



The Criminal Trial of Venezuelan Lawyer José Amalio Graterol

November 2013

Report of the International Bar Association's Human Rights Institute (IBAHRI)
Supported by the IBAHRI Trust

Material contained in this report may be freely quoted or reprinted,
provided credit is given to the International Bar Association



International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

Website: **www.ibanet.org**

Contents

Glossary of Acronyms	4
Executive Summary	5
Chapter One: Introduction	6
1.1 The IBAHRI and the basic principles on trial observations	6
1.2 The IBAHRI and the independence of the judiciary in Venezuela	7
Chapter Two: The case of José Amalio Graterol	9
2.1. Background	9
2.2. José Amalio Graterol and the defence of Judge Afiuni	10
2.3. The arrest of and charges against José Amalio Graterol	10
2.4. The trial of José Amalio Graterol	12
Chapter Three: Conclusions and Recommendations	16

Glossary of Acronyms

COPP	Organic Criminal Procedure Code (Código Organico Procesal Penal)
IACHR	Inter-American Convention on Human Rights
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
INOF	National Institute of Feminine Orientation
OAB	Federal Council of the Brazilian Bar Association (Ordem dos Advogados de Brasil)
UDHR	Universal Declaration of Human Rights
UN	United Nations

Executive Summary

José Amalio Graterol ('Graterol') is defence lawyer to Judge María Lourdes Afiuni ('Judge Afiuni'), one of Venezuela's highest profile political prisoners and whose case is regarded as emblematic of the lack of independence of the legal profession.¹ Since Graterol's arrest for 'obstruction of justice' in June 2012, the International Bar Association's Human Rights Institute (IBAHRI) has maintained an international observation at his trial hearings; this report consolidates the findings of its observers and presents some preliminary conclusions.

On 3 June 2012, Graterol strongly criticised the Venezuelan authorities' handling of the *Afiuni* case and the situation of judicial independence in the country. The following day, he received a telephone call from a court official warning him that 'something' was being prepared against him. That afternoon, in a separate case, Graterol's client Leonardo Colmenares, accused of murder, refused to appear at his trial, alleging that the presiding judge was not impartial. The Venezuelan penal code as it stood at the time did not allow trials *in absentia* and so Graterol refused to allow the trial to continue. The presiding judge ordered his arrest and he was charged with 'obstruction of justice'. A few days later, on 15 June 2012, the Criminal Procedure Code was amended by presidential decree to allow for trials *in absentia*, effectively basing Graterol's charge on a retroactive use of the amended provision.

Graterol was eventually convicted to six months in prison on 18 December 2012. His appeal was denied on 15 July 2013. At the time of writing, Graterol is waiting for a 'psychosocial' examination that will determine whether he will serve his sentence in prison or on conditional release.

The IBAHRI finds it difficult to escape the conclusion that the prosecution has been brought against him in order to frustrate the defence of Judge Afiuni and/or in retribution for his defence of Afiuni and related public criticisms. It is outside the IBAHRI's mandate to consider substantive points of Venezuelan law; however, it is alarmed at the multiple due process violations in the case. The IBAHRI is extremely concerned both at the apparent arbitrariness of the prosecution and the lack of regard for basic due process safeguards by the Venezuelan authorities, which not only contravene domestic guarantees, but also the principles of natural justice and international human rights standards.

At the time of its 2011 report, the IBAHRI was encouraged that it did not hear of any threats against lawyers, including Afiuni's defence counsel. This situation has dramatically changed and the IBAHRI is now extremely concerned at the creation of a 'Graterol' effect, which risks creating a similar chilling effect amongst the Venezuelan legal profession, with lawyers fearful of being deprived of their liberty for taking on politically sensitive cases or expressing their views publicly on justice-related matters.

¹ For more information regarding the case against Afiuni, see the IBAHRI's report, *La Desconfianza en la Justicia: El caso Afiuni y la Independencia de la Judicatura Venezolana (Distrust in Justice: The Afiuni case and the independence of the judiciary in Venezuela)*, (IBAHRI, 2011), full report available in Spanish at www.ibanet.org/Document/Default.aspx?DocumentUid=0E0DC15A-4F39-4EE6-81F5-F36A60D90231; Executive Summary available in English at www.ibanet.org/Document/Default.aspx?DocumentUid=CE82F018-221F-465B-81CD-2C4E1669A2EE and Portuguese at www.ibanet.org/Document/Default.aspx?DocumentUid=481F7226-9F17-4831-A8E4-7CAFF65881A2. All URLs throughout this report were last accessed 13 September 2013 unless otherwise specified.

Chapter One: Introduction

1.1 The IBAHRI and the basic principles on trial observations

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. Its membership includes more than 50,000 lawyers and over 200 bar associations spanning every continent.

The International Bar Association's Human Rights Institute (IBAHRI) works to promote and protect human rights under a just rule of law. The IBAHRI believes that the independence of the judiciary is one of the cornerstones of the rule of law and works to protect the right and ability of judges and lawyers to practise freely and without undue interference. In order to advance their objectives, the IBAHRI undertakes a variety of projects including: trainings for judges and lawyers; capacity building for bar associations and law societies; undertaking high-level fact-finding missions; and conducting trial observations.

The guiding principle of trial observations conducted by the IBAHRI is the right to a fair and public trial. This principle is established in several international and regional human rights instruments, such as Article 10 of the Universal Declaration of Human Rights (UDHR), Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and, also, Article 35 of the Statute of the International Court of Justice and Article 8 of the Inter-American Convention on Human Rights (IACHR). The Bolivarian Republic of Venezuela (hereinafter, 'Venezuela') ratified the ICCPR on 10 May 1978 and the American Human Rights Convention on 23 June 1977.

The right to observe trials is provided for in Article 9(b) of the Declaration of Duties and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Liberties adopted by the United Nations (UN) in 1998. The practice of conducting trial observations has been accepted by the international community, and IBAHRI, together with other international, regional and national legal organisations, continually sends representatives for trial observations. The presence of trial observers helps to ensure the good administration of justice and proper functioning of the court as a manner of guaranteeing due process. The IBAHRI follows a strict procedure both for selecting and sending international observers. In terms of selecting observers, the IBAHRI always works with suitable and internationally recognised legal professionals. Sending observers always includes giving written notice to government bodies in the country and the relevant embassies to formalise the presence of observers.

This report deals with the international observation of the trial against the lawyer José Amalio Graterol who, since April 2010, has been the defence counsel in the case of Judge María Lourdes Afuni Mora. The *Afuni* case has been in process since her detention on 10 December 2009.² The IBAHRI thanks the international observers, Luis Fernando Vargas Rodríguez, a Colombian lawyer, specialist in penal law and criminological science, member of the British-Colombian Lawyers Association and the Colegio de Abogados Rosaristas (Rosario Bar Association); and Jordi Morató-Aragonés, Judge of the Provincial Court of Tarragona (2001–2003) and of the Contentious Administrative Chamber in the Supreme Court of Justice of Catalonia (2003–2011).

² IBAHRI (2011) see n 1 above.

1.2 The IBAHRI and the independence of the judiciary in Venezuela

The IBAHRI has followed the events in Venezuela with great interest and has made four visits to the country – in 1998, 2003, 2007 and 2011 – in order to assess the situation of the Venezuelan justice system.³ The IBAHRI's last visit to Venezuela was between 8 and 11 February 2011 and, as a result, published the report *Distrust in Justice: The Afiuni case and the Independence of the Venezuelan Judiciary*.⁴ The report was launched by the Federal Council of the Brazilian Bar Association (Ordem dos Advogados de Brasil – OAB) in April 2011 and highlighted the huge challenges faced by the judiciary regarding the lack of independence.⁵ The report considered the following to be examples of these challenges: (i) the election of Supreme Court of Justice Magistrates by the National Assembly; (ii) the lack of application of the Code of Ethics to appoint and remove judges; (iii) the frequent appointment of provisional judges without guarantees of independence or security of tenure; and (iv) the public statements and behaviour of members of the Executive, which strongly compromise judicial independence.

The IBAHRI also considered the *Afiuni* case (briefly mentioned in this report as an emblematic case representative of the lack of judicial independence in Venezuela) which the then-President of Venezuela, Hugo Chávez Frías, publicly declared should be an example for other judges. The IBAHRI noted with concern that 'before the *Afiuni* case, judges were fearful of the threat of disciplinary proceedings or removals; however the IBAHRI is extremely concerned that now members of the judiciary are fearful of being deprived of their liberty ...' and that 'Nobody wants to be the next Afiuni.'⁶

Nevertheless, at the time of the IBAHRI visit, Afiuni's defence lawyers stated that they had not received threats while exercising their professional duties and had not experienced any interference in the performance of their work as defence counsel. Therefore, at the time of the report the delegation considered that, despite the lack of independence of the judiciary in Venezuela represented by the aforementioned facts, as well as the events in the emblematic case of *Afiuni* (see below), that lawyers working on politically sensitive cases had not been harassed or suffered persecution.⁷ Nevertheless, during 2012, the IBAHRI received information confirming that both Graterol and Thelma Fernández ('Fernández'), Afiuni's defence lawyers, had started to receive threats by telephone and via text message.⁸ The IBAHRI therefore expressed its concern regarding the harassment suffered by Judge Afiuni's defence lawyers, harassment that, as will be outlined in this report, culminated in the arrest, arbitrary detention and charging of Graterol on 4 June 2012 for the offence of 'obstruction of justice'.

3 *Introductory Report on the Administration of Justice in Peru and Venezuela* (IBAHRI, 1999); *Venezuela: a report on the situation of the justice system* (IBAHRI, 2003); *Venezuela: Justice under threat* (IBAHRI, 2007); *Distrust in Justice: The Afiuni case and the independence of the judiciary in Venezuela* (IBAHRI, 2011). All reports available online at www.ibanet.org/Human_Rights_Institute/HRI_Publications/Country_reports.aspx.

4 IBAHRI (2011) see n 1 above.

5 For more information on the conference see www.ibanet.org/Article/Detail.aspx?ArticleUid=660fa6fb-a163-4b4d-85f7-58cdf820eb0.

6 See *Distrust in Justice: The Afiuni case and the Independence of the judiciary in Venezuela* (Executive Summary) (IBAHRI 2011), available at www.ibanet.org/Document/Default.aspx?DocumentUid=CE82F018-221F-465B-81CD-2C4E1669A2EE, p 9.

7 See *La Desconfianza en la Justicia: El caso Afiuni y la Independencia de la Judicatura Venezolana* (*Distrust in Justice: The Afiuni case and the Independence of the judiciary Venezuela*), (IBAHRI, 2011) available in Spanish at www.ibanet.org/Document/Default.aspx?DocumentUid=0E0DC15A-4F39-4EE6-81F5-F36A60D90231, p 72.

8 'Harassment of Judge Afiuni's lawyers, José Amalio Graterol and Thelma Fernández alarming to IBAHRI', IBAHRI press release, 24 April 2012, available at www.ibanet.org/Article/Detail.aspx?ArticleUid=862012ba-37c3-440a-b840-26b065f7d496.

In light of these events and the potential implications they may have on the independence of the judiciary in Venezuela, the IBAHRI decided to follow the matter through international observations of the trials of both Judge Afiuni and Graterol, in order to assess the level of judicial independence in the country. This report presents the case of *Graterol*, accused of obstructing justice, as well as some preliminary considerations in this case.

Chapter Two: The case of José Amalio Graterol

2.1 Background

To understand the context of the case against Graterol, it is necessary to consider to the case of Judge Afiuni, for whom Graterol is defence counsel and which many view to be the highest profile political case in Venezuela.⁹ On 10 December 2009, Judge Afiuni decided to grant bail to businessman Eligio Cedeño who had been in pre-trial detention for more than two years – the maximum period of detention provided for in the Venezuelan Organic Criminal Procedure Code (COPP). Bail was granted in compliance with a recommendation from a decision of the UN Working Group on Arbitrary Detention and with the Venezuelan Penal Code. Immediately after, the police entered the court room and Judge Afiuni was arrested. Eligio Cedeño subsequently absconded and fled the country.

On 11 December 2009, in a presidential broadcast on national television and radio (*cadena nacional*) President Chávez called Judge Afiuni a ‘bandit’ (*bandida*) and said that she should be convicted and imprisoned. President Chávez stated:

‘She should be in prison. This judge must pay, with the full force of the law, for what she did, together with any judge that thinks of doing the same.’

He added:

‘She has been detained and I demand that this judge be dealt with firmly. I told the president of the Court [Luis Estella Morales] that it will be necessary to make a special law because a judge who frees a bandit is worse than the bandit himself, it is incredibly serious for the Republic, more serious than a murder. I request 30 years of prison in the name of dignity for the country.’¹⁰

Despite requests from various international organisations, such as the IACHR, the UN Working Group on Arbitrary Detention, the UN Special Rapporteur on the Independence of Judges and Lawyers and the Special Rapporteur on the Situation of Human Rights Defenders, Judge Afiuni remained imprisoned in the National Institute of Feminine Orientation for more than one year. In addition to the insanitary conditions of detention, she was imprisoned alongside women whose husbands had been convicted by her, which generated violence against her.¹¹

On 2 February 2011 a court order granted her transfer to house arrest for health and humanitarian reasons, where she was guarded by a large number of military police. However, health complications eventually meant that on 14 June 2013, her house arrest was suspended and she was granted conditional freedom so that she could receive medical treatment. The trial against Afiuni continues

9 IBAHRI (2011), see n 7 above.

10 ‘Chávez pidió 30 años de cárcel para jueza que liberó Cedeño’ (‘Chávez requested 30 years in prison for the judge that freed Cedeño’), *El Universal*, 11 December 2009, available at www.eluniversal.com/2009/12/11/pol_ava_chavez-pidio-30-anos_11A3181213.shtml. See also: ‘Chávez pide 30 años de prisión para jueza que liberó a Eligio Cedeño’ (‘Chávez requests 30 years in prison for the judge that freed Eligio Cedeño’), *El Nacional*, 12 December 2009.

11 At the end of 2012, Judge Afiuni revealed to the author of the book *La Presa del Comandante* (*The Commander's Prisoner*) that she had been raped and forced to abort while in prison. See: Olivares, Francisco, *La presa del Comandante* (Cyngular 2012).

to suffer from delay and procedural irregularities, and has become one of the highest-profile political cases in Venezuela.

2.2 José Amalio Graterol and the defence of Judge Afiuni

Graterol worked as a public defender for nine years, at the end of which he began his independent law practice, defending several victims of human rights violations. He has acted as Judge Afiuni's lawyer since April 2010. As aforementioned, during the first two years he did not receive death threats or threats to his personal integrity, nor did he suffer interference in the performance of his professional duties. However, in 2012 both he and his team started to experience difficulties in undertaking their work.

By March 2012, both Graterol and Fernández had begun to receive threats and intimidation when they publicly criticised the behaviour of the judges in the *Afiuni* case.¹² They criticised the instructions issued by Zinnia Briceño (President of the Metropolitan Penal Circuit of Caracas) ordering the judges to reject appeals made by Graterol and Fernández and to pressure the family members of other defendants to reject the defence.¹³

On 13 March 2012, the lawyers received a call from a court employee, who warned them that people in the Supreme Court were upset by their latest declarations concerning the judicial system and, specifically, regarding certain judges (especially those who had issued decisions in Afiuni's case). The next day a citizen connected to the government, Supreme Court and Public Prosecutor's Office told them that they should be extremely careful because the Public Prosecutor's Office were preparing 'something' against them so that they could be accused of committing crimes and arrested.

Graterol and Fernández decided to make these threats public to avoid future accusations against them aimed at frustrating their defence of Judge Afiuni. The situation was reported in the Venezuelan media and to the Public Ministry and the National Body of Scientific, Penal and Criminal Research, to whom the lawyers delivered the records of threatening text messages they had received on their mobile phones. On 3 June 2012, journalist Nitu Pérez Osuna interviewed José Amalio Graterol on the television programme 'Yo Prometo' (Globovisión TV).¹⁴ During this interview the lawyer strongly criticised and questioned the Venezuelan judicial system.

2.3 The arrest of, and charges against, José Amalio Graterol

The following day (4 June 2012) Graterol and Fernández attended the trial of Leonardo Colmenares, accused of murder, who they were representing. The trial was to be held in Vargas state that day but, when Graterol and Fernández appeared, they became aware that the court judges had been aggravated by the criticisms made publically by Graterol the previous day, and the two lawyers were therefore advised by the court clerks to behave passively. The clerks advised them not to do anything

12 'Venezuela: More than two years preventative detention against Judge Maria Lurdes Afiuni and harassment of her lawyers', Observatory for the Protection of Human Rights Defenders, 12 April 2012.

13 *Ibid.*

14 'Yo Prometo: José Amalio Graterol', Globovisión TV, 3 June 2012, video available at www.youtube.com/watch?v=u0N1IVcIK8.

that would oblige them (the clerks) to take action against the two lawyers.¹⁵ They were also informed of a series of irregularities in the process, such as the dismissal of lawyer Fernández from the defence team. Graterol therefore requested the court admit Fernández again, at which point it was reported that their client had been removed from his cell and had refused to appear at the trial, alleging that the presiding Judge Yalitza Dominguez was not impartial.¹⁶

The judge insisted that the trial continue without the accused being present, which Graterol refused to do, given that at that time Article 125(12) of the COPP prevented courts from holding trials *in absentia*:

‘Article 125: The accused shall have the following rights: [...]

12. Not to be judged in his/her absence, except under the provisions of the Constitution of the Republic.’¹⁷

Following Graterol’s refusal to continue, Judge Domínguez ordered his arrest, and he was handcuffed and taken to the National Guard’s office in Camurí Chico.

At the end of the hearing, Fernández was using her mobile phone to call the media when court clerk Rafael Ascanio reportedly tried to remove her mobile phone and pushed her violently to the ground, breaking her glasses.¹⁸

Later Graterol was accused of ‘obstruction of justice’ and was arrested. It should be noted that, despite the opposition from the defence team, Leonardo Colmenares was convicted *in absentia* to 30 years in prison.

The first hearing against Graterol was scheduled for 5 June 2012, but postponed to Wednesday 6 June, given that the complaint from the Public Prosecutor’s Office had not been received. On 6 June 2012 the hearing was postponed again due to a blackout on the court premises. Finally, the hearing took place on 8 June 2012 in the First District Court of Control, headed by Judge Ramón Contreras, who decided to continue with the trial against Graterol for the crime of ‘obstruction of justice’.

Graterol was accused of ‘obstruction of justice’¹⁹ which is a crime against the administration of justice provided for in Article 110 of the Organic Law of the Judiciary 1998 which states:

‘Anybody who by violence, intimidation or fraud impedes or obstructs the performance of a judicial act or an act of the Public Ministry shall receive a prison sentence of between six months and three years.’

15 ‘Diferida audiencia de flagrancia contra José Graterol para el miércoles’ (‘Differed arraignment hearing against José Graterol for Wednesday’), *El Universal*, 5 June 2012, available at www.eluniversal.com/nacional-y-politica/120605/diferida-audiencia-de-flagrancia-contra-jose-graterol-para-el-miercoles.

16 *Ibid.*

17 Organic Code of Criminal Procedure 1998 (with amendments 2000, 2001), Extraordinary Official Gazette No 5.558 14 November 2001.

18 ‘Rechazan detención de José Graterol y agresión contra Thelma Fernández’ (‘Arrest of José Graterol and assault on Thelma Fernández Denied’), *El Universal*, 5 June 2012, available at www.eluniversal.com/nacional-y-politica/120605/rechazan-detencion-de-jose-graterol-y-agresion-contra-thelma-fernandez.

19 Case No 00-DDC-F58-0008-2012 processed in Public Prosecutor’s Office 58 in the Public Ministry and under No WP01-P-2012-001371 of the Criminal Judiciary Circuit in the State of Vargas.

The IBAHRI observer, who had access to the case file, considered that ‘in no way are the requirements in place that would allow for the classification of punishable conduct as claimed in the formal accusation against [Graterol]’. The IBAHRI observer heard evidence at the trial that, following the non-appearance of the accused Leonardo Colmenares, the judge ordered that the hearing continue without his presence, leading Graterol to argue for the suspension of the oral proceedings. This was not accepted by the judge who decided to continue the trial *in absentia*.

Graterol was freed on 12 June 2012 after a receiving bail bond double the amount provided for in law for this category of offence and with the following conditions: not to leave the country; not to talk to the media about this case or other cases he is working on in Vargas state; and to regularly present himself to the court.

On 15 June 2012, the COPP was reformed, with several of its provisions taking immediate effect. Among them was the removal of the prohibition on trials *in absentia* – despite this being enshrined by the Constitution:

‘IMMEDIATE EFFECT Article 127. The accused shall have the following rights:

2. To communicate with their family members or lawyer of their choice to report their detention.

8. To request early declaration of the inadmissibility of preventative custody. DELETED

12. **Not to be judged in their absence, except under the provisions of the Constitution of the Republic. DELETED.**²⁰ [Emphasis author’s own]

In other words, the charge against Graterol was effectively based on the retroactive use of the amended Article 127 of the COPP.

2.4 The trial of José Amalio Graterol

The criminal trial against Graterol was due to continue on 16 July 2012. However, the hearing did not take place on that day because the Prosecutor filed the charge outside the allowed time limit. A new date was set for 2 August 2012 when, again, the hearing did not take place because a response had not been given to the appeal filed by Graterol’s defence, requesting the annulment of a series of actions in process. The trial was scheduled to continue on 20 August 2012. A response had still not been received on that date regarding the appeal, so the hearing was postponed again to 10 September 2012, when the same thing occurred and a date was set for 14 September. On 14 September 2012 the hearing was suspended and the next hearing held on 18 September 2012, at which the judge admitted the charge of obstruction of justice against Graterol and set a trial date of 9 October 2012.

On 9 October 2012 the trial against Graterol began in the Third District Court of the Judicial Penal Circuit in Vargas state under the supervision of Judge Victor Yepez Pini. This time, testimonies were obtained from witnesses for the Public Prosecutor’s Office: the three members of the Venezuelan National Guard who had arrested Graterol; and a court clerk who was present in the court when the events took place. The defence requested that the witnesses summoned by the Public Prosecutor’s

²⁰ COPP Reform of June 2012. Presidential Decree No 9.042 12 June 2012.

Office should not have contact with each other to prevent the contamination of evidence. The judge granted the defence's order and, at the end of the afternoon, set a date for the trial to continue on 10 October 2012. This date, however, was not convenient for the defence, given that the hearing of Judge Afiuni was scheduled for the same day in the Court of Caracas, which would have prevented the presence of Fernández and Graterol. The judge therefore accepted and set a new date for 11 October. However, the hearing did not continue on this date as Graterol, due to circumstances beyond his control, was unable to arrive on time.

The continuation of the trial was set for 25 October 2012. In this hearing, the testimony of the four court clerks was received, as was that of the secretary who was present in the hearing in which Graterol was arrested. Owing to the fact that not all witnesses appeared at the hearing, the judge ordered it to be continued on 15 November 2012. Judge Domínguez and prosecutor Paudelis Solórzano did not appear attend this hearing on the 15 November, despite having been summoned, and so the judge requested they be brought by the police to the next hearing. According to the IBAHRI observer, during the hearing Graterol intervened (Venezuelan law allows intervention by the accused at any point) referring to the declarations by the witnesses summoned by the Public Prosecutor's Office he indicated that on the day that he had been arrested he had neither threatened nor intimidated the police. He explained that previously he had criminally reported Judge Domínguez for abuse that had occurred in the procedure for Leonardo Colmenares. Additionally, according to the IBAHRI observer:

'It could be clearly seen in the hearings on 9 October and 25 October, that all witnesses who were asked by the defence: "If at any time they saw that [Graterol] had **threatened, intimidated or used violence against** the Judge or any other court employee in the court" clearly, categorically and expressly said that they had not.' [Emphasis author's own]

At the end of his interjection, the judge established a new date to continue, requesting witnesses that had not appeared to be brought to the next date by the police.

On 15 November 2012 some testimonies were received, including that of Judge Domínguez who appears to have given the order to arrest Graterol but who then denied this in her declaration under oath. Given the contradictions presented, a confrontation hearing was scheduled between Judge Domínguez and the employees of the Venezuelan National Guard for 30 November 2012.²¹

On 30 November 2012, the examination of the National Guard officers by Judge Domínguez did not take place due to the absence of the prosecutors. This hearing took place on 4 December 2012, during which more declarations were received from witnesses and the cross examination was held. On 13 December 2012 the oral evidence stage of proceedings was terminated with the holding of another examination hearing between the judge and other National Guard officers who made the arrest and provided further testimony and documentary evidence.

21 'Juez que llevó el caso de José Graterol negó que ordenara arresto en su contra' ('Judge who led the case of José Graterol denied ordering his arrest'), *El Universal*, 16 November 2012, available at www.eluniversal.com/nacional-y-politica/121116/juez-que-llevo-caso-de-jose-graterol-nego-que-ordenara-arresto-en-su-c.

On 18 December 2012, the sentence condemning Graterol was delivered. He was sentenced to six months in prison for the crime of obstructing justice. Despite numerous contradictions presented during the evidence stage according to the IBAHRI observer, the judge disregarded them without any justification and used particular extracts from the evidence upon which to base his decision without having any regard to consistency with the main body of evidence. For example, the testimony by Judge Domínguez was not scrutinised and despite her openly declaring that she had not ordered the arrest of Graterol, the judge in his sentence concluded that she had done so.

The sentence also condemned Graterol to political disqualification, but did not revoke his professional licence. In reality, the prosecutor requested suspension of this licence as part of the sentence but this was not accepted by the court. At the end of the trial, Fernández, Graterol's defence lawyer, stated that:

'not only would it be criminalising legal conduct, where a judge who was performing his/her functions has been imprisoned and put on trial, as is the case of Judge María Lourdes Afiuni Mora, but also now the exercise of the lawyer's profession is being criminalised by imprisoning, putting on trial and condemning a lawyer that was also performing his profession.'²²

The sentence was published on 14 January 2013, almost one month after being given, and on 29 January 2013 the defence for Graterol presented an appeal. It should be noted that the COPP establishes in Article 347(2) that the judge must publish the decision on the same day or no later than within ten days following the ruling.²³ An appeal hearing was set for 3 April 2013. The Court of Appeal declared that it would make a decision within ten days in accordance with the provisions of Article 448(3) of the COPP.²⁴ In actuality, this took in excess of three months.

On 15 July 2013 the Court of Appeals for Vargas state telephoned Fernández to report that the six-month prison sentence for the crime of obstructing justice had been ratified. Notices by telephone are not established in the COPP; they must be written and sent to the address of the parties as provided for in Article 165 of the COPP:

'Article 165. Domicile

For the purpose of publishing notices required by the law, the parties' representatives must indicate in a report to the secretary, or in any written act presented to the court, the domicile where they can be notified.

If no domicile is indicated, the court where the process is being undertaken shall be taken as the address. To this end, the notice board shall be set at the doors of the court and a copy of this shall be added to the respective file.'²⁵

At the time of writing, Graterol's case is now pending before a sentencing court who will decide whether he will serve his sentence in prison or on conditional release. He must first undertake a psychosocial examination by the National Penitentiary Council who will consider, *inter alia*, whether he has demonstrated sufficient 'remorse' for his actions and whether he poses a danger to the public.

²² *Ibid.*

²³ COPP Book II Title III Chapter II Section III On the Sentence.

²⁴ COPP Book IV Title III Chapter II On Appeals against the Final Sentence.

²⁵ COPP Book I Title V Chapter I Section III On Notices and Summons.

IBAHRI is concerned that the National Penitentiary Council has already made hostile comments towards private lawyers in general and that Graterol may be forced to falsely admit his guilt in order to be relieved from a custodial sentence.²⁶ Four months after his conviction, no date has yet been fixed for his examination.

²⁶ 'Varela llama a los reos a revocar a sus abogados privados' ('Varela calls on prisoners to revoke their private lawyers'), *UltimasNoticias*, 26 June 2013, available at www.ultimasnoticias.com.ve/noticias/actualidad/sucesos/varela-llama-a-los-reos-a-revocar-a-sus-abogados-p.aspx#ixzz2aiEbRXo3.

Chapter Three: Conclusions and Recommendations

The prohibition of the retroactive application of criminal law derives from the *nullum crimen sine lege* principle which prohibits criminalising acts committed prior to the entry into force of laws classifying the conduct in question as a crime. This principle, which is designed to safeguard individuals from arbitrary acts of the state, is well-established in international human rights treaties to which Venezuela is party. Graterol has been convicted for the offence of ‘obstruction of justice’ as a result of his refusal to represent his client *in absentia* which was in accordance with the COPP as it stood at the time. Seven days after he was charged, the law was amended to prohibit trials *in absentia*, effectively imposing a retrospective criminal penalty on him. Therefore, the IBAHRI considers his prosecution contrary to international human rights standards, specifically, Article 15 of the ICCPR and Article 9 of the IACHR which prohibit prosecutions under *ex post facto* laws and the imposition of retrospective criminal penalties.

It is outside the IBAHRI’s mandate to consider substantive points of Venezuelan law; however, it is alarmed at the multiple due process violations in the case, in particular the lack of a judicial order for Graterol’s arrest, the contradictions between the prosecutor’s allegations and the lack of witness testimony evidencing any threatening or intimidating behaviour towards the judge and the significant procedural delays throughout the case. The IBAHRI is therefore extremely concerned both at the apparent arbitrariness of the prosecution and lack of regard for basic due process safeguards by the Venezuelan authorities which not only contravene domestic guarantees but also principles of natural justice and international human rights standards regarding the right to a fair trial, contained in Article 14 of the ICCPR and Article 8 of the IACHR.

Given the circumstances surrounding the conviction of Graterol – namely his role as defence counsel in the highly politically sensitive case of Judge Afiuni and the escalation in threats and intimidation against him, as well as his arrest the day after making public criticisms about the state of judicial independence in Venezuela – it is difficult to escape the conclusion that the prosecution has been brought against him in order to frustrate the defence of Judge Afiuni and/or in retribution for his defence of Afiuni and related public criticisms. The IBAHRI considers that as well as violating basic due process standards, the prosecution and conviction of Graterol contravenes several guarantees for the functioning of lawyers contained in the UN Basic Principles on the Role of Lawyers (the ‘Principles’). In particular, Principle 16 provides that:

‘Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; ... 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.’

Furthermore, the Principles guarantee that lawyers should not be associated with the causes of their clients²⁷ and that lawyers, just as any other citizens, have the right to freedom of expression and ‘to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights ...’²⁸

The IBAHRI has been concerned at the deterioration of the independence of the legal profession and the rule of law in Venezuela for some time. It has expressed serious concern at the creation of the ‘Afiuni’ effect – that is the chilling effect the *Afiuni* case has had on the Venezuelan judiciary – which ‘not only represents a serious threat to the independence of the judiciary, it crucially undermines public confidence in the administration of justice and deprives Venezuelan citizens of the legitimate expectation to live in a democratic society.’²⁹ At the time of its 2011 report, the IBAHRI was encouraged that it did not hear of any threats against lawyers, including Afiuni’s defence counsel. This situation has dramatically changed and the IBAHRI is now extremely concerned at the creation of a ‘Graterol’ effect, which risks creating a similar chilling effect amongst the Venezuelan legal profession, with lawyers fearful of being deprived of their liberty for taking on politically sensitive cases or expressing their views publicly on justice-related matters.

Finally, in November 2012, Venezuela was elected a member of the UN Human Rights Council for the period 2013–2016. The IBAHRI therefore considers that the Venezuelan government has an added responsibility towards its own citizens, as well as to the international community, to uphold its obligations under the UN treaties it has signed. In view of the above, the IBAHRI does not consider its actions in the case of Graterol to be compliant with those obligations.

Recommendations:

- The IBAHRI calls upon the Venezuelan government to annul the criminal courts’ decisions that convicted Graterol for the offence of ‘obstruction of justice’ – for refusing to represent his client *in absentia*, which was in accordance with the COPP as it stood at the time.
- The IBAHRI calls upon the Venezuelan government to refrain from all practices of intimidation and harassment against members of the legal profession; and to respect and guarantee them the free and full enjoyment of all the rights of their legal profession.
- The IBAHRI calls upon the Venezuelan government to respect the international human rights treaties it has ratified, especially in view of its current seat on the UN Human Rights Council, as well as the UN Basic Principles on the Independence of Judges and Lawyers.
- The IBAHRI calls upon the Venezuelan government to refrain from *ex post facto* prosecutions and respect the separation of powers, the rule of law and basic principles of natural justice, so that all its citizens are entitled to the rights in both the Venezuelan Constitution and international instruments.

27 UN Basic Principles on the Role of Lawyers (1990), Principle 18.

28 *Ibid*, Principle 23.

29 La desconfianza en la Justicia, p 21.



International Bar Association

4th Floor, 10 St Bride Street
London EC4A 4AD, United Kingdom
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
Website: **www.ibanet.org**