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1982

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without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and

- (2) that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.

In his interim report to the Sub-Commission, Dr. Singhvi, who attended the Siracusa Meeting, stated that the Committee's draft principles "provide an instructive illustration of comparative and consensual convergence of diverse perspectives in common accord."¹⁸

These ongoing efforts of international bodies and NGOs to implement existing and to fashion new standards governing the independence of judges and lawyers are crucial to the promotion and protection of internationally recognized human rights.

SOME PATTERNS OF VIOLATION OF THE INDEPENDENCE OF JUDGES AND LAWYERS

*by Juan Ernesto Méndez**

This paper attempts to reflect my personal experiences as an advocate before domestic courts, defending political prisoners and raising issues of fundamental freedoms, and my more recent professional experience with nongovernmental organizations dedicated to the protection and promotion of human rights in foreign countries. It does not focus on the independence of judges and lawyers as a principle in the international law of human rights, nor does it discuss means by which that principle might be upheld or enforced.

This presentation only attempts to describe certain patterns of violation of the independence of the judicial system as those patterns emerge from the practices of certain countries. It is, therefore, a description of several ways in which that independence is abused, *de facto* or *de jure*, around the world. Although I have attempted to inquire into similar problems in countries of different geographic situation, or governed by different types of regimes, the paper inevitably concentrates on recent developments in some Latin American countries, and particularly in Argentina.

Finally, the reader is advised to bear in mind that this is the perspective of a practitioner in the field of human rights, not that of a jurist or a scholar.

Military Courts

The question has been raised as to whether a military court is *ipso facto* not independent.¹ Before responding to this question, however, I find it useful to distinguish between the traditional role of military courts and its distortion and expansion in recent times. Most armed forces throughout the world still retain military courts to try military personnel for offenses committed during acts of

¹⁸ U.N. Doc. E/CN.4/Sub.2/481, *supra* note 16, at 3.

* Director, Washington Office, Americas Watch.

¹ O'Donnell, *The Independence of Judges and Lawyers: U.N. Standard Setting and the Siracusa Draft Principles on the Independence of the Judiciary* (1982), appended to this workshop report *infra*, 326.

duty, or breaches of military discipline. But many governments—usually those arising from military coups—have, in the recent past, instituted military courts to exercise jurisdiction over certain offenses committed by civilians.

One of the situations in which this takes place is the imposition of martial law on a temporary basis to control unrest or to respond to external attacks. Martial law has the effect of placing all civilians under the authority of military commanders and of expanding the jurisdiction of military courts so that they may try offenses committed by civilians. This technique was used in Chile in 1973, and some of its aspects (curfew, for example) remained in effect for long periods.

Some countries have tended to institutionalize martial law, even making it a permanent feature of their form of government. Pakistan has maintained the office of Martial Law Administrator since 1977 (the Administrator presides over all military courts). In 1981 Pakistan passed a Provisional Constitutional Order (an amendment to the Constitution), which, among other things, virtually immunizes military court decisions from judicial review.

In other situations, however, military courts are used on a permanent basis without the establishment of martial law. As in El Salvador since 1980, and in Argentina since 1976, these military tribunals generally coexist with an official declaration of a state of siege, although the two are not necessarily connected in law.

In Argentina the “Consejos de Guerra Especiales” are formed *ex post facto*, to try offenses already committed (which violates the specific clause of the Argentine Constitution related to the principle of “natural judges”). They use procedures from the Code of Military Justice, and they only allow representation by military officers on active duty, who usually are not trained in law. The jurisdiction of the Special War Councils is *ratione materiae*, but there is some overlap with offenses that are of the competence of civilian courts. In practice this means that the decision to place a civilian under a military court or under a federal judge is made by the regional military authorities.

In El Salvador, Decree 507 of December 3, 1980 created military investigative and trial judgeships. These judges can impose “corrective detention” of up to 120 days even when they have no probable cause to initiate proceedings against a defendant. Security agents can detain persons for 15 days without intervention of the military investigative judge. The judge’s investigation is secret for 180 days before its submission to the trial judge. During that period, the accused has no right to any participation. He can be held in *incomunicado* detention and without charge for 195 days.²

Theoretically these military courts replaced the jurisdiction of civilian courts over the offenses against the security of the state for which they were created. In practice, however, they are only used against opponents of the government; for example, the murders of the American nuns and AID officials, in which agents of the security forces were thought to be involved, were investigated by civilian courts.

Although the traditional role of military tribunals (to judge offenses committed by military personnel on active duty) is normally not considered a human rights problem, it is quite conceivable that, following a period in which the armed forces of a country have been actively engaged in repressive measures

² AMERICAN CIVIL LIBERTIES UNION & AMERICAS WATCH COMMITTEE, REPORT ON HUMAN RIGHTS IN EL SALVADOR 91-98 (1982).

against their own population, their crimes or abuses would only be investigated by military courts, since they are really offenses in the course of duty. Human rights leaders in those countries are justifiably concerned that, in those cases, military courts may be used to ensure the impunity of crimes committed by security forces. In this regard, it is interesting to note that legislation recently proposed in France would create special civilian courts to try military personnel for offenses committed in the course of duty.

For the reasons stated above, military courts, even in their traditional role, constitute a major departure from the principle of judicial independence and have a potential for grievous abuse of fundamental human rights. They can only be acceptable in times of emergency, where some rights are lawfully derogable under international law and provided that they are used only as extensively and for as long a period of time as the emergency requires.

Special Civilian Courts

Some countries have resorted to the creation of special tribunals to intervene in cases of a special category of crimes. Although these courts and their members may be just as independent as the regular court system, they have frequently been criticized for violating the right to be judged by one's "natural judges." This is especially so when those special courts are created after the fact, that is, to judge events that have happened before they were created. This is the case of the Special Tribunals used in Nicaragua to judge "Somocistas" and former members of the "Guardia Nacional." They were in effect only between November 1979 and February 1981, and they tried some 4,500 defendants. They were created *ex post facto* but were limited in that the government had abolished the death penalty, and they could apply sentences to a maximum of 30 years. They did not use *ex post facto* legislation but relied on the substantive law in effect when the crimes were committed. They used expedited procedures, but most rights of the defendants were observed. They were criticized, however, for the lack of expertise of their members, only some of whom were required to be lawyers, and for their authority to judge "in conscience," *i.e.*, without specifying the reasonable links between the evidence and the responsibility of the accused. As a result, membership in the Guardia Nacional was considered enough to find a defendant guilty of illicit association and of complicity in the many crimes committed by Somoza's security force.³

Ordinary Civilian Courts

In other instances the established judicial branch of a government can have its independence eroded while maintaining a facade of judicial autonomy.

These cases generally take the form of a *de jure* limitation of their jurisdiction, even though this limitation generally originates from an act of force, such as a coup d'état. This was the case in Argentina in 1976, when all members of the judiciary were stripped of their tenure, and 80 percent were replaced. The new judges have been granted tenure, but they have sworn to uphold the new constitutional order, *i.e.*, the Constitution with amendments enacted by the Junta since 1976. This means that those amendments are not subject to judicial scru-

³ H. FRAGASO & A. ARTUCIO, REPORTS ON NICARAGUA FOR THE INTERNATIONAL COMMISSION OF JURISTS (1980); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE REPUBLIC OF NICARAGUA (1981).

tiny. A very similar oath has been required of judges in Pakistan, after the Provisional Constitutional Order of 1981.

There are also de jure limitations on jurisdiction that do not refer to fundamental constitutional questions, but nevertheless have a great impact on the rights of the accused. In South Africa and Uruguay, for example, judges are not allowed to inquire into the legality of incommunicado detentions during interrogation. A different but also serious attempt at a de jure limitation of jurisdiction is seen by some in the proposal to limit the Article III jurisdiction of U.S. federal courts, if the ultimate objective is to change substantive constitutional law.⁴

De facto limitations on the jurisdiction of ordinary courts are less noticeable, but can have more devastating effects on human rights. For example, habeas corpus has been nominally in full effect in Argentina since 1976. But since the coup of that year, no judge has exercised his investigative functions in habeas corpus proceedings by visiting detention centers or personally verifying the accuracy of a report from a police authority. As a result, the security forces see themselves as effectively shielded from any outside investigation. This, in my view, is the major contributing factor in the establishment of the methodology of 6,000-20,000 "disappearances" as a means to control political opposition. In four consecutive cases labeled *Pérez de Smith*, the Argentine Supreme Court has upheld the independent investigatory powers of the courts but has refused to order the lower courts to exercise them in cases of "detenidos-desaparecidos" by searching beyond the official reports on their whereabouts.

The same lack of effective judicial independence can be found in Argentina in the cases of administrative detentions without charges, under the powers granted to the executive branch by the state of siege. Until 1976 the courts could review the reasonableness of the detention in habeas corpus proceedings. If the courts found the detention unreasonable, they would authorize a release or allow the person to go into exile. Now the courts are not exercising the review. In *Zamorano*, *Timerman*, *Moya* and several other cases, the courts have engaged in a general abdication of judicial review of administrative action.

An important example of extralegal, de facto limitations happened as recently as March 1982, in a case in Buenos Aires called *Simerman*, where the Commander-in-Chief of the Army (who is also President, Gen. Galtieri) refused to allow an officer who participated in repressive actions to come before the court and provide testimony on the whereabouts of a person who was detained and subsequently disappeared, on the grounds that these acts were in performance of military duty and protected by the secrecy of defense operations. In this case a person disappeared in 1977 or 1978. A few weeks later her young daughter was delivered by a high military officer to the grandparents. In the habeas corpus proceeding to determine the mother's whereabouts, the judge had ordered the military officer to come and testify.

Defense Lawyers

Sometimes lawyers themselves contribute to the lack of independence of the judiciary. In Nicaragua court-appointed counsel to represent Somocistas were generally ineffective either because the defenders lacked professional experience (many were senior law students) or because the unpopularity of the causes they defended led them to simply ask for the clemency of the courts, or to submit

⁴ Meserve, *Limiting the Jurisdiction and Remedies of Federal Courts*, 68 A.B.A.J. 159 (1982).

only character evidence on behalf of the defendants. That has not been the case in the several cases brought before civilian courts since 1981 for security-related offenses, except in the cases of Miskito Indian defendants (February 1981), who were also tried with court-appointed counsel.

Much more frequently, however, lawyers are not the cause, but the victims, of attempts to destroy judicial independence. Persecution of lawyers can assume differing forms. One of them is the disbarment of a colleague deemed to have gone too far in representing his client. That is the case of Dr. Jan Cernogursky in Czechoslovakia, expelled from the Regional Lawyers Association in Bratislava on April 15, 1981, as a result of his defense of a political dissident. A related, but even more serious, attack on the legal profession is the outright dissolution of bar associations, as when the Government of Syria dissolved the Damascus and Syrian Bar Associations in 1980 for their stands opposing the prolonged emergency, arbitrary arrests, and torture of political prisoners.

Persecution of individual practitioners is a far more extended practice. It can take the form of harassment and intimidation, as in the case of Sofia Kalistratova in the Soviet Union, whose house has been searched three times in recent weeks. Ms. Kalistratova represents many dissidents and as a member of the Moscow Helsinki Group is closely associated with Dr. Andrei Sakharov.

In other cases, lawyers are persecuted in much more serious ways, such as the murder of Mlungisi Griffiths Mxenge in South Africa, on November 20, 1981, and the subsequent incommunicado detention without charges of two members of his firm, Messrs. Maqudela and Ngeuka, under Section 6 of the Terrorism Act, which allows for incommunicado detention without charge indefinitely. These lawyers were actively engaged in the defense of political prisoners and corresponded with the Southern Africa Project of the Washington Lawyers' Committee for Civil Rights Under Law. In 1981 at least 13 Guatemalan lawyers were abducted or murdered. According to the Committee on International Human Rights of the Association of the Bar of the City of New York, more than 50 judges, lawyers and law professors were killed or "disappeared" in Guatemala in 1980 and 1981.

In Argentina, a combination of all these practices has been used since the early 1970s, and they reached dramatic proportions after the military takeover of March 1976. Since then, at least 90 lawyers have disappeared, more than 100 have been or still are in administrative detention without charges, and hundreds have been forced into exile as a result of threats and harassment.

My personal case is illustrative. I practiced law in my home town of Mar del Plata beginning in July 1970. In December 1971, my house was searched by the police, with a great display of their weapons, after two colleagues and I had filed court papers submitting evidence of police participation in an attack against a student assembly that had resulted in the death of an 18-year-old student. In 1973, together with other colleagues, we presented evidence of the existence of two houses of torture used by the police in Mar del Plata.

Later in 1973 mobs painted threats on the front door of my law office, in the presence of uniformed police, and then proceeded to paint similar threats against my life throughout the city. For many months I was under surveillance in my home and office by armed members of rightwing squads. In early 1974, as I left a meeting in the law school where I taught, I was arrested by the federal police and wrongfully charged with possession of firearms. A federal judge dismissed the charges and released me within three days. As a result of these actions against me, I moved to Buenos Aires, where I was less well known. By