BRAZIL

The Brazilian judiciary confronted a myriad of difficulties, including failure to function expeditiously, lack of independence and corruption. The overly broad jurisdiction accorded to the military judiciary and the resulting impunity contributes to further human rights violations by police forces. Lawyers defending prisoners faced undue obstacles in carrying out their duties. Debate in Congress concerning judicial reform continued, without achieving substantial progress.

BACKGROUND

The 1988 Federal Constitution establishes Brazil as a federal republic composed of 26 states and a federal district, its capital. Each federated state has its own constitution, the provisions of which must comply with the Federal Constitution. The Constitution provides for the separation of powers. Legislative power is exercised by a bicameral parliament: a 513-seat Chamber of Deputies (*Camera de Deputados*) and an 81-seat Federal Senate (*Senado Federal*). Executive power is vested in the President of the Republic, who is elected through popular vote for a four-year period. The Administration of justice is reserved to a court system.

Fernando Henrique Cardoso presently serves as President with the support of a mixed coalition including his own centre-left Social Democratic Party, PSDB, the Brazilian Social Democratic Party, the Brazilian Democratic Movement and the Liberal Front Party. While the governing coalition holds an overwhelming majority it has been sometimes difficult to gain support for governmental legislative priorities due to weak party loyalty and the continuing corruption scandals that have undermined the stability of the coalition.

In February 2001, widespread disturbances took place within the penal system of the state of Sao Paulo. During the incidents, the worst in Brazilian penal history, prisoners gained control of 29 institutions across the state and took approximately 8,000 hostages, including visiting children. The rebellion claimed the life of 20 inmates, who were reported to have been killed by their fellow inmates and by the police during the disorders.

HUMAN RIGHTS ISSUES

Human rights violations continued on a substantial scale. State Police forces perpetrated numerous extrajudicial killings, tortured and beat suspects while interrogating them, and arbitrarily arrested and detained persons.

During the period under review, the country came under scrutiny by several international human rights mechanisms. In May 2000, the UN High Commissioner for Human Rights Mary Robinson visited Brasilia, Sao Paulo and Rio de Janeiro, and reached a working agreement with the Brazilian Government on technical assistance. In the context of the 2001 World Conference against Racism, Xenophobia and other forms of Intolerance, discussions arose over racial equity in Brazil. Brazilians of African origin were said to be excluded by poverty from many of the opportunities enjoyed by those of European descent. In May 2001, the Committee against Torture analysed the initial report of Brazil submitted after a delay of ten years. The Committee expressed concern over the competence of the police to carry out inquiries after reports of crimes of torture committed by

members of police forces, without effective control in practice by the Public Prosecutor's Office. According to the Committee, this contributes to the impunity enjoyed by the perpetrators of these acts. The Committee recommended that the State explicitly prohibit the use as evidence in judicial proceedings of any declaration obtained by means of torture.

Visit of the Special Rapporteur on Torture

In August-September 2000, the UN Special Rapporteur on Torture, Sir Nigel Rodley, carried out an intensive three-week visit to Brazil during which he visited Sao Paulo, Rio de Janeiro, Belo Horizonte, Recife, Belém and Marabá. In his 2001 report to the UN Human Rights Commission, the Special Rapporteur noted widespread public distress over levels of ordinary criminality, which led to demands for a draconian official response, sometimes without legal control. According to the report, torture and other ill-treatment occurred on a widespread and systematic basis throughout country. The Special Rapporteur observed that "[torture] is found at all phases of detention: arrest, preliminary detention, other provisional detention and in penitentiaries and institutions for juvenile offenders. It does not happen to all or everywhere; mainly it happens to poor, black common criminals involved in petty crimes or small-scale drug distribution". The Special Rapporteur described conditions of detention as "subhuman". He concluded that "the judicial system as a whole has been blamed for its inefficiency, in particular slowness, lack of independence, corruption and for problems relating to lack of resources and trained staff as well as the pervasive practice of impunity for the powerful." Brazilian authorities described the report as hard but useful and pledged to give careful consideration to its recommendations. In October 2001, the Government launched a campaign all over the country to prevent torture and to provide hot-lines to report cases of torture.

Impunity

The judiciary, which typically refuses to give credence to allegations of torture by criminal defendants, shares responsibility for the lasting exercise of torture in Brazil. Unreserved approval by courts of official denials of torture and their rejection of well-founded claims of physical abuse by detainees encourage further violations. For example, the Santa Catarina State Supreme Court stated that "the allegation of torture, when not accompanied by other evidence and coming from a prisoner, considered highly dangerous and who has escaped from penitentiary, does not merit credibility". The Rio de Janeiro State Supreme Court and the highest court in Brazil, the Federal Supreme Court, (*Supremo Tribunal Federal*), have also supported this path of jurisprudence.188

Brazil's official report to the Committee against Torture recognises that "many of these crimes remain unpunished, as a result of a strong feeling of *esprit de corps* among the police forces and reluctance to investigate and punish officials involved with the practice of torture" and it added that "within the period of time when data was gathered for this report - from April 1997 to November 1998 - there was no indication of the existence of sentences based on the Law of Torture". This statement would confirm concerns that the impunity enjoyed by torturers is, to say the least, almost total.

On 29 June 2001, Colonel Ubiratan Guimaraes, who led the 1992 military assault on the Sao Paulo Carandiru prison, which resulted in the death of 111 inmates, was convicted of co-authorship of simple homicide of 102 detainees, and five counts of attempted homicide. Colonel Guimaraes, who was sentenced to 632 years in prison, has not been imprisoned pending an appeal against his conviction.

Although human rights defenders function without formal legal limitation, there have been several cases of intimidation against them, including ill-founded law suits, harassment, threats, and also murder attempts. Those defenders operating in rural zones were particularly vulnerable to attacks from gunmen employed by landowners, sometimes with the consent of police officers.

THE JUDICIARY

During the period under review, Parliament continued its consideration of significant amendment propositions involving the media, the Association of Judges and the Lawyers Bar Association and approved a new Civil Code and reform of the Labour Court System.

Structure

Federal Constitution (Article 92 FC) provides that the bodies of the judicial power are the Federal Supreme Court (*Supremo Tribunal Federal*), the High Court of Justice (*Superior Tribunal de Justiça*), the Federal Regional Courts (*tribunais regionais federais*), and the federal one-judge courts (*juizes Federais*). Judicial power is also vested in tribunals and courts specialising in labour, electoral and military matters, although they hold an autonomous structure. Finally, the tribunals and one-judge courts of the various states and the Federal District (*tribunais e juizes dos estados e do distrito federal e territórios*) also form part of the national judiciary.

The highest court is the 11-seat Federal Supreme Court, which has jurisdiction over the entire territory. It is competent to review federal laws as to constitutionality; to try the President, ministers and Members of Parliament for common crimes; to consider habeas corpus petitions against the President and Parliament, to try judges of Superior Courts for common criminal offences and misconduct (*crime de responsabilidade*) and to settle conflicts of jurisdiction between Superior Tribunals and other courts (Article 102 FC)).

The High Court of Justice is composed of a minimum of 33 justices (Article 104 FC). It has powers to try state governors for common crimes, to try Chief Justices of the state Superior Courts, judges of the Federal Regional Courts and specialised tribunals for labour and electoral issues for common crimes and misconduct and to deal with *habeas corpus* petitions against Cabinet ministers (Article 105 FC). It also serves as a court of appeal for decisions taken by lower level courts.

The Federal Regional Courts are composed of at least seven judges each and are competent to try federal judges, including those specialised in labour and military matters, working within their jurisdiction, for common crimes and misconduct (Article 106 FC). Decisions taken by federal judges may be appealed before these Regional Courts.

The country is divided into judicial districts (*seção judiciária*), which correspond to each of the states and the federal district.

Labour Courts

The Constitution establishes separate and specialised branches of the judiciary for labour, electoral and military matters. Constitutional amendment 24-99 reformed the court system on labour matters, which had been the subject of pronounced criticism. The new system is composed of the High

Labour Court, the Regional Labour Courts and one-judge labour courts (Article 111 FC). The amendment eliminated the Boards of Conciliation and Judgement and passed its powers to the newly created one-judge labour courts (*juizes de trabalho* -Articles 112, 116, 117 FC).

The institution of "temporary judges" - those representing employers and employees - was eliminated from the composition of the High Labour Court and the Regional Labour Courts (Articles 111, 115 FC) and the aforementioned first instance courts. The High Labour Court is now composed only of 17 justices (Article 111). The reform was welcome in Brazil, as the separate system for labour courts and the institution of the "temporary judges" had been the target of particular criticism (see *Attacks on Justice 2000*).

Military Police Courts

There are two police forces in Brazil: the civil police, which has investigation powers, and the military police, which carries out regular police functions such as public security and crime prevention. The military police is not a division of the military. Rather, it is a division of the police, established by a 1977 amendment during the military dictatorship and maintained by the 1988 Constitution, with special jurisdiction over acts of the military police. Article 125 of the Constitution grants the military court's jurisdiction over military police for military crimes as defined in law. Article 19 of the 1969 Military Criminal Code defines peace time military crimes as the those "...committed by military personnel who even if not on duty, use military weaponry or any other warlike material to carry out illegal acts". In 1996, Law 9.299/96 reformed the Military Criminal Code and granted the civilian judiciary the power to judge only cases of voluntary crimes against life, but left intact the rest of the jurisdiction of the military justice system with regard to the military police. The initial police inquiry continues to rest with the military investigator, as does the classification as to whether a crime is intentional homicide or manslaughter. Furthermore, the crimes of bodily harm, torture, kidnapping, manslaughter, when committed by military police officers, continue to fall within the exclusive jurisdiction of military courts.

A further cause of concern with regard to the military courts is that they are composed of active military personnel. At the Federal Level, the military judiciary is composed of a military court of first instance, and high Tribunal Military. The first is constituted by a hearing judge and four active military officers who make up the Council of Justice. The 15-seat High Military Tribunal, consists of 11 active military officers of the different branches of the armed forces and four civilian judges. The President of the Republic appoints the whole tribunal.

At the state level, states of the federation have the power to establish High Military Tribunals if it is considered necessary. In practice, many states have created these courts, which typically suffer the same deficiencies as their counterpart at the Federal level.

Military Police Courts are widely considered to contribute to impunity, as punishment is very light and few officers have been convicted. The Special Rapporteur on Torture observed that "[p]rosecutions in military courts reportedly take many years as the military justice system is said to be overburdened and inefficient". In its 2000 annual report, the Inter-American Commission of Human Rights recommended "that Brazil take measures to abolish the military justice system over criminal offences committed by police against civilians"

Office of the Public Prosecutor's Investigation powers

The Public Prosecutor's Office has the duty to oversee prosecutions of all defendants. The Federal Constitution (Article 129) provides that the Public Prosecutor is exclusively responsible for undertaking public criminal action; assuring effective respect by the Government branches and by services of public relevance for the rights ensured under the Constitution; exercising external control over police activities; and requesting investigation procedures and the institution of police investigations and indicating the legal grounds of its procedural acts.

This provision has been interpreted as meaning that the Public Prosecutor's Office has the power to proceed with independent criminal investigations even in cases where no police inquiry has been opened or where a police inquiry is still pending or has been filed, and that it may indict law enforcement officials involved in criminal activities. A police inquiry is therefore not obligatory in a case in which a prosecutor possesses a sufficient measure of prima facie evidence (*Indicio*). The Office may gather such evidence through means other than a police inquiry, such as through a civil or administrative inquiry.

According to prosecutors interviewed by the Special Rapporteur on Torture, this interpretation is the subject of one of the most severe present institutional struggles, as the police firmly dispute this approach. The draft law recently put before Congress, which would grant public prosecutors greater power over police inquiries, has become a new flash point in this clash. According to the President of the Federal Court of Appeal, politicians lobbied by the police were attempting to undermine the power of the Office of the Public Prosecutor to supervise police behaviour.

Administration

The Federal Union is empowered to organise and maintain the judiciary, the Ministry of Justice and the Public Defender's Office of the Federal District and the territories (Article 21 FC). For their part, the federated states have the authority to organise their justice systems, provided that they respect the principles set forth in the Federal Constitution (Article 125 FC). The scope of the courts and of the state judges is set forth in the states' constitutions, and the law on judicial organisation shall be the initiative of the court of justice (Article 125).

The Federal Constitution provides for the organisational and administrative independence of the courts, including the power of the courts to determine the operations of their organs, as well as their financial autonomy, including the ability to draw up their own budgets (Article 99).

Appointment and Security of Tenure

The justices of the Supreme Court and the High Court of Justice, are appointed by the President of the Republic after their nomination has been approved by the Federal Senate (Articles 101, sole paragraph and article 104, sole paragraph. FC). The members of the Federal Regional Courts are appointed by the President from a list presented by each Regional Court itself, whereas the members of the High Court on Labour are appointed by the President of the Republic with the Federal Senate's consent from a list presented by the court itself (Article 111 FC). One fifth of the members of the Federal Regional Courts must be lawyers and prosecutors coming from outside the judiciary. This appointment procedure gives substantial power to the President of the Republic and has been highlighted as prone to facilitate unjustified political influence, particularly concerning the Supreme Court.

Judges enjoy life tenure (Article 95 FC). This security of tenure is granted to first level judges only after serving a two-year term in office. Judges cannot be removed except in the public interest and following the procedures and requisites established by the Constitution and the law.

Discipline and Causes for Dismissal

The absence of discipline and internal control, concurrent with slowness and a deficient legislative framework, has been elaborated as one of the primary problems of the Brazilian judiciary,. The disciplinary and sanctioning procedures instituted to deal with judges and prosecutors accused of misconduct while in discharge of their functions, or for ordinary crimes, are lax and inadequate. The law gives higher tribunals the power to exercise disciplinary control over members of lower tribunals, with the exception of the Federal Supreme Court whose justices are subject to impeachment proceedings before the Federal Senate.

The Constitution grants to the Federal Senate the power to impeach the Chief Justice of the Supreme Court, the Attorney General and the Defender General for misconduct perpetrated whilst carrying out their functions (Article 52(II)). Two-third of Congress may decide on the dismissal of these officers and their ineligibility for any other public position for an eight-year period in cases in which a judicial officer may be sanctioned by a body outside the judiciary itself.

All other judges are liable to discipline and control by the immediately higher judicial body. For instance, the Supreme Court tries and sanctions its own members, other than the Chief Justice, those of the High Court of Justice, and specialised High Courts for labour and electoral matters (Article 102(I) paragraphs b and c FC). The High Court of Justice, consequently, tries and sanctions members of all Federal Regional Tribunals (Article 104(I) paragraph a), and the Regional Tribunals carries out the same function over all other federal judges working in their jurisdiction (Article 108(I) paragraph a FC). The states' judiciaries follow the same internal discipline and control. In actuality, however, this control scheme only functions to some extent for first level judges who are tried and sanctioned by the disciplinary division of the higher tribunal. The regime does not work efficiently in cases involving judges of higher tribunals, due to lack of legal provisions on the matter.

The Federal Constitution (Article 93X)) provides that in respect of all disciplinary measures, the reasons for the decision must be stated and be adopted by a majority of members of the respective tribunal.

The most important reason for the failure of the disciplinary control of the judiciary is the proclivity of judges to shelter one another. In addition, the definition of misconduct is vague, giving grounds for substantial legal uncertainty. Law 1079, which defines misconduct (*crime de responsabilidade*) of the justices of the Supreme Court, fails to make explicit the actions that may constitute misconduct with regard to judges at lower levels (High Court, Federal Regional Tribunals, etc.). Law 1079, enacted in 1950 and prior to the 1988 Constitution, has not been amended to remedy this deficiency. However, it has been argued that the definition of misconduct provided by the rules of the tribunals and in a law applicable to all public officials may be applied to overcome the deficiency of Law 1079. In 1999, a report by a Senate Committee of Inquiry underlined the problem of effectively holding accountable all members of the judiciary (see *Attacks on Justice 2000*).

Judicial Reform

During the period under review, debate within Congress directed toward adoption of important proposals to reform the judiciary continued. However, the discussion has not advanced substantially. Besides the approval of a new Civil Code, which is widely considered to be a positive development, approval of most of the legislative initiatives regarding the judiciary remains pending. These bills contain constitutional amendments and the enactment of new laws that are necessary to overcome the corruption, impunity and lack of timeliness that affect the proper administration of justice in the country. The following are some of the most significant and controversial topics of the ongoing reform of the judiciary see also *Attacks on Justice 2000*):

- Disciplinary control of judges for misconduct, and the body in charge of discipline in the judiciary. As mentioned above, the 1950 Law defining misconduct for judges of the Supreme Court does not contain an equivalent provision concerning the rest of the judiciary. A draft bill to reform the law with regard to the misconduct of judges at all levels has been before Congress. A National Council of the Judiciary composed mostly of representatives of the judiciary, the Public Prosecutor's office, and the Bar Association was approved on the first reading in the Chamber of Deputies as the most appropriate body to carry out disciplinary proceedings and to apply sanctions.

- Measures to expedite judicial proceedings and penalise unjustified delays. One proposal to overcome this problem is the incorporation of the legal principle of binding opinion (*súmula vinculante*), roughly corresponding to the "binding precedent" basis of Anglo-Saxon legal systems, directed toward guaranteeing uniformity of jurisprudence and restricting the recurrent appeals to the Supreme Court of cases similar to others for which there is extant jurisprudence. However, the suggested bill would force judges to comply with the patterns instituted by the Supreme Court and would only allow review by the highest court in all cases where no precedent exists. It would give more power to the Supreme Court, whose all members are elected by the President, and therefore, could widen the executive's influence on the judiciary. The AMB proposed instead a formula that would impede the recourse to a higher tribunal if the lower judge had decided to follow the established precedent and would allow it when the judge decides differently. It would not oblige the judge to follow the criteria set up by the highest tribunal.

- The reform of criminal investigation procedures, and principally the duties of judges and prosecutors in the investigation stage. Brazilian law does not clearly limit the role of prosecutors and police during the preliminary investigation stage. The Public Security Secretary of the state of Sao Paulo presented a proposal for constitutional reform allowing the elimination of the preliminary police investigation to parliament, whereby the police investigation would be replaced by an investigation conducted by the prosecutor and controlled by an investigating judge. The Government has backed the proposal, but it has faced strong opposition from the police. The proposal for an amendment to the Constitution, which would eliminate police investigation as an institution, purports also to eliminate the division between the civil and military police in the states and replace them by a single state police. The unified structure of the new state police would arguably lead to the unification of the jurisdiction to which its members are subject for the commission of common crimes.

- The federalisation of certain human rights violations. Certain human rights crimes, now under state jurisdiction, would be brought under the federal remit. However the criteria used to federalise certain human rights and the possibly inadequate federal infrastructure to

deal with a great number of new cases have been raised as obstacles to effective implementation of this initiative.

Obstacles to Lawyers

During his visits to police lock-ups, the Special Rapporteur on Torture found that most of the suspects believed that their families had not been notified of their arrest and location and that persons arrested were very infrequently counselled by a lawyer. On the contrary, it was reported that in the few cases in which a detainee was able to secure a private lawyer, the latter had been prevented from seeing his or her clients until after the conclusion of the preliminary proceeding. Lawyers said that they often saw their clients for the first time at the first court hearing. According to the public defenders met by the Special Rapporteur in Rio de Janeiro, a 1995 decree requires that a letter be sent to the Public Defender's Office communicating any arrest within three or four days from the date of the arrest. According to prosecutors from the *Nucleo Contra Tortura* of the Federal District of Brasilia, 97 per cent of suspects were not assisted by a lawyer during the investigation phase, while the majority are only assisted by law students during the judicial phase. It was also reported that students do not go to the police stations, but usually meet their clients for the first time during the first instruction hearings and are therefore not in a position to present witnesses.

CASES

Darcy Frigo {Lawyer}: Mr. Frigo is a lawyer and member of the Pastoral Land Commission (PLC) of Paraná. In February 2000, he received a death threat by telephone. He was warned he would have his legs "broken" if he were to leave his home. This threat was related to a false accusation against Mr. Frigo, that he had broken a policeman's leg during the use of excessive force against a demonstration by landless peasants at Curitiba, Paraná State. Mr. Frigo, who went to the demonstration, had been seriously beaten by the police. In April 2000, he received protection from the Federal Police. The authors of the threats remain unknown.

Valdenia Aparecida Paulino {Lawyer}: In June 2000, Ms. Paulino, a human rights lawyer working in Sao Paulo, received death threats related to her representation of the relatives of two persons allegedly killed by police officers. Two military officers were said to have approached a witness in the case and told him to take a message to Ms. Paulino that she should "be careful".

Henri Burin des Roziers {lawyer}: At the beginning of year 2000, Mr. Burin, a lawyer of the Peasant Movement without Land, was included on a list of people "destined for death" which had circulated publicly. At least, five members of PML had been killed recently. The threat to Mr. Burin worsened when he was preparing the file for the trial of a major landowner, who had been sentenced in June for the murder of a trade unionist. Mr. Burin was subject in July 2000 to a vast smear campaign after he had published a file on the practice of torture committed by the civil police in the Police Commissariat of the South of Pará state. Mr. Burin was prosecuted by the Pará Government for libel. In December 2000 he was tried together with another lawyer, Anulson Rusi, for taking part in a protest demonstration.

Rosa Marga Roth {Ombudsman}: Ms. Roth is a police Ombudsman in Belém, Pará state. In November 1997, members of the Civil Police of Belém, Pará state, tortured Hildebrando Freitas. Mr. Hildebrando was allegedly taken by ten police officers from his bar after having a dispute with

them. Mr. Hildebrando has still not physically recuperated from the torture suffered by him both in the police car and in the police station. The Attorney General's Office has not opened any inquiry into this case. Ms. Roth tried to reopen the investigation and give publicity to the case. Ms. Roth was taken to a court by a police officer, who accused her of crimes, including libel and tampering with a witness. Furthermore, the police chief attempted to instigate her dismissal. The courts have dismissed all charges against Ms. Roth, but at the time *Attacks on Justice* went to press, an appeal before the same court filed by the police officer was still pending. According to Amnesty International, to try to intimidate ombudsmen by starting criminal procedures against them is a regular practice.

Gustavo dos Reis Gazzola, Roberto de Campos Andrade and Thomás Mohuyico Yabiku {Prosecutors}: In February 2001, the three prosecutors brought charges against 26 police officers and prison guards for torturing prisoners at a public prison in Sorocaba, Sao Paulo state. Mr. de Campos Andrade allegedly received an anonymous call on his mobile phone telling him that he would be killed. Mr. dos Reis Gazzola also received a death threat by telephone that he would be killed on his way home from the university at which he teaches. The threats were probably in relation to the prosecutors' role in bringing charges against the prison guards and police officers.