

ATTACKS ON JUSTICE – BRAZIL

Highlights

The judiciary is inefficient, subject to executive influence, especially in the Supreme Court where judges are appointed by the executive, and corrupt, particularly at state level. Courts are slow and the absence of disciplinary mechanisms has rendered the judiciary unaccountable. There is a shortage of judges coupled with insufficient resources, resulting in a mounting backlog of cases and trial delays. To tackle these problems, the government embarked on a program of judicial reform, including the introduction of constitutional amendments in December 2004 establishing the principle of binding precedent with regard to high court decisions in order to increase the efficiency of lower courts and the establishment of a National Council of Justice to deal with complaints against judges. The law remains unclear as to whether it is the police or prosecutors who have the prerogative to initiate criminal investigations – a legal vacuum that has yet to be addressed in the constitutional reform process. The constitutionality of criminal investigations initiated by the Public Prosecutor's Office is currently being tested by the Federal Supreme Court. The UN Special Rapporteur on the Independence of Judges and Lawyers noted in November 2004 that there is a tendency to nepotism in the appointment of ancillary judicial staff and judicial exams are not always conducted transparently. Judges and lawyers continue to suffer attacks. While the judicial reform initiative has recognized the functional and administrative autonomy of the Office of the Public Defender for the Federal District and Territories, no provisions have been adopted to ensure the independence of the federal and state offices. Access to justice continues to be discriminatory.

BACKGROUND

In **October 2002**, Brazil's constitutional federal republic held its fourth general election since military rule ended in 1985, electing President Luiz Inácio Lula da Silva of the Workers' Party to a four-year term in accordance with the 1988 Constitution. The elections reportedly met international standards.

Human rights violations remain of serious concern in Brazil. Numerous cases of extrajudicial killing and torture by police forces have been reported both by UN thematic Rapporteurs and civil society groups. According to government data, in Rio de Janeiro the police killed 593 people between **January and August 2004**, with off-duty policemen accounting for 54 of the killings. Most of these crimes tend to go unpunished since only 7.8 per cent of all homicides committed every year reportedly result in criminal prosecution.¹

¹ See "Report of the Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions, Asma Jahangir", E/CN.4/2004/7/Add.3, <http://www.unhchr.ch/executions/documents.htm>. Also: <http://www.state.gov/g/drl/rls/hrrpt/2004/41751.htm>.

The situation of human rights defenders in Brazil is worrying. There is a widespread public perception that activists in Brazil are seeking impunity for common criminals, frequently resulting in verbal and physical attacks against them, and this is often coupled with neglect or acquiescence on the part of the state authorities. Human rights defenders are at particularly high risk in rural areas.²

Conditions of detention continue to fall short of internationally-accepted human rights standards. Serious overcrowding, substandard sanitary conditions, ill-treatment and torture remain issues of concern. The situation of detainees has resulted in frequent rioting. The last reported prison riot took place in **April 2005** at a youth detention centre in Rio de Janeiro.³

The Constitution was amended in **2003** to establish an upper limit for the annual salary of government officials, which in any event cannot exceed that of Supreme Court judges.⁴

JUDICIARY

The 1988 *Constitution* guarantees the independence of the judiciary.⁵ The judiciary is made up of state and federal courts. The **Federal Supreme Court** (*Supremo Tribunal Federal*), the highest judicial authority exercising federal jurisdiction and providing constitutional interpretation, currently comprises 11 judges nominated by the President of the Republic and appointed by an absolute majority of the Senate of the Republic. The **High Court of Justice** (*Superior Tribunal de Justiça-STJ*) consists of 33 judges nominated by the President and approved by a simple majority of the Senate. Each of Brazil's 26 states has state and federal courts exercising first instance jurisdiction.

Judicial reform

The need to reform the Brazilian judiciary has been the subject of debate for over 12 years: the judiciary has resisted reform and the creation of external control mechanisms by upholding a strict interpretation of the principle of separation of powers and the system of checks and balances enshrined in the Constitution.

Judges' reluctance in the past to agree to Brazil's incorporation into the United Nations system has accentuated the judiciary's shortcomings. The most contentious aspect of the judicial reform agenda has centred on governance of the judiciary; successive reform proposals in the past shared several areas of concern, including enhancing the justice system, rationalizing the mechanisms for constitutional judicial review, strengthening accountability and external control, broadening access to justice and democratizing judicial institutions. Public perception has traditionally been that the judiciary is a power that is above the country and the law itself, and therefore

² See "Front Line Brazil: Murders, Death Threats and Other intimidations of Human Rights Defenders, 1997—2001". Also: "Human Rights in Brazil 2003 Global Justice Annual Report".

³ See "Brazil: Riot in Rio Youth Detention Center", <http://www.hrw.org/english/docs/2005/03/28/brazil10378.htm>

⁴ <http://www.georgetown.edu/pdba/Constitutions/Brazil/brazil.html>

⁵ <http://www.georgetown.edu/pdba/Constitutions/Brazil/brazil.html>

unaccountable. Ever since President Lula took office in January 2003, he has been determined to resolve the issue of lack of accountability, which he has referred to as the ‘black box’.

In **May 2003**, the government established the **Secretariat for Judicial Reform** (*Secretaria de Reforma do Judiciário*) as an organ of the Ministry of Justice charged with formulating, fostering, supervising and coordinating the process of reforming the administration of justice and fostering dialogue between the legislative, executive and judicial branches. On **7 July 2004**, the Senate approved the basic content of the long-awaited judicial reform. The approved bill included amendments to the Constitution that sought mainly to establish the principle that High Court decisions should be considered as binding precedent and to permit external control of the judiciary. Constitutional Amendment 45 of **8 December 2004** (*Emenda Constitucional N° 45 de 8 de Dezembro de 2004*) was subsequently adopted, amending and developing over 20 provisions of the Federal Constitution dealing with the judiciary, including better judicial mechanisms for protecting human rights.⁶

One key aspect of *Constitutional Amendment 45* is the prominence given to Brazil’s **international human rights obligations**. The constitutional reforms enhance the status of human rights treaties ratified by Brazil both at the substantive and the procedural level. A new clause in **article 5** of the Constitution establishes that international human rights treaties ratified and approved by a three-fifths majority in the legislature will automatically acquire the status of constitutional amendments and will become part of domestic law with constitutional legal force. At the procedural level, in cases involving human rights violations which may breach Brazil’s obligations under international law, the reform amends **article 109** of the Constitution to empower the General Prosecutor (*Procurador Geral da República*) to request the Supreme Court that such cases be transferred from state courts to the federal courts. Although this measure seeks to give prominence to the federal prosecution of human rights abuses and, given that state-level judges are more subject to political influence, ensure that appropriate judgments are handed down, it has reportedly been criticized by certain members of the judiciary as an encroachment on the power of state courts. The absence of concrete guidelines for the General Prosecutor has also been criticized. In **May 2005**, the **Brazilian Judges’ Association** (*Associação dos Magistrados Brasileiros*, or AMB) questioned the constitutionality of **paragraph five of the amended Federal Constitution’s new article 109** (see ‘Cases’ below).

A further new article in the **amended constitution, article 102**, establishes the principle that summary judgments relating to Federal Supreme Court decisions are binding. Although, prior to the reform, Federal Supreme Court judgments on constitutional matters were binding on all lower courts, judgments on other common matters were not, thus unnecessarily increasing the flow of litigation between the lower and higher courts and undermining legal certainty. According to some lower court judges, this reform will provide them with more guidance and increase court efficiency; other court judges argue that they will be less independent since they will not be free to decide cases. In general, however, higher court judges are said to

⁶ See *Secretaria de Reforma do Judiciário do Ministério da Justiça*, <http://www.mj.gov.br/reforma/>; *Emenda Constitucional N° 45 de 8 de Dezembro de 2004*, published in the “Official Gazette of the Union” on 31 December 2004, <http://www.mj.gov.br/reforma/>

support the idea that summary judgments should be binding, while lower court judges fear that it may limit their autonomy and decision-making (see ‘Cases’ below).

The National Council of Justice

Another essential change introduced as a result of the reform program is the new **article 103-B of the Constitution**, which establishes the **National Council of Justice** (*Conselho Nacional de Justiça*, or CNJ) as an external body independent of the courts, and with power to oversee compliance with internal rules and deal with complaints against all judges. The prime objective is to increase transparency and strengthen accountability in the internal functioning of the judiciary. Due to become operational in **June 2005**, the CNJ will comprise 15 members appointed by the President and approved by the Senate, of which nine will be judges selected from all levels of the state and federal branches; the remaining six members will be made up of representatives from the Public Prosecutor’s Office, as well as the Bar Association and citizens of high standing who have legal expertise designated by the legislature. The names of all CNJ members were made public on **5 May 2005**.⁷ The CNJ’s legality was challenged by the Brazilian Judges’ Association (*Associação dos Magistrados Brasileiros*, or AMB) in **December 2004** (see ‘Cases’ below).

Independence

The judiciary is slow and often corrupt, and the weakness of its disciplinary mechanisms inhibits its effectiveness. The failure over decades to introduce any type of judicial reform has led to increasing backlogs and trial delays. Bureaucratic congestion of the courts is a major hindrance. Besides, there is a shortage of judges – 7.62 for every 100,000 inhabitants as of May 2005 – and the population feels that the majority of the country’s 16,900 judges (as of July 2003) is out of touch and unaccountable to the citizenry they serve. A poll commissioned by the Brazilian Bar Association in **May 2003** indicates that the judiciary is the second least respected government institution in Brazil. Roughly 38 per cent of those consulted in the survey did not trust the judicial system.⁸

A visit to Brazil by the UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, in **November 2004** revealed other pervasive problems affecting the Brazilian judiciary. The Special Rapporteur noted that, while entry into the judicial profession is through state and federal competitive examinations as provided for in article 93(I) of the Constitution, these examinations have not always been conducted in an anonymous and transparent manner. He also highlighted the notorious under-representation of women, those of African descent and indigenous people in the judiciary and Public Prosecutor’s office. Nationwide, women are in the majority in lower courts but only hold five per cent of the top judicial positions, with members of black or indigenous communities occupying less than one per cent of such jobs. The Special Rapporteur pointed to a tendency to nepotism in the

⁷ See ‘Indica últimos nomes para Conselho Nacional de Justiça’, 6 May 2005, <http://www1.folha.uol.com.br/folha/brasil/ult96u68818.shtml>

⁸ See ‘Presidente do Supremo apresenta os indicadores estatísticos do Poder Judiciário e sugere mudança na atuação da Justiça’, 12 May 2005, <http://www.infojus.gov.br/porta/noticiaver.asp?lgNoticia=16852>; The Cyrus R. Vance Center for International Justice Initiatives Strategy Summit for the Americas, New York, 3–5 March 2005 - Country Report Brazil.

appointment of ancillary judicial staff, and the sometimes excessive reliance on judicial secrecy, particularly in corruption cases involving members of the judiciary.⁹

Cases

The National Council of Justice (Conselho Nacional de Justiça)

On **14 April 2005**, the Federal Supreme Court ruled on the constitutionality of the National Council of Justice (CNJ). Its legality was challenged by the Brazilian Judges' Association (*Associação dos Magistrados Brasileiros, AMB*) in **December 2004** in a constitutional challenge (*Ação Direta de Inconstitucionalidade No. 3367*). The AMB contended that the creation of an external oversight body to supervise the judiciary could undermine judicial independence and jeopardize the principle of separation of powers. The Federal Supreme Court held, by a 7-4 majority, that the CNJ was constitutional and posed no barrier to the independent exercise of judicial activity.¹⁰

ADIN (ação direta de inconstitucionalidade) No. 3486

In **May 2005**, the **Brazilian Judges' Association** (*Associação dos Magistrados Brasileiros, AMB*) questioned the constitutionality of **paragraph five of the amended Federal Constitution's new article 109**, which establishes that federal judges can decide cases concerning gross violations of human rights. Since the federal government has the ultimate responsibility for international human rights treaties that have already been ratified, the new paragraph stipulates that a case at state level related to a gross human rights violation can at any time, on application to the High Court of Justice, be transferred to a federal court. The AMB's main arguments concern the principle of the 'natural judge', namely, the initial court/judge and usually the only one to receive, hear and rule on the proposed case. It claims that the definition of what constitutes a human rights offence is vague, thus allowing for a range of different interpretations that could lead to the 'new' clause being abused. The AMB also claims that there are no clear criteria for the transfer of judicial competences from state courts to federal ones, thereby bringing uncertainty into the criminal law system. The case is being considered at present by the Brazilian Supreme Court.

Attacks on judges

In **October 2002**, both **Dr Cristiano Arantes e Silva**, judge for the judicial district of Xinguara in the south of Para state in the Amazonia region, and his wife were reportedly the target of an elaborate campaign of threats and intimidation, which

⁹ "Report of the Special Rapporteur on the independence of judges and lawyers, Mr Leandro Despouy, Addendum. Mission to Brazil", E/CN.4/2005/60/add.3, 22 February 2005, paras. 21-24, http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&se=59&t=9

¹⁰ See "*AMB questiona criação do Conselho Nacional de Justiça*", <http://www.stf.gov.br/noticias/imprensa/ultimas/ler.asp?CODIGO=129986&tip=UN¶m>; "*Plenário julga Conselho Nacional de Justiça*", <http://www.stf.gov.br/noticias/imprensa/ultimas/ler.asp?CODIGO=129986&tip=UN¶m>; "*STF-Supremo julga constitucional Conselho Nacional de Justiça*", 13 April 2005, <http://www.stf.gov.br/noticias/imprensa/ultimas/ler.asp?CODIGO=130087&tip=UN¶m>; "*Ordem Dos Advogados do Brasil STF diz que Conselho Nacional de Justiça é constitucional*", 13 April 2005, <http://www.oab.org.br/noticias.asp>

appeared to be related to his anti-corruption stand. He had delivered verdicts in several cases of corruption, which had been plaguing the district for many years. On 25 September 2002, four shots were fired at his house, causing serious damage to the front door. He was also subject to numerous anonymous insulting phone calls, and anonymous letters defaming him had been posted throughout the town.

On **14 March 2003**, an unknown assailant killed **Judge Antônio Machado José Dias** in the town of Presidente Prudente, in the state of São Paulo. Dias, a district judge in Presidente Prudente, was the victim of an ambush in which an unknown assassin shot him dead in his car as he was on his way home. Dias was also the administrator of seven prisons in the Presidente Prudente region. He had been overseeing trials involving the leadership of the First Capital Commando (*Primeiro Comando da Capital*, or PCC), a criminal organization that operates inside the prisons in São Paulo State, as well as the trial of Rio de Janeiro drug lord Fernandinho Beira-Mar, who had been transferred to a São Paulo prison on 27 February 2003. Judge Dias had received threatening letters in late 2002 and as a result received police protection for some time. Two days before he was killed, Dias, believing that his safety was no longer at risk, proceeded to dismiss his bodyguards.¹¹

On **24 March 2003**, **Alexandre Martins de Castro Filho**, judge at the Espírito Santo State Criminal Court (*Vara de Execuções Penais*) was killed in Vila Velha, Espírito Santo. Castro Filho was a member of a group set up at state-level by the Public Prosecutor's office to fight organized crime (*Grupo de Repressão ao Crime Organizado do Ministério Público Estadual*) as well as of a special task force established by the federal government to fight organized crime in Espírito Santo. Two unidentified gunman riding a motorcycle shot Castro Filho in the head, abdomen and left arm as he arrived at the Bele Forma gym in Vila Velha's Itapoã neighbourhood. Castro Filho was under police protection because he had previously received death threats connected with his work to combat organized crime in the state.

Judicial corruption

Cases of judicial corruption were reported during the period. In **October 2003**, a police operation codenamed 'Anaconda' caught judges 'selling' lenient sentences to criminals. The operation led to the arrest of eight individuals, including **Judge Joao Carlos Rocha Mattos**, two police captains and several businessmen.¹²

A **July 2004** report by the Joint Parliamentary Commission of Inquiry – a body established by the government in June 2003 to investigate violence and sexual exploitation of minors in Brazil (*Comissão Parlamentar Mista de Inquérito da Exploração Sexual*) – directly implicated over 250 members of the Brazilian elite and authorities, including judges and serving politicians, in child prostitution rings. The judiciary was accused of being complicit in the exploitation by omission and collusion. Judges often grant impunity to alleged abusers who have political and

¹¹ See http://www.icj.org/news.php3?id_article=2773&lang=en

¹² See "Online Pioneer, The War On Corruption Nets A Passel Of Suspects", 17 December 2004, <http://ins.onlinedemocracy.ca/print.php?sid=4304>

economic influence. The report called for the indictment of the 250 alleged abusers and the implementation of stricter laws.¹³

LEGAL PROFESSION

Article 133 of the Constitution proclaims the indispensability of lawyers in the administration of justice and affirms their immunity in respect of acts committed and comments made in the discharge of their duties, within the limits of the law.

While lawyers practising in most areas are generally independent and can exercise their profession without fear or coercion, those working on human rights issues, particularly those affecting the poor and disenfranchised sectors of society who are most neglected by the justice system (see ‘Access to Justice’ below), are often subjected to attacks and intimidation. Human rights lawyers often suffer stigmatization, which can jeopardize their chances of promotion or judicial appointment and their ability to obtain clients.¹⁴

The gender composition of the Brazilian legal profession is more balanced than is the case with judges. As of **September 2004**, there were 436,698 lawyers practising in Brazil, of whom 190,318 were women. Furthermore, official statistics indicate that the percentage of women lawyers who have qualified in the last five years is over 50 per cent.¹⁵

The Brazilian Bar Association

Admission into the legal profession and other professional rules and regulations are governed by internal codes issued by the Brazilian Bar Association (*Ordem dos Advogados do Brasil, OAB*). These rules include, *inter alia*, the March 1995 Code of Ethics and Discipline (*Código de Ética e Disciplina*), which obliges lawyers to uphold the Constitution, the mode of organization of the legal democratic state, human rights and social justice.

All lawyers seeking to practise in Brazil must pass the OAB examination to gain membership. Prior to the December 2004 constitutional reform, judges and prosecutors were not required by law to be members of the Bar Association. The constitutional amendment now requires all judges and prosecutors to demonstrate that they have practised law, but the terms of this practice are still to be fully regulated. Sometimes this can be demonstrated by having been an intern in a court of law, for example. Furthermore, once a candidate passes the examination and becomes eligible to be a judge or prosecutor, he or she has to resign their membership of the OAB because the two activities are incompatible.

Cases

¹³ See “Brazil’s child sex abusers feel the heat”, 17 June 2004, <http://english.aljazeera.net/NR/exeres/979854FF-D028-4958-A7CE-FBDEAFC0C288.htm>.

¹⁴ See Cyrus R. Vance Center for International Justice Initiatives Strategy Summit for the Americas, New York, 3–5 March 2005 – Country Report Brazil.

¹⁵ See Cyrus R. Vance Center for International Justice Initiatives Strategy Summit for the Americas, New York, 3–5 March 2005 – Country Report Brazil.

Attacks on lawyers

Lawyer **Valdênia Paulino**, was forced to leave the country in **November 2003** after she received threats from police officers. This followed a public hearing in **June 2003** at which she denounced human rights violations committed by police in the suburbs of São Paulo. Valdênia worked at the Sapopemba Human Rights Centre in the São Paulo suburbs. In over ten years of work, she campaigned against police corruption and police violence in the region. It was not the first time that she had had to leave the country as a result of threats.¹⁶

PROSECUTORS

The Public Prosecutor's Office (*Ministério Público*) is the institution responsible for instigating criminal prosecutions in Brazil. **Article 129 of the 1988 Constitution**, which lists the office's powers and institutional functions, authorizes it to initiate civil investigations but does not expressly authorize it to initiate criminal investigations. Conversely, **article 144** places the right/duty to investigate crimes on the police without expressly stating that it should have the monopoly in doing so. The situation has been described as a 'legal vacuum', since it is unclear in law whether it is the police or the prosecutors who have the right to initiate criminal investigations. Although **Constitutional Amendment 45 of December 2004** established an external oversight body for the Public Prosecutor's Office – the **National Council of the Public Prosecutor's Office**, this legal vacuum has yet to be addressed in the context of the constitutional reform.

Between **2000 and 2003**, the Public Prosecutor's Office carried out a number of criminal investigations that unveiled several cases of corruption and fraud and other scandals involving public officials. In response, one public official, who had been indicted as a result of investigations carried out by the Public Prosecutor's Office, asked the Federal Supreme Court in **April 2003** to rule on the constitutionality of such investigations (see 'Cases', below). These constitutional challenges argued that, because articles 129 and 144 of the Constitution expressly grant the police the power to initiate criminal investigations but do not explicitly indicate that the Public Prosecutor's Office has the same powers, any criminal investigations carried out by the latter and any resulting indictments and/or convictions are unconstitutional. It is feared that if the investigative powers of the Public Prosecutor's Office are struck down, many current and future prosecutions for corruption will have to be dropped, thus fostering a climate of impunity among government officials.

Cases

In **April 2003** Remi Abreu Trinta, a federal deputy from the State of Maranhão who had been accused of fraud on the basis of investigations carried out by the Federal Prosecutor's Office, applied to the Federal Supreme Court (*Supremo Tribunal*

¹⁶ See "Rede Social Sapopemba: killing policies in the periphery of São Paulo", <http://www.social.org.br/relatorio2003ingles/relatorio021.htm>

Federal, STF) for the charges to be dropped, arguing, *inter alia*, that the investigation was unconstitutional. The STF's decision was pending as of **13 May 2005**.¹⁷

ACCESS TO JUSTICE

A “**Report on Judicial Power**” (*Diagnóstico do Poder Judiciário*) published in **August 2004** by the Secretariat for Judicial Reform highlights the problems arising from the delays and backlogs afflicting the Brazilian court system. According to the report, **in 2003**, 17.3 million cases (one for every ten inhabitants) had been filed before the courts, of which 12.5 million had been settled, thus leaving a backlog of 4.7 million unresolved cases for that year alone.¹⁸

Civil society organizations have indicated that public authorities bear a large amount of responsibility for the backlog, given that 80 per cent of court rulings deal with matters connected to the State. While delays and backlogs are endemic throughout the judicial system, some parts of the country, such as São Paulo, are more adversely affected than others.¹⁹

Discrimination

Groups that are marginalized and discriminated against often have to endure further discrimination when seeking access to justice, in terms of both finding a lawyer to represent them and gaining access to a court, particularly when members of such groups are the victims or claimants in a case.

Both the Inter-American Commission and human rights NGOs have condemned ‘the general pattern of negligence and ineffectiveness on the part of the State in prosecuting and convicting aggressors’ in cases of violence against women. One indication of this neglect of victims of domestic violence by the judicial system is the fact that only two per cent of complaints of domestic abuse culminate in a conviction. Brazil is currently one of the few countries in the region that has failed to enact legislation on domestic violence. It is also difficult for a judicial remedy to be obtained in the case of ‘street children’ and adolescents who have been murdered by death squads or subjected to sexual exploitation.²⁰

¹⁷ See “*Ministério Público do Maranhão. MP está mobilizado para acompanhar votação no STF*”, 31 August 2004; “*Supremo Tribunal Federal Inquérito Nr 1968*”, http://www.stf.gov.br/processos/processo.asp?PROCESSO=1968&CLASSE=INQ&ORIGEM=AP&RECURSO=0&TIP_JULGAMENTO=M; “Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr Leandro Despouy, Addendum. Mission to Brazil”, E/CN.4/2005/60/add.3, 22 February 2005, paras. 21–24, http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&se=59&t=9

¹⁸ See “Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr Leandro Despouy, Addendum. Mission to Brazil”, E/CN.4/2005/60/add.3, 22 February 2005, paras. 21–24, “*Secretaria de Reforma do Judiciário – Diagnóstico do Poder Judiciário*” [“Secretariat for Judicial Reform – Report on Judicial Power”], <http://www.mj.gov.br/reforma/>

¹⁹ See “*Movimento Nacional de Direitos Humanos, Uma reflexão sobre o judiciário brasileiro frente aos direitos humanos*”, <http://www.mndh.org.br/>

²⁰ See “Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen”, Addendum, Analysis of Country Situations and Other Activities of the Special Rapporteur, 16 February 2005, paras. 15–17, http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&se=59&t=9; “Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr Leandro Despouy”, Addendum, Mission to Brazil, E/CN.4/2005/60/add.3, 22 February 2005, paras. 24–37, http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&se=59&t=9; Maria da Penha vs Brazil, Case 12,051, Report

Other social and ethnic communities, such as indigenous peoples, landless workers, those of African descent and *Quilombo* residents, face similar problems in accessing justice, particularly when they are the victims or claimants in proceedings. The issue of impunity for human rights violations committed against indigenous communities and landless rural workers is particularly worrying. Reportedly, only five per cent of the 1,207 murders of rural workers that took place nationwide between 1985 and March 2001 led to a conviction. Human rights violations committed against Brazilian Indians also suffer from impunity.²¹

The Office of the Public Defender

In a country where over 70 million people live below the poverty line and 54 per cent of the population is either unemployed or receiving less than the national minimum wage, the provision of free legal services is undoubtedly of paramount importance. The Office of the Public Defender, created in January 1994, provides for free legal assistance to the public.

Article 5 (LXXIV) of the **1998 Federal Constitution** stipulates that ‘the State has to provide full and free legal assistance to whoever proves not to have sufficient funds’. So that this duty can be carried out, article 134 provides for the enactment of legislation to establish the Office of the Public Defender (*Defensoria Pública*). Although the Office of the Public Defender is regarded as a single and indivisible institution, it is effectively divided into three branches: **Complementary Law no. 80 of 12 January 1994** (*Lei Complementar nº 80 de 12 de janeiro 1994*) establishes the Office of the Public Defender for the Federal District and Territories (*Defensoria Pública do Distrito Federal e Territórios*) and the Federal Office of the Public Defender (*Defensoria Pública da União*) and lays down general provisions for the creation by the competent authorities of public defenders’ offices in every state.

The otherwise efficient functioning of this institution is hampered by a distinct ‘lack of autonomy and subjugation to the executive’, according to a general study by the Secretariat for Judicial Reform published in **December 2004**. For example, 73 per cent of the state public defenders’ offices are controlled by state governors and 95 per cent depend on state budgets for funding. Although the December 2004 judicial reform adds a new paragraph to article 134 of the Constitution recognizing the functional and administrative autonomy of the Office of the Public Defender for the Federal District and Territories, no provisions have been adopted to ensure the independence of the federal and state offices. Furthermore, there are still three states that do not have a public defender’s office, including São Paulo, where it is estimated that some 15 million people need legal assistance.

No. 54/01, OEA/Ser.L/V/II.111 Doc.20 rev. at 704 (2000), para. 55, <http://www1.umn.edu/humanrts/cases/54-01.html>; OMCT, “Violence against Women in Brazil: A Report to the Committee on Economic, Social and Cultural Rights”, May 2003.

²¹ See “Report of the Special Rapporteur on the Independence of Judges and Lawyers, Mr Leandro Despouy, Addendum. Mission to Brazil”, E/CN.4/2005/60/add.3, 22 February 2005, paras. 34–36, http://ap.ohchr.org/documents/sdpage_e.aspx?b=1&se=59&t=9; Amnesty International Brazil, “Foreigners in Our Own Country: Indigenous Peoples in Brazil”, 30 March 2005, <http://web.amnesty.org/library/index/engamr190022005>

In order to alleviate this need, the Brazilian Bar Association has, since 2000, contracted 43,000 private lawyers to provide *pro bono* legal counsel, although it has been argued that such agreements do not offer the same guarantees of autonomy and independence as public defender's offices. A draft law has been proposed by civil society to encourage the state authorities to set up a public defender's office in São Paulo. As of **May 2005**, the proposal was being considered by the state legislature.²²

While the *Children and Young Persons Act* of 1990 provides adequate protection, it is not uniformly applied throughout the country. Although, as of **January 2004**, there were specialist children's units in 150 public defenders' offices nationwide, many areas still lacked such facilities.

Cases

A **July 2004** report by the Joint Parliamentary Commission of Inquiry – a body established by the government in June 2003 to investigate violence and sexual exploitation of minors in Brazil (*Comissão Parlamentar Mista de Inquérito da Exploração Sexual*) – directly implicated over 250 members of the Brazilian elite and authorities, including judges and serving politicians, in child prostitution rings. The judiciary was accused of being complicit in this exploitation by omission and collusion. Judges often grant impunity to alleged abusers who have political and economic influence. The report called for the indictment of the 250 alleged abusers and the implementation of stricter laws.

In **October 2004** a Federal Court ruling overturned the sentence imposed on a man convicted of genocide in 2001 after he was found guilty of orchestrating the massacre of 14 members of the Tikuna tribe in 1988. Civil society organizations have condemned the ruling as biased and confirming the climate of impunity that exists in Brazil with regard to cases involving crimes against indigenous communities and landless peasants.²³

LEGAL REFORMS DURING THE PERIOD

December 2003: *Constitutional Amendment 41/2003* of 19 December 2003 – Imposition of upper limits on the salaries of public officials.

December 2004: *Constitutional Amendment 45/2004* of 8 December 2004 – Major Judicial Reform.

²² See Brazil: Constitution 1988, with 1996 reforms, <http://www.georgetown.edu/pdba/Constitutions/Brazil/brtitle4.html>; *Movimento Pela Defensoria Pública*. ANADEP (*Associação Nacional de Defensores Públicos*), <http://www.anadep.org.br/>; Secretariat for Judicial Reform – Report on the Office of the Public Defender in Brazil, December 2004 [*Secretaria de Reforma do Judiciário – Estudo Diagnóstico Defensoria Pública No Brasil, Dezembro 2004*], <http://www.mj.gov.br/reforma/>; “*Reforma do Judiciário. Emenda Constitucional n° 45/2004, Esquematização das principais novidades*”, <http://www1.jus.com.br/doutrina/texto.asp?id=6463>

²³ See “Tribunal absolves Tikuna massacre mastermind and reduces sentence of those directly responsible for the crime”, 11 April 2004, <http://www.amazonia.org.br/english/noticias/noticia.cfm?id=132778>