

The reform of the Constitution in Brazil in December 2004 included an amendment providing for treatment at the federal level of cases of crimes against human rights committed in the states, among them those concerning freedom of expression and press freedom, thus against journalists. This provision is contained in the Constitution's Article 109.

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Modifies provisions set forth under articles 5, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 and 168 of the Federal Constitution, and adds articles 103-A, 103B, 111-A and 130-A, and sets forth other provisions.

THE BOARDS OF THE HOUSE OF REPRESENTATIVES AND THE FEDERAL SENATE, under the terms of § 3, Article 60 of the Federal Constitution, hereby enact the following Amendment to the constitutional text:

Art. 1 Articles 5, 36, 52, 92, 93, 95, 98, 99, 102, 103, 104, 105, 107, 109, 111, 112, 114, 115, 125, 126, 127, 128, 129, 134 and 168 of the Federal Constitution go into effect with the following wording:

"Art. 109.

V-A the cases regarding human rights to which § 5 of this article refers;

.....  
§ 5 In the event of severe human rights violations, the Attorney General, for the purpose of ensuring compliance with the obligations arising from international treaties on human rights, of which Brazil is a party thereto, may require before the Supreme Court, during any stage of the inquiry or process, a change of jurisdiction to the Federal Justice." (NR)  
Brasilia, December 8, 2004

**The following note explains the historical reasoning and the basis for this important amendment for the battle against impunity surrounding crimes against journalists.**

Federalization of Crimes Against Human Rights:  
History and Justification

The federalization of crimes against human rights, in practical terms, involves the jurisdiction of the Federal Justice in the processing and judging of behaviors that violate human rights that have heretofore gone unpunished at the state level. The State Attorney for Citizen's Rights of São Paulo, Ela Wiecko Volkmer de Castilho, participated in the discussions regarding the inclusion of the measure in the Proposal for a Constitutional Amendment (PCA). She remembers that the first proposal regarding this subject was developed in the 1990s: "The idea came up as a consequence of the mandate set forth by international organizations for Brazil to stop the chronic inefficiency of state authorities in punishing crimes, particularly in rural areas and poor districts of the cities."

An example of this idea was furnished in the reformulation bill of the Human Rights Protection Agency, of which she is a member. In October 1993, the Workshop – Human Rights Agenda, which was created after the conclusion of the World Conference on Human Rights, held in Vienna, provided suggestions for modification of the bill, recommending that the Federal Police



should investigate crimes of child-juvenile work exploitation, drug trafficking, torture, child trafficking, slave work exploitation, eradication of children and adolescents, and crimes committed by members of civil and military policing organizations.

Additionally, the Federal Government National Program for Human Rights Protection, prepared in conjunction with a private organization between 1995 and 1996, with support from the University of São Paulo/Center for the Study of Violence, was aimed at fighting impunity, transferring to Federal Justice the jurisdiction for trying crimes affecting property or affairs under the control of the Federal Organization for Human Rights Protection, whether the cases were civil or criminal. When this program was launched, the proposal was included by the President of the Republic Henrique Cardoso in Article 109 of Constitutional Amendment No. 368 (PCA 368/96), and was sent to the National Congress.

The rationale was that the impunity was such that, if no measures were taken to revert the situation, the social conflicts might escalate to such a level that the State alone would not be able to control it. Moreover, the Federal Justice and the Public Ministry of the Union, due to the existence of the problem nationally, "were more immune to political, social and economical local factors."

Ms. de Castilho relates that there were objections to the proposal to the Commission of the Constitution, Justice and Composition of the House of Representatives. The disapproval was aimed toward House Representative Gilvan Freire, a sponsor of PCA 368/96, to submit a substitute, which was approved. However, the merit should have been evaluated by a special commission, but that was never created.

The Association of Federal Judges of Brazil (AJUFE) subsequently approved, at its 15<sup>th</sup> National Meeting held in Rio de Janeiro in 1998, an alternative wording for Article 109. Moreover, in 1999 a commission made up of prosecutors from the state of São Paulo and attorneys general of the Republic also defended the proposal under certain conditions.

Consequently, PCA 386/96 was finally annexed to PCA 96-A/92 of the Judicial Reform. In September 1999 House Representative Zulaiê Cobra submitted a written report with another substitution. However, another wording of §5º prevailed during the final vote held by the House of Representatives, which stated: "In the event of severe human-rights violations, the Attorney General, for the purpose of ensuring compliance with obligations arising from international human-rights treaties in which Brazil participates, which require appearance before the Supreme Court, during any stage of the inquiry or process, an incident that warrants a change of jurisdiction to the Federal Justice."

Accordingly, under its new number--PCA 29/2000--the proposal was approved by the Senate with the same provisions stated in this wording. Senator Bernardo Cabral argued, "The federalization of crimes against human rights is necessary and a legal requirement whose main objective is protecting human rights, and said need for protection lies within the treaties and international agreements subscribed by the Union in the name of the Republic."

Then, Ms. de Castilho adds, there was a battle over that approval. The Ninth National Conference for Human Rights rejected the proposal for a constitutional amendment in July 2004. Among the allegations, they stated that the subjectivity for the transfer, social uncertainty and legal insecurity would weaken the system and engender disregard for the federal courts of first instance. Furthermore, at its 158<sup>th</sup> Special Meeting on November 10, 2004, the Council for the Protection of Human Rights approved, by majority vote, the favorable opinion of Board Member Flavia Piovesan for the text of the constitutional amendment being processed by the Federal Senate.

According to Piovesan, the proposal for federalization included in the amendment guarantees more protection for the victim and strengthens the fight against impunity; strengthens and spreads international responsibility regarding human rights in different federal entities, particularly at the State



level; strengthens the responsibility of the Union regarding human rights internally, in agreement with their international responsibility; and improves the process of national responsibility of serious human-rights violations.

The final text published by the Constitutional Amendment No. 45, dated December 31, 2004, is the following: "Art. 109 – Federal judges must process and try: [...] V-A – the cases regarding human rights to which § 5º of this article refers; [...] §5º In the event of severe human-rights violations, the Attorney General, for the purpose of ensuring compliance with obligations arising from international human-rights treaties in which Brazil participates, requiring appearance before a Supreme Court, during any stage of the inquiry or process, an incident that warrants a change of jurisdiction to the Federal Justice."

## OTHER MECHANISMS

Ms. de Castilho adds that before Constitutional Amendment No. 45 there were other federalization mechanisms in place. Law No. 4.319/64, which established the Council for the Protection of Human Rights, allows an organization of federal nature to investigate facts.

Article 34, VII, of the Federal Constitution of 1988 also provides for intervention to ensure the observance of human rights. The Attorney General of the Republic may request the participation of the Federal Supreme Court or may halt the execution of an act that is being contested and remove authorities. Furthermore, Law No. 10,446, dated May 8, 2002, foresees the investigation by the Federal Police of penal violations regarding human-rights violations that Brazil has agreed to fight in international treaties, when there are interstate or international repercussions that require uniform punishment.

Judges' associations and the Office of the Attorney General directly proposed unconstitutional acts while enforcing Constitutional Amendment No. 45. Among other arguments, they insisted that the subjective criteria by which to define human-rights violations should be the principle of natural judgment; they claimed that federalization constitutes a white intervention of the Union of the States as well as an intervention of the Office of the Attorney General over the offices of state attorneys, and they insisted that to disclose cases through the general media would predispose the courts. They also stated that it would delay the processes of the Federal Justice.

Ms. de Castilho counters this criticism. "The new constitutional ruling," she says, "barely specifies the possibility of direct legal intervention by the Union. The Union should not be responsible internationally and still be unable to do anything about impunity regarding human-rights violations." She adds, "Undoubtedly it is challenging to verify, on a case-by-case basis, whether constitutional requirements are being met, that is, it's a severe human-rights violation that involves an international treaty on the protection of human rights, as well as the inefficiency of or omission by local institutions."

Based on article *History of Federalization of Violations Against Human Rights*, by Ela Wiecko V. de Castilho