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What Kind Of Judiciary Do We Want?

The access to Justice in Brazil

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Abstract: The goal of this paper is to discuss a key issue in the Democratic Rule of Law State: what are the role and main functions of the Judiciary in Brazil?

Is the Judiciary mainly a public service provider, adjudicating disputes and guaranteeing individual rights? Or also as a state power, it should mainly control and guide the moral values of the society, changing the status quo and reducing social conflicts? In this sense, what are the conflicts that must be examined by the Judiciary?

We will seek to answer these questions based on a discussion subsidized by courts official statistics and the results of surveys conducted with the Brazilian general population. The surveys measured how do citizens feel about their judicial system and what are the circumstances and the facts that determine the judicialization of conflicts. We work with the perceptions and attitudes of citizens relating to the Judiciary as it is today and discuss the Judiciary they want. Then, we compare how attitudes and perceptions relate to actual behavior and use of courts.

Contents

1 Introduction	2
2 Structure of Brazil's Judicial System	3
3 Empirical Research – Surveys and official statistics	4
4 Conclusions	12
References	13

1 Introduction

Since the beginning of the 1980's, with the transition to democracy and the demands for rights and citizenship, the Brazilian judiciary has undergone considerable change, with regard to access to justice. This movement peaked with the 1988 Federal Constitution which, in turn, consolidated several of these transformations. Among the main changes are the creation of the Small Claims Court in 1984, the emergence of the class action in 1985, the strengthening of the Public Prosecutor and, more important, guarantee that all the civil, political and social rights became constitutional rights. This final change which had enlarged the formal rights outlined in the Constitution, moreover had allowed that any kind of dispute, conflict or law threat could be taken to the judiciary.

All these changes put the judiciary and the justice system on the center of the political arena, not just as a public service provider but also as an important political actor deciding public policies and defining moral guidelines.

The Brazilian political framework designed by the 1988 Federal Constitution had guaranteed the characteristics of a consensual democracy as describe by Arendt Lijphart (LIJPHART, 1999) with some more dramatical aspects, which are: a decentralized constitutional review and an original jurisdiction of the high court; a multiple party system with a deep fragmentation; a federal political system with very deep regional differences. All this items added to a large variability of lawsuit and a enlarged access to justice, a political agenda full of controversial institutional reforms and more complex society, made the judiciary the main political actor.

The prominent role that the Brazilian judiciary has gained since the 1988 Constitution raised also many critics related to its low response capacity to the exponentially growing demands brought to it and its legitimacy as a political democratic actor.

Part of this criticism was answered by the Judicial Reform, approved in December 2004, which established the "National Judicial Council" (Conselho Nacional de Justiça - CNJ), a body responsible for controlling the activities of the judiciary. The CNJ has been instituting goals to be reached by the courts regarding the speed of decisions and congestion charges.

What is at stake in the actions taken by CNJ is the performance of the judiciary as a public service provider, which as such must be transparent and accountable. But should the Judiciary be seen and reduced to a provider of a public service? If so, how has it been performing

its activities? What are the expectations and views of the population regarding the Judiciary and how is it being evaluated in the eyes of Brazilian citizens?

In this article, we look through the statistics produced by the courts themselves and data produced by the research on trust in the judiciary, to discuss the role of courts in Brazilian society today.

2 Structure of Brazil's Judicial System

The organization and structure of the judiciary affect public perceptions about courts activities. In general, it is clear that the judiciary has two types of activities: resolving conflicts between individuals (MONTESQUIEU) and controlling the other branches of government, outlining a mechanism of checks and balances (Federalist Papers). In these two activities, the judiciary has been acting to provide a public service essential to the well functioning of the state, namely, law enforcement, and judicial review, mediating actions and relations between the legislative and executive branches by the use of the constitution as a political charter and a list of rights.

In some countries the more prominent role of the judiciary is to resolve conflicts between individuals, while its constitutional control function is designed for a particular court, which is not normally part of the judiciary, having original jurisdiction. In other countries, following the U.S. model, the function of resolving conflicts between individuals and constitutional control is performed by judicial institutions, and the constitutional court is part of the structure of the judiciary.

The 1988 Brazilian Constitution, following the previous constitutions, opted for the American model, in which the constitutional court is part of the structure of the judiciary, having original jurisdiction for constitutional revision. This model puts the judiciary in the center of the political arena.

Since the 1988 Constitution, the Brazilian Judiciary has been divided into two major layers: the State and the Federal Judiciary.

The State Judiciary is organized into twenty-seven Justice Courts, according to the number of federate units, and is formed by the Regular and the Small Claim Courts. Regular Courts are responsible for hearing in civil, family, commercial, criminal cases, and include the

Jury Court. The Small Claim Courts are responsible for hearing cases involving less complex claims of criminal and tort law.

The Federal Judiciary comprehends: Federal Courts, Labor Courts, Electoral Courts, and Military Courts. The Federal Courts, which also comprises the Federal Small Claim Courts, are responsible for all lawsuits to which the Union is one of the parties. The Labor Courts hear all cases involving labor relations and services characterized as work contracts. The Electoral Courts are responsible for the cases related to elections, political parties, and democratic representative offices in the Executive and Legislative branches. The Military Courts deal with all cases involving military career officials and military police forces on duty to prevent and repress crime.

The Brazilian Judiciary also is formed by the Federal Supreme Court, which is responsible for judicial review, and the Superior Justice Tribunal, which is a court of appeal.

3 Empirical Research – Surveys and official statistics

According to Sadek (2009) the return to democracy and the Constitution of 1988 strengthened the Judiciary and the justice system as a whole. Judicial institutions have become more visible and accessible to both political actors and the general population. Political Actors seek the Judiciary in its authority to invalidate government policies and overrule majority legislative decisions. Citizens seek the Judiciary as a public service provider aimed at resolving disputes and conflicts and ensuring the effectiveness of a wide range of rights.

The gain in visibility also comes from extensive media coverage and the profusion of academic studies². Those studies have in common a diagnosis of crisis, indicating that the Judiciary is expensive, slow and incapable of responding to demands that affect the day-to-day life of the ordinary citizen.

International organizations, such as the World Bank (2004) and United Nations (2005) also portrayed Brazil's Judiciary as being in crisis, placing it amongst the most inefficient, ineffective, iniquitous and corrupt in the world.

² SADEK, Maria Tereza; ARANTES, Rogério (1994). LOPES, José Reinaldo Lima (1994). SADEK, Maria Tereza (org). (1995). JUNQUEIRA, Eliane Botelho (1996).

Despite all the diagnosed problems, there is a continuing high rate of litigation in Brazilian courts as a growing trend.

Growth in demand for judicial remedies is extraordinary. Official statistics³ show that the total number of new cases in the first degree of jurisdiction increased threefold between 1990 and 2010, going from 5.12 million to 17.74 million cases, what represents 5,5 new case per inhabitants, just in one year.⁴

If those numbers are already impressive, Sadek (2009) shows that in 2008 demand reached one new case for every 3.0 inhabitants. The author asserts that it should not be inferred from these data that the high demand of judicial services is equivalent to broad access to justice. The high volume of cases has mainly public authorities as the authors – government, organs of the Union, states and municipalities – as well as minority and privileged sectors of the population (Sadek, 2009: 273).

A recent national survey (PNAD 2009) revealed the amount of Brazilian citizens that used the Judiciary in the past five years. According to the survey, 12.6 million Brazilians aged 18 years or older were involved in some kind of serious conflict in the past five years preceding the date of interview (from 2004 to 2009) –representing 9.4% of Brazilian adult population.

And what are the problems faced by Brazilians that lead them to the Judiciary? What are the circumstances and facts that determine the judicialization of conflicts?

According to PNAD 2009, when asked what kind of conflict they faced, the highest cited areas were labor (23.3%), family (22.0%), crime (12.6%), essential services such as telephone, water and light (9.7%), social security (8.6%), bank or financial issues (7.4%) and others, such as housing, taxes, etc. (16.4%). From those 12.6 million people, 57.8% declared they went to the courts to solve the issue, 12.4% declared they went to small claim courts, 6.6% used the police, 3.9% went to a consumer protection agency; 2.4% looked for friend or relative help and 16.9% solved the problem by other means.

With a different research methodology and different sample procedures the Justice

3 CNJ, *Justiça em Números*. Available at www.cnj.jus.br.

4 In the Sao Paulo state, this number represents 8,9 new case per inhabitant in 2010.

Confidence Index⁵ points that 52% of interviewed population have already filed a lawsuit (in person or someone residing in their household). The essential difference between the Justice Confidence Index and PNAD is the way the question is made. PNAD asked respondents which was the most serious conflict they have faced in the past five years. The Justice Confidence Index asks if respondents or someone living in their household have already used the Judiciary.

According to the Justice Confidence Index, there is a clear relationship among the use of the Judiciary and income, education and place of residence (metropolitan regions versus countryside). Thus, the higher the income and education, the greater the use of Judiciary: 47% of low income people have already used the courts while 53% of people on higher income did⁶; 44% of low education people used the Judiciary against 65% of high educated people. Likewise, residents of large urban centers also use more the Judiciary (53%) compared to residents of country cities (50%).

The main motivation for using the Judiciary was related to consumer issues (improper billing, credit card, defective products, etc.), followed by questions concerning labor law (dismissal, compensation, extra hours payment, etc.) and family law (divorce, pension, child custody, inventory, etc.).

5 Justice Confidence Index is a project designed to measure public opinion on judicial performance in Brazil. The survey's target population in the Justice Confidence Index is the country's general population. The sample is distributed through 8 States (Amazonas, São Paulo, Rio de Janeiro, Belo Horizonte, Pernambuco, Bahia, Rio Grande do Sul, Distrito Federal) which together represent approximately 60% of the country's population, according to census data. The sample size is determined by the number of inhabitants in each State. The informant is an individual who represents the selected household, of any gender (male or female) and is 18 years old or more. The sampling frame was constructed to take the range of 95% and absolute sampling error of 2.5%, setting the size in 1.650 respondents. Interviews are conducted via telephone. Available at: <http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/9799/Relat%C3%B3rio%20ICJBrasil%201%C2%BA%20Trimestre%20-%202012.pdf?sequence=1>

6 To measure income, it was considered that a monthly earning up to US\$510.00 as low income, of US\$510.00 to US\$1,020.00 as medium income and more than US\$1,020.00 as high income.

GRAPH 1. Reported reasons for using the courts.

Source: Justice Confidence Index, 2012.

(1621 respondents that already used the court - in person or someone in the household)

Another important public opinion survey conducted in Brazil in 2009 was the SIPS (System of Social Perception Indicators) from IPEA (Institute of Applied Economic Research)⁷. The study revealed that 63% of people who had experienced a conflict situation did not seek the Judiciary to solve it. The conclusion of the survey goes in the same direction as the Justice Confidence Index, showing that litigation is directly related to the level of education and poverty. According to IPEA study, 63.85% of all demands can be explained by levels of education and poverty: an increase of 1 year in the average education level in a State, for example, increases the demand for judicial services in 1.682 new cases per year for every 100 thousand inhabitants. And 1 point reduction in the percentage of poor people in a State increases the demand for judicial services in 59 new cases per year for every 100 thousand inhabitants.

We can conclude from IPEA study that income and education are the most important predictors for the use of Judiciary as a public service provider, but they are not the only ones. The Justice Confidence Index measured the incidence of conflict situations possible to be experienced by the population: labor conflict (job loss without payment of due compensation), consumer dispute (undue collection) and traffic accidents.

It was asked to the interviewee if he or she has experienced any of those three kinds

⁷ IPEA Research. Available at:

http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=6141&Itemid=2v
and http://www.ipea.gov.br/portal/index.php?option=com_content&view=article&id=6141&Itemid=2

of conflict situations and, having experienced any of it, it was asked if they had gone to the Judiciary to solve the issue or not.

The result indicates that 21% of respondents have received improper billing, and of those who received it only 12% sought the Judiciary to solve the problem. Around 15% was fired and didn't get to receive what the employer owed them (and here also only few did go to Judiciary: 15%), and 9% had a car accident and could not resolve the issue with the other part involved – from those 7% sought a judicial remedy.

GRAPH 2. Experience of conflict and the use of Judiciary

Source: Justice Confidence Index, 2012. (1195 respondents) (Question: 1. I would like you to tell me if you or someone in your household have experienced any of the situations I'll cite. Have you or someone in your household already? 2. Did you go to the court to solve this problem?)

But why people do not resort to courts? The Justice Confidence Index considered motivations of people that faced some of these conflicts but didn't go to the Judiciary. The most frequent argument is related to aspects of the administration of justice, with 59% of respondents stating that they thought it would be expensive, slow, or that they do not trust the Judiciary. Around 12% didn't know how to explain why they haven't gone to courts and 5% are still waiting to go to court (they are gathering documents, talking to lawyers, etc.).

For 2%, what prevented access to courts were personal issues (stress, health problems, etc.), 12% didn't know how to use the courts and only 4% say they have solved the problem in other instances (outside the Judiciary).

GRAPH 3. Experience of conflict and the use of Judiciary

Source: Justice Confidence Index, 2012.

(581 respondents that faced at least one of the 3 kinds of conflicts but didn't seek the Judiciary)

But how do Brazilian citizens feel about their judicial system? What are the perceptions and attitudes of citizens relating to the Judiciary as it is today? When less than half of Brazilian citizens have used the courts, and the most frequent reason for not using it is distrust in the judicial system, the feeling towards Judiciary and its evaluation is clearly not good.

IPEA survey asked respondents to grade judicial system, attributing a score from zero to ten, and the average response was 4.55. Similarly, the Justice Confidence Index asked respondents how much they trust Judiciary and the answer was that only 39% declared to trust it.

From data displayed in graph 4 we can see that the higher the income and education, the higher the confidence in the Judiciary. And male and white people trust more the Judiciary than female and non white people. Previous experience with Judiciary doesn't seem to make a difference.

GRAPH 4. Confidence in the Judiciary (% that trust or trust a lot)
Source: Justice Confidence Index, 2012. (3301 respondents)

Judiciary is seen by the majority of people as facing severe structural problems: it is slow, expensive, difficult to use, unfair and lacks competence to solve cases. There is a low degree of confidence in the courts. Compared to a list of other institutions, Judiciary only scores better than the Congress, Political Parties and television media .

GRAPH 5. Confidence in the Judiciary (% that agree)
Source: Justice Confidence Index, 2012. (3301 respondents)

GRAPH 6. Percentage of respondents who say they trust Institutions (completely or somewhat)

Source: Justice Confidence Index, 2012. (3301)

(Question: How much would you say you trust, would you say you completely trust, somewhat trust, somewhat distrust or completely distrust)

In spite of all those problems, the general perception is that Brazilian Judiciary is better today than it was in the past and the expectation is that it tends to improve in the future – for 50% of the respondents Judiciary is better now than it was in the past five years and 73% believe it tends to improve even more over the next five years.

This optimism about the future can be an explanation on why the great majority of respondents declare they would certainly look for the Judiciary to resolve conflicts in their lives. Justice Confidence Index presented six hypothetical situations and for which one was asked respondent the chances of seeking the Judiciary to solve the issue. Possible answers were: definitely not, possibly not, possibly yes, definitely yes.

The cases that mostly would take citizens to Judiciary regards family and consumer law. In case of a husband or wife who abandon home taking the children, 82% would “definetly” seek the Judiciary. Another situation where 81% of respondents stated that they would seek Judiciary to remedy damages would be the case of a defective car purchase, in which the buyer is not able to solve the issue with the dealership.

In cases in which the local government causes damages to residence because of work conducted in one’s street, 77% of respondents said they would seek the Judiciary. And 72% said they would definitely go to court to secure their rights if fired and received less compensation than was entitled.

Situations that would least take Brazilian to trigger the Judiciary are the ones involving medical error and neighborhood relations, but still about 65% say they would definitely seek the

Judiciary in the case of being victim of medical error, and 66% of respondents said they would go to court to resolve a dispute with a neighbor.

It looks contradictory: Brazilian citizens have a low trust in the Judiciary, considering it slow, expensive, difficult to use, unfair and lacking competence, but at the same time the great majority of people say they would go to the Judiciary in case of experiencing conflicts. And the situation looks even more contradictory when we consider that only 40% of the respondents would accept using alternative dispute resolution methods. The majority of them would prefer to talk to the judge.

GRAPH 7. Percentage of respondents who say they would definitely accept using alternative dispute resolution methods. Source: Justice Confidence Index, 2012. (3301 respondents)

(Question: If you go through some of the situations listed above or needed to solve a problem in the court, would you accept an agreement acknowledged by the courts, but decided by a person other than a judge?)

Conclusions

We are not pretentious to imagine we could give all answers to solve the problems and issues confronting the well functioning of the Judicial System in Brazil, but we hope we had shed some light to those problems. First of all it is important to consider the apparent

contradiction between the image of the Judiciary (seen as slow, expensive, difficult to access and unfair) and the growing expectation and demand for its services.

The public perception about the judiciary and the motivations that drive people to use the courts, in turn, is one way of measuring the legitimacy of the institution.

In Brazil, the crisis in the justice system is not a recent phenomenon. Research shows that, at least regarding the efficiency of the judiciary, with respect to time and the bureaucratization of its services, its legitimacy has been questioned since the early 1980's. Since then, and with greater intensity since 2000, some studies collected data on the activities of the judiciary, as the total number of new cases and the ongoing cases every year. With the justice reform approved in December 2004⁸ and the creation of the National Council of Justice (CNJ) in 2005, there were some advances in the production and publication of data on the Brazilian Judiciary, in its various organizations and forums. One example is the report "Justice in Numbers" (*Justiça em Números*), published annually by the CNJ and made available on its website⁹.

So that, it is important to recognize with Sadek (2010) that the Judiciary has been changing and improving in recent years and this change has occurred in seeking to improve the quality of service provided to citizens. And the public has realized it, but still it is very entrenched the belief about the Judiciary as distant from social concerns. And the instrumental political use that some groups make of the institution contributes to keep the belief that Judiciary is one of the less trustworthy institutions, and the slowness caused by the workload per judge, the total number of new cases, associated with a problem of internal administration, all of these contribute to perpetuating problems and a negative view of justice as a whole.

Considering the participation of the judiciary in the political arena and on issues involving moral conduct, the political model adopted by the Brazilian Constitution of 1988, as well as comparative studies showing an increasingly active role of the judiciary in the political scenario, it is unlikely to imagine a decrease in its role as a political actor. In this sense, what is at stake is its performance as public service provider.

Likewise, if what affects public confidence in the judiciary are the issues related to managing its activities and its performance as a public service provider, it is urgent to adopt some

⁸ Constitutional amendment n° 45, approved in December 2004.

⁹ CNJ, *Justiça em Números*. Available at www.cnj.jus.br.

policies that produce different results . With limitations in the possibility of increasing the number of judges - that in Brazilian case is not small - or revising its budget - for which there are lots of restrictions, especially if one sees the high public expenditure for the Brazilian judiciary compared with other countries - it is important to create some other mechanisms, such as procedural filters, which somehow can reduce judicial demand, and also acknowledge alternative and legitimate forms of conflict resolution.

In Brazilian case, both policies have a strong resistance from the judiciary itself and from the legal community, who do not look favorably upon the existence and recognition of other instances of conflict resolution or some kind of restriction on their jurisdiction. Administrative courts are not part of the Brazilian justice system and the decisions taken by administrative bodies, are questioned by the courts due to the application of certain procedures.

Thus, unless there is the promotion of a liable discussion about the role of the judiciary and the low public confidence in its services, bringing also the possibility of the existence of new forms of conflict resolution and new instances, it will not be possible to imagine an improvement in the overall image of the Judiciary.

In this sense, there is an urgent need to filter the demands that arrive in the Judiciary – it doesn't mean it needs to opt for one of its roles (public service provider x state power), but that it needs to balance it.

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