

GLOBALISATION, LAWYERS AND THE STATE

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As technicians, interpreters and defenders of the legal order, lawyers have traditionally played a pivotal role in maintaining state authority and the hegemonic domination of successive ruling classes.¹ In recent years they have played an important part in facilitating the processes which have come to be known as globalisation. Thus an army of lawyers have been deployed around the globe to serve the interests of national and multi-national capital. At the same time, lawyers act as advisors and functionaries of the world's states which continue to play a fundamental role by providing order and security, enabling the processes of globalisation to expand and intensify.²

Historically lawyers have also played a significant part in resisting state power, and perhaps to a lesser extent, private corporate power. Such resistance has generally been waged in courtroom struggles. They do this more as guerrillas fighting occasional legal skirmishes than as conventional forces in all-out political confrontation with the superior force of the state. We do not normally associate lawyers with political resistance to dominant socio-political, economic trends.

The traditional role of lawyers has been challenged in recent decades by the growth of social movement lawyering which emerged from two developments. First, the radical lawyer movements of the mid-sixties and seventies³ and, second, the emergence of human rights legal activism which has seen lawyers involved in a wide range of issues and movements.⁴ In recent years a third model of lawyering has begun to emerge in a number of countries. We will refer to it as 'resistance' lawyering.⁵ Its emergence is a response to the actions of political states which, under the pressure of forces unleashed by globalisation (including the 'war on terror') have dropped the pretences of liberalism and increasingly adopted authoritarian practices. In doing so, they have laid down a challenge to the lawyers: you are with us or against us. To their great credit, courageous lawyers across the world, using different tactics, have resisted the policies and practices of the state in public demonstrations of political opposition.

In 2007, we saw some extraordinary developments involving very significant extra-curial confrontations between lawyers and states, from France to Pakistan, Malaysia and the Philippines. These lawyer resistance movements, and the degree of repression of lawyers by reactionary governments, represent a significant

development for lawyers internationally. It is vital that this development be known and understood by all those who are committed to constitutionalism, human rights, equality and the broad struggle against exploitation and oppression. In this article, we want to bring to the attention of Australian lawyers and others some of the under-reported reality of world-wide lawyers' resistance.

The most highly publicised was the titanic struggle over the judiciary which Pakistan's General Musharraf provoked in March by suspending the Chief Justice, Iftikhar Chaudry⁶ after the Supreme Court had accepted for decision a case challenging the General's candidacy in Presidential elections on the ground that it was unconstitutional for him to stand while retaining control of the military. Massive protests by lawyers continued month after month. The sight of thousands of Pakistani lawyers demonstrating on the streets was riveting. Though roughly confronted by police, they persisted in vehement demands for the reinstatement of their Chief. The commitment of those lawyers, and their tactics, was both surprising and inspiring. In July Musharraf decided he had no choice but to reinstate Chaudry.

Though he promised to enter the election as a civilian, the General did not. His victory on 6 October was no surprise. Military control had been tight since the coup in 1999 which first brought him to power. But another case was filed in the Supreme Court challenging his election. Fearing the worst from the Supreme Court, Musharraf declared a State of Emergency on 3 November. The judges were required to take an oath to support his regime and, therefore, the election. Chaudry and 11 of the 17 Supreme Court judges refused. Musharraf had them sacked, detained and replaced by trusted others. About 50 judges from the regional High Courts were similarly sidelined.

It was also no surprise when the new, supine Supreme Court upheld Musharraf's election. But the situation was quite different from 1999 when he promised to end corruption and restore democracy. The lawyers' struggle, among other events, had irrevocably tarnished his regime. He finally stood down from the military in December; but the subsequent assassination of Benazir Bhutto probably sealed the fate of Musharraf's party at the February Parliamentary elections in which they lost control of Parliament. Commentators referred to the judges and lawyers as the real heroes in the country.⁷

REFERENCES

1. See eg Maureen Cain, 'The Symbol Traders' in Maureen Cain and Christine B Harrington (eds), *Lawyers In A Postmodern World* (1994) 15–48. See generally on law and lawyers, Yash Ghai, Robin Luckham, Francis Snyder (eds), *The Political Economy of Law: A Third World Reader* (1987).
2. See Spyros Sakellariopoulos, 'Towards a Declining State? The Rise of the Headquarters State' (2007) 71(1) *Science and Society* 7–32. He argues that the state has been transformed, living off and/or reducing its social functions, and becoming more authoritarian. We argue that this calls for resistance which increasingly involves lawyers in political struggle.
3. See Jonathan Black (ed), *Radical Lawyers* (1971); Robert Lefcourt (ed), *Law Against the People* (1971). See generally, David Weisbrot, *Australian Lawyers* (1990) Chs 2.3. See also regarding Australia, Stan Ross, *Politics of Law Reform* (1982) and Stan Ross and Mark Weinberg (eds), *Law for the People* (1976).
4. See Micheline R Ishay, *History of Human Rights: From Ancient Times to the Era of Globalisation* (2004). See generally Micheline R Ishay (ed), *The Human Rights Reader* (2nd ed, 2007). And see Nick O'Neill, Simon Rice, Roger Douglas, *Retreat from Injustice: human rights law in Australia* (2002).
5. On conceptions of non-traditional lawyering, see generally Maureen Cain and Christine B Harrington (eds), *Lawyers in a Postmodern World* (1994) Chs 1–3, 11.
6. See BBC, 'Lawyers protest against Musharraf', BBC News, 12 March 2007, <news.bbc.co.uk/1/hi/south-asia/6441133.stm> at 28 August 2008; World Socialist Web Site, K Ratnayake and Keith Jones, 'Mounting calls from Pakistan's military and judicial establishments for Musharraf to quit', 2 February 2008, <[wsws.org/articles/2008/feb2008/paki-f02_pnn.shtml](http://www.wsws.org/articles/2008/feb2008/paki-f02_pnn.shtml)> at 28 August 2008.

Less well known is the militant response of French lawyers to the neo-liberal program of President Nicolas Sarkozy.⁸ In his election campaign, Sarkozy (a lawyer before entering politics) promised substantial reforms to the French 'judicial map'. This was part of his pledge to 'modernize' the country and make it more competitive: the French political, judicial and economic institutions and practices were to be made more 'efficient'.

France's legal system was to be pared down with the elimination of about half the regional appeal courts (from 35 to 19), nearly half the superior trial courts (from 181 to 96) and about 40 per cent of the lower courts (from 473 to 200). Reform of the legal system also meant that some white-collar offences were to be decriminalised, sex offenders' release from jail upon completion of their sentence was no longer automatic, and minimum sentences were introduced for recidivists in regard to an array of traditional (ie non-white-collar) crimes. This trifecta was an indication of the class bias and authoritarianism of the 'new morality' Sarkozy had also promised the voters.

Elimination of courts meant a diminution of access to justice, particularly for the poor and working class, as litigants would have to travel longer distances, and it would be costly as there is often no public transport from rural areas to the remaining courts. The loss of the superior courts where legal aid must be applied for suggests that fewer people will be able to secure it.

The specific reform plans were announced one month after the election. The announcement unleashed a wave of protests involving lawyers, judges and court staff across the country, particularly in the small cities, towns, and in rural areas which would be hardest hit. At Bourges courthouse, 200 lawyers demonstrated; in Metz, 450 lawyers and others; Pau saw 300; Amiens another 200 lawyers and judges; and in Marmande and Chateauroux, lawyers blocked access to the courthouse. A majority of the Bar Associations went on strike or demonstrated as part of a general nationwide slow-down against the Sarkozy government's radical program of reforms.

In September the National Council of Bar Associations asked Justice Minister Rachida Dati to withdraw the reform. She declined. She was adamant that the government 'would go all the way'. In October she began a 'tour de France' to sell the reform. She was met at every location by striking lawyers in full regalia, sometimes violent, at other times more creative: in Paris, protesting lawyers and Bar Association Presidents presented her with bouquets of white roses.

Mme Dati responded by announcing that the reforms would not be applied 'mechanically', but the National Bar Council, representing 47 000 lawyers, withdrew from the consultative committee which had been established but not used.

The judges' unions now drew the line, with the left-wing Magistrates' Union declaring that the legal system was a public service and must be protected, calling for resistance to the reforms. All judges' unions agreed to join the national strike which the French trade

union movement announced for 29 November. Just before the strike, the president of the Montluçon Bar, two lawyers and a law clerk went on hunger strike. In Belfort a lawyer was bashed on the head as she attempted to climb over a police barricade.

On the day of the strike, in front of every courthouse in France, lawyers, judges, clerks, trade unionists, politicians, and others demonstrated. In Paris the target was the Justice Department. Hundreds gathered and watched 15 Bar Association Presidents chaining themselves to the railing outside the building. In Bordeaux, 700 lawyers took part, including a number of students from the national judges' school which is located there; 300 protested in Rennes and in Lyon another 200. In Marmande, 16 lawyers and judges slept overnight in the Courthouse.

Despite this spirited resistance the government did not withdraw the reform. The final version was less radical as the number of courts eliminated was reduced (196 instead of over 300 — interestingly none of the appellate courts was to go). But the Minister had a surprise: 63 of 271 Labor courts and 55 of 191 business courts were to disappear.

While the March 2008 elections saw major Opposition gains, the legal reforms were not derailed. But the struggle of the lawyers, and their allies, can be seen as an important political statement that the government will be strongly resisted if it does not heed the calls for moderation in its pursuit of so-called economic efficiency. There is a strong tradition in France of resisting the state and fighting for justice; the French, it is said, 'demonstrate like they breathe' and lawyers, like others, maintain that tradition.⁹ As one French commentator has noted, 'France has a time-honored tradition of legislating from the street. French-style people power has even acquired a force that trumps representative rule'.¹⁰

In the Philippines lawyers are under the most serious threat as they continue to confront the corrupt and repressive regime of President Arroyo.¹¹ The latest available figures indicate that, during her tenure, over 900 people have been the victims of 'extra-judicial killings' and some 200 have been 'disappeared'. Hundreds more have survived attempted assassination, and many hundreds have been abducted and tortured. Numerous international inquiries confirm that the reign of terror has been largely the responsibility of the Armed Forces of the Philippines using its operational plan Freedom Watch to oppose 'terrorism', Communist guerrillas and, to a lesser extent, Moro (largely Muslim) forces in the southern islands. The Philippine National Police are also involved in the repression.

Of the extra-judicial killings, nearly 30 have been lawyers, several of whom were judges, while two recent victims were successive Legal Advisors to the Commission on Elections. The others were human rights activists working with social movement organizations and trade unions, fisherfolk, peasant and teacher associations. Effectively, there has been a military-police onslaught directed at resistance

7. See 'Hero's welcome for defiant judge', 7 May 2007; Medea Benjamin, 'Who Is Defending Pakistan's Democracy? Not the Politicians, It's the Judges' 29 November 2007, <alnet.org/story/69164/> at 28 August 2008. Wrangling between major parties over the conditions of reinstatement further stained the reputation of the politicians, see 'Irate Chaudry set to refuse job', 10 May 2008, 14.

8. For a full set of references to the French lawyers' struggle, largely from the French media, see Stuart Russell, 'French lawyers take to the barricades' unpublished memo, 6 January 2008 (available from the author: <jsrussell301254@hotmail.com>). The conflicts within the legal professions in our study have not been discussed but certainly need to be acknowledged. The French case is well demonstrated by the repressive role played by the criminal courts in response to rioting in the poor suburbs of Paris. See Alex Lantier, *France: drumhead tribunals and threats of police state repression* (30 November 2007) World Socialist Web Site <wsws.org/articles/2007/nov2007/fran-n30_prr.shtml> at 28 August 2008; Antoine Lerougetel, *France: A sharp increase in police repression* (20 December 2007) <wsws.org/articles/2007/dec2007/fran-d20_prr.shtml> at 28 August 2008.

9. See generally on the French tradition of protest, Patrick Pelloux, *Histoire d'urgences* (2000).

10. BBC, Henri Astier, 'Does French "people power" rule OK?' BBC News, 14 November 2007, <news.bbc.co.uk/2/hi/europe/7094525.stm> at 28 August 2008.

11. See generally Gill H Boehringer, 'Philippine "Elections"? Democracy subverted' (2007) 32(3) *Alternative Law Journal* 172; Gill H Boehringer, 'Terror Behind Sham Filipino Democracy', <bulatlat.com> June 24-30 (2007) VII (20); Gill H Boehringer, 'Resistance to Killings as Arroyo Falters', <bulatlat.com> August 19-25 (2007) VII(28).

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leadership reminiscent of the Phoenix Program run by the Americans during the Vietnam War. The Americans have for years advised, supplied and trained the Filipino military and police.¹²

In addition to their 'resistance' work with civil society groups, Filipino lawyers have been active in challenging 'war on terror' legislation (ironically entitled the Human Security Act) as unconstitutional; constantly challenging those arrests and detentions which violate human rights; organising submissions to government and international agencies on human rights violations. They have also played a significant role in monitoring intimidation and corrupt election practices whereby Arroyo has maintained her position. Environmental issues are also pursued in a context of violence and intimidation, as mining companies, several Australian, are in the process of destroying many communities. Resistance to the mining has been widespread and determined. The companies have been protected by the military and police, and some private security operatives (including an ex-general who is thought to be responsible for many of the killings and disappearances before his retirement last year). Lawyers, and others, assisting the local people have been killed.¹³

Despite the risks, progressive lawyers have not been intimidated. In 2007, in order to unify and strengthen their movement, they formed the National Union of Peoples' Lawyers.¹⁴ The NUPL has engaged in a program of research and human rights advocacy which has responded critically to the government's rhetoric on human rights.

The international response has been disturbingly inadequate, given recognition of the impunity with which government forces act in the killings and other abuses. (There have been only two convictions involving the military in the killing of two journalists, few serious investigations and only a handful of charges laid.) The Philippines retains its seat on the UN Human Rights Council. Recently, however, as a result of heavy criticism by Philip Alston, the UN Special Rapporteur on Extra Judicial Killings, and submissions by the NUPL, the Council has stressed that the Philippines must take effective action against the perpetrators.

A unique intervention in the political struggle was made by the Chief Justice of the Supreme Court, Reynato Puno.¹⁵ Clearly frustrated with the lack of action by the Arroyo government, Puno called together some 200 political, judicial, military/police, Church and

civil society leaders for a summit on the killings and disappearances from which came a number of positive recommendations, including strengthening the concept of military/police command responsibility for human rights violations by subordinates.

Two further recommendations have since been implemented: the judicial writs of *habeas data* and of *amparo* which are known to civil lawyers.¹⁶ These writs may be applied for by relatives and others — or initiated by government agencies — in cases of suspected abuse including killings and disappearances. They go beyond the writ of *habeas corpus* which has proved almost useless in these cases. No longer can a state agency simply deny they have, or know the whereabouts of, an allegedly detained, killed or disappeared person. With these writs, the challenged agency is required to release to the court, and thus to the applicant, all information it has regarding the person and a detailed account of all efforts it has made to discover the precise facts in the specific case. It is also possible for the court to order the officials to provide access to all suspected places of confinement, torture or disposal of the individual sought. Failure to obey the court orders is a punishable offence.

In trying to understand these and other contemporary lawyer resistance movements, it is important to acknowledge that each has to be considered in its own specific history, traditions, legal culture and state-civil society relations.

In France, the 'modernizing' government of a developed, liberal Western democracy acted to restore the tarnished legitimacy of the state and the capacity of French corporate capital to compete and prosper. As Interior Minister, Sarkozy had already implemented a hard-line approach to urban riots, especially involving alienated youth from migrant communities; police and judicial repression was comprehensive. His government proceeded to implement the reforms needed to 'streamline' the public sector, including the legal system. The resistance to his program was strong. That of the lawyers was generally within the framework of law, or the traditions of popular resistance. Negotiation was expected and, to some extent, worked. The reforms were mitigated and the resistance was brought to an end. The state retained its legitimacy. Having applied what pressure they could, the lawyers had to accept a substantial defeat.

The Philippines presents a story of ongoing confrontation and continuing challenges to the

12. On the culture of impunity in the country and lack of successful prosecutions in the killings and disappearances of lawyers and other human rights activists, see for example Human Rights Watch 'Scared Silent: Impunity for EJKs in the Philippines' <hrw.org/reports/2007/philippines0607/> at 28 August 2008.

See also the Karapatan Monitor, published in English quarterly by Karapatan (Alliance for the Advancement of Peoples' Rights), <karapatan.org> at 28 August 2008; the report of a request from the Chief Justice R S Puno to the Philippine National Police, 'Puno Asks PNP to Hasten Probe On Judge's Slay', *Philippine Daily Inquirer*, 16 January 2008. For a general analysis of the situation facing human rights lawyers in the Philippines and elsewhere today, see Gill H Boehringer, 'GlobalUSAion: Lawyers, Human Rights and the Contradictions of Legal Order', Conference paper delivered in Hong Kong, June 2008 (available from the author at <gill.boehringer@humn.mq.edu.au>).

13. See Ruth Cervantes, 'Defending human rights, Resisting Terrorism: The Philippines Experience' Conference paper delivered in Hong Kong, June 2008 (available from the author, Information Officer of Karapatan, at <ruth.cervantes@gmail.com>). See also Danilo Arana Arao, 'The Human Security Act and Philippine Journalism' at the website of the Philippine Human Rights Reporting Project, <rightsreporting.net> at 28 August 2008.

14. See <nupl.wordpress.com/> at 28 August 2008. See the report of the Founding Congress of the National Union of People's Lawyers, <arkibongbayan.org/2007-09Sept16-nupl/nuplcongresssept16.htm> at 28 August 2008.

15. See generally <supremecourt.gov.ph/publications/summit/index.php> at 28 August 2008.

16. For the text of the rules of the Writ of Amparo, see <<http://philippines.ahrchk.net/pdf/PrimerOnWritOfAmparo.pdf>> at 28 August 2008; and see Human Rights Solidarity website <w6.hrsolidarity.net/mainfile.php/2007vol17no06/2595/> at 28 August 2008.



legitimacy of the state. A rapacious elite and corrupt regime face a dense civil society, tempered like fine steel through its successful battles to depose the dictator Marcos, to force the withdrawal of American troops and bases, and the ousting of Arroyo's predecessor. Through all these struggles lawyers have been integrated in the social movements resisting the state. In those circumstances they have not been on their own, vulnerable to being simply picked off or co-opted as a group. Nor have negotiations been an option. As a result, the Arroyo regime has not attempted to confront them directly, other than in court, often before compliant judges. Rather the Philippine state is engaged in a 'shadow war' in which progressive lawyers and their allies are 'neutralised' by violent extra-judicial measures.

In Pakistan, an authoritarian state has been in place for years and civil society is less united and less experienced in the tactics and methods of politically confronting the state than in the Philippines. With few exceptions, lawyers have not played a significant part in political opposition to the state. Only recently has the Pakistani state been confronted by mass lawyer resistance. That resistance was so widespread and spontaneous, involving so many respected members of the community, it was impossible to contain. At first the Musharraf regime sought to brazen out the protests over the suspension of the Chief Justice. This was similar to what had happened after the military coup led by Musharraf, but at that time they were strong enough to prevail. This time the regime was far weaker

politically and had to resile from his decision. His later attempt to 'pack' the top echelons of the judiciary was a desperate measure and a significant factor in his loss of control of the Parliament.

The law is a central mechanism for regulation of the social relations of daily existence as well as the socio-political, economic relations of corporate capital. It is therefore not surprising that some sections of the legal profession are being drawn into confrontation with the state. They have a particular commitment to social justice and experience in fighting for it alongside the people. In addition to a general commitment to the rule of law, they have today an awareness of, and experience in, human rights activism.

We have tried to indicate some of the elements to be considered in the analysis of lawyer resistance in the face of repressive state activity. Such resistance will be increasingly vital in the difficult conditions confronting many countries today. In such circumstances, we ought to keep in mind the likely tendency of state practice *in extremis*, failing committed resistance from a strong civil society including, importantly, lawyers.

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