

# Organization of the Brazilian Judicial Power

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## 1. Introduction

The Judicial Power, differently from the Legislative and the Executive, which are entwined to a certain degree, it is unequivocally the most singular Power in comparison to the others. In this sense, Konrad Hesse observes that it is not the fact that the Judiciary applies the Law which distinguishes it, being that it is a function that is also performed by other state organs in a more or less intensive way, particularly by the Public Administration. However, what most characterizes the judicial activity is rendering autonomous decisions in an authorized form, which makes them binding in case of contestation or violation of rights.

The Constitution of 1988 trusted the Judiciary with a role until then not yet granted by any other Brazilian Constitution. It was given institutional autonomy, unknown in the history of our constitutional model and which also reveals itself be singular and worthy of distinction also at the comparative law level. It was sought, thus, to guarantee the administrative and financial autonomy of the Judicial Power and to ensure the functional independence of judges.

The current constitutional model grants free access to the Judiciary. The principles of effective judicial protection (article 5, XXXV), of the natural judge (article 5, XXXVII and LIII) and of the due process of Law (article

5, LV) have decisive influence in the organizational process of the Judiciary, especially in what concerns the guarantees of the magistrature and the independent structuring of the organs.

For that matter, it should be underlined that judicial independence is more important for the effectiveness of fundamental rights than any catalog in the constitutional text because human rights can only be achieved by limiting the Power of the State. Thus, it is the good application of fundamental rights of judicial character – with preeminence of the effective judicial protection – which differentiates the rule of Law.

In this sense, the principle of effective judicial protection configures the cornerstone of the rights protection system, motivating the conception of new judicial guarantees of the objective constitutional order and of the subjective rights system.

## **2. The Brazilian Judicial Power**

The organization of the Brazilian Judiciary is widely disciplined in the Constitution. The Constitution of 1988 granted Brazilian courts with the power of self-government, consisting in the election of its directive organs, elaboration of its internal rules, organization of its secretariats and auxiliary services, as well as filling positions necessary to the administration of Justice. The judiciary also has the power to elaborate its own budget proposals within the limitations established with the other Branches in the law of budgetary directives.

Moreover the Constitution contemplates a few basic guidelines for the organization of the Judicial Power as a whole, such as: *i.* admission to the career through public contest of exams and titles, with the participation of the Brazilian Bar Association in all its phases, requiring of the law graduate a minimum of three years of legal profession; *ii.* promotion from level to level, alternately based on seniority and merit; *iii.* evaluation of merit according to performance by objective criteria of productivity and efficiency; *iv* refusal to

promote the most senior judge only by a substantiated vote of two-thirds of the court.

In addition, the Constitution of 1988 created five divisions of competence for the Brazilian Judicial Power: *i.* Federal Justice (CF art. 109) competent to adjudicate, generally, civil and criminal causes directly or indirectly related to the Federal Union; *ii.* Labor Justice (CF, art. 114) competent to adjudicate labor relations; *iii.* Electoral Justice competent to adjudicate electoral litigations; *iv.* Military Justice of the Union (CF, art. 124) competent to adjudicate military crimes; and *v.* State Justice, competent to adjudicate all other civil and criminal disputes.

Generally, each case is decided by a single judge. There is a jury only in cases concerning crimes against the human life. As a rule, it is possible to appeal to a regional court against the single judge's decision. Additionally, every branch of competence (labor, electoral, military and ordinary branches) has a superior Court responsible for the integrity and harmonization of the law interpretation.

The *Supremo Tribunal Federal*, Brazil's Supreme Court, is the top organ of the Brazilian judicial system and is responsible for the guarding of the Constitution. Therefore, it has the final word in all matters regarding constitutional interpretation in concrete as well as in abstract cases.

The Reform of the Judiciary, implemented by Constitutional Amendment 45, of December 2004, brought important innovations to the realm of the Brazilian judicial system. Among these innovations, the creation of the National Judicial Council (CNJ) should be distinguished. It is the controlling organ of the Judicial Power, composed of representatives of the magistrature, of the Public Prosecutor's Office, of the Bar Association and of the civil society. It is in charge of supervising the administrative and financial activities of the Judiciary.

The creation of the National Judicial Council did occur as a way to integrate and coordinate several jurisdictional organs in the country, through a

central organism with attributions of administrative, financial and correctional control and inspection.

It is therefore incumbent to the National Judicial Council to answer to the challenges of modernization and to the deficiencies of fragmented visions and practices of the administration of the Judiciary. The activity developed by the National Judicial Council, as an organ for administrative coordination and planning of the Judiciary, is fundamental for the improvement of the Brazilian legal system and the concretization of the ideal of a fast and efficient justice, which is a necessary premise for the effectiveness of the principle of legal certainty.

The National Judicial Council is responsible for collecting and analyzing the data and information about the Judiciary, in order to identify its challenges and propose solutions. For example, the 2008 statistics made by the National Judicial Council pointed out that last year near 70 million cases were pending for a population of less than 200 million people. This fact alone shows that there is an excessive use of the Judiciary in Brazil and that adequate policies and strategies as well as other forms of conflict resolution must be considered and employed.

Therefore, the National Judicial Council has the mission to formulate the policies and strategies of the Judiciary, as an essential instrument to raise the level of correction and efficiency of the Brazilian justice.

### **3. Management of the Judicial Power**

The mission of the National Judicial Council, as an organ in charge of supervising administrative and financial activities of the Judiciary, is subdivided into five guidelines: *i.* strategic planning and coordination of judiciary policy; *ii.* Operational and technological modernization; *iii.* Broadening access to justice, pacification and social responsibility; *iv.* Guaranteeing respect to public liberties and enforcement of criminal sentences; *v.* inspection and control of the functioning of judicial and extrajudicial secretariats.

A premise of such institutional mission is to promote researches that allow identifying the reality of the Brazilian judiciary. In this sense, it should be noticed the importance of the Department of Judicial Research at the National Judicial Council and the report “Justice in numbers”, organized by this organ, capable of providing and systemizing data and indicators that allow for the better knowledge of the functioning of Justice by the organs of the Judiciary themselves, by state institutions and by the civil society.

According to this report, during the year 2008, 70 million cases were in pending before the Brazilian judiciary, being 57 millions (81%) before the state courts, 6.9 millions (9%) before labor courts and 6 millions (8%) before federal courts, showing the high level of litigation within Brazilian society.

The indicators of litigation in the report “Justice in numbers” of the year 2008 also demonstrate that, in federal and state courts, backlogged cases are concentrated in the first instance and in small claims courts, both with the heaviest workloads and the highest rates of backlog, revealing a necessity of a special attention from the higher courts to these segments.

Facing this diagnose, measures such as proportional application of the budgetary resources, reallocation of civil servants, higher investments in infra-structure and technology are now discussed and encouraged, as desirable actions that might, in a short or long term, change the present reality.

Generally, the statistic reports reveal that, beyond the investments that the Brazilian Judiciary needs, it is necessary to restructure the very management of the Judiciary.

It is consolidated the understanding that the effectiveness of the Brazilian Judiciary goes beyond mere expansionism, repeatedly translated as increasing the physical structure and staff. It is necessary to improve efficiency in the administrative and judiciary fields to face the culture of excessive judicialization, in which the Judiciary is seen as an ultimate answer to the expectations of a third of the population, approximately.

Alternatives to the traditional expansionist model have been developed, in which, the higher the number of processes, the higher the number of judges, civil servants, courts and posts at the appellate level. Improving the management, searching and sharing creative solutions and investing in technology can lead to increasing expressive results, without enlarging the structure.

In this context, two solutions prescribed by the National Judicial Council are noteworthy: the national strategic planning; and the modernization of the “productive process” of the Judiciary.

### **3.1. Strategic Planning**

In the matter of improving the management of courts, the National Judicial Council coordinated the work of building the “Strategic Planning in the Judicial Power” approved by the Presidents of 91 Brazilian courts in the 2nd National Judiciary Meeting, that took place in February 2009, and institutionalized by the Resolution 70, of the National Judicial Council.

Such initiative means that all the organs of the Judiciary will act with common goals, translated into strategic objectives, guided by attributes of worth such as credibility, accessibility, ethics, impartiality, modernity, honesty, environmental and social responsibility and transparency.

In line with strategic themes consensually established and with the commitment to plan their actions for the next five years – avoiding, thus, harmful administrative discontinuity -, the organs of the Judiciary, still in the year 2009, will have an instrument capable of producing a true “management shock”.

From strategic objectives common to all the Judiciary, elected consensually, programs are developed, nationally and locally, in search of a standard public service in which the sharing of knowledge, good practices, systems and structures contribute to the improvement of services and to the gradual elimination of the inequality among the several segments of Brazilian Judiciary. Today the Judicial Power defines itself as a National Power, in which

each one of the organs, independently from its competence, is part of a large mechanism.

In face of the different levels of development of Brazilian courts, which reveals the need for establishing a minimum common level of legal services available for society, the presidents of the Brazilian courts made a commitment to achieve, still in the year of 2009, the 10 National Targets.

I highlight the so called “Target 2”: to identify the oldest judicial proceedings still pending and adopt concrete measures for the judgment of all the cases distributed before December 31st of 2005 (at 1<sup>st</sup> and 2nd instances as well as superior courts). Other than the presented challenge and need of double efforts of each judge and civil servant of the Judiciary, “Target 10” demonstrates the institutional commitment before the Brazilian society to deliver legal services in a reasonable period of time.

For that matter, the data collected until the moment have been positive. Until July 2009, according to the information given by 86 out of the 91 courts that compose the Brazilian judicial system, 496.246 cases filed prior to December 2005 were adjudicated. Moreover, 47 courts informed having in their backlog less than 1,000 cases regarding “Target 2”, while other 26 courts informed having between 1,000 and 100,000 cases to be adjudicated until the end of the year.

It is essential to highlight that, from a National Management Plan, the Brazilian Judiciary is from now on adopting a culture of results, in which each strategic objective is connected to indicators and short, medium and long term targets, permanently monitored in search of better results.

### **3.2. Modernization of the productive process in the Judiciary Power**

The policy for modernizing judicial activities is also in the center of this great effort. A big part of the leveling targets of 2009 are related to technology of information: automation of the cases’ distribution, interconnection of districts and courts, implementation of the electronic proceedings, including in

the enforcement of criminal sentences; incentives to the use of electronic tools for identifying people and assets; and the use of portals for displaying the stages of proceedings with transparency.

The investments in this area, however, need to be planned. Many resources were invested by the courts in the past years and, in spite of good examples of technological systems, we still have not achieved the desired interoperability nor have we developed a system capable of attaining the common functionalities of all the divisions of the Judiciary.

Having in mind that informatization is a great ally in the process of modernization, the National Judicial Council has fostered the use of instruments capable of raising the operational efficiency and, in last analysis, modernize the traditional way of solving demands, especially with the use of technology.

Transparency and publicity also have been constant concerns, because of the Judiciary's duty, in all its levels, to account for judicial services and resources before resources. It is necessary to advance beyond the traditional model of seeking correction, many times late, of accomplished facts. The duty of transparency, in itself, represents an efficient instrument of prevention.

With this view, the Brazilian Judiciary has already given meaningful steps. All Brazilian courts have the obligation of transparency in divulging their activities (Resolution 79 of CNJ) and the National Judicial Council already displays its expenses in its internet Portal. The next step will be the development of a system that grants total publicity to the courts' budget execution.

#### **4. Conclusion**

Recent innovations brought to the Brazilian judicial system by the National Judicial Council intend to make possible the constitutional promise of a fast and effective judiciary.

It should be also mentioned the ongoing efforts to stimulate the extrajudicial resolution of conflicts and to terminate the litigation culture that was

strongly established in the country – shown by the 70 millions of lawsuits in a population of little less than 200 million people that were handled in the year of 2008 -, according to which practically all matters must go to courts.

The judiciary needs to stop being the only answer for the most imminent demands of citizenship, ensuring, thus, the objective of better legal protection and the least possible judicial intervention.

Administrative modernization of the Judiciary is a necessity before the constitutional guarantee of effectiveness of justice, but, beyond that, it is a premise for the development of the country, having in mind that the certainty of fast resolution of conflicts is a necessary requisite for economic development and an incentive for attracting foreign investments.

Thus, one hopes that the ongoing efforts to upgrade the Brazilian judicial system are useful not only to ensure the concretization of the constitutional right of access to justice, but also as stimulation for national development.

When the Judiciary operates efficiently, constitutional guarantees are preserved, inequality is reduced, society is stronger and, with it, the Rule of Law.