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By Stephen Thaman

Criminal Justice Issues in Revolutionary Nicaragua

Although the Contra war financed by Congress and the C.I.A. continues to beleaguer Nicaragua with its terrorist incursions, and the media are quick to pick up on the abridgment of certain civil liberties thereby occasioned, little attention has been given to the efforts of the newly elected Constituent Assembly to write a new constitution and reinstitute the rule of law in Nicaragua.

A group of five local attorneys and law professors was invited to Nicaragua in May 1985 by the Association of Democratic Jurists of Nicaragua to speak and consult in the areas of international, constitutional and criminal law to aid the fledgling constitutional process. Because of my specialization in criminal law, I lectured to judges, lawyers, students and professors in Managua, Masaya and Leon on the intricacies of our criminal justice system, underlining what I felt were its progressive as well as more questionable aspects.

I had extensive discussions with many of these legal professionals, including judges, justices of the supreme court, and a commission appointed to draft a "Pilot Plan for Judicial Transformation," which was to be submitted to the Constituent Assembly for implementation in the Fourth Region, a populous area southwest of Managua which includes Masaya, Granada and Rivas. I also visited a "Popular Antisomocista Tribunal" and spoke with the judges, as well as a model prison farm for former Somocista National Guardsmen outside of Managua. We also met for an afternoon with the head of the Nicaraguan prison system.

I left Nicaragua with the impression that a revolutionary struggle is currently being fought within the institutions responsible for criminal justice. There is a pluralism of views, not only comprising those of the dominant Sandinistas and the minority

parties, but within the Sandinista party itself. This struggle pits judges and lawyers against lay Sandinista cadre, the supreme court against the Ministry of Justice, and proponents of revolutionary efficiency against those of procedural fairness and due process. The discussions are open, and frank, and are covered in both the government and opposition media. The positions are firmly stated, but the spirit seems to be one of compromise, hopefully leading to institutions which will supplement procedural fairness with popular participation. It seems that this pluralist legitimation strived for by the Nicaraguan revolution is one of the main targets of Reagan's attacks.

When the revolution triumphed on July 19, 1979, the Sandinistas inherited an antiquated criminal procedure codified in 1879, yet drawing its inspiration from the Spanish "Novisima Recopilacion" of 1805. Inquisitorial in nature, a single judge conducted the investigation of the case in secrecy without defense participation, presided over both the summary and plenary hearings, rendered the verdict and passed sentence. The accused had no right to remain silent and the proceedings were entirely written, giving rise to mountains of documents which the jury, when summoned, had to read. Although the Sandinistas abolished the Somocista constitution and adopted a progressive Statute on the Rights and Guarantees of Nicaraguans akin to our Bill of Rights, the old criminal codes continue to remain in force despite the junta's passage of hundreds of decrees and laws.

If the anticipated structure of the criminal justice system remained more or less intact, its personnel did not. Nearly all of the judges and many lawyers left the country at the time of the 1979 victory, necessitating the appointment of a new

judiciary by the nine-person junta which assumed power until dissolved after the elections in November 1984. The junta appointed seven justices to the supreme court. Currently, its members include three Sandinistas, two Conservatives, one Liberal and one with no party affiliation. Court of appeals justices were appointed for each region, as well as district and municipal court judges. It is many of these judges who have found themselves confronting government officials and ministries over the propriety of certain legal reforms.

The Statute on the Rights and Guarantees of Nicaraguans promulgated on September 17, 1979, guarantees freedom of speech, thought, religion and information, the right to privacy, protection from unreasonable searches and unlawful arrests, the right to counsel and to jury trial in certain cases, the privilege against self-incrimination, as well as equal protection of the laws. It bans the death penalty and all other cruel and unusual punishments, provides for segregation of pretrial detainees and convicted prisoners, and posits rehabilitation and reincorporation into the productive process as the goal of its prison system. The statute further decrees that the "exercise of the rights and freedoms of each person is inseparable from the fulfillment of his or her duties to the community." Finally, the statute allows, in conformance with international law, for the suspension of the rights and guarantees set forth therein, in times of war or national emergency.

Although freedom of religion and certain other protections are inviolate in Nicaragua, the rights of freedom of the press, of association, to a fair trial, among others, have been suspended for long periods since the revolutionary victory, initially because of the aftermath of the civil war,

but thereafter because of the United States-financed invasion of the country. The repercussions of the various States of Emergency on the criminal justice system can be witnessed in decrees creating two species of popular tribunals, the first functioning from 1979 to 1981 to try former members of Somoza's hated National Guard, and the second functioning now to try captured "Contras" and others arrested for national security violations. Operating under the auspices of the Ministry of Justice, these tribunals function parallel to the established court system and have been criticized for violations of due process both overseas and by the Nicaraguan judiciary itself.

Current Criminal Procedure

When a person is arrested for a common crime, a police judge or "juez instructor" has 10 days to investigate and determine whether probable cause exists to charge the suspect in district court. During this stage, called the "sumario," the suspect has no right to counsel. If a suspect is charged in district court, the judge must determine whether *corpus delicti* can be proved. In this first part of the "plenario," as it is called, the witnesses are subject to cross-examination by defense counsel. In the second phase, the case is tried, either before the judge or a jury, which, since 1981, is only available for limited crimes of violence. This final stage is completely written, except for the final arguments of counsel. Juries are selected from a panel of 80 "blue ribbon" citizens chosen by judges and government officials. A petit panel of eleven is chosen for each trial and the defense has two peremptory and two bias challenges. The jury consists of seven members, and a majority of four is sufficient to render a verdict.

The jury system has been held in dispute in Nicaragua for some time. Under

Somoza, juries were often either bribed or threatened to render a verdict for one side or the other. Currently, it is argued that the manner of selection of jurors insures that they will share bourgeois values and that they will be too lenient with respect to crimes against the state and too severe where the crime is against private property. The same critique has been levied against the judges themselves who, of course, are instrumental in nominating the jurors. Furthermore, because of the exclusively written nature of the proceedings, the relative eloquence of the attorney usually is the decisive factor in the jury's deliberations.

Defense attorneys are also held in low esteem among the populace at large. If they defend people charged with crimes against the state they are often suspected of harboring the same sympathies as the accused. Furthermore, although indigent defendants have the right to court-appointed counsel, these attorneys are not paid and consequently do not provide an adequate defense in many cases. The Nicaraguans responsible for drafting the pilot project expressed great interest in our public defender system and felt that parity between prosecution and defense was necessary to redress the imbalance which now exists.

In October 1980, the junta passed a decree empowering the police judges to sentence arrestees for up to three months for consumer crimes, and up to two years for cattle rustling, drug trafficking and "public insult to authority." Thus, without the benefit of counsel or a trial, and expressly when the evidence is insufficient to send the case to district court, a person may be summarily given a lengthy jail sentence. This mechanism has been used against opponents of the government and the only appellate remedy is to appeal to the chief of police or a delegate of the Ministry of the Interior.

Special Tribunals

From 1979 to 1981, approximately 6000 former Somocista National Guardsmen were tried in nine special tribunals for crimes committed during the bloody civil war which led to the Sandinista triumph. The tribunals consisted of one lawyer and two lay judges, appointed by the junta after having been nominated from the mass organizations, which are closely linked to the Sandinista movement. The main mass organizations are the Sandinista Defense Committees (neighborhood block organizations); AMNLAE (the women's association), CST (the worker's confederation) and ATC (the peasant confederation).

Before the Special Tribunals the accused had 24 hours to respond to the charge and eight to 12 days to submit evidence in his defense. Following a conviction, the prisoner had three days to appeal to one of three special appellate tribunals, also staffed by two lay and one professional judge. During the trial there was no restriction on admissible evidence and the standard of proof, "according to conscience," gave wide rein to the individual value judgments of the judges. Of the 6,310 charged, 1,760 were released because of insufficient evidence, 229 were acquitted, and 4,231 were sentenced. These prisoners, like the Contras later, were given the right to appeal under a "Law of Clemency" to the National Commission for the Promotion and Protection of Human Rights for release. Eighty-nine of the 250 who have invoked this measure have been released. During our trip we met with Mary Hartman, an American nun, who heads this pro-government human rights commission and discussed the "Ley de Gracia" with her and her staff of lawyers. We also visited "Granja Kilometer 23½," an open prison farm, where some of the National Guardsmen convicted in the Special Tribunals are serving their time. The prison guards carry no

weapons, while the prisoners work the fields wielding machetes. There are no walls or fences and the prisoners are allowed to visit their families in and around Managua on weekends. We spoke with Somoza's former bodyguard who was the prisoner's representative. The maximum sentence for the Guardsmen, as for anyone prosecuted in the courts or the popular tribunals, is 30 years. The death penalty has been abolished.

Popular Anti-Somocista Tribunals

On April 6, 1983, a junta decree created a second set of popular tribunals called "Popular Anti-Somocista Tribunals" to try the Contras captured during the war with the United States-supported rebels. Two panels, each consisting of one professional judge, and two lay judges nominated by the Sandinista Defense Committees, were set up in Managua, one to try the accused counterrevolutionaries and the other to handle appeals. As with the Special Tribunals, no recourse is possible to the court system proper.

In many cases the suspected Contras have languished in pretrial detention for long periods while the government has investigated their cases. Once the trial commences, however, the period given the accused to prepare his defense has often been inadequate. Although entirely written, the trials are public, and the accused has a right to counsel, to confront the evidence against him and to present a defense. Like in the Special Tribunals, the formal rules of evidence are not followed. The standard of weighing the evidence is "sana critica," or "the correct human understanding in which the rules of logic interplay with the personal experience of the judges." Although superior to the "apreciación en conciencia" standard of the earlier tribunals, the "sana critica" standard, coupled with the relaxed rules of evidence and the predilections of the

judges, make convictions inevitable in most cases.

The advent of the popular tribunals and, most recently, the "Popular Anti-Somocista Tribunals" is symptomatic of the struggle which has existed since the revolutionary victory between the executive and judicial branches of the new government. The pluralist supreme court maintains that all judiciary functions should be under its aegis, whereas the Sandinista leadership, distrustful of judges and legal professionals, wants to create a new justice system under the Ministry of Justice consisting of popular tribunals. The revolutionary leadership contends that the established court system is too slow and that bourgeois judges and juries mete out a class justice antagonistic to the revolution. The judiciary decries the abridgment of the right to a fair trial and the lack of due process inherent in many procedures followed by the tribunals.

The conflict between executive and judiciary was often expressed in the early years by refusal of the prison authorities to release prisoners whose convictions had been set aside by the courts. These abuses have subsided in recent years.

The Pilot Project for Judicial Transformation

Over the past couple of years a committee composed of representatives of the Ministry of Justice, the supreme court, the Ministry of Interior and the junta (until dissolved in January of 1985) began to formulate a project for judicial reform aimed at injecting popular participation and procedural reform into the archaic structures inherited from Somocismo. I spoke before a group of professionals, many of whom were working on this pilot project, in Masaya, the capital of the Fourth Region where this new system will be provisionally implemented. I was given a draft of the proposed project and discussed it with

members of the committee in charge of its preparation. The goal of the project is to create an antiformalist, oral, public, concentrated, and flexible criminal procedure, which will insure that the verdict is based in the reconstruction of the crime and its surrounding circumstances. The triers of fact will be, as in the popular tribunals, one professional judge and two lay judges nominated by the mass organizations, but approved by the supreme court. Once chosen, the lay judges would be educated about principles of law so as to improve their efficacy.

The Pilot project would abolish the "police courts" which gave police judges the right to sentence, and would assure that the right to counsel would adhere during the "sumario" investigation by the "juez instructor." The new system would provide for release on bail, on police vigilance (daily reporting to the police), house arrest, or preventive detention (for no longer than 18 months). I was told that, under the current system, virtually no one is released pending trial.

All testimony in the new system would be oral, and the defendant would have a right to cross-examine the witnesses. All evidence seized contrary to law would be suppressed and inadmissible at trial. The burden of proof would be "beyond a reasonable doubt," with a provision for acquittal due to mitigation when the proof has nevertheless been met (something akin to jury nullification). Only a majority of the three judges would be necessary to render a verdict.

Conclusion

The struggle in the legal sphere in Nicaragua can only be understood in relation to the corrupt Somocista past, the delicate Sandinista-dominated pluralism of the present, and the ominous presence of the United States and its attempts to liquidate the revolution. Under Somoza the criminal

justice system was fraught with corruption. Judges and lawyers were distrusted and juries were bribed and threatened. During the civil war the system broke down completely. The Sandinista leadership, themselves former victims of Somocho, seek a revolutionary cleansing of the system—both to remove the class bias of the legal professionals who dominate the system (and have corrupted it), and to expeditiously prosecute those who infringe its order. The legal professionals, on the other hand, advocate the independence of the judiciary (something under attack in this country as well), procedural fairness, as well as insuring their primacy in the system as triers of fact. Some legal professionals I spoke with preferred to

remain with the antiquated written system rather than risk a process the result of which could diminish their influence in the system.

One must also not forget that the revolutionary leadership and the masses who fought and died to oust Somocho believe that they have earned an integral role in the country's institutions, including the judicial system. They believe that revolutionary principles *should* guide the trier of fact and that this higher morality will result in more legitimate verdicts.

With respect to the popular tribunals, the supreme court maintained that the court system could have tried both the Somocistas and the Contras within its existing structure. Despite the expedited

procedures and deficit in procedural safeguards, it must be remembered, however, that *none* of the prisoners of either war have been executed, all received public trials, and all had the right to present a defense and be represented by counsel. One asks whether traitors of the United States in times of war would fare so well, not to speak of anti-government rebels in other well-known Latin American countries, which happen to be our allies.

The pilot project seems to be a compromise which pays tribute to the Sandinista precept of popular participation via the use of lay judges chosen from the mass organizations, yet accords the accused procedural safeguards which have never existed in Nicaragua—not under the current system, the popular tribunals, nor under Somocho. It remains to be seen when and whether the pilot project is instituted, and thereafter, whether it spreads to the rest of the country. It also remains to be seen whether the lay judges can render just verdicts pursuant to a rigorous standard of proof, despite their pro-revolutionary inclinations.

It is, however, completely in our government's hands to determine whether Nicaragua will proceed with peaceful reforms based on compromise between opposing ideologies, i.e., a spirit of pluralism, or cast off its gentle face because of the exigencies of being perpetually threatened and at war with the most powerful nation on earth.

Stephen Thaman, an Assistant Public Defender for Alameda County, traveled to Nicaragua in May 1985 as part of a group of American lawyers and law professors invited by the Nicaraguan Association of Democratic Justice to consult on the judicial process.

