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INSTITUT INTER-AMÉRICAIN DES DROITS DE L'HOMME
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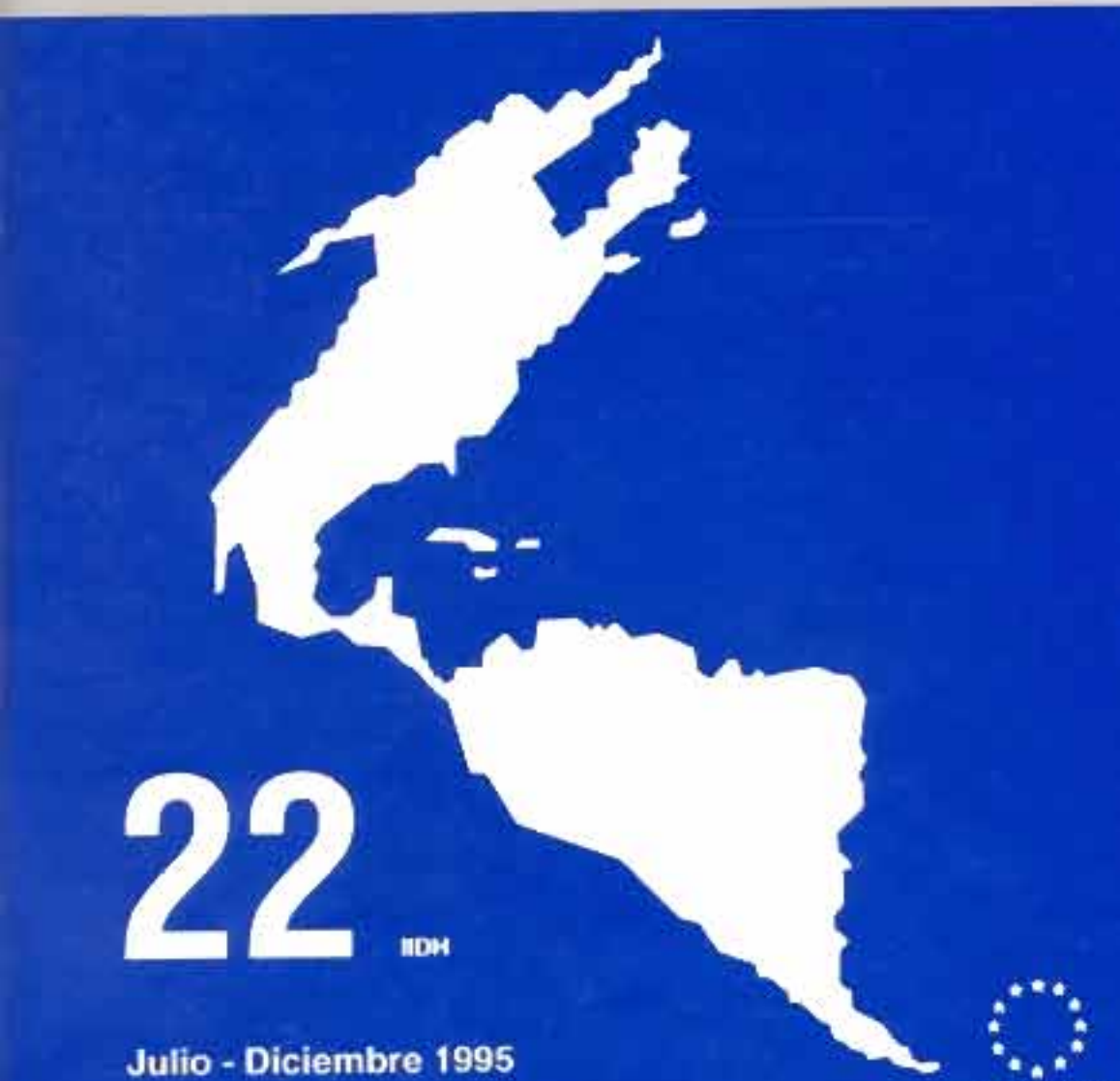

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IIDH

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CORTE INTERAMERICANA DE DERECHOS HUMANOS

PRESENTACIÓN

Nos es grato presentar la edición Número 22 de la Revista del Instituto Interamericano de Derechos Humanos, la cual surgió como primer número para el semestre enero-junio del año 1985 y, desde entonces, con periodicidad a la fecha.

Después de más de una década de editarse la Revista IIDH, como se le conoce en el ámbito de académicos y lectores, hay que hacer una reflexión y el merecido reconocimiento a las entidades que han apoyado la publicación ininterrumpidamente para este período, así como a los distinguidos colaboradores de su Capítulo de Doctrina.

Para los primeros veinte números se ha contado con el valioso apoyo de la Agencia para el Desarrollo Internacional de los Estados Unidos de América, USAID, cuyo aporte ha sido incondicional.

Asimismo, agradecemos a los órganos de supervisión internacional de los derechos humanos, por el envío de los contenidos específicos que acompañan a la Revista. Y, más recientemente, nos ha copatrocinado la Comisión de la Unión Europea, CUE.

Los Editores

DOCTRINA

PARA UNA GLOBALIZACIÓN DE LA EFICACIA DE LOS DERECHOS HUMANOS: LA ETAPA DEL MAYOR PROTAGONISMO DE LAS PERSONAS EN LOS SISTEMAS DE PROTECCIÓN INTERNACIONAL DE LOS DERECHOS HUMANOS

Susana Albanese

1.- Introducción

Después de la terminación de la denominada "Segunda Guerra Mundial" varios han sido los mecanismos diseñados en la búsqueda de la eficacia de la protección internacional de los derechos humanos.

A lo largo del medio siglo de referencia y en el marco de las organizaciones internacionales, ya universal, ya regionales, han sido elaborados declaraciones tanto generales cuanto específicas, tratados, protocolos facultativos, adicionales o de enmienda, han sido establecidos órganos de control, incluyendo judiciales, entre otros medios, demostrando una creatividad resaltable al servicio de la vigencia de los derechos humanos.

A través de este conjunto de instrumentos internacionales se han ido perfilando los códigos utilizados en los diversos sistemas mencionados, los inconvenientes y los problemas que fueron surgiendo en el accionar de los órganos y las diferentes maneras de encauzar las soluciones posibles en los espacios institucionales trazados en el período señalado.

Frente al fenómeno de la titulada "globalización y junto a ello la radiación de las comunicaciones e informaciones[1], constituye una necesi-

1. La Corte Interamericana de Derechos Humanos afirmó "que una sociedad que no está bien informada no es plenamente libre" en Opinión Consultiva OC-5/85 del 13

dad insoslayable analizar los instrumentos utilizados en unos sistemas de protección internacional de los derechos humanos con el objeto de estudiar la posibilidad de su adopción en otros, sin llegar a una mecánica copia, en la búsqueda señalada al comenzar el presente trabajo, evitando esfuerzos innecesarios, caminos ya andados, tiempos ya experimentados.

Adelantando convenientemente los tiempos se llega a otorgar un mayor protagonismo a las personas consustanciándose con la etapa actual como una manera más plena y espontánea del ejercicio de la libertad.

En consecuencia, frente a determinadas innovaciones que se intentan proyectar o se proyectaron en uno de los sistemas regionales de protección de los derechos humanos –en el caso, el europeo– se las podría adoptar en otro –en el americano–, siendo que una de las llaves de este proceso consistiría en planear para el sistema americano, un Protocolo Adicional o de Enmienda a la Convención Americana sobre Derechos Humanos sobre la base de los Protocolos 9 y 11 del Convenio Europeo de Derechos Humanos, incluyendo las modificaciones correspondientes de la Carta de la Organización de los Estados Americanos y de aquellos instrumentos vinculados con el cambio propuesto.

En este ensayo de perspectivas se analizan esencialmente las peticiones que las personas presenten ante los órganos de control internacional, excluyendo las comunicaciones interestaduales reguladas en determinadas convenciones.

2.- El Sistema Regional Americano

No es posible exponer en este breve trabajo las características principales y por cierto originales que marcaron la creación de dos órganos de control en el sistema americano de protección de los derechos humanos, ni sus semejanzas y diferencias con el sistema europeo. No obstante se marcarán algunas pautas simbólicas para desarrollar las propuesta que sucintamente se viene de presentar.

a) Comisión Interamericana de Derechos Humanos

La Comisión Interamericana fue creada en virtud de la resolución VI de la Quinta Reunión de Ministros de Relaciones Exteriores reunida en Santiago de Chile en 1959 donde se dispuso que la Comisión estaría compuesta de

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de noviembre de 1985. La colegiación obligatoria de periodistas (arts. 13 y 29 Convención Americana sobre Derechos Humanos) solicitada por el gobierno de Costa Rica. Serie A, núm. 5, pár. 70.

siete miembros elegidos a título personal de ternas presentadas por los gobiernos y estaría encargada de promover los derechos humanos, entendiéndose como tales los consagrados en la Declaración Americana de los Derechos y Deberes del Hombre de 1948 de acuerdo con su Estatuto, que fue aprobado al año siguiente por el Consejo de la OEA[2]. En la reforma del Estatuto de 1979 se debe destacar que en su artículo 1º se establece "...por derechos humanos se entiende: a) los derechos definidos en la Convención Americana sobre Derechos Humanos en relación con los Estados partes en la misma; b) los derechos consagrados en la Declaración Americana de Derechos y Deberes del Hombre, en relación con los demás Estados miembros"[3].

Las normas transcriptas tienen una profunda importancia en la evolución del derecho internacional de los derechos humanos, teniendo en cuenta que con la aprobación del estatuto la Asamblea General fija un mecanismo normativo idóneo frente a aquellos Estados miembros de la OEA que aún no han ratificado la Convención Americana[4].

Se debe remarcar que la Comisión no nació de un tratado específico, como se viene de señalar, nació de una resolución de uno de los órganos de la OEA, debiendo puntualizarse una diferencia, desde esta perspectiva, con la Comisión Europea de Derechos Humanos[5].

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2. El texto de la Quinta Reunión de Consulta, Santiago de Chile, del 12 al 18 de agosto de 1959, Documento OEA/Serie C/II.5. El texto del Estatuto de 1960, Documento OEA/Serie L/V/I.I, 26 de septiembre de 1960.

3. El texto del Estatuto de la Comisión Interamericana de 1979 en *Documentos Básicos en materia de Derechos Humanos en el Sistema Interamericano*, OEA/Ser./L/II/.71 doc.6 rev.1, 23 de septiembre de 1987.

4. Ver al respecto García Amador, Francisco V.: "Atribuciones de la Comisión Interamericana de Derechos Humanos en relación con los Estados miembros de la OEA que no son partes en la Convención de 1969" en *Derechos Humanos en las Américas*, CIDH, Washington, 1984, pp.177 a 187. Desde esta perspectiva debe mencionarse la Opinión Consultiva Nº 10 (OC-10, 14 de julio de 1989) donde la Corte Interamericana, interpretando la Declaración Americana, reconoce en ella una fuente de obligaciones internacionales.

5. Albanese, Susana: *Promoción y Protección Internacional de los Derechos Humanos*, Ed. La Rocca. Buenos Aires, 1992, Cap. XIV: "Algunas comparaciones entre los sistemas regionales de promoción y protección de los Derechos Humanos" pp.142 a 164; Gros Espiell, Héctor:"La Convention Américaine et la Convention Européenne des Droits de l'Homme. Analyse Comparative", *Recueil des Cours de l'Académie de Droit International*, 1989/VI, pp.175 y ss. El autor sostiene que en las circunstancias actuales y en un futuro inmediato, la condición en virtud de la cual solo los Estados y la Comisión pueden presentar un caso ante la Corte debe mantenerse, p. 408.

En 1980 la Comisión Interamericana modificó su reglamento otorgando atribuciones para tomar en consideración cualquier información disponible que le parezca idónea y en la cual se encuentren los elementos necesarios para iniciar la tramitación de un caso que contenga, a su juicio, los requisitos para tal fin[6], adquiriendo esta función características singulares, habida cuenta de la responsabilidad que asume el órgano de control al auto-convocarse al respecto.

La Comisión Interamericana cumplió una extraordinaria función en la búsqueda de la plena vigencia de los derechos humanos. De ello dan cuenta los documentos elaborados desde su creación hasta la fecha, sus informes anuales demuestran parte de las actividades que despliegan sus miembros así como el rol activo de la Secretaría Permanente, ello, en su aspecto formal[7]; en el otro aspecto, el esencial, los testimonios de su eficacia quedan enmarcados en las vivencias de muchos habitantes americanos.

Para resaltar el protagonismo del ciudadano se debería potencializar la estructura de la Comisión hacia una mayor receptividad de casos, como propuesta mínima, a fin de poder investigar disímiles situaciones que hagan posible el principio de indivisibilidad e interrelación de los derechos –no exclusivamente desde el prisma de la técnica procesal– más allá de la prioridad de la observancia de algunos de ellos, como fue fijado en su Estatuto de 1965.

b) Corte Interamericana de Derechos Humanos

La Corte Interamericana de Derechos Humanos es "una institución judicial autónoma cuyo objetivo es la aplicación e interpretación de la Convención Americana de Derechos Humanos" como lo establece su Estatuto en el artículo 1°. En sus 15 años de funcionamiento ha tenido una actuación fundamental en el segundo de los objetivos citados a través de las opiniones consultivas solicitadas por los Estados y la Comisión[8].

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6. Art. 26.2 en OEA/Ser.L/II.71 doc. 6 rev.1, pp. 69 a 96.

7. Ver Publicaciones de la Comisión Interamericana: Anuarios a partir de 1972, Informes Anuales 1971 en adelante, Informes sobre países a partir de 1962, *Derechos Humanos en las Américas*, Washington 1984, entre otras publicaciones. Padilla, David J.: "La Comisión Interamericana de Derechos Humanos" en *Estudios Básicos de Derechos Humanos*, Tomo I, IIDH, San José, Costa Rica. 1994, el autor detalla en forma concisa y práctica las funciones de la Comisión, p.232 y ss. Nieto Navia, Rafael: *Introducción al Sistema Interamericano de Protección a los Derechos Humanos*, Ed. Temis, IIDH, Bogotá, 1993. Pinto, Mónica: *La denuncia ante la Comisión Interamericana de Derechos Humanos*, Ed. Del Puerto, Buenos Aires, 1993.

8. Albanese, Susana: "Los protocolos adicionales y facultativos y las opiniones consultivas en la evolución progresiva del derecho internacional de los derechos humanos" en *El Derecho*, Buenos Aires, t. 155-547, 1994.

Su función consultiva se encuentra regulada en el artículo 64 de la Convención Americana y fueron emitidas 14 opiniones a la fecha.

Desde la primera opinión consultiva la Corte ha elaborado una doctrina tendiente a resaltar el objeto y fin de los tratados internacionales sobre derechos humanos diferenciando estos últimos de los tratados internacionales tradicionales[9].

Por otra parte, ha tenido oportunidad de interpretar el alcance del artículo 4° de la Convención Americana con precisión, debiendo destacarse, entre otros conceptos, los siguientes: "En verdad el texto revela una inequívoca tendencia limitativa del ámbito de dicha pena (la de muerte) sea en su imposición, sea en su aplicación"[10].

En la Opinión Consultiva N°5 la interpretación a favor de la persona enmarcada en el objeto y fin de los tratados específicos, y regulada en ellos, surge con concisión en estos términos: "...si a una misma situación son aplicables la Convención Americana y otro tratado internacional, debe prevalecer la norma más favorable a la persona humana"[11].

Asimismo, la Corte ha identificado al "bien común" como "un concepto referente a las condiciones de la vida social que permiten a los integrantes de la sociedad alcanzar el mayor grado de desarrollo personal y la mayor vigencia de los valores democráticos...", mas aclara posteriormente que

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9. Opinión Consultiva OC-1/82 del 24 de septiembre de 1982 "Otros Tratados" objeto de la función consultiva de la Corte (art. 64 Convención Americana sobre Derechos Humanos) Series A y B, núm. 1, pár. 24. En la Segunda Opinión Consultiva OC-2/82 del 24 de septiembre de 1982. "El efecto de las reservas sobre la entrada en vigencia de la Convención Americana sobre Derechos Humanos"(arts. 74 y 75) Series A y B, núm. 2, la Corte profundiza el alcance y la diferencia entre los tratados internacionales de derechos humanos y los demás tratados (pár. 29) citando la doctrina de la Comisión Europea en el caso Austria c. Italia acerca del carácter especial de los tratados de derechos humanos.

10. Opinión Consultiva OC-3/83 del 8 de septiembre de 1983 "Restricciones a la pena de muerte" (arts. 4.2. y 4.4. Convención Americana sobre Derechos Humanos) Series A y B, núm. 3, párr. 52.

11. Opinión Consultiva OC-5/85 del 13 de noviembre de 1985 "La colegiación obligatoria de periodistas" (arts. 13 y 29 de la Convención Americana sobre Derechos Humanos), Serie A, núm. 5, pár. 52. La noción de "cláusula del individuo más favorecido" es recordada por Pedro Nikken, citando a Karel Vasak en el caso de Chile frente a los Convenios 1 y 111 de la OIT en: *La protección internacional de los derechos humanos, su desarrollo progresivo*, Ed. Civitas, IIDH, Madrid, 1987, p. 88. Ver, asimismo, Cançado Trindade, Antonio A.: "Reflexiones sobre la interacción entre el derecho internacional y el derecho interno en la protección de los derechos humanos", *Colección Cuadernos de Derechos Humanos*, PDH, Guatemala,1995, 3-95, p.36 a 39.

"...de ninguna manera podrían invocarse el 'orden público' o el 'bien común' como medios para suprimir un derecho garantizado por la Convención o para desnaturalizarlo o privarlo de contenido real" recordando el artículo 29. a) de la Convención interpretada[12].

Entre la diversa temática abordada en el ejercicio de la función consultiva, afirmó la Corte con respecto a la trascendencia de las garantías "...sirven para proteger, asegurar o hacer valer la titularidad o el ejercicio de un derecho. Como los Estados partes tienen la obligación de reconocer y respetar los derechos y libertades de las personas, también tienen la de proteger y asegurar su ejercicio a través de las respectivas garantías, vale decir, de los medios idóneos para que los derechos y libertades sean efectivos en toda circunstancia"[13]. Sobre este tema, el de las garantías, reiteró en la Opinión Consultiva Nº 11 que garantizar: "implica la obligación del Estado de tomar todas las medidas necesarias para remover los obstáculos que puedan existir para que los individuos puedan disfrutar de los derechos que la Convención reconoce. Por consiguiente, la tolerancia del Estado a circunstancias o condiciones que impidan a los individuos acceder a los recursos internos adecuados para proteger sus derechos, constituye una violación del artículo 1.1. de la Convención"[14].

Los conceptos transcriptos constituyen signos de una trayectoria prestigiosa que posibilitan a algunos operadores del derecho su alegación ante los tribunales nacionales, y a otros, su aplicación directa, con el propósito de tutelar los derechos lesionados o amenazados por conductas arbitrarias o ilegítimas.

En cuanto a la función contenciosa de la Corte a la que ha sido convocada en diversas oportunidades, sin lugar a dudas el caso Velásquez Rodríguez es uno de los que ha sido destacado, analizado y estudiado profundamente por los alcances de la sentencia de fondo, por las conceptualizaciones vertidas y por sus efectos[15].

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12. Opinión citada en nota 1, párs. 66 y 67.

13. Opinión Consultiva OC-8/87 del 30 de enero de 1987 "El hábeas corpus bajo suspensión de garantías" (arts. 27.2, 25.1 y 7.6 Convención Americana sobre Derechos Humanos) Serie A, núm. 8, pár. 25.

14. Opinión Consultiva OC-11/90 del 10 de agosto de 1990, Arts. 46.1.a) y 46.2 de la Convención Americana sobre Derechos Humanos, pár. 34 recordando conceptos vertidos al respecto en los casos Velázquez Rodríguez, Godínez Cruz, Fairén Garbi y Solís Corrales.

15. Caso Velázquez Rodríguez, pronunciamiento de la Corte Interamericana sobre excepciones preliminares el 26 de junio de 1987; el segundo, sentencia del 29 de julio

Cabe sostener la influencia de las valiosas interpretaciones de la Corte Interamericana en el ámbito interno. Los más altos tribunales de las judicaturas, así como los tribunales inferiores, fundamentan sus posiciones mediante citas permanentes de la doctrina de la Corte Interamericana, demostrando la integración del derecho.

Al respecto, en los últimos años el reconocimiento de los Estados de su responsabilidad internacional por los hechos que se denuncian ante los órganos de control correspondientes marcan un hito trascendente. Si bien, se puede sostener que se trata de reconocimientos tardíos, habida cuenta que llegar ante la Corte implica un procedimiento previo ante la Comisión y el agotamiento de recursos internos –con sus valiosas excepciones–, no por ello debe desvirtuarse el alcance de la influencia señalada.

En el contexto que se viene de enmarcar, se encuentra el caso Aloeboetoe. En efecto, algunas de las soluciones adoptadas por la Corte Interamericana frente a las reparaciones solicitadas teniendo en cuenta que el Estado demandado –Surinam– había reconocido su responsabilidad en los hechos que oportunamente fueron denunciados ante la Comisión Interamericana, resultan muy interesantes[16]. Entre las medidas destacables se debe mencionar la que teniendo en cuenta que los hijos de las víctimas viven en Guyaba donde la escuela y el dispensario no funcionaban, la Corte decidió que Surinam está obligada a "reabrir la escuela de Guyaba y a dotarla de personal docente y administrativo para que funcione permanentemente a partir de 1994. Igualmente se ordenará que el dispensario allí existente sea puesto en condiciones operativas y reabierto en el curso de un año..." Una eficiente manera de obtener la operatividad de los derechos de segunda generación.

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de 1988, serie C, núm. 4, 194.5; el tercero, sobre el alcance de la indemnización compensatoria ha sido dictado el 21 de julio de 1989 y una aclaratoria del pronunciamiento anterior solicitada por la Comisión fue emitida el 17 de agosto de 1990, estas pautas temporales deben destacarse debido a la complejidad del tema, los actores involucrados y la inserción de nuevos mecanismos de aplicación de decisiones internacionales en el ámbito interno. Así, en el tercer pronunciamiento citado se señala el acuerdo suscripto en Tegucigalpa el 23 de enero de ese año -1989- entre el Gobierno hondureño y la Comisión en virtud del cual "el Gobierno de Honduras una vez más manifiesta su decidido propósito de dar cumplimiento integral a la sentencia dictada por la ilustre Corte Interamericana de Derechos Humanos de acuerdo con los términos establecidos en la referida sentencia..." demostrando conexidades e interrelaciones que marcaron hitos en la historia reciente del derecho internacional de los derechos humanos.

16. Corte Interamericana de Derechos Humanos, septiembre 10 de 1993, Caso Aloeboetoe y otros s/ reparaciones (art.63.1 de la Convención Americana sobre Derechos Humanos).

En el camino apuntado se debe mencionar el caso conocido como El Amparo[17]. Y recientemente, el caso Garrido y Baigorria[18].

El tribunal americano ha debido pronunciarse en su función contenciosa sobre una temática vinculada con la violación de derechos esenciales, aquellos a los que la Comisión Interamericana debía prestar principal atención desde sus primeros años de actividad[19]. Debería también receptar casos relacionados con posibles lesiones a otros derechos y garantías.

3.- El Sistema Regional Europeo

En la actualidad todos los Estados miembros del Consejo de Europa son partes de la Convención Europea de Derechos Humanos[20].

Tanto la Corte Interamericana cuanto la Europea han sido creadas a través de Convenciones específicas, siendo que esta última ha comenzado sus actividades veinte años antes que la citada en primer término. La función consultiva desarrollada por la Corte Interamericana y resaltada

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17. Corte Interamericana de Derechos Humanos, enero 18-1995, Caso El Amparo, p. 19: "Por medio de nota del 11 de enero de 1995, el gobierno anunció al Presidente que Venezuela...acepta la responsabilidad internacional del Estado... y solicitó a la Corte que pidiera a la Comisión avenirse a un procedimiento no contencioso a objeto de determinar amigablemente -bajo supervisión de la Corte- las reparaciones a las que haya lugar..."

18. Corte Interamericana de Derechos Humanos, 2 de febrero de 1996, Caso Garrido y Baigorria, dice la Corte:"Argentina aceptó también las consecuencias jurídicas que derivan de los hechos mencionados...Asimismo, este Estado reconoció plenamente su responsabilidad internacional en el presente caso" P.VII. 27.

19 Al modificarse el estatuto de la Comisión en 1965, Segunda Conferencia Interamericana Extraordinaria, celebrada en Río de Janeiro,en noviembre de ese año, se estableció entre sus disposiciones: "Solicitar a la Comisión que preste particular atención a esa tarea de la observancia de los derechos humanos mencionados en los Artículos I [derecho a la vida, a la libertad, a la seguridad e integridad de la persona], II [derecho de igualdad ante la ley], III [derecho de libertad religiosa y de culto] IV [derecho de libertad de investigación, opinión, expresión y difusión], XVIII [derecho de justicia], XXV [derecho de protección contra la detención arbitraria] y XXVI [derecho a proceso regular] de la Declaración Americana de los Derechos y Deberes del Hombre. Texto completo en el Acta Final de la Segunda Conferencia Interamericana extraordinaria, OEA/Ser.E/XIII.1-1965 p.46 y 47.

20. Llegan a 34 el número de Estados que siendo miembros del Consejo de Europa son partes de la Convención Europea de Derechos Humanos. Al 31 de mayo de 1995 todos los Estados miembros han aceptado la competencia contenciosa de la Corte Europea con excepción de Andorra, Estonia, Letonia y Lituania. Note d'Information du greffier de la Cour, 1995, Ver: Berger, Vincent: *Jurisprudence de la Cour Européenne des Droits de l'Homme*, 4a. ed., Sirey, Paris, 1994.

precedentemente, no ha tenido antecedentes en la Europa, no obstante que un Protocolo le otorga esa facultad[21].

En cuanto a la función contenciosa, la Corte Europea desde 1959 hasta 1994 ha sido convocada en 506 casos de los cuales 375 fueron presentados por la Comisión, 99 por la Comisión después por un gobierno; 1 por la Comisión después por dos gobiernos; 14 por un gobierno después por la Comisión y 17 por un gobierno, constatándose una mayor cantidad de casos en los últimos años[22].

Teniendo en cuenta el tiempo simultáneo de actividades de ambos tribunales, la Corte Europea ha desarrollado su función contenciosa en un número mayor de casos que su par americana.

Frente a ello corresponde preguntar: ¿Cuáles son los motivos que traban el desarrollo de la función contenciosa de la Corte Interamericana y con ello la imposibilidad de expresar su potencialidad?

¿Se consideraría que frente a la experimentada actuación de la Comisión, su decisión en cada caso concreto se transformaría en una evaluación suficiente que resguardase los intereses de las personas denunciantes?

¿Es conveniente dejar librado a un solo órgano la decisión que se viene de mencionar?

¿Se espera de los Estados americanos una actitud evolutiva diferente en demanda de la función contenciosa del órgano judicial americano?

¿Se estaría frente a una evaluación conjunta interórganos susceptible de quebrar el funcionamiento unidireccional del sistema americano?

Son varios los interrogantes en este contexto. Algunas respuestas penetran en el campo de las decisiones complejas y necesariamente consensuadas. No obstante, aquellas surgidas en el seno de otros sistemas, que

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21. Protocolo N° 2 a la Convención Europea de Derechos Humanos: a petición del Comité de Ministros, el Tribunal puede emitir opiniones consultivas sobre cuestiones jurídicas relativas a la interpretación del Convenio y de sus Protocolos; sin embargo, las opiniones no pueden referirse a cuestiones que traten el contenido o la extensión de los derechos y libertades definidos en el Convenio y en sus protocolos ni a cuestiones que podrían ser sometidas a la Comisión, a la Corte o al Comité de Ministros (ver arts. 1.1.2 y 3 del Protocolo 2 adoptado en 1963, con vigencia desde el 21/9/70).

22. Cour Européenne des Droits de l'Homme - Trente-cinq années d'activité, 1959-1994, Greffe de la Cour, *Conseil de L'Europe*, Carl Heymanns Verlag, Strasbourg, 1995.

indican el camino hacia la perfección de la plena vigencia de los derechos humanos, constituyen *"a priori"* paradigmas incuestionables.

a) Los protocolos como mecanismos idóneos en la perfectibilidad del sistema

Las cartas constitutivas de las organizaciones internacionales, tanto universal cuanto regionales, han logrado generar tratados-base sobre derechos humanos en cumplimiento de sus disposiciones. A su vez, esos tratados generaron instrumentos conexos para perfeccionar el sistema previsto convencionalmente, desde disímiles aspectos. Son los Protocolos adicionales, facultativos o de enmienda y a ellos vamos a referirnos en los próximos parágrafos.

El Convenio Europeo de salvaguarda de los derechos humanos fue suscripto en el marco del Consejo de Europa el 4 de noviembre de 1950. Se prefirió reconocer un número reducido de derechos fundamentales con protección eficaz y emplear el mecanismo de los Protocolos adicionales para perfeccionar tanto el sistema diseñado en el tratado-base, cuanto el reconocimiento de nuevos derechos que se fueron incorporando en la forma expresada, favoreciendo a los destinatarios.

En la actualidad son 11 los Protocolos elaborados, algunos, en proceso de ratificación[23].

Para plantear el panorama de los últimos años y los cambios surgidos en el ámbito europeo, conviene recordar que con el fin de mejorar y en particular agilizar el procedimiento el Protocolo N° 8, facilita la actividad de la Comisión decidiendo la constitución de Comisiones más que en sesiones plenarias, y a su vez estas, con la capacidad de establecer Comités compuestos por tres miembros como mínimo con el poder, ejercido a través de una votación por unanimidad, de declarar inadmisible o de suprimir de su lista de casos una demanda presentada en virtud del artículo 25 del Convenio[24].

El Protocolo N° 10, en el mismo sentido que el precedentemente citado, agiliza también el procedimiento, al modificar el artículo 32 de la Conven-

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23. Instruments Internationaux relatifs aux Droit de l'Homme, *Human Rights Law Journal*. HRLJ. Classification et état des ratifications au 1er. janvier 1995, Vol.16, N° 1-3. Conseil de L'Europe, Etat des signatures et des ratifications d'une selection d'instruments dans le domaine des Droits de l'Homme au 21 juin 1995, H(95)6.

24. Protocolo N° 8 al Convenio Europeo relativo a los procedimientos para hacer más expeditivos los procesos ante la Comisión Europea de Derechos Humanos, Viena, 19 de marzo de 1985.

ción con la finalidad de reducir la mayoría de dos tercios prevista para que el Comité de Ministros del Consejo de Europa tome una decisión acerca de la existencia o no de la violación de la Convención Europea, una vez que la Comisión haya elevado su informe y no se haya presentado el caso ante la Corte Europea[25].

b) Los Protocolos 9 y 11

Frente a los grandes problemas suscitados globalmente en este fin de milenio, el ejercicio del derecho a la jurisdicción, a una jurisdicción eficaz –con el alcance otorgado por la Corte Interamericana a los recursos en el sentido de tener la capacidad de producir el resultado para los que han sido concebidos–[26], se transforma en una necesidad básica del ciudadano para la defensa de sus derechos. Por ello, esta garantía elemental debe permitirle no solo la presentación de peticiones en el ámbito internacional, sino otorgarle la oportunidad de ser el protagonista de su tiempo, que es decir, de sus derechos. En cuanto al criterio a emplear para saber qué tipo de oportunidad es la más apropiada corresponde inclinarse por la que sostiene *in dubio pro actione*[27].

Por lo tanto, no debería monopolizarse el cauce relacionado con las denuncias o quejas que motivan el inicio de las actuaciones internacionales correspondientes. La difusión generalizada y efectiva de los mecanismos de control internacional debería constituir un medio capaz de producir el conocimiento necesario para provocar el uso adecuado de los sistemas internacionales en beneficio del hombre y, en este aspecto, los organismos no gubernamentales han desarrollado y deben continuar desarrollado un rol informativo de singular importancia.

Al mencionar el protagonismo de las personas para iniciar demandas internacionales, se debe interpretar en esta expresión, no solo la presentación inicial –ya regulada– sino la facultad de impulsar el procedimiento y, en el caso del sistema americano, una vez concluida la etapa llevada a cabo por la Comisión, poder ejercer la atribución de elevar un caso ante la Corte Interamericana, tener legitimidad procesal para ello.

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25. Protocolo N° 10, Strasbourg 25-III-1992.

26. Caso Velázquez Rodríguez, sentencia del 29 de julio de 1988, citado en nota 15, pár. 66.

27. Morello, Augusto M.: "El proceso justo (de la teoría del debido proceso legal al acceso real a la jurisdicción)", *La Ley*, ejemplar del 5 de junio de 1990, p. 1/4. Bidart Campos, Germán J.: *Tratado Elemental de Derecho Constitucional Argentino*, T.III, ed. Ediar, Buenos Aires, 1995, p. 350.

Se trata del poder de decisión del que carece, en gran medida, en la actualidad, esencialmente cuando un caso no es elevado a la Corte por la Comisión o por el Estado denunciado[28].

1. El Protocolo 9

El Protocolo N° 9 del Convenio Europeo permite a las personas físicas, a los organismos no gubernamentales o a grupo de particulares elevar un caso ante la Corte, una vez que la Comisión Europea ha concluido su etapa procesal. Congruente con esta disposición, el Informe que presenta la Comisión Europea es transmitido al Comité de Ministros, a los Estados interesados y al demandante –los que se vienen de citar– en caso de haberse iniciado una petición en los términos del artículo 25 del Convenio[29].

Si bien el Protocolo N° 9 establece una serie de requisitos para que tanto la persona física, cuanto los organismos no gubernamentales y grupos de particulares puedan acceder al tribunal[30], ese reconocimiento constituye un acontecimiento que debe ser subrayado. Se remueve otro obstáculo hacia la afirmación del derecho procesal a la jurisdicción internacional recogiendo la experiencia acumulada por los diferentes órganos que integran la protección de los derechos. Desde esta perspectiva corresponde manifestar que el reglamento de la Corte Europea aceptaba la presencia del demandante ante el tribunal, con determinadas limitaciones, que debe ser considerado como un paso previo al Protocolo comentado[31].

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28. Estas consideraciones generales no son excluyentes de la valorización del trabajo de las ONG, su "rigor y objetividad en la investigación" sobre violaciones de los derechos humanos como lo afirma José M. Vivanco en: "Las Organizaciones No Gubernamentales de Derechos Humanos" en *op. cit.* IIDH, nota 7, en todo caso el núcleo del cuestionamiento se encuentra en el siguiente parágrafo de la Opinión Consultiva OC-5/85 citada en nota 1 "...Dado que los individuos no están legitimados para introducir una demanda ante la Corte y que un gobierno que haya ganado un asunto ante la Comisión no tiene incentivo para hacerlo, la determinación de esta última de someter un caso semejante a la Corte, representa la única vía para que operen plenamente todos los medios de protección que la Convención establece" p. 26. Se trata de "cristalizar la titularidad subjetiva internacional plena de la persona humana" como afirma Cançado Trindade en: "Los retos de los promoción internacional de los derechos humanos en América Latina" con ocasión del 15° Aniversario de Instituto Interamericano de Derechos Humanos", San José de Costa Rica, 13 de junio de 1995 p. 9.

29. El Protocolo N° 9 entró en vigencia el 1° de octubre de 1994. Al 31 de mayo de 1995, 17 Estados lo ratificaron. *Conseil de l'Europe*, Traités Européens, 21/6/95. *H (95) 6.*

30. Artículo 5.2 del Protocolo N° 9 que reforma el art. 48 de la Convención Europea de Derechos Humanos.

31. Artículos 30, 37, 38, 39 y 40 del reglamento de la Corte Europea. En el Art. 33, 1.d) se establece que tras la recepción de una demanda el Secretario entregará una copia "...a

En este contexto, el reglamento de la Corte Interamericana establece la obligación de comunicar al tribunal si entre quienes asisten a los delegados de la Comisión figuran abogados representantes designados por el denunciante original, por la presunta víctima o por los familiares de esta[32]. En la práctica, asistentes designados por la Comisión, representantes de ONG, son designados por los familiares de las víctimas para que los representen ante la Corte[33]. Asimismo, fija ese cuerpo reglamentario que el Secretario de la Corte debe notificar la demanda al denunciante original si se conoce y a la víctima o sus familiares, si fuere el caso, siguiendo el camino trazado por la Corte Europea.

En consecuencia, la participación activa de las personas, en tanto víctimas de los derechos conculcados, se ha ido manifestando de diversas maneras. En el ámbito europeo se recepta en un Protocolo parte de lo establecido y aplicado a través de un Reglamento de un órgano de control, avanzando en la evolución progresiva del derecho internacional de los derechos humanos.

2. El Protocolo 11

Reestructurando el mecanismo de control establecido en el Convenio Europeo, el Protocolo de Enmiendas N° 11 precisa el acuerdo de todos los Estados Parte de dicho Convenio para su entrada en vigencia. Cuando ello ocurra, el Protocolo N° 9 quedará derogado[34].

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la persona física, organización no gubernamental o grupo de particulares que hayan acudido a la Comisión en virtud del artículo 25 del Convenio". También se fija la posibilidad de su participación en el procedimiento ante el tribunal que dan lugar a la siguiente afirmación: "...la circunstancia de que el individuo aparezca investido con poderes jurídicos suficientes para intervenir, en condiciones de igualdad, en el debate judicial contradictorio, implica que, por obra del Reglamento de la Corte Europea, ha alcanzado técnicamente la condición de parte en los procesos que tienen lugar ante ella", Nikken, Pedro, *op. cit.* nota 11, p.227.

32. Artículo 22.2 del Reglamento de la Corte Interamericana aprobada en su XXIII período ordinario de sesiones del 9 al 18 de enero de 1991.

33. Entre otros, Corte Interamericana de Derechos Humanos, enero 18-1995, Caso El Amparo, P.I.6. Además en el Caso Velázquez Rodríguez ya citado en nota 15, es importante recordar en cuanto al alcance de "parte" la posición del Juez Rodolfo E. Piza Escalante, p. 1-6.

34. El Protocolo N° 11 al Convenio para la protección de los derechos humanos y de las libertades fundamentales relativo a la reestructuración del mecanismo de control establecido por el convenio, fue ratificado por 9 Estados al 31 de junio de 1995, *op. cit.* nota 29. Todos estos cambios se producen por diversas causas de las que no están ausentes la caída del muro de Berlín y el reacomodamiento de las sociedades en el contexto del pluralismo político en el sistema democrático que incluye incuestionablemente el respeto por los derechos humanos.

En la Declaración de Viena del 9 de octubre de 1993, los Jefes de Estado y de Gobierno de los Estados Miembros del Consejo de Europa afirmaron que "desde la entrada en vigor del Convenio de 1953, el número de Estados contratantes casi se ha triplicado y otros Estados van a adherirse al mismo una vez convertidos en miembros del Consejo de Europa. Somos de la opinión de que resulta muy urgente que se adapte a esa evolución el mecanismo de control actual con el fin de mantener en el futuro una protección internacional efectiva de los derechos humanos. El objetivo de esta reforma es el aumento de la eficacia de los medios de protección, la reducción de la duración de los procedimientos y el mantenimiento del elevado nivel de protección de los derechos humanos"[35].

Según surge del Informe explicativo al Protocolo N° 11, la posibilidad de una fusión de la Comisión y de la Corte en un órgano único fue planteada por primera vez en la 8° reunión del Comité de Expertos para mejorar el procedimiento del Convenio Europeo en 1982; sin embargo, fue en 1985 en la Conferencia Ministerial Europea de Derechos Humanos donde se comenzó a tratar a nivel político la idea de una fusión.

El establecimiento de un tribunal único tiene por finalidad evitar duplicidad de actuaciones, observándose que el retraso acumulado en el examen de los asuntos pendientes ante la Comisión fue uno de los temas centrales en el estudio de la reestructuración del sistema, así como el reforzamiento de los elementos judiciales.

La jurisdicción del tribunal se extenderá a todos los asuntos relativos a la interpretación y a la aplicación del Convenio, tanto para los litigios entre Estados como para las demandas individuales. Además, ejercerá su función consultiva cuando así lo solicite el Comité de Ministros, como ocurre en la actualidad.

El número de jueces será igual al de las partes contratantes, debiendo gozar de la más alta consideración moral y reunir las condiciones requeridas para el ejercicio de las funciones judiciales o ser jurisconsultos de reconocida competencia, formando parte del tribunal a título individual.

Una vez más es imprescindible señalar la importancia de la imparcialidad, independencia e idoneidad que deben acreditar los miembros de los órganos de control internacionales. Por ello se han incluido las condiciones que deben reunir los futuros integrantes del tribunal permanente, reiteran-

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35. Como antecedentes ver "Reforma du Systeme de controle de la Convention Européenne des Droits de l'Homme", *Conseil de l'Europe*, Strasbourg déc. 1992 *H(92)14*.

do el art. 19.3 del Convenio Europeo. En ese contexto, la disponibilidad constituye un elemento imprescindible en las actividades de los jueces debido al carácter permanente del tribunal[36].

Para ejercer su función contenciosa, el tribunal actuará en Comités formados por tres jueces o en Salas de siete jueces o en una Gran Sala de 17 jueces. No se excluye la posibilidad de que un juez sea miembro de dos Salas.

De la lectura puntual del protocolo 11 se evalúan diversos aspectos tanto procesales cuanto de fondo que hacen al mecanismo de control que se ha proyectado implementar, cuya vigencia, como ya se manifestara, dependerá del consenso de los Estados partes del Convenio Europeo.

Al aumento de demandas presentadas en el sistema europeo se responde con un proyecto destinado a aumentar la eficacia. La alta litigiosidad ha motivado una evaluación profunda de las circunstancias, creándose tribunales permanentes para el ejercicio efectivo de los derechos.

3. El Tribunal Permanente Interamericano de Derechos Humanos - Modificaciones a la Convención Americana

Teniendo en cuenta los protocolos 9 y 11 del Convenio Europeo y reflexionando acerca de una futura reestructuración en el sistema americano de protección de los derechos humanos, se podría proyectar la creación de un Tribunal Permanente Interamericano de Derechos Humanos compuesto por Salas y por una Corte Suprema. Más allá de los títulos o denominaciones que las albergue, ante las primeras, las personas podrían presentar sus demandas, ser partes activas del procedimiento, con ofrecimiento de prueba y su producción hasta la sentencia que, en determinados casos, podría ser apelada por las personas y el Estado denunciado ante una Corte Suprema cuya decisión sería inapelable y definitiva.

De esta forma, la Comisión Interamericana con su experiencia y prestigio podría fusionarse en Salas de Primera Instancia, y la Corte actual, en una

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36. Nieto Navia, Rafael, *op. cit.* nota 7 y sus interesantes consideraciones en torno a los Jueces *"ad hoc"*, p. 260. Ver Buergenthal, Thomas y otr.: *La protección de los derechos humanos en las Américas*, Ed. Civitas, IIDH, Madrid, 1990, especialmente Cap. VI: "Independencia, Incompatibilidad e Imparcialidad". p. 465 y s. Morello, Augusto M.: "Las Cortes Políticas y la independencia del Poder Judicial" en *El Derecho*. Buenos Aires, ejemplar del 15/12/1993, denomina el autor 'jurisprudencia de acompañamiento' aquella que "traduce un exceso en la homologación de las políticas del gobierno, más que en su imprescindible control y contención de posiciones institucionales..."

Corte Suprema Interamericana, receptando las causas que las personas y los Estados eleven sobre temas específicos y fundamentales a consensuar, manteniendo, asimismo, su actual función consultiva.

El Tribunal Permanente debería estar formado por un número de jueces igual al de Estados Partes de la Convención Americana sobre Derechos Humanos y sus protocolos. El aumento del número de miembros en los órganos jurisdiccionales de control americano tiene una relevancia fundamental vinculada con la idea de integración que permitiría, además, un enriquecimiento metodológico sustantivo relacionado con el perfeccionamiento del sistema.

Si faltase el consenso necesario para la modificación sucintamente planteada, se debería, como proyecto mínimo, modificar los artículos 50 y 51, 61.1 y correlativos de la Convención Americana sobre Derechos Humanos con la finalidad de permitir a las personas elevar su caso a la Corte Interamericana una vez agotados los procedimientos fijados en los artículos 48 y 49 de la Convención, como una manera de continuar elaborando la capacidad de un sistema, alcanzando grados sucesivos de compromisos acordes con las nuevas circunstancias y los permanentes principios: la dignidad humana.

No es solo en el plano normativo donde se encontrarán las soluciones al ejercicio pleno de los derechos; no obstante, a partir de normas consensuadas que prestigien el rol de las personas se puede avanzar en la construcción de caminos que a veces se hallan sutilmente obstruidos en otros ámbitos.

Fusionar la Comisión y la Corte actuales en un Tribunal Permanente Interamericano de Derechos Humanos, o solo modificar algunas disposiciones de la Convención Americana para que de una u otra forma las personas puedan ser protagonistas principales del sistema de control internacional, evitando monopolios sean de la naturaleza que fueren, constituiría un paso justo y equitativo en la búsqueda constante de la efectiva vigencia de los derechos humanos. De eso se trata.

INDICE

COMMONWEALTH CARIBBEAN JURISPRUDENCE AND THE PRIVY COUNCIL

*Michael de la Bastide**

It is almost impossible to win an argument on whether or not the Privy Council should be replaced by a regional Court as the final Court of Appeal for the Commonwealth Caribbean. The problem is that so many of the points that are made for and against are matters of perception or impression, and are incapable of being proved to the satisfaction of the determined disbeliever. For example, is the retention of a right of appeal to a Court in a foreign land incompatible with Independence, or is it an exercise of sovereignty? Is the remoteness of the Judges in the Privy Council, both culturally and geographically, an asset or a handicap? Will the cost to the taxpayer of having to pay for our own final Court of Appeal be effectively offset by the saving to the litigant who will no longer have to pay fees, at London rates and in pounds sterling, to English solicitors and counsel, or alternatively meet the expense (irrecoverable as costs according to a Privy Council ruling) of transporting his own attorney to England and putting him up in a London hotel? Are there or are there not enough lawyers in the region of the right calibre, willing to serve on a regional court of appeal? Like most of you, I am sure, I have strong views on these matters and I have never been reluctant to share them with those prepared to listen. It did occur to me, however, that it might better illuminate the debate on this important issue to adopt a more inductive approach and look at what has been happening in the Judicial Committee recently and consider whether that has any message for us. I propose to consider first how the jurisdiction of the Judicial

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Committee has been attenuated. Next I will look at the statistics relating to appeals from the Commonwealth Caribbean, and finally I will turn to the real meat of the matter, which is a consideration of a few of the more important decisions recently made by their Lordships in appeals from the Caribbean.

The Dwindling Jurisdiction of the Privy Council

The number of independent countries who retain appeals to the Privy Council has been greatly reduced in recent years. If one excludes the Caribbean, there would appear to be only four, namely Brunei, Zambia, Mauritius and New Zealand. Moreover, appeals from Brunei are now to be limited to civil cases, and the authorities in New Zealand are at the moment in the process of considering whether or not to retain or abolish the right of appeal to the Privy Council. The right of appeal from Singapore was greatly curtailed in 1989 and was finally abolished very recently. Within the last ten years, appeals which used to go to the Privy Council from Fiji, Malaysia, and the States of Australia have been discontinued (in the case of Fiji when it left the Commonwealth). The only non-independent 'clients' of the Privy Council outside the Caribbean are Hong Kong and the Channel Islands and appeals from Hong Kong will perforce cease in 1997. Soon the Commonwealth Caribbean countries may find themselves the only countries (apart from the Channel Islands) who retain appeals to the Privy Council. It may be of course that our circumstances are unique, or that we unlike others, have not sacrificed our best interests to blind nationalism. The fact, however, that we still cling to the skirts of the Privy Council when so many others have let go, must give rise to the disturbing thought that maybe what distinguishes us from the others is a profound lack of self-confidence.

A Statistical Review of Caribbean Appeals

Let us look now at the number of cases which have gone from this region to the Privy Council during the last ten years, that is from 1985 to 1994, both inclusive. I have included in my figures all the Commonwealth Caribbean countries including Belize and the Bahamas, as well as the islands which are still dependencies of the United Kingdom, including Bermuda. The total number of appeals to the Privy Council entered during the last 10 years from the region so defined, was 214 and the number of appeals determined after a hearing was 163, with 68 appeals having been dismissed without a hearing. Of the appeals determined, the decision of the local Court of Appeal was upheld in 102 cases, and in 61 cases it was reversed, the percentages being 63% upheld and 37% reversed. During the same period there were 292 petitions for special leave to appeal, of which only 87, or roughly 30%, were granted. By far the most prolific source of appeals in the

region was Jamaica with 89 appeals entered during the period under review. The next highest was Trinidad and Tobago with 51 appeals entered, and then the Bahamas with 16. There were only 11 appeals entered from Barbados during this ten-year period. No wonder I had difficulty a couple years ago in finding a precedent in Bridgetown for an application for leave to appeal to the Privy Council! If you are interested in how Barbados did in relation to those appeals, the answer is pretty well. Of the 8 appeals from Barbados that were determined, the Barbados Court of Appeal was upheld in 6 cases and only twice reversed. The comparable figures for Jamaica, are 69 appeals determined, 39 dismissed and 30 allowed. For Trinidad and Tobago 44 appeals determined, 26 dismissed and 18 allowed and for the Bahamas 15 appeals determined, 9 dismissed and 6 allowed. The success rate therefore, of those who appealed to the Judicial Committee from the Appeal Courts of these four countries during this period was about 41%, though in the case of Barbados, it was only 25%. You may be surprised that the Privy Council is so lightly used, relatively speaking, by litigants in the area, more so as the right of appeal exists in civil matters whenever the amount involved exceeds a very minimal figure, in Trinidad and Tobago TT$1,500.00. Presumably, a more effective barrier is the high cost of pursuing appeals to the Judicial Committee. The vast majority of the petitions for special leave to appeal are on behalf of persons sentenced to death, and if capital punishment were abolished in the region, the flow of these petitions would virtually dry up. At the end of 1994 the number of appeals pending was 12 from Jamaica, 1 from Trinidad and Tobago, 3 from the Bahamas and 3 from Barbados. These figures make it clear that one criticism which cannot be levelled at the Judicial Committee, is that it has allowed a backlog of cases to build up. This admittedly is in stark contrast to what obtains in some of the Courts of Appeal in the region.

Pratt and Morgan

Indeed delay provides the link to my consideration of some of the more notable recent decisions of the Privy Council. Probably the most important, and certainly the most controversial, of these decisions is the Jamaican case of *Pratt and Another v. Attorney-General of Jamaica* (1993) 43 W.I.R. 340 in which the Board held that prolonged delay in carrying out a sentence of death could amount to "inhuman and degrading punishment or other treatment" within the meaning of the prohibition against such punishment or treatment contained in the Jamaican Constitution. The Board held that in the case of the two appellants (Pratt and Morgan) the delay was of that order and commuted their death sentences to sentences of life imprisonment. In doing so the Board consisting of seven Judges instead of the usual five, overruled the decision of the majority comprising Lords Hailsham, Diplock and Bridge in *Riley and Ors. v. Attorney-General of Jamaica* (1983) 1 A.C. 719.

The facts in *Pratt and Morgan* were particularly bad. The murder of which the appellants were convicted was committed in 1977 and their appeal against conviction was dismissed by the Jamaican Court of Appeal in December, 1980. Their petition for special leave to appeal to the Privy Council was dismissed in July 1986. The Jamaican Court of Appeal had, through an oversight, omitted to give reasons for its dismissal of the appellants' appeal for nearly 4 years. This was wrongly stated by Lord Templeman when refusing special leave to appeal to the Privy Council, to have made it impossible for the appellants to petition the Privy Council in the meantime, and it was on the basis of this mis-statement that the United Nations Human Rights Committee held that the failure of the Jamaican Court of Appeal to give reasons was a breach of the International Covenant on Civil and Political Rights. The Jamaican Privy Council which advises on the exercise of the prerogative of mercy, did not consider the appellants' case until November, 1986. The death warrant was read to the appellants on no less than 3 occasions. The impact of all these circumstances was described by the Judicial Committee in this way (at page 343 a):

> The statement of these bare facts is sufficient to bring home to the mind of any person of normal sensitivity and compassion the agony of mind that these men must have suffered as they have alternated between hope and despair in the 14 years they have been in prison facing the gallows.

The majority in *Riley* held that delay could never render the hanging unconstitutional. That decision was based not on a finding that delay could never render the carrying out of a sentence of death "inhuman or degrading" but rather on the majority's interpretation of Section 17 (2) of the Jamaican Constitution. That sub-section preserved from challenge under the Constitution any description of punishment which was lawful in Jamaica before Independence and the majority held that it operated to save from challenge the carrying out of a death sentence regardless of the extent of the delay that occurred between sentence and execution. The Judicial Committee in *Pratt and Morgan* held that the majority decision in *Riley* was based on a wrong premise, namely that there could have been no challenge prior to Independence to a long delayed execution. The seven-man Board in *Pratt and Morgan* preferred the interpretation of Section 17 (2) adopted by the minority in *Riley*, and held that while it rendered hanging per se immune from attack on the ground that it was "inhuman or degrading" punishment, it did not save it from attack if because of long delay, it took on the dimension of something that was inhuman or degrading.

The actual decision in *Pratt and Morgan* is not all that controversial, if confined to the facts of that case. Only 6 months before the judgment in *Pratt and Morgan*, the Trinidad and Tobago Court of Appeal in the case of

Jurisingh (Civil Appeal No. 151 of 1992) while following as they were bound to do the majority decision in *Riley*, and rejecting the argument that delay had rendered the carrying out of a death sentence unconstitutional, made it quite clear that they were attracted by the approach of the minority in *Riley*, and predicted quite accurately that another Board might prefer theirs to the majority opinion. But their Lordships in *Pratt and Morgan* went much further than simply deciding that on the facts of this case, hanging the appellants would be a breach of their constitutional rights. Firstly, they addressed the question whether or not the time which elapsed while the convicted person is exercising his right of appeal to the local Court of Appeal and thereafter in pursuing an appeal to the Privy Council, should be taken into account in determining whether the delay was so great as to render the carrying out of the sentence unconstitutional. The Judicial Committee held that the time taken in such appeals should be taken into account. Their Lordships expressed their position in these words (at page 359 g-j):

> In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows swiftly as practicable after sentence allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will take every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearing over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with the capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.

If this had been in a pleading, one would have sought further and better particulars of that word "our"!

A little later in the judgment it is said (at page 360 g):

> Their Lordships are very conscious that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at their disposal to administer the legal system. Nevertheless, if capital punishment is to be retained it must be carried out with all possible expedition.

The Board then went on to set targets of 12 months to hear a capital appeal after conviction, and a further 12 months for the determination of the further appeal to the Privy Council.

The second controversial ruling made by the Privy Council, which must be read in conjunction with the first, is the prescription of a 5-year deadline between sentence and execution after which "there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'" (page 363 e). The effect of these rulings was immediate and far-reaching. In Trinidad and Tobago, 53 persons who were under sentence of death had their sentence commuted because more than 5 years had elapsed since sentence was imposed. I do not know what the comparable figure was in Jamaica, but I would expect that the number of commutations would have been even greater. In Trinidad and Tobago the other work of the Court of Appeal has very largely been put aside, so that the Court can concentrate almost exclusively on the hearing of appeals in capital cases. The inevitable result is that all other appellants apart from convicted murderers have to accept yet a further addition to the already horrendous delays in having their appeals determined. Those in Barbados who thought that *Pratt and Morgan* had nothing to do with them, received a rude awakening recently when the Judicial Committee applied that decision in an appeal from Barbados and commuted the death sentences imposed on two appellants in *Bradshaw and Roberts*, (unreported) on the ground of delay in carrying out the death sentence.

These rulings by the Privy Council come perilously close to achieving that which would normally be achieved by the legislature, that is, a partial abolition of the death penalty. That is not to say that these are not decisions which the Judiciary is entitled, and indeed obliged, to take as part of its function of guardian of the Constitution. The question, however, is whether these are the sort of decisions that should be taken in London by judges who have no contact at first hand with the societies to whom the decisions apply. What the judges are about here is not a search for some uniquely correct common law solution to a problem, but rather the balancing of important interests and considerations that are in competition. On the one hand, the interest of the condemned person who has to face the dreadful prospect of death by hanging over a protracted period, and the importance of maintaining in the society proper standards of humaneness and compassion. On the other hand, there is the interest of the relatives of the victim and of the community as a whole, in having the punishment mandated by law applied to the offender, not only so that the retributive element of the punishment should not be foregone but also so that its deterrent effect should not be diluted. These considerations must also be weighted in the context of a frightening increase in the incidence of murder and other violent crimes. The irony is that it is the very increase in criminal activity which is responsible to some extent for the clogging of the judicial system and the resultant delays in processing criminal trials and appeals. The Court of Appeal in Trinidad and Tobago has already expressed the view that a time-

limit of 5 years is inappropriate, while recognizing that compliance with it is mandatory (see *Wallen and Guerra v. Baptiste & Ors.* Civil Appeal Nos. 65 and 66 of 1994). But it is not so much whether the Privy Council gave the right answer to these questions, but whether they ought to be answering them at all. One wonders whether their Lordships have a proper appreciation of the extent of the delays in the determination of other non-capital cases and civil matters generally. Given that capital cases are entitled to priority, surely the delays suffered by other claimants on the judicial system must have some relevance. Evidence provided to the Court in a recent constitutional motion in Trinidad and Tobago (*Tookai v. D.P.P. and A.G.* Civil Appeal No. 116 of 1994) indicates that it is not unusual for a preliminary enquiry in Trinidad to take 4 to 5 years, and that the normal lapse of time between committal in a non-capital case and the first listing of the matter before the Assizes is in the region of 8 years. It is difficult to resist the impression from some of their Lordships' language in *Pratt and Morgan* that they regard capital punishment with some distaste, and that would hardly be surprising given that the death penalty has been abolished in England for many years. There are no doubt judges in the Caribbean who share that distaste, but when one is making a decision as arbitrary as fixing the maximum period of time which may be allowed to elapse between a sentence of death and its execution, it is probably easier for a judge to weigh the different factors appropriately if he has experienced them at first hand.

The decision in *Pratt and Morgan* gives rise to one or two other random thoughts. Firstly it is something of a shock to have a constitutional law decision in which Lord Diplock participated, overruled. Even the most insightful of judges apparently can err, and when that happens it is important that there should be the possibility of correction. This case demonstrates that the Privy Council is prepared to correct its own mistakes, and that same right has been claimed for itself by the House of Lords. Regrettably, however, some members of the Judicial Committee have taken the view that when sitting as members of the Judicial Committee they are not entitled to differ from decisions of the House of Lords. See *Hart v. O'Connor* (1985) A.C. 1000 and *Tai Hing Cotton Mills Ltd. v. Sui Chong Hing Bank Ltd.* (1986) A.C. 80. Of course so far as our own Courts are concerned, not only are they bound by decisions of the Privy Council in appeals from the jurisdiction in which they sit, but by all decisions of the Privy Council, even those made in appeals emanating from some other jurisdiction. Secondly, one appreciates the desire to establish some time-limit of general application for carrying out a death sentence, given the large number of persons in Jamaica and in Trinidad and Tobago in particular, who have been under sentence of death for long periods. Nevertheless, it does seem a pity that in the interest of avoiding a multiplicity of constitutional cases, it was decided to forego the advantage of considering each case individually on its

merits. Such a case by case approach has been endorsed by the Supreme Court of India in the case of *Sher Singh v. State of Punjab* (1983) 2 S.C.R. 582 and in *Triveniben v. State of Gujarat* (1989) 1.S.C.J. 383, both of which were cited in *Pratt and Morgan*. In the earlier of those two cases, the Supreme Court of India expressed the opinion that no "absolute or unqualified rule can be laid down that in every case in which there is a long delay in the execution of death sentence, the sentence must be substituted by the sentence of life imprisonment". The Court identified some of the factors besides delay which had to be taken into account as follows:

> Why the delay was caused and who was responsible, the nature of the offence, the diverse circumstances attendant upon it, its impact upon the contemporary society and the question whether the motivation and pattern of the crime were such as were likely to lead to its repetition.

The Indian Court rejected the deadline of 2 years for carrying out of the death sentence which had been laid down in an earlier case, as that time-limit was 'inconsistent with common experience' as regards the time generally occupied by proceedings in the High Court, the Supreme Court and before the executive authorities. This decision was upheld by five Judges of the Supreme Court of India in *Triveniben*, the second case referred to above. It was also held in *Triveniben* that the only delay which would be material for consideration would be the delay from the date the judgment by the apex Court was pronounced, and so the time consumed in the hearing of appeals was to be left out of the reckoning. The rationale was that as long as a condemned man's case was subject to appeal, he had a ray of hope, and therefore did not suffer the same mental torture as a person who had exhausted all his appeals. While as stated above, it is accepted that a single arbitrary limit was obviously desirable so that it could be applied to those already on death row, it would have been preferable if for the future the less arbitrary and more flexible approach adopted by the Supreme Court of India could be adopted by our Courts as well, but as things stand we would have to wait before that happens on another change of heart by the Judicial Committee. And that is probably too much to hope for, if *Bradshaw and Roberts* is any guide.

Delay in Non-Capital Cases

The effect of delay in a non-capital case on a convicted person's constitutional rights was considered by the Privy Council in *Bell v. D.P.P.* (1985) 32 W.I.R. 317 an appeal from Jamaica. It was a case in which a retrial was ordered by the Jamaican Court of Appeal and there was a delay of 32 months between that order and the retrial itself.

The Privy Council overruling the Court of Appeal held that the appellant was entitled to a declaration that his right under the Jamaican Constitution to a fair hearing within a reasonable time had been infringed. The Board accepted that the average delay in the hearing of a case in the Court was 2 years and that the delay of that order did not by itself infringe the rights of an accused to a fair hearing within a reasonable time. The Board also recognized that in general the Courts of Jamaica are best equipped to decide whether in any particular case a delay for whatever cause contravenes the fundamental right granted by the Constitution. In dealing specifically with delays caused by witnesses not being available, the Board recognized that the Courts had to weigh the right of the accused to be tried promptly against the public interest in ensuring that the trial should only take place when the guilt or innocence of the accused could fairly be established by all the relevant evidence. The Board indicated that it would normally defer to the view of the local Court of Appeal as to whether or not the right of an accused to a fair hearing within a reasonable time had been infringed, but on the facts of this particular case, they felt able to intervene because of an error of principle committed by the Court of Appeal when it failed to take into account that the delay in this case had occurred after an order for a retrial and could not be assessed by reference to the average delay in cases which did not involve a retrial. The Board in *Pratt and Morgan* does not appear to have shown the same concern to relate the deadline which the Board fixed for carrying out a death sentence, to the average time actually and currently taken in Jamaica over the judicial and executive processes involved, nor to receive the views of the Jamaican Courts as to what was reasonable in terms of a deadline. The decision in *Bradshaw and Roberts* would seem to suggest that the 5 year deadline fixed by their Lordships may not be subject to variation because of differences (if any) in local conditions as between one Caribbean country and another, but when the reasons in that case become available, one will be in a better position to judge.

It is likely that the Judicial Committee will have the opportunity soon of considering the effect of delay in a non-capital case as it is expected that the State will appeal from a recent majority decision of the Court of Appeal of Trinidad and Tobago in *Tookai v. D.P.P. and the A.G.* (Civil Appeal No. 116 of 1994) which was delivered on the 8th March, 1995. In that case the appellants applied by motion to quash an indictment that was preferred almost 8 years after they were committed for trial. The majority held that the preferring of the indictment at that point in time constituted a breach of the appellants constitutional rights and that the criminal prosecution should be terminated, and moreover made an order for compensation to be assessed. There was a very powerful dissenting judgment by Hamel-Smith J.A. in which he made a careful and thorough review of relevant authorities from different parts of the Commonwealth. The Judge in the Court below had

dismissed the plaintiffs' motion, so that the local Judges were split two-all. One imagines that the Judicial Committee is likely to uphold the view of the majority in the Court of Appeal, but it will be interesting to see how they support that result.

Guerra and Wallen

I turn now to a recent order made by the Privy Council in circumstances which produced an embarrassing confrontation between the Judicial Committee and the Trinidad and Tobago Court of Appeal. This was in the case of *Guerra and Wallen v. the State*. Guerra and Wallen had been convicted of murder and sentenced to death and had exhausted all their appeals. They were sentenced on the 18th May, 1989, and their petitions for special leave to appeal to the Privy Council were dismissed on the 21st March, 1994, just about 2 months short of the 5 year limit. Warrants for their execution were read to both men on the 24th March, 1994, and the executions were scheduled for the following day. On the 24th March, there was a flurry of activity. Constitutional motions were filed on their behalf claiming that the carrying out of the executions would constitute a violation of their constitutional rights because of the delay which had occurred. A summons was filed seeking a conservatory order to delay the executions, and was dismissed by Lucky J. at 10 p.m. that same night. Notice on Appeal was immediately filed and the matter came before Hosein J.A. at 1 a.m. on the 25th March. He dismissed the appeal, but gave leave to appeal to the Judicial Committee and granted a conservatory order for 48 hours pending an appeal to the Judicial Committee. Within a couple hours of that, the Judicial Committee granted a conservatory order staying execution for 4 days. On the 28th March, the Judicial Committee adjourned the petitioners' application for leave to appeal to the 25th April and extended the conservatory order until after the determination of the petition on that date. In the meantime the Attorney-General had moved the full Court of Appeal in Port of Spain on an application to set aside the 48 hours' stay of execution granted by Hosein J.A. On reading a faxed copy of the order of the Judicial Committee for the stay, the Court of Appeal adjourned the Attorney-General's application until the 28th March. On the 31st March the Court of Appeal gave judgment on the Attorney-General's application. They held that Hosein J.A. had erred in granting leave to the petitioners to appeal to the Judicial Committee without recourse to the full Court of Appeal, but decided that since the Judicial Committee was already seized of the matter, they would not set aside the order of Hosein J.A. On the 18th April, Jones J. dismissed the petitioners' constitutional motion and refused a stay of execution pending an appeal. On the 25th April, the stay granted by the Judicial Committee lapsed but the Attorney-General undertook that no execution would take place until the hearing of an application to the Court

of Appeal for a stay and on the 29th April, the Court of Appeal by consent granted a conservatory order directing that the sentence of death be not carried out until after the determination of the appeal to the Court of Appeal. The Court of Appeal gave their judgment on the 27th July, 1994, dismissing the appeal. Before their judgment was given, however, on the 25th July, Guerra and Wallen petitioned the Judicial Committee asking for a conservatory order directed to preventing their execution pending the determination of an appeal from the Court of Appeal in the event that the Court of Appeal dismissed their appeal and did not themselves grant a conservatory order. On the 25th July, two days before the Court of Appeal gave its decision, the Judicial Committee made what must surely be an unprecedented order. The Committee ordered that if the Court of Appeal dismissed the petitioners' appeal and did not immediately grant a conservatory order, the execution of the sentence of death should be deferred until after the determination of an appeal (which the petitioners' counsel undertook to file) to the Judicial Committee. When the Court of Appeal delivered its judgment on the 27th July, 1994, they were then told by counsel of the order which had been made by the Judicial Committee. The Court of Appeal after reading the order and the reasons of the Privy Council, expressed its reaction in this way:

> While their Lordships have expressed anxiety not to encroach on the Court's jurisdiction and have sought to found such jurisdiction by making a contingent order, the effect of same is to pre-empt this Court's exercise of its discretion in relation to this particular appplication. In other words, this Court has been mandated to exercise its discretion in a particular manner. That a Court should be compelled to so do is incomprehensible. This Court cannot in similar circumstances imagine itself assuming jurisdiction to order a Judge of the High Court to exercise its discretion in a particular way by directing him that if he does not do so, this Court will. A Judge or any Court for that matter must be trusted to act judicially and properly.

In the circumstances the Court of Appeal found that it would be futile to purport to exercise any discretion with regard to the conservatory order in view of the subsisting order of the Privy Council and simply declined to make any further order apart from granting leave to appeal to the Privy Council. The reasons the Judicial Committee, gave on the 26th July for making its order, only served to make matters worse. They pointed out that to permit Wallen and Guerra to be executed before they had exhausted their right of appeal to the Privy Council would "plainly constitute the gravest breach of their constitutional rights and would frustrate the exercise by the Judicial Committee of its appellate jurisdiction". Yet despite protestations of great respect for the Judges of the Court of Appeal, their Lordships

obviously did not feel they could rely on the Court of Appeal to avoid these consequences by making the conservatory order which was so obviously called for. In order to justify this unflattering lack of confidence in the local Court, the Judicial Committee referred to what had happened in the case of *Glen Ashby* who was executed before the judicial process had taken its course, and to "recent decisions" of the Courts of Trinidad and Tobago, which it was claimed gave the impression that it was not normal practice for a Court in Trinidad and Tobago to grant a stay of execution pending an appeal to a higher court, even where the appellant was under sentence of death. I do not know what were the recent decisions which their Lordships had in mind but I venture to state quite categorically that there is no case in which the Court of Appeal of Trinidad and Tobago decided that a sentence of death should be carried out notwithstanding that the condemned person wished to exercise a right to appeal, or apply for leave to appeal, to the Privy Council for a reversal or commutation of that sentence, and I have the confidence which obviously the Judicial Committee lacked, that the Trinidad and Tobago Court of Appeal would never refuse a stay of execution in such circumstances.

Ashby

There remains the reference to what happened in the *Ashby* matter. Ashby was another person convicted of murder and sentenced to death who had exhausted all his appeals. A motion alleging that to execute him would be a breach of his constitutional rights was filed on the 13th July, 1994, the day before he was scheduled to be hanged. An application for a conservatory order staying execution was refused by Sealy J. at about 8.30 p.m. on the 13th July. Unknown to Sealy J. until after she had given her decision, an application for stay had been made earlier that day to the Judicial Committee, but no order had been made on that application in the light of a statement made by counsel for the Attorney-General, the effect of which was not altogether clear. An appeal was filed against the decision of Sealy J. shortly before midnight and the Court of Appeal convened to hear the appeal at about 12.25 a.m. The Court of Appeal did not proceed then to hear the matter on the merits because of the uncertainty which counsel were unable to remove, about what had taken place before the Judicial Committee the previous day. Accordingly, the matter was stood down until later that morning in order to enable counsel for Ashby to get clarification of what had happened in the Privy Council. The Court of Appeal resumed sitting at 6.20 a.m. The President of the Court had given instructions that the Registrar (whose presence is required at a hanging) should be present in Court when the Court resumed, but in fact he was not. It is obvious that the intention of the President in giving this directive was to ensure that no hanging took place until the Court had made its decision. It appears that at 6.45 a.m.

Trinidad and Tobago time the Privy Council made an order granting a stay of execution in the event that the Court of Appeal refused a stay of execution. This was communicated to the Court of Appeal at about 6.52 a.m. Before either of these things happened, however, Ashby, had in fact been hanged at about 6.40 a.m. and this was reported to the Court in person by the Registrar shortly after it received the news of the stay. It would seem unfair in these circumstances to blame the Court of Appeal for the fact that Ashby was executed, or to suggest that they had decided to refuse a stay of execution. The fact of the matter is that it was the premature intervention of the Privy Council which created the confusion which the parties were attempting to clear up when the execution took place. I have no doubt whatever that if there had been no application to the Privy Council, or if that application had been rejected out of hand by their Lordships as premature, the Court of Appeal would have considered the matter on its merits when it first convened shortly after midnight on the 14th July, and would have granted a stay of execution. Nothing I have said should be taken as in any way exonerating the executive for their role in causing or permitting the execution of Ashby to take place literally while the Court of Appeal was sitting to determine whether the carrying out of the death sentence should be deferred pending an appeal to the Privy Council. To my mind, one does not require the assistance of any Committee in order to recognise that the hanging of Ashby was a grave violation of due process and the rule of law, an aberration which hopefully will never be repeated in this region.

I have no doubt that in both these cases the Judicial Committee believed that it was necessary for it to make the orders that it made in fulfilment of its duty as the highest Court of the land to defend the Constitution. In my respectful view, in coming to this conclusion, it totally misjudged the situation and offered an unnecessary affront to the local Court of Appeal. I would respectfully suggest that the lack of confidence which their Lordships displayed in the Trinidad and Tobago Court of Appeal so far as the matter of staying execution of a death sentence is concerned, was totally unsupported by the evidence.

The reaction of the public to these strange goings-on was as usual best captured by their traditional spokesman, the calypsonian. One of the contestants in the 1995 Calypso Monarch competition in Port of Spain, 'Sugar Aloes', sang a song entitled '*Who's in Charge*' which contained the following lines:

> But if we still have to send quite up in London
> to get the O.K. to hang a criminal in we own land
> Then what's the use of having an Independence or Republic holiday?
> When them Q.C.'s in London don't respect what we say

And while we lockup tight in we home-made jail
Cause them criminals free at large
Between the Queen, Manning or Sat Maharaj
I wonder who is in charge.

On a more official level, there has recently been published in Trinidad and Tobago a Bill to amend the Constitution. This Bill seeks to do two things one is to deal with abuse of the constitutional motion by imposing a requirement that leave of the Court must be obtained before a person makes a claim for redress for breach of the Constitution and again before he appeals from the determination of the High Court in a constitutional matter. Secondly, the Bill would make the decision of the Court of Appeal final and unappealable in any constitutional matter arising out of criminal proceedings. The Bill reportedly seeks to implement one of the recommendations of a Committee headed by Sir Ellis Clarke which was appointed by the Prime Minister to advise the Government how to deal with the problem of escalating crime. In order to pass into law this Bill would require the support of a two-thirds majority in each House of Parliament. It would therefore require the support of the Opposition and it is doubtful at best whether such support will be forthcoming.[1]

The Muslimeen Case - Round 1

I go now to two decisions of the Privy Council in the proceedings arising out of the attempted coup by the Muslimeen in Trinidad on July 27, 1990. The first decision, *Lennox Phillip and Ors. v. the D.P.P.* in (1992) 1 A.C. 545, really concerns a procedural point. The question was whether the 114 persons who were charged with murder, treason and other offences arising out of their participation in the attempted coup, were entitled to challenge by means of a constitutional motion and an application for habeas corpus, the legality of their detention and prosecution on the ground that they had received a valid pardon in respect of the offences charged, or whether they were compelled to wait until they were arraigned upon indictment before raising a plea in bar based on that pardon. The local Courts held that they were obliged to wait until arraignment. The Judicial Committee held quite sensibly, if one may say so with respect, that they not have to wait, but were entitled to have the validity of the pardon determined in the two proceedings which they had brought for the purpose. The Board however, were not content simply to decide the procedural point. They succeeded in conveying the impression both by the interventions which they made during the oral arguments and from certain things said in their judgment that the State had little chance of successfully challenging the pardon. It was made clear

1 This Bill was subsequently withdrawn by the Government.

in the judgment which was written by Lord Ackner, that the Board regarded a pre-conviction pardon as a valuable tool for dealing with the sort of situation the Muslimeen created when they stormed and occupied the Parliamentary building and TV Station, and took and held members of Parliament and others hostage. Lord Ackner quoted in support of that view a statement made by Alexander Hamilton in 1788. The pardon which was held to have been given to the Muslimeen may well have saved the lives of the hostages on this occasion, but should it be the policy of the law to encourage the making of deals with terrorists? Ought the law to provide those who might be minded to take similar action in the future with an ironclad guarantee that if things go awry, any pardon which they can extract for themselves by bartering the lives of others will be valid and binding? This is not an issue on which I would imagine the common law can claim to provide any universally or uniquely correct answer, and I question the credentials of their Lordships to determine the policy which our law should adopt with regard to pardons given in such circumstances.

At the stage at which Lord Ackner wrote his judgment, no evidence had been filed on behalf of the State for it was relying on a preliminary objection. Nevertheless, in the course of his judgment Lord Ackner made certain statements of fact based on the evidence filed by the Muslimeen without any qualification or reservation, as though the facts so stated had either been found or conceded. In fact Lord Ackner later went on to say (at page 559 F) that the "factual allegations set out in the many affidavits in the constitutional appeal did not appear to be in dispute, although they may not provide the entire story...". At page 551 E of the report he said this:

> The applicants, relying upon the terms of the pardon, took the necessary steps open to them to fulfill its conditions. The release of the captives and the physical surrender of the applicants were planned for 29 July, but had to be delayed until 1 August, because of the danger to everyone posed by some members of the security forces, who initially refused to accept the terms of surrender.

Nearly all of these assertions were hotly contested by the State in evidence filed subsequently and the facts as they were ultimately found on the whole of the evidence, differed significantly from those stated by Lord Ackner in the passage just quoted.

Lord Ackner made the point very strongly that at no stage of the proceedings, either in the Court below or in the Court of Appeal, had there been any attack upon the validity of the pardon. He did not seem to treat that as explainable simply on the basis that the case had stalled on a preliminary objection taken successfully by the State in the Courts below. The inference

appeared to be that if the State had anything which they could reasonably put up in opposition to the pardon, they would already have done so. Indeed Lord Ackner described Mr. George Newman Q.C., Counsel for the State, as having "manfully sought to persuade their Lordships not to set aside the orders made in the Courts below because there was bound to be a challenge to the validity of the pardon".

In rejecting that submission Lord Ackner went on to suggest that even if the pardon was invalid, it must be a matter of policy as to whether it would be politic to take the point, and referred again to the same comment of Alexander Hamilton which he had earlier quoted with approval. It is to say the least surprising that in the face of the statement by Counsel for the State that the pardon was bound to be challenged, their Lordships should have speculated that it might not be considered 'politic' to make that challenge. It would not be far-fetched to construe such speculation as the giving of a hint to the Attorney-General and the D.P.P. as to the course they should adopt, and therefore an unsolicited venture into the realm of policy.

Lord Ackner also said rather ominously (at page 559 F) that:

> Their Lordships therefore envisage no great difficulty in Blackman, J. or whoever has the task of deciding the issue, determining whether or not the pardon was a valid one.

All of this served to strengthen the impression that in their Lordships' view there was little point in the State contesting the pardon. This first judgment of the Judicial Committee no doubt caused the accused persons and their lawyers to be greatly heartened, but it did very little for the morale of the public of Trinidad and Tobago. One advantage enjoyed by a Judge who lives in the jurisdiction is that he knows in advance pretty well what his fellow citizens will think of his judgment and how they will react to it. He may or may not let that knowledge affect his judgment but it must be of advantage to him to have it.

Finally, their Lordships' view of the delay predicted before arraignment was expressed by Lord Ackner in these rather uncompromising terms (at page 560 D):

> No civilised system of law should tolerate the years of delay contemplated by the Courts below, before the lawfulness of this imprisonment could be effectively challenged.

The Muslimeen Case - Round 2

The case therefore returned to Trinidad for a determination on the merits. Brooks J. and a majority of the Court of Appeal, Sharma and Ibrahim JJA., Hamel Smith J.A. dissenting, held that the pardon was valid and as a consequence not only were the Muslimeen immune from prosecution for the acts committed by them during the attempted coup and entitled to be set free forthwith, but the State was liable to pay them damages to be assessed for having wrongfully incarcerated them over a period of about 2 years in addition of course to their enormous bill of costs. To the population of Trinidad and Tobago this was a grotesque result and they were traumatised by it. There is no right of appeal in habeas corpus matters in Trinidad and Tobago but the State appealed on the constitutional motion first to the Court of Appeal and then to the Privy Council. Brooks J. and all three Judges of the Court of Appeal held that the pardon was not invalidated by duress and in this they were upheld by the Privy Council. The Privy Council held that it would only be in the most exceptional circumstances that a pardon could be invalidated for duress. To produce that result the duress would have to consist of direct physical violence or pressure or actual imprisonment to the person who had issued the pardon. No such direct action was established in the instant case. Hamel -Smith J.A. held the pardon invalid on the ground that when the Acting President issued it, he was not directing his mind to the exercise of his discretion under Section 87 (1) of the Constitution which confers the power of pardon, but was acting in accordance with a direction contained in an invalid agreement made at gun-point in the Red House with members of the Government who were being held hostage. From time to time those who argue for retaining appeals to the Privy Council have pointed to the risk that in small communities like ours Courts may be unwilling to make decisions that are unpopular with the Government. The trouble with this argument is that it is very rarely, if ever, supported by empirical evidence.

The judgments of the Trinidad and Tobago judges in the Muslimeen case suggest, as they did some 20 years earlier in the case of *Lasalle and Shah v. R.* (1973) 20 W.I.R. 361 in which two of the officers who led an army mutiny in 1970, successfully appealed their convictions by a court-martial, that our Courts are staffed by persons who are not afraid to make decisions that are unpopular both with the public and with the Government of the day. The Board in its judgment in this case (*Attorney-General v Phillips and Others* (1995) 1 A.E.R. 93 at page 97 H) paid tribute to the local Judges in these words:

> The Board are happy to acknowledge that their judgments disclose that the Court dealt with this extremely sensitive and difficult case with great care and objectivity.

The criticism that may be made of the local Courts in this case is not that they lacked independence, but rather that they were unable to find on a proper interpretation of the evidence and a legitimate application of legal doctrine and precedent, a way of achieving the result which was obviously demanded by reason and justice. To its credit the Board of the Judicial Committee which heard this case the second time around, was able to find a way to this result through the findings of fact available on the evidence and such authorities as could be found on the exercise of a power of pardon. The decision of the Board really turned on the failure of the Muslimeen to end the insurrection promptly after receipt of the pardon. Instead of doing so they had continued to negotiate for certain other objectives. The Board held that for the pardon to be valid, it would have had to be subject to a condition that the recipients would bring the insurrection to an end promptly after it was issued and this they failed to do. The Board also held that it would be an abuse of process to prosecute the Muslimeen further having regard to the fact that there was no right of appeal from the grant of habeas corpus by Brooks J. Given the lapse of time which had occurred, that ruling caused some disappointment but no great consternation in Trinidad and Tobago. The important victory that had been won was that damages (and most of the costs) would no longer have to be paid to the terrorists. While I think the whole of Trinidad and Tobago was grateful, and rightly so, to their Lordships for having been able to produce such a result, one is entitled at the same time, to wonder whether the judgment of the Board in the first appeal did not, albeit unconsciously, affect the approach of the local judges to the question of the validity of the pardon. In any event, the local judges would have been acutely aware that in this case the Judicial Committee was going to have the last word.

Before parting company with the Muslimeen case there are two points which I should like to make. Firstly, much of the reasoning of the Privy Council in this case turned on what may be described as their pro-pardon approach, that is their view that nothing should be done which would shake the confidence of any future recipient of a pardon in its validity, or to look at it from the other side, that the offer of a pardon is a card which should be available to the lawful authorities to play when dealing with insurrectionists in the future. This view coloured their approach to the question of what degree of duress was required before a pardon could be invalidated, and also prompted them to adopt a purposive construction of the pardon, that is a construction which tended to uphold its validity. As I have indicated above, this pro-pardon approach is really a matter of policy and not one dictated by any rule of the common law. So the case raises again the same question, that is, whether we should be abdicating to others the responsibility for determining our own policy.

Secondly, the whole of the Muslimeen case was argued and decided from beginning to end on the basis of a legal fiction. The legal fiction is that the discretion whether or not to issue a pre-conviction pardon under Section 87 (1) of the Constitution, is vested in the President. The point is a simple one. Section 87 provides:

> The President may grant to any person a pardon... respecting any offences that he may have committed. The power of the President under this sub-section may be exercised by him either before or after the person is charged with any offence and before he is convicted thereof.

Section 80 (1) provides:

> In the exercise of his functions under the Constitution or any other law, the President shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where other provision is made by this Constitution or such other law, and without prejudice to the generality of this exception, in cases where by this Constitution or such other law he is required to act-
>
> (a) in his discretion;
>
> (b) after consultation with any person or authority other than the Cabinet; or
>
> (c) in accordance with the advice of any person or authority other than the Cabinet.

The question which arises therefore, is whether Section 87 (1) either contains a requirement that the President should act in his discretion or makes some provision for the President to act otherwise than in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet. In my view, it is clear that Section 87 (1) contains no such requirement and makes no such provision. The use of the word "may" and the reference to the power being exercised "by him" are quite colourless in this regard and simply reflect and repeat the language of many other statutory provisions which give powers to the President that are clearly not intended to be exercised by him in his own discretion. Both sides however, chose to interpret Section 87(1) as giving the President an unfettered discretion of his own and obviously both did so for tactical reasons.

Mr. Newman for the State was obviously afraid that if the President had to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, this would have brought into play Section 80 (2) which provides:

> where by this Constitution the President is required to act in accordance with the advice of any person or authority, the question whether he has in any case so acted shall not be enquired into in any court.

For my part, I refuse to believe that any Court would have so construed this provision as to debar the State from asking the Court to note that the Muslimeen had by their own actions in taking the Primer Minister and most of the Cabinet prisoners and holding them hostage, made it impossible at the material time for the Cabinet or any Minister acting under the general authority of the Cabinet to give any advice to the Acting President on the grant of a pardon that was not fatally flawed by duress.

The point was purportedly reserved by Mr. Newman in the Courts below, and in the Privy Council an attempt was made by Mr. Ewart Thorne Q.C., Counsel for the D.P.P., to argue for the first time that the discretion was not the President's, but their Lordships, not surprisingly, refused to hear him. Anyone who is familiar with the constitutional role of the President in Trinidad and Tobago, and the way in which it evolved from that of the Governor-General, would be shocked by the suggestion that a power charged with such potentially grave political consequences as that of pardoning offences before they have even been charged, could be exercised by the President in his sole and absolute discretion, without even the need for consultation with the Prime Minister. On the face of it therefore, the *ratio decidendi* of the Muslimeen case would seem to have turned one of the most fundamental of our constitutional arrangements upon its head. It is a question whether the local Courts ought to have accepted such a palpably wrong interpretation even though it was put forward by both sides, given the important constitutional implications. One thing is sure, the next time that occasion arises for the exercise of this power of pardon, both the President and the Prime Minister and those advising them will be in a quandary to know who has the power to take the decision.

Rees v. Crane

I turn now to consider the decision of the Judicial Committee in *Rees v. Crane* (1994) 1 A.E.R. 833. The procedure for the removal of a Judge from office in Trinidad and Tobago is the same as that found in the Constitutions of other Commonwealth Caribbean countries and consists essentially of three stages. The first stage is a representation by the Judicial and Legal Service Commission to the President that the question of removing the Judge ought to be investigated. The second stage is an enquiry into the matter by a tribunal appointed by the President resulting in a report on the facts to the President, and a recommendation to the President as to whether he should refer the question of removal of the Judge to the Judicial Commit-

tee. The third stage, if it is reached, is the determination by the Judicial Committee whether the Judge ought to be removed from office or not. The major question of principle which arose for decision in this case was whether a Judge was entitled to be heard at the first stage, that is before the Commission represented to the President that the question of his removal ought to be investigated. There was a numerically even division of opinion on this question in the local Courts. The trial Judge, Mr. Justice Blackman and Mr. Justice Sharma in the Court of Appeal, thought that the Judge was not entitled to be heard at that stage. Two Judges comprising the majority of the Court of Appeal, that is Davis and Ibrahim JJA., held that he was so entitled. The Judicial Committee agreed with the majority of the Court of Appeal. Everyone accepted that the Judge was entitled to be treated fairly. The dispute was as to what fairness required given that the Commission was not required to make any findings or express any opinion, and that there were two subsequent stages at which the Judge would be entitled to be heard. Was the Commission required to hear him before it made its representation? There is little doubt that the weight of authority was against this being required. The Judicial Committee admitted as much when in the subsequent case of *Huntley v. The Attorney-General for Jamaica* (1995) 1 A.E.R 308 they conceded that the decision in Crane was "contrary to the general approach" (at page 318 B). Moreover, the case appeared to be covered by a dictum of Lord Reid in *Wiseman v. Borneman* (1969) 3 A.E.R. 275 at pages 277 to 278, when he said this:

> Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a prima facie case but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. So there is nothing inherently unjust in reaching such a decision in the absence of the other party.

The judgment in the *Huntley* case, an appeal from Jamaica, was given by the Judicial Committee about 10 months after the decision in *Crane*. Again the question turned on the right to be heard, this time in the context of a new Act in Jamaica which made a distinction between capital and non-capital murder and provided for the murders committed by those already convicted and under sentence of death to be classified accordingly. Anyone convicted of a murder which was classified as non-capital would have his sentence commuted to one of life imprisonment. The classification was to be done initially by a Judge of the Court of Appeal, but if he classified the case as capital, the prisoner had a right to have that classification reviewed by three Judges of the Court of Appeal and to be represented by Counsel at that stage. The Judicial Committee held that the review was an exercise to which the principles of fairness had to be applied and acknowledged that the

outcome of that exercise was 'obviously of vital importance' to the appellant (at page 317 g). They thought it important, however, in considering what were the requirements of fairness, that the decision of the single Judge could be reviewed, and that at the stage of the review there was the right to be represented and to make representations. Reliance was also placed on the desirability of expedition. In the result the Judicial Committee held that the appellant was not entitled to be heard before the single Judge made his classification.

In an earlier decision of the Judicial Committee in January 1994 in *Brooks v. D.P.P.* 44 W.I.R. 332, the Board had held that a doctor was not entitled to be heard by the Judge who issued a voluntary bill of indictment charging him with an offence with which he had been previously charged. He had been discharged on the previous charge at the conclusion of the preliminary inquiry as the Magistrate held that no prima facie case had been made out.

I refer to these cases not for the purpose of criticizing their Lordships' decision in *Rees v. Crane*. It is to be noted that the Court of Appeal of Guyana came to the same conclusion in a case arising out of the attempted removal of Mr. Justice Barnwell from office. But the decision in *Crane* was a very important one, which affected the judiciary and involved an interpretation of the Constitution. On the state of the authorities, it was a finely balanced decision. It really turned on a very subjective assessment of what fairness demanded. In the later case of *Huntley*, it was held that fairness did not demand that the appellant be heard at the first decision-making stage, even though a favourable decision at that stage would have irrevocably removed the sentence of death which he was under. The assessment in Crane involved the balancing of a number of competing considerations, on the one hand the necessity to ensure that the independence of the judiciary is properly buttressed and the reputation of a Judge should not be vulnerable to unwarranted attack, on the other hand the importance of ensuring that the process of removing an unsuitable Judge from active duty is not rendered too cumbersome or protracted. In other words, this was another instance of what I would term a policy decision and the case raises yet again the question of the appropriateness of placing on the members of the Judicial Committee the responsibility for determining policy for the people of this region.

Conclusion

Our training as lawyers should enable us to look at these decisions coolly and objectively and without hysteria or emotion, assess their impact on the case for the establishment by the independent countries of the region of their own final Court of Appeal. That is not to say that if such a court were

set up, it should not be available to those islands in the region like Bermuda, Montserrat and the British Virgin Islands, which are still colonies or dependencies of the United Kingdom. I do not recommend that we retain or abolish appeals to the Privy Council depending on whether we like or dislike the decisions which their Lordships have been handing down. Given the level of expertise on the Judicial Committee, it is unlikely that any of their decisions will be open to criticism on what may be described as purely technical grounds. What I do think we should look at is the nature of the issues which a final Court of Appeal, whose jurisdiction is virtually unlimited, is called upon from time to time to decide, as illustrated by these recent cases. When we do that, we see that a number of these decisions which have extremely important consequences for the whole community, are really policy decisions, involving the weighing of competing interests and considerations. The competition is typically between the interests of the individual, whether it is to humaneness or fairness or some such consideration, and the interests of the rest of society to be protected and to have the law of the land enforced. Neither the common law, which consists really of the principles derived from decided cases, nor statute law can provide a clear and certain answer to every question, and the decisions which a final Court of Appeal is called upon to make in order to fill the interstices is sometimes not very different from those made by a democratically elected Parliament. The cases which I have reviewed are examples of decisions of that type. In making such decisions, one is not unearthing some universal verity but determining what is best for a particular society in the circumstances existing at a certain point in its history. I would have thought that it was essential for the decision-makers in such cases to have an intimate knowledge acquired at first hand of the society for whom the decision is made. Another aspect of the matter is that while no one suggests that judges should make their decisions by reference to public opinion, it is a salutary form of accountability (if not the only one in practice) for a judge to live in, or at least close to, the society for whom he makes decisions of this kind. In any event I would have thought that after all these years of Independence, we would be uncomfortable to say the least about sending the decisions of our Courts on these policy matters for review to London, a practice not altogether dissimilar from that which obtained in colonial times of appealing to the Secretary of State for the Colonies when the local Governor made decisions or took actions that were unacceptable to those whom he governed.

It is instructive to note how uncomfortable the British have become with the ability of the European Court of Human Rights in Strasbourg to review decisions taken by the executive or judiciary in Britain, even though the European Court's decisions are not formally binding in the U.K. When an American civil rights lawyer lodged an appeal to the European Court on

behalf of the two young boys who were convicted by the Preston Crown Court of the brutal murder of James Bulger, an even younger boy, the leader writer of 'the Times' (May 25, 1994) saw the appeal's objection that the court breached the boys' rights because it failed to give them a fixed penalty as 'an alarming hint of potential legal battles between Britain and the European Court' and gave the European Court this waring:

> It is important, therefore, that Strasbourg should not be tempted to meddle in a system of checks and balances which is more subtle and delicately balanced than may appear to continental eyes.

Again Sir Thomas Bingham, Master of the Rolls and a Privy Councillor, in delivering the Denning Lecture in March, 1993, argued powerfully for the incorporation into United Kingdom law of the European Convention on Human Rights and Fundamental Freedoms. One of the advantages of such incorporation according to Sir Thomas was that allegations of breaches of the Convention would be justiciable by courts in England and resort to the European Court would no longer be necessary. He described the effect of this in these words (109 LQR (1993) 390 at page 400):

> But the change would over time stifle the insidious and damaging belief that it is necessary to go abroad to obtain justice.... And it would enable the judges more effectively to honor their ancient and sacred undertaking to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.

Is it not time that we remove that same 'insidious and damaging belief' from the minds of our own people and give our own judges the opportunity to fulfill more effectively the obligation they assumed when they took their oath of office? Is it not time in other words to complete our Independence?

INDICE

NUEVAS PERSPECTIVAS PARA EL TRATAMIENTO DE LOS DECRETOS LEYES DE LOS GOBIERNOS DE FACTO

Alberto Borea Odría[*]

Uno de los legados de mayor duración que los gobiernos de facto dejan a las democracias es el de los decretos leyes.

No nos referimos, por cierto, a la legislación de emergencia que se dicta con ese nombre al amparo de disposiciones constitucionales, como sucede en España a tenor de la Carta de 1978 u otras como la de Italia o Brasil mismo, que recoge este anclaje normativo, sino a las disposiciones que con ese nombre imponen las dictaduras que derrocan a los gobiernos democráticos y actúan al margen y contra el sistema.

Este fenómeno ha sido especialmente reiterado en América Latina.

Ese legado constituye –por cierto– más que un beneficio, una pesada carga a la que todavía no se ha confrontado jurídicamente, aceptándose, como consecuencia de la teoría de la equivalencia reconocida durante y a propósito de dichos gobiernos, que esos instrumentos prorrogan su vigencia luego de concluidos dichos períodos formal y materialmente irregulares desde el punto de vista del derecho.

La vigencia que mantienen esos decretos leyes, además es similar a la que corresponde a las leyes ordinarias Se les reconoce la misma jerarquía en la estructura normativa y preceden –como parece lógico en ese esquema– a las normas promulgadas por los gobiernos democráticos a través de sus organismos ejecutivos.

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Sin embargo, esta es una de las razones por las que se incuba con mayor rapidez la ingobernabilidad del sistema democrático que se reinicia luego de los períodos en que rigen los gobiernos de facto.

La aplicación de instrumentos que responden a una lógica diferente a la democrática impide muchas veces –por la jerarquía que se le acuerda a los decretos leyes– que se cumplan los propósitos que los gobernantes se hicieron en el período en que "candidateaban" para ocupar los cargos de representación y fomentar una sensación de ineficacia en el sistema democrático que lo erosiona rápidamente.

Los gobernantes –cuyo poder en el esquema de la democracia es limitado– confrontan demandas urgentes que la mayor parte de las veces fueron reprimidas o simplemente no fueron expresadas por los usuarios del sistema durante la vigencia de los regímenes autocráticos, y que, además la ciudadanía aguarda como de su pronta reparación.

Este problema, por cierto, se presenta en los más diversos campos del quehacer nacional. La persistencia normativa de los decretos leyes atenta así, directamente, contra la consolidación de la democracia.

Las razones que se han dado para esta supervivencia son varias. Las analizaremos por separado.

La primera razón que se menciona es la de la continuidad del Estado más allá de las contingentes formas de gobierno que en él se presentan. Desde esta perspectiva las normas jurídicas aprobadas por el gobierno de facto se asimilan a las que son el resultado de la actividad legisferante en el sistema democrático Lo importante, parece señalarse, es que han sido emitidas por órganos del Estado que en el momento en que se pusieron en vigor tenían el poder para hacerlo. Una vocación "decisionista" se halla entonces en el sustrato de esta teoría: se convierta en norma jurídica todo dispositivo que pueda hacerse cumplir como tal por parte de los detentadores del poder.

La segunda razón que se da en respaldo de esta tesis es la de la seguridad jurídica. Obligados a vivir bajo un determinado régimen, los ciudadanos de una Nación establecen sus relaciones de convivencia y sus negocios jurídicos según estas normas. Lo contrario, se señala, sería abrir largos e interminables paréntesis en cuyo interregno no podrían construirse situaciones duraderas con el consiguiente perjuicio que ello acarrearía para la sociedad.

Sin embargo, el número de los decretos leyes no solamente es impresionante, sino que las materias que los mismos abordan cruzan prácticamente

toda la problemática social y económica, por no hablar incluso de los campos político y cultural. Con ello se da la paradoja que, aunque hayan cesado en cuanto a su permanencia externa en el poder, sus determinaciones se prolongan mucho más allá de la fecha en que retornan los estados de derecho. No es aventurado señalar que así las cosas, las democracias siguen regidas por las leyes de las dictaduras.

En el caso del Perú, en donde la democracia rigió desde 1980 hasta abril de 1992, continuaban vigentes una gran cantidad de los decretos leyes que fueron aprobados durante los 12 años que se enquistó en nuestra Nación la dictadura militar. En efecto, durante esos 12 años se aprobaron 6.151 decretos leyes, mientras que en los siguientes doce años correspondientes al período democrático solo se habían aprobado 2.203 leyes y 769 decretos legislativos, que son instrumentos con jerarquía formal de ley aprobados por el Poder Ejecutivo al amparo de una ley habilitante.

Posteriormente, entre el 5 de abril de 1992 y el 31 de diciembre de dicho año, Alberto Fujimori, quien se alzó con todo el poder como consecuencia de un golpe de Estado, dictó 745 decretos leyes mientras que, desde el 1° de enero de 1993 hasta el 28 de julio de 1995 (lapso en que funcionó el llamado Congreso Constituyente Democrático que ideó para darle apariencia democrática a su gobierno), solo se dictaron 327 leyes y 20 decretos legislativos.

Dentro de las normas aprobadas por decretos leyes figuran las relativas a tópicos de la más decisiva importancia, como modificaciones a los procedimientos de garantías constitucionales (Hábeas Corpus y Amparo), o la de reestructuración empresarial que instauró una nueva legislación para las empresas fallidas, o aquella que adecua el Código de Justicia Militar a las normas constitucionales.

Vale decir que no solo se trata de su número, sino que también ha de tomarse en cuenta los puntos centrales que son abordados por estos dispositivos.

Lo que a la vez nos lleva a otra consideración y que es que dada la confusión de órganos y funciones que en estos esquemas se producen, se le da categoría de ley casi a cualquier cosa. No distinguiéndose así las materias de real importancia que exigen esta norma superior en el esquema jurídico y las otras para las que bastaría una de inferior jerarquía. Esto, por su parte, apareja dentro de la concepción que discutimos la dificultad excesiva incluso para modificar instrumentos reglamentarios.

A todo esto ha de agregársele que –corrientemente– los gobiernos de facto tienen una orientación básica distinta de aquellos a los que han

precedido y también a aquellos otros que los suceden en condiciones democráticas, con lo que se agrava aún más el problema. Normas con una proyección autoritaria y por tanto intervencionista, son las columnas de una estructura jurídica en la que -por definición de la democracia- se tiende a desconcentrar el poder y a reconocer amplios márgenes de libertad para los habitantes. Si a ello le agregamos que en no pocos casos la orientación ideológica de uno y otro gobierno no han sido la misma (como sucedió en el Perú de 1980 respecto a las pretensiones "revolucionarias" y colectivistas del proceso iniciado en 1968, o en el Chile actual donde una postulación de solidaridad social difiere del individualismo en que se llevaron a cabo las acciones de gobierno en la era Pinochet), entonces la situación se complica gravemente para los regímenes democráticos.

¿Es justo o conveniente que esto siga sucediéndose así?, o, para ponerlo en términos más contemporáneos y preocupaciones actuales más compartidas, ¿ayuda esta interpretación a la gobernabilidad de las democracias?

La respuesta clara es no. Este andamiaje teórico obstaculiza el pronto reordenamiento del sistema democrático y coloca sobre el mismo una pesada carga con el agravante que procesalmente le pone también trabas que le impiden resolver las contradicciones.

¿Dónde se genera el impasse?

A nuestro entender, el problema se complica en el momento en que se acepta la naturaleza formal de ley de las normas que con esa pretensión jerárquica son promulgadas por los gobiernos de facto.

Para rechazar esta hipótesis hay que volver a los presupuestos del Estado Constitucional de Derecho.

Sobre el tema de la ultractividad de los decretos leyes emitidos por los gobiernos de facto ha habido un retroceso en la jurisprudencia latinoamericana. Como lo recuerda Humberto Quiroga Lavié en su "Derecho Constitucional", en 1930, al fallar el caso Malmonge Nebreda, la Corte dijo que los decretos leyes dictados por el Presidente de Facto "sólo tienen validez mientras dure el período de facto, pero no cuando comienza el nuevo gobierno constitucional: dichas normas cesan con el gobierno de facto y para continuar su validez deben ser ratificadas por el nuevo Congreso". (Quiroga Lavié, Humberto. "Decreto Constitucional" 1978:904).

Pero luego, en 1947 al resolver el caso Ziella, la Corte Suprema Argentina señaló que los decretos-leyes "valen por su origen y puesto que tienen el valor de las leyes, subsisten aunque no hayan sido ratificadas por el

Congreso, salvo una derogación expresa por medio de Ley" (Quiroga Lavié 1978:907).

Esta línea fue de que, de alguna forma, quedó instituida. En los demás países de la región, donde no siempre hubo un cuestionamiento como se dio en Argentina respecto a la validez y a la prolongación de los efectos de los decretos-leyes, se asumió esta tesis.

Como queda clara es en el plano doctrinario y jurisprudencial en que se juega la ultractividad de los decretos leyes de los gobiernos de facto. Es, entonces, en ese campo donde puede buscarse hoy una solución, máxime cuando el único sistema que legitima al poder en el mundo occidental actual, es el sistema democrático, lo que de por sí marca una diferencia notable con lo que acontecía en los años en que se pegueño la tesis de la validez de los decretos-leyes aún con posterioridad a la caída del régimen que los había promulgado.

Hasta hoy la discusión se ha centrado sobre la validez con carácter de ley de los decretos emanados por los gobiernos de facto. Las razones que se han dado en ese sentido descansan en los presupuestos de continuidad del poder y de la necesidad de su ejercicio rechazando los vacíos de poder o la confusión que podría generarse en el caso de negarse validez "ab initit" a dichos instrumentos. Sobre esto puede especialmente consultarse la opinión de César Enrique Romero, profesor argentino que adhirió con frecuencia a los gobiernos de facto en su país (Romero, César Enrique, "Derecho Constitucional", 1976: TII 171-188).

Creo que el centro de la gravedad del debate debe variarse. No debe de basarse en cómo se generaron ni en si tuvieron vitualidad mientras la fuerza los impuso, sino debe de radicarse en las formas necesarias y en la competencia de los órganos del sistema democrático que pueden promover y conseguir su modificación o derogación.

Modificar lo acontecido durante el gobierno de fuerza, salvo las excepciones de violación o desconocimiento a los derechos humanos que hemos aludido, pueden, en efecto, provocar una situación de inestabilidad, pero prolongar los efectos de esas medidas como si tuvieran jerarquía legislativa es prorrogar el abuso y atar a los gobiernos de iure en la posibilidad de una pronta recomposición de los cauces democráticos y de la eficacia de sus políticas.

Una ley tiene una posición preeminente en el esquema democrático en tanto que constituye la expresión de la voluntad general de la Nación a través de la Asamblea Nacional o Congreso de la República a cuya confor-

mación han concurrido -o han estado en posibilidad de concurrir- todos los ciudadanos de ese Estado.

La obligación que la ley conlleva es el resultado del auscultamiento de esa voluntad general de la Nación, entendida no como la voluntad conforme de toda la población en el mismo producto, pero si el de la participación de aquella en su proceso formativo según las reglas que relievan y reconocen los valores fundamentales del ser humano: su libertad y su igualdad.

En efecto, no solo se trata de la votación que se lleva a cabo por parte de los diputados –lo que de por sí ya le da a dicha norma un carácter especial– sino que en el curso del proceso legislativo, que el sistema democrático requiere que sea público, participan de diversa forma los miembros de la comunidad que tienen interés en el resultado de la norma, ya sea a través de artículos u opiniones que se publican o emiten en los medios de comunicación, o los pedidos directos que se formulan por parte de los ciudadanos a los representantes, o las manifestaciones públicas de adhesión o rechazo que el proyecto mismo provoca. A todo esto le podemos agregar que -no pocas veces- las mismas comisiones encargadas de dictaminar los temas en debate, convocan a expertos que aportan su ciencia en el proceso formativo de la norma. A través de esta participación no sólo los miembros de las cámaras participan en el proceso legislativo.

Nada de esto –por el contrario– sucede con los decretos leyes aprobados por los gobiernos de facto a los que la teoría tradicional que, hoy refutamos, asimila a las leyes producto del sistema democrático.

En primer término, quienes la convierten en obligatoria no sólo no han recibido, sino que han usurpado el mandato popular. La voluntad que se convierte en ley no es sino la suya. La voluntad general -presupuesto para la obligación del ciudadano en el sistema democrático, no se confirma. El querer de la comunidad –en el mejor de los casos– que se trate de un gobierno de facto de "buenas intenciones" sólo se intuye o se presupone. No se le otorga tampoco posibilidad de contradicción a la voluntad preeminente.

Pero no solo por la ausencia de participación en las instancias decisorias, sino por la prescindencia de la sociedad como tal es que resulta impropio asimilar a la ley a estos instrumentos normativos.

En efecto, el proceso de aprobación de las disposiciones en los gobiernos de facto es normalmente secreto. La discusión se lleva a cabo en el gabinete ministerial y al mismo no tienen acceso los periodistas y, menos aún,

el público. La sociedad toma nota de aquello a que está obligada luego que todo el proceso ha culminado. Nadie le pidió su opinión y no hay formas ordenadas de canalizarla.

La voluntad general –como mecanismo participativo al que todos están convocados– insisto, no tiene lugar en este sistema.

Si es la situación de excepcionalidad la que lleva a que se acepten estos dispositivos con el carácter de ley, no tiene ninguna explicación que, retornándose a la institucionalidad democrática, los mismos sigan gozando del privilegio autoconcedido por sus mentores.

En segundo lugar, la ultractividad de estas normas luego del período de facto pone en situación de entredicho el principio democrático de la utilización del poder por parte de las autoridades elegidas por el pueblo y dentro de los límites que la Constitución les impone.

Los usurpadores, al no haber recibido poder ni autorización de nadie, someten al pueblo a una voluntad que le es extraña y ajena. Bastante se hace ya con soportarla en el lapso en que la fuerza todavía les alcanza para sostener ese yugo.

Si bien los partidarios de la seguridad jurídica y de la continuidad de la persona estatal insisten en que no puede desconocerse el hecho de que la sociedad en estos momentos es regida por las normas que esos detentadores del poder dictan y que la ciudadanía -ajena a la actividad política- continúa desarrollando su actividad habitual conforme a esas normas, no es menos cierto que las Constituciones, especialmente las más modernas, han aprobado dispositivos que fulminan de nulidad los actos de los que usurpan funciones públicas, agregando de esta forma un nuevo ingrediente a la normativa jurídica, que dificulta la continuación de las corrientes convalidadoras que estamos refutando.

De esta manera, por virtud de un mandato expreso de la misma Constitución restaurada, las Cortes podrían alegar la nulidad de estos dispositivos, dependiendo, claro está, de otras consideraciones de justicia, oportunidad y tiempo de vigencia, así como de la posición privilegiada o no que hubieren tenido durante el curso del gobierno usurpador las personas que invocaren estas normas en su favor.

Esta solución tendrá que darse, sin lugar a dudas, cuando las "normas" que se hubieren dictado en el gobierno de facto atentaran contra las más graves convicciones y deberes asumidos o dictados por la naturaleza humana. "Leyes" convalidatorias de genocidios o de exterminios selectivos, por

ejemplo, no podrían pretender ni siquiera un tratamiento con cierta presunción de validez. Aquí, a la ilegitimidad de origen y de procedimiento se liga también la de destino o fin del instrumento normativo, por lo que el círculo se cierra en el esquema democrático y no puede haber lugar para ningún grado de convalidación ni de permisividad en cuanto a su vigencia o su validez en un Estado Constitucional de Derecho.

Sin embargo, existen otras normas que han estado referidas a temas de administración o de organización o asignación de recursos, o vinculados a la tarea pública que no han agredido los derechos humanos y los presupuestos básicos de la consideración de la dignidad del ser sobre los cuales se asienta la democracia.

Una solución radical llevaría –al igual que en lo señalado precedentemente– a la declaración de nulidad total de esa norma. La justificación desde el punto de vista formal sería -simplemente- la de un falta de legitimidad por origen y por procedimiento de ese instrumento normativo.

No obstante, no se pretende en estos casos llegar tan lejos, sino proponer una fórmula que –sin desconocer el principio de seguridad jurídica– rompa con el fetichismo de una continuidad anómala que pretende que todo es igual- desde una perspectiva jurídica- con un gobierno elegido o con un gobierno de hecho.

Sostengo que los decretos leyes, restaurado el gobierno democrático, o iniciado uno nuevo, puedan ser derogados o modificados por normas emanadas del Poder Ejecutivo elegido y que se concluya con la pretensión de la jerarquía legal de dichas disposiciones.

Como hemos visto, esas normas son aprobadas por los Consejos de Ministros o por consejillos asimilables instaurados por los gobiernos de facto, por lo que no cuentan ni con legitimidad democrática ni con la formalidad que conlleva a la obligación de la comunidad.

¿Cuál es entonces la razón para que dichas normas puedan tener tantas pretensiones frente a las normas emanadas según las formalidades y el principio de legitimación democrático?

El Ejecutivo del gobierno democrático no tiene por qué ser puesto en inferioridad de condiciones frente al Ejecutivo del gobierno de facto. Las formalidades seguidas en uno y otro caso son similares, con la cualitativa diferencia de que el Presidente electo cuenta con un respaldo popular, del que los usurpadores carecen, y que sus ministros responden por sus actos ante la representación nacional.

Remitir la modificación de los decretos-leyes a un necesario procedimiento parlamentario es conceder indebidos privilegios a quienes se alzaron con el poder o a quienes se aliaron con él o lo asintieron y se beneficiaron con el mismo, los que, comúnmente tienen una representación parlamentaria luego de concluido el gobierno de facto, posición desde la cual retardan o impiden la modificación de esa normativa que no resulta la mayoritaria y que fue impuesta a la sociedad por medio de la fuerza. Los "golpistas", parapetados en las curules parlamentarias alargan la vida de los dispositivos que nunca debieron haber nacido. La utilización de procedimientos parlamentarios les resulta más que ventajosa para esos propósitos.

Por otro lado, como ya se ha adelantado, esta extraña legislación retarda la concreción de las reformas que el sistema requiere para su adecuación total.

Cuando adelantamos esa idea en el curso de una conferencia alguien señaló que ello sería contradictorio con la presencia del Congreso el que, en esa interpretación propuesta no tendría arte ni parte y se daría la paradoja que existiendo un cuerpo legislativo este no pudiera abocarse a su conocimiento. Creo, si embargo, que esa atingencia es deleznable.

En primer lugar porque nada obsta a que el Congreso pueda modificar, convalidar o derogar un decreto ley dictado por el gobierno de facto. Si quiere hacerlo puede intentarlo en el momento que lo creyese oportuno. Incluso puede hacerlo, porque esa es su función típica, luego que el Ejecutivo -en la interpretación que estamos planteando- hubiere tomado cartas en el asunto y decidido algún rumbo sobre uno de los decretos leyes de cuestión.

En segundo lugar porque se le estaría concediendo al Ejecutivo de facto una jerarquía mayor que el Ejecutivo de "iure", que tendría que permanecer inmovilizado y rectificando a diario sobre la vigencia de normas que se le pide aplicar aunque él no las comparta y que fueron promulgadas sobre la base de presupuestos totalmente diferentes.

Esta interpretación tiene, adicionalmente la ventaja de no requerir modificación legislativa de ningún tipo. No hay una sola Constitución en el área que reconozca taxativamente dentro de su texto a los decretos leyes. Estos no son mencionados. Existen como consecuencia de desarrollos doctrinarios que han empujado o soportado –según el caso– a decisiones jurisprudenciales. Votos bien razonados por una buena Corte de cualquier país del continente y el apoyo expreso de los estudiosos de la materia son todo lo que se necesita para producir este vuelco en favor de una consolidación de la democracia y de un argumento más seguro para su gobernabilidad.

Planteada una cuestión ante las Cortes ha de establecerse que el órgano usurpador no puede pretender que sus normas gocen de una jerarquía mayor de aquella de la que gozan las normas aprobadas por su organismo democrático de similares características. De esta forma, un decreto supremo de un gobierno democrático bastará para volver las cosas a su nivel y podría acabar con la ultraactividad de esos extraños e irregulares instrumentos normativos que son los decretos leyes.

Debe entenderse en el Derecho Constitucional Latinoamericano que el gobierno democrático debe de contar con los instrumentos necesarios para su rápido desmontaje de las estructuras autocráticas que afloran como resultado de un golpe de Estado. Esta función restauradora debe entendérsele conferida al gobernante que resulte elegido luego de la conclusión del período dictatorial. Incluso a los que sean elegidos con posterioridad.

Así como durante años se utilizó la ficción de un poder equivalente al de los gobernantes de "iure" a los gobernantes de "facto", así hoy ha de plasmarse la teoría –más congruente con el sistema democrático– de que un gobernante que no tiene un origen legitimado por la votación popular y las instituciones del sistema, no puede pretender mayor fuerza que quien asume el poder en concordancia con esos criterios legitimadores.

Como ya se ha adelantado, la presunción, en este caso, es del conferimiento de estos poderes especiales a los gobernantes que suceden a quienes han estado "de facto" en el ejercicio del poder.

Con esta solución propuesta se elimina el alegado riesgo de la inseguridad jurídica, en tanto que los decretos supremos (o del gobierno), modificatorios de las leyes de facto no tendrán carácter retroactivo. Esto quiere decir que las relaciones generales a su amparo tendrían efectos jurídicos hasta su modificatoria que se realizaría a través de este mecanismo. No habría así desconocimiento de derechos para los ciudadanos que se hubieren debido someter a la situación creada por el gobierno de facto, pero paralelamente se cancela también el absurdo de la ultraactividad de una norma impuesta por el gobierno de facto que retrasa el curso querido por el gobierno democrático.

Otro "pero" al que hay que responder es el vinculado a la extensión de la facultad modificatoria que se le conferiría al Ejecutivo democrático. Se ha señalado que, con este pretexto, las modificaciones a los decretos leyes podrían alcanzar nuevos campos o que por este medio el Poder Ejecutivo podría inmiscuirse en terrenos que no habían sido abordados por las aludidas normas del gobierno de facto.

Sin duda, esta es una objeción rápidamente superable. En primer término, porque el Ejecutivo democrático está siempre controlado, por virtud del principio de separación de poderes, tanto por el Legislativo cuanto por el Judicial y –más recientemente y de manera creciente en nuestro Continente– por los Tribunales Constitucionales o las Salas de Constitucionalidad en las respectivas Cortes Supremas.

Es obvio que si el Ejecutivo democrático quiere "sacar los pies del plato" para, por esta vía, legislar en materias no comprendidas o no vinculadas al original Decreto Ley que se quiere cambiar, los parlamentarios de la oposición –en caso que los del gobierno convaliden el exceso– pondrán el tema en debate ante la opinión pública y podrán presentar los proyectos derogatorios o modificatorios correspondientes o, más fácil aún, dispondrán de titularidad para pedir la anulación de esas normas ante los Tribunales Constitucionales competentes.

La materia que se ha de acordar como propia del Ejecutivo democrático en relación con estas normas no puede ser la puramente derogatoria. Tampoco puede pretenderse que –como una sola unidad– se derogue o se convalide todo lo concebido en el decreto ley que se cuestiona. Muchas de esas disposiciones pueden ser debidas a la lógica de una administración común y no tendría sentido anularlas "in totum". Asimismo, el decreto ley puede haber recogido, en gran parte legislación previamente aprobada por los organismos democráticos y haber modificado aspectos –importantes o secundarios– de esa normativa precedente. Es por ello que proponemos que el ejecutivo democrático tenga libertad para modificar la ley sin derogarla e incluso para regular fenómenos complementarios que tengan vinculación con los temas tratados en los decretos leyes. La vinculación real, o su aprovechamiento como pretexto, podrá ser siempre controlada política y jurídicamente por el Legislativo y por las Cortes o el Tribunal.

Una solución que perfeccionará el esquema, pero que si requeriría un tratamiento normativo a nivel constitucional, sería el de precisar que –producida la modificatoria del Decreto Ley por parte de Ejecutivo– debería de remitirse el nuevo texto al Congreso para que este tome nota del mismo de manera oficial, no implicando por ello –como sucede con la legislación delegada– que los efectos de la norma como queda luego de la intervención del Ejecutivo democrático, se mantenga en suspenso hasta la aprobación legislativa.

Finalmente otro punto de la mayor importancia es el relativo al tiempo en que una norma tramitada como decreto ley sería posible de ser derogada o modificada por un Decreto Supremo de un Ejecutivo democrático.

Un primer raciocinio llevaría a concebir que esa capacidad solo alcanzaría al primer gobierno siguiente a la restauración. Se podría asumir aquí que habrían quedado convalidados en la pretensión de su jerarquía legislativa todos aquellos que no se hubieran modificado por ese gobierno democrático.

Una segunda opción se asentaría sobre la base de que la modificación podría ser emprendida por cualquier gobierno democrático posterior en tanto que, reconociéndose a partir de la restauración a los gobernantes la capacidad abrogatoria, esta no tendría por qué limitarse a un solo período.

Personalmente me inclino por esta segunda. En tanto no se hubiere producido un pronunciamiento expreso sobre la norma en cuestión por parte de los gobernantes democráticos, la naturaleza de ese instrumento cuasi legislativo –como es el decreto ley– no tiene por qué entenderse alterada.

La posibilidad de modificación, si es que no se echa mano de una solución normativa no puede ser otra –dentro de la solución que proponemos para una inmediata aplicación por la vía interpretativa– que la segunda. Vale decir, que cualquier gobierno democrático posterior está en aptitud de modificar las normas aprobadas mediante decretos leyes.

Una solución más elaborada, que requeriría una expresión legislativa formal o, incluso constitucional, podría referir la solución a un término de caducidad que tendría que arbitrarse y que permitiera convalidar –si puede utilizarse este término– la nulidad de origen que acompaña al decreto ley.

En todo caso, tendría que transcurrir un tiempo muy largo para poder catalogar al decreto ley como de una jerarquía análoga al de una ley. Este plazo, por lo demás, tendría que empezarse a computar recién cuando comience su mandato el gobierno democrático y deberá necesariamente interrumpirse en la eventualidad de un nuevo quebranto del sistema.

Así se daría un margen de seguridad muy amplio al sistema democrático y el tiempo solo surtiría su efecto convalidatorio en un período muy extenso.

Otro tema que hay que analizar es el referido a la situación de la legislación luego de la derogatoria de un decreto ley. ¿Vuelve aquí a tener vigencia la ley preexistente que rondaba sobre los temas que fueron abordados posteriormente por ese decreto ley derogado?

La presunción normal es que la derogación de una ley no le devuelve validez al dispositivo que a su vez esta había derogado. Esto, claro está, en aras de la seguridad jurídica y de los cambios en las circunstancias que

motivaron la dación de la segunda norma que modificaba la primera y que luego fue derogada por esta tercera. No puede asumirse en este tercer momento que la situación es similar a la que se presentó cuando se dio la norma original, por lo que mal se haría en restituir de inmediato los efectos de esa primera ley que estuvo destinada a regir esa situación.

Sin embargo, la cuestión se complica un tanto en la hipótesis que desarrollamos, dado que habría sido un ente de menor jerarquía formal –si acaso se le acepta alguna categoría equivalente a los gobernantes de facto– el que habría modificado la norma original.

Ya hemos visto que la solución simple no siempre es correcta en términos de seguridad de la convivencia comunitaria. Esta simplicidad ataca por igual al extremo derogatorio a ultranza como el extremo convalidatorio total. Es por ello que han de pensarse en esas nuevas soluciones para las difíciles democracias de América Latina y de otras partes del mundo que ven con frecuencia interrumpido su sistema.

Creemos en este punto que –al pronunciarse el Poder Ejecutivo democrático sobre el decreto ley respectivo– debería necesariamente hacerse una referencia a la restauración de la norma precedente para el caso que se considerara la conveniencia de la restitución de la vigencia plena de la norma derogada por el decreto ley.

La norma cuya vigencia se restituiría recuperaría su jerarquía legal plena. Vale decir, que una nueva modificación de esta norma solo podría llevarse a cabo a través del procedimiento legislativo normal.

Para concluir es preciso señalar que los decretos del Ejecutivo democrático, modificatorios de los decretos leyes, deben de rotularse con una denominación que deje traslucir su naturaleza ya que no puede denominarse leyes por no haber sido aprobadas por el Congreso, ni tampoco decretos leyes dado que no se puede propiciar una confusión con el espurio origen de estos instrumentos. Un título como Decreto Legislativo Especial –dado que la voz Decreto Legislativo a secas es reservado en algunas latitudes para las normas que se dictan al amparo de facultades constitucionalmente delegadas– podría ser el apropiado.

Repensar este tema es fundamental para la vigencia plena de un Estado de Derecho con normas de raíz democrática y es, sobre todo, contribuir a la gobernabilidad de nuestras naciones en las que los movimientos pendulares se han perpetuado, entre otras causas, por la prolongación de los efectos de las normas y de la lógica de esas normas elaboradas por los gobiernos de facto al margen de todo consenso.

INDICE

IMPROVING OF THE ADMINISTRATION OF JUSTICE IN THE AMERICAS

PROTECCTION AND GUARENTEES FOR JUDGES AND LAWYERS IN THE EXERCISE OF THEIR FUNCTIONS

Jonathan T. Fried

Although the subject of "Improving the Administration of Justice in the Americas" has been on the agenda of the Inter-American Juridical Committee since 1985,[1] it was only in 1992 that the Committee first decided to address "Protections and Guarantees for Judges and Lawyers in the Exercise of their Functions". At its August, 1993 session, the Committee reiterated the need to continue studies on the subject,[2] and requested Jonathan T. Fried to serve as Rapporteur for this subject.

This paper constitutes the first report of the Rapporteur, prepared with the able research assistance of James T. Stringham, Victoria Bazan, and Monica Phillips. The author is particularly grateful to Harold Sandell, Legal Counsel to the Judicial Affairs Unit of the Canadian Department of Justice, for his insight and comments on earlier drafts.

I. WHY ARE JUDGES AND LAWYERS SO IMPORTANT? SOME PHILOSOPHICAL FOUNDATIONS

The judicial function is an intrinsic element of any effectively functioning legal system, and necessary to ensure the rule of law.

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1 CJI/RES.I-02/85, wherein the Committee resolved to solicit information from member states on the subject "...recognizing the importance of the administration of justice for the rule of law, the preservation of human rights and of peace, and taking into account that a moral, efficient and autonomous administration on justice is the best guarantee for achieving balanced development that reduces inequality in a climate of liberty...".

2 CJI/RES. II-17/93.

A. Judging and the Legal System.

Historians and philosophers both consider the concept of rules to be an inevitable feature of organized society.[3] In any community, rules provide a framework within which individuals may conduct social relations. Within the universe of such social norms, the notion of "law" holds a special place. While some dictates for behavior may derive from religion, customs or manners, "law" refers to those rules possessing certain defining characteristics:

1. Laws are coercive in character, both in respect of the source of their authority and of their enforceability.[4] In other words, laws derive from an authoritative source.[5]

2. Laws are accepted as binding and are observed as such by the community.[6]

3. Laws are general in nature, providing "norms of conduct set for a given community" rather than individual commands.[7]

For there to be a legal system, a process must exist by which it can be determined whether a given rule is a "law", and by which general norms can be applied to particular facts. Accordingly, a legal system comprises the laws themselves and additional elements describing the process of making "rules", their observation and the effects of non-compliance, and the institutions and procedures for interpreting and applying rules, including for resolving disputes.[8]

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3 Roberts, *Pelican History of the World*, p. 57ff.; Pollock and Maitland, *History of English Law* (2d ed.), p. xciii; H.L.A. Hart, *The Concept of Law*, p. 121; Friedmann, *Legal Theory*, p. 14.

4 Austin, *The Province of Jurisprudence Determined* (1832); Pollock, *First Book of Jurisprudence*, at 28; Kelsen, *Principles of International Law* (1952), at 5.

5 H.L.A. Hart's "secondary rules of recognition" are those rules, themselves "laws", which society accepts as defining the authoritative source of "primary rules of obligation", i.e., those which directly regulate conduct.

6 "...(A)s probably most competent jurists would today agree, the only essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity...", Brierly, *The Law of Nations* (6th ed. [Waldock], 1963), at 71.

7 Friedmann, *supra*, note 1, at 16.

8 Hughes, "Rules, Policy, and Decision-Making", 77 Yale L.J. 411 (1968). In *The Morality of Law* (1964) at 6ff., Lon Fuller derives eight requirements for "inner morality" of law

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.[9]

The role of authoritatively determining how a law is to be applied to particular cases is embodied in the judicial function.[10] While it has been argued that, at least in theory, "...the notion of law does not include of necessity the existence of a distinct profession of lawyers, whether as judges or as advocates...",[11] study by legal anthropologists provides convincing

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from the nature of a legal system: (1) generality; 92) promulgation; (3) prospective legal operation; (4) intelligibility and clarity; (5) avoidance of contradictions; (6) avoidance of impossible demands; (7) constancy of the law through time; and (8) congruence between official action and the rule as declared.

9 Hart, *supra* note 3, at 127.

10 Professor Dworkin catalogued instances where more than a merely mechanical application of a general rule to specific facts is required in an early work, "Judicial Discretion", 60 J. Phil, 624 (1963) at 627:

"(i) In many cases a court is pressed to, and in some cases does, *overrule* a textbook rule, and substitute a new one.

(ii) Even when, as is more often the case, a court is determined to follow a particular textbook rule if it applies, that rule may be so ambiguous that it is not clear *whether* it applies, and the court cannot decide simply by studying the language in which the rule has been expressed.

(iii) Sometimes *two* textbook rules by their terms apply, and the judges must choose between them. In some such cases the need for choice may be disguised, in that only one rule is mentioned, but research (or imagination) would disclose another rule that the court could have adopted as easily.

(iv) Sometimes a court itself will state that no textbook rule applies to the facts. Often the gap may be cured by what is called "expansion" of an existing rule, but sometimes a wholly new rule must be invented.

(v) A large, and increasing, number of cases are decided by citing rules so vague that it is often unhelpful even to call them ambiguous: the critical words in such rules are "reasonable", "ordinary and necessary", "material", "significant", and the like."

11 Pollock and Maitland, *The History of English Law* (2d. ed.), Vol. I, at xcvii. The authors go on to note that "...justice can be administered according to settled rules by persons taken from the general body of citizens for the occasion, or in a small community even by the whole body of qualified citizens...In Athens, at the time of Pericles, and even of Demosthenes, there was a great deal of law, but not a class of persons answering to our judges or counsellors. The Attic orator was not a lawyer in the modern sense. Again, the Icelandic sagas exhibit a state of society provided with law quite definite as far as it goes, and even minutely technical on some points, and yet without any professed lawyers. The law is administered by general assemblies of freemen, though the court which is to try a particular cause is selected by elaborate rules. There are old

proof that judicial authority and adjudicative procedures are well-developed in "primitive" societies.[12]

This judicial function was recognized even in revolutionary France. The tendency of the Parlements to identify with the aristocracy and to ignore progressive legislation led to a marked separation of powers and regulation of the judiciary. Rule-making was the legislature's domain[13] and the *Tribunal de Cassation* was established to ensure that judicial interpretation of statute conformed to the legislature's intent.[14] Yet the tribunal's mandate recognized that the function of interpretation was essentially judicial, and led ultimately to the evolution of the present day *Cour de Cassation*.[15]

In the United States, eminent judges have described their task as resolving disputes about applying laws to concrete controversies.[16]

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men who have the reputation of being learned in the law; sometimes the opinion of such a man is accepted as conclusive; but they hold no defined office or official qualification. In England...there was no definite legal profession till more than a century after the Norman Conquest. In short, the presence of law is marked by the administration of justice in some regular course of time, place and manner, and on the footing of some recognized general principles."

12 Hoebel, *The Law of Primitive Man* (1954).

13 de Vries cites the Law of August 16-24, 1790, Title II, Article 10, establishing the new courts: "They shall issue no general rulings ('reglements') but shall address themselves to the legislative body wherever they believe it necessary either to interpret a law or to enact a new one.", *Cases and Materials on the Law of the Americas* (New York: Columbia University, 1976) at 166.

14 Dawson, *Oracles of the Law* (Ann Arbor: University of Michigan Law School, 1968) at 377-78.

15 "It will be noted that the Tribunal of Cassation was not itself expected to provide authoritative interpretations of the statutes involved in the cases that came before it. On the contrary, its original function, consistent with its separate, nonjudicial nature, was merely to quash judicial decisions based on incorrect interpretations of statutes. Such cases would then go back to the judiciary for reconsideration and decision; that was, after all, a judicial function... However, by a gradual, but apparently inevitable, process of evolution, the tribunal came to perform the second step, as well as the first. Thus it not only indicated that the judicial decision was wrong; it also explained what the correct interpretation of the statute was. During this same period, the tribunal's nonjudicial origin dropped from view, and it came to be called the Court of Cassation; thus judicialized, it assumed a position at the apex of the system of ordinary courts", Merryman, *The Civil Law Tradition* (California: Stanford University Press, 1985) at 40-41.

16 Holmes, "The Path of the Law", 10 Harv. L.Rev. 457 (1897); Cardozo, *The Nature of the Judicial Process* (1921); Pound, "A Survey of Social Interests", 57 Harv. L.Rev. I (1944).

The role of determining which rules are "laws" is also inherent to the judicial function. Even countries governed under a system of "parliamentary sovereignty" must still have a procedure to determine whether a measure sought to be enforced is in fact a law. In countries of the British Commonwealth, for example, a court "...must inquire whether the measure has in fact been enacted by a body which is authorized, under the existing law, to pass it, and whether it was enacted in the correct manner and form; this is merely an application of the rule of law."[17] A line of cases beginning with the *Trethowan case*[18], and including *Harris v. Minister of the Interior*[19], *Liyanage v. The Queen*[20], and *The Bribery Commissioner v. Ramasinghe*[21] support the proposition that the fact that a legislature is sovereign does not affect the necessity of judicially determining whether in fact the legislature has acted. Objections based on doctrines of "parliamentary privilege" and the "enrolled bill rule" to court examination of the validity of parliamentary acts are contrary to long- standing authority[22] and may be interpreted as stemming from the notion that parliament is a court of record, and not from any notion of parliamentary sovereignty.[23]

The question of which rules are laws is pivotal in the aftermath of a revolution or a coup d'etat. Courts in common law jurisdictions have been called upon "to resolve issues of the survival of the constitutional order and the validity, legitimacy, and legislative power of usurper regimes."[24] Rely-

17 Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined", 92 L.Q.R. 591 (1976); Heuston, "Sovereignty", in *Oxford Essays in Jurisprudence* (Guest, et., 1961) at 217; Gray, "The Sovereignty of Parliament Today" 10U.T.L.J. 54 (1953).

18 (1932) A.C. 526(J.C.P.C.)

19 (1952) (2)S.A.L.R. (A.D.) 428.

20 (1967) 1 A.C.259 (J.C.P.C.)

21 (1965) A.C. 172 (J.C.P.C.). For commentaries on these cases, see Winterton, *supra* note 17; Tarnopolsky, *The Canadian Bill of Rights* (2d ed., 1975); McWhinney, Case Comment, 30 Cdn. Bar Rev. 692 (1952); Friedmann, "Trethowan's Case, Parliamentary Sovereignty and the Limits of Legal Change", 24 Aust. L.J. 103 (1950).

22 *Stockdale v. Hansard*, (1839) 112 E.R. 1112.

23 Winterton, *supra* note 17. See also Swinton, "Challenging the Validity of an Act of Parliament: The Effect of Enrollment and Parliamentary Privilege", 14 Osgoode H.L.J. 345 (1976).

24 Mahmud, "Jurisprudence of Successful Treason: Coup d'Etat & Common Law" (1994) 27 Cornell Int'l L.J. 49-140 at 51-52. Mahmud details the situation of the Grenadian courts after the *coups d'état* in 1979 and 1983 as follows: "the *Mitchell* court refused to validate a usurper regime that had already fallen. Still the court, itself a product of the usurper regime, invoked the doctrine of necessity to validate both its own existence and its jurisdiction." *Ibid.* at 126.

ing on the *Estrada Doctrine*, "extra-constitutional regimes in post-colonial civil-law settings do not consider their legitimacy and validity open to judicial or international question."[25] Nonetheless, *de facto* governments often seek recognition and legitimacy from their highest courts;[26] in return, these courts may insist on pledges from the new regime to respect the Constitution and the rule of law.[27]

It is, therefore, necessary to provide for the judicial function in any legal system to apply general rules to specific cases, and to determine which rules are laws.

B. Judges, Lawyers and Governmental Authority

The collective relation of persons in an organized society to a sovereign authority or government was at issue well before the advent of the modern nation-state. Two political and philosophical currents of monumental proportions, namely the concept of the rule of law and the notion of inherent limits on governmental authority, have come together in the twentieth century to demand the maintenance of an independent judiciary and legal profession.

1. The Rule of Law

The rule of law finds its modern origins in the *Magna Carta* of 1215. King John agreed to the demands of a group of nobles that:

> No freeman shall be taken or (and) imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgement of his peers or (and) by the law of the land.

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25 *Ibid.*, at 52.

26 Galleher, "State Repression's Facade of Legality: the Military Courts in Chile" (1988) 2 Temple Int'l & Comp. L.J. 183; see also Vaughn, "Proposals for Judicial Reform in Chile" (1992-93) 16 Fordham Int'l L.J. 577-607.

27 Rosenn, "Judicial Review in Latin America" (1974) 35 Ohio State L.J. 785-819 at 813; see also Lynch, "Constitutional Ambiguity and Abuse in Argentina - the Military Reign 1976-83", (1989) 6 Journal of Human Rights 353-382; Feinrider, "Judicial Review and the Protection of Human Rights under Military Governments in Brazil and Argentina" (1981) 5 Suffolk Transnational L.J. 171-199; Biles, "The Position of the Judiciary in the Political Systems of Argentina and Mexico" (1976) 8 Lawyer of the Americas 287; Galleher, *supra* note 26.

On the eve of the Enlightenment, John Locke stated that even a sovereign legislature must rule "by promulgated standing laws, and [interpreted by] known authorized judges".[28] The customs of the people that enjoyed habitual obedience, the "common law", thus served as the basis for the concept of the rule of law, or "the supremacy of positive law".[29] And, as noted above, an institution other than the legislature itself must be able to decide whether a law is properly promulgated.

Colonial governance has also left a legacy reinforcing the rule of law in the Americas, and thereby the necessity of a judiciary equipped to enforce it. Prior to the passage of the *Colonial Laws Validity Act* of 1865[30], no legislature of a British colony was considered to have any authority to legislate contrary to the rules and principles of the British common law. Although s. 3 of the Act removed the prohibition on legislation repugnant to British common law, it continued to bar colonial legislation contrary to acts of the Imperial Parliament.[31] In granting authority to the colonial legislatures to remake their constitutions and create courts, section 5 of the Act stipulated that this could be done only "provided that such Laws shall have been passed in such Manner and Form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony". Colonial and Imperial judges were thus long accustomed to making determinations regarding the consistency of legislative measures with higher authority.

More recently, the *British West Indies Act* of 1967, which introduced a concept of Associated Statehood, has been described as a "colonial export model" of the Westminster system, differing from Britain in several important respects: the absence of the doctrine of the sovereignty of Parliament, the existence of the power of judicial review, the specification of fundamental rights provisions, and the fact that these constitutions are committed to writing".[32] Although "(t)he constitutions do not anywhere explicitly give the Supreme Court jurisdiction to review substantive legislation and to pronounce upon the *vires* of such legislation"[33], the power of judicial review

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28 Locke; *Second Treatise on Civil Government* para. 136.

29 Cappelletti and Cohen, *Comparative Constitutional Law* (1979) at 10.

30 28 & 29 Vict. c. 63 (1865).

31 See Wheare, *The Statute of Westminster and Dominion Status* (3d ed. 1947).

32 Gilmore, "The Associated States of the Commonwealth Caribbean: The Constitution and the Individual", 11 Lawyer of the Americas 1 (1979).

33 Forbes, "The West Indies Associated States: Some Aspects of the Constitutional Arrangements", 19 Soc. & Econ. Studies 59 (1970), at 82.

arises from the fact of written constitutions defining law-making powers.[34]

Federalism also demands an arbiter between different levels of government, each with a claim to legislate within their own sphere. A functioning judiciary is essential to this task.[35]

In the civil law tradition, the principle of *legalité* is integral to an *état de droit*[36]. The French revolutionary government reacted to the excesses of the French Parlements during the *ancien régime* by establishing a rigorous separation of powers and regulating the judiciary.[37] However, the need for judicial review of administrative actions led to the evolution of a parallel system of administrative courts, with the *Conseil d'Etat* at the apex.

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34 Alexis, "The Basis of Judicial Review of Legislation in the New Commonwealth and the USA", 7 Lawyer of the Americas 567 (1975); Carnegie, "Judicial Review of Legislation in the West Indian Constitutions", 1971 Pub.L'. 276.

35 Dicey stated that the supremacy of a constitution is fundamental to a federal state, and implies that judicial control over legislation is essential "...to prevent either the legislature of the federal unit or those of the member states from destroying or impairing that delicate of power...". *The Law of the Constitution* (10th ed., Wade, ed., 1959) at 144. Former Chief Justice of Australia Owen Dixon, in "The Law and the Constitution", 51 L.Q.R. 590 (1935), observed that "(t)he rival conception of the supremacy of law over the legislature is the foundation of federalism. Under that system, men quickly depart from the tacit assumption to which a unitary system is apt to lead that an Act of Parliament is from its very nature conclusive. They become accustomed to question the existence of power and to examine the legality of its exercise."

36 Alternatively, an *estado de derecho, stato di diritto,* or *Rechstaat*. "This concept of the state according to law is based on the principle that not only must all power of the public bodies forming the state stem from the law, or be established by law, but that this power is limited by law. According to this concept, the law becomes, as far as the state is concerned, not only the instrument whereby attributions of its bodies and officials are established, but also the instrument limiting the exercise of those functions. Consequently, the *etat de droit,* or state according to the rule of law, is essentially a state with limited powers and subject to some form of judicial control... In its most common sense, this may refer to the subjection of the state not only to formal law, but also to all the sources of the legal order of a given state. This implies, therefore, that all state bodies are required to obey the law of the state, and particularly, the law as enacted by Parliament. This has given rise to the 'principle of legality' applied to government or administrative actions, according to which the administration must act in accordance with the law and can be controlled judicially to that end. "Brewer-Carias, *Judicial Review in Comparative Law,* (Cambridge: Cambridge University Press, 1989) at 7.

37 Decree of Dec. 22, 1789, Art. 7, states "They [the administrators of departments and the districts] cannot be disturbed in the exercise of their administrative functions by any act of the judicial power." The Law of Judiciary Organization of 16-24 August

> Administrative court remedies are intended to enforce the French concept of *legalité*. The term *legalité* embodies twin notion of compliance with delegated authority and with standards of due process. The notions of compliance with delegated authority is an aspect of the hierarchy of norms, and that of due process is expressed in the term "general principles of law".[38]

Thus in both common and civil law systems, the judicial function is inherent to maintaining the rule of law.

> The state is not only a set of bureaucracies. It is also a legal order. Normally, this legal order textures social relations along the territory covered by an entity internationally recognized as a nation state. This texturing is effective when most social agents, even though they may lack detailed knowledge of the law, abide by it, expect others to do so, and know that, in case of conflict, they may have access to fair adjudication by one segment of the state apparatus, the judiciary. Civil and political rights (democracy) as well as contract and property rights (capitalism) may be written on paper, but they are effective only when and where the above expectations are actually met.[39]

2. Limits on Governments and the Enforcement of Rights

The scope of sovereign authority has been a central concern of political and legal philosophers since ancient times.[40] Aristotle drew the distinction between positive law, deriving its authority from being promulgated as law, and natural law, inherent in human nature, and Roman jurisprudence distinguished between the *jus gentium* and the *jus civile*. As Henkin notes, however, the Stoics and their successors "did not perceive natural law as a

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1790, Art. 13, states; "Judicial functions are distinct and shall always remain separate from administrative functions. Judges may not, subject to the penalties of *forfaiture*, interfere in any manner with the operations of administrative bodies, or summon administrators to appear before them to account for the exercise of their functions." Both cited in de Vries, *Civil Law and the Anglo-American Lawyer* (New York: Oceana Publications, 1976) at 91.

38 *Ibid.*, at 126. See text accompanying note 13, *supra*.

39 O'Donnell, "Some Reflections on Redefining the Role of the State", in Bradford (ed.), *Redefining the State in Latin America*, Paris, OECD, 1994, at 252.

40 "The belief, then, in the need to subordinate certain acts of the law-making power to higher, more permanent principles is not confined to our own time. It may be traced, through the Enlightenment philosophers, the English courts of equity, the French Parlements, the medieval scholastics, and early Church fathers to its earliest direct origins in Greco-Roman civilization." Cappelletti and Cohen, *supra* note 29, at 5.

higher law invalidating and justifying disobedience to man-made laws that did not measure up, but as a standard for making, developing, and interpreting law; law should be made and developed so that it will correspond to nature".[41] The Old Testament itself provides a concept of fundamental law, set out in the Five Books of Moses in such texts as the Ten Commandments.[42]

As reflected in the writings of St. Thomas Aquinas, Christianity traced natural law to divine origins, superior to society's rules. In the Iberian peninsula, the *Fuero Juzgo*, an amalgamation of Roman and Gothic law completed in 694, required, "that the prince be merciful, just and pious - worthy of his responsibility. The king is bound by the laws since all men are equal before God. His authority must be based upon wise law. Injustice undermines the legitimacy of his authority."[43] In 1075, Pope Gregory VII declared the Roman Catholic Church to be independent of the Holy Roman Empire, and the Concordat of Worms signed in 1122 recognized the jurisdiction of the Church over a number of matters.[44] Jurists were thus forced to consider the proper sphere of jurisdiction of church and of state. "The twelfth and thirteenth centuries gave rise to theorizing by both canon and Roman lawyers about the nature and scope of governmental power, on the one hand, and, on the other, to speculation about the appropriate means of restraining its arbitrary exercise.[45]

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41 Henkin, *The Rights of Man Today* (1978) at 5.

42 Cogan, "Moses and Modernism", 92 Mich. L. Rev. 1347 (1994), suggests that Mosaic fundamental law "...is not withheld, hidden, or discretionary; it is express. Typically, it is not general, vague, or ambiguous.; it is specific and intended to be clear. Although delivered orally at first, it is then written...[but] while the form of Mosaic fundamental law...is presented in what appears to be a static form, much of that law was in fact the product of what we may rightfully term 'a progressive form' of lawmaking...[which] reflected a crystallization of understandings and traditions that had evolved over centuries...thus leaving us with an example...of a people who were given, who were able to accept, and who thrived for fifteen centuries on a text that combined...differing accounts of fundamental law." *Ibid.* at 1350.

43 de Vries, *supra* note 13, at 63.

44 Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983) at 98.

45 Reid, "Am I, by Law the Lord of the World: How the Juristic Response to Frederick Barborossa's Curiosity Helped Shape Western Constitutionalism", 92 Mich. L. Rev. 1647 (1994) at 1649. His review essay of Kenneth Pennington's *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* provides a superbly succinct summary of medieval constitutionalism". He notes that the fourteenth-century jurist Baldus (1327-1400) maintained that the emperor could invade the *dominium* of others and confiscate private property only when he had a *ratio motiva*, and that *ratio* carries with it a basic concept of justice and precluded "arbitrary actions" *ibid* at 1652. "[In] the juridical culture of the twelfth century...Roman and

The *Siete Partidas*, dating from 1260 and promulgated in 1348, "were not so much rules for conduct in the Roman sense but rather medieval-type principles of proper conduct and of the well-ordered society and polity that approached the sanctity and status of being moral treatises."[46] A canon of statutory interpretation enacted in 1769, the *Lei da Boa Razão*, directed the Portuguese and Brazilian judiciary to apply Roman law to fill legislative lacunae only when it accorded with "good human sense", which was understood to mean natural law.[47] In England, Sir Edmond Coke stated that "...when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."[48]

Just as canon law and Papal authority provided a check on the otherwise unlimited claims of a right to rule by royalty in continental Europe, the "Glorious Revolution" and the *Charter of Rights* of 1688 marked the first significant check on the arbitrary authority of King James I. In his *Second Treatise on Government* published in 1690, John Locke began the transformation from natural law to natural rights and the evolution from divine to secular foundations for such rights: laws must not violate the natural rights of individuals that exist by the "law of Nature". In the context of claims against royal prerogative, parliamentary sovereignty itself was at the time considered to be subject to fundamental law.[49]

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canon lawyers...formed a kind of seedbed from which grew the whole tangled forest of early modern constitutional thought.", Tierney, *Religion, Law, and the Growth of Constitutional Thought* (1982) at 1, quoted by Reid, *ibid.*, who observes that "[i]n a series of important articles. Tierney demonstrated that the canonists of the twelfth and thirteenth centuries developed sophisticated theories of rights — theories that had far-reaching, if little-noticed, influence on the development of Western jurisprudence.", *ibid.* at 1661.

46 Wiarda, "Law and Political Development in Latin America: Toward a Framework for Analysis", 19 A.J.C.L. 434 (1971) at 439.

47 Rosenn, "The Jeito - Brazil's Institutional Bypass of the Formal Legal System and its Development Implications", (1971) 19 Am. J. Comp. L., 514, at 519, states: "'Good human sense' theoretically meant consistent with natural law, defined as 'the essential intrinsic and unalterable truths which Roman ethics had established, and which were given formal recognition by divine and human laws to serve as moral or legal rules of Christianity'."

48 *Dr. Bonham's Case*, 8 Co.Rep.113b, 77 E.R. 638 (C.B., 1610).

49 Keeton, "The Judiciary and the Constitutional Struggle 1660-1688", 7 J. Soc. Pub. Teach. L. 56 (1963); Phillips, "The British Constitution from Revolution to devolution; 17 W & M L. Rev. 423 (1976); Dixon, *supra* note 35; Dixon, "The Common Law as an Ultimate Constitutional Foundation" 31 Aust.L.J., 240 (1957); Radin, "The Myth of Magna Carta" 50 Harv. L. Rev. 1060 (1947); Monpensier, "The British Doctrine of Parliamentary Sovereignty: A Critical Enquiry", 26 La. L. Rev. 753 (1966). See also Jennings, *The Law and the Constitution* (3d ed. 1943) at 138-140; Gough, *Fundamental Law in English Constitutional History* (1955).

In the course of the eighteenth century the ideas that governmental authority depends on the consent of the governed (the "social contract" of Locke and Rousseau) and that certain rights are inherent to human beings and thus are inalienable culminated in the American Declaration of Independence of 1776 and the French Declaration of the Rights and Duties of Man of 1789, codifying the political philosophy that had guided the American and French revolutions. A constitution is a social contract in fact: a society chooses what limited powers it wishes to grant to government, and no exercise of authority by government beyond that authorized under the constitution is permitted. As stated by Thomas Paine in *The Rights of Man*, "representative government is freedom". Experience had shown, however, that parliaments alone do not necessarily afford protection for the rights the people retained against their government.

> The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[50]

This echoed Montesquieu's conception of political liberty in *De l'Esprit des Lois*:

> When legislative power and executive power are in the hands of the same person or the same magistrates body, there is no liberty ... Neither is there any liberty if the power to judge is separate from the legislative and executive powers... All is lost if the same man, or the same body of princes, or people exercised these three powers; that of laws, that of executing public resolutions and that of wishes or disputes of individuals.[51]

As early as 1787, then, judges were seen as essential to preventing the exercise of arbitrary power by the executive and legislative branches infringing on the natural rights of the citizen.

Article 16 of the French *Declaration* states that "A society in which the guarantee of rights is not assured or the separation of powers is not determined has no constitution at all." Early decisions of the *Conseil d'Etat* affirmed that "natural and imprescribable human rights" limited the public

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50 *The Federalist* No. 47 (James Madison).

51 Chapter VI, Volume XI, as quoted in Brewer-Carias, *supra* note 36, at 12.

power.[52] Providing effective judicial means for the protection of fundamental rights and liberties is now recognized as integral to an *état de droit*.[53]

It should be emphasized, therefore, that more than a century of American history and a strong line of precedents — to say nothing of contemporary writings — stood behind Chief Justice Marshall in 1803 when, interpreting the somewhat confused terms of article VI, paragraph 2 of the Federal Constitution of 1789, he enunciated the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.[54]

The dominant concepts in the first civil codes of France, Austria, Italy and Germany were individual private property and individual freedom of contract, reflecting a belief that these fundamental rights "were guarantees of individual rights against intrusion by the state."[55] In the 19th century, Latin American nations inherited this civil law tradition from the Iberian

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52 Szladits, *The International Encyclopedia of Comparative Law*, (Paris: J.C.B. Mohr(Paul Siebeck) at 29, citing pasages from the *arret Blanco*, Trib. Confl. 8 Feb. 1873, Rec. Cons. d'Etat I suppl. n. 61., states: An important change came when the Law of 24 May 1872 conferred upon the Conseil d'Etat a delegated Jurisdiction (*justice déléguée*) by which the administration became subject to the control of a veritable court. This instituted a period of growth in the course of which by a serie of leading decisions (*"grands arrets"*) the fundamental principles of modern administrative law were established and the judicial control of the administration extended further and further. The two leading ideas directing this process were, on the one hand, the primacy of the individual and the affirmation of "natural and imprescribable human rights," limiting the public power, and on the other hand, the concept of the public service, which extended the power of the administration by subjecting it to a law "whose special rules vary according to the needs of the service."

53 Brewer-Carias, *supra* note 36, at 7-8. "In fact, French citizens possess a powerful weapon against legislative social injustice and discrimination: their ability to challenge laws as repugnant to fairness and public policy as enunciated by the Declaration of the Rights of Man, incorporated in the Preamble to the French Constitution. The fact that individual rights are provided by statute rather than by a constitution, although guaranteed by the Constitution's Preamble, suggests that the French legal system is blessed with greater flexibility to adapt to social, economic and technological changes than in the United States, where the Supreme Court often is chained to precedent and partisanship." Kublicki, "An Overview of the French Legal System from an American Perspective", 12 Boston U. Int'l L.J. 57 (1994), at 90.

54 Cappelletti and Cohen, *supra* note 29, at 11, quoting from *Marbury v. Madison*, (1803) 1 Cranch (5U.S.) 137.

55 Marryman, "The Public Law-Private Law Distinction in European and American Law" 17 Journal of Public Law; cited in de Vries, *supra* note 13, at 97.

peninsula, and adapted it to their own circumstances together with the written constitutional models of the United States and France.[56]

Brazil, for example, borrowed *habeas corpus* from the British and incorporated it into the Brazilian 1830 *Penal Code*.[57] Article 72(22) of the Constitution of 1891 provided an expansive form of *habeas corpus* which was used to challenge the constitutionality of statutes and decrees;

> Habeas corpus shall lie whenever an individual suffers, or is in imminent danger of suffering, violence or coercion through illegality or abuse of power.[58]

In the early 20th century, Brazilians brought *habeas corpus* suits to protect freedom of speech and assembly, and political and electoral rights. However, a constitutional amendment in 1926 reduced the scope of the writ to cases where an individual's power to come and go was threatened.[59] In response to this retreat, the 1934 Constitution of Brazil provided a new remedy - the *mandado de segurança* (writ of security) - for the protection of fundamental rights other than personal liberty.[60]

The 1988 Constitution[61] provides *habeas corpus* to protect against illegal deprivations of liberty, and *mandado de segurança* to protect those rights unprotected by *habeas corpus*. *Habeas corpus* may be used to challenge the constitutionality of statutes and executive acts on their face, whereas *mandado de segurança* only prevents the application of a law against the party that sought the writ.[62] To relieve Brazilians from bringing individual *mandado de segurança* actions to protect their rights, the Constitution provides a collective writ of security to protect the rights of a group. In addition, the Constitution provides a new action -*habeas data*- to discover information which the government holds about a plaintiff.[63]

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56 Clark, "Judicial Protection of the Constitution in Latin America" (1975) Hastings Constitutional L.Q. 405; Wiarda, *supra* note 43.

57 Rosenn, *supra* note 27.

58 *Ibid.*, translation, at 789.

59 *Ibid.*

60 *Ibid.*, at 792; Brewer-Carias, *supra* note 36, at 319.

61 *Constituição da República Federativa do Brasil* (Oct 5, 1988)

62 Rosenn, *supra* note 27, at 792.

63 Rosenn, "A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil", (1992) 23 University of Miami Inter-American L.Rev. 659 at 682-3.

In Mexico, the *juicio de amparo* (trial for protection) was conceived as a procedural instrument to "protect against official acts, those fundamental rights of the citizenry, including the right to challenge laws of dubious constitutionality."[64] *Amparo* first appeared in state constitution of Yucatan in 1841.[65] Influenced by de Tocqueville's descriptions of judicial review in the United States of America,[66] the drafters of the 1847 *Acta de Reformas* added amparo to the restored 1824 Mexican Constitution.[67] Article 25 declared:

> The Federal Courts shall protect (*ampararán*) any inhabitant of the Republic in the exercise and preservation of the rights allowed him by this Constitution and by constitutional laws against any attack by the Legislative and Executive, whether Federal or State. These courts shall restrict their action to giving protection in specific cases heard before them, without power to make general declarations regarding the law or the acts underlying the case in question.[68]

The fundamental features of judicial review through *amparo* were set out in the Constitution of 1857, and refined in the Constitution of 1917.[69] The Constitution grants the federal courts the exclusive jurisdiction to hear *amparo* actions.[70] Like the *mandado de segurança*, the *amparo* remedy only applies to the aggrieved party seeking relief.[71] However, the Supreme Court

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64 Fix Zamudio, "A Brief Introduction to the Mexican Writ of *Amparo*" (1979)9 California Western Int'l L.J. 306 at 311.

65 *Ibid.*, at 312-13.

66 *Ibid.*, at 309; Karst and Rosenn, "Law and Development in Latin America: A Case Book" *Latin American Studies* Series Vol. 28 (Los Angeles: University of California Press, 1975) at 127.

67 Fix Zamudio, *supra* note 64 at 312-13.

68 Fix Zamudio, "Judicial Protection of the Individual Against the Executive in Mexico" (1970) 2 Gerichtsschutz Gegen die Exekutive 713 at 716.

69 *Constitución Política de los Estados Unidos Mexicanos* (1917).

70 Karst and Rosenn, *supra* note 66, at 127 cite Article 103 as follows:
"The federal courts shall decide all controversies that arise:
I. Because of law or acts of the authorities that violate individual guarantees;
II. Because of laws or acts of the federal authority restricting or encroaching on the sovereignty of the States;
III. Because of laws or acts of State authorities that invade the sphere of federal authority..."

71 Karst and Rosenn, *supra* note 66, at 128 cite Article 107 as follows:
"All controversies mentioned in article 103 shall follow the legal forms and procedures prescribed by law, in accordance with the following bases:

and collegiate tribunals may establish *jurisprudencia* by holding the same point of law in five consecutive judgments; *jurisprudencia* are binding on lower courts.[72]

Amparo has evolved from its origins as a remedy to protect rights so that "*amparo* now serves as the guardian of the entire Mexican judicial order, from the highest constitutional precepts to the most modest ordinances of municipal government."[73] It has been described as having five diverse functions:

> (1) protection of individual guarantees; (2) testing allegedly unconstitutional laws; (3) contesting judicial decisions; (4) petitioning against official administrative acts and resolutions; and (5) protection of the social rights of farmers subject to the agrarian reform laws.[74]

The *amparo de la libertad* protects the individual and social rights set out in the first 29 articles of the Constitution (the Mexican "Bill of Rights") against violations by acts of an authority.[75] It may be invoked against all agencies and authorities belonging to the Executive, as well as officials including the President, Cabinet ministers, civil servants and judges.

The constitutionality of statutes and regulations may be challenged directly by *amparo contra leyes*. As noted above, finding a law unconstitutional in one case does not have a general (*erga omnes*) declaratory effect. However, *jurisprudencia* is often quickly established because of the frequency of challenges on constitutional questions.[76]

> I. A trial in amparo shall always be granted upon the request of the aggrieved party. II. The judgment shall only affect private individuals, being limited to according them the relief and protection pleaded for in the particular case, without making any general declaration as to the law or act on which the complaint is based...".

72 Fix Zamudio, *supra* note 64, at 347; Cabrera and Headrick, "Notes on Judicial Review in Mexico and the United States" (1963) 5 Inter-American L.Rev. 253 at 265.

73 Fix Zamudio, *supra* note 64, at 348.

74 *Ibid.*, at 317. Others suggest a simpler classification, dividing amparo into two classes: legality amparo (*amparo de la legalidad*) and constitutionality amparo (*amparo contra leyes*); Rosenn, *supra* note 27, at 797-98. Legality amparo protects the citizen's civil right to legality -garantía de legalidad; Cabrera and Headrick, *supra* note 72, at 255-56.

75 Brewer-Carias, *supra* note 36, at 164.

76 Cabrera and Headrick, *supra* note 72, at 265.

The most common form of *amparo*, accounting for more than 80 per cent of the *amparo* cases, is the *amparo judicial* or *amparo casación*.[77] It is used to review judicial and quasi-judicial decisions in criminal, civil, administrative and labour cases for procedural errors and errors in the application of the law.

The *amparo administrativo* is used to challenge administrative acts which violate the Constitution or statute law.[78] In effect, this form of *amparo* constitutes a system of administrative review.

The final type, *amparo agrario* protects peasants' property rights against acts of agrarian authorities.

Consistent with the Brazilian and Mexican experience, from the latter half of the 19th century to the present day, most Latin American republics have enshrined fundamental human rights in their constitutions, and provided some form of judicial review to protect these rights.[79] The mechanisms for judicial review are varied: some have used expansive forms of *habeas corpus*,[80] while others created legal institutions, such as *amparo*[81], *mandato de segurança*[82], and *acción popular*[83].

In contrast to the Latin America states, Canada and countries of the Commonwealth Caribbean, along with the United States, have long relied on prerogative writs such as *certiorari*, *mandamus*, prohibition, and *habeas corpus* to provide effective avenues for judicial review of administrative action. Canada enshrined fundamental human rights in its Constitution only recently - in 1982. The *Canadian Charter of Rights and Freedoms*[84] applies to the federal Parliament and government, and the provincial legislatures

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77 Fix Zamudio, *supra* note 64, at 324.

78 Brewer-Carias, *supra* note 36, at 164.

79 *Ibid.*

80 In addition to Brazil (1830). Peru (c.1916) and Columbia (1991).

81 In addition to Mexico (1857), Guatemala (1879), El Salvador (1886), Honduras (1894), Central American Federation (1898), Nicaragua (1911), Panama (1941), Costa Rica (1949), Argentina (1957), Bolivia (1967), Paraguay (1967) and Ecuador (1967).

82 Brazil (1934).

83 Colombia (1910).

84 *Canada Act*, 1982, Schedule B, Part. I.

and governments. Section 24(1) sets out the role of the courts in enforcing Charter rights:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 52 of the Constitution Act, 1982[85] provides an explicit basis for judicial review on legislation, declaring that the Constitution of Canada is "the supreme law of Canada" and that "any law that is inconsistent with the provisions of the Constitution, is, to the extent of the inconsistency, of no force or effect."

In the second half of the twentieth century, both the United Nations and Inter-American Human Rights Systems have recognized that judicial means of control are essential to protecting the rights of citizens from infringing actions by other branches of government. For example, the *Charter of the Organization of American States*.[86] the *American Declaration of the Rights and Duties of Man*[87] and the *American Convention on Human Rights*[88] posit that human rights are inherent and that a nation's juridical and political institutions should protect these rights.[89]

The *Declaration* provides that every person has the right to resort to the courts to ensure respect for his legal rights[90] and that states have an explicit, converse obligation to make available a simple and rapid procedure whereby the court will protect a person from acts of authority that violate any

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85 *Canada Act*, 1982, Schedule B.

86 Signed 30 April 1948; OEA/Ser.A/2, Rev.3 [Treaty Series No. 1-E] (hereinafter, *Charter*).

87 Res. XXX, adopted by 9th International Conference of American States, 30 March - 2 May 1948; Final Act of 9th Conference, at 38-45 (hereinafter *Declaration*).

88 Signed 22 November 1969; OEA/Ser.A/16 [Treaty Series No.36] (hereinafter *Convention*).

89 For example, the Declaration states "*Whereas*...The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness..."

90 Article XVIII.

fundamental constitutional rights.[91] Accused persons have the right to be presumed innocent until proven guilty, and the right to be given an impartial and public hearing and to be tried before a court previously established in accordance with pre-existing laws.[92]

The *Charter* commits Member States to "dedicate every effort" to ensuring that adequate provision be made for all persons to have due legal aid in order to secure their rights.[93]

The *Convention* provides that every person has the right a fair trial, including the right to a hearing by a competent, independent and impartial tribunal previously established by law; the right to the assistance of legal counsel of his own choosing and to communicate freely and privately with that counsel.[94] Everyone has the right to simple and prompt recourse to a competent court for protection against acts the violate his fundamental rights; State parties are obliged to ensure that a person claiming such a remedy shall have his rights determined by a competent authority, to develop the possibilities of judicial remedy, and to ensure the competent authorities enforce the remedies when granted.[95]

In sum, the observations of Chief Justice Howland in a Canadian case could as well have been made in respect of any of the legal systems of the Americas:

> ...Judicial independence, like the rule of law, is one of the cornerstones of our legal system. The courts stand between the state and the individual to maintain the supremacy of the law. They safeguard the rights of the individual and ensure that there is no interference with his or with her liberty which is not justified by the laws.[96]

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91 *Ibid.*

92 Article XXVI.

93 Article 44(i).

94 Article 8.

95 Article 25.

96 Howland C.J.O., *R. v. Valente* (1983) 2 C.C.C. (3d) 417 at 423. See Colin Bradford. "Redefining the Role of the State: Political Processes, State Capacity and the New Agenda in Latin America", and Alain Touraine, "From the Mobilising State to Democratic Politics", in Bradford (ed.), *supra* note 39, for a discussion of the importance of legal and judicial institutions and procedures to facilitating participation the democratic political process. Touraine states, "For development to take place in the absence of any unifying actor, there must be as much autonomy as possible amongst

II. CONSEQUENTIAL IMPERATIVES

The previous section sets out the necessity for a legal system to provide for the judicial function, to provide for judicial review to ensure the Rule of Law, and to provide for a judicial check on the exercise of legislative or executive authority when individual human rights are infringed. What factors are necessary for the judiciary to perform these functions and for the bar to support these functions on a practical level? Although the answer is somewhat different for judges than for lawyers given their different roles in society, a number of guarantees have been consistently identified as necessary.

A. Independence of the Judiciary

According to Kaufman "[t]he essence of judicial independence is... the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality."[97] It is the judge's duty to decide the matter before him or her impartially, in accordance with his or her assessment of the facts and understanding of the law and without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.[98]

The independence of the judiciary is commonly referred to as comprising two basic elements: the collective independence of the judiciary as an institution and the independence of individual judges.[99]

1. Institutional/Collective Independence

a. Separation of Powers

Central to the concept of institutional independence of the judiciary is the idea that the judiciary not be under the authority of the executive or legislative branches of government and continue to retain impartiality and

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the three factors mentioned above -- more specifically, among the agents of investment, of redistribution and of national integration, and therefore amongst economic activity, socio-political debate and judicial and administrative institutions."

97 Kaufman, "The Essence of Judicial Independence" (1980) 80 Columbia L. Rev. 671.

98 See *Universal Declaration of Human Rights*, G.A. Res. 217A (III), 10 December, 1948; 3(pt.1) GAOR, Res. A/410, at 71-77.

99 Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", Ch. 52 of *Judicial Independence: The Contemporary Debate* (Shetreet and Deschenes, ed.; Dordrecht: Martinus Nijhoff, 1985) at 598.

independence. President Roosevelt's efforts to "pack" the Supreme Court met with widespread criticism in the United States. The Rule of Law also demands that a legislature not be permitted to pass legislation that reverses with retroactive effect a judgement of a court or otherwise purports to interfere with the judicial function.[100]

b. Administration

The administration of justice as a system requires that judges be given some degree of administrative independence from the other branches of government, including regarding budgeting and expenditures, appointment and supervision of staff and assignment of case loads. This is necessary to prevent sanction or reward in the form of distribution of resources and to guarantee timely access to the courts.

> At first sight many would not regard the control of finance and administration as providing any threat to judicial independence. But if the matter is given more consideration, it is to my mind apparent that the control of the finance and administration of the legal system is capable of preventing the performance of those very functions which the independence of a judiciary is intended to preserve, that is to say, the right of the individual to a speedy and fair trial of his claim by an independent judge. To take a wholly fanciful example for the purpose of illustration, the enforcement of the rule of law by judges would be wholly frustrated by the refusal to appoint judges, to provide Courtrooms for them to sit in or staff to service those Courts. To take a much less fanciful example, there is in my view an interference with the enforcement of the rule of law if there is a failure to finance the appointment of sufficient judges or the provision of adequate Courts and Court staff to meet society's current demands for justice. The integrity of the legal system does not depend solely on the integrity of each individual judge. It also depends on the ability of the citizen to come before the independent judge and receive his judgment.[101]

c. Jurisdiction

The administration of justice also requires that the jurisdiction of the Courts be respected. This includes guarantees against the abrogation of judicial authority. As stated in the *Convention*, OAS Member State parties

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100 See *Convention*, *supra* note 88, Article 9 (Principle of Legality and of Non-Retroactivity).

101 Browne-Wilkinson, "The Independence of the Judiciary in the 1980's", 1988 Public Law 44 at 44-45.

are obligated on guarantee that the competent judicial authority established under law will decide the rights of all persons who seek a remedy, to improve access to judicial remedies, and to guarantee that competent executive authorities will implement judicial decisions when rendered.[102]

The requirement that governments respect the pre-established jurisdiction of the judiciary also carries implications for the recent trend in several American countries to create specialized administrative tribunals. These administrative adjudicators frequently hold temporary appointments subject to renewal at the pleasure of the executive, and as a result may be vulnerable to real and perceived external influences. Thus, if administrative tribunals are entrusted with judicial or quasi-judicial authority, their members should be afforded protections similar to those afforded to the judiciary.

2. Individual Independence

For individual independence, a judge should not be regarded as a civil servant, but rather as an autonomous officer of the state.[103]

> The independence of the individual judge is comprised of two essential elements: substantive independence and personal independence. Substantive independence means that in the making of judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law. Personal independence means that the judicial terms of office and tenure are adequately secured. Personal independence is secured by judicial appointment during good behaviour terminated at retirement age, and by safeguarding judicial remuneration. Thus, executive control over terms of service of the judges such as remuneration, pensions, or travel allowance is inconsistent with the concept of judicial independence. Still much less acceptable is any executive control over case assignment, court scheduling, or moving judges from one court to another, or from one locality to another.[104]

Judges thus require long term job security, guarantees of adequate salary and pensions in order to effectively maintain independence. Similarly, the judge requires protection against incursion into this personal

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102 *Convention, supra* note 88, Article 25(2).

103 Lederman, "The Independence of the Judiciary", in Marshall *Judicial Ethics Casebook*, Winter 1990. See also Henderson, "The Independence of the Judiciary" (1980) 14 The Law Society Gazette 236.

104 Shetreet, *supra* note 99, at 598-99.

autonomy, including protection from criticism, civil and criminal immunity and protection from removal from office. Each of these elements is discussed in turn.

a. Adequate Remuneration

Judges require adequate remuneration. If a judge's salary can be increased or decreased at the whim of the executive there will always be a suspicion in the mind of the public that this influences decisions. In a similar vein, because judges are required by most countries to cease involvement with business, salaries must be sufficient to attract and retain qualified candidates, taking into consideration that previous income or tax-shelters will be discontinued. A rational, objective process is required to ensure adequate judicial salaries.

The concept of promotions should not appear in the judicial system. This concept could induce judges to tailor decisions in order to gain favour. The range of salaries among various levels of the judiciary should therefore also remain fairly narrow.

Inadequate salaries or financial resources available for court administration may also invite corruption of other court personnel, such as reporters and bailiffs.

b. Security of Tenure, including Discipline and Removal

Security of tenure, subject to the usual requirement for "good behaviour" is essential. Judges who can be dismissed at the pleasure of the executive will be both actually subject to influence and will appear to society to be susceptible to influence. Both the grounds and procedures for removal should be set out in law.

> If a Judge is to be truly independent there must be adequate safeguards to ensure that he cannot be removed arbitrarily. Decisions which are adverse to a government, or to a section of the community, should not place the Judge in peril of losing his office. However, the public must be protected by permitting the removal of a Judge who through inability becomes incapable of carrying out his judicial functions, or misbehaviour so that his judicial standing is seriously prejudiced.[105]

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105 Sears, "The Appointment of Judges and the Termination of their Office", *24th Biennial Conference of the International Bar Association* (London: International Bar Association, 1992), at 7.

c. Appointments

Judicial selection should be, in fact and appearance, free of political motivation, and should properly be based on such objective criteria as knowledge and experience in the law. Judicial appointments should not be made based on the political orientation of the candidate. Inclusion of a consultative element in the process for judicial appointments helps to ensure impartial selection.

Five types of judicial selection processes are used in the Americas:

1. free executive selection with some form of legislative or judicial approval as a check;

2. free executive selection;

3. executive selection from a list of pre-screened candidates prepared by the judiciary or legislature;

4. legislative selection; and

5. popular elections.[106]

Although the appointments process differs from country to country, the underlying principle that the appointments process should not be designed in a manner that leads to actual or perceived bias or favour on the part of the judge is an essential element of any system of appointments. Further, as discussed below, no system of appointments can function to protect the judiciary where executive decrees, especially common during states of siege, operate to suspend the usual system for appointments.

d. Immunity

Judicial immunity is also essential for the independence of the judiciary. Judges must be able to render decisions without fear of reprisal by either party or of any requirement to answer for or explain decisions after they are rendered with reasons.

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106 See discussion at Section IV(a)(2)(c), *infra*. Malcolm Rowat, Chief of the Public Sector Modernization Unit for Latin America and the Caribbean Region, notes that "In many countries, judgeships are not considered prestigious positions. In some cases they are elected, in others appointed, for a fixed term thereby compromising their independence.", Rowat, "Creating an Enabling Environment for Private Sector Development in the Latin American Region", speech to the American Institute Conference on Doing Business with Latin America, Chicago, October 17-18, 1994.

e. Physical Security/Personal Safety

It is obvious that for the judiciary to perform its functions, the physical security of judges, staff and court facilities must be preserved. Judges must have the authority to protect their courts and proceedings.

3. Emergencies and States of Siege

On more than one occasion, and in various countries of the hemisphere, circumstances have arisen where governments have considered it necessary to limit or curtail the exercise of rights by their citizens. Most legal systems authorize derogations from at least certain constitutionally-guaranteed rights in time of war or other emergency. Among the rules set out in various international human rights instruments is "...the vital principle that though the emergency may bar the enforcement of certain rights temporarily, it does not abrogate the rule of law:[107] Thus, Article 27(1) of the *Convention* recognizes that a State may take measures derogating from its obligations in such circumstances only "...to the extent and for the period of time strictly required by the exigencies of the situation..."[108] Article 27(2) states that despite this authorization, not even a war or state of emergency authorizes any suspension of specified rights (*e.g.*, right to juridical personality, right to life, freedom of conscience and of religion, political participation) "...or of the judicial guarantees essential for the protection of such rights."[109]

> This means that the ordinary courts of a State should not abdicate their responsibility of testing the legality of a declaration of emergency, even if it may be considered necessary or advisable to leave the political organs of the State with a certain, and preferably implied, margin [of] appreciation.[110]

Thus, even in time of emergency, civilians for example should continue to be tried in ordinary courts if charged with ordinary criminal offences, and

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107 Dess, "Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights -A Contribution to the Freedom of the Individual Under Law", UN Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, Thirty-Third Session, E/CN.4/Sub.2/432/Add.7, at para. 7.

108 *Convention, supra* note 88.

109 *Ibid.*

110 Dess, *supra* note 107, at para. 150.

detention should be subject to *habeas corpus* so as to permit the judiciary to supervise the legality of executive action.

B. Independence of the Legal Profession

The independence of the bar is essential to the administration of justice. Lawyers should be free to accept any client, and in accordance with the responsibility of the profession should remain free to provide impartial and independent advice, even on matters that are controversial or political in nature.[111]

1. Institutional/Collective Independence

a. Access

Access to independent legal advice is thus also critical to the administration of justice. Increasingly, legal aid is viewed as a necessary component of a political system functioning on the basis of the Rule of Law, since it ensures to those without adequate resources fair and impartial treatment before the courts.

b. Regulation

Independence of the profession can be assured only if it is free of unwarranted government regulation. Lawyers should therefore be authorized by law to set and enforce their own standards of professional conduct.

c. Membership

Entry to the legal profession should be regulated on the basis of skill, competence, and knowledge and be free from discrimination on the basis of race, political belief, or other extraneous factors.

2. Individual/Personal Independence

a. Representation

Lawyers must be free to represent either party in a dispute and oppose government actions on behalf of clients. Lawyers must believe themselves to be free to act for any citizen, in any way within the confines of suitable

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111 Dess, *supra* note 107 at para. 967-969. See also "Report of the Seminar on National and Local Institutions for the Promotion and Protection of Human Rights", UN Document ST/HR/Ser.A/2, at 44.

practice. Without this guarantee, lawyers may resist the request of a citizen for representation for fear of reprisal, and the fundamental right to counsel would lose its meaning.

Freedom to properly represent a client entails consequential rights, such as the right of the lawyer to meet with his or her client, to obtain information relevant to the client's case, and to have access to sites necessary for this representation. Conversely, no system of law should identify the lawyer, in his capacity as counsel, with his client's cause, no matter how unpopular, i.e. to be penalized for his advocacy.

b. Privileged Communications

The right to representation requires that lawyers also enjoy privilege in respect of communications with clients and immunity for statements made in good faith and in support of a client's position or rights.

c. Physical Security/Personal Safety

Lawyers must be free from threats or physical danger in the exercise of their profession.

3. Emergencies and States of Siege

The preservation of judicial guarantees for the protection of rights from which derogations are not permitted in time of war or emergency requires that the individual and collective independence of the bar not be compromised in such circumstances.

III. THE EXTENT OF THE PROBLEM: THREATS TO INDEPENDENCE

Regrettably, the Americas have witnessed a great number and variety of threats to the independence of judges and other legal professionals, including outright subversion of the role of the courts, attacks on legal professionals, and more subtle threats such as the erosion of judicial salaries and the coercive use of disciplinary proceedings.

Because they usually practice outside government employ, lawyers face threats to personal safety and the removal of their right to practice. Prosecutors also tend to face legal persecution, disciplinary action and removal from their jobs.

Judges face both threats to their personal security and removal from the bench, punitive transfers and legal persecution. The independence of the

judiciary has also been threatened by individual harassment or persecution and by actions that undermine the administration of justice as a system. Such actions as limiting guarantees of tenure or adequate salaries also affect each judge's individual independence.

1. The System of Justice

a. Abrogation of Judicial Powers

The most obvious form of executive interference with the judiciary is formal abrogation of judicial authority, often by *de facto* military regimes.

In 1960 Cuba formally abrogated judicial independence after the acquittal of forty-five members of Batista's air force on genocide charges. President Castro convened a special tribunal to reverse the acquittals. Judicial independence was formally abolished by the *Judicial Organizational Law* of 1973 which explicitly subordinated the judiciary to the Council of Ministers. These measures were confirmed by the 1976 Constitution and the 1977 *Judicial Organization Law*.

Similarly, in 1977, Uruguay instituted the *Institutional Act* and explicitly abolished the independence of the judiciary by discarding the tripartite separation of powers and eliminating the judiciary as a separate branch of government. The Uruguayan government gave itself the power to dismiss any judge for any reason. All court administration and control was transferred to the Minister of Justice, who was granted full authority over judicial salaries.

In Ecuador, President Velasco Ibarra abrogated the 1967 Constitution, reformed the Supreme Court and took over the government after the Supreme Court invalidated several executive decrees.

Argentina, Brazil, El Salvador and Peru have each revamped court membership pursuant to institutional acts issued by *de facto* regimes.[112]

In Argentina, the Supreme Court has a guarantee of tenure for life. Despite this, the Court has been replaced *en masse* six times since 1946 (1946, 1957, 1966, 1973, 1976, 1983).[113] Judge Raúl Alberto Borrino was removed

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112 Rosenn, "The Protection of Judicial Independence in Latin America", 102-3 Law and Justice 30 (1989); Roberts, "The Writ of Amparo: A Remedy to Protect Constitutional Rights in Argentina" 31 Ohio St.L.J. 831 (1970).

113 "Between 1930 and 1970 constitutional guarantees were suspended approximately forty-five percent of the time. The Supreme Court was forced to recognize and

from a case dealing with an allegation of torture by the police and the judge subsequently assigned to the case dropped all charges and freed the officers.[114] Also in 1991, Judge José Ignacio Torrealday was removed from his post while investigating illegal adoptions and brought to trial. During the trial his tires were slashed.[115] In 1990, the new government of Argentina enlarged the Supreme Court from five to nine members, and appointed to it five lawyers with ties to the ruling party.[116]

In Brazil, the Supreme Federal Tribunal was expanded in 1965 from eleven to sixteen by the military government. Three years later three highly independent judges were forced to retire, the Chief Justice stepped down under protest, and the size of the court was returned to eleven members.[117]

'legitimate' the seizures of power in 1943, 1955, 1962 and 1966. Members of the Court were forced to pledge fealty to the goals of the 1946 and 1966 'revolutions'...In March, 1976...the judges of the Supreme Court and all Superior Tribunals (of the provinces) were relieved of their duties, and the security of tenure of office was suspended for all judges and judicial officials. Within two weeks of the coup, twenty-four judges were permanently removed from office.", Feinrider, *supra* note 27, at p. 187. Campos, *The Argentine Supreme Court: The Court of Constitutional Guarantees* (Brsk, trans., 1982) in analyzing the provisional government established by General Uriburu in 1930, stated '[t]he high court...wrestled with the consequences of recognizing a government which had come to power following a patent breach of constitutional order in deposing the elected government of President Yrigoyen. But the Court, as the only remaining legitimate remnant of constitutional democracy, responded with both firmness and prudence...[The Court's resolution] was an attempt to reconcile dedication to constitutional principles with practicality" by acknowledging the authority of provisional governments while reaffirming its own authority to protect individual rights. See Note, "Constitutional Ambiguity and Abuse in Argentina - The Military Reign 1976-1983", 6 J. Human Rts. 353 (1989), for a detailed review of the way in which Argentine Courts deprived themselves of the ability to review executive action under extraordinary authority by concluding that declaration of a state of siege is a non-reviewable "political question". See also Zoglin, "The National Security Doctrine and the State of Siege in Argentina: Human Rights Denied", 12 Suffolk Trans. L.J. 266 (1989).

114 Brody, Reed, ed., *The Harassment and Persecution of Judges and Lawyers 1990-1*. Centre for Independence of Judges and Lawyers of the International Commission of Jurists: Switzerland, 1991 (hereinafter ICJ 1990-1); Lawyers' Committee for Human Rights, *In Defence of Rights: Attacks on Lawyers and Judges in 1991*: New York, 1991 (hereinafter *Lawyers' Committee 1991*).

115 *Lawyers' Committee 1991*.

116 Brody, Reed, ed., *The Harassment and Persecution of Judges and Lawyers July 1989-June 1990*, Centre for Independence of Judges and Lawyers of the International Commission of Jurists: Switzerland, 1990 (hereinafter ICJ 1989-90).

117 *Ibid.* Feinrider, *supra* note 27, notes that the military government also 'retired' a number of lower judges.

In 1979, the military junta in El Salvador dismissed the entire Supreme Court and appointed judges more sympathetic to the regime. Similarly, the retirement age for judges was often modified under President Valasco to allow the appointment of new judges or the replacement of those deemed unacceptable.

In Peru, on April 5, 1992, President Alberto Fujimori suspended the Constitution, revoked the independence of the judiciary and suspended Congress. Some 30 prosecutors and 137 Magistrates and Judges were dismissed by mid-May of that year.[118]

b. Incursions into Jurisdiction

American constitutions rarely restrict the incursion of special tribunals into regular judicial jurisdiction. Incursions into jurisdiction can occur through the creation of special tribunals outside the regular court system or the curtailment of the powers of review of the ordinary courts.[119] For example, in 1965, Brazil began to try civilians accused of national security crimes outside the court system through military tribunals. Brazilian courts of ordinary jurisdiction were prevented from invalidating this extension because of a provision excluding judicial review of all government acts based on various *Institutional Acts.*[120] In 1966, the Onganía government promulgated a law regulating amparo to limit access to judicial remedies[121] and a subsequent Decree granted jurisdiction to military courts over civilians for several common crimes. In 1982, Guatemala enacted a decree-law which provided for Tribunals of Special Jurisdiction to deal with people accused of violating a declared state of siege or participating in other subversive activity. Similar legislation has been in effect at various times in Chile, Colombia, El Salvador, Peru and Uruguay.

c. Judicial Salaries

All countries in the Americas face problems in varying degrees in seeking to maintain judicial salaries at appropriate levels.

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118 Brody, Reed, ed. *The Harassment and Persecution of Judges and Lawyers June 1991-May 1992*, Centre for Independence of Judges and Lawyers of the International Commission of Jurists: Swizerland, 1992 (hereinafter *ICJ 1991-1992*).

119 Rosenn, *supra* note 112.

120 Feinrider, *supra* note 27 notes that Institutional Act No. 6 "narrowed the Court's jurisdiction to hear appeals in *mandado de segurança* cases, and eliminated its appellate jurisdiction for cases in which civilians had been tried by military courts for 'national security' crimes.

121 See Feinrider, *supra* note 27, at 191 for a detailed description of the limits imposed.

In 1985, the Argentinean Supreme Court held that the constitutional guarantee or the irreducibility of judicial salaries should be interpreted as real, rather than nominal and affirmed a lower court ruling requiring monetary correction of judicial salaries to compensate for inflation.[122] In the United States, judicial salaries have also declined in real dollars. Lawsuits have been instituted by judges challenging the constitutionality of Congress' failure to raise salaries.[123] Salary reductions and freezes of inferior court judges' salaries in certain Canadian provinces is being challenged by those judges before the superior courts on the grounds of judicial independence.[124]

d. Failure to Enforce Judicial Decisions

Several instances of refusal by the executive or legislative branches to implement judicial decisions over the last several years illustrate the scope of this threat to independence.

In Chile, under the Allende government, the executive refused to enforce a decision ordering the return of illegally occupied land, seized factories and asserted the President's right to review every judicial decision.

In Colombia, in 1989, Judge Marta Luz Hurado of the 6th Public Order Courts issued warrants on charges of terrorism against a battalion commander, an army major and the commander of police at Segovia in respect of the massacre of 43 people in response to which, according to witnesses, the police failed to intervene. The army refused to place the officers under arrest and a Military Judge held there were no grounds on which to institute pre-trial proceedings against the police.

e. Adequacy of Resources

Adequate resources and control over their disposition is crucial for the judiciary.

> Most countries in the region allocate a more or less fixed percentage of the national budget (2 - 3 per cent) to the judicial sector, though often even this amount is not made available. As a result, the court infrastructure has deteriorated badly over the years. This includes not only overall courtroom facilities but also the informatics base which is

122 Rosenn, *supra* note 112.

123 *Ibid.*

124 Lederman, *supra* note 103.

essential for proper records management, statistical analysis, case flow management analysis, long-range planning and maintenance of archives. As such, most Latin American courts do not have systematic records for cases pending, disposed of, as well as judicial opinions for access by the public. In some countries, this has allowed court clerks to become key players in docket management and prone to bribery.[125]

In 1989 in Argentina, amnesty was granted to members of the military charged with human rights violations between 1973 and 1983, largely because of the length of time and resources required to clear up the cases.

2. Legal Professionals Individually

a. Discipline and Removal of Judges

Judicial independence remains threatened by acts against or the censure or removal of judges for political reasons. Instances of improper discipline or removal have been reported in many member countries over several years.[126]

In Chile, Judge René García Villegas of the 20th Criminal Court of Santiago was suspended at half salary for two weeks on October 25, 1988 for making public statements to newspaper journalists and on video about torture practices of the state security police. He was removed from his post in January of 1990 on grounds of "lack of good behaviour as required by law". García had pursued more than 30 complaints of torture by the state security police and from October 1989 to his removal received 6 death threats, one involving the ransacking of his home on October 5, 1989[127]

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125 Rowat, *supra* note 102.

126 Reports of unwarranted discipline or removal of judges and lawyers include Argentina: three lawyers faced disciplinary action *(ICJ 1989-1990)*, six judges removed *(ICJ-1991)*, 2 judges removed unilaterally *(ICJ 1991-1992; Lawyers' Committee 1991)*, three lawyers dismissed or removed from specific cases *(Lawyers' Committee 1991)*; Chile: two judges removed from the bench unilaterally or disciplined *(ICJ 1989-1990)*; Lawyers' Committee for Human Rights, *In Defence of Rights: Attacks on Lawyers and Judges in 1990*, New York, 1990-1991 (hereinafter *Lawyers' Committee 1991)*; El Salvador: two judges forced to resign after political pressure *(ICJ 1990-1991)*; Nicaragua: one judge (President of Supreme Court) removed unilaterally *(ICJ 1990-1991)*; Colombia: one judge disciplined *(ICJ 1991-1992)*, three judges facing discipline; Lawyer's Committee for Human Rights, *In Defence of Rights: Attacks on Judges and Lawyers in 1992*, New York, 1992 (hereinafter *Lawyers' Committee 1992)*; Brazil: two lawyers removed from cases *(Lawyers' Committee 1992)*; Haiti: closure of one judge's court *(Lawyers' Committee 1992)*.

127 Brody, Reed ed. *The Harassment and Persecution of Judges and Lawyers January 1988-June 1989*. Centre for Independence of Judges and Lawyers of the International Commission of Jurists: Switzerland, 1989 (hereinafter *ICJ 1988-1989*).

Judge Carlos Cerda Fernández of the Santiago Court of Appeal faced disciplinary proceedings for refusing to close a case against several officers of the armed forces implicated in kidnapping and disappearances. He was suspended for two months at half pay and was subsequently dismissed, ostensibly based on a poor evaluation.[128] This removal was overturned on appeal and he was reinstated in 1991.[129]

In Nicaragua, in July of 1990, President Chamorro by decree removed the President of the Supreme Court and replaced him with a new member appointed under an expansion of the Court.[130].

In Panama, Judge Luis Guillermo Zúñiga had his telephone lines tampered with and is currently facing disciplinary hearings for releasing a former military officer on bail.[131]

b. Personal Security of Judges and Lawyers

In recent years a number of countries have witnessed an alarming number of attacks on legal professionals, with only some of the cases having been followed up through investigation or the laying of charges.[132] Attacks against judges and lawyers range from assassinations to kidnapping and death threats. The number of reported threats in the United States far exceeds those reported in other countries, possibly as a result of the high reporting rate of threats by both judges and lawyers as well as because of the concerted effort by the government to maintain accurate statistics. Both Colombia and Peru also show higher rates of violence against legal professionals than other countries, due in part to a number of high-profile attacks in these two countries that led to increased vigilance in reporting and scrutiny by non-governmental organizations.

The data available suggests that physical security is a problem in virtually every member country and is increasingly prevalent. Further, statistics may be misleading, since persons murdered or attacked may be subject to death threats or other forms of harassment before the attacks. Conversely, those arrested, detained or kidnapped are often the victims of

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128 *ICJ 1990-1991; Lawyers' Committee 1990.*

129 *Lawyers' Committee 1991.*

130 *ICJ 1990-1991.*

131 *Ibid.*

132 *ICJ 1989-1990.*

torture while in custody or subject to illegal searches upon arrest. Finally, statistics are thought to be grossly underrepresentative for many countries due to the success of various intimidation campaigns and the lack of systematic collection of data by governments.[133]

In Colombia, the Andean Commission of Jurists calculates that an average of twenty-five judges and lawyers have been assassinated or have been attacked each year since 1979.[134] In 1989 alone, there were nine known assassinations of judges, two attempted assassinations and countless death threats. By 1990, these numbers had increased to eleven judges assassinated and nine who faced attempts on their lives.[135] Between 1989, the reports indicated that at least two of the murdered judges requested but did not receive any police protection.[136] Harassment and arrests of judges and lawyers in Colombia has also been reported.[137]

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133 All statistics cited in this section are based on threats to judges and lawyers in their professional capacity. Cases unrelated to the profession or cases which could not be confirmed are not included in either the *ICJ* or the Lawyers' Committee reports.

134 *Justicia Para La Justicia: Violencia Contra Jueces y Abogados en Colombia: 1979-1991*, Colombian Section, Andean Commission of Jurists (1992), cited in Pahl, "Concealing Justices or Concealing Injustice?: Colombia's Secret Courts", 21 Denv. J. Int'l L. & Pol'y 431 (1993). Pahl goes on to note that "in all, 515 cases of violence against judges and lawyers have been reported between 1979 and 1991, 329 of which have been murders or attempts to murder. And, of the approximately 4,500 Colombian judges, roughly 1,600 have received threats to themselves or their families."

135 *ICJ 1988-1989* reported eleven lawyers assassinated and by the 1989-1990 report that number had increased to twenty-five murders and eight attempted murders. From June 1990 to May 1991 the ICJ reported five assassinations of judges, thirty assassinations of lawyers and four attempts on the lives of lawyers. From June 1991 to May 1992 there were two assassinations and three attempted assassinations reported against judges and fifteen assassinations and three attempts against lawyers. The decrease in 1992 is largely attributed to a decrease in violence related to drug prosecutions. The Lawyers' Committee reported seven assassinations and one attempted assassination of judges in 1990 and twenty-five assassinations and two attempts against lawyers. *The Lawyers' Committee 1991* report indicated four judicial assassinations with two attempts and ten assassinations of lawyers, with three attempted assassinations. For 1992 the Lawyers' Committee reported two assassinations and two attempts against judges and ten assassinations and three attempts against lawyers. (*ICJ 1989-1990; ICJ 1990-1991; ICJ 1991-1992; Lawyers' Committee 1990; Lawyers' Committee 1991; Lawyers' Committee 1992*).

136 Enrique Low Murta and Samuel Alonso Rodríguez Jacome, *See ICJ 1989-1990; Lawyers' Committee 1990*.

137 *ICJ 1989-1990; ICJ 1990-1991; ICJ 1991-1992* report: from July 1989 to June 1990 three lawyers detained, two subject to torture, five "disappearances", and two kidnappings; from June 1990 to May 1991 seven lawyers kidnapped; from June 1991 to May 1992 one judge kidnapped and one lawyer kidnapped. *Lawyers' Committee 1990; Lawyers' Committee 1991* report: one judge kidnapped, one lawyer arrested and detained and four lawyers kidnapped in 1990 and one judge kidnapped and two lawyers who "disappeared" in 1991.

In Peru, in 1989-90, seven assassinations of judges were reported along with two attempted assassinations.[138] In 1990-91, six assassinations and five attempts were reported against judges, with one attempt reported against a court staff member.[139] Lawyers also faced assassinations, death threats, kidnapping and bombings.[140]

In 1989, Judge Robert S. Vance and Judge Robert E. Robinson of the United States were killed by mail bombs. The killings are believed to be related to race relations in the country. Judge John P. Coderman was injured by a bomb concealed in a package left outside his apartment in December of 1989.[141]

The problem of physical security also extends to court staff. A number of staff and other court officials have been subject to violence in various countries. In Colombia, three judicial secretaries and one court official[142] were assassinated in 1990. Judge Jorge Gómez Lizarazo fled Colombia after death threats. The day after an article in which he denounced the Colombian military for human rights violations appeared in the New York Times, his

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138 *ICJ 1989-90; Lawyers' Committee 1990.*

139 *ICJ 1990-1991; Lawyers' Committee 1991; ICJ 1989-1990* reports one incident of torture and two bombings against judges; from June 1990 to May 1991 one illegal search and one bombing were reported by judges; and from June 1991 to May 1992 seven assassinations, two attempted assassinations and seven death threats were reported against judges and one bombing was directed against a court staff member.

140 The ICJ reported from January 1988 to June 1989 two assassination attempts, two assassinations and eight death threats against lawyers, from July 1989 to June 1990 eight death threats, three assassinations, one attempted assassination and one "disappearance", from June 1990 to May 1991 seven assassinations, three bombings, four attempted assassinations and six death threats, and from June 1991 to May 1992 three assassinations, one attempted assassination, five death threats, one kidnapping and one bombing. The Lawyers' Committee findings were similar: in 1990 six judicial assassinations, one attempt, six assassinations of lawyers, one attempted assassinations, two bombings, six death threats and one kidnapping; in 1991 one judicial assassination, two attempts, two death threats and two illegal searches, one lawyer assassinated, four attempts, two death threats and two bombings with one staff member assassinated; in 1992 one attempted assassination against a lawyer, one "disappearance", two cases of detention, two illegal searches and one staff member who received a death threat.

141 *ICJ 1989-1990.*

142 Efraín Bonilla Camacho, Secretary of the Municipal Criminal Court, Javier Humberto Gómez Castano, Secretary of the 17th Municipal Criminal Court in Medellín and a secretary and official of the Judicial Commission of the 75th Court of Criminal Investigation in Bogota. See *ICJ 1990-91 and Lawyers' Committee 1991.*

personal secretary was killed.[143] Twelve members of the Judicial Commission of Inquiry of the region of Magdalena Media, including two magistrates (Mariela Morales Caro and Pablo Antonio Beltrán Palomino) and their secretaries, six judicial detectives and two drivers were shot dead on January 18, 1989 while investigating massacres, political killings and "disappearances" in the region.[144] Judge Luis Miguel Angarite, a member of the Judicial Commission of the 75th Court of Criminal Investigation was killed along with several staff members in an ambush in Bogota.[145]

In his report on his visit to Colombia, the Special Rapporteur on Summary and Arbitrary Executions of the UN Commission on Human Rights, S. Amos Wako, noted that victims of extra-judicial execution in Colombia have included various justices of the Supreme Court, several other judges and judicial officials. In the same report Asonal Judicial (the union representing judicial official and workers) estimated that one-fifth of the 4,379 judges in Colombia were under the threat of death.[146]

Killings in Colombia have not always been connected to the international drug trade.[147] Marta Lucía González was forced to flee Colombia in September of 1988 after receiving death threats related to an investigation of mass killings at a banana plantation.[148] Judge María Elena Díaz Pérez took over and was assassinated July 28, 1989.[149]

Attacks on Judges in Peru have forced the concentration of the courts into the departmental capitals, greatly impeding the access to justice. Both

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143 *Lawyers' Committee 1991; ICJ 1988-1989* reported ten staff assassinations, and *ICJ 1989-1990* reported ten assassinations and three attempted assassinations from June 1991-May 1992. The Lawyers' Committee reported nineteen staff assassinations in 1990 and eight assassinations with one attempted assassination in 1991.

144 *ICJ 1988-1989.*

145 *Lawyers' Committee 1991.*

146 U.N. document E/CN.4/1990/22/Add.1. Death threats have also been recorded in great numbers against lawyers and staff: see *ICJ 1988-1989; ICJ 1989-1990; ICJ 1990-1991; ICJ 1991-1992; Lawyers' Committee 1990, 1991, 1992.*

147 Pahl, *supra* note 129, states that according to the Andean Commission study, "...of the 240 cases of violence against the judiciary with a known author or cause, eighty have been linked to paramilitary groups, fifty-eight to drug traffickers, forty-eight to state agents (including the military and the police), thirty-two to guerrillas, and twenty-two to other factors".

148 *ICJ 1988-1989.*

149 *ICJ 1989-1990.*

the Andean Commission of Jurists, an affiliate of the ICJ, and the Peruvian office of Amnesty International have been damaged by explosions, impeding independent scrutiny of incidents.[150]

César Carlos Amando Salazar, a civil judge of the Superior Court of Justice of Ayacucho, had his home dynamited. The group believed responsible (the *Comando Rodrigo Franco*) is a paramilitary group dedicated to violence against members and supporters of the Shining Path (*Sendero Luminoso*) guerrillas. Six months earlier, Amando Salazar was forced to move to the departmental capital after repeated death threats in the province of Cangallo.

Arrest and detention of judges and lawyers has also been reported in Peru.[151] On May 28, 1990, Diesel Alfonso Amasifuen Pinchi was detained by members of the national security force and upon his release, reported having been tortured.[152] Judge Abner Torres Pinnedo was arrested on September 28, 1990 after intervening in the beating of a civilian by a member of the National Police in *Villa Rica*. Judge Torres was subsequently assaulted while in custody and required hospital treatment.[153]

Other forms of harassment of the judiciary reported in Peru include criminal complaints[154] and penal actions[155] for unpopular decisions. The case of Judge Moisés Ochoa Girón is an example of several forms of harassment. The judge was investigating possible military involvement in

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150 *Ibid.*

151 *ICJ 1988-1989; ICJ 1989-1990; ICJ 1990-1991; ICJ 1991-1992* reports: from January 1988 through June 1989, one lawyer detained; from July 1988 through June 1990, one judge and two lawyers detained; from June 1990 through May 1991, two judges and four lawyers detained; and from June 1991 through May 1992. two judges and five lawyers arrested or detained. *Lawyers' Committee 1990; 1991; 1992* reports: in 1990, one judge detained; in 1991, two lawyer detained; and in 1992 seventeen lawyers detained or arrested.

152 *ICJ 1989-1990; Lawyers' Committee 1990.*

153 *ICJ 1990-1991; Lawyers' Committee 1990.*

154 Judge Victor Segundo Roca Vargas of Lima acquitted an alleged leader of the Shining Path and a military commander subsequently filed a complaint against him; *ICJ 1989-1990.*

155 Judge César San Martín Castro of the Superior Court of Lima faced penal action after granting a petition of *habeas corpus* during a state of emergency relying on the Peruvian Constitution and Advisory Opinion 08/87 of the Inter-American Court of Human Rights. These charges were subsequently dismissed; *ICJ 1989-1990.*

the murder of a journalist. The military refused to identify members known only to the Court by pseudonyms. The judge was visited in his office by soldiers demanding information on the case and at his home by approximately thirty soldiers who claimed to be looking for a subversive. A number of the soldiers illegally searched the judge's home. An Americas Watch report indicated that an army document dated March, 1991, was made public which urged the creation of a military court to hinder the process of the Ochoa investigation.[156]

In the United States, 230 judges and 101 prosecutors received threats in the period from October 1988 to September 1989. The number of incidents has been steadily increasing in the last few years.[157]

Argentina[158], Bolivia[159], Brazil[160], Canada[161], Chile[162], Cuba[163], the Dominican Republic[164], Ecuador[165], El Salvador[166], Guatemala[167], Haiti[168],

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156 *Lawyers' Committee 1991; ICJ 1990-1991.*

157 The U.S. Marshall's Report in *ICJ 1989-1990* reports 335 threats against judges and 110 threats against procecutors in the period from October 1989 to June 30, 1990, and the U.S. Marshall's Report in ICJ 1990-1991 and in *ICJ 1991-1992* reports that from October 1, 1990 to September 30, 1992, 249 threats were reported against judges.

158 *ICJ 1989-1990; 1990-1991; 1991-1992* reports: from July 1989 to June 1990, attempted assassinations, two death threats and one bombing involving judges; from July 1990 through May 1991, nine death threats and one attack against judges, one staff member assassinated and one death threat, and one death threat against a lawyer; from June 1991 through May 1992 death threats against judges. *Lawyers' Committee 1990; 1991; 1992* reports: in 1990, one illegal search, three death threats, one bombing, one attempted assassination against judges, one death threat against a lawyer; in 1991, one death threat and one attempted assassination against judges, and one death threat and one arrest involving lawyers; in 1992 eight death threats against judges and two against lawyers, as well as six bombings or fires in courts.

159 From July 1989 through June 1990, three threats against lawyers; *ICJ 1989-1990 and Lawyers' Committee 1990*, in 1992 one lawyer arrested, *Lawyers' Committee 1992.*

160 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992* reports: from January 1988 through June 1989, one lawyer assassinated, one attempted assassination and one case of unwarranted detention; from July 1989 through June 1990, one lawyer assassinated, three attempted assassinations, three death threats, four cases of detention or arrest and one assault; from July 1990 through May 1991 one death threat against a judge, eleven death threats against lawyers; from June 1991 through May 1992, four death threats against lawyers, one assassination and two cases of detention; *Lawyers' Committee 1990; 1991; 1992*, four death threats against lawyers, one assassination and two cases of detention; *Lawyers' Committee 1990; 1992* reports: in 1990 one judge detained, seven lawyers detained and one assassinated; in 1991 five death threats against a lawyer and one assassination; and in 1992, three lawyers assassinated and seven death threats. The *Jornal do Brasil* of August 5, 1992, following the assassination of a criminal court judge (Luis Leite Araujo), reported that the President of the Judicial Tribunal of Rio de Janeiro admitted that the majority of judges in Rio have

Honduras[169], Mexico[170], Panama[171] and Paraguay[172] have all recorded attacks against the judiciary and/or legal professionals in recent years.

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been threatened, but that the federal Military Police had yet to provide adequate security. The article also reported that a group of men had been investigated for "casing" the summer home of the President of the Tribunal, that the gas line to his home had been out off, and that his son's car had been vandalized; and that several judges and the chief prosecutor had received telephone threats in connection with prosecutions of participants in the *jogo do bicho* (a Brazilian' numbers racket").

161 The Canadian Bar Foundation, *Report to the Canadian Bar Association on the Independence of the Judiciary in Canada*, August 20, 1985.

162 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992* reports: from January 1988 through June 1989, two death threats against judges, two death threats against lawyers; from July 1990 through May 1991, one judicial bombing, one death threat, one detention and one death threat against a lawyer; *Lawyers' Committee 1990; 1991; 1992* reports: in 1990, one death threat against a judge, one lawyer arrested; in 1992 one illegal search, one assassination, one bombing and six kidnappings, all involving lawyers.

163 *ICJ 1988-1989; 1990-1991* reports: from January 1988 through June 1989, one lawyer detained, from June 1990 through May 1991, two lawyers detained; *Lawyers' Committee 1992* reports: one lawyer arrested.

164 *Lawyers' Committee 1992* reports; in 1992, one lawyer arrested and one lawyer assassinated.

165 *ICJ 1990-1991; 1991-1992* reports: from June 1990 through May 1991, one lawyer assassinated; from June 1991 through May 1992, two lawyers detained; *Lawyers' Committee 1992* reports: in 1992, two lawyers detained.

166 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992* reports: from January 1988 through June 1989, one judge assassinated; from July 1989 through June 1990, one lawyer arrested, two detained and one tortured; from June 1991 through May 1992, one attempted assassination against a judge; *Lawyers' Committee 1991; 1992* reports: in 1991, one attempted assassination against a judge, two lawyers who experienced interference with investigations; in 1992, one lawyer attacked.

167 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992* reports: from January 1988 through June 1989, one judge kidnapped; from July 1989 through June 1990, one judge and one lawyer received death threats; from June 1991 through May 1992, two lawyers received death threats; *Lawyers' Committee 1990; 1991; 1992* reports: in 1990, one lawyer assassinated; in 1991, two lawyers received death threats; in 1992 one judge and two lawyers received death threats.

168 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992* reports: from January 1988 through June 1989, two lawyers assassinated; from July 1989 through June 1990, three layers detained, one subject to illegal search; from June 1990 through May 1991, two lawyers received death threats, three detained, and one assaulted; from June 1991 through May 1992, five judges arrested or detained, three lawyers arrested or detained and one subject to illegal search; *Lawyers' Committee 1990; 1991; 1992* reports: in 1990, two lawyers received death threats, three arrested or detained; in 1991, two judges arrested, six lawyers arrested, four received death threats, one assaulted, and two detained; in 1992, three judges subject to illegal searches; one attempted assassina-

c. Transfer of Judges

Transfer or re-assignment of judges has been used as a punitive measure in a manner that has compromised the independence of the judiciary. For example, in El Salvador, after Judge Bernando Ruada Murcia sentenced five members of the National Guard to long prison terms based on a jury finding them guilty of murdering four American nuns, the Supreme Court reversed the convictions and Ruada was transferred to northern Chalatenango Province, an area subject to frequent clashes between leftist guerrillas and the army and two hours from the Judge's home.[173]

d. Freedom from Legal Persecution

Legal persecution of lawyers appears to be common in a number of countries of the Americas, through such techniques as taxation audits, disciplinary charges and criminal charges for offences such as "offending the military" which are often preferred against lawyers working for victims of torture. Recently, in the United States lawyers have been jailed for their refusal to testify against clients or former clients.[174] Other countries re-

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tion, one assassination and four arrested, eight lawyers arrested, two tortured, one detained, one searched illegally, one assassinated, one received death threat, and one staff member arrested.

169 *ICJ 1989-1990; 1990-1991* reports: from July 1989 through June 1990, one lawyer detained and one assassinated; from July 1990 through May 1991, two lawyers detained, one tortured, one assassinated; *Lawyers' Committee 1991; 1992* reports: in 1991, two lawyers received death threats, three detained, one assassinated, one assaulted; in 1992, one lawyer received a death threat.

170 *ICJ 1989-1990; 1990-1991* reports: from July 1989 through June 1990, one judge assassinated, two lawyers assassinated and one death threat; from June 1990 through May 1991, one assault against a lawyer; *Lawyers' Committee 1990; 1991; 1992* reports: in 1990, one judge assassinated, one kidnapped, one arrested and one receiving death threat; in 1991, one lawyer assassinated and two detained; in 1992, one lawyer received a death threat.

171 *ICJ 1990-1991* reports: from June 1990 through May 1991, two attempted assassinations and one death threat against judges, and three lawyers received death threats.

172 *ICJ 1988-1989; 1989-1990, 1990-1991* reports: from January 1988 through June 1989, six lawyers detained; from June 1990 through May 1991, two lawyers detained and one attempted assassination; *Lawyers' Committee 1991* reports: in 1991, two lawyers detained and one attempted assassination.

173 Rosenn, *supra* note 112.

174 See the case of Linda Backiel and her client Elizabeth Ann Duke, a political activist charged with possession of explosives; *ICJ 1989-1990.*

ported to have used these techniques against members of the legal community include Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Paraguay, Peru and Venezuela.[175]

3. Emergencies and States of Siege

In Argentina, "[the] Argentine Supreme Court has developed the practice of issuing accords legitimating *de facto* governments in return for a promise by the leaders of the golpe to maintain the supremacy of the Constitution...The Brazilian Supreme Federal Tribunal similarly recognized the golpe that originally brought Getulio Vargas to power ... but has not made this a regular practice."[176]

Shortly after taking power, the Pinochet regime sought and obtained a judgement of the Supreme Court that the coup d'état was a legal act to remove a government that was "flagrantly illegitimate". The Court also "...pardoned the armed forces' flagrant violation of the 1925 Constitution, which stated specifically that any act in breach of Article 22 would be null and void. The Court reasoned that the Allende government's 'illegal' acts had rendered the Constitution invalid, and therefore, the armed forces were obligated only to 'respect the Constitution and the Laws of the Republic insofar as the present state of the country so permits..."[177]

In 1985, the Peruvian government established various emergency zones on the basis of Article 231 of the Constitution, and granted military jurisdiction over military and common offences committed by military personnel in the designated areas.[178] On April 5, 1992, President Fujimori proclaimed

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175 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992* reports: from January 1988 through June 1989, in Brazil, one lawyer; in Chile, one judge and three lawyers; in Haiti, one judge; in Peru one judge; from July 1989 through June 1990, in Chile, six lawyers; in Guatemala, one lawyer; in Paraguay, two lawyers; in Peru, one judge; in the United States, one lawyer; in Venezuela, one lawyer; from June 1990 through May 1991, in Argentina, one judge and five lawyers; in Brazil, two lawyers; in Chile, one staff member; in the United States, two lawyers; from June 1991 through May 1991, in Argentina, one lawyer; in the United States, four lawyers; *Lawyers' Committee 1990; 1992* reports: in 1990, in Argentina, one lawyer; in Brazil, one lawyer; in Guatemala, one lawyer, in Venezuela, one lawyer; in 1992, in Chile, one lawyer; in El Salvador, one lawyer; in Guatemala, two lawyers.

176 Rosenn, *supra* note 27, at 813.

177 Galleher, *supra* note 2.

178 Law 24,150, approved by Congress in June, 1985. A 1991 interim report by M. Pinto to the Inter-American Commission on Human Rights, "Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial Branck", OEA/Ser.L/V/II.80, Doc. 9, 23 September 1991 (hereinafter IACHR Re-

an "emergency Government of national reconstruction" under which the judicial branch was reorganized.[179] On that day, military units took over the courts of justice, and in the following days police protection for judges hearing terrorism-related cases was withdrawn.[180]

IV. THE RESPONSE IN MEMBER COUNTRIES

Member countries have responded to the threats described above through constitutional, legal, and political measures. In respect of Colombia, the proposed cure has, according to a 1991 interim report to the Inter-American Commission on Human Rights[181], undermined other values fundamental to the inter-American system.

A. Independence of the Judiciary

1. Institutional/Collective Independence

a. Separation of Powers

The constitutions of most Latin American countries are modelled on the Constitution of the United States, which provides for separate and co-equal legislative, executive and judicial branches of government, and establishes a system of "checks and balances". As noted above[182], however it was not until *Marbury v. Madison* that the U.S. Supreme Court established its authority to judicially review actions of other branches of government for their conformity with the Constitution.

Recent constitutional developments in Brazil, Colombia and El Salvador are indicative of a current trend to entrench more explicitly the separation of powers necessary to ensure that the independence of the judiciary is protected in a manner that permits it to enforce the Rule of Law, or *estado de*

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port), at 13, notes that as of July 28, 1991, more than half of Peru was under the emergency zone system.

179 The *IACHR Report*, *supra* note 178, at 14 notes that accusations of corruption against the judiciary were made public in February, 1992, that the President had earlier criticized the judicial branch for its alleged soft treatment of *Sendero Luminoso* guerrillas, and that in early April, the President rejected candidates for the Supreme Court submitted by the Association of Judges because he viewed the proposed names as political.

180 *IACHR Report*, *supra* note 178, at 14.

181 *IACHR Report*, *supra* note 178.

182 *Supra*, text at note 54.

derecho. The 1988 Brazilian Constitution, for example, expands the *ação popular*, elevates the principle of *legalite*, or *moralidade administrativa*, to the constitutional level, and explicitly subjects all public authorities to these principles,[183] The 1983 Constitution of El Salvador, as revised by the Peace Accords in 1991 and 1993, explicitly guarantees the independence of the judiciary and the right of the courts to exercise judicial review in respect of administrative and constitutional questions.[184]

b. Administration

Significant steps have been taken in several countries to put the financial and functional aspects of administration of the judicial branch on a firm footing. For example, the 1988 Constitution of Brazil directs the judiciary to prepare the budget for the judicial branch for submission to Congress; expenditures are subject to audit by the Tribunal of Accounts.[185] In El Salvador, the *Ley de la Carrera Judicial*[186] gives the Supreme Court authority to develop the budget for the judicial branch.[187] Colombia's Constitution also permits the judiciary to develop its own budget for submission to the legislative branch.

More creative approaches to effective administration are reflected in the Constitutions of Costa Rica, Honduras, Guatemala, El Salvador and Panama, all of which mandate that a percentage of the government budget be allocated to the judiciary. The amounts allocated vary from two percent

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183 Federal Constitution, Article 5, LXXIII, and Article 37, quoted by Carlos Mario da Silva Velloso, Minister of the Supreme Federal Tribunal, in "Controle Externo do Poder Judiciario e Controle de Qualidade do Judiciario e da Magistratura: Uma Proposta", 195 R. Dir. Admin 9, at 17 (1994).

184 Article 86 provides: "Public power emanates from the people. The organs of government exercise this power independently within their respective attributions and competences established in this Constitution and the laws. The attributions of the organs are not delegable...Article 172 provides: "The Supreme Court of Justice, the Chambers of Second Instance and other tribunals established under law constitute the Judicial Organ. Corresponding exclusively to this organ is the power to judge and have executed judgements in constitutional, civil, penal, commercial, labour, agrarian, and administrative matters, as well as other matters determined by law...The Magistrates and Judges, in respect of the exercise of the jurisdictional function, are subject exclusively to the Constitution and the laws.

185 Article 99, Article 48(II) and Article 70 provide for legislative review and approval of the budget.

186 Decreto No. 415, Diario Oficial, January 13, 1993.

187 Article 256(5).

(Guatemala) to six percent (Costa Rica, El Salvador) of the nation's ordinary annual receipts.[188]

The Inter-American Development Bank has identified modernization of legal and judicial systems as a priority area for Bank activity.[189]

c. Jurisdiction

Again, newer constitutions in Latin America go some way towards ensuring constitutional protection of the judiciary's ability to exercise administrative and constitutional review.

As noted above, the 1988 Brazilian Constitution provides for a collective writ of security, for a new *habeas data* procedure to facilitate court control over public authorities and to ensure access to information, and expanded standing to bring a direct constitutional action (*representação*).[190]

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188 Rosenn, *supra* note 112, at 31.

189 "Generally, this area involves Bank assistance to member countries in their efforts to bring judicial codes in line with the new requirements for economic and social development, to strengthen trends that make laws responsive to these requirements, and to redefine the role of the law and jurisprudence in regulating economic and social relations...In particular, the Working Group has developed...an overview of the countries' ideas regarding the main initiatives the IDB could undertake to support programs (whether they are under way or are being planned) to improve the management of judicial power; enhance the training and careers of judges; streamline judicial procedures; identify alternative ways to solve conflicts; create broader access to the courts; and adapt the law and justice to conform with the new demands arising from the globalization of societies and economies, and, therefore, from the greater international integration of the countries concerned." Tomassini, "The IDB and the Modernization of the State", in Bradford (ed.), *supra* note 39. Bradford himself observes that "[t]he redefinition of the role of the state towards a broad integrative and interactive role is intimately related to the social fabric of each country. The *rule of law and the role of the judiciary* become crucial elements in shaping and maintaining the social order as well as providing essential support for private sector transactions and development. Therefore, new programmes to support judicial and legal reform, on which the Inter-American Development Bank has already embarked, are important innovations in this field", Bradford, "Some Conclusions from the Conference Discussion", *Ibid.*, at 263.

190 See text accompanying notes 62 and 63, *supra*. The 1985 Diffuse Interests Law (Law No. 7347/85) "...extends to legally constituted organizations concerned with protection of the environment, historical patrimony, or consumers' rights (as well as to government organs and the public prosecutor's officer -- *Ministério Público*) the right to sue those esteemed to be producing damage by commission or omission. An important aspect of this law is its recognition of the right to sue for entities that have not been personally damaged by the violation in question." Keck, "Sustainable Development and Environmental Politics in Latin America, in Bradford (ed.), *supra* note 39.

Colombia's Constitution provides a similar remedy for information on government files,[191] and Article 86 creates an action of *tutela* as a summary procedure to protect fundamental constitutional rights "when they are violated or threatened by an action or omission of any public authority"[192] as a complement to the popular action, permitting any citizen to challenge the constitutionality of statutes before the Supreme Court.[193]

Protection of judicial jurisdiction has also taken on an international dimension in Central America. Since 1989, supreme court justices of Guatemala, El Salvador, Honduras and Nicaragua have met annually to review common functional and institutional problems. A *Consejo Judicial Centroamericano* was created as an "executive organ" of the group, comprising the Chief Justices of each of the courts.[194] At their 1990 meeting, the justices decided that, on the request of any judicial authority, the *Consejo* would convene on an urgent basis to examine threats to the independent exercise of judicial authority in any of the member countries. The *Consejo* has issued two advisory opinions, in respect of El Salvador and Nicaragua, under this authority.[195] Based on this experience, the Tegucigalpa Protocol[196] under the Charter of the Organization of Central American States created the Central America Court of Justice. In addition to a grant of broad jurisdiction over various aspects of the common market, Article 22 of the Statute of the Court[197] gives the Court jurisdiction:

> ...(f) at the request of the injured party, to hear and resolve lawsuits that may arise between the fundamental agencies and branches of government of the States, and when court sentences handed down are not complied with.[198]

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191 Article 15; see Rosenn, *supra* note 63, at 682.

192 Rosenn, *Ibid.* at 683.

193 Rosenn goes on to describe other miscellaneous actions available in both Colombia and Brazil, including popular actions to protect public patrimony, *Ibid.* at 686.

194 For a description of the *Consejo* and its activities, see *La Independencia Judicial* (San Salvador, Supreme Court of El Salvador, 1992).

195 *Ibid.*, at 51-59.

196 *Protocol de Tegucigalpa a la Carta de la Organización de Estados Centroamericanos (ODECA)*, signed 13 December, 1991, at Tegucigalpa ___UNTS___; ___OASTS___; El Salvador Diario Oficial, 22 May, 1992.

197 *Estatuto de la Corte Centroamericana de Justicia*, signed December 10, 1992.

198 The Juridical Dimension of Integration: Settlement of Disputes in the Central American Integration System (CAIS) and the Central American Common Market", CJI/SO/II/doc19/94.

This authority has been described as "...a measure of protection for the judiciaries of States that lack juridical defence mechanisms, except in the case of the existence of special constitutional tribunals, offering protection against aggressive actions threatening their independence by the Executive and Legislative Branches".[199]

2. Individual/Personal Independence

a. Adequate Remuneration

The underlying principle of a requirement to protect judicial salaries and pensions is to protect judges from financial retribution for rendering decisions contrary to the views of their governments, or conversely, to avoid creating a system of rewards for favorable decisions. Although the irreducibility of judicial salaries is often guaranteed as a formal matter, chronic inflation presents a special challenge. In Mexico, the Constitution of 1917 guaranteed the irreducibility of judicial salaries for sitting judges as determined by law and Article 127 of the Constitution prohibited the raising of salaries during the judge's term of office[200] Because of severe inflation the Mexican government in 1982 replaced this prohibition with a provision requiring adequate compensation of judges to be determined annually in an equitable manner. Uruguay and Paraguay have dealt with the inflation issue by guaranteeing that judges' salaries will not be less than those of their well-paid Ministers' Secretaries of State. The Peruvian Constitutional guarantees to judges compensation "that insures them a life worthy of their mission in the hierarchy".[201]

b. Security of Tenure

In general, removal or dismissal of judges in Latin American countries is entrusted to other members of the judiciary, whether by an appellate court or a council of magistrates. The Chilean system requires that the Supreme Court review all judges below the Supreme Court level annually and those found to be performing unsatisfactorily for two consecutive years will be automatically dismissed regardless of tenure. The impeachment model of the United States is followed by Argentina and Mexico while Brazil[202], Haiti

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199 *Ibid.*

200 Rosenn, *supra* note 112 at 31.

201 *Ibid.*, at 32.

202 In Brazil, impeachment proceedings against ministers of the Supreme Tribunal may be brought in the Senate; Constitution Article 52(II).

and Paraguay vary the impeachment and review process depending on the judge's level.

In El Salvador, the *Ley del Consejo Nacional de la Judicatura*[203] provides for an independent and periodic evaluation of the judges' work, presented to the Supreme Court for appropriate action by the Court. The *Ley de la Carrera Judicial*[204] provides for a merit-based competition and application process for judicial appointments.

c. Appointments

As noted above, the appointments process varies from country to country. Newer constitutions tend to emphasize more explicitly the objectivity of the selection process, and thereby help to reinforce public confidence in the impartiality of those selected.

In Argentina, the President makes federal judicial appointments with the approval of the Senate, In Chile, appointments to the Supreme Court and the Court of Appeals are made by the President from a list of candidates compiled by the Supreme Court. In Mexico, the President, with he approval of the Senate, appoints the members of the Supreme Court who in turn appoint members of the Circuit and District Courts. In Panama, the Cabinet Council appoints members of the Supreme Court for 10-year terms and the Supreme Court appoints the appellate judges, who then appoint members of the lower courts. In Paraguay, the Senate must consent to the appointment of Supreme Court judges for their five year terms, and Supreme Court judges must consent to lower court appointments. Under the Peruvian Constitution, the President appoints judges from the recommendations of the National Council of Magistracy, but at the present time President Fujimori has disbanded superior courts and has assumed judicial functions. In 1989, Haiti restricted the previously unfettered power of the president to appoint judges. The President now chooses new members of the highest court, the Court of Cassation, for a term of 10 years from a list of three candidates prepared by the Senate.

In El Salvador, the *Ley del Consejo Nacional de la Judicatura*[205] establishes a National Council for the Judiciary, comprising lawyers nominated by the

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203 Decreto No. 414, Diario Official, January 13, 1993, See also Velloso, *supra* note 173, where the Minister of the Supreme Court proposes a similar Council in Brazil.

204 Decreto No. 415, Diario Oficial, January 13, 1993.

205 *Supra*, note 197.

Supreme Court, other members of the bar, judges of various levels, law professors, and a representative of the Attorney General (as nominated by the Inspector General, Procurator General and Procurator for the Defence of Human Rights) all elected by the Legislative Assembly and acting in a personal, independent capacity, to make Supreme Court nominations to the Assembly. The Assembly confirms appointments from the list presented, by a public, two-thirds vote. Nominations for other judges are made to the Supreme Court.

In Brazil, judges enter their career only after completing a course of studies and licensing by the official bar association[206]; the President nominates and the legislature approves the names of magistrates of the Supreme Tribunal and Superior Tribunals[207] and ministers of the Supreme Tribunal are approved by an absolute majority vote in the Senate.

In the United States Article II, section 2 of the Constitution requires Senate ratification of presidential nominations to the Supreme Court and federal courts, while state and local judges may be popularly elected.[208]

d. Immunity

In Anglo-American jurisprudence, judges have generally been held to be immune from claims against the performance of their tasks.[209] In contrast, most Latin American countries regard judges as regular citizens exposed to criminal and civil liability for negligent application of the law.

e. Physical Security/Personal Safety

The most dramatic response to threats to judges has been in Colombia. In 1984, President Virgilio Barco placed the country under a state of siege on the ground that the constitutional system was being disrupted by chronic violence and public disorder.[210] Special "Courts of Public Order" were established for drug cases, and were expanded in 1987 to include political

206 Article 93(1).

207 Articles 52(III)(a), 101, 104, 107, 111(1), 115, 119(II), 120(1)(III), 123. See Velloso, *supra* note 178.

208 It is open to question whether judicial elections in fact or in perception reduce judicial independence by exposing candidates to local pressures and inviting judges to engage in political activity.

209 See discussion in Section V(A)(2)(d), *infra*.

210 Decree 1038, 1984.

crimes.[211] Funding for the establishment of these courts was partially provided by the Administration of Justice Program passed by the U.S. Congress in 1983.[212] Spurred by the assassination of the then Attorney General, Carlos Mauro Hoyos, a 1988 decree, known as the "Statute for the Defence of Democracy"[213] expanded the scope of crimes subject to special jurisdiction. On the same day, a second decree[214] was adopted that established a new chamber in the superior district courts as an appeals court for the Courts of Public Order and to hear cases involving a range of offences, including "...illegal coercion, torture, homicide, personal injury, kidnapping and kidnapping for extortion purposes against the person of a magistrate, judge, governor, public official..."[215] A third decree imposed more restrictive *habeas corpus* procedures in cases where detention is related to crimes of a public order nature.[216] In 1989, the government established a Security Fund for the Judicial Branch to pay for protection of judges and their families.[217] The 1990 Statute for the Defence of Justice[218], in addition to combining and restructuring the jurisdiction of the Public Order Courts and the specialized chambers, included protection measures consisting of "establishment of a secret jurisdiction, based on shielding of the identity of those involved in the process, including judges and staff of the Public Prosecutor's office."[219] The 1991 Colombian Constitution includes a transitory provision under which a Special Legislative Commission converted the various decrees into permanent legislation.[220]

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211 Decree 1631 of August 27, 1987 gave the special courts jurisdiction to investigate and rule on all offences "when their intent appears to be to persecute or intimidate any inhabitant of the country on account of his beliefs and political opinions, whether party-related or not...".

212 The AOJ also provided funds for the establishment of special courts in El Salvador and Panama. In addition to criticizing the absence of due process in these courts, the Lawyers Committee for Human Rights alleges that these courts provide a means to compensate for the absence of extradition treaties.

213 Legislative Decree 180 of January 27, 1988.

214 Decree 181, January 27, 1988.

215 Translation in *IACHR Report, supra* note 178, at 3.

216 Decree 182, January 27, 1988.

217 Legislative Decree 1855, August 18, 1989.

218 Legislative Decree 2790, November 20, 1990, complemented by Decrees 99 and 390 of January 14 and February 8, 1991, respectively.

219 *IACHR Report, supra* note 178, at 6.

220 *Ibid.*, at 10.

The judges presiding in these Courts of Public Order have been described as *"jueces sin rostro"*;

> All communication is done either through two-way mirrors using Darth Vadaresque voice distorters, or in writing. Witness statements are authenticated by a complex system of fingerprints in lieu of signatures. Opinions are unsigned, with only a judicial number affixed to the decision. The identity of police agents and informants may be kept secret as well. As a final protection, a chief of security is assigned to each court to coordinate threat assessments, and the judges are provided with armed escorts to and from work.[221]

Although it was hoped that providing judges with anonymity would afford more effective protection from physical threats, violence has continued[222], and serious questions have been raised regarding whether this system of courts respects basic human rights norms of the Americas.[223]

In Peru, a 1987 law[224] directed the judiciary, the office of the Public Prosecutor and the Ministry of the Interior to develop arrangements for protection of judges, attorneys, court officials and witnesses. An Organic Law on the Judicial Branch[225] set out specific rights of magistrates in this regard.[226] However, the April 5, 1992 declaration of an emergency govern-

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221 Pahl, *supra* note 134, at 434. See *IACH Report*, *supra* note 178, for a detailed exposition of the applicable rules and procedures.

222 *Ibid., at 439*, noting that *"una jueza sin rostro"* was threatened in June. 1992, and another assassinated in Medellin in September, 1992.

223 The *IACHR Report*, *supra* note 178, criticizes the measures for creating conflicts of jurisdiction, slowing proceedings to the point that proceedings are not closed, crimes defined too broadly to be judicially administered, and as violating the *Declaration*, *Convention*, and jurisprudence of the Inter-America Court of Human Rights by permitting overly-broad powers of arrest, search, seizure and detention without arraignment, secret trials, and denial of due process (e.g., in respect of the right to face one's accuser).

224 Law 24,700 of June 22, 1987, cited in *IACHR Report*, *supra* note 178, at 13.

225 Legislative Decree 767, December 4, 1991, in effect as of January 1, 1992.

226 Article 189 states: "The rights of magistrates are:
1. Independence in the exercise of their jurisdictional functions;
2. Stability in their position, pursuant to the Constitution and the relevant laws;
3. To be transferred, at their request and subject to prior assessment, when for duly demonstrated reasons of health or safety it is not possible for them to continue in their permanent position;
4. Protection and safety of their physical integrity and that of their families;...
7. Life insurance coverage when they work in emergency zones;...; *IACHR Report*, *supra* note 205, at 14.

ment, as discussed in the next section, significantly altered the protection afforded to members of the judiciary.

3. Emergencies and States of Siege

The 1988 Brazilian Constitution[227] places significant limits on the power of the Executive in times of emergency, including a requirement for Congressional ratification and a circumscribed list of rights that may be derogated.

Articles 213 and 214 of the 1991 Constitution of Colombia also imposes limits on executive authority during states of siege or emergency:

> During a state of internal commotion, no civilian may be investigated or tried by criminal military courts. Moreover, legislative decrees issued by the Executive during a state of exception may not suspend human rights or fundamental liberties. In all cases, the rules of International Humanitarian law must be respected. The legislature is required to enact a statute that will regulate governmental powers during a state of exception and to set up judicial controls to protect individual rights, in conformity with international treaties. Measures adopted by the Executive during a state of exception must be proportional to the gravity of the actual facts, a provision that invites meaningful judicial scrutiny. Colombia's Constitution also imposes liability upon the President and his cabinet ministers for any abuses committed during states of exception. Because states of exception have lasted for years, Colombia's new Constitution sharply limits their duration. States of exception usually may last only 90 days; Senate authorization is required to prolong them for an additional 180 days.[228]

The ability of the judiciary to enforce such limits is open to question, based on experience to date. Some authors have argued that, based on the judiciary's own perception that it is bound to respect the sphere reserved to the political branches of government, the judiciary has traditionally bowed to restrictions on its independence and to the suspension of civil liberties.[229]

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227 Articles 131, 136.

228 Rosenn, *supra* note 63, at 679-680.

229 Alejandro Garro and Henry Dahl, "Legal Accountability for Human Rights Violations in Argentina: One Step Froward and Two Steps Backward", 8 Human Rights Law Journal 283 at 295; Feinrider, *supra* note 27, in respect of Argentina; Note, *supra* note 108; *Nunca Mas*, Informe de la Comisión nacional sobre la desaparición de personas (12a edición, 1986) is critical of how many members of the judiciary did not

Other authors have argued that Latin American courts have been defiant activists despite periods of political unrest and constitutional suspension.[230]

In the United States civil liberties are expressed in unqualified terms and there are no limitation clauses. The Supreme Court of the United States can only save emergency legislation and the suspension of civil liberties if they are reasonable means of achieving a legitimate legislative purpose.[231]

B. Independence of the Bar/Legal Profession

1. Access and Representation

Newer constitutions afford an explicit guarantee of the right to counsel. Colombia's 1991 Constitution guarantees the accused the right to counsel during investigation and trial.[232] The Brazilian constitutional guarantee is more broad, guaranteeing the right to assistance in criminal matters and legal aid in civil matters.[233]

2. Regulation

The legal profession is largely self-regulated throughout the Americas. Opinions vary, however, on the limits of such regulation, as evidenced by the current debate in Brazil about the proposed revised statute for the *Ordem dos Abvogados do Brazil (OAB).*

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uphold their duties with dignity throughout the "Dirty War" and were often complacent to human rights violations. Conversely, the report points to those judges and prosecutors who, for fulfilling their duties and responsibilities, faced tremendous pressures. The *IACHR Report, supra* note 178, at 15, states that "the suspension of constitutional rights [in Peru] since April 5, 1992...has meant a major and unlawful ascendancy of the political over the Judicial Branch, which has in effect been taken over. To this must be added the dissolution of Parliament — which had been characterized as seeking to find methods and means that would serve to remedy the situation of violence — thus preventing any oversight over the state of emergency and depriving the Judicial Branch of an important ally."

230 René Provosts, "Emergency Judicial Relief for Human Rights Violations in Canada and Argentina", 23 Inter-American Law Review 694 at 700; Feinrider, *supra* note 27, in respect of Brazil.

231 Nowak and Rotunda, *Constitutional Law* (4th ed., 1991) ch.14.

232 Rosenn, *supra* note 63, at 670.

233 *Ibid.* However, James Brooke of the *New York Times* reported on December 30, 1994 that according to a recent Brazilian Justice Ministry survey of the country's 129,000 prisoners, 75 percent were unable to hire a lawyer.

3. Privileged Communications

The "solicitor-client" privilege is the subject of extensive literature in the United States.[234] In Anglo-American systems, the privilege is viewed as essential to promoting communication between lawyer and clients, and to encourage persons to seek legal advice, thereby helping to ensure that persons receive "professional advice by well-informed attorneys" by affording a promise of confidentiality.[235] Despite the clear recognition of the privilege, its scope remains subject to debate, for example regarding the lawyer's obligation to reveal the identity of a client or fee arrangements.[236]

A review of the protection afforded to lawyer-client communications in member countries is beyond the scope of this paper.

V. THE RESPONSE-CANADA AS AN EXAMPLE

Canada provides a useful example of a legal system which attempts to protect the independence of the judiciary and the legal profession.

A. Independence of the Judiciary

Canadian courts are organized in two systems: provincial and federal. The *Constitution Act, 1867* gives the provincial Legislatures the power to make laws in relation to the constitution, maintenance and organization of Provincial Courts.[237] There are typically three levels of provincial courts: inferior courts, superior trial courts, and superior courts of appeal.[238]

The *Constitution Act*, 1867 confers on the federal parliament the power to provide for a general court of appeal for Canada, as well as additional

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234 See Goode, "Identity, Fees, and the Attorney-Client Privilege", 59 G.W.L. Rev. 307(1991), at 313.

235 *Ibid.*, at 319. Goode also notes that some have argued that privilege also "promotes individual values such as privacy, autonomy, dignity, trust, and fairness".

236 *Ibid.*

237 Section 92. In each Province the legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, ... (14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

238 This simplified scheme does not describe the erstwhile district and county courts (which have all been amalgamated with superior courts), and specialized courts, such as unified family courts (which are usually established as superior courts).

courts for the better administration of the laws of Canada.[239] The Supreme Court of Canada was established pursuant to this power; it sits as the final court of appeal for both the federal and provincial court systems. The Federal Court of Canada was also established pursuant to this power; it has two divisions, trial and appeal. Its jurisdiction is limited to subject matters conferred on it by federal statute[240]; those subject matters are further limited to those governed by the laws of Canada.[241] The Tax Court of Canada, whose primary (but not sole) jurisdiction relates to income tax appeals, and the territorial superior courts of the Yukon and Northwest Territories, are also established pursuant to this Parliamentary power.

1. Institutional/Collective Independence

a. Separation of Powers

There is no general "separation of powers" in the Canadian Constitution.[242] In the framework of responsible government, "between the legislative and executive branches, any separation of powers would make little sense...".[243] Similarly, there is no defined separation between the judicial branch and the two political branches. Either the federal parliament or the provincial Legislatures may confer non-judicial functions on its courts,[244] and with one notable exception, the Parliament and Legislatures may also confer judicial functions on bodies that are not courts.[245]

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239 Section 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

240 For example, *Federal Court Act*, R.S.C. 1985,c. F-7 as amended.

241 See Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992) at 7-14 for a discussion of this limitation.

242 In particular, the *Constitution Act*, 1867.

243 Hogg, *supra* note 241 at 7-24.

244 *Ibid.*, at 7-25. For example, they have conferred the traditionally executive function of rendering advisory opinions to the government upon the courts. By virtue of section 53 of the federal *Supreme Court Act*, R.S.C. 1985, c. S-26 the federal government may refer to the Supreme Court of Canada important questions of law or fact concerning the interpretation of the Constitution, the constitutionality or interpretation of any legislation, the powers of the Parliament or the Legislatures, or any other questions which the government sees fit to refer.

245 *Ibid.*, at 7-25-27.

Nonetheless, the Supreme Court of Canada has found that the principle of judicial independence is essential and integral to the Canadian constitutional system, and that the courts must be completely separate in authority and function from the executive and legislative branches.[246]

b. Administration

There are no explicit constitutional guarantees of an independent judicial administration. However, the Supreme Court of Canada has held that institutional independence with respect to matters of administration bearing directly on the exercise of a judicial function is an essential condition of judicial independence for the purposes of s.11 (d) of the *Canadian Charter of Rights and Freedoms*.[247] Thus, judicial control over matters such as the assignment of judges, sittings of the court and courts lists, allocation of court-rooms and direction of administrative staff carrying out theses functions are essential to judicial independence.[248] However, a more independent role in other aspects of administration - financial (budgetary preparation, presentation and allocation of expenditure) and personnel (recruitment, classification, promotion, remuneration and supervision of support staff) - was not essential to judicial independence.[249]

In the Supreme Court of Canada, the court registrar superintends the officers, clerks and employees appointed to the Court, subject to the direction of the Chief Justice.[250] In the Federal Court of Canada, the Administrator of the Court performs these functions, subject to the direction of the Chief Justice.[251] Similarly, in the Ontario Court of Justice, the chief

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246 *The Queen v. Beauregard* [1986] 2 S.C.R. 56; 30 D.L.R. (46th) 481 at 494: "Canadian constitutional history and current Canadian constitutional law establish clearly the deep roots and contemporary vitality and vibrancy of the principle of judicial independence in Canada. The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from *all* other participants in the justice system."

247 *Valente v. The Queen*, *supra* note 96, at 190. Section 11(d) of the *Charter* states: "11. Any person charged with an offence has the right..(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

248 *Ibid.*, at 188.

249 *Ibid.*, at 188-89.

250 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 15.

251 *Federal Court Act*, R.S.C. 1985, c. F-7, c.15(2) states: "Subject to the Rules, all such arrangements as may be necessary or proper for the holding of courts, or otherwise for the transaction of business of the Trial Division, and the arrangements from time

justice of the General Division, and the Chief Judge of the Provincial Division, and their respective regional senior justices and judges, direct the sittings and the assignment of the judicial duties of the two court divisions.[252]

In 1981, a report on the administrative independence of the Canadian judiciary noted that in the legal system, a provincial Minister of Justice or Attorney General may play multiple, seemingly conflicting roles, in that he or she:

a. acts daily before the courts personally or, more often, through his substitutes, as attorney for public prosecution;

b. provides the courts with the support staff and services needed for them to operate; and

c. defends the budgets of the courts in Parliament.[253]

The report recommended:

> The political authorities should realize the ambiguity in the present position of Minister of Justice or Attorney General and separate the function of attorney for public prosecution from that of provider of court services.[254]

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to time of judges to hold such courts or to transact such business, shall be made by the Associate Chief Justice."

252 Ontario *Courts of Justice Act*, R.S.O. 1990, c. C-43, s.76(1) states: "the powers and duties of a judge who has authority to supervise and direct the sittings and the assignment of the judicial duties of his or her own court include the following:
1. Determining the sittings of the court.
2. Assigning judges to the sittings.
3. Assigning cases and other judicial duties to individual judges.
4. Determining the sitting schedules and places of sittings for individual judges.
5. Determining the total annual, monthly and weekly workload of individual judges.
6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.

253 Deschênes and Baar, "Administrative Independence: Concerns of the Canadian Judiciary", reprinted from *Masters in Their Own House: A Study of the Independent Judicial Administration of the Courts* (Deschênes and Baar; The Canadian Judicial Council, Ottawa, 1981) in Morton, *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1985) at 120.

254 *Ibid*, at 121.

Part III of the federal *Judges Act*[255] addresses this recommendation with respect to the Supreme Court of Canada, the Federal Court of Canada, and the Tax Court of Canada. It provides for a Commissioner for Federal Judicial Affairs, whose duties are to administer the salaries and benefits provisions of the Act for all federally appointed judges, to prepare budgetary submissions for the requirements of the Federal Court and the Tax Court, to be responsible for the administrative requirements of the support staff of those courts, and to do other tasks as required by the Minister of Justice within the Minister's responsibilities for the proper functioning of the judicial system in Canada. The Act also provides for staff to assist the Commissioner in carrying out those duties.[256]

In Ontario, the Attorney General is charged with superintending all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary.[257] However, the Ontario Courts Advisory Council, which includes the Chief Justices and regional senior judges of the two divisions of the Ontario Court of Justice, makes recommendations on administrative matters to the Attorney General.[258] In addition, the Ontario Courts Management Advisory Committee, made up of the chief justices, officials and representative of the Attorney General, and barristers and solicitors from the provincial bar, makes recommendations on the administration of the courts to the relevant bodies and authorities.[259]

c. Jurisdiction

As noted above, the legislative branch may confer judicial functions on bodies that are not courts. In the past three decades, the federal Parliament and provincial Legislatures have created myriad administrative tribunals to adjudicate disputes which arise in specialized areas of the law, such as human rights, labour relations, immigration, transportation, and broadcasting. There is one notable exception to this trend. Canadian courts have interpreted the Judicature section of the *Constitution Act 1867*[260] as preventing the Legislatures from conferring judicial functions performed by pro-

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255 R.S.C. 1985, c. J-1.

256 ss. 72-79.

257 *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 71.

258 s.72.

259 s.73.

260 ss. 96-101.

vincial superior courts on another body unless that body meets the constitutional prescriptions for superior courts set out in the Constitution.[261] In addition, provincial administrative tribunals are always subject to judicial review by provincial superior courts on the grounds of jurisdiction; a private clause cannot exclude judicial review on questions of the limits of the tribunal's jurisdiction.[262]

It is debatable whether recent changes to the constitutional amending mechanism have constitutionally entrenched the status of the Supreme Court of Canada as the final national court of appeal. As noted above, the Court is not established expressly in the Constitution, but rather by federal statute.[263] Any amendment to the Constitution of Canada in relation to the composition of the Supreme Court requires the unanimous consent of the legislative assembly of each province and the two houses of Parliament.[264] Any other amendments to the Constitution in relation to the Supreme Court requires the consent of the two houses on Parliament and the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, at least fifty per cent of the population of all the provinces.[265] Some publicists have suggested that these provisions entrench the Court in the Constitution by reference;[266] others argue that since the Supreme Court is not expressly provided for in the Constitution, these amending provisions will have no effect until the Constitution is amended accordingly.[267]

2. Individual Independence

a. Adequate Remuneration

The Canadian Constitution allocates the responsibility for the remuneration of judges to the legislative branch. *The Constitution Act, 1867* stipulates that the Legislatures are responsible for the payment of provin-

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261 *Re Residential Tenancies Act* [1981] 1 S.C.R. 714.

262 *Crevier v. A.-G. Quebec* [1981] 3 S.C.R. 220.

263 *Supreme Court Act*, R.S.C. 1985, c. S-26.

264 *Constitution Act*, 1982, s. 41(d).

265 *Ibid.*, s.38, 42(d).

266 Shetreet, *supra* note 99, at 590.

267 Hogg, *supra* note 241, at 4-19 and 4-22.

cial inferior court judges,[268] whereas the Parliament of Canada is responsible for fixing and providing the salaries, allowances and pensions of the judges of the Supreme Court of Canada, the federal courts (i.e., the Federal Court of Canada and the Tax Court of Canada), and the provincial superior courts.[269] Pursuant to Parliament's power, the *Judges Act*[270] sets out the judges' salaries, allowances and pensions according to their office, and provides an annual adjustment for inflation; nonetheless, in this period of restraint in the public sector, the salaries for each office have been subject to a four year freeze in salaries commencing in 1992.[271] Generally, pursuant to the Legislatures' power, the provinces have conferred the task of setting the salaries of Provincial inferior court judges to their government executives, to be established by regulation.

There is no explicit guarantee of adequate remuneration in the Constitution. However, the Supreme Court has found that the financial security of judges "is crucial to the very existence and preservation of judicial independence as we know it"[272] and that it is an essential condition of judicial independence for the purposes of s.11(d) of the *Canadian Charter of Rights and Freedoms*.[273] Whether salaries are set by the Legislative or the Executive branch, the essential guarantee of financial security is that the right to a salary is established by law, and there is no way in which the Legislative or Executive branch can "interfere with that right in a manner to affect the independence of the individual judge."[274]

> The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, if there was discriminatory treatment of judges vis-à-vis other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s.100 of the *Constitution Act, 1867*.[275]

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268 s. 92(4).

269 ss. 100-101.

270 R.S.C. 1985, c. J-1.

271 *Ibid.*, s. 25; S.C. 1993, c. 13, s. 10; S.C. 1994, c. 18, s. 9.

272 *The Queen v. Beauregard, supra* note 246, at 496.

273 *Valente v. The Queen, supra* note 96, at 176.

274 *Ibid.*, at 186.

275 *The Queen v. Beauregard, supra* note 246, at 497.

The *Judges Act* provides an independent mechanism for reviewing the adequacy of judges' remuneration. Every three years, the Minister of Justice must appoint a commission to "inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judge's benefits generally."[276]

> This complex process is designed to preclude arbitrary interference by the executive branch of government in the determination and granting of the judicial compensation package, thereby upholding the principle and strengthening the practical manifestation of judicial independence.[277]

The Triennial Commission is granted six months to meet, entertain written submissions and conduct public hearings, and produce a report within its terms of reference. The most recent report recommended that the salaries of puisne judges should reflect what "the marketplace expects to pay individuals of outstanding character and ability"; according to the report, this would be roughly equivalent to the salaries of the most senior level of public servant, deputy ministers. The report noted that current salaries met this criterion.[278] At the time of writing, provincially appointed judges in a number of provinces are involved in litigation against their respective governments in challenges to various budget-related measures, such as salary cutbacks, that have had an impact on their judicial compensation.

b. Security of Tenure

The *Constitution Act, 1867* provides that superior court judges will hold office during good behavior but shall be removable by the Governor General on address of the Senate and House of Commons and shall cease to hold office at the age of seventy-five.[279] This constitutional guarantee does not apply to Provincial inferior court judges, and it is debatable whether it applies to judges of the federal courts.[280]

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276 s. 26.

277 Triennial Commission, *Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits* (Ottawa: Department of Justice, 1993) at 6.

278 *Ibid.*, at 11.

279 s. 99.

280 Hogg, *supra* note 241, at 7-24. Case law on this question is divided: *Addy v. The Queen* [1985] 2 F.C. 452 (T.D.) suggests that s.99 does apply to federal courts, but obiter comments in *Valente v. The Queen*, *supra* note 96, are contrary.

The Supreme Court of Canada has held that security of tenure is an essential condition of judicial independence for the purposes of s.11(d) of the *Canadian Charter of Rights and Freedoms*, and the power to remove a judge is sufficiently restrained by "the requirement of cause, as defined by statute, together with a provision for judicial inquiry at which the judge affected is given a full opportunity to be heard..."[281] However, the Court put no constraint on the executive or legislative branch to follow the report of the judicial inquiry: "The existence of the report of the judicial inquiry is a sufficient restraint on the power of removal, particularly where... the report is required to be laid before the Legislature."

By statute, judges of the federal courts hold office during good behavior until the age of seventy-five, subject to removal by the Governor General on address of the Senate and House of Commons.[282]

The Canadian Judicial Council, established pursuant to Part II of the *Judges Act*, inquires and investigates into allegations and complaints against judges of the federal courts and the provincial superior courts.[283] The Council comprises the Chief Justice of Canada and the chief and associate chief justices of the superior courts.[284] At the request of the Minister of Justice of Canada or a provincial attorney general, the Council must commence an inquiry as to whether a judge should be removed for reasons of infirmity, misconduct, failing in the due execution of office, or having been placed, by conduct or otherwise, in a position incompatible with that office.[285] In addition, the Council may inquire into any complaint against a judge. The Council may conduct the inquiry, or may designate Council members to form an Inquiry Committee together with members of the bar appointed by the Minister of Justice. The inquiry body has the authority of a superior court, and must afford the impugned judge an opportunity to be heard, to cross-examine witnesses and to adduce evidence.[286] After the inquiry has been completed, the Council must report its conclusions to the Minister; if in the opinion of the Council, the judge has become incapaci-

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281 *Valente v. The Queen*, *supra* note 96, at 179.

282 *Supreme Court Act*, R.S.C. 1985, c. S-26, s.9; *Federal Court Act*, R.S.C. 1985, c. F-7, 8; *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s.7; *Northwest Territories Act*, R.S.C. 1985, c. N-27, s.33; *Yukon Act*, R.S.C. 1985, c. Y-2, s.33.

283 Hogg, *supra* note 241, at 7-9.

284 s. 59.

285 ss. 63, 65.

286 ss. 63-64.

tated or disabled, it may recommend in its report that the judge be removed from office.[287] The Canadian courts have determined for this purpose that incapacity due to illness is tantamount to absence of good behaviour.[288]

In general, provincial inferior court judges may be removed by the provincial government before the age of retirement only for cause - misbehavior or disability - following a judicial inquiry.[289] For example, under the Ontario *Courts of Justice Act*[290], Ontario inferior court judges hold office until retirement at age 65, unless removed from office for cause by the Lieutenant Governor.[291] Cause can only be found if a complaint has been made to the Ontario Judicial Council, and a judicial inquiry has recommended removal on the ground that the judge has become incapacitated or disabled from the due execution of office by reason of infirmity, conduct that is incompatible with office, or having failed to perform the duties of office.[292]

The procedure for removal is commenced by making a complaint regarding the judge to the Judicial Council. The Council is composed of the Chief Justice of Ontario, four subsidiary chief justices, the Treasurer of the provincial bar society, and up to two appointees of the government.[293] The Council investigates into the complaint, giving the judge an opportunity to be heard and produce evidence on his or her behalf, and then may make a report to the provincial Attorney General recommending a full inquiry.[294] The provincial Lieutenant Governor in Council may appoint a judge of the provincial superior court to conduct an inquiry into the question of whether the judge should be removed from office.[295] The report of the inquiry must be laid before the Legislative Assembly, and an order for removal may be

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287 s. 65. The Supreme Court of Canada has given general approval to the concept of "collegial judgment" in the judicial discipline process as a system reinforcing the objective of judicial independence; *Valente v. The Queen*, *supra* note 96 at 673 and *MacKeigan v. Hickman* [1989] 2 S.C.R. 796.

288 *Gratton v. Canadian Judicial Council and A.G. Canada*, unreported judgement of the Federal Court (Trial Division), May 18, 1994.

289 *Valente v. The Queen*, *supra* note 96.

290 R.S.O. 1990, c. C-43, as amended.

291 ss. 44, 46.

292 s. 46.

293 s. 47.

294 s. 49.

295 s. 50.

made by the Lieutenant Governor only on address of the Legislative Assembly.[296]

This process would essentially remain much the same following the coming into force of the amendments to the Ontario *Courts of Justice Act* contained in Bill 136, which received Royal Assent on June 12, 1994. The amendments, however, expand the membership of the Council, provide for a mediation process involving complainants and judges who are the subject of complaints, and establish a range of disposition short of removal if misconduct on the part of a judge has been found. These dispositions include warning the judge; a reprimand; ordering the judge to apologise to the complainant or to any other person; ordering the judge to take specified measures, such as receiving education or treatment as a condition of continuing to sit as a judge; suspension with pay; and suspension without pay for a period of up to thirty days.

c. Appointments

The *Constitution Act, 1867* stipulates that the Governor General has the power to appoint judges to the provincial superior courts,[297] the federal Parliament may provide for the appointment of judges to the federal courts,[298] and the provincial Legislatures have the power to appoint judges to their respective inferior courts.[299] Parliament and the Legislatures have passed laws empowering their respective Governors-in-Council to make appointments to federal courts[300] and provincial inferior courts.[301] By constitutional convention, a Governor-in-Council exercises his or her power on the advice of the government. Thus, the power to appoint judges lies with the federal and provincial executive branches. There is no public scrutiny of appointments in Canada.

Federal and provincial statutes set out minimum requirements for appointments. Justices of the Supreme Court of Canada must be or have

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296 s. 46.

297 s. 96.

298 s. 101.

299 s. 92(4).

300 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 4; *Federal Court Act*, R.S.C. 1985, c. F-7, s.5; *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s.4; *Northwest Territories Act*, R.S.C. 1985, c. N-27, s.32; *Yukon Act*, R.S.C. 1985, c. Y-2 s.32.

301 For example, the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C-43, s.42.

been a judge of a superior court of a province, or a barrister or advocate of least ten years standing at the bar at the time of their appointment.[302] Appointees to the Federal Court of Canada and Tax Court of Canada must be or have been a judge of a superior, county or district court, or a barrister or advocate of at least ten years standing at the bar.[303] Candidates for provincial superior courts must be a barrister or advocate of at least ten years standing at the bar of that province, or have been a barrister or advocate and a magistrate of that province for an aggregate of ten years.[304] Appointments to provincial inferior courts are usually conditioned on at least ten years standing at the bar.[305]

In practice, federal appointments are made by Cabinet on the advice of the Minister of Justice for puisne judges and on the advice of the Primer Minister for chief justices.[306] In turn, the Minister of Justices bases a recommendation on the assessment of lawyer-applicants made by seven-member, independent judicial appointment advisory committees established in each province and territory. The committees are composed of a judge of the superior court of the province, a lawyer of the provincial or territorial bar society, a lawyer nominated by the provincial or territorial branch of the Canadian Bar Association, three representatives of the federal Minister of Justice, and a representative of the provincial or territorial Attorney General. Provincial appointments follow a similar appointment process.[307]

d. Immunity

In English and Canadian common law, a superior court judge is protected by absolute immunity from any civil liability for anything he does or says in the performance of this functions as a judge.[308] As Lord Denning observed:

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302 *Supreme Court Act*, R.S.C. 1985, c. S-26, s.5.

303 *Federal Court Act*, R.S.C. 1985, c. F-7, s.5; *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s.4.

304 *Constitution Act, 1867*, s. 97 and 98; *Judges Act*, R.S.C. 1985, c. J-1, s. 3.

305 For example, Ontario *Court of Justice Act*, R.S.O. 1990, c. C-43, s.42.

306 Morton, *supra* note 253, at 61; Hogg, *supra* note 241, at 7-6.

307 Ontario *Courts of Justice Act*, R.S.O. 1990, c. C-43, s.48.

308 *Royer v. Mignault* (1988) 13 Q.A.C. 39, 50 D.L.R. 345 at 354; leave to appeal to S.C.C. refused (1988) 50 D.L.R. (4th) viii.

> If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment, it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to action... Nothing will make him liable except that it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.[309]

More recently, Lord Bridge of Harwich stated:

> It is, of course, clear that the holder of any judicial office who acts in bad faith, doing what he knows he has no power to do, is liable in damages.[310]

These judgements were referred to by the Supreme Court of Canada; restating the rule, Chouinard, J. said, in part:

> ...superior court judges... could only be sued in damages where the qualifications made by Lord Bridge of Harwich, or before him by Lord Denning, applies, that is in the formula as stated by the former, a judge who in bad faith did something which he knew he did not have the jurisdiction to do, or as stated by the second, a judge who was not acting in the course of his judicial duties knowing that he had no jurisdiction to act.[311]

For provincial inferior court judges, the common law immunity rule may be narrower, shielding a judge only from liability for judicial acts done within their jurisdiction.[312] However, this immunity may be altered by statute. In some provincial jurisdictions, the common law rule for superior court judges is applied to inferior court judges;[313] in others, the rule for inferior court judges has been expanded.[314]

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309 *Sirros v. Moore* [1974] 3 All E.R. 776 at 785.

310 *McC v. Mullan* [1984] 3 All E.R. 908 at 916.

311 *Morier v. Rivard* [1985] 2 S.C.R. 716 at 744; 23 D.L.R. (4th) 1 at 21-22.

312 *Shaw v. Trudel* (1988) 53 D.L.R. (4th) 481.

313 For example, Ontario *Courts of Justice Act*, R.S.O. 1990, c. C-43, s.82 states: Every judge of a court in Ontario and every master has the same immunity from liability as a judge of the Ontario Court (General Division).

314 For example, the Manitoba Court of Appeal found that section 12 of the Manitoba *Provincial Judges Act* expanded the common law protection: *Shaw v. Trudel* (1988) 53 D.L.R. (4th) 481.

The Quebec Court of Appeal has found that the immunity rule is an essential element of the constitutional principle of judicial independence.[315]

3. Emergencies and States of Siege

The *Emergencies Act*[316] permits the suspension of civil rights during extraordinary crisis periods, and then only on a temporary basis. The preamble of the Act acknowledges that the application of the *Emergencies Act* and a suspension of civil liberties would be subject to judicial review under the *Canadian Charter of Rights and Freedoms*.[317] In particular, it would be up to the courts to decide whether the application of the Act and a suspension of civil liberties were "reasonable and demonstrably justified in a free and democratic society."[318]

It should be noted that Parliament or the legislature of a Province may override any judicial determination of unconstitutionality by resorting to the "notwithstanding" clause of the Constitution. [319] By re-enacting an offending Act or provision with a "notwithstanding" declaration, Parliament could effectively suspend civil rights. However, popular opinion in such circumstances would likely serve as an effective check against any attempted abuse.

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315 *Royer v. Mignault, supra* note 308.

316 R.S.C. 1985, c. 22 (4th Supp.), S.C. 1988, c. 29, in force July 21, 1988, Section 30, as amended by 1992, c. 49, s. 25 came into force on February 1,1993. Prior legislation, the *War Measures Act*, was repealed by R.S. 1985, c. 22 (4th Supp.) s.80.

317 See Tenofsky, "The War Measures and Emergency Acts" (1989) 19 American Review of Canadian Studies 293.

318 *Canadian Charter of Rights and Freedoms*, s.1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

319 *Constitution Act*, 1982, s. 33 states in part:
(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
(2) an Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

B. Independence of the Bar/Legal Profession

1. Institutional/Collective Independence

a. Access

The right to counsel is guaranteed in the *Canadian Charter of Rights and Freedoms*.[320] The accused must be afforded "a reasonable opportunity to retain and instruct counsel without delay", including the use of a telephone or other facility to make contact with counsel.[321] The accused must make a "reasonably diligent" effort to contact counsel,[322] and cannot insist upon the services of a lawyer who is unable or unwilling to represent him.[323] Where duty counsel and legal aid are available, the accused must be informed of these services.[324] It would appear that where an accused cannot afford counsel, legal aid must be provided.[325]

b. Regulation

The legal profession in Canada is governed by twelve law societies. The societies are established by provincial statutes, and are therefore subject to legislative change by the provincial or territorial legislatures. Otherwise, however, the law societies are largely self-governing and autonomous in the exercise of delegated authority. To practice law and be heard before a provincial court, a lawyer must be licensed by and be a member of the provincial law society. Barristers and solicitors of any province are allowed to practice before the federal courts.[326]

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320 s. 10(b) states: Everyone has the right on arrest or detention...(b) to retain and instruct counsel without delay and to be informed of that right. See Hogg, *supra* note 235 at 47-6 to 47-13.

321 *R. v. Manninen* [1987] 1 S.C.R. 1233, 1241.

322 *R. v. Smith* [1989] 2 S.C.R. 368.

323 *Re R. and Speid* (1983) 43 O.R. (2d) 596 (C.A.)

324 *R. v. Brydges* [1990] 1 S.C.R. 190.

325 *R. v. Rowbotham* (1988) 63 C.R. (3d) 113 (Ont. C.A.). This case held that lacking the means to employ counsel violated the accused's s. 7 and s.11(d) *Charter* rights. Section 7 reads "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of natural justice." Section 11(d) reads "Any person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

326 For example, *The Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 22-24 states:
"22. All persons who are barristers or advocates in a province may practice as barristers, advocates and counsel in the Court.

c. Membership

The *Canadian Charter of Rights and Freedoms* has been used on two occasions to secure greater participation in the legal profession. In one case,[327] a citizenship requirement for entry into the profession in British Columbia was struck down on the basis that it violated the equality rights[328] of an entire class of persons (permanent residents who were non-citizens) and that the violation could not be justified as a reasonable limit demonstrably justified in a free and democratic society.[329] The Supreme Court of Canada held that the requirement was not carefully tailored enough to meet the purported objectives of the requirement: familiarity with Canada and its laws, a commitment to Canadian society, and honorably and conscientiously carrying out a lawyer's public duties.

In the second case,[330] two law society rules were found to violate the mobility rights[331] of members of the Alberta Bar. One rule prohibited the joint practice of law in Alberta between bar members who were active in and ordinarily resident in Alberta, and members who were not active and resident in Alberta. A second rule prohibited members from being a partner or an associate with more than one law firm. The rules were enacted to discourage law firms in one province from establishing branch offices in Alberta. The Supreme Court of Canada found that the rules impaired the ability of lawyers to maintain viable associations for the purpose of obtain-

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23. All persons who are attorneys or solicitors of the superior courts in a province may practice as attorneys, solicitors and proctors in the Court.
24. All persons who may practice as barristers, advocates, counsel, attorneys, solicitors or proctors in the Court are officers of the Court.

327 *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143; 56 D.L.R. (4th) 1.

328 *Canadian Charter of Rights and Freedoms*, s.15(1) states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability."

329 *Canadian Charter of Rights and Freedoms*, s.1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

330 *Black v. Law Society of Alberta* [1989] 1 S.C.R. 591; 58 D.L.R. (4th) 317.

331 *Canadian Charter of Rights and Freedoms*, s.6(2)(b) states: "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right...to pursue the gaining of a livelihood in any province."

ing a livelihood, and would make it practically impossible for a person to practice law in Alberta without taking up residence in the province.

2. Individual/Personal Independence

a. Representation

Lawyers are free to represent clients on any matter that they are competent to handle, subject to such ethical considerations as conflict of interest.[332]

b. Privileged Communications

Solicitor-Client privilege is recognized in common law, and protected in the federal and provincial evidence acts.[333] All information that must be provided in order to obtain legal advice and that is given in confidence for that purpose enjoys the privilege of confidentiality. The privilege arises as soon as the client takes the first steps to obtain legal advice.[334]

VI. THE RESPONSE - INTERNATIONAL RECOMMENDATIONS

The protection of lawyers and judges, and of the independence of the judiciary, has long been the subject of international consideration. The International Bar Association adopted a "Code of Minimum Standards of Judicial Independence" in 1982 (attached as Annex I). In the same year, the Law Association for Asia and the Western Pacific (LAWASIA) debated the "Tokyo Principles on the Independence of the Judiciary in the LAWASIA

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332 In commenting on the right of Canadian lawyer Douglas Christie to represent an individual charged with "hate crimes" under the Canadian *Criminal Code*, the general counsel of the Canadian Civil Liberties Association, Alan Borovoy, emphasized the distinction between the lawyer as advocate and as citizen. He stated that "...we're so concerned that lawyers must feel free to defend the rights of unpopular people and that is certainly important to a civil liberties organization. What we said was lawyers, like everyone else, must have the right not only to defend their client's rights, but also to endorse their views. but the moment they go beyond the mere defence of their client's rights to endorsing their client's views, then the rest of society is entitled at that point to judge the lawyers not as lawyers but as citizens expressing those views. So at that point, we're entitled to treat them as we would treat their clients"; quoted in *Canadian Lawyer*, Vol. 14(8), November, 1990.

333 For example, under s. 30 of the *Canada Evidence Act*, R.S.C. 1985, c. E-5, business records made in the ordinary course of business may be admitted as evidence, but "(10) Nothing in this section renders admissible in evidence in any legal proceeding ... such part of any record as is proved to be ... a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding."

334 *Descoteaux v. Mierzwinski* [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590.

Region".[335] In 1983, the First World Conference on the Independence of Justice[336] adopted the "Universal Declaration on the Independence of Justice" (attached as Annex II). In 1985, the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders adopted "Basic Principles on the Independence of the Judiciary" welcomed by the General Assembly that same year (attached as Annex III). In 1990, the Eighth UN Congress adopted "Basic Principles on the Role of Lawyers", welcomed by the General Assembly in that year (attached as Annex IV). In 1991, the Inter-American Commission on Human Rights published an interim report, including recommendations (attached as Annex V) on "Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial Branch". And the Federacion Interamericana de Abogados, in its Resolution 13 adopted in April, 1993, "Study of the Essential Conditions that Guarantee the Independence and Efficiency of the Judiciary" (attached as Annex VI), urged states of the hemisphere to critically examine the norms that must be respected to ensure judicial independence. Various international academic associations have also addressed the topic.[337] While not every precept of each of these instruments must be implemented to achieve independence of the judiciary, the documents are indicative of the factors considered relevant.

VII. CONCLUSIONS

That the independence of the judiciary, and the protection of lawyers and judges in the exercise of their functions, is essential to a functioning legal system, to the Rule of Law, to the effective exercise of administrative and constitutional review, and to enforcing human rights, is beyond dispute.

Such international instruments as the UN Basic Principles on the Independence of the Judiciary and Basic Principles on the Role of Lawyers, and the Inter-American Commission on Human Rights' Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial Branch comprehensively codify the obligations on

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335 Reprinted in Shetreet, *supra* note 99.

336 Co-sponsored by the Canadian Judicial Council, the Canadian Judges Conference, the Canadian Association of Provincial Court Judges, the Canadian Bar Association, the Royal Society of Canada, the Canadian Institute for the Administration of Justice, and the Canadian Section of the International Commission of Jurists, with the support of the Governments of Canada and of Quebec.

337 Including the XIth International Congress of the Academy of Comparative Law and the VIIth Congress of the International Society of Procedural law (Wuerzburg); see Shetreet, *supra* note 99.

governments to ensure this independence and protection. The IBA Code of Minimum Standards of Judicial Independence and the Universal Declaration on the Independence of Justice reflect the views of leading publicists in the field.

This study reveals, however, that the independence of the judiciary continues to be threatened throughout the Americas, and that the response in member countries has been less than consistent. Information is not, however, readily available on the actual situation in all member countries. It has long been recognized throughout the UN and OAS systems that publicity and dissemination of information[338] and regular reporting are essential means to ensure respect for internationally-agreed principles. A reporting and review process

> ...assumes that there is a need for a constructive dialogue between the State concerned on the one hand, and an independent international group of experts on the other. Reporting is not something that is imposed upon an unwilling State, nor is it something designed as an adversarial process. Rather it is premised on the assumptions first that every State is an actual or potential violator of human rights (no matter how good its intentions might be) and second that a degree of routinized international accountability is in the best interests of the State itself, of its citizens, and of the international community.[339]

On August 26, 1993, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities of the UN Human Rights Commission recommended the creation of a monitoring mechanism on the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officials, and the nature of potential threats to this independence and impartiality.[340] In July, 1994, a UN Eco-

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338 See "Report of the Human Rights Committee: Revised Guidelines for the Preparation of State Party Reports", UN GAOR, 46th Session, Suppl, No 40, at 207, UN Doc A/46/40 (1991), which requests information on "..whether any special efforts have been made to promote awareness among the public and the relevant authorities of the rights contained in the various human rights instruments".

339 Alston, "The Purposes of Reporting", in *Manual on Human Rights Reporting*, UN Doc. HR/Pub/91/1, UN Sales No. E.91.xiv1 (1991) at 13, quoted by Ginger, "The Energizing Effect of Enforcing a Human Rights Treaty", 42 DePaul L. Rev. 1341, at 1366. See Schwelb, "Civil and Political Rights: The International Measures of Implementation", 62 AJIL 827 (1968); Mower, "The Implementation of the UN Covenant on Civil and Political Rights", 10 Revue des Droits de L'Homme 271 (1970); Note, "Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee", 76 AJIL 142 (1982).

340 Resolution 1993/39, based on the final report of the Special Rapporteur of the Sub-Commission, document E/CN.4/Sub.2/1992/25 and Add.1.

nomic and Social Council decision approved a resolution of the Human Rights Commission to appoint a special rapporteur on the subject.[341]

It is therefore recommended that the Inter-American Juridical Committee resolve to recommend that the Committee on Political and Juridical Affairs:

1. propose that the General Assembly:

(a) call the attention of member states to the basic principles on the independence of the judiciary and on the role of lawyers, as set out in the UN Basic Principles on the Independence of the Judiciary and Basic Principles on the Role of Lawyers, and the Inter-American Commission on Human Rights' Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial Branch and supported by the International Bar Association Code of Minimum Standards of Judicial Independence, the Universal Declaration on the Independence of Justice;

(b) urge member states to bring to the attention of judges, lawyers, members of the executive and the legislature and the public in general the international instruments in this field; and

(c) encourage all member states give priority to efforts to respect these principles;

2. maintain under continuous review developments in member countries that may threaten the independence of the judiciary or that impede adequate protection of judges and lawyers in the exercise of their functions, through:

(a) developing a system for annual reporting by member countries on such threats and on steps taken to enhance independence and protection, as well as for receipt of information from non-governmental organizations on these matters;

(b) review of these reports by an appropriate organ of the Organization; and

(c) publishing, in an appropriate summary form, the results of such reports and reviews.

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341 ECOSOC Decision 1994/251 of 22 July, 1994, approving Commission on Human Rights Resolution 1994/41 of 4 March, 1994. Dr. Dato' Param Curamaswamy of Malaysia has now been named as Special Rapporteur.

ANNEX I

INTERNATIONAL BAR ASSOCIATION CODE OF MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE.

The Jerusalem Approved Standards as adopted in the Plenary Session of the 18th IBA Biennial Conference held on Friday, 22 October 1982, in New Delhi, India.

A. Judges and the Executive

1. (a) Individual judges should enjoy personal independence and substantive independence.

   (b) Personal independence means that the terms and conditions of judicial service are adequately secured, so as to ensure that individual judges are not subject to executive control.

   (c) Substantive independence means that in the discharge of his judicial functions, a judge is subject to nothing but the law and the commands of his conscience.

2. The judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive.

3. (a) Participation in judicial appointments and promotions by the Executive or Legislature is not inconsistent with judicial independence, provided that appointments and promotions of judges are vested in a judicial body, in which members of the judiciary and the legal profession form a majority.

   (b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

4. (a) The Executive may participate in the discipline of judges, only in referring complaints against judges, or in the initiation of disciplin-

ary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.

(b) The power of removal of a judge should preferably be vested in a judicial tribunal.

(c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.

5. The Executive shall not have control over judicial functions.

6. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.

7. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process.

8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

9. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

10. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.

11. (a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

(b) In countries where the power of division of judicial work is vested in the chief justice, it is not considered inconsistent with judicial independence to accord to the chief justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.

(c) Subject to (a), the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.

12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.

13. Court services should be adequately financed by the relevant government.

14. Judicial salaries and pensions shall be adequate, and should be regularly adjusted to account for price increases independently of Executive control.

15. (a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.

    (b) Judicial salaries cannot be decreased during the judges' service except as a coherent plan of an overall public economic measure.

16. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.

17. The power of pardon shall be exercised cautiously so as to avoid its use as an interference with judicial decision.

18. (a) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute, or frustrates the proper execution of a court judgment.

    (b) The Executive shall not have the power to close down, or suspend, the operation of the court system at any level.

B. Judges and the Legislature

19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.

20 (a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation, unless the changes improve the terms of service.

    (b) In case of legislation reorganizing courts, judges serving in theses courts shall not be affected, except for their transfer to another court of the same status.

21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before ad hoc tribunals.

C. Terms and Nature of Judicial Appointments

22. (a) Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement, at an age fixed by law at the date of appointment.

    (b) Retirement age shall not be reduced for existing judges.

23. (a) Judges should not be appointed for probationary periods except for in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment.

    (b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

24. The number of the members of the highest court should be rigid and should not be subject to change, except by legislation.

25. Part-Time judges should be appointed only with proper safeguards.

26. Selection of judges shall be based on merit.

D. Judicial Removal and Discipline

27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.

28. The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to a final and reasoned disposition of this request by the Disciplinary Tribunal Judgments, in disciplinary proceedings, whether held in camera or in public, may be published.

29. (a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.

    (b) All disciplinary action shall be based upon standards of judicial conduct promulgated by law, or in established rules of court.

30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent, and be composed predominantly of members of the Judiciary.

32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

E. The Press, the Judiciary and the Courts

33. It should be recognized that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.

34. Subject to Standard 41, judges may write articles in the press, appear on television and give interviews to the press.

35. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.

F. Standards of Conduct

36. Judges may not, during their term of office, serve in Executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.

37. Judges may serve as chairmen of committees on inquiry in cases where the process requires skill of fact-finding and evidence taking.

38. Judges shall not hold positions in political parties.

39. A judge, other than a temporary judge, may not practice law during his term of office.

40. A judge should refrain from business activities, except his personal investments, or ownership of property.

41. A judge should always behave in a manner as to preserve the dignity of this office and the impartiality and independence of the Judiciary.

42. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.

43. Judges may take collective action to protect their judicial independence and to uphold their position.

G. Securing Impartiality and Independence

44. A judge shall enjoy immunity from legal actions, and the obligation to testify concerning matters arising in the exercise of his official functions.

45. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

46. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

H. The Internal Independence of the Judiciary

47. In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.

ANNEX II

UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE

Unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Québec, Canada) June 10th, 1983.

Preamble

Whereas justice constitutes one of the essential pillars of liberty;

Whereas the free exercise of fundamental human rights as well as peace between nations can only be secured through respect for the rule of law;

Whereas States have long established courts and other institutions with a view to assuring that justice be duly administered in their respective territories;

Whereas the Charter of the United Nations has established the International Court of Justice as its principal judicial organ in order to promote the peaceful solution of disputes between States, in conformity with the principles of justice and international law;

Whereas the Statute of the International Court of Justice provides that the latter shall be composed of a body of independent judges, elected regardless of nationality, which as a whole shall be representative of the main forms of civilization and of the principal legal systems of the world;

Whereas various Treaties have established other courts endowed with an international competence, which equally owe exclusive allegiance to the international legal order and benefit from representation of diverse legal systems;

Whereas the jurisdiction vested in international courts shall be respected in order to facilitate the interpretation, application and progressive development of international law and the promotion of human rights;

Whereas national and international courts shall, within the sphere of their competence, cooperate in the achievement of the foregoing objectives;

Whereas all those institutions, national and international, must, within the scope of their competence, seek to promote the lofty objectives set out

in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Optional Protocol to the latter Covenant and other pertinent international instruments, objectives which embrace the independence of the administration of the justice;

Whereas such independence must be guaranteed to international judges, national judges, lawyers, jurors and assessors;

Whereas the foundations of the independence of justice and the conditions of its exercise may benefit from restatement;

The World Conference on the Independence of Justice recommends to the United Nations on the consideration of this Declaration.

I. International Judges

Definitions

1.01 In this chapter:

(a) "judges" means international judges and arbitrators;

(b) "court" means an international court or tribunal of universal, regional, community of specialized competence.

Independence

1.02 The international status of judges shall require and assure their individual and collective independence and their impartial and conscientious exercise of their functions in the common interest. Accordingly, States shall respect the international character of the responsibilities of judges and shall not seek to influence them in the discharge of these responsibilities.

1.03 Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.

1.04 When governing treaties give international courts the competence to determine their rules of procedure, such rules shall come into and remain in force upon adoption by the courts concerned.

1.05 Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.

1.06 The ethical standards required of national judges in the exercise of their judicial functions shall apply to judges of international courts.

1.07 The principles of judicial independence embodied in the Universal Declaration of Human Rights and other international instruments for the protection of human rights shall apply to judges.

1.08 Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.

1.09 No reservation shall be made or admitted to treaty provisions relating to the fundamental principles of independence of the judiciary.

1.10 Neither the accession of a state to the statute of a court nor the creation of new international courts shall affect the validity of these fundamental principles.

Appointment

1.11 Judges shall be nominated and appointed, or elected in accordance with governing constitutional and statutory provisions which shall, if possible, not confine the power of nomination to governments or make nomination dependent on nationality.

1.12 Only a jurist of recognized standing shall be appointed or elected to be a judge of an international court.

1.13 When the statute of a court provides that judges shall be appointed on the recommendation of a government, such appointment shall not be made in circumstances in which that government may subsequently exert any influence upon the judge.

Compensation

1.14 The terms of compensation and pension of judges shall be established and maintained so as to ensure their independence. Those terms shall take into account the recognized limitations upon their professional pursuits both during and after their tenure of office, which are defined either by their statute or recognized and accepted in practice.

Immunities and Privileges

1.15 Judges shall enjoy privileges and immunities, facilities and prerogatives, no less than those conferred upon chiefs of diplomatic missions under and recognized by the Vienna Convention on Diplomatic Relations. Only the court concerned may lift these immunities.

1.16 Judges shall not be liable for acts done in their official capacity.

1.17 (a) In view of the importance of secrecy of judicial deliberations to the integrity and independence of the judicial process, judges shall respect secrecy in, and in relation to their judicial deliberations;

(b) States and other external authorities shall respect and protect the secrecy and confidentiality of the courts' deliberations at all stages.

Discipline and Removal

1.18 All measures of discipline and removal relating to judges shall be governed exclusively by the statutes and rules on their courts, and be within their jurisdiction.

1.19 Judges shall not be removed from office, except by a decision of the other members of the court and in accordance with its statute.

Judges Ad Hoc and Arbitrators

1.20 Unless reference to the context necessarily makes it inapplicable or inappropriate, the foregoing articles shall apply to judges ad hoc and to arbitrators in public international arbitrations.

II. National Judges

Objectives and Functions

2.01 The objectives and functions of the judiciary shall include:

(a) to administer the law impartially between citizen and citizen, and between citizen and the state;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights;

(c) to ensure that all peoples are able to live securely under the rule of law.

Independence

2.02 Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law and without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

2.03 In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.

2.04 The judiciary shall be independent of the Executive and Legislative.

2.05 The judiciary shall have jurisdiction, directly, or by way of review, over all issues of a judicial nature.

2.06 (a) No ad hoc tribunals shall be established;

(b) Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts;

(c) Some derogations may be admitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, and only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts;

(d) In such times of emergency:

I. Civilians charged with criminal offenses of any kind shall be tried by ordinary civilian courts, expanded where necessary by additional competent civilian judges;

II. Detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar procedures, so as to insure that the detention is lawful, as well as to inquire into any allegations of ill treatment;

(e)The jurisdiction of military tribunals shall be confined to military offenses committed by military personnel. There shall always be a right of appeal from such tribunals to a legally qualified appellate court.

2.07 (a) No power shall be exercised so as to interfere with the judicial process.

(b) The Executive shall not have control over judicial functions.

(c) The Executive shall not have the power to close down or suspend the operation of the courts.

(d) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

2.08 No legislation or executive decree shall attempt retroactively, to reverse specific court decisions, or to change the composition of the court to affect its decision-making.

2.09 Judges may take collective action to protect their judicial independence.

2.10 Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of belief, expression, association and assembly.

Qualifications, Selections and Training

2.11 Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.

2.12 In the selection of judges, there shall be no discrimination on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

2.14 (a) There is no single proper method of judicial selection provided it safeguards against judicial appointments for improper motives.

(b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments

of judges are made in consultations with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.

2.15 Continuing education shall be available to judges.

Posting, Promotion and Transfer

2.16 The assignment of a judge, to a post within the court to which he is appointed is an internal administrative function to be carried out by the judiciary.

[Explanatory Note: Unless assignments are made by the court, there is a danger of erosion of judicial independence by outside interference. It is vital that the court not make assignments as a result of any bias or prejudice or in response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the judiciary or similar body.]

2.17 Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law. Article 2.14 shall apply to promotions.

2.18 Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.

[Explanatory Note: Unless this principle is accepted, transfer can be used to punish an independent and courageous judge, and to deter others from following his example. This principle is not intended to interfere with sound administrative practices enumerated in the law. Thus exceptions may be made, for example, where a judge in his early years is transferred from post to post to enrich his judicial experience.]

Tenure

2.19 (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their detriment.

(b) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists.

2.20 The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they shall be phased out gradually.

[Explanatory Note: This text is not intended to exclude part-time judges. Where such practice exists, proper safeguards shall be laid down to ensure impartiality and avoid conflict of interests. Nor is this text intended to exclude probationary periods for judges after their initial appointment, in countries which have a career judiciary, such as in civil law countries.]

2.21 (a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.

(c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

2.22 Retirement age shall not be altered for judges in office without their consent.

2.23 The executive authorities shall, at all times, ensure the security and physical protection of judges and their families.

Immunities and Privileges

2.24 Judges shall enjoy immunity from suit, or harassment, for acts and omissions in their official capacity.

2.25 (a) Judges shall be bound by professional secrecy in relation to their deliberations, and to confidential information acquired in the course on their duties other than in public proceedings.

(b) Judges shall on be required to testify on such matters.

Disqualifications

2.26 Judges may not serve in an executive or a legislative capacity unless it is clear that these functions are combined, without compromising judicial independence.

2.27 Judges may not serve as chairmen or members of committees of inquiry, except in cases where judicial skills are required.

2.28 Judges shall not be members of, or hold positions in, political parties.

[Explanatory Note: This text is not intended to permit membership of judges in political parties in countries where under law or practice such is excluded, but to lay down standards limiting the scope of judicial involvement in countries where such membership is permissible.]

2.29 Judges may not practice law.

[Explanatory Note: See note 2.20]

2.30 Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property.

2.31 A judge shall not sit in a case where a reasonable apprehension of bias on his part may arise.

Discipline and Removal

2.32 A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33 (a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary.

(b) However, the power of removal may be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of a court or board as referred to in 2.33 (a).

[Explanatory Note: In countries where the legal profession plays an indispensable role in maintaining the rule of law and judicial independence, it is recommended that members of the legal profession participate in the selection of the members of the court or board, and be included as members thereof.

2.34 All disciplinary action shall be based upon established standards of judicial conduct.

2.35 The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

2.36 With the exception of proceedings before the Legislature, the proceedings for discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to a final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

2.37 With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.

2.38 A judge shall not be subject to removal except on proved grounds of incapacity or misbehavior, rendering him unfit to continue in office.

2.39 In the event that a court is abolished, judges serving in this court shall not be affected, except for their transfer to another court of the same status.

Court Administration

2.40 The main responsibility for court administration shall vest in the judiciary.

2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities, appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.

2.42 The budget of the court shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirements to the appropriate authority.

2.43 The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

2.44 The head of the court may exercise supervisory powers over judges on administrative matters.

Miscellaneous

2.45 A judge shall ensure the fair conduct of the trial and inquire fully into any allegation made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

2.46 Judges shall accord respect to members of the Bar.

2.47 The state shall ensure the due and proper execution of orders and judgments of the courts; but supervision over the execution of orders and judgments process shall be vested in the judiciary.

2.48 Judges shall keep themselves informed about international conventions and other instruments establishing human rights' norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

2.49 The provisions of Chapter II: National Judges, shall apply to all persons exercising judicial functions, including arbitrators and public prosecutors, unless reference to the context necessarily makes them inapplicable or inappropriate.

III. Lawyers

Definitions

3.01 In this chapter:

(a) "lawyer" means a person qualified and authorized to practice before the courts, and to advise and represent his clients in legal matters;

(b) "Bar Association" means the recognized professional association to which lawyers within a given jurisdiction belong.

General Principles

3.02 The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.

3.03 There shall be a fair and equitable system of administration of justice, which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, induce-

ments, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3.04 All persons shall have effective access to legal services provided by an independent lawyer, to protect and establish their economic, social and cultural, as well as civil and political rights.

Legal Education and Entry into the Legal Profession

3.05 Legal education shall be open to all persons with requisite qualifications, and no one shall be denied such opportunity by reason of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

3.06 Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyers, and of human rights and fundamental freedoms recognized by national and international law.

3.07 Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development

3.08 Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer, and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil and political rights.

Education of the Public Concerning the Law

3.09 It shall be the responsibility of the lawyer to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant available remedies.

Rights and Duties of Lawyers

3.10 The duties of a lawyer towards his client include: a) advising the client as to his legal rights and obligations; b) taking legal action to protect him and his interests; and, where required, c) representing him before courts, tribunals or administration authorities.

3.11 The lawyer, in discharging his duties, shall at all times act freely, diligently and fearlessly in accordance with the wishes of his clients and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

3.12 Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and it is the duty of the lawyer to do so to the best of his ability Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be

3.13 No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause

3.14 No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client

3.15 It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing

3.16 If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer

3.17 Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings, or in his professional appearances before a court, tribunal or other legal or administrative authority.

3.18 The independence of lawyers, in dealing with persons deprived of their liberty, shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestions of collusion, arrangement of dependence between the lawyer who acts for them and the authorities.

3.19 Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including: a) absolute confidentiality of the lawyer-client relationship;

b) the right to travel and to consult with their clients freely, both within their own country and abroad; c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work; d) the right to accept or refuse a client or a brief.

3.20 Lawyers shall enjoy freedom of belief, expression, association and assembly, and in particular shall have the right to: 1) take part in public discussion on matters concerning the law and the administration of justice, b) join or form freely local, national or international organizations, c) propose and recommend well-considered law reforms in the public interest and inform the public about such matters, and d) take full and active part in the political, social and cultural life of their country.

Legal Services for the Poor

3.22 It is a necessary corollary of the concept of an independent bar, that its members shall make their services available to all sectors of society, so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural as well as civil and political, of individuals and groups.

3.23 Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

3.24 Lawyers engaged in legal service programmes and organizations, which are financed wholly, or in part, from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

- the direction of such programmes or organizations being entrusted to an independent board, composed mainly or entirely of members of the profession, with full control over its policies, budgets and staff;

- recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgment.

The Bar Association

3.25 There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers, recognized in law, whose council or other executive body shall be freely elected by all the

members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join, in addition, other professional associations of lawyers and jurists.

3.26 In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar Association.

Functions of the Bar Associations

3.27 The functions of the Bar Association in ensuring the independence of the legal profession shall be, inter alia:

(a) to promote and uphold the cause of justice, without fear or favour;

(b) to maintain the honor, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;

(c) to defend the role of lawyers in society and preserve the independence of the profession;

(d) to protect and defend the dignity and independence of the judiciary;

(e) to promote the free an equal access of the public to the system of justice, including the provision of legal aid and advice;

(f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal, and in accordance with proper procedures in all matters;

(g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;

(h) to promote a high standard of legal education as a prerequisite or entry into the profession;

(i) to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;

(j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;

(k) to affiliate with, and participate in, the activities of international organization of lawyers.

3.28 Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall cooperate in assisting a foreign lawyer to obtain the necessary right of audience.

3.29 To enable the Bar Association to fulfil its function of preserving the independence of lawyers, it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the Association shall have prior notice for: i) any search of his person or property, ii) any seizure of documents in his possessions, and iii) any decision to take proceedings affecting or calling into question the integrity of a lawyer. In such cases the Bar Association shall be entitled to be represented by its president or nominee, to follow the proceedings, and in particular to ensure that professional secrecy is safeguarded.

ANNEX III

BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, in August and September, 1985, and welcomed by the 40th General Assembly of the United Nations in resolution 40/146, adopted December 13, 1985.

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Whereas the International Convenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedom, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16 called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats of interferences, direct or indirect, from an quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted or its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to division. This principle is without prejudice to judicial review or to mitigation of commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always, conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of Service and Tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their terms of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional Secrecy and Immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at is initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

ANNEX IV

BASIC PRINCIPLES ON THE ROLE OF LAWYERS

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba in August and September 1990, and welcomed by the 45th General Assembly of the United Nations in resolution 45/121, adopted December 14, 1990.

Whereas the Universal Declaration of Human rights enshrines the principles of equality before law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligations of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance, of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards Guaranteeing Protection of Those Facing the Death Penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 on the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to Lawyers and Legal Services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, color, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and

other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special Safeguards in Criminal Justice Matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within hearing, of law enforcement officials.

Qualifications and Training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, color, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions, or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and Responsibilities

12. Lawyers shall at all times maintain the honor and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

    (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

    (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

    (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the Functioning of Lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential.

Freedom of Expression and Association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional Associations of Lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing edu-

cation and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary Proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

ANNEX V

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

1992 REPORT ON "MEASURES NECESSARY TO ENHANCE THE AUTONOMY, INDEPENDENCE AND INTEGRITY OF THE MEMBERS OF THE JUDICIAL BRANCH"

Recommendations

1. Guaranteeing that the executive and legislative branches will not interfere in matters that are the preserve of the Judicial Branch;

2. Providing the Judicial Branch with the political support and the means needed for it to be able to fully perform its function of guaranteeing human rights;

3. Ensuring the exclusive exercise of jurisdiction by the members of the Judicial Branch, and elimination of special courts;

4. Guaranteeing that judges cannot be removed from office as long as their conduct remains above reproach, and ensuring that panels are set upon to consider the cases of judges who are accused of unethical conduct or corruption;

5. Maintaining of the constitutional state; and declaration of states of emergency solely when absolutely necessary, in terms of Articles 27 of the American Convention on Human Rights and 4 of the International [Covenant] on Civil and Political Rights, structuring this system in such a way that it does not appreciably change the independence of the different organs of government, so that human rights legislation remains basically untouched;

6. Ensuring unrestricted access to the courts and legal remedies and enabling the victim, when called for, to take action to bring those responsible to book;

7. Ensuring the effectiveness of the judicial guarantees essential for the protection of human rights, and removing the obstacles that prevent their swift and appropriate application;

8. Guaranteeing due process of law – accusation, defense, evidence and judgment – through the public holding of trials;

9. Returning to judges the responsibility for disposition and supervision over persons detained;

10. Guaranteeing that judges will be immediately notified of all facts and situations in which human rights are restricted or suspended, regardless of the juridical status of the accused;

11. Removal of the procedural obstacles that cause trials to run on for extended periods of time, so that cases may be tried within a reasonable period and settled by means of judgments covering all points involved;

12. Ensuring separate hearings of criminal cases and of civil or administrative disputes involving compensation for injuries and losses.

ANNEX VI

INTER-AMERICAN BAR ASSOCIATION
RESOLUTION 13
APRIL, 1993

Study of the Essential Conditions that Guarantee the Independence and Efficiency of the Judiciary

Whereas:

The overwhelming majority of the countries in the Hemisphere have reestablished the basic norms of representative democracy;

That one of the most essential conditions for the consolidation of democracy is the respect for the norm of due process;

The existence of an independent, modern and efficient judiciary is an essential component of due process;

The ratification of the American Convention on Human Rights, and the legal value of the American Declaration of the Rights and Duties of Man, creates an obligation for the States of the Hemisphere to ensure respect for due process, including the existence of Judiciaries that are independent, modern, and efficient,

Resolves

1. To recommend that the Hemispheric States undertake to critically review the norms that could effectively ensure the independence and efficiency of the judiciary.

2. To recommend that those studies should include, *inter alia*:

   a. The systems to appoint and promote judges

   b. Preparation of judges

   c. Efficient judicial procedures

   d. Access to justice under conditions of equality.

3. Keep the subject under consideration by the Inter-American Bar Association.

INDICE

LA SOLUCIÓN AMISTOSA DE RECLAMACIONES ANTE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS

Nicolás de Piérola y Carolina Loayza

1. Introducción

La Convención Americana sobre Derechos Humanos prevé el procedimiento de conciliación, destinado a alcanzar una solución amistosa de las denuncias que sean presentadas ante la Comisión Interamericana de Derechos Humanos por violación de los derechos protegidos por la Convención. El Reglamento de la Comisión incluye normas sobre este procedimiento. Asimismo, el aspecto de la obligatoriedad o no de dicho procedimiento ha sido tratado por la jurisprudencia, tanto de la Corte como de la Comisión Interamericana de Derechos Humanos.

Sin embargo, la conciliación y solución amistosa ha sido poco utilizada hasta el presente:

> desde la entrada en vigencia de la Convención son muy pocos los casos en que la Comisión ha tenido la oportunidad de ejercer esta función de conciliación y, por consiguiente, no ha desarrollado todavía una práctica que permita determinar con precisión la mejor manera de cumplir con ... [las] normas de la Convención y del Reglamento (en materia de solución amistosa) y de evaluar los resultados de su aplicación[1].

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1 Aguilar, Andrés "Procedimiento que debe aplicar la Comisión Interamericana de Derechos Humanos en el examen de las peticiones o comunicaciones individuales sobre presuntas violaciones de derechos humanos", en Derechos Humanos en las Américas, Libro homenaje a la memoria de Carlos A. Dunshee de Abranches, Comisión Interamericana de Derechos Humanos, Washington D.C., 1984, pág. 213.

El propósito del presente artículo es examinar las normas sustantivas y reglamentarias, así como la jurisprudencia de la Comisión y de la Corte Interamericana de Derechos Humanos y los principios de la conciliación y solución amistosa, para determinar su actual estado de utilización y sus perspectivas futuras.

2. Antecedentes

2.1 César Sepúlveda cita los primeros casos en que se inició, aunque no se concluyó, el procedimiento[2]:

El Caso 1966, sobre expropiación de diarios en el Perú: luego de la expropiación de los diarios que originó la denuncia, un nuevo gobierno devolvió los diarios a sus propietarios[3], con lo que el asunto concluyó fuera del procedimiento de conciliación;

El Caso 7578, sobre expropiación de un diario en Grenada: el caso terminó luego de la invasión de tropas norteamericanas a Grenada, devolviéndose el diario a sus propietarios, también al margen del procedimiento de conciliación;

El Caso 7956, por la detención y posterior deportación de Honduras, de Luis Alonzo Monge, sin juicio justo llevado a cabo por autoridad competente y bajo la acusación de ser ciudadano salvadoreño a pesar de haber presentado documentos certificando su nacionalidad hondureña por nacimiento y por ser hijo de madre hondureña y por negativa del gobierno de Honduras a otorgarle la nacionalidad hondureña.

Este caso se encontraba pendiente de solución al escribir César Sepúlveda el artículo citado. Sin embargo, posteriormente, el 5 de marzo de 1985, la Comisión adoptó la Resolución 5/85, señalando que se había alcanzado la solución amistosa[4]; y,

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2 Sepúlveda, César "El Procedimiento de Solución Amistosa ante la Comisión Interamericana de Derechos Humanos", en Derechos Humanos en las Américas, *op. cit*. Washington D.C. 1984, pág. 244.

3 El primer acto del gobierno del Presidente Fernando Belaúnde Terry, el 28 de julio de 1989, consistió en la devolución de los diarios a sus propietarios y en el pleno restablecimiento de la libertad de prensa en el Perú.

4 La Resolución 5/85 está publicada en el Informe Anual de la Comisión Interamericana de Derechos Humanos 1984-1985, pág. 109. El caso está también citado por Thomas Buergenthal "International Human Rights", West Publishing Co, St. Paul Minnesota, 1981, pág. 151.

El Caso 7964, sobre reclamos de los Miskitos contra Nicaragua: luego de iniciado el procedimiento, la Comisión lo suspendió.

En el artículo citado, César Sepúlveda, hizo importantes sugerencias para facilitar el procedimiento de conciliación y solución amistosa, muchas de las cuales fueron luego incorporadas en el Reglamento de la Comisión. Estas sugerencias, unidas a los criterios expuestos en la jurisprudencia de la Comisión y de la Corte, han contribuido a una mayor utilización de la conciliación.

2.2. En los últimos tiempos se advierte una creciente tendencia a utilizar este procedimiento:

Así, en los Casos acumulados 10.288, 10.310, 10.436, 10.496, 10.631 y 10.771 (Argentina)[5], por denegación de indemnización por daños y perjuicios patrimoniales y morales por detención arbitraria durante el Gobierno Militar, el Gobierno objetó la admisión de las denuncias basándose en la aplicación *ratione temporis* de la Convención y sostuvo que las peticiones eran inadmisibles "por versar sobre hechos y situaciones acaecidos con anterioridad a la vigencia de la Convención Americana en el país". Durante la audiencia concedida a los peticionarios por la Comisión Interamericana de Derechos Humanos el 11 de mayo de 1990, los representantes de la Argentina informaron que el Gobierno del Presidente Ménem no estaba necesariamente en desacuerdo con los peticionarios y presentaron copia del Decreto 798/90 del 26 de abril de 1990, que autorizaba la creación de la Comisión *ad hoc* en Argentina para redactar un proyecto de ley que brindara a los peticionarios la compensación que merecían.

Tanto la Comisión como los peticionarios expresaron su aprobación por esta decisión del Gobierno, poniéndose la Comisión a disposición de la partes a fin de llegar a una solución amistosa fundada en el respeto de los derechos humanos, de conformidad con el artículo 48.1.f) de la Convención. Dictado el decreto 70/91 y otros posteriores, los peticionarios manifestaron su acuerdo con los montos indemnizatorios ofrecidos por el Gobierno. Ambas partes solicitaron a la Comisión el cierre de los casos por haber llegado a una solución amistosa, expresando la Comisión su reconocimiento al Gobierno Argentino por su manifiesto apoyo a la Convención y por haber cumplido con el pago de la compensación a los peticionarios y por la aceptación de los peticionarios.

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5 Informe 1/93 de 3 de marzo de 1993, en Informe Anual de la Comisión Interamericana de Derechos Humanos 1992-1993, pág. 36-41.

El Caso Maqueda contra Argentina ha sido resuelto mediante solución amistosa, aprobada mediante Resolución de la Corte Interamericana de Derechos Humanos, de 17 de enero de 1995. Volveremos sobre este caso más adelante.

3. Presentación de denuncias ante la Comisión

Conforme a la Convención Americana sobre Derechos Humanos, los Estados parte se han comprometido a "respetar los derechos y libertades reconocidos en ella y a garantizar su libre ejercicio a toda persona que esté sujeta a su jurisdicción"[6], asimismo, se han comprometido a adoptar "las medidas legislativas o de otro carácter que fueren necesarias para hacer efectivos tales derechos y libertades"[7]. Y, con el fin de garantizar el respeto

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6 Al interpretar el alcance del artículo 1.1 de la Convención Americana sobre Derechos Humanos, la Corte Interamericana manifestó que "la segunda obligación de los Estados partes es la de 'garantizar' el libre y pleno ejercicio de los derechos reconocidos en la Convención a toda persona sujeta a su jurisdicción ... Como consecuencia de esta obligación los Estados deben prevenir, investigar y sancionar toda violación de los derechos reconocidos por la Convención ..." Agregó, "El Estado está en el deber jurídico de prevenir, razonablemente, las violaciones de los derechos humanos, de investigar seriamente con los medios a su alcance las violaciones que hayan cometido dentro del ámbito de su jurisdicción a fin de identificar a los responsables, de imponerles las sanciones pertinentes y de asegurar a la víctima una adecuada reparación,... si el aparato del Estado actúa de modo que tal violación quede impune y no se restablezca, en cuanto sea posible, a la víctima en la plenitud de sus derechos, puede afirmarse que ha incumplido el deber de garantizar su libre y pleno ejercicio a las personas sujetas a su jurisdicción". Con respecto a la obligación de investigar señaló que "... debe tener sentido y ser asumida por el Estado como un deber jurídico propio y no como una simple gestión de intereses particulares que dependa de la iniciativa procesal de la víctima o de sus familiares o de la aportación privada de elementos probatorios, sin que la autoridad pública busque efectivamente la verdad. ." (Caso Velásquez Rodríguez, Sentencia del 29 de julio de 1988, párrafos 172, 174, 176 y 177).
Este artículo contiene un deber positivo para los Estados, ha señalado la Corte Interamericana de Derechos Humanos en su Opinión Consultiva OC-11/90; en tal sentido"garantizar" implica la obligación del Estado de tomar todas las medidas necesarias para remover los obstáculos que puedan existir para que los individuos puedan disfrutar de los derechos que la Convención reconoce (párr.34). La Comisión citando a la Corte Interamericana de Derechos Humanos, en su Inf. 14/93 ha señalado que "la obligación de garantizar el libre y pleno ejercicio de los derechos humanos no se agota con la existencia de un orden normativo dirigido a hacer posible el cumplimiento de esta obligación, sino que comporta la necesidad de una conducta gubernamental que asegure la existencia, en realidad, de una eficaz garantía de libre y pleno ejercicio de los derechos humanos (Consideración 2.2. párr. 4, Inf. Anual 1993, pág. 353-354).

7 En relación con las obligaciones que emanan del Artículo 2 de la Convención, la Corte Interamericana dijo: "Son muchas las maneras como un Estado puede violar un tratado internacional y, específicamente, la Convención. En este último caso, puede hacerlo, por ejemplo, omitiendo dictar las normas a que está obligado en el artículo

a la Convención, ésta autoriza a cualquier persona, grupo de personas o entidad no gubernamental legalmente reconocida en uno o más Estados miembros de la Organización, para presentar a la Comisión peticiones que contengan denuncias en caso de violación de los derechos que ella proclama:

> Cualquier persona o grupo de personas, o entidad no gubernamental legalmente reconocida en uno o más Estados miembros de la Organización, puede presentar a la Comisión peticiones que contengan denuncias o quejas de violación de esta Convención por un Estado parte[8].

Si bien los individuos y las entidades no gubernamentales pueden presentar denuncias contra un Estado parte, también pueden hacerlo los demás Estados parte[9]. Sin embargo, para que la Comisión pueda conocer la denuncia de un Estado parte, se requiere que el Estado denunciado haya aceptado previamente esta competencia de la Comisión[10].

3.1 Las normas acerca de presentación de denuncias[11] exigen que ellas estén debidamente fundamentadas, y conceden diversas posibilidades de

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2. También por supuesto, dictando disposiciones que no estén en conformidad con lo que de él exigen sus obligaciones dentro de la Convención. Si esas normas se han adoptado de acuerdo con el ordenamiento jurídico interno o contra él, es indiferente para estos efectos ... El hecho de que se trate de "leyes internas" y de que ésas hayan sido"adoptadas de acuerdo con lo dispuesto por la Constitución", nada significa si mediante ellas se violan cualesquiera de los derechos y libertades protegidos ... En el ámbito internacional lo que interesa determinar es si una "ley resulta violatoria de las obligaciones internacionales asumidas por un Estado en virtud de un tratado"... (Corte IDH: OC-13/93, 16 de julio de 1993, pág. 8).

8 Artículo 44 de la Convención Americana sobre Derechos Humanos.

9 Artículo 45 de la Convención. En el presente año (1995), por primera vez se presentó un contencioso interestatal ante Estados parte de la Convención Americana sobre Derechos Humanos, Tanto Perú como Ecuador presentaron denuncias recíprocas ante la Comisión Interamericana de Derechos Humanos, alegando violaciones a la Convención, ocurridas durante el enfrentamiento armado que sostuvieran durante los meses de enero y febrero de 1995, en la zona de frontera pendiente de demarcar.

10 Esta diferenciación pone de manifiesto la prioridad que la Convención concede al individuo en la defensa de los derechos humanos lesionados. Y en la práctica las denuncias ante la Comisión solo son presentadas por los individuos y las organizaciones no gubernamentales.
A la fecha, Argentina, Chile, Colombia, Costa Rica, Ecuador, Jamaica, Perú, Uruguay y Venezuela, han reconocido la competencia de la Comisión para recibir denuncias de un Estado parte contra otro Estado parte, de conformidad con el artículo 45 de la Convención, por tiempo indefinido y bajo condición de reciprocidad.

11 Artículo 48.1 de la Convención.

solución, dentro del respeto a los derechos humanos proclamados por la Convención.

En efecto, la Convención otorga a la Comisión la facultad de reconocer la"admisibilidad" de las denuncias, pudiendo admitirlas o desestimarlas según éstas cumplan o no los requisitos exigidos por la Convención[12].

Cuando una denuncia es admitida a trámite, la Comisión notifica al Estado denunciado y le concede un plazo para dar una respuesta; el gobierno tiene aquí la oportunidad de dar una explicación satisfactoria o resolver prontamente el caso; y de ser así, la Comisión procede a archivar el expediente.

En efecto, recibida la respuesta (o vencido el plazo sin que el Estado denunciado responda), la Comisión verifica "si existen o subsisten los motivos de la petición o comunicación"[13]. Adicionalmente, la Comisión puede, "sobre la base de una prueba sobreviniente", declarar la "inadmisibilidad" o "improcedencia" de una denuncia[14]. Ciertamente, esta no es una facultad que la Comisión pueda ejercer en forma arbitraria, se requeriría prueba de que, por ejemplo, el caso está pendiente de otro procedimiento de arreglo internacional[15] o, que el caso haya sido resuelto por los tribunales internos, como lo señaló la Comisión al indicar:

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12 Los requisitos de admisibilidad están señalados en el artículo 46 de la Convención: a) que se haya agotado la jurisdicción interna conforme a los principios del Derecho Internacional generalmente reconocidos; b) que sea presentada dentro de los seis meses, a partir de la fecha en que el presunto lesionado haya sido notificado de la decisión definitiva; c) que la materia de la denuncia no esté pendiente de otro procedimiento de arreglo internacional; y, d) que si la denuncia es interpuesta por una persona, grupo de personas u organismo no gubernamental, la petición contenga el nombre, la nacionalidad, la profesión, el domicilio y la firma de la persona o personas o del representante legal de la entidad que somete la petición.

13 Artículo 48.1.b) de la Convención.

14 Artículo 48.1.c) de la Convención.

15 La Comisión se declara competente para conocer las denuncias individuales que se le presenten siempre que éstas no se encuentren pendientes de otro procedimiento de arreglo internacional, ni sean reproducción de petición anterior ya examinada por la Comisión (Inf.8/93, Considerando 7. Inf. Anual 1992-93, pág. 116). La Comisión, ha declarado fuera de su conocimiento, los casos que le fueron sometidos y que habían sido objeto de pronunciamiento por el Comité de Derechos Humanos del Pacto de Derechos Civiles y Políticos de las Naciones Unidas; sin embargo, el estudio por parte del Grupo de Trabajo sobre Desapariciones Forzadas o Involuntarias de las Naciones Unidas no constituye circunstancia que impida que la CIDH pueda conocer y pronunciarse sobre los hechos a que ella se refiere (Inf.1/92, Considerando 1.d. Inf. Anual 1991, pág. 42).

que la petición señalaba que las disposiciones legales del Estado denunciado no recogían adecuadamente determinadas normas de la Convención pero, luego de presentada la denuncia, un tribunal del Estado denunciado reconoció la preeminencia constitucional de la Convención Americana sobre la norma interna cuestionada y la inconstitucionalidad de esta última[16].

Solo después de cumplidos estos requisitos, la Comisión pasa a estudiar el fondo del asunto mediante el examen de pruebas, inspecciones *in loco* (con anuencia del país visitado si éstas proceden) y celebración de audiencias[17].

3.2 No obstante, la Convención contempla otra posibilidad de arreglo del caso, señalando que la Comisión

se pondrá a disposición de las partes interesadas, a fin de llegar a una solución amistosa del asunto fundada en el respeto a los derechos humanos reconocidos en esta Convención[18].

Y el artículo 45 del Reglamento de la Comisión precisa que podrá hacerlo "en cualquier etapa del examen de una petición".

La Convención no es un Código Penal. Y sus órganos de control –la Comisión y la Corte– tampoco son Tribunales penales. El objeto de la Convención es garantizar el respeto de los derechos humanos, así como el restablecimiento de su vigencia en caso de violación, y al hacerlo, la Convención establece la responsabilidad del Estado[19,20].

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16 Informe 24/92 de 2 de octubre de 1992, recaído en los Casos acumulados 9.328, 9.329, 10.131, 10.230, 10.429 y 10.469 (Costa Rica); en Informe Anual de la Comisión Interamericana de Derechos Humanos 1992-1993 pág. 74).

17 Artículo 48.1.d) de la Convención y Artículo 43 del Reglamento de la Comisión.

18 Artículo 48.1.f) de la Convención Americana sobre Derechos Humanos.

19 La Convención, que fue abierta a la firma el 22 de noviembre de 1969, no establece responsabilidades penales internacionales del individuo, ni impone sanciones al individuo infractor; la determinación de tales responsabilidades y la aplicación de sanciones, queda dentro de la competencia del Estado parte declarado responsable. Sin embargo, la tendencia actual del derecho internacional es la de establecer la responsabilidad personal internacional de los individuos que cometan crímenes de lesa humanidad. Algunos de estos delitos han sido declarados crímenes internacionales mediante tratados; en este caso, cualquier Estado parte en los Convenios correspondientes puede juzgar a las personas acusadas de la comisión de tales crímenes: es el caso del genocidio y la tortura, así como de los crímenes de guerra, crímenes contra la paz y crímenes contra la humanidad. En otros casos, de delitos aún no declarados como crímenes internacionales por Tratados, como algunos casos de violaciones

Y para alcanzar este restablecimiento, como hemos visto, la Convención contempla diversos medios de solución de las controversias que puedan presentarse, uno de los cuales es la conciliación.

Otros medios de solución previstos por la Convención son i) Recomendaciones de la Comisión al Gobierno interesado y ii) La solución judicial, ante la Corte Interamericana de Derechos Humanos; sin embargo, esta última solo procede en el caso de los Estados que han aceptado expresamen-

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graves de los derechos humanos, la tendencia del derecho internacional es la de aplicar el principio de universalidad, en virtud del cual, un Estado puede juzgar a personas acusadas de tales delitos, aún cuando no tengan su nacionalidad y el crimen o crímenes hayan sido cometidos fuera de su territorio. También dentro de esta tendencia de juzgamiento de los acusados de crímenes de lesa humanidad, y aun cuando no existen tribunales penales internacionales de carácter permanente, el Consejo de Seguridad ha constituido un Tribunal internacional para el juzgamiento de quienes hayan cometido crímenes de guerra en la ex-Yugoslavia, y otro Tribunal internacional similar para el caso de Ruanda. El fundamento para la constitución de estos tribunales penales internacionales, es que la comisión de crímenes de guerra pone en peligro la paz y la seguridad internacionales.

20 En relación con la responsabilidad del individuo, la Corte ha señalado en la OC-14/94, de 9 de diciembre de 1994, lo siguiente:
"52. El derecho internacional puede conceder derechos a los individuos e, inversamente, determinar que haya actos u omisiones por los que son criminalmente responsables desde el punto de vista de ese derecho. Esa responsabilidad es exigible en algunos casos por tribunales internacionales. Lo anterior representa una evolución de la doctrina clásica de que el derecho internacional concernía exclusivamente a los Estados.
53. Sin embargo, actualmente la responsabilidad internacional puede ser atribuida solamente por violaciones consideradas como delitos internacionales en instrumentos que tengan ese mismo carácter, tales como los crímenes contra la paz, los crímenes de guerra y los crímenes contra la humanidad o el genocidio que, naturalmente, afectan también derechos humanos específicos.
56. En lo que concierne a los derechos humanos protegidos por la Convención, la competencia de los órganos establecidos por ella se refiere exclusivamente a la responsabilidad internacional del Estado y no a la de los individuos. Toda violación de los derechos humanos por agentes o funcionarios de un Estado es, como ya lo dijo la Corte, responsabilidad de éste (Caso Velásquez Rodríguez, Sentencia de 29 de julio de 1988, Serie C N 4, párr. 170; Caso Godínez Cruz, Sentencia de 20 de enero de 1989, Serie C N 5, párr. 179). Si constituyera, adicionalmente, un delito internacional generará, además, responsabilidad individual ..."
Los párrafos citados de las Sentencias dictadas en los casos Velásquez Rodríguez y Godínez Cruz, dicen en su parte pertinente:
"... es un principio de Derecho internacional que el Estado responde por los actos de sus agentes realizados al amparo de su carácter oficial y por las omisiones de los mismos aun si actúan fuera de los límites de su competencia o en violación del derecho interno".

te la competencia contenciosa de la Corte conforme al artículo 62 de la Convención[21,22].

Ciertamente, el procedimiento de conciliación no es nuevo en el Derecho internacional. Está previsto en la Convención Europea de Derechos Humanos, de la que nos ocuparemos más adelante. Y está mencionado en el caso de las "Zonas Libres de Alta Silesia y Gex"[23], en que la Corte Permanente de Justicia Internacional señaló:

> Judicial settlement of international disputes, with a view to which the Court has been established, is simply and alternative to the direct and friendly settlement of disputes between the Parties[24],

y agregó:

> consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement[25].

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21 El artículo 62 de la Convención dice:
"Artículo 62.
1. Todo Estado parte puede, en el momento del depósito de su instrumento de ratificación o adhesión de esta Convención, o en cualquier momento posterior, declarar que reconoce como obligatoria de pleno derecho y sin convención especial, la competencia de la Corte sobre todos los casos relativos a la interpretación o aplicación de esta Convención.
2. La declaración puede ser hecha incondicionalmente, o bajo condición de reciprocidad, por un plazo determinado o para casos específicos. Deberá ser presentada al Secretario General de la Organización, quien transmitirá copias de la misma a los otros Estados Miembros de la Organización y al Secretario de la Corte.
3. La Corte tiene competencia para conocer de cualquier caso relativo a la interpretación y aplicación de las disposiciones de esta Convención que le sea sometido, siempre que los Estados partes en el caso hayan reconocido o reconozcan dicha competencia, ora por declaración especial, como se indica en los incisos anteriores, ora por convención especial.

22 El Comunicado de Prensa de la Corte Interamericana de Derechos Humanos CDH-CP5/95, de 19 de junio de 1995, señala que, a la fecha, 17 Estados parte en la Convención han aceptado la competencia contenciosa de la Corte: Argentina, Barbados, Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panamá, Paraguay, Perú, Suriname, Trinidad y Tobago, Uruguay y Venezuela.

23 Orden N° 22, de 19 de agosto de 1929.

24 Citada por Lauterpacht, Sir Hersch "The Development of International Law by the International Court", Grotius Publications Limited, Cambridge, 1982, pág. 236.
"el arreglo judicial de controversias internacionales, para cuyos efectos ha sido establecida la Corte, es simplemente una alternativa al arreglo directo y amistoso entre las partes".

25 *Ibíd.*
"Consecuentemente, la Corte debe facilitar, hasta donde sea compatible con su Estatuto, ese arreglo directo y amistoso".

3.3. Este procedimiento ha sido desarrollado en el Reglamento de la Comisión[26], el cual establece que éste puede constituirse en "órgano de solución amistosa"[27], por iniciativa propia o a solicitud del denunciante o del Estado denunciado; sin embargo, si una de las partes solicita la iniciación del procedimiento de conciliación, la Comisión debe consultar a la otra parte y pedirle su aceptación expresa a esa vía[28]; de modo análogo, aunque el Reglamento no lo indica, es obvio que si la Comisión se pone "a disposición de las partes" por iniciativa propia, para iniciar el procedimiento de conciliación, las partes deben manifestar su "disposición", es decir, dar también su aceptación expresa a esta vía.

De ello se desprende que el procedimiento de conciliación, es facultativo para las partes. En efecto, la Corte ha señalado que

> En un procedimiento de solución amistosa es indispensable la intervención y decisión de las partes involucradas ... (la Comisión) solamente podría sugerir a las partes entablar las conversaciones enderezadas a la solución amistosa pero no podría, por carecer de poder para ello, decidirla. La Comisión debe propiciar el acercamiento pero sus resultados no dependen de ella. De alcanzarse el acuerdo debe ella cerciorarse de que los derechos humanos hayan sido adecuadamente defendidos[29].

La Corte enfatiza que "la Comisión debe propiciar el acercamiento" pero, a renglón seguido, agrega que la Comisión carece de facultad para imponer el procedimiento: A ningún fin útil serviría forzar a ambas partes o a una de ellas a iniciar este mecanismo contra su voluntad, puesto que la Comisión carece de atribuciones para dictar recomendaciones obligatorias dentro del procedimiento de conciliación.

3.4 En síntesis, para que la Comisión se ofrezca como "órgano de solución amistosa", deben quedar cumplidos dos requisitos: a) que estén "precisadas suficientemente las posiciones y pretensiones de las partes", lo que significa que el procedimiento solo puede iniciarse después que el gobierno haya dado respuesta expresa a la denuncia; y, b) que a juicio de la

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26 Artículo 45 del Reglamento de la Comisión.

27 Parece identificarse la "conciliación", que es el procedimiento, con la "solución amistosa", que es su objetivo.

28 Artículo 45.3 del Reglamento de la Comisión.

29 Caso Caballero Delgado y Santana, Excepciones Preliminares, Sentencia de 21 de enero de 1994, párr. 30.

Comisión "el asunto por su naturaleza sea susceptible de solucionarse mediante el procedimiento de solución amistosa".

La "naturaleza" del caso no está dada solo por el hecho o hechos que motivan la denuncia, es decir, por la violación de derechos humanos atribuida al Estado denunciado, sino también por la actitud de las partes.

En los casos 10.288, 10.310, 10.436, 10.496, 10.631 y 10.711 planteado por 13 ciudadanos argentinos contra Argentina, por haber sido detenidos ilegalmente por la Junta Militar que gobernó Argentina entre 1976 y 1983 por períodos que varían de tres meses a siete años sin condena alguna, bajo la acusación de ser subversivos, el Gobierno Argentino, en su respuesta a la denuncia, objetó la admisibilidad de las peticiones, basándose en la inaplicabilidad *ratione temporis* de la Convención Americana y sosteniendo que la petición era inadmisible "por versar sobre hechos y situaciones acaecidos con anterioridad a la vigencia de la Convención Americana en el país".

Sin embargo, con posterioridad, durante la audiencia concedida a las partes el 11 de mayo de 1990, los representantes de Argentina informaron que el Gobierno del Presidente Carlos Ménem, no estaba necesariamente en desacuerdo con los peticionarios. Indicaron que el propio Presidente Ménem había estado detenido por razones políticas durante el Gobierno Militar, que simpatizaba con la situación de los peticionarios y que quería brindarles una compensación adecuada. La Comisión Interamericana, de conformidad con lo establecido en el artículo 48.1.f) de la Convención, se puso a disposición de las partes a fin de llegar a una solución amistosa del asunto fundada en el respeto a los derechos humanos[30].

En el Caso 10.289 (Costa Rica), presentado por el señor Sheik Kadir Sahib Tajudeen, nacional de Singapur residente en Costa Rica, si bien la Comisión admitió a trámite la denuncia, no aceptó el pedido del reclamante para iniciar el procedimiento de conciliación y, finalmente, desestimó la denuncia, señalando:

> Comprueba la Comisión que el peticionante ha formulado continuamente presuntos "hechos nuevos" añadiendo argumentos y denuncias extemporáneas que han causado la prolongación más allá de lo razonable de ese caso y la consiguiente postergación de su decisión definitiva, circunstancias que no puede dejar de señalar porque hacen a la probidad y buena fe que deben observar las partes de los procedimientos ante

30 Inf. 1/93, párr. 2. Inf. Anual 1992-93, pág. 36-40.

esta Comisión y que no hizo antes para que no sea dado aducir limitación al derecho de defensa[31].

Por otra parte, si después de haber quedado precisadas "las posiciones y pretensiones de las partes", una de estas propone la conciliación y la otra acepta el procedimiento, no habría razón para que la Comisión se negara a iniciarla.

La aceptación debe ser expresa. La falta de respuesta no puede ser considerada como un aceptación. En este sentido, debe tenerse en cuenta que la Comisión ha señalado en el Caso 10.113 (Guatemala), referente al secuestro de Domingo Morente Gómez, que

> ...la falta de respuesta de parte del Gobierno no permite que se aplique en este caso el procedimiento de solución amistosa (aquí se identifica el procedimiento de conciliación, con su objetivo, la solución amistosa)[32].

En algunos casos, la Comisión ha descartado de plano la solución amistosa por resultar innecesaria. En los casos 9328, 2329, 2742, 9884, 10.131, 10.193, 10.230, 10.429, 10.469 sobre Derecho de Revisión de fallo penal, planteados contra Costa Rica, las peticiones alegaban que determinadas normas del Código de Procedimientos Penales de Costa Rica impedían la revisión posterior de condenas penales menores a cierta extensión del período de condena, inhabilitación, internación de seguridad o multa, lo que impedía la vigencia en dicho país del artículo 8.2.h de la Convención. Al respecto, la Comisión dijo:

> 29. Que como surge del contenido de las Sentencias de la Corte Suprema mencionadas, y a raíz de las mismas, el régimen legal costarricense abrió la posibilidad del recurso de casación para casos como los denunciados, por lo que se hace innecesario el procedimiento de solución amistosa (sic) previsto en el artículo 48 de la Convención[33].

En otros casos, la Comisión ha descartado la conciliación en consideración a que los hechos denunciados configuran crímenes internacionales como la desaparición forzada de personas, las ejecuciones extrajudiciales,

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31 Informe 2/92, Considerando 14.b) de 4 de febrero de 1992. En Informe Anual de 1992, pág. 80.

32 Informe 26/91, Considerando 2, en Informe Anual de la Comisión Interamericana de Derechos Humanos de 1991, pág. 179.

33 Inf. 24/92. Inf. Anual 1992-93, pág. 86.

tortura, etc. Así, en los informes 13-92 y 14-92, ambos de 4 de febrero de 1992, recaídos en los casos 10.399 y 10.447 (ambos de El Salvador), la Comisión señala que

> no es aplicable el procedimiento de solución amistosa (sic) por la naturaleza misma de los hechos denunciados (desapariciones forzadas y ejecuciones extrajudiciales)[34].

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34 Informe Anual de la Comisión Interamericana de Derechos Humanos 1991, pág. 155 y 159. En otros Informes, la Comisión ha declarado "a) ... los hechos motivo de la denuncia [captura y posterior desaparición] no son, por su naturaleza susceptibles de ser resueltos, a través de la aplicación del procedimiento de solución amistosa y de que las partes no solicitaron ante la Comisión este procedimiento, previsto en el artículo 48.1.f. de la Convención y en el artículo 45 del Reglamento de la CIDH. b) ... al no ser aplicable el procedimiento de solución amistosa, la Comisión debe dar cumplimiento a lo dispuesto en el Artículo 50.1 de la Convención, emitiendo su opinión y conclusiones sobre el asunto sometido a su consideración. Inf. 1/92, Considerado 2. Inf. Anual 1991. pág. 43. "...al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f. de la Convención Americana, por la naturaleza de los hechos denunciados [detención/captura y desaparición], la Comisión debe dar cumplimiento a lo dispuesto en el Artículo 50.1 de la Convención, emitiendo sus conclusiones y recomendaciones sobre la denuncia sometida a su consideración". Inf. 3/92, Considerando 11. Inf. Anual 1991, pág. 88] Inf. 4/92, Considerando 10. Inf. Anual 1991, pág. 94; Inf. 7/92, considerando 11, Inf. Anual 1991, pág. 113; Inf. 12/92, Considerando 12. Inf. Anual 1991, pág. 146; Inf. 15/92, Considerando 13, Inf. Anual 1991, pág. 168. "... al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f. de la Convención Americana, por la naturaleza de los hechos denunciados [detención y posterior muerte], la Comisión debe dar cumplimiento a lo dispuesto en el Artículo 50.1 de la Convención, emitiendo sus conclusiones y recomendaciones sobre la denuncia sometida a su consideración". Inf. 5/92, Considerando 9. I Inf. Anual 1991, pág. 101; Inf. 6/92, considerando 9. Inf. Anual 1991, pág. 108. "...al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f de la Convención Americana, por la naturaleza de los hechos denunciados [secuestro, tortura y posterior privación de la vidá], la Comisión debe dar cumplimiento a lo dispuesto en el Artículo 50.1 de la Convención, emitiendo su conclusiones y recomendaciones sobre la denuncia sometida a su consideración". Inf. 8/92, Considerando 14. Inf. Anual 1991, pág.124.
"... al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f de la Convención Americana, por la naturaleza de los hechos denunciados [secuestro y tortura], la Comisión debe dar cumplimiento a lo dispuesto en el Artículo 50.1 de la Convención, emitiendo sus conclusiones y recomendaciones sobre la denuncia sometida a su consideración". Inf. 9/92, Considerando 10.Inf. Anual 1991, pág.129; Inf. 10/92, Considerando 9. Inf. Anual 1991, pág.135; Inf. 14/92, Considerado 7. Inf. Anual 1991, pág.159. "...al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f de la Convención Americana, por la naturaleza de los hechos denunciados [ejecución extrajudicial], la Comisión debe dar cumplimiento a lo dispuesto en el Artículo 50.1 de la Convención, emitiendo sus conclusiones y recomendaciones sobre la denuncia sometida a su consideración". Inf. 111/92, Considerando 9. Inf. Anual 1991, pág. 140 "...al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f. de la Convención Americana, por la naturaleza de los hechos denunciados [detención, tortura y ejecución extrajudicial], la Comisión debe dar cumplimiento a lo dispuesto en el Artículo 50.1 de la Conven-

Asimismo, en el Caso 10.563 (Perú), la Comisión señaló que tampoco es aplicable el procedimiento cuando

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ción, emitiendo sus conclusiones y recomendaciones sobre la denuncia sometida a su consideración". Inf. 13/92, Considerando 8. Inf. Anual 1991, pág. 155. "Los hechos motivo de la denuncia [ejecución extrajudicial] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación del procedimiento de solución amistosa y de que las partes no solicitaron ante la Comisión este procedimiento, previsto en el artículo 48.1.f de la Convención y en el artículo 45 del Reglamento de la CIDH". Inf. 32/92, Considerando 3. Informe Anual 1992-93, pág. 61. "a) Que los hechos motivo de la denuncia [captura y desaparición] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación del procedimiento de solución amistosa y de que las partes no solicitaron ante la Comisión este procedimiento, previsto en el artículo 48.1.f. de la Convención y en el artículo 45 del Reglamento de la CIDH". Inf. 3 3/92, Considerando 3. Informe Anual 1992-93, pág.76. "...al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f de la Convención Americana sobre Derechos Humanos, por la naturaleza misma de los hechos denunciados [asesinato, persecución del testigo principal]", Inf. 8/93, Considerando párr. 2. Inf. Anual 1992-93, pág. 117. "15. Que al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48, inc. 1.f de la Convención Americana sobre Derechos Humanos, por la naturaleza misma de los hechos denunciados [desaparición de ocho personas por acción del Ejército], y por la ausencia de respuesta de parte del Gobierno, la Comisión debe dar cumplimiento a lo dispuesto en el artículo 50...". Inf. 9/93, Considerando. Inf. Anual 1992-93, pág.134. "12. Que al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f de la Convención Americana sobre Derechos Humanos, por la naturaleza misma de los hechos denunciados [detención y posterior desaparición], la Comisión debe dar cumplimiento a lo dispuesto en el artículo 50 . ."Inf. 10/93, Considerando. Inf. Anual 1992-93, pág.145. "11. Que al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f de la Convención Americana sobre Derechos Humanos, por la naturaleza misma de los hechos denunciados [detención y desaparición Falconieri Saravia Castillo], la Comisión debe dar cumplimiento a lo dispuesto en el artículo 50..." Inf. 11/93, Considerando. Inf. Anual 1992-93, pág.153. "15. Que al no ser aplicable el procedimiento de solución amistosa previsto en el artículo 48.1.f de la Convención Americana sobre Derechos Humanos, por la naturaleza misma de los hechos denunciados [detención y desaparición], la Comisión debe dar cumplimiento a lo dispuesto en el artículo 50. ." Inf. 12/93, Considerando, Inf. Anual 1992-93.
pág. 160. "... los hechos motivos de la denuncia [detención arbitraria y posterior desaparición de la solución amistosa y de que las partes no solicitaron ante la Comisión este procedimiento previsto en el artículo 48.1.f de la Convención y en el artículo 45 del Reglamento de la CIDH". Inf. 22/93, Considerando 3.a. Inf. Anual 1993, pág.82. "... los hechos motivo de la denuncia [detención ilegal y posterior homicidio] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa, tampoco las partes no solicitaron ante la Comisión este procedimiento de solución previsto en el artículo 48.1.f de la Convención y en el artículo 45 del Reglamento de la CIDH". Inf. 23/93. Considerando 3.a. Inf. Anual 1993, pág. 96. "...los hechos motivos de la denuncia [el irrecuperable derecho a la vida y la irrevisable absolución contra evidencia que los priva para siempre del derecho a que se les haga justicia] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa, y de que las partes no solicitaron ante la Comisión este procedimiento previsto en el artículo 48.1.f de la Convención y en el artículo 45 del Reglamento de la CIDH". Inf. 1/94, Considerando 5.a. Inf. Anual 1993, pág.118.

...las autoridades han informado a los familiares de la señora Ccallocunto que ésta "no ha sido detenida en ninguna oportunidad ni bajo ninguna circunstancia por personal Militar del Frente N°4". No resultaría ilógico inferir de la respuesta que alguna otra unidad o dependencia militar o

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"... los hechos motivos de la denuncia [detención arbitraria y posterior desaparición] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa tampoco las partes no solicitaron ante la Comisión este procedimiento de solución previsto en el artículo 48.1.f de la Convención y en el artículo 45 del Reglamento de la CIDH". Inf. 24/93, Considerando 3.a. Inf. Anual 1993, pág. 137. "... los hechos motivos de la denuncia [el irrecuperable derecho a la vida y la irrevisable absolución contra la evidencia que los priva para siempre del derecho a que se les haga justicia] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa y de que las partes no solicitaron ante la Comisión este procedimiento previsto en el artículo 48.1.f de la Convención y en el artículo 45 del Reglamento de la CIDH". Inf. 2/94, Considerando 5.a. Inf. Anual 1993, pág. 159. "... los hechos motivos de la denuncia [pérdida de la vida] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa, ni el Gobierno ni los peticionarios solicitaron ante la Comisión este procedimiento, previsto en el artículo 48.1.f de la Convención y el artículo 45 del Reglamento de la CIDH". Inf. 3/94, Considerando 4.a. Inf. Anual 1993, pág. 170. "... los hechos motivos de la denuncia [desaparición forzada de personas] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa, por otra parte ni el Gobierno ni los peticionarios solicitaron ante la Comisión este procedimiento, previsto en el artículo 48.1.f de la Convención y el artículo 45 del Reglamento de la CIDH". Inf. 4/94, Considerando 4.a. Inf. Anual 1993, pág. 181. "... los hechos motivos de la denuncia [detención, tortura y amenaza de desaparición] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa... ni el Gobierno ni los peticionarios solicitaron ante la Comisión este procedimiento, previsto en el artículo 48.1.f de la Convención y el artículo 45 del Reglamento de la CIDH". Inf. 5/94, Considerando 4.a. Inf. Anual 1993, pág. 186, "... los hechos motivos de la denuncia [detención de menor de edad, malos tratos físicos y sicológicos, amenaza de muerte] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa... ni el Gobierno ni los peticionarios solicitaron ante la Comisión este procedimiento, previsto en el artículo 48.1.f de la Convención y el artículo 45 del Reglamento de la CIDH". Inf. 7/94, Considerando 4.a. Inf. Anual 1993, pág. 204. "... los hechos motivos de la denuncia [muerte de niña y atentado contra la ambulancia que fue trasladada] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa... ni el Gobierno ni los peticionarios solicitaron ante la Comisión este procedimiento, previsto en el artículo 481.f de la Convención y el artículo 45 del Reglamento de la CIDH". Inf. 8/94, Considerando 4.a. Inf. Anual 1993, pág. 216. "... los hechos motivos de la denuncia [detenciones arbitrarias, torturas y malos tratos] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa... y la negativa de quienes ejercen el poder en Haití de aportar información..." Inf. 9/94, Considerando III.18. Inf. Anual 1993, pág. 315. "... los hechos motivos de la denuncia [desapariciones y muertes] no son, por su naturaleza susceptibles de ser resueltos a través de la aplicación de la solución amistosa ... y la negativa de quienes ejercen el poder en Haití de aportar información..." Inf. 10/94, Considerando 17. Inf. Anual 1993, pág.322. "... al no ser aplicable el procedimiento de solución amistosa establecido en el artículo 48.1.f de la Convención y en el artículo 45 del Reglamento de la CIDH dada la naturaleza del caso [denuncia sobre la muerte de...]" Inf. 11/94, Considerando III.19. Inf. Anual 1993, pág.332.

policial, distinta del "Frente N° 4", pudo haber secuestrado a la víctima, puesto que sólo se niega la detención de la señora Ccallocunto por personal militar de ese "Frente". Además, por su propia naturaleza, los hechos denunciados (detención-desaparición) no son, a juicio de la Comisión, susceptibles de ser resueltos mediante el procedimiento de solución amistosa (sic)[35].

3.5 Un punto adicional que conviene precisar: ni la Convención ni el Reglamento de la Comisión señalan el plazo dentro del cual las partes deben responder a la Comisión sobre la aceptación de esta vía[36]: desde luego, la Comisión puede llenar este vacío señalando el plazo al consultar a las partes sobre su aceptación para iniciar el procedimiento.

4. Jurisprudencia sobre el procedimiento de conciliación

La Corte Interamericana de Derechos Humanos ha tratado sobre la naturaleza y sobre la obligatoriedad o no de este procedimiento en diversos casos contenciosos.

4.1 Caso Velásquez Rodríguez

Así, en el caso Velásquez Rodríguez[37], el Estado demandado planteó una excepción preliminar, aduciendo que la Comisión había omitido el procedimiento y agregando que este es un trámite que la Comisión debe seguir obligatoriamente y cuya omisión, no sólo vicia la tramitación de la denuncia, sino que le impide presentar una demanda ante la Corte[38]; el Gobierno sostuvo también que las condiciones establecidas por el artículo 45 del Reglamento "son inaplicables" porque contradicen lo dispuesto por la Convención que tiene mayor jerarquía[39]; la Comisión, en su respuesta,

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35 Informe 37/93 de 7 de octubre de 1993, Análisis 1(d), párr. 2. En Informe Anual de la Comisión Interamericana de Derechos Humanos de 1993, pág. 394.

36 Esto ya fue señalado por César Sepúlveda, Ob. cit. pág.242.

37 La demanda fue interpuesta por la Comisión, contra Honduras, por la desaparición del señor Velásquez Rodríguez.

38 Caso Velásquez Rodríguez, Excepciones Preliminares, Sentencia de 26 de junio de 1987, párr. 42.

39 El Artículo 45.2 del Reglamento de la Comisión, dice:
"Artículo 45.2 Para que la Comisión ofrezca a las partes actuar como órgano de solución amistosa del asunto será necesario se hayan precisado suficientemente las posiciones y pretensiones de éstas; y que, a juicio de la Comisión, el asunto por su naturaleza sea susceptible de solucionarse mediante la utilización del procedimiento de solución amistosa".

expresó que la solución amistosa "no tiene carácter imperativo"[40] y, además, que en el caso Velásquez Rodríguez no fue posible realizarla pues los hechos estaban "imperfectamente definidos por falta de cooperación del Gobierno" y porque este no había "reconocido ninguna responsabilidad"; adicionalmente expresó la Comisión que los derechos violados, relativos a la vida, a la integridad y libertad personales, que fueron la materia del caso, "no pueden ser restituidos en su vigencia a través de la conciliación"[41]. Planteadas las posiciones de las partes, la Corte pasó a pronunciarse sobre la obligatoriedad o no de la conciliación señalando:

> Desde un punto de vista literal, la frase utilizada por el artículo 48.1.f) de la Convención, la Comisión "se pondrá a disposición de las partes interesadas, a fin de llegar a una solución amistosa", parece establecer un trámite obligatorio. Sin embargo, la Corte considera que una interpretación, de acuerdo con el contexto de la Convención, lleva al convencimiento de que esa actuación de la Comisión debe intentarse solo cuando las circunstancias de una controversia determinen la necesidad o la conveniencia de utilizar este instrumento, supuestos sujetos a la apreciación de la Comisión[42].

Conforme al criterio de la Corte, el procedimiento de conciliación no es forzoso. La Comisión solo debe intentarlo cuando las circunstancias de un caso "determinen la necesidad o la conveniencia" de utilizarlo. Y es la Comisión la que debe apreciar si el procedimiento resulta "necesario" o "conveniente" en un caso determinado.

Seguidamente la Corte, citando el artículo 45.2 del Reglamento, precisó que la Comisión posee

> facultades discrecionales, pero de ninguna manera arbitrarias, para decidir, en cada caso, si resulta adecuado o conveniente el procedimiento de solución amistosa (sic) para resolver el asunto en beneficio del respeto a los derechos humanos[43],

con lo cual desestima el argumento del Gobierno sobre la inaplicabilidad del referido artículo 45.2 pero, al mismo tiempo, señala que las facultades de la Comisión para decidir o no la iniciación de procedimiento no son

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40 Caso Velásquez Rodríguez, Excepciones Preliminares, párr. 43.

41 *Ibíd*, párr. 43.

42 *Ibíd*, párr. 44.

43 *Ibíd*, párr. 45.

"arbitrarias" sino "discrecionales": Es decir, que si la Comisión omite el procedimiento, debe fundamentar adecuadamente su decisión.

La Corte pasa luego a determinar si la omisión del procedimiento, en el caso en estudio, estaba o no justificada; la Corte fija su posición diciendo:

> Con independencia de si en este caso se han precisado o no las posiciones y pretensiones de las partes y del grado de cooperación del Gobierno con la Comisión[44];

parece ello señalar que tales argumentos de la Comisión no fueron tomados en cuenta por la Corte, y que ésta basaba su decisión solo en el siguiente razonamiento:

> cuando se denuncia la desaparición forzada de una persona por acción de las autoridades de un Estado y este niega que dichos actos se han realizado, resulta muy difícil lograr un acuerdo amistoso que se traduzca en el respeto de los derechos a la vida, a la integridad y libertad personales[45];

es decir, la Corte consideró que el impedimento para la solución amistosa estaba en la negativa del Gobierno a reconocer su responsabilidad en la desaparición forzada del señor Velásquez Rodríguez por acción de las autoridades del Estado.

Sin embargo, la Corte concluyó que

> tomando en consideración todas las circunstancias existentes en el presente caso, entiende que no es objetable la actuación de la Comisión a propósito de la solución amistosa[46].

Dentro de las "circunstancias existentes en el presente caso" estaba el hecho de que no habían quedado precisadas "las posiciones y pretenciones de las partes y el grado de cooperación del Gobierno con la Comisión"; y como antes la Corte había indicado que expresaba su decisión "con independencia" de estas razones, puede decirse que no las tomó en cuenta en forma específica sino solo como parte de un contexto general y que su decisión se basó, esencialmente, en la negativa del Gobierno para reconocer su responsabilidad en la desaparición forzada de la víctima, lo que hacía

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44 *Ibíd*, párr. 46.

45 *Ibídem*.

46 *Ibídem*.

"muy difícil lograr un acuerdo amistoso". Siendo así, la Corte determinó que "no es objetable la actuación de la Comisión a propósito de la solución amistosa"[47].

4.2 Casos Godínez Cruz, Fairén Garbi y Solís Corrales

Términos análogos sobre el indicado procedimiento contienen las Sentencias pronunciadas en las Excepciones Preliminares en el Caso Godínez Cruz[48] y en el Caso Fairén Garbi y Solís Corrales[49].

4.3 Este criterio de la Corte fue luego invocado por la Comisión en el informe que emitió en los Casos acumulados 10.147, 10.181, 10.240, 10.262, 10.309 y 10.311 (Argentina), donde justificó su omisión en intentar la solución amistosa no solicitada por las partes, diciendo:

> Con respecto a la solución amistosa, la Comisión hace suyo lo sostenido por la Corte Interamericana en el Caso Velásquez Rodríguez, cuando afirma: "esa actuación de la Comisión debe intentarse solo cuando las circunstancias de una controversia determinen la necesidad o la conveniencia de utilizar este instrumento, supuestos sujetos a la apreciación de la Comisión" (Corte I.D.H., Caso Velásquez Rodríguez, Excepciones Preliminares, sentencia de 26 de junio de 1987; Serie C N° 1, párr. 44). En la especie, en que la cuestión es parte de una política de Gobierno que el Estado aún sustenta, la Comisión es de opinión que una solución amistosa no es necesaria ni procedente[50].

En estos casos, los peticionarios alegaron que las leyes No.23.492 de 24 de diciembre de 1986 y No. 23.521 de 8 de junio de 1987, que enervaban el derecho de las víctimas de continuar los juicios destinados a comprobar los delitos por violación de los derechos humanos, identificar a los autores e imponer sanciones, violaba, entre otros, el derecho a la Protección Judicial (art. 25) y las garantías judiciales (art. 8).

Igualmente, en los casos 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 y 10.375 (Uruguay), los peticionantes denunciaban los efectos jurídi-

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47 *Ibíd.*

48 Sentencia de 26 de junio de 1987, Excepciones Preliminares, párr. 45 a 49.

49 Sentencia de 26 de junio de 1987, Excepciones Preliminares, párr. 47 a 51.

50 Párrafo 20 del Informe N° 28/92 de la Comisión Interamericana de Derechos Humanos, de fecha 2 de octubre de 1992, publicado en el Informe Anual de la Comisión I.D.H. 1992-1993, pág.46.

cos de la Ley No.15.848 que declaraba la caducidad del ejercicio de la pretensión punitiva del Estado respecto de los delitos cometidos hasta el 1° de marzo de 1985 por funcionarios militares y policiales, equiparados y asimilados, por móviles políticos, en cumplimiento de sus funciones o en ocasión de acciones ordenadas por los mandos que actuaron durante el período de gobierno de facto, como violatorios de los derechos reconocidos en la Convención a la protección judicial (art. 25) y las garantías judiciales (art. 25). La Comisión fue de opinión que

> En el presente caso, la cuestión se refiere a un programa legislativo completo que el Estado defiende activamente, la Comisión opina que el procedimiento de una solución amistosa (sic) no es necesario ni procedente[51].

4.4 Caso Caballero Delgado y Santana

En el caso Caballero Delgado y Santana[52], presentado por la Comisión contra Colombia, el Gobierno demandado planteó como excepción preliminar la falta de iniciativa de la Comisión para utilizar el procedimiento de conciliación.

En su sentencia, la Corte resume los argumentos de las partes acerca de la obligatoriedad o no de este procedimiento: en opinión del Gobierno, la Comisión estaba obligada a ponerse a disposición de las partes para lograr una solución amistosa[53] de acuerdo con el artículo 48.1.f) de la Convención[54]; por otra parte, dijo Colombia que

> de manera indebida la Comisión pretende extender al presente el criterio sustentado por la Corte en el caso Velásquez Rodríguez en su sentencia de 26 de junio de 1987 sobre excepciones preliminares,

ya que en aquel caso el Gobierno de Honduras negó que hubiera existido participación de autoridades gubernamentales o militares en la desapari-

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51 Informe N° 29/92, en Informe Anual de la Comisión Interamericana de Derechos Humanos 1992-1993, párr. 18, pág. 166.

52 Excepciones Preliminares, Sentencia de 21 de enero de 1994.

53 Colombia reitera el argumento utilizado por Honduras en el caso Velásquez Rodríguez, expuesto en el párrafo 3.1. *supra*.

54 Colombia reitera el argumento expuesto por Honduras en el caso Velásquez Rodríguez, acápite 3.1. *supra*, sobre la obligatoriedad para la Comisión de ponerse a disposición de las parte para una solución amistosa.

ción forzada de la víctima y, en cambio, el Gobierno de Colombia no solo no ha negado "el hecho real y material de la desaparición forzada de una persona", sino que ha reconocido que "pudieron tener participación autoridades militares colombianas"[55]. Y agregó Colombia que

> en ningún momento negó los hechos materia de la denuncia y por ello resulta arbitraria la afirmación... (de la Comisión), en el sentido de que los hechos materia de la denuncia no son, "por su naturaleza", susceptibles de ser resueltos mediante el indicado procedimiento[56].

El Gobierno rechazó también la afirmación de la Comisión en el sentido de que no había iniciado el procedimiento porque las partes no lo solicitaron indicando que la Convención no faculta a la Comisión para trasladar a las partes la obligación que tiene, "en forma exclusiva" de ponerse a su disposición para lograr una solución amistosa[57].

Otro argumento del Gobierno[58] fue que el artículo 45.1 del Reglamento de la Comisión[59]

> no corresponde a un desarrollo exacto del artículo 48.1.f) de la Convención, por la razón elemental de que los Estados Partes no deben encontrarse en la incómoda posición de tener que solicitar una solución amistosa, lo que podría interpretarse como una confesión anticipada de su responsabilidad con los consiguientes riesgos políticos y procesales[60].

Por su parte, la Comisión señaló que, con el fallo de la Corte que resolvió las excepciones preliminares interpuestas por el Gobierno de Honduras en el caso Velásquez Rodríguez,

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55 Idem. párr.22;con ello, Colombia señala diferencias entre el caso Caballero Delgado y el caso Velásquez Rodríguez.

56 *Ibíd*, párr. 20.

57 *Ibíd*, párr. 21.

58 También reiterando el argumento similar de Honduras en el caso Velásquez Rodríguez, expuesto en el párrafo 3.1. *supra*.

59 También reitera Colombia el cuestionamiento del artículo 45.2 hecho por Honduras en el caso Velásquez Rodríguez.

60 *Ibíd*.

> ha quedado establecido de manera definitiva que el procedimiento de solución amistosa (sic) no debe considerarse como un trámite obligatorio para la Comisión, sino una opción que está abierta a las partes y a la Comisión misma, de acuerdo con las condiciones y características de cada caso[61].

Dijo también la Comisión que

> en este fallo se determinó la validez del artículo 45 de su Reglamento, en virtud de que no contradice la Convención, sino que por el contrario, desarrolla de manera adecuada el artículo 48.1.f) de la Convención[62].

Finalmente, la Comisión manifestó que

> en el caso Velásquez Rodríguez la Corte se abstuvo de apreciar la conducta del Gobierno de Honduras ante la Comisión y si las pretensiones de las partes estaban suficientemente claras y precisas, en virtud de que la cuestión esencial era que la Comisión no estaba obligada siempre a iniciar el procedimiento de solución amistosa (sic)[63].

Seguidamente, la Corte pasó a fundamentar su fallo, reiterando que la Comisión no tiene facultades arbitrarias en materia de iniciación del procedimiento de conciliación, no siendo suficiente que se abstenga de iniciarlo alegando la "naturaleza" del asunto. Por el contrario,

> Es muy clara la intención de la Convención respecto del papel conciliador que debe cumplir la Comisión antes que un caso sea enviado a la Corte o publicado[64];

Reitera la Corte que la Comisión debe cumplir la función de conciliación que le asigna la Convención, precisando también que

> Solo en casos excepcionales y, naturalmente, por razones de fondo, puede la Comisión omitir el procedimiento de la conciliación porque está de por medio la protección de los derechos de las víctimas o de sus familiares[65];

por ello

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61 *Ibíd.*, párr. 23.

62 *Ibídem.*

63 *Ibíd.*, párr. 24.

64 *Ibíd.*, párr. 27.

65 *Ibídem.*

> La Corte estima que la Comisión debió fundamentar cuidadosamente su rechazo a la solución amistosa, de acuerdo con la conducta observada por el Estado a quien imputa la violación[66].

No obstante, dice la Corte que la omisión del procedimiento de conciliación en este caso, no vició el procedimiento, ya que con ello

> no causó ningún daño irreparable a Colombia porque el Estado, si no estaba de acuerdo con ella, tenía la facultad de solicitar la iniciación del procedimiento de solución amistosa (sic) de acuerdo con el inciso 1 del artículo 45 del Reglamento de la Comisión[67],

con lo cual desestimó la argumentación de Colombia en el sentido de que este dispositivo no desarrolla adecuadamente el artículo 48.1.f) de la Convención.

La Corte desestimó también el argumento de Colombia en el sentido de que, si un Estado solicita la solución amistosa, ello podría interpretarse "como una confesión anticipada de su responsabilidad". Sobre este punto, la Corte señaló que

> frente al objeto y fin (de la Convención) que es la defensa de los derechos humanos, una propuesta del Gobierno para iniciar el procedimiento de solución amistosa (sic), no podría entenderse como un reconocimiento de responsabilidad sino, al contrario, como un cumplimiento de buena fe de los propósitos de la Convención[68].

Finalmente, la Corte dice que

> no encuentra aceptable que el Gobierno arguya como excepción preliminar que la Comisión no ejecutó el procedimiento de solución amistosa (sic), cuando frente a las disposiciones del Reglamento, él tenía esa misma facultad[69].

Y concluye:

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66 *Ibíd.*, párr. 28.

67 *Ibíd.*, párr. 29.

68 *Ibíd.*, párr. 30.

69 *Ibídem.*

No se puede exigir de otro un comportamiento que uno mismo pudo cumplir en igualdad de condiciones pero no lo hizo[70].

En el caso Velásquez Rodríguez, el argumento de la Corte para desestimar la excepción preliminar por la omisión de la solución amistosa, fue la falta de colaboración del Gobierno en el curso del proceso ante la Comisión. En cambio, en el caso Caballero Delgado y Santana, el argumento de la Corte fue la omisión de Colombia para solicitar el procedimiento de conciliación.

4.5 Caso Aloeboetoe

El Caso Aloeboetoe contra Suriname, sobre ejecuciones extrajudiciales, se inició ante la Comisión el 1 de febrero de 1988 y continuó hasta el 15 de mayo de 1990 en que la Comisión adoptó el informe N°03/90 donde señala, *inter alia*, "que las partes no han podido arribar a una solución amistosa"[71]. Sometido el caso a la Corte el 27 de julio de 1990, y presentadas la memoria de la Comisión y la contra memoria de Suriname, la Corte citó a una Audiencia para el 2 de diciembre de 1991, en la que Suriname reconoció su responsabilidad, adoptando la Corte la Sentencia de 4 de diciembre de 1991 en la que sin hacer referencia alguna a la omisión del procedimiento de conciliación, la Corte declara que:

1. Toma nota del reconocimiento de responsabilidad efectuado por la República de Suriname y decide que ha cesado la controversia acerca de los hechos que dieron origen al presente caso; y,

2. Decide dejar abierto el procedimiento para los efectos de las reparaciones y costas del presente caso[72].

Es posible que la interposición de la demanda ante la Corte haya conducido a Suriname a reconocer su responsabilidad, evitando así el riesgo de un fallo adverso.

Continuado el caso ante la Corte sobre Reparaciones, se dictó Sentencia el 10 de setiembre de 1993.

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70 *Ibíd.* La Corte equipara a la Comisión con el Estado en el sentido de que ambos tienen la obligación de proteger los derechos humanos, fin primero y último de la Convención Americana. En tal sentido aplica la "regla de *estoppel*" al Gobierno Colombiano dentro del procedimiento ante la Corte.

71 Caso Aloeboetoe, Reparaciones, Sentencia de 10 de setiembre de 1993, párr. 8.

72 *Ibíd*, párr. 12.

4.6 Caso Gangaram Panday

En el Caso Gangaram Panday, resuelto por Sentencia de 21 de enero de 1994, tampoco hay indicación de haberse seguido el procedimiento. Sin embargo, en este caso la Comisión se puso a disposición de las partes para llegar a una solución amistosa en el curso del proceso ante la Comisión, celebrándose una audiencia con tal objeto en noviembre de 1989; el Gobierno se abstuvo de reaccionar frente a la propuesta que le fuera sometida por el peticionario; seguidamente, al no llegarse a una solución amistosa y dentro del plazo fijado por el Estatuto, la Comisión redactó el Informe en los términos del artículo 50 de la Convención[73].

4.7. La Corte ha señalado reiteradamente que la Comisión "debe desempeñar el papel conciliador que le asigna la Convención", propiciando el acercamiento entre las partes. Sin embargo, como la iniciativa para iniciar el procedimiento de conciliación corresponde tanto a la Comisión como a las partes, el criterio expuesto por la Corte lleva a la conclusión de que la obligatoriedad de iniciar este procedimiento para la Comisión no es absoluta sino relativa: la Comisión solo está obligada a iniciarlo si, luego de haber quedado precisadas "las posiciones y pretensiones de las partes", alguna de éstas se lo solicita y la otra parte acepta esta vía.

4.8 Se ha señalado que, en algunos casos, es poco probable lograr una solución amistosa "por la actitud de las partes"[74]. Ya hemos visto que la actitud de las partes es esencial: en el Caso Aloeboetoe y en el Caso Caballero Delgado Santana se trató acerca de privación ilegítima de la vida y, aun así, la actitud de los gobiernos demandados es indicativa de que la solución amistosa hubiese sido, tal vez, posible.

4.9 Caso Maqueda

El Caso Maqueda contra Argentina fue presentando ante la Comisión por rechazo del Recurso de Queja ante la denegatoria de un Recurso Extraordinario contra el fallo de 11 de junio de 1990 que condenaba a Guillermo Maqueda a diez años de prisión por ser considerado como coautor de asociación ilícita calificada y partícipe secundario de los delitos de rebelión, usurpación, robo agravado, privación ilegítima de la libertad, homicidios consumados y en grado de tentativa doblemente agravados y lesiones graves y leves, con base en su pertenencia al MTP (Movimiento

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73 Informe 4/90 de 15 de mayo de 1990, citado en la Memoria de la Comisión al presentar la demanda contra Suriname ante la Corte Interamericana de Derechos Humanos.

74 Aguilar, Andrés *op. cit.* pág. 213.

Todos por la Patria). Maqueda no tuvo la posibilidad de interponer recurso de revisión de la sentencia debido a que, a diferencia de todo otro proceso penal vigente, la Ley 23.077 no contempla apelación ni recurso amplio para ningún tribunal de alzada; el Recurso Extraordinario ante la Corte Suprema de Justicia fue declarado inadmisible por la Cámara Federal de Apelaciones de San Martín el 25 de octubre de 1990; ante esta negativa, Maqueda presentó un recurso de queja ante la Corte Suprema de Justicia por denegación del Recurso Extraordinario: el recurso de queja fue rechazado el 17 de marzo de 1992.

Seguidamente, el 15 de setiembre de 1992, la Comisión Interamericana recibió la denuncia de Guillermo Maqueda en contra el Estado Argentino; admitida la denuncia y comunicada al Gobierno argentino, el 12 de mayo de 1993 la Comisión recibió respuesta de este Gobierno argumentando no haber violado el derecho a la presunción de inocencia, ni tampoco a la posibilidad de recurrir del fallo; sin embargo, los representantes del Estado agregaron que como la cuestión judicial se encontraba definitivamente clausurada, solo quedaba conforme al ordenamiento constitucional argentino, la solución del conflicto por la vía del artículo 86.a de la Constitución, esto es, que el Presidente de la Nación conceda el indulto o la conmutación de la pena; asimismo, el Gobierno comunicó que ya había comenzado a transitar este camino. Transmitida la respuesta del Gobierno, los peticionarios manifestaron su aceptación a arribar a una solución por vía del artículo 86.a de la Constitución Argentina. En audiencia celebrada en el mes de octubre de 1993, la Comisión recibió a los peticionarios –los padres de la víctima– y a los representantes del Gobierno que señalaron la posibilidad del indulto de Guillermo Maqueda o la conmutación de la pena. Como consecuencia, la Comisión decidió suspender el trámite mientras se buscaba una solución amistosa; sin embargo, en entrevista de miembros de la Comisión con el Ministro de Justicia durante los primeros días de diciembre de 1993 en Argentina, se les comunicó que dichas medidas serían imposibles por el momento. En enero de 1994, la Comisión recibió a los peticionarios y a los representantes legales del Gobierno; los primeros solicitaron a la Comisión continuar con el trámite del caso porque consideraban que el tiempo para alcanzar una solución amistosa había vencido.

No habiendo alcanzado la solución amistosa, el 24 de febrero de 1994 la Comisión envió al Gobierno el Informe 17/94 del 9 de febrero de 1994, resolviendo someter el caso a la Corte si transcurrido el plazo de 60 días el Gobierno de Argentina no remediase las violaciones a los derechos de Guillermo Maqueda. Mediante Nota de 22 de abril de 1994, el Gobierno solicitó una prórroga de 30 días para informar sobre las medidas a adoptar en relación con el Informe. En la misma fecha, la Comisión concedió una

prórroga de 20 días, considerando que el plazo para presentar la demanda ante la Corte se vencía el 25 de mayo de 1994.

La demanda fue presentada ante la Corte el 25 de mayo de 1994[75]; sin embargo, durante la reunión de la Comisión celebrada en la segunda mitad del año, el Gobierno Argentino solicitó la reanudación del procedimiento destinado a lograr una solución amistosa, (lo que fue puesto en conocimiento de la Corte) procedimiento que concluyó en un acuerdo firmado por la Comisión y el Gobierno argentino, en virtud del cual, el Gobierno se comprometió a dictar un decreto que permitiera la liberación condicional del señor Maqueda. Cumplido el acuerdo y puesto en libertad condicional el señor Maqueda, luego de que el tribunal argentino concediera el Recurso de Queja antes denegado, la Comisión se desistió de su demanda. En tal virtud, la Corte dictó una Resolución con fecha 17 de enero de 1995, estableciendo:

1. Admitir el desistimiento de la acción deducida por la Comisión Interamericana de Derechos Humanos en el caso Maqueda contra la República Argentina.
2. Sobreseer el caso Maqueda.
3. Reservarse la facultad de reabrir y continuar la tramitación del caso si hubiere en el futuro un cambio de las circunstancias que dieron lugar al acuerdo.

Se trata aquí de una situación novedosa: un acuerdo de solución amistosa alcanzado después de emitido el Informe de la Comisión confor-

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75 Esta fue la primera demanda interpuesta por la Comisión ante la corte, en defensa de los derechos de una persona viva. En efecto, en la demanda se indica que el Estado argentino ha violado, en perjuicio del señor Maqueda "el derecho a ser oído por un tribunal imparcial (Art. 8.1 de la Convención); el derecho a la presunción de inocencia (Art. 8.2); y el derecho de recurrir del fallo ante juez o tribunal superior (Art. 8.2.h); juntamente con las garantías judiciales del artículo 25, todos ellos en relación con la obligación genérica de respetar los derechos y garantizar su libre y pleno ejercicio de conformidad con el artículo 1.1 de la misma. Asimismo, que declare que el Estado Argentino ha violado el artículo 2 de la Convención, al no hacer efectivo el derecho consagrado en el artículo 8.2.h"; Caso Maqueda, Resolución de 17 de enero de 1995, párr. 2.
Una segunda demanda por detención ilegal de una persona fue interpuesta por la Comisión ante la Corte en enero de 1995; la demanda se fundamenta en la violación cometida por el Estado demandado de "los artículo 5 (Derecho a la integridad personal); 7 (Derecho a la libertad personal), 8 (garantías judiciales), 25 (protección judicial) y como consecuencia de los mismos, el 1.1 (obligación de respetar los derechos), ... Asimismo, considera (la Comisión) que violó el artículo 51.2 de la misma Convención, por no cumplir las recomendaciones formuladas por ella"; Comunicado de Prensa de la Corte CDH-CP/95, de 22 de marzo de 1995.

me al artículo 50 de la Convención y aún después de interpuesta la demanda ante la Corte. Es decir, el procedimiento de conciliación que había quedado interrumpido, se reinició después de interpuesta la demanda, y alcanzó resultado positivo. Como es de verse, la interposición del caso a la Corte constituyó un factor determinante para la decisión del Gobierno Argentino de continuar el procedimiento de conciliación; de esta forma, evitó ser condenado por la Corte por la violación de los derechos humanos del señor Maqueda.

Otras reflexiones surgen de esta Resolución de la Corte: en primer lugar, el desistimiento de la acción, que normalmente pone fin al proceso, o actúa así en este caso, pues la Corte se reserva la facultad de reabrirlo "si hubiere un cambio de las circunstancias que dieron lugar al acuerdo"; es decir, si la libertad condicional otorgada al señor Maqueda fuese revocada. En segundo lugar, se observa que no se otorga ninguna Reparación al señor Maqueda por el tiempo que estuvo, indebidamente, detenido, a pesar de que en su demanda la Comisión pidió a la Corte *inter alia*:

> Que declare que el Estado Argentino debe reparar e indemnizar adecuadamente a Guillermo Maqueda por el grave daño –material así como moral– sufrido a consecuencia de la violación de sus derechos protegidos por la Convención.

Sobre este punto, el párrafo 6 del acuerdo de solución amistosa firmado en Washington D.C. el 20 de setiembre de 1994 ante la Comisión y que este remitió a la Corte, dice:

> 6. Los representantes de Guillermo Maqueda manifiestan que, de cumplir el Estado Argentino con las obligaciones que asume en este acuerdo, su parte renuncia expresamente a todo reclamo de indemnización pecuniaria en favor de Guillermo Maqueda o de sus padres, como así también a las costas y honorarios del trámite judicial internacional actualmente en marcha[76].

La renuncia de los representantes de Guillermo Maqueda a la indemnización que correspondía a este por el tiempo que estuvo indebidamente en prisión, desde el 11 de junio de 1990 hasta el 20 de setiembre de 1994, es decir 4 años y 3 meses, tal vez, haya sido una exigencia del Gobierno Argentino. Y esto puede resultar comprensible desde el punto de vista del Gobierno, y aun de los representantes del señor Maqueda, quienes prefirieron renunciar a la reparación que correspondía a este, con tal de obtener su pronta liberación.

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76 Caso Maqueda, Resolución del 17 de enero de 1995, párr. 18.

77 Escapa al objeto del presente trabajo extendernos más sobre el tema de las Reparaciones.

Y sin duda, la Corte ha optado por una interpretación restrictiva del artículo 63.1 de la Convención, que dice:

> Artículo 63
> *1. Cuando decida que hubo violación de un derecho libertad protegido* en esta Convención, la Corte dispondrá que se garantice al lesionado en el goce de su derecho conculcados. Dispondrá, asimismo, si ello fuera procedente, que se reparen las consecuencias de la medida o situación que ha configurado la vulneración de esos derechos y el pago de una justa indemnización a la parte lesionada (énfasis agregado).

Como éste no ha sido un caso decidido por la Corte, ésta no ha aplicado la norma transcrita y, si bien ha tomado precauciones para garantizar la libertad del señor Maqueda, no ha ordenado el pago de la indemnización.

Pero este extremo de la sentencia de la Corte, así como el acuerdo patrocinado por la Comisión, constituyen un precedente para casos futuros[77].

4.10 Caso El Amparo

El Caso El Amparo interpuesto por la Comisión contra Venezuela por la ejecución extrajudicial de las personas y la violación del derecho a la integridad personal de otras 2 personas. Interpuesta la demanda, el Gobierno venezolano comunicó a la Corte que: "no contiende los hechos referidos en la demanda y acepta la responsabilidad internacional del Estado" y solicitó a la Corte que pidiera a la Comisión "avenirse a un procedimiento no contencioso a objeto de determinar amigablemente -bajo supervisión de la Corte- las reparaciones a que haya lugar, todo de conformidad con lo establecido en los artículos 43 y 48 del Reglamento de la Corte". En efecto, el artículo 43.2 del Reglamento de la Corte, dice:

> Artículo 43. Sobreseimiento del Caso.
> 2. Cuando las partes en un caso ante la Corte, comunicaren a esta la existencia de una solución amistosa, de una avenencia o de otro hecho apto para proporcionar una solución al litigio, la Corte podrá, llegado el caso y después de haber oído a las personas mencionadas en el artículo 22.2 de este Reglamento[78], sobreseer el caso y archivar el expediente.

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78 El artículo 22 del Reglamento de la Corte, dice:
"Artículo 22. Representación de la Comisión.
1. La Comisión será representada por los delegados que al efecto designe. Estos delegados podrán hacerse asistir por cualesquiera personas de su elección.
2. Si entre quienes asisten a los delegados conforme al párrafo precedente figuran abogados representantes designados por el denunciante original, por la presunta víctima o por los familiares de ésta, ésta circunstancia deberá comunicarse a la Corte".

La Corte dictó Sentencia el 18 de enero de 1995 tomando nota del reconocimiento de responsabilidad por el Gobierno de Venezuela con lo cual "ha cesado la controversia acerca de los hechos que dieron origen al presente caso". Asimismo, decidió que "la República de Venezuela está obligada a reparar los daños y pagar una justa compensación a las víctimas sobrevivientes y los familiares de los fallecidos", y que "la forma y monto de la indemnización serán fijadas por la República de Venezuela y la Comisión Interamericana de Derechos Humanos, de común acuerdo, dentro de un plazo de seis meses contados a partir de la notificación de esta sentencia", reservándose la Corte "la facultad de revisar y aprobar el acuerdo y, en caso de no llegar a él, la Corte determinará el alcance de las reparaciones y el monto de las indemnizaciones y costas, para lo cual deja abierto el procedimiento".

Es este el primer caso de un procedimiento de conciliación *iniciado después de haberse presentado una demanda ante la Corte* y pone de manifiesto el creciente uso que se está haciendo de esta vía. Ya no por iniciativa de la Comisión, sino del Estado demandado.

5. La Conciliación en el sistema europeo

La "Convención Europea para la Protección de los Derechos Humanos y Libertades Fundamentales" contempla en su artículo 28.1.b)[79] un procedimiento similar al que establece el artículo 48.1.f) de la Convención Americana: La Comisión Europea debe ponerse a disposición de las partes, por iniciativa propia o de cualquiera de éstas, para alcanzar una solución amistosa.

Y en efecto, si –a modo de ejemplo– examinamos la jurisprudencia de la Comisión Europea de Derechos Humanos durante el segundo semestre de 1993, podemos apreciar que se alcanzó la solución amistosa en siete casos: Caso N° 15220/89 (A.S. v. Austria), Caso 15942/90 (D.R. v. Países Bajos), Caso 18235/91 (Rosa Canudo v. Portugal), Caso 17494/90 (B.I. v. Francia), Caso 16532/90 (Morel à L'Huissier v. Francia), Caso 17203/90 (Henriques v. Portugal) y Caso 17090/90 (Hell v. Austria) [80,81].

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79 Texto adoptado conforme al Protocolo N° 8 que entró en vigor el 1° de enero de 1990.

80 Information Sheet N° 33, Human Rights, July-December 1993; Council of Europe, Strasbourg, 1994; p. 43 y 44.

81 Una importante modificación está pendiente de introducirse en el sistema europeo: El Protocolo 11, suscrito el 11 de mayo de 1994, aún no en vigor al redactarse el presente trabajo, suprime la Comisión Europea de Derechos Humanos. Los Estados parte, las personas, grupos de personas y organizaciones no gubernamentales, tendrán acceso directo para presentar demandas ante la Corte, una vez agotada la jurisdicción interna.

Asimismo, durante el primer semestre de 1994 la solución amistosa alcanzó el décimonoveno caso: Caso N° 15202-5/89 (Gürgodan y otros v. Turquía), Caso N° 18420-91 (Vella v. Malta), Caso N° 15701/90 (Wick v. Austria), Caso N° 17293/90 (Sultán v. Dinamarca), Caso N° 14943/89 (Denev v. Suecia), Caso N° 19362/92 (Geberger v. Alemania), Caso N° 14740/89 (Anderson y otros v. Suecia), Caso N° 13811/88 (A.E. y L.E. y otros v. Austria), Caso N° 14249/88 (I.P. y L.P. v. Austria), Caso N° 16494/90 (Shober v. Austria), Caso N° 18760/91 (Cardoso da Silva v. Portugal), Caso N° 15591/90 (K. y S. Weiss v. Austria), Caso N° 16941/90 (K.E. v. Austria), Caso N° 18186/91 (J.L. v. Francia), Caso N° 20609&/92 (Wills v. Reino Unido), Caso N° 18426/91 (Charaud v. Francia), Caso N° 18665/91 (Fortis Elevadores Lda. v. Portugal), Caso N° 15492/89 (Bernard v. Francia) y Caso N° 19361/92 (H.P. y Austria)[82].

Y en el segundo semestre de 1994 se alcanzó la solución amistosa en trece casos: Caso N° 17596/90 (K.I. v. Alemania), Caso N° 18249/91 (F.K., T.M., y C.H. v. Austria), Caso N° 20454/92 (L.W. v. Austria), Caso N° 20523/92 (Laszlo Muszda v. Austria), Caso N° 18581/91 (Valada v. Portugal), Caso N° 18866/91 (Texeira Da Mota v. Portugal), Caso N° 19372/92 (T.S. Thomas Dos Santos v Portugal), Caso N° 20381/92 (Santos Marques v. Portugal), Caso N° 20502/92 (Oliveira Barros v. Portugal), Caso N° 20844/92 (Reis Antunes v. Portugal), Caso N° 20879/92 (Vieira v. Portugal), Caso N° 18756/91 (Martimort v. Francia) y Caso N° 24516/94 (Buteau v. Francia)[83].

Este no es un número elevado dentro del volumen de denuncias que admite a trámite la Comisión Europea, pero pone de manifiesto que ella desempeña su función conciliadora, con alguna frecuencia.

5.1. En cuanto a los casos en que se omitió el procedimiento, la práctica de la Corte Europea es similar a la de la Corte Interamericana en el sentido de no hacer observación alguna en las sentencias. Así puede verse, por ejemplo, en las siguientes sentencias recientes: Hentrich v. Francia (23/1993/418/497) sentencia de 22 de setiembre de 1994; Kroon y otros v. Países Bajos (29/1993/424/503) sentencia de 27 de octubre de 1994; y Boner v. Reino Unido (30/1993/425/504) sentencia de 28 de octubre de 1994.

En cuanto a la solución amistosa, el nuevo texto de la Convención Europea establecido por el Protocolo 11, la encomienda a la Corte, en condiciones análogas a las actuales en que está a cargo de la Comisión.

82 Information Sheet N° 34, Human Rights, January-June 1994; Council of Europe, Strasbourg, 1995; p. 61-63.

83 Information Sheet N° 35, Human Rights, July-December 1994; Council of Europe, Strasbourg, 1995; p. 65 y 66.

La Comisión Europea hace uso discrecional del procedimiento de conciliación pero, en la práctica, lo utiliza en algunos casos. Cuando la conciliación parece posible.

6. La Conciliación ante otros órganos internacionales

Tanto la "Convención para la Eliminación de Todas las Formas de Discriminación Racial" como el "Pacto Internacional de Derechos Civiles y Políticos", establece normas para la solución amistosa de las denuncias presentadas por violación de la Convención[84] y del Pacto[85]. Sin embargo, esta vía solo es aplicable a las denuncias de un Estado Parte contra otro Estado Parte; no es aplicable a las denuncias interpuestas por personas o por grupos de personas.

Ambos instrumentos internacionales mencionan los conceptos de "conciliación" y de "solución amistosa" y encomiendan a "Comisiones Especiales de Conciliación", la conducción del procedimiento. Así, la Convención antes citada señala que el Presidente del Comité para la Eliminación de la Discriminación Racial, designará una "Comisión especial de Conciliación". A su vez, el Pacto encomienda al Comité de Derechos Humanos la designación de una también llamada "Comisión Especial de Conciliación". Puede decirse entonces que hay un procedimiento de conciliación destinado a tratar de alcanzar una solución amistosa.

7. La Conciliación y solución amistosa ante la Comisión

Como ya hemos señalado, la jurisprudencia de la Corte Interamericana ha mencionado reiteradamente el "papel conciliador" que debe cumplir la Comisión y se ha referido a ésta como "órgano de conciliación", como lo hacen los instrumentos internacionales que se acaba de citar *supra* 6.

Con ello la Corte está aplicando a la conciliación en materia de derechos humanos, prácticas establecidas por la doctrina y por el derecho internacional en el sentido de que, así como debe agotarse la vía interna antes de acudirse a procedimientos internacionales, debe también agotarse la posibilidad de conciliación antes de llegar a la vía judicial.

7.1 La conciliación presenta algunas ventajas, tanto respecto al trato directo como respecto a la solución judicial:

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84 Artículos 12 y 13 de la Convención.

85 Artículos 41.1.e) y 42 del Pacto.

It is true that the body in question cannot made any binding decisions. However, the voluntary acceptance of a proposed settlement can streng-then its effectiveness and durability. Instead of a trial in which one party must lose, with a resulting loss of prestige, one has here a solution a *l'amiable* where no-one need lose face. As compared with direct negotiations there is de advantage that it is easier to accept the proposals of a third party and make concessions to him that when a party deals directly with its opponent, also political and moral considerations may take it more difficult to reject a proposed compromise.

It is also possible to avoid all publicity and to conduct the proceedings in secret, numerous mediations attempts have failed because of indiscretions. The resort to public statements leads to a hardening of the parties' positions and restricts not only their freedom of action but also that of mediator[86].

En el mismo sentido, señala Andrés Aguilar que

Desde el punto de vista de la protección de los derechos humanos es sin duda preferible una solución amistosa fundada en el respeto de estos derechos (los derechos humanos) que la condena del gobierno aludido en la petición o comunicación[87].

El hecho de poder proponerse fórmulas prácticas de solución, de una parte, y que el procedimiento pueda conducirse en forma reservada, por otra, son algunas de las ventajas de la conciliación, respecto a la solución judicial. Asimismo, la flexibilidad del procedimiento puede conducir a las partes, con la participación de la Comisión Especial, para ir acercando paulatinamente sus posiciones hasta alcanzar una solución, lo que representa una ventaja respecto del trato directo entre las partes.

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86 R. L. Bindschedler, Conciliation and Mediation, in Bernhart (ed.), Encyclopedia of Public International Law (Instalment I (1981) p. 50). "Es verdad que el órgano en cuestión no puede adoptar decisiones obligatorias. Sin embargo, la aceptación voluntaria de un arreglo propuesto puede afianzar su efectividad y durabilidad. En lugar de un juicio en el que una de las partes debe perder, con la resultante pérdida de prestigio, uno tiene aquí la solución amistosa donde nadie "pierde cara". Comparada con la negociación directa hay la ventaja de que es más fácil aceptar la propuesta de un tercero y hacer concesiones frente a éste que cuando una parte trata directamente con su oponente; asimismo, consideraciones políticas y morales pueden hacer más difícil rechazar una solución propuesta...
También es posible evitar toda publicidad y conducir el procedimiento en reserva; muchos intentos de mediación han fracasado por indiscreciones. Recurrir a declaraciones públicas, conduce a dificultar la actuación de las partes y restringe no solo su libertad de acción sino también la del mediador".

87 Aguilar, Andrés *op. cit.* pág.213.

7.2 ¿Cómo debe conducirse el procedimiento de conciliación? La Convención y el Reglamento de la Comisión se limitan a decir que esta última debe actuar pruebas, realizar visitas *in loco* y celebrar audiencias. Nada dicen sobre el papel que deba desempeñar la Comisión para alcanzar la solución amistosa. La doctrina puede dar planteamientos que ayuden a cubrir esta laguna;

> Las distintas ramas del derecho han logrado su autonomía después de una evolución en la cual han participado la legislación, la práctica jurisprudencial y la doctrina. En un principio, las normas que configuran una determinada rama del derecho no son suficientes para resolver ciertos casos concretos y la jurisprudencia y la doctrina se ven precisadas a recurrir a normas jurídicas pertenecientes a otras ramas del derecho ya consolidadas o a reglas jurídicas comunes a todas ellas (...) A medida que la actividad humana que es objeto de una rama del derecho es regulada íntegramente por normas jurídicas específicas y desde el momento en que la jurisprudencia desarrolla sus criterios propios y la doctrina elabora también sus propias teorías, esa arma del derecho se vuelve autónoma y el recurso a otras normas jurídicas se torna menos frecuente[88].

La ausencia de normas específicas sobre el procedimiento de conciliación en materia de derechos humanos, lleva a la necesidad de elaborar estas normas. Para ello, puede tomarse como referencia las reglas del procedimiento de conciliación internacional, en general.

Sin embargo, conviene hacer dos precisiones: la primera, que no solo los Estados Parte sino también los individuos pueden presentar denuncias contra otro Estado Parte por violaciones de la Convención; con creciente frecuencia, los Estados vienen celebrando tratados en los que se reconoce derechos y obligaciones a los individuos; así lo ha señalado la jurisprudencia internacional, al menos, desde la Opinión Consultiva N°15 (1928), de la Corte Permanente de Justicia Internacional, que dijo:

> It cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by national courts[89];

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88 Barberis, Julio A. "Los Principios Generales de Derecho como Fuente de Derecho Internacional", en Revista del Instituto Interamericano de Derechos Humanos N° 14, julio-diciembre 1991, pág.11.

89 Serie B, N°15 (1928), pág.17, citada por Sir Hersch Lauterpacht, "The Development of International Law by the International Court", Grotius Publications Limited, Cambridge, 1982, pág. 174.

generalmente se cita esta Opinión Consultiva de la CPJI como el punto de partida del reconocimiento de la personalidad jurídica del individuo en derecho internacional.

El desarrollo del derecho internacional ha conducido al reconocimiento de derechos específicos al individuo. Concretamente, en el campo de los Derechos Humanos:

> La Comisión Europea de Derechos Humanos ha establecido en el Caso "Austria vs. Italia", citado por la Corte Interamericana de Derechos Humanos en su Opinión Consultiva OC-2, que el objeto de los tratados de derechos humanos es "realizar los fines y objetivos del Consejo de Europa... y establecer un orden público común de las democracias libres en Europa con el objeto de salvaguardar su herencia común en tradiciones políticas, ideas y régimen de derecho".
>
> Lo antes descrito constituye el marco del reconocimiento de la persona como sujeto de Derecho Internacional en el Sistema Regional Europeo. En el Sistema Regional Americano, se hace el mismo reconocimiento de la subjetividad internacional de la persona. La Convención Americana de Derechos Humanos confiere a las personas, individual o colectivamente, el derecho de presentar peticiones [ante la Comisión] contra cualquier Estado que haya ratificado la Convención, que contengan denuncias o quejas de violación de derechos humanos que dicho instrumento consagra[90].

Por ello, cuando la Convención contempla la posibilidad de conciliación entre Estados así como entre un Estado y una persona particular, está reconociendo personería internacional al individuo, ya no solo para presentar denuncias contra Estado, sino también para participar en procedimientos de conciliación con éstos[91].

"No puede discutirse que el objeto de un acuerdo internacional, de acuerdo con la intención de las partes contratantes, puede ser la adopción por las partes de algunas reglas definitivas creando derechos y obligaciones individuales, ejecutables por los tribunales nacionales".

90 Loayza Tamayo, Carolina "Los Tratados de Derechos Humanos", en Ratio Juris, Facultad de Derecho, Universidad de Lima, Mayo de 1993, pág. 32.

91 El Derecho Internacional presenta otros antecedentes en que está prevista la conciliación entre un Estado y un particular, *inter alia*, en el "Reglamento de Arbitraje y Conciliación para la Solución de Controversias Internacionales entre dos Partes de las cuales solo una es un Estado" de la Corte Permanente de Arbitraje, de 1962; y en la "Convención para la Solución de Controversia sobre Inversiones entre Estados y Nacionales de otros Estados", de 18 de marzo de 1965.

La segunda precisión se refiere a que la conciliación, cuando se trata de derechos humanos, debe tener connotaciones propias pues están de por medio los derechos fundamentales: la vida y la libertad de las personas. Volveremos sobre este punto más adelante.

Hechas estas dos precisiones, cabe señalar que la Comisión debe aplicar al procedimiento de conciliación, las mismas reglas procesales que aplica al procedimiento regular, en cuanto a la presentación de pruebas, pericias, testigos, etc.

Sin duda, la práctica de la conciliación que promueva la Comisión Interamericana, conducirá a la formación de reglas específicas, propias de la conciliación en materia de derechos humanos.

7.3 En cuanto al objeto de la conciliación, el mismo autor señala:

> A third party's proposal may be limited to the procedure to be followed or they may suggest a substantive solution in the conflict. The purpose of such activities is to narrow the gap between different points of view and find an acceptable compromise. Both concepts thus go beyond fact-finding and inquiry, where the aim is simply the impartial clarification of a disputed set of facts[92].

Ciertamente, la Comisión, en su rol de órgano conciliador, no debe limitarse a proponer reglas procesales, sino que debe procurar alcanzar una solución amistosa entre las partes, dentro del respeto a los derechos humanos.

7.4 Para conducir el procedimiento de conciliación, conforme al Reglamento de la Comisión, ésta debe designar a uno o más de su Miembros para integrar una Comisión especial[93]. Como hemos visto, este procedimiento se desarrolla con mecanismos similares a los fijados para la tramitación de denuncias:

a) se recibe y actúa pruebas;
b) se puede realizar una observación *in loco*, con anuencia del Estado interesado, si tal observación es necesaria; y,
c) puede también celebrarse audiencias.

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92 Bindschedler, R. L., *Op. cit.*
"La propuesta de un tercero puede limitarse al procedimiento a seguir o puede sugerir una solución sustantiva al conflicto. El propósito de este procedimiento es reducir la distancia entre las diferentes posiciones y encontrar una solución adecuada. Ambos conceptos van más allá del mero esclarecimiento de hechos en indagaciones cuyo objeto es únicamente el esclarecimiento imparcial de un conjunto de datos".

93 Como la Comisión Interamericana tiene siete Miembros, es de suponer que la Comisión Especial estará integrada por uno o tres Miembros.

Si bien el procedimiento es conducido por la Comisión Especial, esto no significa que la Comisión Interamericana se aparte del caso. Por el contrario, se mantiene informada a través de un diálogo permanente con la Comisión Especial sobre la marcha del procedimiento, toma decisiones sobre el término probatorio y la actuación de pruebas, así como sobre visitas *in loco* y puede poner término a su intervención como órgano de solución amistosa, si advierte que el caso no es susceptible de conciliación, que alguna de las partes no consienta en la aplicación del procedimiento o no muestre voluntad de llegar a una solución amistosa fundada en el respeto a los derechos humanos. De aquí resulta que, en este procedimiento, "la Comisión desempeña una función de conciliación"; es decir, el órgano conciliador es la Comisión Interamericana y no la Comisión Especial; ésta solo actúa por delegación de aquélla para los efectos específicos señalados.

7.5 Las normas del procedimiento de conciliación previstas en el Reglamento de la Comisión, son muy generales. Otros instrumentos internacionales establecen reglas más precisas. Así, en cuanto a la actuación del conciliador, el "Convenio para el Arreglo de los Conflictos Internacionales" celebrado en La Haya el 18 de octubre de 1907 (Convenio de La Haya), dice en su artículo 9 que se designará

> una comisión internacional encargada de facilitar la solución de estos conflictos, esclareciendo las cuestiones de hecho mediante un examen imparcial y concienzudo.

Asimismo, el "Acta General Revisada para el Arreglo Pacífico de las Diferencias Internacionales" aprobada por la Asamblea General de Naciones Unidas el 28 de abril de 1949 (Acta General Revisada), dice en su artículo 15.1:

> La Comisión de conciliación tendrá por misión dilucidar las cuestiones en litigio, recoger a este fin todas las informaciones útiles ya sea por medio de investigaciones o cualquier otro procedimiento, y se esforzará en conciliar a las Partes...

En términos similares, el "Tratado de No Agresión, Conciliación, Arbitraje y Arreglo Judicial" (Tratado Colombia-Venezuela), celebrado en Bogotá el 17 de diciembre de 1939[94], dispone en su artículo XII:

> La Comisión Permanente de Conciliación tendrá la misión de examinar las cuestiones en litigio, recoger con ese fin todas las informaciones

94 Transcrito por Uribe Vargas, Diego "Solución Pacífica de Conflictos Internacionales", Universidad Nacional de Colombia, Bogotá, 1988, p. 215.

útiles, por vía de investigación o en otra forma, y esforzarse por conciliar a las Partes...

Por su parte, el "Reglamento de Conciliación de la Comisión de Naciones Unidas para el Derecho Mercantil Internacional" (Reglamento de Conciliación), aprobado por Resolución 35/52 de la Asamblea General de Naciones Unidas el 4 de diciembre de 1980, dice en su artículo 7.1:

El conciliador ayudará a las partes de manera independiente e imparcial en sus esfuerzos por lograr un arreglo amistoso de la controversia.

Desde luego, la Comisión Interamericana, como órgano conciliador, debe también actuar "en forma independiente e imparcial", recogiendo "todas las informaciones útiles" y "esclareciendo las cuestiones de hecho", "mediante un examen concienzudo", esforzándose para "conciliar a las partes y lograr un arreglo amistoso".

Cabe citar aquí una reflexión de César Sepúlveda sobre la dificultades que enfrenta la Comisión para hacer uso más frecuente de este procedimiento, pues este

...requiere de una dedicación continua de parte de la Comisión Especial o del miembro designado para tal fin, probablemente con necesidad de desplazarse al Estado de que se trate para mantener no obstante contacto. La CIDH carece en el momento actual de la infraestructura suficiente para tales funciones[95].

Y en cuanto a las condiciones que debe reunir el conciliador

... exige también ciertas cualidades especiales de las personas asignadas a esa tarea, que no son muy comunes, como elevadas cualidades humanas, inteligencia, experiencia en asuntos internacionales, talento diplomático, tacto, desprendimiento, conocimiento de los elementos que originan la disputa, de las estructuras sociales, y debe contar demás con una buena dosis de sicología y de paciencia[96].

7.6 En cuanto a la participación de las partes en el ofrecimiento y actuación de pruebas e inspecciones *in loco* los instrumentos internacionales citados, dicen lo siguiente:

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95 Ob. cit. pág. 246.

96 *Ibídem.*

El Convenio de La Haya, dispone en sus artículos 19, 22, 23 (primer párrafo) y 29:

> Artículo 19.- ... cada una de las partes comunicará a la comisión... la exposición de los hechos y, en todo caso, las actas, piezas y documentos que ella estime conveniente para el esclarecimiento de la verdad, así como una lista de los testigos y peritos que desee que sean oídos.
>
> Artículo 22.- La comisión tiene el derecho de solicitar de ambas partes todos los informes y explicaciones que juzgue convenientes.
>
> Artículo 23 (primer párrafo).- Las partes se obligan a procurar a la comisión investigadora, con la mayor amplitud que consideren posible, todos los medios y a darle todas las facilidades necesarias para el total conocimiento y la apreciación exacta de los hechos en cuestión.
>
> Artículo 29.- En el curso o al final de la investigación los agentes podrán presentar por escrito a la comisión y a la parte contraria las observaciones, peticiones o resúmenes de hechos que estimen convenientes para el esclarecimiento de la verdad.

Asimismo, el Acta General Revisada señala en su artículo 13:

> Las Partes se comprometen a facilitar los trabajos de la Comisión de conciliación y en particular a procurarle, en la medida más amplia posible, todos los documentos e informes útiles, así como a emplear los medios de que dispongan para permitirle proceder en su territorio y según su legislación a la citación y audición de testigos o de peritos y la práctica de inspecciones oculares.

Por su parte, el Tratado Colombia-Venezuela dice en su artículo X:

> Las Altas Partes Contratantes se comprometen a facilitar los trabajo de la Comisión Permanente de Conciliación, y especialmente a suministrarle de la manera más amplia posible todos los documentos o informaciones útiles, así como también a emplear los medios de que dispongan para permitirle que proceda a citar y oír testigos o peritos y practicar otras diligencias en sus respectivos territorios y de conformidad con sus leyes.

Y el Reglamento de Conciliación establece en sus artículos 5.1, 5.2, 5.3, 7.3 y 11:

> Artículo 5.1. El conciliador, después de su designación, solicitará de cada una de la partes que le presente una sucinta exposición por escrito

describiendo la naturaleza general de la controversia y los puntos en litigio...
5.2 El conciliador podrá solicitar de cada una de las partes una exposición adicional, por escrito, sobre su respectiva exposición y sobre los hechos y motivos en que ésta se funda, acompañada de los documentos y otros medios de prueba que cada parte estime adecuados.
5.3 El conciliador podrá, en cualquier etapa del procedimiento conciliatorio, solicitar de una de las partes la presentación de otros documentos que estimare adecuados.

Artículo 7.3 El conciliador podrá conducir el procedimiento conciliatorio en la forma que estime adecuada, teniendo en cuenta las circunstancias del caso, los deseos que expresen las partes, incluida la solicitud de cualquiera de ellas de que el conciliador oiga declaraciones morales, y la necesidad de lograr un rápido arreglo de la controversia.

Artículo 11. Las partes colaborarán de buena fe con el conciliador y, en particular, se esforzarán en cumplir las solicitudes de éste de presentar documentos escritos, aportar pruebas y asistir a las reuniones.

El conciliador debe desempeñar un papel activo en la conducción del procedimiento, pidiendo a las partes que fijen sus posiciones mediante exposiciones escritas y orales[97]; asimismo, pidiéndoles que señalen los medios de prueba que estimen adecuados, sean estos documentales o de testigos y peritos; el conciliador tiene también "el derecho" de solicitar informaciones y explicaciones a las partes; las partes deben "colaborar" con el conciliador y, a tal efecto, deben "esforzarse" por atender sus pedidos sobre presentación de documentos y comparecencia de testigos y peritos.

Acerca de la carta de la prueba, y tratándose de la conciliación en materia de derechos humanos, debe tenerse presente el control que ejerce el Estado sobre los medios de prueba, como lo ha señalado la Corte en el caso Velásquez Rodríguez:

135. A diferencia del Derecho Penal interno, en los procesos sobre violaciones de derechos humanos, la defensa del Estado puede descansar sobre la imposibilidad del demandante de allegar prueba que, en muchos casos, no pueden obtenerse sin la cooperación del Estado.

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97 Si bien las "posiciones y pretensiones "iniciales han quedado fijadas en la denuncia del peticionario y en la contestación del gobierno, es conveniente que, al iniciarse la etapa de conciliación, se conceda una primera oportunidad a las partes para acercar sus posiciones, mediante una presentación oral o escrita.

136. Es el Estado quien tiene el control de los medios para aclarar hechos ocurridos dentro de sus territorios. La Comisión, aunque tiene facultades para realizar investigaciones, en la práctica depende, para poder efectuarlas dentro de las jurisdicción del Estado, de la cooperación y de los medios que le proporcione el Gobierno[98].

7.7 Acerca de los testigos y peritos, el Convenio de La Haya dice en su artículo 23 (segundo párrafo):

Artículo 23 (segundo párrafo).- (Los Estados) Se obligan a emplear los medios de que puedan disponer conforme a su legislación interior para que comparezcan ante la comisión los testigos y peritos que se encuentren en su territorio citados ante la comisión.

Si estos no pudiesen comparecer ante la comisión, las partes harán que sean examinados por sus autoridades competentes.

La Comisión tiene ya una amplia experiencia sobre la concurrencia y el examen de testigos y peritos. Sin embargo, las reglas sobre la comparecencia de testigos y peritos, tanto si son ofrecidos por las partes como si son citados de oficio por el conciliador, pueden también ser utilizadas en el procedimiento de conciliación, si es necesario. En especial, los Estados deben prestar las facilidades y utilizar los recursos de su legislación interna para facilitar la concurrencia de los testigos y peritos que se encuentran en su territorio.

7.8 En cuanto a las inspecciones *in loco*, si bien el Reglamento de la Comisión Interamericana señala que éstas se deben realizar "con anuencia del Estado interesado" resulta obvio que, si éste actúa de buena fe, no podrá negarse a dar su "anuencia", salvo casos excepcionales y debidamente justificados, a las inspecciones *in loco*, en sus territorios.

7.9 Acerca de las audiencias trata el Reglamento de Conciliación, en sus artículos 9.1 y 10:

Artículo 9.1 El conciliador podrá invitar a las partes a reunirse con él o comunicarse con ellas oralmente o por escrito. Podrá reunirse o comunicarse con las partes conjuntamente o con cada una de ellas por separado.

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98 Caso Velásquez Rodríguez, Fondo del Asunto, Sentencia de 29 de julio de 1988. Del mismo tenor son los párrafos 141 y 142 de la Sentencia de 20 de enero de 1989, en el Caso Godínez Cruz, Fondo del Asunto.

> Artículo 10. Si el conciliador recibe de una de las partes información de hechos relativos a la controversia revelará su contenido a la otra parte a fin de que ésta pueda presentarle las explicaciones que estime convenientes. Sin embargo, si una parte proporciona información al conciliador bajo la condición expresa de que se mantenga confidencial, el conciliador no revelará esa información.

Nada impide que la Comisión Especial se reúna con ambas partes conjuntamente o por separado. Puede comunicarse con ellas oralmente o por escrito.

Las informaciones de hechos relativos a la controversia que reciba de una de las partes, debe comunicarlas a la otra parte, a fin de que ésta pueda dar las explicaciones que juzgue convenientes; empero, si una parte proporciona información a la Comisión Especial "bajo condición expresa de que se mantenga confidencial", la Comisión Especial no debe revelarla a la otra parte.

Mediante las reuniones separadas e informales con cada una de las partes, la Comisión Especial puede ir acercando las posiciones; las reuniones conjuntas pueden servir también a este fin. El traslado de información de una parte a la otra sirve también para aclarar conceptos; y cuando las informaciones de hechos se den a la Comisión Especial con carácter confidencial, estas informaciones también servirán para que la Comisión Especial se forme un concepto más claro del caso.

7.10 El examen de las pruebas y el acercamiento que se vaya alcanzando entre la partes debe conducir a éstas y al conciliador, a proponer fórmulas de solución.

Un modelo sobre la actuación del conciliador par la solución del caso, nos lo proporciona la Convención para la Eliminación de Todas las Formas de Discriminación Racial, cuyo artículo 13 dice:

> Artículo 13.1 Cuando la Comisión haya examinado detenidamente el asunto, preparará y presentará al Presidente del Comité un informe en el que figuren sus conclusiones sobre todas las cuestiones de hecho pertinentes al asunto planteado entre las partes y las recomendaciones que la Comisión considere apropiadas para la solución amistosa de la controversia.
> 2. El Presidente del Comité transmitirá el informe de la Comisión a cada uno de los Estados partes en la controversia. Dentro de tres meses, dichos Estados notificarán al Presidente del Comité si aceptan o no las recomendaciones contenidas en el informe de la Comisión.

> 3. Transcurrido el plazo previsto en el párrafo 2 del presente artículo, el Presidente del Comité comunicará el informe de la Comisión y las declaraciones de los Estados parte interesados a los demás Estados partes en la presente Convención[99].

El artículo citado no incluye un mecanismo que permita aproximar a las partes. La Comisión de Conciliación se limita a escucharlas y luego redacta un Informe que se trasmite a ellas. Las partes pueden luego aceptar o desestimar el Informe[100].

A su vez, el Pacto Internacional de Derechos Civiles y Políticos dispone que el Comité de Derechos Humanos, al término del procedimiento de conciliación:

> i) Si se ha llegado a una solución con arreglo a lo dispuesto en el inciso e, se limitará a una breve exposición de los hechos y de la solución alcanzada;
> ii) Si no se ha llegado a una solución con arreglo a lo dispuesto en el inciso e, se limitará a una breve exposición de los hechos y agregará las exposiciones escritas y las actas de las exposiciones verbales que hayan hecho los Estados Partes interesados[101].

En este caso el conciliador presenta el Informe después de haber agotado las posibilidades de conciliación, lo que le permite tratar de acercar las posiciones. Si lo logra, presenta el Informe dejando constancia de la solución alcanzada; en caso contrario hace una exposición de los hechos y de las exposiciones verbales de los Estados interesados.

Hay dos diferencias entre ambos modelos de conciliación : a) en cuanto a la actitud del conciliador, el Pacto le otorga mayor flexibilidad y capacidad de diálogo con las partes; y b) en cuanto a la solución, la Convención Internacional faculta a los Estados partes en la controversia, a acudir a la Corte Internacional de Justicia si no están de acuerdo con el Informe de la Comisión Especial de Conciliación, con lo cual se resolvería la controversia; en cambio, el Pacto no contempla la solución judicial.

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99 Artículo 22 de la Convención establece que, si no se alcanza la solución, cualquiera de los Estados Parte en la controversia puede presentar una demanda ante la Corte Internacional de Justicia.

100 Sin embargo, en caso de no alcanzarse la solución amistosa, el artículo 22 de la Convención faculta a cualquiera de las partes en la controversia, a llevar el caso ante la Corte Internacional de Justicia.

101 Artículo 41.1.h) del Pacto.

Por su parte, el Convenio de La Haya dice en sus artículos 32 y 35:

> Artículo 32.- Cuando las partes hayan presentado todos los esclarecimientos y pruebas y hayan sido oídos todos los testigos, el presidente declarará terminada la investigación y la Comisión se reunirá para deliberar y redactar su informe.
>
> Artículo 35.- El informe de la comisión, que se limitará a consignar los hechos, no tendrá en modo alguno el carácter de sentencia arbitral. Dejará a las partes en absoluta libertad en cuanto a las consecuencias que pueda tener la investigación.

Y el Acta General revisada señala en su artículo 15.1 que la comisión de conciliación:

> 15.1 ...Podrá después de examinar el asunto, exponer a las Partes los términos del arreglo que le pareciera conveniente y señalarles un plazo para pronunciarse.

A su vez, el Reglamento de Conciliación, establece en sus artículos 7.4, 12, 13.1, 13.2 y 13.3 que:

> Artículo 7.4 El conciliador podrá, en cualquier etapa del procedimiento conciliatorio, formular propuestas para una transacción de la controversia. No es preciso que esas propuestas sean formuladas por escrito ni que se explique el fundamento de ellas.
>
> Artículo 12 Cada una de la partes, a iniciativa propia o a invitación del conciliador, podrá presentar a éste sugerencias para la transacción de la controversia.
>
> Artículo 13.1 Cuando el conciliador estime que existen elementos para una transacción aceptable por las partes, formulará los términos de un proyecto de transacción y los presentará a las partes para que éstas expresen sus observaciones. A la vista de estas observaciones, el conciliador podrá formular nuevamente otros términos a posible transacción.
> 2. Si las partes llegan a un acuerdo sobre la transacción de la controversia, redactarán y firmarán un acuerdo escrito de transacción. Si las partes así lo solicitan, el conciliador redactará el acuerdo de transacción o ayudará a las partes a redactarlo.
> 3. Las partes, al firmar el acuerdo de transacción, ponen fin a la controversia y quedan obligadas al cumplimiento de tal acuerdo.

Volviendo ahora al Reglamento de la Comisión, éste dice que, si se alcanza una solución amistosa, la Comisión Interamericana prepara un informe con una breve exposición de los hechos y de la solución lograda. Este informe se transmite a las partes interesadas y al Secretario General de la OEA para su publicación[102].

Como ya hemos visto, en el curso de la conciliación la Comisión Especial puede consultar a cada una de las partes sobre posibles fórmulas de solución. Éste será el principal esfuerzo de la Comisión Especial y de las partes. Podrá requerir más de una reunión del conciliador con cada una de las partes y con ambas conjuntamente. Pero con ello la Comisión Interamericana estará dando estricto cumplimiento a lo dispuesto por la Convención, que le asigna la responsabilidad de actuar como órgano de conciliación.

El esfuerzo no es solo de la Comisión:

> Se requiere además la voluntad política del gobierno de acatar las recomendaciones que le vaya formulando la Comisión a medida que avanza el proceso[103].

Alcanzada la solución amistosa, parece conveniente que se redacte un "acuerdo de conciliación", como indica el Reglamento de Conciliación, a fin de que consten de modo expreso los términos de la solución lograda[104].

7.11 El Reglamento de la Comisión contempla también la posibilidad de que se frustre el procedimiento de conciliación, señalando que la Comisión puede "en cualquier estado del procedimiento, dar por concluida su intervención como órgano de solución amistosa", si "durante el procedimiento", advierte

i) que el asunto "por su naturaleza", no es susceptible de solución amistosa,
ii) que alguna de las partes "no consienta en la aplicación de este procedimiento" o,
iii) que alguna de las partes "no muestre una voluntad de querer llegar a una solución amistosa fundada en el respeto a los derechos humanos[105].

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102 Artículo 49 de la Convención Americana. En términos análogos se expresa el artículo 28.2 de la Convención Europea.

103 Sepúlveda, César Ob. cit. pág.247.

104 Así se hizo en el Caso Maqueda. Ver nota 73 *supra*.

105 Artículo 45.7 del Reglamento.

En tal caso el asunto vuelve a la tramitación regular: la Comisión debe examinar "las pruebas que suministren el Gobierno aludido y el peticionario, las que recoja de testigos de los hechos o que obtenga mediante documentos, registros, publicaciones oficiales o mediante una investigación *in loco*".

Finalmente, "la Comisión preparará un informe en el que expondrá los hechos y las conclusiones respecto al caso sometido a su conocimiento"[106].

Aunque el Reglamento no lo dice, es obvio que las pruebas documentales, de testigos o inspecciones *in loco* actuadas durante la conciliación conservan su valor, no siendo necesario que los testigos sean examinados nuevamente ni que se repitan las inspecciones *in loco*.

7.12 Frustrada la conciliación, la Comisión puede, en su Informe, formular recomendaciones y, si procede, decidir interponer una demanda ante la Corte o disponer la publicación del mismo Informe[107].

7.13 Así pues, en ningún caso el procedimiento de conciliación será inútil, ni retardará la tramitación del caso.

Si la Comisión señala un plazo prudencial, para que las partes expresen su disposición a iniciar el procedimiento, si las pruebas actuadas durante la conciliación conservan su valor aunque esta se frustre, y si la Comisión puede dar por concluida la conciliación tan pronto como este deje de resultar factible, aun entonces el procedimiento habrá cumplido su finalidad de propiciar el acercamiento entre las partes. Cualquier efecto dilatorio del procedimiento puede ser evitado por la Comisión, poniendo fin a la etapa de conciliación.

8. *Los principios de la conciliación y solución amistosa.* La Convención Americana dispone que la solución amistosa debe estar "fundada en el respeto a los derechos humanos reconocidos en esta Convención"[108]. De modo análogo, la Convención Europea establece que la solución amistosa debe fundarse en el respeto a los derechos humanos reconocidos en la Convención[109]. Por su parte, la Convención para la Eliminación de Todas las

106 Artículo 46 del Reglamento de la Comisión.

107 Artículos 50 y 51 de la Convención.

108 Artículo 48.1.f de la Convención y artículo 45.1 del Reglamento de la Comisión.

109 Artículo 28.1.b) de la Convención Europea, conforme al Protocolo 6, en vigor desde el 1 de enero de 1990.

Formas de Discriminación Racial establece que la solución amistosa debe estar "basada en el respeto a la presente Convención"[110], y el Pacto Internacional de Derechos Civiles y Políticos señala que la solución amistosa debe estar "fundada en el respeto de los derechos humanos y de las libertades fundamentales reconocidos en el presente Pacto"[111].

Este es el primer principio: la solución amistosa debe estar basada en el respeto a los derechos humanos. Es un principio ineludible: la Comisión está obligada a verificar que el principio se cumpla. Y así lo ha señalado la Corte Interamericana en diversas oportunidades.

Este principio es aplicable a la solución que se logre, pero no solo a ella sino a todas las etapas del procedimiento de conciliación; al inicio, las partes deben expresar libremente su disposición a esta vía; luego, en la actuación de pruebas, deben esforzarse por facilitar el trabajo de la Comisión, contribuyendo a la actuación de las pruebas y proporcionando todas las informaciones y explicaciones que la Comisión requiera; para ello, debe tenerse presente el papel que corresponde al Estado en la carga de la prueba, por el control que ejerce sobre los medios de prueba, como ya hemos visto; para las inspecciones *in loco*, el Estado no debe negar su anuencia, salvo razones excepcionales que deben ser debidamente fundamentadas y cuya aceptación debe quedar a criterio de la Comisión; en las audiencias, tanto con la presencia de ambas partes como de una sola de ellas, las partes deben esforzarse por atender las recomendaciones de la Comisión para encontrar una solución; y, finalmente, en el acuerdo que se logre, debe quedar estrictamente cautelado el respeto a los derechos humanos protegidos por la Convención. Es decir, debe restablecerse el pleno ejercicio de los derechos humanos que hayan sido violados y señalarse una reparación adecuada, si esto es procedente[112].

La actitud de la Corte Europea frente a la defensa de los derechos humanos en la solución amistosa, ha sido planteada en los términos siguientes:

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110 Artículo 12.1.a) de esta Convención.

111 Artículo 41.1.e) del Pacto.

112 Sin embargo, en caso Maqueda tanto la Comisión como la Corte aceptaron la renuncia a la indemnización que hicieron los representantes de la víctima. Cabe señalar que, en el Caso Velásquez Rodríguez, Sentencia de 29 de julio de 1988, párr. 166 de Corte expresó que los Estados deben procurar "la reparación de los daños producidos por la violación de los Derechos Humanos", agregando en el párrafo 174 que el Estado está en el deber jurídico de asegurar a la víctima "una adecuada reparación". La Corte reitera este criterio en el caso Godínez Cruz, Sentencia de 20 de enero de 1989.

> Quelle est l'attitude de la Cour lorsqu'elle se trouve saisie d'un règlement amiable? Elle distingue à chaque fois l'intérêt particulier de l'intérêt général. Le premier ne soulève pas de difficulté quant à son constat: il lui semble préservé puisqu'elle ne met pas en doute la validité du consentement de l'individu. Le second, au contraire, a donné lieu dans l'affaire SKOOGSTRÖM à une forte division au sein de la chambre[113].

Se trataba de un caso de detención provisional arbitraria. El Gobierno sueco ofreció poner en libertad al detenido y modificar su legislación procesal para evitar casos análogos en el futuro. Pero no indicó en que consistían las modificaciones legales que propondría a los legisladores, ni el plazo dentro del cual plantearía la propuesta legislativa. La mayoría de 4 jueces encontró satisfactoria la explicación, pero la minoría de 3 jueces la encontró incompleta, precisando que

> ne lui "semble pas répondre à l'intérêt général qui s'attache au respect des droits de l'homme et que la Cour a pour mission de sauvegarder[114].

Los tratados sobre derechos humanos no tienen como finalidad el establecimiento de derechos y obligaciones recíprocos entre los Estados parte, sino la protección de los derechos humanos y libertades fundamentales de las personas sometidas a la jurisdicción de cada Estado parte[115]. El principio del respeto a los derechos humanos está así en directa relación con el cumplimiento del objeto de la Convención Americana.

En cualquier caso específico de violación de los derechos humanos surgirá la cuestión entre el interés personal y el interés general: siguiendo el interés personal, se deberá propiciar el arreglo que permita al individuo recuperar el derecho reclamado; pero siguiendo el interés general puede ocurrir que ésto exija al Estado denunciado la promulgación de una norma general.

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113 Berger, Vincent "Le règlement amiable devant la Cour européenne des Droits de l'Homme" (La solución amistosa frente a la Corte Europea de Derechos Humanos), en Libro Homenaje a Gérard Wiarda, pág. 57.
"¿Cuál es la actitud de la Corte cuando se encuentra ante una solución amistosa? Ella distingue en cada caso el interés particular del interés general. El primero no presenta dificultad en cuanto a su constatación: le parece preservado porque no pone en duda la validez del consentimiento del individuo. El segundo, por el contrario, dio lugar en el caso (detención provisional) a una fuerte división en el seno de la sala".

114 *Ibídem.*
"(no) parecía responder al interés general que la Corte tiene la misión de salvaguardar (artículo 48 # 4 del reglamento)".

115 OC-2/82 del 24 de setiembre de 1982, párr. 29 y OC-3/83 del 8 de setiembre de 1983, párr. 65. Véase también Carolina Loayza, ob cit., pág. 32.

8.1 Por otra parte, el respeto a los derechos humanos está estrechamente vinculado con el orden democrático. En el párr. 26 de la Opinión Consultiva 8/87 del 30 de enero de 1987, la Corte expresó:

> El concepto de derechos y libertades y, por ende, el de sus garantías, es también inseparable del sistema de valores y principios que lo inspira. En una sociedad democrática los derechos y libertades inherentes a la persona, sus garantías y el Estado de Derecho constituyen una triada, cada uno de cuyos componentes se define, completa y adquiere sentido en función de los otros.

Puede suponerse que un Gobierno democrático tratará de alcanzar una solución amistosa, solicitando el inicio del procedimiento de conciliación o aceptándolo, si la iniciativa viene de la Comisión o de la otra parte; prestará facilidades a la Comisión durante la etapa probatoria y procurará encontrar una solución basada en el respeto a los derechos humanos protegidos por la Convención[116]. El Estado de Derecho y el orden democrático constituyen una garantía de que el Gobierno se esforzará por encontrar una solución amistosa y por restablecer la plena vigencia de los derechos humanos que puedan haber sido vulnerados.

En este sentido, la promoción de la solución amistosa, además de constituir el cumplimiento de la función conciliadora que la Convención le asigna, contribuirá al afianzamiento del orden democrático en los Estados parte.

8.2 Otros principios de la conciliación están señalados en el artículo 7.2 del Reglamento de Conciliación:

> 7.2 El conciliador se atendrá a principios de objetividad, equidad y justicia, teniendo en cuenta, entre otros factores, los derechos y las obligaciones de las partes, ... y las circunstancias de la controversia, incluso cualquiera prácticas establecidas entre las partes.

Se menciona en el artículo transcrito, los principios que deben observarse en la conciliación: la objetividad, la justicia, la equidad; se señala también como "factores" que el conciliador debe tener en cuenta, el respeto a los derechos recíprocos, las circunstancias de la controversia y las prácticas establecidas entre las partes; a ellos debe agregarse el principio de la buena fe, señalado en el artículo 11 del mismo Reglamento de Conciliación. Estos principios son aplicables a toda conciliación y, sin duda, también a la conciliación en materia de derechos humanos.

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116 Desde luego, la misma actitud cabe esperar del peticionario: que actúe animado por el respeto a los derechos humanos.

8.3 El principio de la buena fe rige la observancia de los tratados[117]. Asimismo,

> An indispensable requirement of a well functionig legal order is that legal relations be conducted in good faith[118].

La buena fe es indispensable en toda relación jurídica. Sin embargo, en materia de derechos humanos, este principio adquiere características propias:

> Si bien la Convención Americana está destinada a la protección de los derechos humanos en el continente, la interpretación de sus disposiciones -sean sustantivas o procesales-, deben ser finalistas o teleológicas. En tal sentido, la Corte, cuya función es la defensa de los derechos humanos mediante decisiones justas que declaren y restablezcan el derecho en caso de violación, ha señalado que la actuación de las partes en el proceso debe ajustarse al Principio de la Buena Fe y del respeto de los derechos recíprocos.
>
> ...Los Principios de la Buena Fe y el Estoppel, ... adquieren características propias al ser trasladados al ámbito del Derecho Internacional de los Derechos Humanos, lo que responde a la estructura de dicho ordenamiento jurídico y a la naturaleza de las obligaciones que en ese marco adquieren los Estados: de naturaleza unilateral en favor de las personas que se encuentran bajo su jurisdicción, a diferencia de los tratados tradicionales que tienen por objeto un intercambio recíproco de derechos y obligaciones[119].

La buena fe debe animar a las partes en el curso de todo el procedimiento si de veras desean alcanzar la solución amistosa. Desde la actitud inicial, proponiendo o aceptado esta vía, y luego en la actuación de pruebas, poniendo a disposición de la Comisión todos los elementos de que dispongan; y especialmente de parte del Estado, dando facilidades para la concu-

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117 Preámbulo y artículo 26 de la Convención de Viena sobre Derecho de los Tratados.

118 H. Mosler, "General Principles of Law", en R. Bernhardt (ed.), Ob. cit. Instalment 7 (1984), pág. 103.
"Un requerimiento indispensable para el buen funcionamiento del orden legal, es que las relaciones jurídicas sean conducidas de buena fe".

119 Piérola Balta, Nicolás de y Loayza Tamayo, Carolina "Los Principios Generales de Derechos de la Buena Fe y el Estoppel y la Regla del Agotamiento de la Jurisdicción Interna en la Jurisprudencia de la Corte Interamericana de Derechos Humanos", en Gaceta Jurídica, Julio 1994, Sección Actualidad Jurídica, pág. 80.

rrencia de testigos y peritos, así como para las inspecciones *in loco*, y durante las audiencias, tanto con la concurrencia de ambas partes como de una sola de ellas, procurando encontrar una solución, hasta el acuerdo que se logre.

8.3.1 Estrechamente relacionada con el principio de la buena fe está la doctrina del abuso del derecho:

> It is only a rudimentary stage of legal development that society permits the unchecked use of rights without regard to its social consequences. The determination of the point at which the exercise of a legal right has degenerated into abuse of a right is a question which cannot be decided by an abstract legislative rule, but only the activity of courts drawing the line in each particular case[120].

El derecho internacional de los derechos humanos no se encuentra en una etapa "rudimentaria". Tanto en el sistema universal como en el sistema interamericano existe órgano de control; en este último caso la Comisión y la Corte, a las que corresponde determinar en qué momento el ejercicio de un derecho deja de ser lícito y se convierte en abuso del derecho. En efecto,

> The power to apply some such principle as that embodied in the prohibition of abuse of rights must exist in the backround of any system of administration of justice in which courts are not purely mechanical agencies[121].

La Corte Interamericana se refirió al principio de la buena fe y rechazó una actitud que constituía un abuso del derecho, en un caso específico, cuando señaló:

> en virtud de la Buena Fe, no se puede solicitar algo de otro y, una vez obtenido lo solicitado, impugnar la competencia de quien se lo otorgó[122].

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120 Lauterpacht, Ob. cit. pág. 162.
"Solo en una etapa rudimentaria de desarrollo del Derecho la sociedad permite el ejercicio incontrolado de derechos sin consideración de sus consecuencias sociales. La determinación del punto en el cual el ejercicio de un derecho ha degenerado en abuso de ese derecho es un asunto que no puede ser resuelto por un norma leal abstracta, sino solo por la actividad de las cortes fijando la línea en cada caso específico".

121 Idem, pág. 165.
"La facultad de aplicar algunos principios como el incorporado en la prohibición del abuso del derecho debe existir en el marco de cualquier sistema de administración de justicia en que las cortes no sean órganos puramente mecánicos".

122 Corte Interamericana de Derechos Humanos, "Caso Neyra Alegría y otros", Sentencia de 11 de diciembre de 1991, párr. 35.

8.3.2 También está relacionado con la Buena Fe el principio de *estoppel*:

> Estoppel ... is also an emanation of good faith. Estoppel operates on the assumption that one party has been induced to act in reliances on the assurances or other conduct of another party, in such a way that it would be prejudiced were the other party later to change its position. The legal effect of estoppel is that the party acting in reliance on the other party's assurance of conduct can challenge any subsequemt contradictory conduct by the other party[123].

En armonía con este criterio doctrinario, la Corte Interamericana de Derechos Humanos ha señalado:

> Según la práctica internacional cuando una parte en un litigio ha adoptado una actitud determinada que redunda en beneficio propio o en deterioro de la contraria, no puede luego, en virtud del principio de *estoppel*, asumir otra conducta que sea contradictoria con la primera. Para la segunda actitud rige la regla de *non concedit venire contra factum proprium*[124].

Y como ya vimos, el principio de *estoppel*, como el de la buena fe, adquieren características propias al ser trasladados al ámbito de la aplicación e interpretación de los tratados sobre Derechos Humanos, pues estos no establecen derechos y obligaciones recíprocos entre dos o más Estados, sino que son de naturaleza unilateral, en favor de las personas que se encuentran dentro de la jurisdicción de los Estados parte.

8.4 El principio de objetividad debe seguirse en la interpretación de la Convención y otros tratados sobre Derechos Humanos, que resulten aplicables en la conciliación y en su resultado final: la solución amistosa:

> (Las) obligaciones asumidas por los Estados en los tratados de derechos humanos "son esecialmente de carácter objetivo", porque han sido

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123 Ob. cit. pág. 104.
"El *estoppel*... es también una emanación de la buena fe. El estoppel opera cuando una parte ha sido inducida a actuar confiando en las seguridades o actitudes de la otra parte, de tal manera que resultaría perjudicada si la otra parte cambia luego su posición. El efecto jurídico del estoppel consiste en que la parte que actuó confiando en las seguridades o actitudes de la otra parte puede tachar cualquier cambio de conducta posterior de esta otra parte".

124 Corte Interamericana de Derechos Humanos, "Caso Neyra Alegría y otros", Sentencia de 11 de diciembre de 1991, párr. 29.

diseñadas para proteger los derechos fundamentales de los seres humanos de las violaciones de los Estados[125].

Sobre el método objetivo de interpretación de los tratados, se ha señalado también:

El sentido y alcance de la Convención Americana sobre Derechos Humanos ha sido precisado por la Corte Interamericana utilizando los criterios de interpretación de la Convención (de Viena sobre Derecho de los Tratados) que, según afirma, "puede considerarse regla de Derecho Internacional General sobre el tema". Según la Corte, el método de interpretación a que se refiere el artículo 31.1 y 32 de la Convención de Viena se acoge al principio de la primacía del texto, es decir, a aplicar criterios objetivos de interpretación. A su parecer, "en materia de tratados relativos a la protección de los derechos humanos, resulta todavía más marcada la idoneidad de los criterios objetivos de interpretación, vinculados a los textos mismos, frente a los subjetivos, relativos a la sola intención de las partes" por su naturaleza, es decir, no "ser tratados multitalerales de tipo tradicional" sino que su "objeto y fin son la protección de los derechos fundamentales de los seres humanos"[126].

8.5 Otro principio aplicable a la solución amistosa es la equidad:

Equity as the basis of a decision can be aplied as a rule of law only in connection with an evaluation of the circumstances relevant in the concrete case. These circumstances can be either facts or legal situations or a combination of both. To avoid the subjective elements of this evaluation running over into a decision *ex aequo et bono*, the relevance of the factual and legal circumstances and their relative weight must be elaborated using rational arguments[127].

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125 Loayza Tamayo, Carolina Ob. cit. pág. 32. La Prof. Loayza cita aquí el párrafo 34 de la OC-2.

126 Loayza Tamayo, Carolina, Ob. cit. pág. 33. Aquí, la Prof. Loayza cita la OC-3, párr. 65, 48 y 50.

127 H. Mosler, Ob. cit. pág.103.
"La equidad como base de una decisión puede ser aplicada como regla de derecho solo en relación con una evaluación de las circunstancias relevantes en un caso concreto. Estas circunstancias pueden ser tanto de hecho como de derecho o una combinación de ambas. Para evitar que elementos subjetivos en esta evaluación conduzcan a una decisión *ex aequo et bono*, la relevancia de las circunstancias de hecho y de derecho y su relativa importancia, deben ser apreciados utilizando argumentos racionales"..

Queda a criterio del conciliador evaluar las circunstancias de hecho y de derecho de cada caso, a fin conducir el procedimiento de la conciliación, hacia una solución equitativa.

8.6 Los "factores"que menciona el artículo citado del Reglamento de Arbitraje, conducen a la recta aplicación del principio de justicia: en efecto, el conciliador debe atenerse a:

i) Los derechos y obligaciones de las partes;
ii) Las circunstancias de la controversia, y
iii) cualesquiera prácticas establecidas entre las partes. Y este último "factor" está relacionado también con el *estoppel*.

9. Conclusiones

La promoción y vigencia de los derechos humanos es un objetivo de la comunidad Internacional Universal y Regional así como de cada uno de los Estados que las conforman; y se cautela mediante el establecimiento de mecanismos convencionales de protección de los derechos humanos.

Las controversias que se suscitan entre un ser humano y un Estado, relacionadas con la protección de los derechos humanos, en principio deben ser resueltas en el plano interno de los Estados a través de los mecanismos que la propia legislación establezca. Solo en los casos en que la víctima considere que el Estado no ha cumplido con la protección de su derechos humanos puede, previo agotamiento de la jurisdicción interna, recurrir a las instancias de protección internacional regional o universal. Ese es el caso de la Comisión Interamericana de Derechos Humanos, que tiene como primer mandato, el de cumplir una función conciliadora entre el Estado y el denunciante.

En este contexto, el procedimiento de conciliación constituye un mecanismo alternativo de solución en el que ambas partes satisfacen sus expectativas. Por un lado, la víctima y/o sus familiares, en relación con el derecho conculcado, y por otro lado, el Estado que reafirma su compromiso con los derechos humanos fundamento de toda sociedad civilizada.

En la tramitación de denuncias presentadas ante la Comisión Interamericana de Derechos Humanos, viene utilizándose con creciente frecuencia el procedimiento de conciliación. Este procedimiento puede intentarse tanto en la etapa de tramitación de la denuncia ante la Comisión, como después de presentada una demanda ante la Corte Interamericana de Derechos Humanos[128].

128 Artículo 43.2 del Reglamento de la Corte.

Ello encuentra justificación en el objeto y fin de tales instancias internacionales: la protección de los derechos humanos.

De alcanzarse una solución amistosa cuando una demanda ya ha sido presentada ante la Corte, esta mantiene jurisdicción sobre el caso para salvaguardar los derechos de la víctima.

Argentina, que durante una época tuvo el mayor número de casos ante la Comisión Interamericana de Derechos Humanos, ha encontrado en la conciliación el medio más adecuado para lograr una solución armoniosa entre el Estado y los denunciantes, cautelándose tanto el interés particular de la víctima, como el interés general de la sociedad, dentro del pleno respeto a los derechos humanos. De esta forma ha evitado no solo el procedimiento judicial, sino también la condena por un tribunal internacional –la Corte Interamericana– por la violación de derechos humanos.

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