BULLETIN
of the
CENTRE FOR THE INDEPENDENCE
of
JUDGES AND LAWYERS

CONTENTS

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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)

In an increasing number of countries, and on an increasing scale, serious inroads have been made into the independence of the judiciary and practising advocates, particularly those who have been engaged in the defence of persons accused of political offences who have been harassed, victimised, arrested, imprisoned, exiled and even assassinated by reason of carrying out their profession with the courage and independence that our profession expects. In some countries this has resulted in a situation where it is virtually impossible for political prisoners to secure the services of an experienced defence lawyer.

In response to the increasing gravity of this situation the International Commission of Jurists established, in January 1978 at its headquarters in Geneva, a Centre for the Independence of Judges and Lawyers following the decision on this subject taken at the twenty-fifth anniversary Commission meeting in Vienna in April 1977.

The objects of the Centre are:-

(1) to collect reliable information from as many countries as possible about

   (a) the legal guarantees for the inedpendence of the legal profession and the judiciary;

   (b) any inroads which have been made into their independence;

   (c) particulars of cases of harassment, repression or victimisation of individual judges and lawyers;

(2) to distribute this information to judges and lawyers and organisations of judges and lawyers throughout the world;

(3) to invite these organisations to cooperate in this project, either by supplying information about erosions of the independence of lawyers and judges in their own or in other countries, or by taking action in appropriate cases brought to their attention.

If you or your organisation are willing in principle to participate, could you please write and state the name and address of the person to whom communications upon this subject should be addressed. A favourable reply does not, of course, commit your organisation to take action in any particular case. That will have to be considered at the appropriate time on a case by case basis. Replies should be addressed to

Secretary, CIJL
International Commission of Jurists
P.O. Box 120
1224 Chêne-Bougeries/Geneva
Switzerland

Individuals and organisations wishing to support the work of the Centre are invited to make a financial contribution. An appropriate form will be found on the last page.

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CASE REPORTS AND COMMENTARIES

This section comprises a selection of cases concerning the persecution, detention, assassination or harassment of judges and lawyers in various countries which have been reported to the Cent since the publication of the previous Bulletin, and commentaries on the judiciary and legal profession in Chile, El Salvador and Swaziland.

ARGENTINA

A comprehensive study of the position of the judiciary and the legal profession in Argentina is contained in the first issue of this Bulletin.

ACOSTA Osvaldo

Former professor of law at the University of Buenos Aires, was arrested at his home with his family in Moreno (near Buenos Aires) on May 29th, 1978.

He was beaten, submitted to simulated execution and his home was ransacked. His wife, Mrs Nelida Lozano and his five sons were subsequently freed. The reasons for his arrest are not known.

GIORDANO-CORTAZZO, Hector

Sr. Giordano-Cortazzo is a 39 year-old lawyer and journalist. A Uruguayan national, he had lived in Buenos Aires since 1973 and was under the protection of the United Nations High Commissioner for Refugees. He was arrested in June 1978 at his home in Floresta (Buenos Aires); in the course of his arrest he sustained severe head injuries. Although his arrest has not been officially acknowledged, he is believed to be detained in Palomar air base in Buenos Aires province and to have undergone severe torture.

In Uruguay, Sr. Giordano-Cortazzo was a defence lawyer of political prisoners and lawyer to a textile trade union. He was a member of the Revolutionary Communist Party. As a journalist he worked on the newspaper Epoca and De Frente.

HOCKMAN, Abraham

A well known defence lawyer who was abducted from his home in Buenos Aires on 17 August, 1978. The Argentinian authorities have denied having arrested him.
His wife and daughter have been warned that his life would be in jeopardy if they persisted in their efforts to find him. The reasons for his arrest are unknown.

The CIJL has written to the Minister of Justice of Argentina expressing its concern about the disappearance of Mr Hockman and requesting that his personal safety be guaranteed. Law associations in 40 countries have been invited to make similar representations to the Argentinian government on his behalf.

INTELISANO, Lucila

A lawyer who was reported abducted in November 1978. To date there is no news of her whereabouts. Her case was previously mentioned in the first issue of this Bulletin (February 1978).

DIAZ-LESTRUM, Guillermo

The body of Guillermo Diaz, a prominent defence lawyer, was found on 30th November, 1978 in Buenos Aires. He was reported missing at the end of October 1978.

His case was included in the first issue of this Bulletin in which it was reported that, in March 1976, he had been arrested by the security forces, detained without trial and subsequently released in 1977. Prior to his disappearance, he had presented a preventive habeas corpus writ (to Federal Judge Francisco Marquardt) after learning that an unknown group of the security forces had been looking for him at a previous address. His family have also reported that he had received telephone threats.

As a judge, in October 1973, he had ordered the release of a group of Chilean refugees who were detained without charge. It is reported that the security forces objected to this order. In August 1974, there was a bomb attack on his home in Buenos Aires. During 1976, he was detained by the military, reportedly tortured, and held in Sierra Chica prison (Buenos Aires province) for several months, without charge or trial, at the disposal of the National Executive Power.

His wife, Nelly ORTIZ, also a lawyer (and who has defended political prisoners) was kidnapped in November 1976 and has since disappeared. She is now feared dead.

Judge Emilio Jorge Garcia Mendez has ordered an investigation into the death of Guillermo Diaz.

PERPIGNAN, Sara

A lawyer who was reportedly abducted in November 1978. To date, there has been no news of her whereabouts.

PESCI, Eduardo

A 36 year-old defence lawyer who was detained by unknown persons in a Buenos Aires street on 23 October 1978. A writ of habeas corpus has been filed, but it has not been possible to establish his whereabouts to date.

SEMAN, Elias

A well known defence lawyer and member of the Argentinian communist party, who was arrested by the army on 17 August 1978. Mr Seman is the father of two children.
The reasons for his arrest are not known.

ZARACEANSKY, Mario

Mr Zaraceansky, an active labour lawyer in Argentina, who taught at the faculty of law at the University of Cordoba, was arrested with his wife in July of 1977, and has been detained since that time without charge.

C H I L E

I. The Judiciary

Article 14 of the International Covenant on Civil and Political Rights, which Chile has signed, provides that: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

The right of access to an independent court is crucial for the protection of human rights at all times, but even more so during a state of emergency. Whilst there is a danger that the broad powers vested in the executive to deal with internal crises will be arbitrarily and illegally applied in violation of the fundamental rights of its citizens, the power of the legislature to exercise ultimate control over the enactment of emergency regulations and decrees by the executive is often severely restricted.

In this situation, the civilian judiciary is the sole "state power" to which a citizen can turn to seek relief against abuses of governmental power.

Unfortunately, since the military coup d'état in Chile in 1973, the civilian courts have either been unable or have simply refused to investigate and punish those responsible for the thousands of murders, disappearences, illegal imprisonments and brutal torture of detainees that have occurred in Chile since the military junta took power in 1973.

(i). Remedy of Amparo

Numerous applications have been lodged on behalf of missing or detained persons with the Supreme Court or the Court of Appeal in amparo (habeas corpus) proceedings, the purpose of which is to protect the freedom of persons arrested in violation of the law. Such applications have, almost without exception, been refused or shelved by the court despite the fact that the government of Chile itself declared in 1977:

> "In the present state of emergency, grounds for an action for enforcement of rights (amparo) include both insufficient grounds for detention and non-compliance with the procedural formalities ... The President of the Republic, during a state of emergency, may order the detention of any person for up to five days in his own home or in some place other than a prison. After five days, the detained person must be either released or brought before the courts to be dealt with."

In spite of this, the President of the Supreme Court recently ruled that

> "The purpose of amparo is to remedy the mistakes of the country's ordinary courts, not to inquire into arbitrary abductions or into detentions by the Executive."

Thus the court has rejected all applications for amparo where detention has been ordered under the state of siege or where the person concerned was said by the Executive not to be under detention. With respect to applications in the first category the courts refused even to consider cases where the detainee had been subjected to prolonged detention and where his health was seriously threatened or where he had been mistreated or even tortured by the security police. In the second category the courts have almost always

relied on the assertion of the Ministry of the Interior that the authorities have not arrested the person named in the application. An example is the application submitted in March 1977 to the Santiago Court of Appeal by 159 persons of diverse social and political backgrounds on behalf of 501 detained or missing persons. In this case the court accepted the assertion of the Ministry of Interior that the persons named had not been arrested on its orders despite the fact that it was not responsible for the security authority alleged to have been responsible for the arrests, namely the notorious Directorate of National Intelligence (DINA). Even where the Court has incontrovertable proof that a person has been arrested by the security forces and orders his release, the authority to which the order has been addressed simply ignores it.

In the case of Mr. Carlos Contreras Maluje, the court order summoning the DINA agents responsible for the arrest was opposed by the Ministry of Interior for national security reasons. When the court sent a judge to the headquarters of the DINA to obtain further information about the case, he was refused entry into its premises. (1)

To the knowledge of the Inter-parliamentary Union working group, "since September 1973 not one single application for amparo presented to a Chilean Court of Appeal has led to the release of a detainee or to the reappearance of a missing person. In only one case, a person was released after an application for amparo, but was re-arrested on the same day and subsequently sentenced." (2)

Where the amparo proceedings have proved useless, the missing person's relatives have requested the criminal courts to commence an independent investigation to determine whether any criminal act was committed with respect to their disappearance. These investigations, too, have been thwarted by the authorities. In the case of Roberto Gajardo Gutiérrez proceedings were brought against the DINA for his illegal arrest. When the Court summoned the officials who had carried out the arrest to appear before it, the Ministry of Interior informed the magistrate that "the Directorate of National Intelligence is not subordinate to this Ministry, and since the secret services work under conditions of absolute secrecy, it is impossible for them to appear before this Court".

In other proceedings the court has been told that it is forbidden to communicate directly with or request the names of DINA agents with the result that because the court is unable to discover evidence of the involvement of the DINA agents, it is compelled to abandon the investigation.

The Supreme Court or Court of Appeal have power to have the records of the enquiry brought before them, if the parties re-apply to them for a writ of amparo. Yet where the parties have done so, the courts have declared their incompetence to make a decision.

Mr Felipe Gonzalez, First Secretary of the Spanish Socialist Workers Party, after visiting Chile in September 1977, commented in a report to the 1977 Inter-Parliamentary Union conference that:

> "(The High Courts) - as occurred in the judgement of the member of Parliament, Carlos Lorca, and the former member Bernardo Araya - have the files with the evidence 'before them' but do not consider

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(1) Pursuant to an administrative order issued in July 1976 by the Ministry of Justice prohibiting direct official communication with DINA.

(2) ...Report of the Special Working Group of the Inter-parliamentary Union (September 1977). Doc. CL/121/77/5(a).

them; they declare themselves incompetent to decide who is guilty of the detention and, abandoning their oversight functions, order the return of the case to the criminal courts because it is their responsibility to conduct the inquiry."

(ii) Independence of the Judiciary

The conduct of the Judges with respect to the treatment of administrative detainees in Chile is the result of the serious undermining of the independence of the Judiciary since the Military Coup in 1973. The ways in which this has occured include the following:

- Politicisation of the Judiciary

There has been strong political influence in the appointment and promotion of judges, with preference being given to those who have shown themselves sympathetic and even subservient to the government. Judges who have adopted a more critical attitude, or shown a more progressive outlook are liable to be replaced or transferred to less important posts.

The judges of the Supreme Court and of the Court of Appeal are appointed by the President from lists submitted by the Supreme Court; but given the outlook of the Supreme Court as at present constituted, this procedure affords little protection for the independence of the judiciary.

- Non-Compliance by the Executive with Judicial Orders

The lack of independence of the judiciary is exemplified by the handling of any complaint made against members of the security authorities and the latter's contempt of judicial authority - matters which have already been discussed with respect to amparo proceedings.

Instead of the civilian judges themselves carrying out judicial investigations into the conduct of the Security Police, as is required by law, they merely transfer such cases to the military jurisdiction (2), asserting that they have no jurisdiction to investigate matters implicating the security authorities. There is, in fact, no legal authority for this denial of jurisdiction, but no judge dares to exercise his jurisdiction in such cases.

The contemptuous attitude of the military and security authorities is frequently seen in their complete lack of cooperation in judicial enquiries which call into question their own behaviour. In cases where such authorities are requested by a court to carry out investigations on its behalf and to report back to the court, the report, in any matter which could be embarrassing to these authorities or to the government, is inevitably completely negative. This is aided by the concealment or destruction of vital evidence.

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(2) The procedure of military courts was characterised by the United Nations Commission on Human Rights in a recent report on Chile (Doc. E/CN.5/1266 A5P.30), as not measuring up even to "minimum international standards of fair trial as proclaimed by the Universal Declaration of Human Rights ..." Only one of the 7 military judges who are appointed by the military commander, need have legal training; no appeal from the military court is permitted to any court; the prisoner has no right to see a lawyer and regular use is made of admissions of guilt often extracted under duress during interrogation.

-Intimidation of the Judiciary

Subtle measures are adopted to bring pressure upon judges to be compliant with the wishes of the authorities. There has for long in Chile been a system of reporting on the work of the judges, and the Court of Appeal or Supreme Court conduct a yearly review of the work of the judges. Formerly these procedures were directed solely to the professional competence of the judges. Now, however, a strong political element has entered into these matters, and judges who are suspected of being lukewarm in their attitude to the regime are subjected to the harassment and uncertainty of prolonged investigations. For example, if a judge in a labour court is found to have decided more cases in favour of the workman than the employer, this is taken as evidence of bias on the part of the judge. In one case a judge was accused by a leading Chilean newspaper of being a communist, a completely false accusation. The judge was eventually exonerated but only after an investigation by the Supreme Court lasting six months based solely upon the newspaper attack.

II. The Legal Profession

The situation of advocates who have defended political prisoners is precarious. They are subject to intimidation, sometimes by their own College of Advocates which has commenced disciplinary proceedings against advocates purely for political reasons. Lawyers who have represented the families of missing persons have sometimes themselves disappeared.

The situation of defence lawyers in Chile has been tersely described in the following excerpt of a report of the United Nations Ad Hoc Working Group to the U.N. General Assembly in 1976:

> "Immediately after the coup of 1973, there were numerous defence lawyers; by 1974 their number had diminished to the point where, except for a nucleus of approximately 25 attorneys, none remained in Santiago who would undertake the defence of political prisoners. Of these 25 most were employed directly by the Comité de Cooperación para la Paz, while the others were associated with it to the extent of accepting referrals of cases.
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> "The Group has therefore come to the conclusion that the arrest of the 11 members of the Comité and its dissolution in October 1975 were occasioned by the fact that it was the only effective instrumentality for legal recourse.
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> "The void created by the dissolution of the Comité de Cooperación para la Paz has been substantially filled by the creation of the Vicaría General de Solidaridad. Although the Vicaría is solely a Catholic agency, while its predecessor had been ecumenical in nature, it absorbed most of the staff and functions of the Comité.
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> "Many lawyers are hampered in truly pursuing their profession." (3)

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(3) Document A/31/253, para. 290

CZECHOSLOVAKIA

Disbarment Proceedings against Dr. Joseph DANISZ

Dr. Danisz is a 32 year old lawyer who has undertaken the defence of political cases, notably the defence of several Charter 77 signatories, including the writer Jiří Gruša, Ing. Pavel Roubal, Jaroslav Kukal, Tomáš Petřivý and Jiří Chmel. He recently defended Dr. Jaroslav Sabata, a prominent human rights activist, and one of the spokesmen of the Charter 77 group who was sentenced on 11 January, 1979, to nine months in prison on a charge of insulting a government official. The CIJL has been informed that the Committee of the City Association of Lawyers in Prague (Dr. Danisz' employer) has sought the consent of the local trade union committee to which Dr. Danisz belongs, to have him expelled from the legal profession. Although the trade union committee has postponed a decision until further documentary evidence is provided by the employer, it is believed that considerable pressure will be put on it to accede to the employer's request.

The reasons given for this request by the lawyers committee were that during the trial of Jiří Chmel, Dr. Danisz had mentioned the trials of the 1950's and that on another occasion he had referred to the use of physical force against a signatory of Charter 77. However, the daughter of Dr. Sabata believes that the real reason for the attempt to have Dr. Danisz disbarred was because "the authorities are afraid of an uncompromising defence at the trial of my father", and that "in the past year his conduct (in the Charter 77 cases), under the conditions in which Czech lawyers have to work, has been a unique example of courage and professional ethics".

Just before the trial of Dr. Sabata, he was also served with a writ charging him with insulting a public official in 1975. Apparently a member of the police force threatened him with physical violence and when he complained about the threat to the authorities, the complaint was construed as an insult to a public official.

The CIJL considers that the official grounds for disbarring Dr. Danisz are, in themselves, insufficient for depriving him of his means of livelihood and if his disbarment is carried out, it will constitute a serious curtailment of the independence of advocates in Czechoslovakia.

It is essential that advocates should be free to discharge, without fear of consequence and free from any interference, their obligations under the rule of law. Such obligations include their readiness to defend persons associated with unpopular causes and the views of minority groups with which they themselves may be entirely out of sympathy, and to press upon the court any argument of law or fact which they may think proper for the due presentation of the case by them.

The CIJL has appealed to the appropriate Czechoslovak authorities to reconsider the decision to commence disbarment proceedings against Dr. Danisz.

EL SALVADOR

The Judiciary and the Law of Defence and Guarantee of Public Order

The International Commission of Jurists recently published the report* of Mr. Donald T. Fox, a United States Attorney, upon his mission to El Salvador in July 1978 to study the application of the "Law of Defence and Guarantee of Public Order", promulgated in November 1977 by the Legislative Assembly of El Salvador.

He concluded, inter alia, after undertaking a detailed study of the new law that: "The procedure introduced by the law reduces the independence of the judiciary and its capacity for healthy criticism."

Background

The country has been subject to a military government from 1931 to the present day and although there is a political opposition, the electoral laws and the army have made it increasingly difficult for the three main opposition parties to function effectively. As a consequence, the latter decided not to participate in the 1978 general elections. Frustrated younger members of the political opposition have turned to radical left wing terrorist groups, who have claimed responsibility for a series of acts of violence, robberies, kidnappings and killings over the past two years.

As a result of the increasing unrest, the Legislative Assembly voted a state of siege in February 1977 and passed new security legislation in November 1977. The new law specifies 18 categories of offences against the constitutional public order, many of which are "vague and subjective", and increases the severity of punishments over those provided for in the penal code. (1)

The Judiciary

Mr Fox makes the following observations in his report about the impact the new law has had or will have on the independence of the judiciary:

i. The first criminal courts are given jurisdiction to hear cases brought under the new law, putting a heavy additional load upon judges whose work is already burdensome.

ii. The courts are empowered to decree provisional arrest on the basis of "any presumption or indication about the participation of the accused", including extra-judicial confessions.

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(1) According to a study prepared in July 1978 by the Secretariat on Social Communication of the Archbishopric of San Salvador, 715 persons were arrested by the security forces under this law between December 15, 1977 and July 9, 1978. Of these, 590 were freed after, in the majority of cases, being beaten. Two were assassinated and 21 "disappeared".

* Copies of the report are available from the International Commission of Jurists.

iii. The Courts may permit any type of evidence, besides that referred to in the code of Civil Procedure, that will lead to a conviction, including "known or notorious events or actions that belong to the public domain ... if deemed prudent".

With respect to these points, Mr Fox comments that:

"In sum, the procedure established under this law invites an abuse of power on the part of the security forces and makes it exceedingly difficult for the judiciary to live up to its obligations to make an independent and critical evaluation of the proof in a criminal case. The amendment of the Code of Criminal Procedure to permit the use of extra-judicial confessions as a basis for decreeing provisional detention assures that the security forces will attempt to get such a declaration in almost every case. Once this decree is issued, the accused will be legally confined for a substantial period of time in any event. Permitting the court to take into consideration "notorious events" in order to evaluate the offences, presumably to determine whether they are committed with an intent to introduce or support totalitarian doctrines, invites the court to be swayed by the extraneous and inflamed allegations made in the news media."

Mr Fox makes reference to a complaint made to the Supreme Court against judges of the first criminal court demanding an investigation into abuses committed by them. In particular, it is alleged that the judges denied the accused access to counsel, delayed the proceedings and refused to order a medical examination to determine whether the allegation of a prisoner that he had been tortured was true.

Although the judges concerned denied these allegations, two defence lawyers familiar with proceedings under the new law stated that the allegations could be amply supported by evidence.

Mr Fox concluded that:

"If these allegations about the First Criminal Court are valid, the Law of Defence and Guarantee of the Public Order will have already corrupted the judicial process in El Salvador. Whether or not the evidence is found sufficient to support the allegations, the nature of the procedure provided for by the law tends to put the judiciary in the control of the organisations of public security."

I N D O N E S I A

Mr GUMULYO

The CIJL is pleased to learn of the release in July 1978 of Mr Gumulyo, an elderly lawyer who had been imprisoned in Salemba Prison in Jakarta since 1968. His case was taken up by the Centre directly with the Indonesian authorities and was subsequently reported in the second issue of the Bulletin in September 1978.

P A R A G U A Y

Amilcar SANTUCHO

Mr Santucho's case was briefly outlined in the first issue of this Bulletin (February 1978)* He is an Argentine defence lawyer and member of the Argentine League of Human Rights. He is well known in Argentina for his defence of political prisoners.

In April 1975 Mr Santucho left Buenos Aires because of the increasing persecution of lawyers who defended political prisoners (1) and the threats on his life by the Anti-Communist Alliance of Argentina. He went to Paraguay intending to stay there only a short period before going on to Europe. Upon entering Paraguay he was arrested by the Paraguayan police. Although the Paraguayan government claimed shortly after his arrest that he was arrested because he had entered Paraguay with inadequate travelling papers, they later claimed he was in detention under the state of siege Decree as they had discovered evidence proving that he had entered the country with the intention of carrying out subversive activities which would threaten the security of the state. Nevertheless he has never been formally charged or brought to trial. The family of Mr Santucho believes he is being detained because of pressure placed upon the Paraguayen government by the Argentinian government and fear that he may be exchanged at any time for a group of Paraguayan citizens arrested in Argentina.

In August 1975 his parents and his wife went to Paraguay and were permitted to see him in prison. They were informed by the prison officials that he would most likely be released at the end of 1975 and allowed to travel to Europe. His parents are planning to return to Paraguay shortly to appeal directly to the Paraguayan authorities to release him.

The CIJL has written to the Paraguayan government urging his immediate release unless formal charges are preferred against him. Law organisations in various countries have been invited to do likewise.

* Another member of the Santucho family, Manuela Santucho, who is also a lawyer and defender of political prisoners, was arrested by the Argentinian authorities in May 1976 and is now reported missing. Her case is reported in detail in the first issue of this Bulletin.

(1) A study on the situation facing judges and lawyers in Argentina is contained in the first issue of this Bulletin (Vol. 1, No. 1, February 1978).

SOUTH AFRICA

Termination of The Mostert Judicial Enquiry into Exchange Control Contraventions.

In a joint statement to the press, the CIJL and the ICJ expressed their concern at the decision of the South African government in 1978 to terminate the judicial enquiry conducted by Mr Justice Mostert into exchange control contraventions.

The decision was taken after Mr Justice Mostert had disclosed information to the public (despite a request by the Prime Minister, Mr Botha, not to do so) which showed that there had been "an improper application of taxpayers' money running into millions of rands". The evidence clearly implicated many important South African politicians, including the former Prime Minister, Mr Vorster, and Dr. Connie Mulder, who has since resigned as Minister for Plural Relations.

The most serious fact to emerge from the enquiry was that the Government secretly used taxpayers' money in an attempt to buy South Africa's influential English language newspaper group, South African Associated Newspapers, and when this was unsuccessful, to establish a pro-government newspaper, "The Citizen".

The Prime Minister pointed out that the proclamation setting up the Mostert Commission prohibited the publication of information submitted to it. The judge replied that the prohibition applied to other persons but not to the Commission, which meant himself as he was its only member.

In fact, the powers of government to appoint and dismiss commissions are not clearly defined under South African constitutional law. It is submitted that such ambiguity in the law and confusion over the terms of a commissioners mandate should not be used to interfere with an investigation by a Commissioner in order to keep vital facts from the public, particularly where the government has tried to give credibility to an investigation into its own practices by nominating a Supreme Court judge to conduct it.

The ICJ and the CIJL fully support those South African lawyers who publicly opposed the termination of the judge's appointment as Commissioner. Mr Douglas Shaw, Chairman of the General Bar Council, representing all the country's advocates, issued a statement that a judge acting as a commission of enquiry should have the same independence as he does in court and that "in these cases nothing should be done to give the impression in any way that his independence is being interfered with".

S W A Z I L A N D

Intimidation of Defence Lawyers

Since 1973, when King Sobhuza II suspended the consitution and dissolved parliament (1), persons in Swaziland charged with political offences have found it increasingly difficult to obtain experienced criminal lawyers to act for them.

Mr Martin Mabiletsa (2), a defence lawyer, formerly practising in Swaziland and now living in exile in the United Kingdom, alleged in a written report to the CIJL that this situation is the result of the harassment of those advocates (including himself) who have been willing to defend unpopular prisoners. He has provided details of his own case and those of two other defence lawyers, Siph Mdluli (who is now living in the United Kingdom) and Musa Shongwe (in detention in Swaziland).

Mr Mabiletsa and his colleagues have for some time taken briefs from persons unpopular with the government including members of Swaziland's political opposition, South African guerrillas (mainly members of the Pan African Congress - PAC) and South African refugees. Mr Mabiletsa explained that Swaziland's complete economic dependence on South Africa, and its keenness not to expose the Swazi people to the more progressive views of its black neighbours has forced the government to adopt an unfriendly attitude towards freedom fighters and refugees from South Africa,[3] many of whom have been arrested and detained and those associated with them persecuted.

The Response of the Judiciary and the Legal Profession

Mr Mabiletsa commented that his experience of the judiciary in Swaziland is that it is independent and impartial but that there is an increasing tendency by the government to "whittle down the jurisdiction of the High Courts".(4)

However, he was disappointed with the response of the bar association to the recent cases of victimisation of its colleagues. There has been no protest from the other lawyers in support of Musa Shongwe, Sipho Mdluli and himself. Further, the reluctance of the majority of lawyers to take an unpopular cases, has meant that those who confront the government in the court room find it almost impossible to obtain adequate legal representation.

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(1) Pursuant to the King's Proclamation of April 12, 1973: "All laws, with exception of the Constitution hereby repealed, shall continue to operate with full force and effect and shall be construed with such modifications, adoptions, qualifications and exceptions as may be necessary to bring them into conformity with this and ensuing decrees." Since then, King Sobhuza II has governed the country on the basis of traditional concepts of royal prerogatives and elders' advice.

(2) Mr Mabiletsa is a South African refugee and former advocate of the Supreme Court of South Africa. He left South Africa for Swaziland in 1976.

(3) He mentions ... cases since 1963 where refugees have been abducted by the South African Government security police without protest from the Swaziland government.

(4) He cites, as an example, the creation of a citizen's tribunal in 1972 whose decisions are not subject to the review of a court of law.

Details of the three cases are as follows:

Martin MABILETSA

At the beginning of 1978, Mr Mabiletsa successfully defended a suspended director of the Swaziland Commercial Board, a Mr Lawrence Mayisela, who had been charged with theft from the Board. Immediately afterwards, Mr Mabiletsa was warned by the Commissioner of Police, T.U. Mtetwa, that he was "in danger".

On April 7, 1978, he and fifteen members of the Pan-African Congress were served with notices under the Immigration Act (1963) of Swaziland, declaring them Prohibited Immigrants. They were subsequently arrested and detained in death cells at the Matsapa Central Prison. The detention was made pursuant to a Royal Proclamation passed in April 1973, which permits the security police to hold detainees for up to 60 days without trial. (5)

According to Mr Mabiletsa, their detention did not comply with the Immigration Act. Moreover, he was not permitted to see his lawyer (in this case Musa Shongwe) and he was informed that his case would not go to trial.

In November 1978, Mr Mabiletsa and his family were granted political asylum in the United Kingdom where they now reside.

Sipho MDLULI

Mr Mdluli, who has now been granted political asylum in the United Kingdom, recently went into exile in South Africa in May 1978, after he was told that a detention order had been made against him and members of the PAC, some of whom he had recently defended. The government suspected him of associating with the activities of his clients.

In a letter to the Attorney-General of Swaziland writtenfrom South Africa, Mr Mdluli complained that he had been constantly harassed by the police and threatened with detention. He declared that "except for representing certain members of the PAC in my professional capacity as an attorney I never had any dealings personally or otherwise with the PAC in respect of the individual members of the said organisation. ... It will be a sad day in Swaziland when legal practitioners cannot represent a client without fear of being identified with his client's cause."

Musa SHONGWE

Mr Shongwe first became unpopular with the Swaziland government after his vigorous defence of Mr Ngwengo, a Swazi national and member of the political opposition, who had been declared an illegal immigrant. (6) Mr Shongwe successfully petitioned the Supreme Court of Swaziland to prevent the government from illegally deporting Mr Ngwengo to South Africa. Subsequently he

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(5) A detainee can be held this way for an unlimited period of time if fresh orders are continuously served on him before the expiry of the previous order.

(6) A citizen tribunal was created in Swaziland in 1972 which has the power to deprive persons of their citizenship who are not born in Swaziland or those whose birth there is deemed doubtful. Ref. note 4. Supra. p.14.

was warned about acting for those who the government 'sought to prosecute."

In August 1978, Mr Shongwe was detained by the security police under the 60 day detention order. Although no reasons were given by the police for his arrest, it is believed that it was linked with his participation in the defence of three highly placed members of the PAC. During the trial he made an application of recusal against the presiding judge - a white South African - and submitted that the charges against the defendants were spurious as they conflicted with government policy. In support of this contention he argued that Swaziland was a party to the OAU declaration allowing freedom of movement to "Freedom Fighters" who had entered Swaziland in pursuance of this agreement.

It is clear that this submission acutely embarrassed the government as the trial received wide publicity. However, Mr Mabiletsa considers that Mr Shongwe's willingness to defend the members of the PAC was sufficient in itself to anger the government and caused them to suspect that he was involved in their activities.

The CIJL wrote to the Minister of Justice of Swaziland in October 1978 expressing its concern at the detention of Mr Shongwe, pointing out that the power to arrest and detain persons without charge for up to 60 days is necessary in certain circumstances but that the need for ensuring the independence of the legal profession requires that this power should be very sparingly used against practising advocates.

The Centre has asked the Minister for further information about the present situation of Mr Shongwe. No reply has yet been received.

T U N I S I A

In September 1978 an Amnesty International Research Assistant, Ms. June Ray, was sent to Tunis to observe the trial before the State Security Court of 30 trade union leaders arrested in January and February 1978 on a wide range of charges relating to a one day general strike on January 26, 1978. The strike, the first of its kind in Tunisia since independence in 1956, produced armed clashes between the strikers, the police and the armed forces, and many arrests followed. Twenty-four defendants received sentences ranging between 10 years hard labour and 6 months imprisonment. The remaining six were acquitted.

The Observer was not permitted entry into the court room to observe the proceedings. She concluded, however, from information obtained from those who did attend the trial that "the rights of the defence in this trial were gravely abused".

In particular she made the following observations:

- Despite the fact that the dossier against the defendants was four or five thousand pages long, the court granted the defence lawyers only two weeks adjournment to study it and not two months asked for by the defence.

- One of the defence lawyers, Mohamed Ballalouna, a former Minister of Justice and former President of the Tunis Bar Association, tried to make several submissions to the court including the request that families of the defendants be allowed into the court room. The President of the court repeatedly interrupted Ballalouna and threatened him twice to withdraw. Finally he did withdraw along with all 25 lawyers for the defence. The President thereupon announced sanctions against Mohamed Ballalouna banning him from the Bar for two years under Article 17 of the 1968 law instituting the Court of State Security. A second lawyer, Noureddine Boudali, received a caution for the same reason.

- Court lawyers were appointed but the defendants and their new counsel refused to conduct the defence as they had been given no opportunity to consult with each other and the lawyers had not opportunity to peruse the trial dossier.

The Amnesty International Observer concluded that: "The lawyers for the defence originally chosen by the detained trade unionists were given insufficient time to study the case dossier. It is therefore obvious that the lawyers appointed by the court who had only a matter of hours to read the dossier and no opportunity to consult with their clients, were quite unable to act on their behalf, and this lack of consultation effectively prevented the trade unionists from defending themselves. Thus, while three of the charges against the trade unionists provided for the death penalty, the conditions of the trial provided no opportunity to put an adequate case for the defence, despite the fact that Article 12 of the Tunisian Constitution guarantees "the necessary conditions for defence". In short, the proceedings fell far short of internationally recognised standards of impartiality as set down in Article 14 of the International Covenant on Civil and Political Rights, which the Tunisian Government ratified in 1969."

YUGOSLAVIA

Vitomir-Vico DJILAS

A lawyer, Vitomir Djilas arrested on March 3, 1977, was tried by the Titograd District Court on May 6, 1977. He received a two year prison term. Pursuant to Article 118 of the Yugoslav Penal Code (hostile propaganda) he was accused by the court of 'maliciously and untruthfully representing the situation in the country'. This charge was based on a 45-line letter which Vitomir Djilas had written, but never sent, to the official Yugoslav newspaper Politika. In this letter Mr Djilas expressed his support for Eurocommunism, and suggested that Yugoslavia's official support for this movement, which is limited to the rejection of Soviet hegemony, should be extended to include the Eurocommunists' proclaimed acceptance of democratic institutions (freedom of speech, press, political parties).

The public prosecutor also accused Mr Djilas of hostility to the President of the State, on the basis of a calendar which was found with the picture of President Tito cut out.

Further, the judge himself tried to prove Mr Djilas' hostility to the Yugoslav politcial system by asking him why he was not a member of the Communist Party. On the advice of his defence counsel, Mr Djilas refused to answer this question.

Dissident sources allege that the charges against Mr Djilas were largely motivated by the fact that he is a cousin of the well-known Yugoslav writer Milovan Djilas, once Tito's closest colleague and one of the country's foremost leaders, who spent ten years in prison as a result of his opposition to Tito's policies and the publication in America of his book The New Class, which attacked the communist system and its leaders.

N O T E S

LEGAL EDUCATION IN THE FIELD OF HUMAN RIGHTS

At the 1962 legal conference sponsored by the ICJ in Rio de Janeiro, Brazil, the following conclusions were enunciated concerning the teaching of law:

> "To keep the action of the executive within the limits of the Rule of Law, it is necessary for all branches of the legal profession - judges, teachers and practitioners - to play a significant role in the community. This is particularly important in communities where there is a rapid and profound process of change. For the legal profession to be able to perform its social function satisfactorily it is necessary that the teaching of law should:
>
> (i) stress the study of the principles, institutions and proceedings that are related to the safeguarding and promotion of the rights of individuals and groups;
>
> (ii) imbue students with the principles of the Rule of Law, making them aware of its high significance, emphasizing the need of meeting the increasing demands of social justice, and helping develop in the student the personal qualities required to uphold the noble ideals of the profession and secure the effective enforcement of law in the community."

It is equally important that the teaching of human rights should continue to be offered to those who have passed out of law school and are actively engaged in their defence and enforcement. The Paris Bar has taken an important step in fulfilling this need.

Earlier this year the President of the Paris Bar, Mr Pettiti, announced that the Bar had established, in collaboration with the United Nations Educational, Scientific and Cultural Organisation (UNESCO), an institute of human rights for the legal profession. Mr Pettiti described the objectives of the centre as providing judges and lawyers with a grounding in the theory and practice of human rights.

At the official opening of the institute, the Director General of UNESCO, Mr Amadou-Mahtar M'Bow, stated that:

> "The first task is to bring human rights down from the realm of abstraction and ideology to which they have long been confined, and to give them force of law by making them directly applicable. Next, the standards laid down by the principles on which they are based, the obligations which they entail and the legislation giving them effect must, as a matter of importance, be made known to all those whose duty it is to supervise the national enforcement of human rights or participate in their defence. To help to train or to inform more effectively those who defend the individual and those who implement and enforce the law, by introducing them to a subject which is complex because its legal content is relatively new and at the same time highly ethical - this

seems to me to be the objective pursued by the Institut de formation en droits de l'homme du Barreau de Paris."

The Institute has included the following topics in its program:

- the concepts and categories of human rights and their application within Europe and internationally;
- equality in the administration of justice;
- defence rights;
- guarantees of individual liberties;
- the right to privacy.

Among those who have been invited to give lectures at the Institute are: Mr Karel Vasak, the Director of the Human Rights Division of UNESCO; Mr Pierre-Henri Teitgen, Judge of the European Court of Human Rights and Mr Robert Lecourt, former President of the European Court of Justice.

U.N. SEMINAR ON THE ROLE OF NATIONAL INSTITUTIONS IN THE PROTECTION OF HUMAN RIGHTS

To commemorate the 30th anniversary of the signing of the Universal Declaration of Human Rights, the United Nations organised a seminar on the role of national institutions in the protection of human rights. Lawyers, law professors, public servants and members of non-governmental organisations concerned with human rights protection attended the seminar, which was held from 18 - 29 September, 1978.

The role of the judiciary and the legal profession were among the subjects discussed under the heading "Constitutional and Protecting or Remedial Institutions".

The Judiciary

Mrs Erika Daes (Greece) opened the discussion by calling attention to Article 8 of the Universal Declaration of Human Rights which provides that everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law.

Many participants regarded the independence of the judiciary as the most important guarantee of human rights. The following were submitted by delegates as some of the essential requirements for an independent judiciary:

"Judges should have security of tenure and an adequate salary which should not be altered to their disadvantage.

They should not take part in political and commercial activities.

They should not be removed, except in cases of physical or mental disability.

They should be provided with adequate and competent staff to discharge their functions.

They should not be granted personal privileges."

It was stressed that the separation of powers between the legislature, the executive and the judiciary was one of the means to prevent the abuse of power. It was essential that the persons responsible for applying and interpreting human rights, and for supervising other authorities, should be protected from pressures and approaches from all other authorities, groups or individuals.

The ICJ contributed to the debate on the judiciary by stressing the points made above, with the further observation that in countries undergoing social change the judiciary must be able to understand the broad policies of government and the fundamental assumptions that underlie the law. If the judiciary remains out of touch with government policy and public opinion, the executive is bound to see it as a reactionary body. In this way, confidence in the judiciary is diminished.

Lawyers and Legal Aid

Mrs Deas also introduced the debate on the section entitled "Legal and social aid arrangements" by stressing the importance of legal aid in the protection of human rights and the role the legal profession, in particular the role the advocate can play in the protection of human rights:

It was incumbent upon every advocate to protect the rights of his client without any discrimination and lawyers should realise the importance of making a contribution to the protection and promotion of human rights through their statements, lectures, publications and writing in general. She stressed the importance of an independent legal profession, and urged governments to facilitate the role of lawyers in the field of human rights. Detainees and prisoners should be free to chose their own advocates and governments should facilitate the task of the advocate by allowing him access to all documents relevant to the case concerned.

A competent and courageous bar as an important factor in the protection of human rights was also stressed.

The view was expressed that in many countries efforts to protect the human rights of citizens have encountered numerous problems as a result of the non-cooperation of lawyers who, instead of providing aid to the citizen, were more concerned about their own interests.

The ICJ made the following representations to the seminar with respect to legal aid and the legal profession:

It stressed the importance of the right of access to the courts and a fair hearing and that no-one should be prevented by economic or social obstacles from pursuing and defending his rights before the courts. It also stressed the importance of creating public bodies to provide legal services to indigent citizens and suggested that legal aid clinics, organised by universities and bar associations, could provide an inexpensive and effective means of making legal aid available to citizens. It drew the participants' attention to the existence of the International Legal Aid Association which promotes legal aid throughout the world and provides lawyers and lawyers' organisations with free advice and information.

With respect to the independence of the legal profession, the ICJ expressed its concern that in some countries governments linked lawyers who defended political offenders with their cause and considered them enemies of the state. Solidarity of the local bar associations and international pressure and education are necessary to correct this dangerous misconception of the role of the advocate.

NIGERIAN ELECTORAL LAWS

The Nigerian Bar Association Criticises an Amendment to the Nigerian Electoral Laws

A recent amendment to the Nigerian Electoral Decree No. 73 (1977) has been criticised in a statement made by the Nigerian Bar Association and signed on its behalf by the president, Mr B.O. Benson, and the publicity secretary, Mr Lai Joseph. The amendment is described as " a serious violation of fundamental human rights of Nigerian citizens".

The amendment set a deadline (December 18, 1978) for political parties to submit applications to the Federal Electoral Commission to have themselves registered and also provided that no law court could entertain any question pertaining to the validity or otherwise of the registration of any association as a political party.

The Association considered that this change in the electoral laws has produced an unnecessary and unjustifiable curtailment of the right guaranteed in the constitution to all citizens to form a political party of their choice and in their own time.

The Association also criticised the erosion of the jurisdiction and independence of the judiciary. The curtailment of judicial review of the administration of the electoral decrees constituted a dangerous erosion of the sacred rights and duties of the courts, to which the public rightly regard as their last recourse in obtaining justice.

The Bar Association regretted that on other occasions it has had to voice its concern and dismay at the ouster of the jurisdiction of the courts affecting the fundamental rights of Nigerian citizens.

STATE IMMUNITY FROM JUDICIAL ACTS

R.L. Maharj v The Attorney General of Trinidad and Tobago (1)

Most states exempt themselves by statute from liability for the wrongful acts of their judicial officers committed in an official capacity. This principle was established not to bestow a privilege on the state, but as an assertion of the independence of the judicial arm of government and is therefore eminently sound.

A.R. Wade says that "the relationship between the (state) and judges is entirely unlike the relationship of employer and employee on which liability in tort is based. The master can tell his servant not what to do, but how to do it. The (state) has had no such authority over the judges ... their independence is the keystone of the rule of law, and if they are independent, no--one else can be vicariously answerable for any wrong that they may do." (2)

It is also well established that where a judge acts within his jurisdiction, "no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office". (3)

"It is better to take the chance of judicial incompetence, irritability or irrelevance than to run the risk of getting a bench warped by apprehension of the consequences of judgments which ought to be given without fear or favour." (4)

However, the judicial committee of the Privy Council recently held in the case of R.L. Maharaj v The Attorney General of Trinidad and Tobago that these principles cannot shield the state from liability for judicial acts which contravene a constitutional right to which remedies are attached for such contravention.

R.L. Maharaj, a barrister, was wrongly committed to prison for 7 days for contempt of court. The Privy Council, in the initial appeal against the committal order, held that the committing judge did not make plain to him the specific nature of the contempt with which he was being charged which should be done before a person alleged to have committed contempt can properly be convicted and punished. (5)

Nor did he give the appellant adequate opportunity to answer the charge. This amounted to a breach of Section 1 of the Constitution of Trinidad and Tobago which provides, inter alia, that:

> "1. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason or race, origin, colour, religion or

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(1) Judgment delivered by the Judicial Committee of the Privy Council on 27 February, 1978.

(2) Wade, Administrative Law, Oxford, Clarendon Press, 1961, at 219.

(3) Anderson v Gorrie (1895), Q.B. 668, 671.

(4) Winfield on Tort, 8th Edition, at 715.

(5) (1977) I ALL E.R. 411

sex, the following human rights and fundamental freedoms, namely:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

... "

The appellant thereupon applied to the High Court of Trinidad and Tobago for redress in the form of monetary compensation pursuant to Section 6 (6) of the Constitution. The High Court rejected his claim holding that pursuant to Section 3 (7) of the Constitution, Section 1 did not apply in relation to any law in force in Trinidad and Tobago at the commencement of the Constitution. Under the existing law, which remained unaltered, a judge was wholly immune from liability for acts done in his judicial capacity and the state was not vicariously liable for such acts. The appellant sought to have this decision reversed by the Privy Council.

In reversing the Court of Appeal's decision, Lord Diplock, who delivered the majority judgment of the Court, held that:

"The Crown was not vicariously liable in tort for anything done by Maharaj J. while discharging or purporting to discharge any responsibilities of a judicial nature vested in him; nor for anything done by the police or prison officers who arrested and detained the appellant while discharging responsibilities which they had in connection with the execution of judicial process. S.4(6) of the State (formerly "Crown") Liability and Proceedings Act, 1966, so provides.

.....Nevertheless ... this claim does not involve any appeal either on fact or on substantive law from the decision of Maharaj J. that the appellant on 17 April, 1975, was guilty of conduct that amounted to a contempt of court. What it does involve is an inquiry into whether the procedure adopted by that learned judge before committing the appellant to prison for contempt contravened a right, to which the appellant was entitled under S.1(a), not to be deprived of his liberty except by due process of law."

---

(6) Section 6 provides in part:

6.(1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or section of this Constitution has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) thereof,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections or section to the protection of which the person concerned is entitled...

(7) S3: "Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution. ... "

..."The order of Maharaj J. committing the appellant to prison was made by him in the exercise of the judicial powers of the State; the arrest and detention of the appellant pursuant to the judge's order was effected by the executive, arm of the State. So if his detention amounted to a contravention of his rights under s.1(a) it was a contravention by the State against which he was entitled to protection".

Lord Diplock further held that: "no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under s.6(1) for what has been done by a judge is a claim against the State for what has been done in the exercise of the judicial power of the State. This is not vicarious liability; it is a liability of the State itself. It is not a liability in tort at all; it is a liability in the public law of the State, and not of the judge himself, which has been newly created by s.6(1) and (2) of the Constitution".

A R T I C L E

CERTAIN ASPECTS OF THE EROSION OF THE INDEPENDENCE OF JUDGES AND LAWYERS IN TODAY'S SRI LANKA

by T.S. Fernando *

The Supreme Court was established in 1802 as the only superior court of record in the country, and continued in existence under successive Charters of Justice. When the Ceylon (Constitution) Order in Council of 1946 came into force, the Supreme Court was in existence in terms of the Courts Ordinance of 1889. The Courts Ordinance provided that the Supreme Court shall consist of a Chief Justice and eight Puisne Justices (later increased to ten) who shall be appointed by Letters Patent to be issued under the Public Seal of the Island by the Governor-General. It was one of the terms of the Letters Patent that no person who had held permanent office either as Chief Justice or as Puisne Justice may appear, plead or act as an advocate or proctor in any court in Ceylon. The Constitution guaranteed security of tenure in the following terms:

"52. (2) Every Judge of the Supreme Court shall hold office during good behaviour and shall not be removable except by the Governor-General on an address of the Senate and the House of Representatives.

(3) The age for the retirement of Judges of the Supreme Court shall be sixty-two years: provided that the Governor-General may permit a Judge of the Supreme Court who has reached the age of sixty-two years to continue in office for a period not exceeding twelve months.

(4) The salaries of the Judges of the Supreme Court shall be determined by Parliament and shall be charged on the Consolidated Fund.

(5) Every Judge of the Supreme Court appointed before the date on which this part of this Order comes into operation and in office on that date shall continue in office as if he had been appointed under this Part of this Order.

(6) The salary payable to any such Judge shall not be diminished during his term of office."

In 1971, Parliament abolished the right of appeal from the Supreme Court to the Judicial Committee of the Privy Council in London, and established a Court of Appeal within Ceylon to exercise substantially the same jurisdiction as was previously exercised by the Judicial Committee. The Court of Appeal Act, No. 44 of 1971, provided that the Court shall consist of a President and of not more than six other Judges, all of whom shall be appointed

* Formerly respectively Attorney-General, President of the Court of Appeal and High Commissioner of Sri Lanka.

to their offices by Letters Patent to be issued under the Public Seal of the Island by the Governor-General. The Act further provided that every Judge shall be appointed for a period of five years and shall hold office during good behaviour and shall not be removable except by the Governor-General on an address of the House of Representatives (the Senate having been abolished by then). The Act also provided that the salaries of Judges shall be determined by Parliament and shall be charged on the Consolidated Fund, and that the salary payable to any Judge shall not be diminished during his term of office.

On May 22, 1972, Sri Lanka declared itself a Republic and a new Constitution drafted by a Constituent Assembly was brought into operation. In regard to the Judicature, this new Constitution contained the following provisions:

"121 (1) Subject to the provisions of the Constitution, the National State Assembly may by law create and establish institutions for the administration of justice ...

(2) Unless the National State Assembly otherwise provides, the Courts established by the Court of Appeal Act, No. 44 of 1971, and ... the Courts Ordinance ... shall continue to function, subject to the provisions of the Constitution. Such courts ... shall be deemed, mutatis mutandis, to derive their jurisdiction and powers under the Constitution.

122 (1) The Judges of the Court of Appeal, of the Supreme Court or of the Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding or substantially similar to the powers and functions exercised and performed by the aforesaid courts shall be appointed by the President.

(2) Every such Judge shall hold office during good behaviour and shall not be removed except by the President upon an address of the National State Assembly.

(3) Unless the National State Assembly otherwise provides, the term of office of a Judge of the Court of Appeal shall be as provided by the Court of Appeal Act, No. 44 of 1971, and the age of retirement of Judges of the Supreme Court shall be sixty-three years.

(4) The salaries of such Judges shall be determined by the National State Assembly and shall be charged on the Consolidated Fund.

(5) The salary payable to or the age of retirement of any such Judge shall not be reduced during his term of office.

132. Until the National State Assembly otherwise provides, every person who immediately prior to the commencement of the Constitution (a) held judicial office in any court referred to in subsection (2) of section 121; ... shall continue to hold such office ... under the same terms and conditions.

In November 1973, the National State Assembly enacted the Administration of Justice Law, No. 44 of 1973. That law sought to repeal the Court of Appeal Act and the Courts Ordinance and to establish a new system of courts in Sri Lanka. There was no provision for a second appeal. The Supreme Court was to be the single appellate tribunal. A High Court was created to exercise the original criminal jurisdiction of the former Supreme Court. The law provided

that the new Supreme Court shall consist of a Chief Justice and of not less than ten and not more than twenty other Judges. It also provided that no person who had held permanent office as a Judge of the Supreme Court may appear, plead or act as an attorney-at-law in any court established under that Law without the consent of the President. The age of retirement of Judges was fixed at sixty-three years.

The Administration of Justice Law was brought into operation on January 1, 1974. The full complement of twenty-one Judges was appointed to the Supreme Court. They included all the existing Judges of the Court of Appeal and of the Supreme Court, and Commissioners of Assize who were within the age limit prescribed in the Administration of Justice Law. Three of the five Judges of the Court of Appeal who were over the age of sixty-three years, but who had about three of their five-year terms of office still to run were excluded. Section 8 (3) of the Administration of Justice Law which fixed the retirement of Judges of the new Supreme Court at sixty-three years appeared to be in conflict with Section 122 (5) of the Constitution which stated that the age of retirement of a Judge shall not be reduced during his term of office. This particular matter, however, was not argued before the Constitutional Court which examined the Bill for constitutionality prior to its presentation in the National State Assembly. Nor did the Constitutional Court advert to it in its judgment. For the first time in Sri Lanka, three judges of the highest court in the land were technically removed from office by the simple device of abolishing their court. The ostensible reason for their "removal" was that they were over the new age limit fixed by the Administration of Justice Law. However, it is significant that the original draft of the Administration of Justice Bill prepared in 1972 provided for the absorption of all existing judges irrespective of their ages; that in December 1972, the President of the Court of Appeal who was also at that time a member of the Constitutional Court resigned from that Court on account of certain remarks made by the Minister of Justice in the National State Assembly; and that in the final draft of the Bill gazetted in mid-1973, the provision relating to absorption irrespective of age was dropped.

In July 1977, the Sri Lanka Freedom Party led by Mrs Bandaranaike was defeated at a general election, and she was succeeded as Prime Minister by Mr J.R. Jayawardene, leader of the United National Party and Leader of the Opposition in the previous National State Assembly. In February 1978, Mr Jayawardene assumed the office of President of the Republic following a constitutional amendment which combined the powers of the Prime Minister and of the President. In August 1978, a new Constitution was adopted by the National State Assembly in which the government, with 141 members, commands a five-sixth majority. The new Constitution sought to establish a new Supreme Court and to vest the jurisdiction of the out-going Supreme Court in a new Court of Appeal. It did that by abolishing the then existing Supreme Court. The new Supreme Court is to serve as a court of second appeal and to exercise certain new jurisdictions in respect of fundamental rights and certain constitutional matters. Section 119 of the new Constitution provides that this new Supreme Court shall consist of a Chief Justice and of not less than six and not more than ten other judges, while Section 137 provides that the Court of Appeal shall consist of the President of the Court of Appeal and not less than six and not more than eleven other judges. Judges of both courts are to be appointed by the President, and the age of retirement is fixed at sixty-five years for the Judges of the Supreme Court and sixty-three for the Judges of the Court of Appeal. All the other usual provisions designed to guarantee security of tenure have been included. In the chapter headed "Transitional Provisions", the Constitution declares that every person who immediately before the commencement of the Constitution held office as a judge or was in the service of the Republic, any local authority or any public corporation, shall continue in such service or hold such office under

the same terms and conditions, subject to one exception. That exception is contained in Section 163 which reads as follows:

> "163. All Judges of the Supreme Court and the High Courts established by the Administration of Justice Law, No. 44 of 1973, holding office on the day immediately before the commencement of the Constitution shall, on the commencement of the Constitution, cease to hold office."

The Constitution of the Democratic Socialist Republic of Sri Lanka (such is the name by which the latest Constitution has been proclaimed to the public) was brought into force by the President on September 7, 1978. On the day previous to that, nineteen persons held office as Judges of the Supreme Court and seventeen as Judges of the High Court.

On September 7, 1978, the President's office announced the appointments of seven judges to the Supreme Court, twelve to the Court of Appeal (six of them being newly appointed) and fourteen to the High Court (five of them being newly appointed).

For the second time in less than five years, the Government of the day had succeeded in "removing" certain judges of the highest court in the land, not by resorting to the constitutional method which is available whenever a judge transgresses the rule of "good behaviour", but by the simple device of abolishing one Supreme Court and creating another Supreme Court in its place.

On the previous occasion, the introduction of a new age-limit was trotted out as the reason for the government's unprecedented act. On this later occasion no reason or explanation has even been attempted. Not even a Nixonian theory has been advanced, but there no attempt was ever contemplated of removing judges who had the Constitutional guarantee of a life tenure, if any of them so desired.

The eight Judges of the Supreme Court who have been "removed" from office are:

Mr Justice Pathirana - age 57 years
Mr Justice Rajaratnam - age 57 years
Mr Justice Udalagama - age 59 years
Mr Justice Wijesundera - age 58 years
Mr Justice M. Perera - age 55 years
Mr Justice Tittawella - age 55 years
Mr Justice Walpita - age 59 years
Mr Justice Gunasekera - age 56 years

One of the above Judges has applied to the President for permission to resume his legal practice. It is understood that permission has been refused.

Five Judges of the High Court have also been "removed" from office although the High Court itself continued to exist in terms of the Administration of Justice Law, No. 44 of 1973, under which it was created. They are:

Mr J.R.M. Perera - age 53 years
Mr C.N. de S.J. Goonewardene - age 55 years
Mr T.J. Rajaratnam - age 59 years
Mr A.A. de Silva - age 47 years
Mr B. Senaratne - age 58 years

Speaking in the National State Assembly on August 3, 1978, in the course of the debate on the Constitution, Mrs Bandaranaike, Leader of the Sri Lanka Freedom Party and former Prime Minister, said:

> "We object to the removal from office of the Judges of the Supreme Court and of the High Court. Every Constitution has guaranteed the Judges of our highest courts security of tenure and provided that they may be removed by Parliament only for proved misconduct. Every government has so far honoured this provision whenever it has sought either to amend or replace a Constitution. For the first time, the present government is seeking to remove all the Judges of the two highest courts in the country in order to constitute new courts of a particular political flavour. This blatant and gross interference with the judiciary can only result in creating courts whose term of office would necessarily have to be limited to that of the government itself."

Mrs Bandaranaike's Party itself interfered with the settled notion of the Independence of the Judiciary when it brushed aside the importance of the security of tenure which the law had accorded to three Judges of the Court of Appeal referred to above. The new government, probably believing that two wrongs may constitute one right, has intensified that interference by removing a number of Judges from both the Supreme Court and the High Court long before the date of retirement of the judges affected.

Having regard to what has been done by the present government in September 1978 and the previous government in November 1973, it will be apparent that there has been, and there may continue to be a serious erosion of the independence of the Judiciary in Sri Lanka.

TO: The Secretary
C.I.J.L.
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(Switzerland)

I/We wish to contribute to the Centre for the Independence of Judges and Lawyers, and agree to make an annual Contribution of SFr. ..... (Contributors paying SFr. 30.-- per annum or more will receive the BULLETIN and any special reports of the Centre free of charge by surface mail, and those paying SFr. 40.-- or more by air mail).

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Country: .....

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