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

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

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

Affiliation

Inquiries have been received from associations wishing to affiliate with the Centre. The affiliation of judges', lawyers' and jurists' organisations will be welcomed. Interested organisations are invited to write to the Secretary, CIJL, at the address indicated below.

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*Inquiries and subscriptions should be sent to the
CIJL, P.O. Box 120, CH-1224 Chêne-Bougeries/Geneva, Switzerland*

CASE REPORTS

I N D I A

The Independence of the Judiciary in India

In recent years the judiciary of India has been the subject of a series of controversies concerning the appointment, transfer and promotion of judges. These problems begin in the early 1970's, a period marked by a concerted governmental effort to realise fundamental and urgently needed social and economic reforms. Legislation was passed on land reform, the nationalisation of banks and the abolition of the privy purses of hereditary princes, resulting in conflicts between the legislature and a Supreme Court anxious to protect the constitutionally guaranteed right to property. This was a fertile breeding ground for criticisms of judicial conservatism and controversies regarding judicial independence. These problems are not, of course, unique to India. President Roosevelt's threat to alter the composition of the United States Supreme Court when it blocked key elements of this New Deal programme was an earlier example of this kind of conflict.

The fact that considerable controversy has surrounded the judiciary is in itself cause for concern. A leading constitutional authority has observed that, having control over neither the financial resources, the administrative apparatus nor the armed might of the state, the judiciary is in a sense the weakest branch and "must rely on the support of the people by virtue of its moral authority". *) Responsibility for damage done to the reputation of the judicial system lies not only with the government, but also with lawyers, journalists and politicians who have exploited controversies regarding the judiciary for political ends and even to members of the judiciary who have needlessly added fuel to them. The Bar Council of India Trust deserves recognition for its effort to study the problem in a serious and impartial way by convening a three day national seminar in Delhi in October 1980.

*) H.M. SEERVAI, The Emergency, Future Safeguards and the Habeas Corpus Case, Bombay 1978, p. 126

One aspect of the problem of judicial independence in India is "supercession", that is the naming of a judge other than the most senior judge as Chief Justice of a given court. Chief Justices of both the Supreme Court and the High Courts are appointed by the President, who acts in such matter upon the recommendation of the Prime Minister. The constitution requires no consultation in the appointment of the Chief Justice of the Supreme Court leaving the decision entirely within the discretion of the executive. However, in the years following independence strict adherence to seniority in promotion to this post had become customary. Chief justices tend to hold this post for relatively short periods since retirement is mandatory at the relatively early age of 65 for the Supreme Court and 62 for the High Courts.

In 1973 the convention of promotion by seniority was disregarded for the first time. The government declared that seniority should not be the sole criterion applied and by-passed the three most senior members of the Supreme Court in appointing a new Chief Justice. While one minister defended the appointment in terms of merit promotion, another stated that the government was entitled to select a Chief Justice whose philosophy correspond with its own in order to reduce conflicts between the parliament and the Supreme Court.

Just prior to the announcement of this appointment in "the Fundamental Rights Case" *) the Supreme Court had approved a substantial package of reform legislation but struck down a proposed constitutional amendment which would have eliminated its power to review conflicts between reform legislation and fundamental constitutional rights. The three superceded judges, unlike the preferred judge, had all decided against the government in this case. This fact contributed to the impression that 'merit selection' was a cloak for rewarding or punishing members of the Court.

*) Kesavananda Bharati v. State of Kevada, A.I.R. 1973 S.C., 1461

The next deviation from the principle of promotion based on seniority did nothing to dispel this impression. In January 1977 the second most senior member of the Supreme Court was named Chief Justice. The most senior judge had been the sole dissenting judge in the controversial decision some months before upholding the suspension of habeas corpus during the then prevailing state of emergency. *) While only days before his appointment the second most senior judge had publicly praised the Prime Minister at a time when public controversy about her handling of the 1975-77 emergency was at its peak. In both cases the appointments were the subject of protests by the bar as interferences with judicial independence. It is not of course intended to imply that either of the Chief Justice who benefited from this policy consciously curried favour with the government or were unworthy of their posts, but rather to draw attention to the inherent dangers of the practice.

The value of merit selection in nomination to the Supreme Court or any other court - is self evident. However, the same arguments do not necessarily apply to the promotion of a judge who is already a full member of the court. The functional differences between the Chief Justice and his colleagues are principally two: he consults with the President regarding the appointment of Supreme Court justices, High Court justices and State chief justices, and he controls the assignment of Supreme Court justices. The Supreme Court is comprised of eighteen judges and cases are heard by panels of various sizes, which lends considerable importance to the power to influence the composition of panels.

In many democratic systems, even where the post entails comparable authority over the composition of courts, the governments right freely to choose the Chief Justice is recognised. In India this form of executive influence over the judiciary has many critics, including the Law Commission of India which recommends that departure from the principle of seniority be made only after consultation with and

*) "The Habeas Corpus Case", A.D.M. Jabalpur v. Shivkant Shukla, A.I.R. 1976 S.C. 1207

agreement by the majority of members of the Court. Whether one favours the principle of merit selection or promotion by seniority, experience demonstrates the danger of exercising the power of appointment in such a way as to undermine public confidence in the independence of the judiciary.

The coincidence of the 1977 supersession with the new Chief Justice's public homage to the Prime Minister illustrates another factor which has tarnished the image of the Indian judiciary: the tendency of some judges not to maintain the necessary aloofness from partisan politics. An earlier example is the decision of a Chief Justice in 1967 to resign and seek national political office, campaigning in part on the strength of his record as a member of the Court. More recently a letter of fulsome praise and congratulations addressed by a member of the Supreme Court to Mrs Gandhi after her election in 1980 caused considerable controversy. The letter, which was intended to remain confidential, was written to seek support for the implementation of a report on legal assistance for the poor made by a Commission which he had chaired. The report had been ignored by the previous administration and he was seeking the new government's support for urgently needed reform in this area. Despite these intentions, the letter and the controversy it provoked demonstrate the danger of any departure from strict political neutrality.

Another source of criticisms has been close social contacts with leading politicians and members of the government, a practice which in itself jeopardises the collegiality which should prevail among members of the judiciary and undermines the appearance of judicial independence. The problem is not of recent origin. Twenty years ago the fourteenth report of the Law Commission of India warned

"Though a few judges still maintain the old isolation a large majority sees nothing incorrect in freely mixing with the executive. ... If the public is to believe that justice is being impartially administered, judges cannot rub shoulders with one and all in a manner which any other person may do. Their

public activities and even their pronouncements outside the court have to be consistent with the isolation which their office demands."

In the opinion of some observers, the habit of mixing with the executive is at least in part attributable to the economic position of the judiciary. Relatively early mandatory retirement, prohibition of return to the practice of law and inadequate salaries and retirement benefits combine to lead many judges to seek post-retirement employment in administrative tribunals, governmental commissions and similar posts. The inadequate salaries of members of the superior courts have for some years also been an obstacle to the recruitment of experienced practitioners to the bench. These salaries are fixed by a schedule to the Constitution and have not been adjusted since the Constitution was adopted in 1950.

Matters relating to the appointment and transfer of judges are a third major area of concern. Although the charge is sometimes manipulated for political purposes - as indeed are all issues concerning the independence of the judiciary - it is generally admitted that caste membership, political loyalties and nepotism too frequently influence the appointment of judges. In a nation plagued by intense and often violent political, religious, social, regional and class conflict, the impartiality of the judiciary is critical to its strength as an institution and its ability to play a constructive role in the mediation of these conflicts.

As one method combating these influences, the government has proposed that one third of the members of the High Court of each State should be composed of judges from other States. The Law Minister has also proposed that the Chief Justice of each High Court, who exercises considerable influence over the appointment of other members of the High Court as well as the appointment of other state court judges, should be from outside the state concerned. Another advantage of this policy is that it would tend to promote national

uniformity in the judicial system. It would seem, however, to be at cross purposes with another policy already adopted, that is increased use of local languages in the courts. Both the Law Commission and the Chief Justice have expressed support for the proposal that one third of the judges be from outside the state, but with the proviso that this should be accomplished only through appointments not transfers. Although some financial compensation is provided in connection with interstate transfer of sitting judges, transfers still work considerable hardship by reason of the change in language, interruption of the education of children and similar considerations. Transfers without the consent of the judge concerned can be made "in the interests of justice". The use of this type of transfer gives rise to speculation about the reasons for it and frequently results in injury to the reputation of the judge, controversy about the government's motivation in ordering the transfer, and even the resignation of the judge in question.

In January 1981 the President ordered the transfer of two High Court Chief Justices, giving rise to a legal controversy about whether his power to transfer High Court judges extends to Chief Justices. In addition, the ambiguity surrounding these transfers "in the interest of justice" gave rise to speculation whether they were quasi-disciplinary in nature or an attempt to implement by transfer the policy of one-third judges from outside the state. The latter possibility raised fears of extensive disruption of the judiciary and evoked unpleasant memories of the extensive transfers ordered during the 1975-77 emergency widely considered to be intended as intimidation and manipulation of the judiciary. The injurious controversy which accompanies such transfers and the potential for abuse by the executive has led many commentators to suggest that if there is real reason to take disciplinary action against a judge the best course of action is to begin impeachment proceedings.

If access to an independent judiciary is a universally applicable right recognised by the Universal Declaration of Human Rights, it is the prerogative of every nation to adopt the institutions and

procedures most suitable for protecting judicial independence given the political, social and cultural characteristics of the nation. The Indian judicial system is one which has been conceived and elaborated with full respect for judicial independence. It is nonetheless normal that there be efforts to refine the system or adapt it to changing realities, just as it is normal that in a democratic society such proposals are the subject of public debate and political controversy. In this process however, care should be taken by all concerned to show the restraint and moderation necessary to prevent injury to the public image and moral authority of the judiciary. Partisan interests should not be elevated above the common interest in the protection of an institution whose strength lies in its impartiality and independence.

If a degree of political immixture in judicial affairs is inevitable in a democracy, the inverse is not. The judiciary should maintain strict neutrality in and separation from partisan politics.

The procedures for appointing the head of the judicial system raise difficult and delicate issues in all countries. It is to be hoped that the competent authorities in India will give careful consideration to the pros and cons of returning to the seniority criterion, or alternatively of taking soundings of the members of the Supreme Court before making the appointment. Whatever procedure is adopted it is essential that the 'spirit of the laws' be respected so as to maintain confidence in the independence of the judiciary.

Finally the several disadvantages of transfers "in the public interest" - hardships, innuendo, and the real potential of transfer for political purposes - suggest that this should be abandoned in favour of transfer by consent.

PAKISTAN

Consolidation of Inroads into Judicial Independence; Mass Resignation of Judges; Conviction of Former Attorney General Bakhtiar

Previous Inroads into Judicial Independence

The previous issue of this Bulletin contained an article describing a major legal crisis in Pakistan concerning two executive orders amending the constitution and severely restricting the jurisdiction of the ordinary courts. The first, Presidential Order No 21 of 1979, transformed an article permitting the legislature to create a system of administrative tribunals exempt from judicial review into an article permitting the Chief Martial Law Administrator to establish a system of military tribunals empowered to try offences by civilians as well as military personnel. In effect a dual system of justice under the direct control of the military authorities. Military tribunals can try any criminal offence, and the Martial Law authorities decide whether a given case will be heard in a military tribunal or ordinary court.

The second order, Presidential Order No I of 1980 promulgated on 27 May, removed the jurisdiction of the ordinary courts with respect to any matter under consideration by a military tribunal and barred the superior courts from issuing any process against any person acting under the authority of the martial law administration. It also declared legal all presidential orders and laws and regulations promulgated under the authority of the martial law administration since the 1977 coup. These provisions inter alia prevent the superior courts from reviewing the legality of detention by martial law authorities and death sentences imposed by military courts, both of which are common in Pakistan.

It will be recalled that the High Court of Baluchistan rendered a unanimous decision in July 1980 declaring both purported constitutional amendments to be illegal and without

effect, and that ten days later all three members of the court were notified of investigations of alleged irregularities in their income taxes.

A certain juridical anomaly or ambiguity was also created by these orders purporting to amend the constitution because in July 1977 General Zia had stated the constitution to be "in abeyance". In the landmark 1977 decision in Begum Nusrat Bhutto's case the Supreme Court stated that the "extra-constitutional" seizure of power and imposition of martial law rule was legitimate by virtue of the law of necessity and the compelling circumstances in which the country found itself.* Significantly the July 1980 decision of the High Court of Baluchistan defined the then prevailing state of law as one of "constitutional deviation" in which the constitution is still the supreme law of the land and still enforceable to the extent the deviation is not warranted by the law of necessity and Begum Nusrat Bhutto's case.

On 24 March 1981 General Zia promulgated the "Provisional Constitutional Order, 1981". Its apparent purposes are to clarify the constitutional law (the preamble refers to the "removal of doubts") and especially to put an end to judicial scrutiny of acts of the executive.

The order is called an "interim provision for governing Pakistan" for the duration of the martial law administration installed in 1977. Only those provisions of the 1973 constitution reiterated in the Provisional Constitutional Order remain in force. Thus for example the provisions of the constitution defining the powers of the Federal government are retained, while those concerning elections, the state and federal parliaments and the fundamental rights of citizens are not. Certain new political institutions are created, such as one or more vice presidents and a Federal Council. Thus there can be no

* See ICJ Review No 23, December 1979, p. 19.

doubt that, at least for the present, the constitution is not the supreme law of Pakistan.

The Provisional Constitutional Order also reaffirms the power of the President and the Chief Martial Law Administrator* to amend the constitution and declares that all laws promulgated since the coup are "validly made" and "shall not be called into question in any court on any ground whatsoever". It also reiterates the other restrictions imposed on the ordinary courts by Presidential Order No 1 of 1980, i.e. that they cannot review or intervene in matters submitted to military tribunals, nor issue any orders binding upon persons acting under the authority of the martial law administration. A third restriction upon the jurisdiction of the court results, of course, from the failure to reiterate various provisions of the constitution in this Provisional Constitutional Order, notably the section defining the fundamental rights of citizens.

Although the terms provisional and interim are used to describe this new constitutional order, its effect is to consolidate the laws and decrees issued throughout the years of martial law rule - presumably in response to the exigences of a transient emergency situation - and to define a legal basis for the continuation of this rule. It therefore resembles an entrenchment of this "interim" regime rather than a transitory step towards the restoration of a constitutional democracy. While military rule has often resulted in the suspension of the constitution or even the occasional promulgation of decrees purporting to amend the constitution, this appears to be an unprecedented attempt to impose a comprehensive constitutional document by decree.

* General Zia ul-Haq assumed the post of Chief Martial Law Administrator upon seizing power in July 1977, and the post of President in September 1978.

Resignation of Superior Court Judges

The provisions of this order affecting the judiciary constitute for the most part a codification of previous orders and decrees, which had had the unwelcome effect of provoking conflict between the two branches of government and focussing attention on the issue of the legitimacy of martial law rule. In order to ensure the submission of the judiciary this time, a provision of the order required all superior court judges to take an oath to uphold the new constitutional order. This led to a wave of resignations among superior court judges.

Three members of the Supreme Court resigned, Chief Justice Anwar ul-Haq, Justice Durab Patel and Justice Fakhruddin Ibrahim. In his letter of resignation the Chief Justice stated that his conscience would not permit him to swear to uphold the new provisional constitution. By inserting this oath requirement into the Provisional Constitutional Order the government has assured itself of the loyalty of all members of the court, circumventing constitutional provisions guaranteeing security of judicial tenure.

A fourth member of the Supreme Court, Justice Ghulam Sadfar Shah also resigned and left Pakistan in late 1980 claiming a politically motivated action against him by the Supreme Judicial Council and police harassment. The charges against him were described in the previous issue of the Bulletin.

The precise number of High Court judges who resigned as a result of the oath requirement is not known, but it is clear that the number is substantial. Published reports indicate that nine of the twenty-eight members of the High Court of Lahore resigned, as did two members of the High Court of Karachi and all three members of the High Court of Baluchistan (Le Monde, 27 March 1981; The Observer, 29 March 1981).

The lawyers of Pakistan, whose vigorous opposition to martial law and restrictions on the jurisdiction of the courts was

also previously reported, have strongly condemned the new order.

Former Attorney General Bakhtiar Convicted

The previous issue of the Bulletin also describes the CIJL Secretary's attendance at hearings in the trial of Mr Yahya Bakhtiar, whose prosecution was considered to have been motivated in part by his role as defence attorney for the late President Bhutto and flawed by several violations of principles of due process. Objections to the prosecution include the following: he was prosecuted under a law permitting a special prosecutor to prosecute election law offences although the law in effect when the offence allegedly occurred required a candidate in the same election to bring such a prosecution; prior to the creation of the Special Court charged to hear this case the Elections Commission, the only body authorised by the constitution to hear such matters, had already been seized of the case; although massive electoral fraud is alleged to have occurred in the 1977 elections Mr Bakhtiar is the only person ever to have been tried on such charges; important prosecution witnesses were heard in the absence of the defendant, who conducted his own defence. It was also previously reported that in September 1980 the High Court of Baluchistan upheld Mr Bakhtiar's claim that the prosecution was discriminatory, mala fides and without lawful authority, but the Supreme Court suspended the decision of the High Court and ordered the Special Court to proceed with the trial.

On 31 March 1981 a guilty verdict was rendered and the maximum sentence imposed: five years imprisonment with hard labour plus a substantial fine. It is doubtful whether Mr Bakhtiar could serve such a sentence because of a heart condition which was attested to during his trial.

MALTA

Suspension of the Courts; Adoption of an Act Endangering the Independence of Lawyers

On 13 March 1981 the Code of Organisation and Civil Procedure (Amendment) Act, 1981 passed into law in Malta. The Bill, which had been criticised in a press release of CIJL and a CIJL circular letter on 6 March, was adopted after undergoing important modifications. Although these amendments reduce the danger which this law poses to the independence of judges and lawyers, its adoption marks a deterioration in the guarantees of independence afforded them by Maltese law, and reduces the jurisdiction of the courts in the field of judicial control of the executive.

The Act creates a "Working of the Law Courts Commission" whose responsibilities include hearing citizens complaints about the administration of justice, supervising the administration of justice in "all courts of civil, commercial and criminal jurisdiction, including the Constitutional Court", and disciplining attorneys. It consists of five members, namely a Chairman, two members of Parliament (who must not be advocates), one member of the Chamber of Advocates and one trade union representative. One of the members of Parliament is nominated by the opposition, but the other four members are nominated by the Prime Minister who can thus ensure political control of the Commission. The members do not enjoy security of tenure, and three constitute a quorum.

In its circular letter the CIJL criticised the proposed Commission on two grounds: its lack of independence from the executive and its sweeping powers.

The amendments made to the Bill substantially reduced the powers of the Commission. A provision authorising it simply to supervise the working of the courts was amended to specify that it is authorised to supervise their workings "and to

recommend to the House of Representatives the remedies which appear to it conducive to a more efficient functioning of such courts". Likewise a provision authorising the Commission to "consider, report on and otherwise deal with" any matter concerning the administration of justice referred to it by the Prime Minister was amended by the deletion of the words "and otherwise deal with". Thus it appears that, with the important exception of its disciplinary powers over lawyers, the Commission has been transformed from one having a very general power to intervene in matters concerning the administration of justice to one having only the power to make reports and recommendations about such matters to authorities outside the judiciary.

The Bill would have given the Commission full power to hear charges of abuse, misconduct and unethical behaviour by attorneys, with the sole qualification that punishments involving permanent or temporary disqualification be approved by the President of Malta. This caused concern that the Commission would be used as a tool of intimidation against lawyers rather than for impartial enforcement of professional standards. This concern was understandable, for in recent months high governmental officials had made a number of harsh accusations against the legal community, even going so far as to attempt to impose a retroactive "fee" of £M 1,000 (approximately US\$ 2,500) per attorney on each of nearly a hundred lawyers who, in a symbolic protest, had affixed their signatures to a legal complaint.

The amendment requires that the Commission seek the advice of the Court of Appeals in all cases where it is of the opinion that disqualification for a period of more than six months should be imposed. While this represents an improvement on the Bill, the power to impose fines and suspensions not exceeding six months is a substantial one entailing considerable power, if improperly employed, to interfere in the independence of lawyers. Disciplinary authority over lawyers is normally vested either directly in the courts, or in their professional bodies, in which case there is often a provision for judicial review.

There is no valid reason to make this unprecedented transfer of disciplinary power from the Court of Appeals to a politically constituted commission consisting in its majority of laymen, and the fact that the Commission has retained this power is bound to be a source of continuing anxiety for those concerned with the independence of the legal profession.

Although some changes were made in the powers of the Commission, no changes were made in its composition or method of appointment. Quite apart from its jurisdiction over the discipline of lawyers, it would seem that the Commission would be able to fulfil its advisory role more efficiently if it were constituted in such a way as to guarantee its independence and impartiality.

In addition to the provisions directly affecting the independence of judges and lawyers, the Bill contained provisions restricting the jurisdiction and powers of the courts. Here again certain improvements were made, notably by retaining the individual's right to seek an immediate interim court order restraining governmental acts which might infringe his constitutional rights, although the Act now requires 10 days notice for any other claim for relief against the government. The most important restrictions on their jurisdiction remain in the Act. The law now strictly limits the grounds upon which governmental acts can be challenged, and in effect eliminates a major part of the field of administrative law i.e. judicial review of the use of discretionary powers accorded to ministers and their officials.

In its press release and circular letter the CIJL also expressed concern about the closure of all the superior courts in Malta for a period of several weeks in January and February of 1981. The courts were also closed, for a briefer period, in November of 1980. This was accomplished by a presidential order suspending for an indefinite period the assignments of all judges, relying upon a law giving the president the power to transfer judges. The declared reasons for the second closure

- the resignation of the Chief Justice and "the atmosphere in the courts" - are not of sufficient gravity to justify the extraordinary step of closing all superior courts in the nation. Moreover the circumstances suggest that the second closure was in fact motivated by the government's desire to delay proceedings in a controversial lawsuit concerning the proposed nationalisation of a hospital. The Chamber of Advocates declared that the closing of the courts was unwarranted, without basis in law and in violation of the constitution and the citizen's fundamental right of access to justice.

This asserted power to close the courts, with no definition of the circumstances justifying this exceptional step, no requirement of consultation with the legislature or Chief Justice and, obviously, no possibility of judicial challenge, has not been retracted and remains perhaps the most important threat to the independence of the judiciary.

HAITI

Prominent Defence Attorney Detained

Lafontant Joseph, prominent attorney and co-founder of the Haitian League for Human Rights was arrested on or about 26 November 1980. He was released from prison near the end of December. No charges were brought against him during his detention.

In 1977 President-for-Life Jean-Claude Duvalier announced a programme of liberalisation, which notably resulted in an increasingly critical and outspoken press, the formation of opposition political parties, attempts to contest elections, and the formation of the above-mentioned human rights organisation. While not entirely devoid of content, this liberalisation now appears to have been motivated by a desire to improve the image of the regime, to appease foreign critics and to find a more sophisticated approach to repression rather than a real desire to create a pluralistic democratic society. In any case those who became too critical in the press, who founded political parties and sought to contest elections, or who sought to educate the public about human rights found themselves expelled from the country, detained without charges, prosecuted for vaguely defined political offences or threatened with violence*.

Me Joseph and other attorneys belonging to the Haitian League for Human Rights, were active in the defence of those detained or prosecuted for having exercised their political and civil rights. In August 1980 for example he was the leading defence counsel in the trial of defendants from St. Marc charged with treason. They were convicted and declared political prisoners by Amnesty International. In October 1980 he accepted the defence of Mr Sylvio Claude, president of the Haitian Christian Democratic Party, arrested on 13 October and charged

* See ICJ Review No 25, December 1980, p. 14.

with insulting President-for-Life Duvalier. This was Mr Claude's fourth arrest since his attempt to contest a national election in 1979 (his candidacy was declared illegal).

It is believed that Maître Joseph's representation of Mr Claude was one of the factors leading to his inclusion in the one hundred or more persons, many of them journalists or politicians, arrested on 26 November 1980. Several of the persons included in this wave of arrests were taken to the airport and expelled from the country; Me Joseph was taken to the airport during his detention but refused to accept exile, preferring to return to detention and risk eventual charges and trial. However, at the end of December he was released unconditionally.

Me Joseph Maxi, another co-founder of the Haitian League for Human Rights, who represented Mr Claude at the time of an earlier arrest, was detained without charges in March 1979 during the time he was attempting to secure his client's release from prison. It has been reported that the human rights league is scarcely functioning because of the repression it has been subjected to.

Among other persons arrested in November 1980 were Jean-Jacques Honorat, lawyer and author best known as the Director of a non-governmental development institute, and Grégoire Eugène, former Secretary of State, professor of civil and constitutional law at the national university and founder of the only other major opposition party, the Haitian Social Christian Party. Both were taken to the airport in early December and sent into exile in the United States.

PARAGUAY

Inter-American Commission on Human Rights Denounces Repression of
Lawyers and Lack of Judicial Independence

The 1979-1980 Annual Report of the Inter-American Commission on Human Rights *) contains reports on the human rights situation in several member states of the Organisation of American States prepared at the request of the OAS General Assembly. The report on Paraguay contains a remarkably frank denunciation of the lack of judicial independence and repression of lawyers in that country. The rather summary nature of the Commission's comments may be attributed to the fact that, although the government agreed in principle in 1977 to accept an on-site investigation by the Commission, it has systematically refused to set a date for such a mission.

Since such a formal denunciation of violations of judicial independence and the independence of lawyers by a competent inter-governmental organ is an important precedent, the relevant paragraphs are reprinted here in full:

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

The Commission has been informed that when a judge acts against the government's interests he is immediately transferred to a less important post in the Judiciary. Others have been removed from their posts. All of this shows that in Paraguay, the right to a fair trial and to due process of law lack essential guarantees.

*) Published 20 October 1980, and available from the General Secretariat, Organisation of American States, Washington, D.C. 20006, U.S.A.

Another aspect that affects this fundamental right of the individual is the persecution of attorneys in the exercise of their profession, some of whom have been victims of serious violations. As an example of this it is sufficient to cite the cases of Dr. Julio César Vasconcellos, who was expelled from the country and who was defending a businessman accused of a common crime; and Dr. Milciades Melgarejo, who was imprisoned and tortured, according to information in the hands of the Commission. Dr. Melgarejo was the defense attorney for the inhabitants of the place known as Fernando de Mora. Both attorneys were the targets of kidnapping attempts, a new technique used by the security forces. An attempt was also made on Lic. Luis A. Resck, a member of the Acuerdo Nacional, according to information that appeared in the newspaper 'ABC' and 'Ultima Hora'."

The Commission recommended "that the Government of Paraguay guarantee the complete independence of the Judiciary and, within that context, the application of justice, the right to due process of law and the exercise of the legal profession".

In August 1979, Dr. Vasconcellos, whose case is referred to in the report of the Commission, undertook the defence of a financier charged with having given a bad cheque in an amount equivalent to US\$240,000 to a local corporation. *) The financier, a foreigner residing in Paraguay, maintained that the cheque had been extorted by duress and that no such sum was owed. An important member of the Board of the corporation in question was General Andrés Rodriguez, commanding officer of the First Calvary Division and reportedly the second most powerful figure in Paraguay, next to President General Alfredo Stroessner. His client having been put in the police hospital as a result of a nervous collapse suffered during interrogation, Dr. Vasconcellos filed an application for habeas corpus. He then, in accordance with a practice wide-spread in Latin America, sent to the press a statement of his client's position in which, without specifying his name, he alleged that this general was responsible for the extortion.

*) Details of the case of Dr. Vasconcellos, as well as the cases of Drs Melgarejo and Galeano, are based in large part on Mbareté, the Higher Law of Paraguay, by Helfeld and Wipfler, published in May 1980 by the International League for Human Rights, 236 East 46th Street, New York, N.Y. 10017, USA

The same day three armed men appeared in Dr. Vasconcellos' study and, threatening his life, demanded that he withdraw the habeas corpus petition and contact the press to withdraw all reference to the general. Five days later the Chief of Police Investigations Department telephoned and asked him to come to the Department. En route he was kidnapped, taken to a provincial airport and placed on a plane for Brazil. The following day his wife, also an attorney, assumed control of the case and the Bar Association expressed its "profound concern" over the way Dr. Vasconcellos had been removed from the conduct of the case. From Brazil, Dr. Vasconcellos issued a series of public statements saying that he would not return until adequate assurances were received that he would be safe from harm, harassment and intimidation. He also let it be known that he had sent a telegram to this effect to President Stroessner.

On the basis of his statements, criminal charges were brought under Articles 2 and 6 of Law 209 charging him with publically condoning a criminal act (apparently referring to the criminal fraud imputed to his client) and calumny or defamation of the president. The latter charge was apparently based on the inference implicit in the sending of the telegram that the president could have exercised some influence over the matters complained of. The prosecutor who filed the charges had never seen the contents of the telegram, whose text had indeed not been made public. Moreover, the judge who approved these charges was also presiding over the criminal trial of the financier, and approved the charge of condoning a crime even though the financier still benefitted from the presumption of innocence.

On the basis of these charges, and a subsequent separate complaint in which he was charged with casting aspersions on the masculinity and courage of a judge, Dr. Vasconcellos was detained for three weeks when he finally returned to Paraguay in October 1979. The final resolution of these charges is not known.

The case of Dr. Melgarejo, also referred to in the report of the Commission, involved a controversy regarding a sewer installation

project for a suburb of the capital. The announcement that the homeowners of the municipality would be expected to pay the entire cost of the project, widespread belief that the costs were inflated, and discontent with the contractor's failure to fulfill a previous contract, led to a decision to commence legal action against the public water and sewer authority which had awarded the contract. Dr. Melgarejo represented the plaintiffs, who at one point numbered more than 500. The plaintiffs claimed not only that the costs were excessive but that the decision to award the contract was corrupt, alleging that the firm receiving the US\$2.8 million contract was only capitalised to the extent of US\$1.6 thousand and that a director of the firm was a brother of the executive director of the public authority, Corposana.

Competing fractions of the ruling Colorado Party took sides on the lawsuit, which became the centre of heated public controversy. (Eventually the plaintiff lost the lawsuit, but Corposana rescinded the contract.) At a political meeting the Chief of the Police Investigations Department called Dr. Melgarejo a "communist element", and Dr. Melgarejo announced his intention to sue for defamation and calumny.

Shortly thereafter he was arrested and assaulted by two security officials in civilian dress. Charged with violating the "Law in defence of public peace and the liberty of persons" (Law 209) and with breach of the peace and instigation of riots, he was detained for more than two months. The charge of instigating riots was apparently based on his meetings with the plaintiff group in the lawsuit. The charge of violation of Law 209 was dropped for lack of evidence; the final outcome of the other charges is not known.

A third case, not mentioned in the Commission's report, is that of Dr. Horacio Galeano Ferrone. In 1976 he agreed to represent the parents of a 17 year old boy tortured and killed by the then

Inspector General of Police of Asuncion. *) After filing a criminal complaint against the Inspector General, Dr. Galeano was arrested and taken to police headquarters, where he was shackled to a wall. The Inspector General in person told the attorney that his life would ^{be} in danger if he did not abandon this case.

In January 1977, the Supreme Court failed to renew Dr. Galeano's license, a measure which the Inter-American Commission of Human Rights indicated in its 1978 Annual Report is widely used against lawyers involved in politically sensitive cases. Two months later criminal charges were brought against him by the mother of a deceased client. She charged that he had advised her son to flee the country rather than face trial, that after following this advice her son was killed while abroad, and that Dr. Galeano had fraudulently taken control of her son's property. In her signed denunciation she stated that she filed the complaint on the advice of the Chief Justice of the Supreme Court and she was accompanied to the prosecutor's office to make the complaint by the Fiscal General (Attorney-General). Within weeks she made a sworn statement withdrawing her allegations about Dr. Galeano and stating that they had been made "at the insistence of the Chief Justice" and "other third persons". For approximately three years, the prosecution was kept pending, a principal cause being the prosecutor's failure to file his brief and recommend action. During the entire time the charges were pending he was unable to practice law, although it is reported that in other cases lawyers with criminal charges pending against them have been permitted to continue practicing. According to a recent report Dr. Galeano has been disbarred.

These three cases indicate the extent to which repression of lawyers has been used to corrupt the administration of justice, and

*) This matter later became the subject of the landmark United States decision Filartiga v. Pena, in which it was held that, torture being a violation of international law, U.S. courts have jurisdiction over civil claims against torturers who come to the United States regardless of where the torture was committed. See I.C.J. Review No. 25 (December 1980), p. 62.

the extent to which members of the judiciary have made themselves accomplices in this. *) It is to the credit of the Inter-American Commission that it has forthrightly condemned this systematic violation of the right of every person to the protection of the law. It is also much to the credit of the Bar Association of Paraguay that it has on numerous occasions made responsible protests about violations of the rights of lawyers and ordinary citizens to the appropriate national authorities, as well as to competent international bodies such as the Inter-American Commission, whose reports on Paraguay frequently include material received from the Bar Association.

GUATEMALA

Systematic Violence Against Judges and Lawyers Continues

The tragic assassination of judges, lawyers and members of law faculties previously reported in Bulletin Nos 4, 5 and 6 continues unabated. Since the latter publication, news has been received of the assassination or kidnapping of an additional fifteen, as well as three attempted kidnappings or assassinations. This led the Centre to issue a circular letter on 6 March 1981 urging bar associations and other organisations of judges and lawyers to write to General Fernando R. Lucas Garcia, President of the Republic (Palacio Presidencial, Guatemala City, Guatemala) expressing their concern about these events.

The gravity of the situation also led the Centre to submit a formal communication about these attacks on the legal community to the Inter-American Commission of Human Rights. A copy of this communication will be found at Appendix A.

*) It should be noted that in its 1978 special report on Paraguay, the Inter-American Commission reported that in some instances judges themselves have been the object of repression.

EL SALVADOR

This small Central American country, underdeveloped, and overpopulated, with wealth and land ownership heavily concentrated in a small upper class, has been the scene of armed conflict for several years. Shortly after a coup in October 1979 this conflict assumed the proportions of a civil war, with 10,000 persons being killed in 1980. While space does not permit fuller description of their background, the three incidents described here shed some light on the effect of these deteriorating conditions on the legal community.

The mixed group of military officers and civilians who took power following the coup were considered moderates, and their declared plan to restore order to the country included land reform and curbing excesses by military and paramilitary forces. In response to a recommendation from the Inter-American Commission on Human Rights the new government established a Special Committee to Investigate Missing Political Prisoners. According to the Inter-American Commission's most recent report on El Salvador*, during the course of its investigations this Special Committee identified a corpse found in a mass grave containing twenty-five other bodies as that of a thirty-year old attorney, María Teresa Hernández Seballos. She had been arrested in Delgado by the National Guard on 15 September 1979, several weeks before the coup.

In connection with this and other deaths the Special Committee recommended the prosecution of the former president, the Director of the National Guard and others. In December a government spokesman announced that the Attorney General's Office had been instructed to undertake the necessary investigation to begin such prosecution. However, in January 1980 doubts about the government's commitment to pursue its stated goals led to the resignation of the more moderate officers among the junta and the representatives of all political parties

* Incorporated in the 1979-1980 Annual Report of the Inter-American Commission, p. 26.

except the Christian Democrats. The Special Committee also decided to discontinue its work and the promised prosecution did not occur.

In its 1979-1980 report the Inter-American Commission recommends "an exhaustive, rapid investigation of the cases of murder in which past or present members of security agencies have been charged as the instigators or authors, with full sanctions of the law against those shown to be responsible parties."

This report also contains the following description of security authorities' interference in the operation of a Legal Aid Office:

"At 7:00 a.m. on July 3, 1980, 120 national security agents riding in three small tanks and military vehicles with gunnery pieces, forcefully entered the Legal Aid office of the Archbishopric, where there is also a primary and secondary Jesuit school.

The agents made a complete search of the office and confiscated records compiled by Legal Aid dating back to 1975. The military operation lasted virtually all day. According to charges received by the Inter-American Commission on Human Rights, the agents carried away a large number of legal documents concerning consultations on labor, penal and civil matters. They confiscated photographs of ... the directors and members of Legal Aid."

The most recent incident provides a horrifying example of the practices of para-military groups which still operate with impunity in El Salvador. Five relatives of a judge of San Salvador including two adolescents and a woman of twenty-eight were assassinated on 14 April 1981. Their heads were severed from their bodies and laid at the doorstep of the judge's home.

This type of barbarity is not infrequent in El Salvador, but it's victims are more often found among the rural poor.

ACTIVITIES OF LAWYERS' ASSOCIATIONS

GENEVA MEETING ON THE INDEPENDENCE OF LAWYERS

The last issue of this Bulletin contained the September 1980 "Oslo Appeal" of the Union Internationale des Avocats calling for a regrouping of efforts by all organisations concerned with the problem of human rights and, in particular, the defence of the independence of lawyers.

An important step towards this regrouping of efforts was realised by a meeting held in Geneva on 13 March 1981. Convened by the Union Internationale des Avocats, the CIJL and the International Commission of Jurists it marked the first attempt which has been made to bring together all the leading international organisations of judges and lawyers to discuss the problem of the independence of judges and lawyers. The international organisations represented were:

- the Centre for the Independence of Judges and Lawyers;
- the Inter African Union of Lawyers;
- the International Association of Democratic Lawyers;
- the International Association of Penal Law
- the International Association of Young Lawyers;
- the International Bar Association;
- the International Commission of Jurists;
- the International Movement of Catholic Lawyers;
- the Union of Arab Lawyers;
- the Union Internationale des Avocats; and
- the Union Internationale des Magistrats.

Also attending as observers were representatives of the United Nations Division of Human Rights, the Inter-Parliamentary Union, Amnesty International, the journal Human Rights Internet, the International League for Human Rights and the International Federation of Human Rights.

One purpose of the meeting was to discuss the criteria which should be applied in determining when to intervene, either publicly or privately, in cases where a threat to the independence of the bench or bar has been perceived. There was unanimous agreement

that intervention is appropriate where a sanction is imposed explicitly because of an action within the proper scope of one's professional obligations. This category includes, for example, the prosecution of a lawyer for contempt of court or defamation of the state for submissions or pleadings properly made on behalf of a client. It was also widely agreed that interventions are appropriate in case of systematic interference, whether by legislation or by administrative action, in the independence of the bench or bar. This would include, for example, purges of the judiciary, the creation of systems of justice under direct control of the executive (e.g. military courts empowered to try civilians for ordinary crimes), interference in the internal self-government of the bar and executive control over the discipline of lawyers.

There was considerable discussion of cases where action is taken against judges or lawyers which is not directly related to their professional duties, but where there is reason to suspect that the real motivation of the action is to intimidate or harass or impede the judge or lawyer in exercising his profession, e.g. by subjecting them to administrative detention, prosecuting them for common law offences or charging them with violations of professional ethics.

It was agreed that mala fides prosecutions of judges and lawyers have been a serious problem in some countries, and that interventions should be made in appropriate cases. Whether the prosecution is an isolated case or forms part of a pattern, and whether the accused will be given adequate opportunity to conduct a proper defence are important factors in determining whether an intervention should be made where bad faith in the prosecution is suspected.

Administrative detention of lawyers or prosecution for political offences is frequently a problem in highly politicised situations. In these situations it is unfortunately all too often the case that the only lawyers willing to provide legal services to those who are the target of repression are those who share their goals or ideology.

Thus although the government asserts that its action is based on the lawyers political activities or affiliations, there may be additional factors suggesting that in fact it is based on his or her professional activities. Although some organisations take the broad view that interventions should be made in the event of any serious violation of the human rights of a lawyer - including for example prosecution for simple membership of a political party - the majority of organisations present agreed that whatever the political background of the lawyer, one must be satisfied that the action taken against him is essentially by reason of his professional activity.

When administrative detention is employed against lawyers there is rarely a statement of the factual basis for the detention, which complicates the task of determining whether or not the detention is based on his professional activities. In many instances, however, a number of lawyers engaged in similar professional activities are detained, creating a presumption that this is the reason for their detention. One organisation even stated that in its experience arrests of political dissidents in a certain country are preceded by the detention of their lawyers !

In determining whether or not to intervene in cases of administrative detention, the adequacy of the opportunity given to the lawyer to challenge the grounds of his detention was considered an important factor. It was also pointed out that the effect of unexplained detention of lawyers on other members of the bar is perhaps as important as the undisclosed reasons for detaining the individuals concerned.

It was also suggested that where there is a practice of repressing lawyers who undertake the defence of political prisoners, the local bar association should endeavour to arrange for the responsibility for defending in these cases to be fairly distributed among experienced members of the bar.

In general, the factors considered useful in determining whether

or not to intervene in cases where there is some difficulty in deciding whether the government's action represents threat to the independence of judges or lawyers include the following:

- the type of professional activities the individual concerned had been engaged in;
- whether or not the individual is known to have engaged in other activities which might explain his difficulties;
- any explanation provided by the government;
- the position taken on the matter by local or national bar associations;
- whether the case is an isolated one or forms part of a pattern of similar incidents; and
- whether the procedures available to the judge or lawyer concerned will permit him adequately to defend his rights.

All the participants recognised the difficulties which frequently exist in determining the degree of governmental responsibility for certain types of repression or in determining the propriety of the government's actions in other cases. It was submitted that this should not discourage action by professional organisations but, particularly when these difficulties coincide with serious or systematic forms of repression, should lead to responsible inquiry and investigation of the facts.

The second topic discussed was methods of promoting and defending the independence of judges and lawyers. With respect to promotion, several organisations spoke of legal studies they have planned or undertaken. Such activities can assist professional organisations to formulate constructive proposals which can influence governmental policies, to help judges and bar associations who have to arrive at decisions affecting the independence of the professions, including disciplinary questions.

In the context of promotional activities there was also discussion of the feasibility of creating international norms regarding the independence of judges and lawyers, and the study on this subject now being undertaken by United Nations Sub-Commission's Special

Rapporteur, Dr. L.M. Singhvi. There was agreement that such norms would be useful, although they must not be conceived of as an attempt to create a single model but rather to create minimum standards capable of universal acceptance and application.

The International Commission of Jurists and the International Association of Penal law referred to a meeting of experts they were helping to organise in order to prepare draft principles regarding the independence of the judiciary. The Union Internationale des Magistrats said it would make available to Dr. Singhvi and the United Nations studies it has undertaken on this subject, and the representative of the Human Rights Institute of the Ordre des Avocats de Paris said the Institute would likewise make available a comparative study now being prepared on "The Rights of the Defence".

It was also pointed out that in their promotional activities professional organisations should not neglect the task of sensitising public opinion to the need for judicial independence and a free legal profession.

Discussion of the methods available for the defence of the independence of judges and lawyers centered on means of expressing professional solidarity on the international level. A review was made of the usefulness of investigatory missions, direct contacts between professional organisations and the government concerned or its diplomatic representatives, and letter and telegram campaigns. Mention was made of the effectiveness of investigations by intergovernmental bodies such as the United Nations or the Inter-American Commission on Human Rights and the role that professional organisations can play in initiating or assisting such investigations.

Several recent cases of serious threats to the independence of judges or lawyers in countries such as Argentina, Guatemala, Malta, Pakistan and Syria were discussed at same length. In some of these cases messages of concern were agreed by various of the participants.

In view of the importance this topic has assumed in recent times, it was felt that closer cooperation of international associations of judges and lawyers in the exchange of information, discussion of criteria for intervention and development of international norms is essential. Concrete proposals to this effect were made, and will be discussed at greater length at a meeting to be held in August or September of this year.

THE INTER-AMERICAN BAR ASSOCIATION

The Inter-American Bar Association has among its members the majority of national bar associations in the Americas as well as a large number of municipal, state and specialised bar associations. Founded in 1941, the Association has from its inception accorded importance to the advancement of democracy and the Rule of Law. Certain resolutions adopted at its XXI Conference in Puerto Rico in August 1979 illustrate several interdependent aspects of the Association's concern to advance the Rule of Law, namely the role of lawyers and the organised bar in promoting and protecting fundamental human rights within their own countries, the right of lawyers to fair disciplinary procedures and to social security, and promotion of the rights of women within the legal profession.

The issue of the proper role of the organised bar in the defence of fundamental rights is of considerable importance. In stable democratic societies the propriety of comments by a bar association on the effect of legislation on the rights of citizens, the need for improvements in the administration of justice or practices having an adverse effect on the legal process is scarcely questioned. When a society enters into a crisis, the need for the Bar to exercise vigilance over the legal process and the rights of citizens is enhanced rather than diminished. However, it is precisely at this point that bar

associations sometimes find themselves under attack for having exceeded their proper mandate. Thus it was entirely appropriate for the Conference to have decided to send to every government in the region a recommendation to the effect that "the authority of bar associations and other legally established associations and entities of lawyers to exercise control and vigorous defence of human rights, be recognised by law".

In developing nations, the independence of lawyers is threatened not only by restrictive regulations and occasionally by violence, but also by financial insecurity. Consequently, certain of the resolutions adopted concerned the need to provide social security for members of the legal profession, and in particular the need for international cooperation in this domain.

On the question of disciplinary procedures for lawyers, the Conference adopted the following recommendations:

- "1. That a disciplinary procedure be adopted through peers of the respondent in which the inquisitory principle predominates, but with adequate guarantees for the lawyer, such as mandatory defense and assistance in the formalities of the action.
2. That an appellate stage of jurisdiction be guaranteed, whenever possible, in the disciplinary action.
3. That, upon exhaustion of the administrative or peer proceedings, the interested party be assured the right of review by a court in a summary hearing, with the customary guarantees."

It is to the Association's credit that its concern with human rights extends to a critical examination of its own practice with respect to the equality of women. Thus the executive organs of the Inter-American Bar Association were reminded of the need for more women members, and member bar associations and attorneys were "urged to promote inclusion of women in the formulation of decisions

in high level political, legal, economic, social and cultural activities". It was also resolved "to recommend to the governments of the american countries that they consider the desirability of appointing women judges as well as participation of women in other positions of the judicial system". Recommendations were made with respect to increased research regarding the legal problems of women and the creation of centres for the provision of legal aid to poorer women.

The Conference also addressed itself to a question of particular importance in Latin America, states of exception. Among its conclusions are the following:

- The defence of a constitutional and pluralistic democracy does not preclude recognising that each State may have to strive to improve its institutions or that it may sometimes have to deal with emergency or exceptional situations; but this fact itself emphasises the need to reiterate that, in such cases, it is essential to handle emergency situations by applying and exercising powers which are limited by the constitutional system and are subject to legal controls which prevent the emergence of a regime of unlimited power, which is to say, a dictatorship;
- The Judicial Branch should be invested, in all instances, with the power which it requires to exercise its corresponding share of control in all cases which involve violations of the rights of persons, whether civil liberties or political rights, whether individual or social rights, since judges, because of their independence and irremovability, constitute the best institutional guarantee as guardians of freedom. ...

... while each state has the right, when it draws up its legal rules at the constitutional level, to make provision for measures to be taken in emergency situations, still, without prejudice to the exceptional powers needed to cope according to the seriousness of the case, those rules should specify precisely their limitations as well as the resources and jurisdictional actions

available to avoid purely arbitrary acts, all this as a form of adequate implementation of the constitutional principle of control.

c) Even in circumstances of extreme emergency, involving temporary and exceptional suspension of some constitutional rights and guarantees, it is to be recognised that the judicial arm of the government has sufficient ordinary authority to assume control of the reasonableness of the specific application of security measures, with respect to individuals and their rights.

In a separate resolution condemning terrorism, the Conference also reiterated that not even the struggle against terrorism justifies violations of the right to life, the right to dignity, the right to a fair trial and those other rights which according to the American Convention on Human Rights cannot be suspended even in time of war or public emergency.

DECLARATION OF ALL-INDIA LAWYERS CONFERENCE

The Centre has received a "Declaration of Delhi - 1981" *) adopted at the conclusion of the All India Lawyers Conference, New Delhi, 1 February 1981. The conference was convened by the Supreme Court Bar Association, and made a positive contribution to the definition of the role of the lawyers in a developing society. The Declaration states, in part, that the participants

*) "Declaration of Delhi" is also the title of a landmark document adopted in Delhi in 1959 at a congress of jurists organised by the International Commission of Jurists. It stresses the dynamic nature of the concept of the Rule of Law and the lawyers duty to "establish social, economic, educational and cultural conditions under which (man's) legitimate aspirations and dignity may be realised."

Reiterate the concept of Liberty as the foundation of our constitutional system, as an indispensable norm and a perennial human aspiration for freedom, dignity and equality, as the source and sustenance of the vision and vitality of our Constitution, as essential condition of democracy and development, as a shield and a sword of social defence, as a challenge and opportunity to the people to help themselves to ameliorate their condition, to emancipate themselves from deadweights, to facilitate and accelerate social transformation, and to achieve Justice, social, economic and political;

Emphasize in particular that Law is the common heritage and trust of mankind, that administration of justice is one of the most fundamental functions of the State, and that judges and lawyers owe their allegiance, by the traditions, training and tenets of their noble profession, to the cause and quest of Liberty and Justice;

Avow that the independence and impartiality of the judiciary and the freedom and independence of the legal profession constitute the sheet-anchor of social order, individual freedom, human rights and equal justice in our society;

Urge the creation of an independent machinery with full security of tenure and with a constitutional status for judicial appointments/transfers, and allied matters to ensure the independence of the judiciary;

Disapprove of preventive detention in peacetime and call for deletion of constitutional provisions authorising preventive detention in peacetime;

Acknowledge and accept the obligation of all bar associations to constitute committees of lawyers particularly to render free legal services in defence of those detained without trial.

A R T I C L E

The Difficult Relationship of the Judiciary with
the Executive and Legislative Branches in France

by Louis Joinet,

Substitut du Procureur de la République au Tribunal de Paris

Since the times of Montesquieu the principle of the separation of powers has postulated that executive, legislative and judicial functions be entrusted to separate and independent authorities so that each serves as a counterweight to the other and "power checks power so that the liberty of the citizen is guaranteed." Since the French Revolution this principle rarely has been called into question, save in times of serious crisis.

However, even a summary perusal of french constitutional history reveals that, as in many other countries, the principle has undergone profound modification. The principle of "hierarchisation" of powers is insidiously supplanting that of separation. In France this process can be observed since the adoption of the constitution of 1958 which marked the beginning of the Fifth Republic. This constitution not only limits the competence and power of initiative of the legislature but limits the constitutional role of the judiciary, which is no longer referred to as the "judicial branch" but simply as the "judicial authority".

In some ways the judiciary becomes no more than a subsidiary of the executive. This is shown by a paradox resulting from two articles of the constitution, articles 64 and 66. The former states that the President of the Republic is the guarantor of judicial independence, while the latter provides that the judiciary, guardian of individual liberties, is charged with assuring the respect of judicial independence. This amounts to saying that the head of the

executive is the guarantor of individual liberties. This constitutional change was the starting point of progressive reinforcement of executive tutelage over the judiciary. Its principal characteristics are described in this article.

Executive Intervention in Judicial Careers

For a magistrate to advance professionally, three obstacles must be overcome:

- In the first instance, the authorities of the court to which he is attached must recommend the magistrate in question for nomination to a higher post. For this reason every magistrate is reported upon annually by his superiors by a system analogous to academic grading.
- Nominations are addressed to a Promotion Commission composed of individuals chosen by the executive, who form the majority, and of high-ranking judges.
- This Commission in turn makes recommendations to the Minister of Justice, in accordance with the following procedures.

First it should be recalled that the french judiciary ('magistrature') is hybrid. It includes not only the 'magistrats du siège' (judges) but also those of the 'parquet'(the prosecutors and assistant prosecutors). *) During his career a magistrate may be transferred and re-transferred from one function to the other. By law the judicial service is divided into two professional grades, each of which is again divided into two sub-grades. To be promoted from the lowest sub-grade one must be placed on an "aptitude list".

*) Ed: The structure of the French judiciary is further described and commented upon by M. Manfred Simon, Président de Chambre Honoraire à la Cour d'Appel de Paris, in The Role of the Prosecution in French Criminal Procedure, CIJL Bulletin No. 5, April 1980, p. 34.

Similarly, to pass from the first grade to the second grade one must be inscribed on a "promotion list". Within the second and more advanced grade nominations for promotion to the higher sub-grade are completely within the discretion of the Minister.

In making appointments the executive is not obliged to promote all the magistrates on the lists submitted, nor even to proceed in order of their ranking on the lists. The only constraint is that the Superior Council of the Magistrature must be consulted. However, the Council is presided by the executive, in the person of the President of the Republic, who also, as we have seen, selects all of its members. Moreover, with the exception of some five of the highest posts in the judiciary, the President makes the final decision and is not bound to follow the advice of the Council.

The process of consultation with the Superior Council of the Magistrature applies only to judges; prosecutors are appointed by the executive with no such consultation.

The end result is that in almost all cases magistrates cannot be nominated for promotion without the approval of the executive branch.

An Imperfect Guarantee of Security

Article 64 of the Constitution provides for the irremovability of judges. In theory they cannot be appointed to a new position, even if it involves a promotion, unless they consent. Therefore a judge may not against his will be removed from the bench where he sits, unless by reason of misconduct and in conformity with the disciplinary procedures. These procedures, as we shall see, leave something to be desired. The prosecutors, for their part, are within a hierarchical apparatus headed by the Minister of Justice and benefit from no security of tenure.

In reality the way in which this guarantee has traditionally been used to a great extent deprives the judge of its intended

benefits. The extreme hierarchisation of the judiciary encourages magistrates to leave their posts at the earliest opportunity, for this is the only way to obtain promotions with the increases in rank and remuneration which that implies. Paradoxically irremovability from office can become a sanction rather than a guarantee. The "secure" magistrate is most often the one to whom all advancement has been refused.

Moreover, irremovability is only guaranteed in a geographic sense. The French system has not incorporated the principle (referred to as "le principe du juge naturel") according to which the law determines not only the jurisdiction in which a case will be heard, but the judge who will hear it. Within a given jurisdiction it is the president of the court who finally decides, guided only by his own judgement, the internal assignments of judges and the allocation of cases to individual judges. Thus even though judges benefit from irremovability, the president of the court - who as we have indicated is appointed by the executive - has great control over them.

"Security and Freedom"

This erosion of the separation of powers and the independence of the judiciary necessarily caused a deep malaise followed by a reaction which in turn caused a reinforcement of the control of the executive over the judiciary. Mr. J. Foyer, Minister of Justice under President de Gaulle, has stated "rarely have relations between the judiciary and the political branches been as problematic as they have been on occasion during the Fifth Republic".

In recent months an acceleration of the deterioration of these relationships has been observed. The bar as well as judges and prosecutors has been affected. It finally erupted in the public conflict occasioned by the law on "Security and Freedom" which has very recently effected a far-reaching reform of French penal law. *)

*) Ed. This law entered into effect on 3 February 1981.

The already limited independence of judges has undergone further alteration. The main changes are as follows.

Reassessment of the Discretion and Powers of Judges

Article 10, paragraph 3 of the International Covenant on Civil and Political Rights requires that:

"The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

Throughout the entire post-war period french penal law has been inspired by this principle. The law "Security and Freedom" completely reverses this policy. It limits or eliminates various means which the law previously put at judges' disposal for adapting the sentence to the particular individual. This is accomplished, for example, by minimum sentences which the judge must impose, an increase in the effect which must be accorded to recidivism, and limitation on the suspension of sentences as well as limitation on the recognition of attenuating circumstances and the power to order release upon conditions. It is a law which the former first President of the Cour de Cassation, M. Aydalot, characterised as manifesting "distrust of the judge".

Most recently the Cour de Cassation itself became the object of this distrust of the judiciary, as its decisions upholding the superiority of treaties over domestic law came under attack. This principle notably permits the French judge to apply provisions of the European Convention on Human Rights directly when they exceed the protection afforded by French law. Since France has always refused to accept the right of individual petition to the European Commission on Human Rights, direct application of the Convention has been the only concrete effect in France of French ratification of the Covenant. However, a measure has now been submitted to the legislature which would overrule the Cour de Cassation's decisions on this issue.

This represents another example of mistrust of the judiciary. In this regard Mr. J. Foyer stated: "The Cour de Cassation let itself become intoxicated with the expansion of judicial power ... when it assumed the right to judge the law according to a rule of law of the (European) community and recognised the right of every court, for such a reason, not to apply a law adopted by the Parliament".

A Disciplinary Procedure under Challenge

During the course of 1980 sixteen judges were added to the growing list of those who have been disciplined or subject to disciplinary procedures. The sanctions imposed range from simple warnings to exclusion from the judiciary (as in the case of Judge Bidalou). Included among them are disciplinary transfers, i.e. transfers "in the interest of the service", which in reality are disguised punishments.

In most cases the disciplinary proceedings allege a failure in the "obligation of reserve". This development is particularly disturbing in that these proceedings have imperceptibly come to involve a review of the decisions of the judge which is disciplinary in nature, although a review of decisions should occur only within the limits of the appellate procedure. This was the case with certain trial judges whose only wrong was to refuse to sign an order for payment with their eyes averted; that is without asking certain creditors for justification for orders forcing the debtors to meet their payments, thus incurring the wrath of the plaintiff credit companies. A member of the parquet was also transferred against his will for having refused to prepare a favourable report (which would clearly have been without support in law) in favour of certain petroleum companies whose executives were facing charges.

Similarly, disciplinary proceedings were contemplated against an examining magistrate who applied the law against an employer criminally responsible for a serious industrial accident in the same

way as he would have done in the case of a criminally negligent driver in an automobile accident.

The Superior Council of the Magistrature was faced with this question of principle for the first time in the Bidalou case. In this case it refused to uphold disciplinary charges based on rulings and decisions of the judge, but only after examining the merits of these charges. In the opinion of this writer, the proper course would have been to reject a priori, from the beginning of the inquiry, all charges based on the rulings or decisions of the judge.

Reinforced Disciplinary Control of Lawyers

The "obligation of reserve" has also served as the expedient for developing a restrictive concept of the lawyer's role. An example is the case of Me. Yann Choucq, member of the bar of Nantes, who during his defence of anti-nuclear protesters, questioned the reason for pre-trial release of a defendant related to the magistrate who ordered it. He was immediately expelled from the court room and suspended from practice for ten days. *)

Despite the strong disapproval such a suspension would elicit in nearly all the bar associations of France, the draft law on Security and Freedom then under discussion in Parliament included an article on the "délit d'audience" which would have institutionalised the practice of summary suspensions. According to the article "when the attitude of a lawyer compromises the serenity of the proceedings the presiding judge can debar him from the hearings for a period of 48 hours". Fortunately this provision was declared by the Constitutional Council to be "inconsistent with the rights of the defence".

*) Ed: This incident is described in CIJL Bulletin No. 5, April 1980, p. 11. The sanction imposed by the judge in question was overruled by the Court of Appeal of Rennes on 14 May 1980.

Extension of the "Obligation of Reserve" to Magistrates' Associations

On 19 November 1980 certain members of parliament sponsored Bill No. 2076, whose first article stated "The obligation of reserve is binding not only on magistrates but also on groups, associations and unions of magistrates". As soon as it was made public this attack on freedom of association and the freedom of expression, which is linked with it, met with the unanimous and unified opposition of all seven existing associations of magistrates. The Bill was then withdrawn, although perhaps only provisionally.

The reaction to the Bill is directly in line with Resolution 13 (XXXIII) adopted by the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities in August 1980. The resolution begins by recalling that: "Associations of judges and lawyers reinforce the professional competence and independence of judges and lawyers and thus aid them in fulfilling this role." The Sub-Commission therefore "calls upon all States fully to respect and guarantee the right of all judges and lawyers freely and without interference to form or participate in professional organisations of their own".

These are some of the tensions recently affecting relations between the judiciary, the executive and, to a lesser extent, the legislature. While they are disquieting they are also, perhaps, an indication that french magistrates are more independent than it would seem. An independent judiciary can always be an embarrassment.

Appendix A

Communication to the Inter-American Commission of Human Rights
Relating to Attacks on Lawyers and Judges in Guatemala

Since its creation in 1978 the Centre for the Independence for Judges and Lawyers has been receiving reports concerning violence directed against members of the legal profession in Guatemala. Information was received recently concerning the disappearance, or assassination of fifteen more lawyers, judges and members of law faculties during the latter part of 1980 and early 1981. This brings to thirty-five the number who have been assassinated or have disappeared in Guatemala from January 1980 to January 1981.

This marks a drastic increase over the number of such incident reported in previous years. A campaign of such scope and intensity is almost without precedent in Latin America, and can only have the gravest consequences on the ability of judges and lawyers to fulfil their professional obligations fearlessly and independently, and on the citizen's right to effective vindication of his legal rights through the system of justice.

A second characteristic of this campaign of violence is the type of professional activity of the victims. The victims include lawyers of many different types, but those practicing labour law, serving in the "Bufete Popular" of the University on representing peasant or indigenous organisations have been particularly affected. Similarly, in at least some cases, there are strong indications that judges were made the targets of attack because of their professional activities. The assassinations of judges Maroquin, Villegran and Valdez in September 1980, referred to in the attached list, is a case in point. This suggests a deliberate effort on the part of those responsible to deprive certain sectors of the society of effective access to the rights recognised by Guatemalan law and to discourage the impartial exercise of the judicial power.

It will be noted from the cases in the attached list that these assassinations and disappearances normally occur during the day, most often in busy urban or suburban setting, and that the methods employed are nearly always the same. To our knowledge, in none of the cases reported in this communication have the persons responsible been brought to justice. This tends to support the accusation frequently made of acquiescence, if not collaboration, of the security forces in this series of attacks.

Details of the recent deaths and disappearances are as follows:

Jaime Rafael Marroquin Garrido, judge in the Criminal Court of Guatemala City, was assassinated on 9 September 1980. He was shot by two men on a motorcycle while driving through the capital at 2.45

p.m. It has been alleged that the judge had been dealing with certain politically sensitive trials, and had received death threats. He was not known to have any political affiliation or activities.

Cristobal Arnulfo Villagran Diéguez, the legal assistant of Judge Marroquin, was killed in the same attack.

Héctor Augusto Valdez Diaz, a 54 year old member of the same court was assassinated on 16 September 1980, the very day he was to have assumed control of the cases previously assigned to Judge Marroquin. Judge Valdez was machine-gunned by men in a car and on a motorcycle as he drove to work at 7 a.m.

Fulgencio Napoleon Rivas Herrera, a prominent practitioner in the city of Huehuetenango, was also assassinated on 16 September 1980. He was machine-gunned at point blank range by two men who arrived in a car as he was closing his office for the evening.

César Augusto Santallana Hernandez, a justice of the peace of Escuintla, was kidnapped on 24 September 1980 by a group of armed men.

Ricardo Galindo Gallardo, a lawyer, was reported to have disappeared after his arrival in Guatemala City on a flight from Panama on 6 October 1980. No other details are available on this case.

Pablo Emilio Valle de la Pena, prominent labour lawyer, was assassinated on 10 October 1980. He was machine-gunned from a passing car while driving through a suburb of Guatemala City.

Rodolfo Montoya Guzman, a lawyer working in the legal aid clinic of the Escuintla branch of the University of San Carlos, was assassinated on 17 October 1980. He was machine-gunned at home in front of his wife and three children.

Rigoberto Aroche, a justice of the peace of San José, Escuintla, was found strangled on 16 November 1980.

Leonel Roldan Salguero, a 42 year old social scientist holding a professorship in the Law Faculty of San Carlos University, was kidnapped as he drove to work through the capital on 17 November 1980. His wife who accompanied him was machine-gunned and killed during the incident. Eighteen days later the corpse of Professor Roldan was found on the highway several kilometers from the capital. It bore multiple bullet wounds and signs of torture.

Miguel Angel Currichiche Gomez, a practitioner with offices in Chimaltenango and Guatemala City, was assassinated on 20 November 1980, machine-gunned while driving through the capital at 1 p.m. His fourteen year old son and another man travelling with him also died in this attack. Mr Churrichiche was the attorney of an association of indigenous people in Comalapa.

Gilberto Jiménez Gutiérrez, Supervisor General of the Courts, was assassinated in Guatemala City on 12 December 1980. Prior to assuming this post he had engaged in private practice, had been a judge in a civil court and had served as confidential clerk to a previous president of the Supreme Court of Guatemala. At the time of his assassination he had been suspended from his functions as Supervisor General for some time, for reasons which were not made public. While driving home for lunch at 1 p.m., the judge was machine-gunned at point blank range by men in a pick-up truck. His driver also died in the attack.

Augusto Sac Necancoj, a seventy year old lawyer, was assassinated in Quetzaltenango on 16 December 1980. While returning home from his law office, his car was stopped on the highway, and he was taken out and shot. Mr Necancoj was affiliated with the Partido Revolucionario, part of the governing coalition, but had not been politically active in recent years. He was a member of the Association of Indigenous Professionals.

Saul Najarro Hernandez, a practicing lawyer, was assassinated as he arrived at his office in the centre of the capital on the morning of 21 January 1981. Witnesses indicated that his assailants attempted to kidnap him but he resisted and was shot nine times. At the time of his assassination Mr Najarro, a former judge, was engaged in several important cases. He had received death threats and, according to news reports, had requested police protection.

Abel Lemus Véliz, a forty-five year old lawyer, was assassinated on 27 January 1981. While driving into the capital at midday he was shot by assailants in a passing vehicle. An active practitioner of both civil and penal law, Mr Lemus was also Secretary for Workers and Peasants Affairs of the social democratic party FUR.

Other recent acts of violence include the attempted kidnapping of lawyer Fredy Rolando Rios Cifuentes in Mazatenango on or about 7 November 1980, the wounding of justice of the peace Oscar Armado Gomez Figueroa of Chichicastenango on or about 28 December 1980, and the attempted assassination of law graduate (Licenciado infieri) Eliézer Nehemias Cifuentes y Cifuentes in Chimaltenango in late 1980.

Details of earlier cases were published in CIJL Bulletin Nos. 4, 5 and 6 which are being sent under separate cover. With respect to these earlier publications, please note the following corrections:

- Rolando Malgar (No. 5, p. 27) should be Hugo Rolando Melgar.
- José Antonio Valle Estrada (No. 6, p. 11) has also been reported as Boy or Bay Estrada, and has been described as legal advisor to the Movimiento Nacional de Pobladores ((MONAP). It has been learned that he was machined gunned by men in a passing vehicle as he left his home.

- Carlos Humberto Martinez Perez (No. 6, p. 10). It appears that the true name is Rafael de Jesus Martinez Perez.

Daniel O'Donnell
Secretary
Centre for the Independence for
Judges and Lawyers

Geneva, 30 March 1981

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The West Bank and the Rule of Law

A study by members of Law in the Service of Man (LSM), a group of Palestinian lawyers affiliated to the International Commission of Jurists (ICJ), published jointly by the ICJ and LSM, Geneva, October 1980, 128 pp. (ISBN 92 9037 005 X). Available in english. Swiss Francs 10 or US\$ 6, plus postage.

The study is the first survey and analysis to have been made of the changes in the law and legal system introduced by Israeli military orders during the 13-year occupation. It is a task which could only be undertaken by West Bank lawyers as the military orders, which number over 850, are not available to the general public and not to be found in libraries. The study is divided in three main parts: the judiciary and the legal profession, restrictions on basic rights and Israeli alterations to Jordanian law. The authors of the study argue that the military government has extended its legislation and administration far beyond that authorised under international law for an occupying power, thus ensuring for the State of Israel many of the benefits of an annexation of the territory.

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Suriname, Recent Developments Relating to Human Rights

Report of a mission to Suriname by Prof. J. Griffiths, Geneva, March 1981, 36 pp. Available in english. Swiss Francs 4 or US\$ 2, plus postage.

Following the coup d'état of February 1980 and two abortive counter-coups large numbers of people were arrested, a state of emergency declared, parliament disbanded and a Special Tribunal established to deal with corruption cases. Prof. Griffiths examines the working of this Tribunal and the principal allegations of human rights violations, freedom of the press, and arrest and ill-treatment of suspects by the military authorities.

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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, 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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ICJ Newsletter

Quarterly report on ICJ activities, published January, April, July and October. Annual subscription: 20 Swiss Francs (surface mail), 25 Swiss Francs (airmail).

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