

### ***Unconstitutionality of the law that alters the military forum and the Amendment Constitutional no. 45/2004***

The constitutional warranties established in the art. 5th of the Federal Constitution of 1988 are norms of full effectiveness and they are insured the all the Brazilians and resident foreigners in the country, even to the that are passing through for the national territory service to the determination in the American Convention of Human Rights - CADH and also the Universal Declaration of Rights of the Man of the Organization of the United Nations.

The structure of the Brazilian Judiciary Power is treated in the Federal Constitution of 1988, that since 1934 it recognizes the Judges and Military Tribunals as being organs jurisdicionais, what moves away the character of Tribunal of Exception. Just in the period from 1937 to 1945 denominated of New State it was that Brazil met a Tribunal of Exception that was the Tribunal of National security - T.S.N. For force of federal law, of the decisions uttered by the Tribunal of National security resources fit for the Superior Military Tribunal - S.T.M, with thirst in that time in the city of Rio de Janeiro.

The competence of the Federal Military Justice is foreseen in the art. 124, caput, of CF. According to the constitutional norm, "TO THE Military Justice it competes to process and to judge the defined military crimes in law". THE Military Penal code in the art. 9.º define which are the military crimes in time of peace and in time of war that should be judged by the Military Justice. The competence of the State Military Justice is established in the art. 125, of the Federal Constitution that it suffered alterations for force of the Amendment Constitutional no. 45/2004, that it started to establish the competence of the Tribunal of the Jury of the Common Justice expressly to process and to judge the state military accused of the he/she practices of deceitful crimes against the life that you/they have as victim the civilians.

Before the coming of the Law 9.299/96 and of the Amendment Constitutional no. 45/2004, the crimes practiced by military policemen and military firemen, that you/they are considered military state for force of the art. 42 of CF, against the civilians' life were processed and judged before the State Military Justice, what moved away the competence of the Jury's Tribunal.

For some sections of the society, the Justiça Castrense is a privileged forum where difficultly the accused are condemned the private feather of freedom. It

should be observed, that this Specialized Justice not even it admits the application of the Law n.º 9099/95 under the allegation that the hierarchy and the discipline should be preserved. Before the Law of Criminal Special Juizados that modifications that hurt the determination in the art suffered. 5th, caput, of CF, only the S.T.F through decisions uttered in extraordinary resources recognized the possibility of application of the benefits of the Law to the Military Justice.

In 1996, the federal legislator in the exercise of the derived constituent power understood that in the case of the deceitful crimes against the life practiced for military, federal or state, against civil these should be judged by the Common Justice. For force of the art. 5th, interruption XXXVIII, of CF, the natural judge to process and to judge the deceitful crimes against the life is the Jury's Tribunal, that possesses sovereignty in their verdicts.

Instead of modifying the art. 124, caput, of CF, that treats of the competence of the Federal Military Justice and the art. 125, § 4th, of CF, that treats of the competence of the State Military Justice, through Constitutional Amendment, the legislator was limited to edit a Federal Law of procedural aspect aiming at to modify the art. 9th of CPM. The modifications introduced by the Law, which were questioned by the doctrine how being unconstitutional, it didn't move away the competence of the Military Justice to process and to judge the deceitful crimes against the life practiced for military against military, and not even the guilty modality, as in the case of the guilty homicide.

The homicide crime practiced by a military, federal or state, he/she didn't stop being inappropriate military crime, that it is also foreseen in the common Penal code, but it went by law force to be processed and judged by the Common Justice, what contradicted the determination in the constitutional norms. In spite of the modifications happened in the extent of the state Military Justice and that you/they were confirmed by the Constitutional Amendment 45/2004, the inquiry policeman to clean the authorship and materiality of that species of illicit is the inquiry military policeman that you/he/she continues being of the competence of the Military Judiciary Police.

The alterations that were accomplished in the Military Penal code no more they are in conflict with the constitutional norms that you/they treat of the judges' attributions and Military Tribunals in the extent of the State Military Justice, but regarding Military Justice of the Union this incongruity stays. The Federal Law as he/she teaches the doctrine can alter competence since he/she doesn't enter in

conflict with constitutional devices. In the case of the deceitful crimes against the life, the competence of the Justice Military, Federal or State, I begin her have been alter only through Constitutional Amendment.

After several years and in reason of the received critics, the legislator proceeded the modification of the Federal Constitution concerning the deceitful crimes practiced by the military ones state against the civilians, but it is not known for which reason didn't do the same modifications in relationship of the Military Justice of the Union, that after the Constitutional Amendment 45/2004 started to be the competent to process and to judge the deceitful crimes against the life practiced by the military ones federal in the exercise of their functions against the civilians, moving away the discussion once and for all regarding the constitutionality of the Federal Law 9.299/96 in the extent of the Union.

The constitutional text allows that each organ of the Power Judiciary, Federal or State, have his/her law of judiciary organization, that cannot cross the established limits for the original representative. The Electoral Justice, for instance, he/she cannot judge matters not to be foreseen in the arts. 118 to 121 of CF. The same happens with the Justice of the Work that can only process and to judge the matters related with the individual and collective salary agreements in service to the arts. 111 to 116 of CF.

The Jury's Tribunal possesses competence to process and to judge the deceitful crimes against the life that you/they are of the competence of the Justice Common of the States-members of the Federation or of the Federal Justice. In the case of the deceitful crimes against the life foreseen in the Military Penal code in time of peace or in time of war these must processed and judged by the Military Justice.

The law that altered the military forum was unconstitutional until the coming of the Constitutional Amendment 45/2004. THE legislator moved away the discussion once and for all as the constitutionality of the law in the extent of the States-members, but it didn't come in the same way in relation to the military ones federal, what demonstrates that mentioned her partly law stays unconstitutional. This way, the legislator ended up establishing two treatment forms for a same category of servants.

The military ones state in reason of the Constitutional Amendment 45/2004 will be processed and judged before the Tribunal of the Jury of the place of

the facts, according to the procedural law that the species is applied, while the military ones federal tends in view the unconstitutionality of the law will be processed and judged before Council of Justice, Special or Permanent, constituted by Judge-auditor and also for the belonging officials the accused's Force.

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