must comply with the request.

5. Trial

There is no need to insist on the importance of the parquet's role during the trial. The presence of a member of the parquet in charge during the entire proceedings is mandatory. He may examine the prisoner and witnesses, call his own witnesses and, at the end of the proceedings, but prior to the defence which always has the last word, sum up the case for the prosecution and request the court to take such decisions as appear in accordance with the law in the prosecution's opinion.

6. In civil matters

The role of the parquet in civil matters, is less important.

The parquet is either a principal or joined party to the proceedings. In some case it is a principal party, e.g. it must address the court on all questions specified by law (article 422 of the code of civil procedure), such as particular aspects of the procedures concerning bankruptcy (article 425), or when the law orders it to act in the capacity of representative or trustee (mandataire). Thus the parquet represents the absent, that is to say a person who has not been heard of for a certain length of time (article 117). The parquet may also act ex officio when authorised by law, for instance to demand the nullity of a marriage, or to demand that measures be taken for the custody and education of children under the age of eighteen, in the interest of mentally disturbed and/or persons interned for that reason and so on.

The parquet will be a joined party if it requests to be informed about the case with liberty to address the court, or if the court asks its representative to take cognizance of the cause sub judice and to give its opinion, in which case he is obliged to act accordingly. Article 431 of the code of civil procedure declares that the presence of the parquet is mandatory only when it is a principal party to the proceedings, when it acts as representative of a party, or when it is obliged to be present by order of the law. In all other cases it may address the court in writing or orally.

Conclusions

There can be little doubt of the importance of the part the prosecution plays in the penal process where it acts from beginning to the end with considerable rights and prerogatives.

Whilst its members, in their capacity as magistrates, seek to defend the interest of society, and whilst their mission is to see that the law is applied, the guilty punished and the innocent acquitted, they also are public officials bound within the limits indicated above to obey instructions they may from time to time receive from the government, to inform the latter by regular reports on the state of all penal proceedings and of all infractions of the criminal law, whatever their nature. To a certain extent, therefore, they are instruments for carrying out the government's policy in the field of criminal law.

Whether the existence of such a category of officials within the judiciary is desirable, is open to discussion.

Some think it would be preferable to transform them into officials of the Ministry of the Interior. But such a reform, in the view of the majority would confer on this Ministry a concentration of power (it already controls the police) detrimental to the freedom of the citizen, a decisive step on the road to the totalitarian State.

Others amongst them the present writer, feel that the Minister of Justice should be divested of his authority over the prosecution whose staff should become fully-fledged members of the judiciary, specialised in this field, and that the judicial police should be attached, including for its discipline and career structure, to the Ministry of Justice.

Obviously such measures would entail a major reform of the role of the prosecution within the State; it would meet with great resistance, if only because it would logically transform the judiciary as a whole into that countervailing and independent power which no French government has ever been willing to accept.

This critical appreciation left aside, it may be stated that the prosecution, as presently organised, is efficiently contributing to the administration of justice, that its action and position conform to a long standing tradition and that reforms, if any, to be effective, should be undertaken only with the advice and consent of the judiciary whose members are, in their majority, we believe, not insensible to its shortcomings, but also conscious of its strength and its importance within the political and constitutional framework of modern French society.

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The Trial of Macias in Equatorial Guinea

Report of an observer mission by Dr Alejandro Artucio, legal officer of the International Commission of Jurists, published by the International Commission of Jurists and the International University Exchange Fund, Geneva, December 1979, 70 pp. Available in english or spanish. Swiss Francs 4 or US$ 2.50, plus postage.

The report includes a description of the nature of the repression under Macías and the economic and social conditions of the country resulting from it. Criticisms are made of certain legal aspects of the trial, but the observer found most of the charges fully proved.

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Persecution of Defence Lawyers in South Korea

Report of a mission by Adrian W. DeWind, former President of the New York City Bar Association and John Woodhouse, Secretary, Centre for the Independence of Judges and Lawyers, published by the International Commission of Jurists, Geneva, November 1979, 68 pp. Swiss Francs 4 or US$ 2.50, plus postage.

This report describes the prosecution and punishment or harassment of nine lawyers arising out of their defence of political prisoners. These cases indicate the harassment accorded to "the small body of civil rights attorneys who have attempted to carry out their obligation to be vigilant in the protestation of human rights." As a background to these cases, the authors describe the general nature of the political repression and the undermining of the independence of the judiciary in South Korea.

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Human Rights in Guatemala

A report of a mission by Donald T. Fox, New York attorney, published by the International Commission of Jurists, Geneva, September 1979, 66 pp. Available in english or spanish. Swiss Francs 4 or US$ 2.50, plus postage.

Mr Fox's report outlines the historical, social and economic factors which have resulted in "a large area of institutionalised exploitation and injustice"; gives an account of the prevailing violence by right and left wing forces, the greater part being by military and clandestine para-military forces acting in the "narrowly perceived economic interests" of dominant groups; and commends the recent proposals of the National Council of Economic Planning for a development strategy to achieve a just and stable social peace.

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