



BRAZILIAN MAGISTRATES' ASSOCIATION

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THE JUDICIAL WORKPLACE AND THE INTERSECTION WITH JUDICIAL INDEPENDENCE

Fourth Study Commission Questionnaire—2023

For most, appointment to judicial office represents not only immense personal achievement but also public acknowledgment of professional eminence. In this Fourth Study Commission analysis, we will look at the judicial workplace and examine aspects of appointment to judicial office, promotion within the judiciary, equitable allocation and distribution of judicial workload and removal from judicial office. This review also endeavors to consider how the judicial workplace is or is not comparable to other workplaces.

Please answer the following in respect of your own country.

1. APPOINTMENT TO JUDICIAL OFFICE

- A. Please describe the process by which a person is appointed to judicial office in lower courts, intermediate courts and superior courts pointing out any relevant differences between appointment in criminal, civil or appellate courts.**

Becoming a Judge in Brazil, despite some current difficulties¹, represents a significant personal achievement and brings with it important public recognition and professional distinction.

¹ As we highlighted in a previous report, the basic salary of the Brazilian Judges is not having adequate adjustment in relation to the increase in the cost of living.

Brazil is a country of continental territorial dimensions, with a population of around 215 million inhabitants and 62 million lawsuits in progress (2022). To meet the expressive jurisdictional demand, the Brazilian Justice has about eighteen thousand judges in activity² and is divided into four basic branches:

<u>Branch</u>	Common Justice (State and Federal)	Labor Justice	Electoral Justice	Military Justice (State and Federal)
<u>Jurisdiction</u>	Lawsuits under public law, including criminal law, and private law in general.	Lawsuits arising from labor relations.	Brazilian electoral process and corresponding lawsuits.	Basically, military crimes.

The structure of each branch and access to the respective positions are defined, essentially, in the Constitution of the Republic. The admission into the career, with the initial post of Substitute Judge, takes place through highly competitive civil-service entrance examination of tests and presentation of academic and professional credentials. The exam has the participation of the Brazilian Bar Association in all phases, and the candidate must have at least three years of legal practice as a holder of a B.A. in law. The appointments to the position follow the ranking order in the examination. There is no other way to access the position.

As a rule, the access to the Court of Appeal stems from the promotion of career Judges, alternating seniority and merit. However, 1/5 of the positions in Courts of Appeal are reserved to Public Prosecutors and to Lawyers, alternately, both indicated by the respective categories. The Public Prosecutor must have more than ten years on the career. The Lawyer must have notorious legal knowledge and unblemished reputation, in addition to more than ten years of effective professional activity. The rules are the same for civil and criminal positions.

There are specific rules for the Electoral Justice and for the Military Justice. Broadly speaking, the Electoral Courts are composed of Lower Court and Appellate Court Judges, as well as by a fraction of Lawyers appointed by the Appellate Court. The Military Appellate Courts from the States have in their composition, in addition to Judges, also career Military Police Officers and Lawyers. There are no Federal Military Courts of Appeal, only a Superior Military Court (High Court).

To each judicial branch corresponds a Superior Court (High Court), located in the capital of Brazil (Brasilia). Their Judges are called Ministers, as a rule. They are appointed

² Totaling 8.5 Judges per group of 100,000 inhabitants in the year 2021, according to data from the 2022 “Justice in Numbers” report of the National Council of Justice.

by the President of the Republic, accordingly to the requirements set forth in the Constitution.

The Superior Court of Justice corresponds to the Common Justice. It is composed of thirty-three Judges, two thirds of which will be chosen among Judges of Courts of Appeal (Federal and States); one third, in equal parts, between Lawyers and Public Prosecutors.

The Superior Labor Court, the highest body of the Labor Justice, is composed of twenty-seven Judges, one fifth of whom are Lawyers with more than ten years of effective professional activity and Labor Public Prosecutors with more than ten years on the career; the others will be chosen among career Judges from Labor Courts of Appeal.

Judges of the Superior Court of Justice and of the Superior Labor Court must be approved by an absolute majority of the Senate before being appointed by the President of the Republic.

The Superior Electoral Court is made up of seven Judges, two of whom are Lawyers of notable legal knowledge and moral integrity, appointed by the Federal Supreme Court.

The Superior Military Court has fifteen Judges appointed by the President of the Republic and submitted for approval by the Senate; ten officers of the Armed Forces; a Military Judge; a Military Public Prosecutor and three Lawyers of notorious legal knowledge and unblemished reputation, with more than ten years of experience.

The Federal Supreme Court, finally, is the highest body of the Brazilian Judiciary and, among others, has the jurisdiction of a Constitutional Court. It is composed of eleven Judges, chosen among citizens of notable legal knowledge and unblemished reputation. The choice is made by the President of the Republic and must be approved by an absolute majority of the Federal Senate. There is no constitutional requirement that the candidate must be a career Judge or Public Prosecutor.

In summary, it is only possible to become a Judge of lower Courts in Brazil through competitive civil-service entrance examination. Intermediate Courts, on the other hand, are composed of 1/5 of Public Prosecutors, which are also originally subject to competitive civil-service entrance examination, and to Lawyers. Similar rule exists in the Superior Courts (High Courts).

B. If applicable, please identify whether politics influences of any description bear upon in any way the appointment of a particular person to judicial office.

The access to lower Courts occurs exclusively through competitive civil-service entrance examination, which is public and highly competitive. Therefore, it is not reasonable to consider political influences in this case.

It is possible to consider, however, that good political transit will tend to be relevant in accessing the Courts of Appeal through the 1/5 reserved for Prosecutors and Lawyers, in particular, but in some sense also on the promotion of career Judges.

Due to the high prestige of the positions of Judges of Superior Courts, it is possible to consider that the influence of some political capital is greater, even to career Judges. It is necessary to register, however, that Law prohibits political party affiliation of Judges and Public Prosecutors.

With regard to the Federal Supreme Court, the candidate's political capital tends to be decisive, as the President of the Republic makes the choice with fewer restraints. Furthermore, the Federal Senate can approve or not the appointment.

In any of the situations, nonetheless, it is relevant to note that political approaches occurs discreetly, with a posture consistent with the dignity of the intended position.

C. Is ethnic or gender diversity in any way relevant to appointment to judicial office, and if so, please describe why and in what respect each may be relevant.

Brazil has legal provision for affirmative action involving ethnic diversity to access Federal Technical and Higher Education since 2012, with reserved places for black, brown and Brazilian indigenous people, as well as considering low-income criteria (Law 12,711 of 2012). Since 2014, in civil-service examination for public servants of the Federal Executive Power (not Judges), a proportion of 20% of the positions have been reserved for blacks and browns³ (Law 12,990 of 2014). Both Laws were ruled constitutional by the Federal Supreme Court (ADPF 186 and ADC 41).

Specifically for access to the position of Lower Court Judge, since 2015, at least 20% of the positions on the competitive civil-service entrance examination will be reserved for blacks and browns. This provision is not contained in the law in a formal sense, but in the Resolution 203 of the National Council of Justice. There are debates today in the National Council of Justice to extend the reserves for Brazilian indigenous people as well.

Currently, there is no provision on reserving positions for Judges by gender criteria. There are, however, growing debates about the “gender gap” and the “glass ceiling” in the Courts. According to data from 2022 of the National Council of Justice, women currently hold 38% of Judge’s positions in the Brazil.

D. Describe whether and if so in what way the process of appointment to judicial office is independent of government.

The Brazilian Judiciary power has its own budget, with very limited intervention of the Legislative or Executive powers in the allocation of its own resources. In this way, appointments to the positions of Lower Court Judges are independent of the government.

³ Mixed race.

The Governor of a State or the President of the Republic is responsible, respectively, for appointing the Judges to the Courts of Appeal and to the Superior Courts. In any case, however, they must follow the constitutional requirements, such as seniority and merit or, in general, have their choices limited by previously formed lists of candidates from the Public Prosecutor's Office or from the Bar Association. Therefore, government interference is limited. In unusual cases, interference may manifest itself in a possible delay in choosing or appointing a Judge to the Court.

2. PROMOTION WITHIN THE JUDICIARY

A. Does scope exist for promotion within the judiciary and if so, please describe how and in what circumstances a magistrate or judge may be promoted.

Promotions in the Judge's career take place based on seniority and merit, in accordance with the Constitution and related legislation. Merit criteria must be objective and are regulated by the National Council of Justice (Resolution 106 of 2010). Some of the criteria are productivity, promptness and studies for technical improvement.

Promotion can be horizontal or vertical. Horizontal promotion means normally change between lower Courts. Normally, it starts in lower Courts in smaller cities, gradually progressing to the larger ones, located in the capitals of the States. In some cases, there may be a salary increase. Vertical promotion essentially occurs by means of appointment to a Court of Appeal. Finally, it is not accurate to consider promotion the appointment to a High Court, since it has different criteria.

B. To what extent is politics affiliation of politics partisanship relevant to promotion within the judiciary.

Political party activity is prohibited for Brazilian Judges. It is grounds for dismissal from office, accordingly to the law.

C. Describe the transparency involved in the process of promotion within the judiciary.

The criteria for promotion in the Brazilian Judiciary are seniority and merit. The seniority criterion considers, essentially, the date of entry into the career and tends not to give rise to substantial divergences. The criteria corresponding to the merit are essentially objective, reducing the Court's discretionary scope. Finally, promotion processes are public and subject to administrative and judicial challenge.

3. WORKLOAD WITHIN THE JUDICIARY

A. In broad terms, what are the requirements for magistrates and judges in relationship to the number of sitting days per year or other measurement of judicial workload requirements?

The names Magistrate and Judge are synonymous in Brazil. Brazilian Judges are not subject to time control or the specific legal requirement of a minimum number of hearings to be held. The Brazilian jurisdictional demand, however, is one of the largest in the world.

However, as a legal provision, court sentences must be handed down within a maximum period of thirty days. In practical terms, therefore, Brazilian judges usually hold a high number of hearings and an extensive workload.

B. If a judge is encountering trouble keeping up with the workload, describe the regime that applies by which –

- (i) that judge's workload is allocated to other judges;**
- (ii) the overloaded judge can recover from workload arrears and from any other disabling factor that led to overload.**
- (iii) there are other mechanisms to address judicial delinquency.**

As a general rule, the legal workload of a Judge cannot be allocated to another Judge, except in very specific situations such as retirement or promotion to another level of jurisdiction. There is no legal provision for the reallocation of pending decisions or sentences of Judges with an overload of work.

In situations of exceptional workload or major delays, however, the Courts have been adopting specific and still unstructured solutions. In some cases, at the request of the Judge or by Court decision, the Judge is temporarily removed from office to act exclusively in reducing the backlog of judgments. In other cases, delayed decisions and sentences are allocated to other Judges. In more structured cases, some Courts have support centers, made up of civil servants and Judges, who receive the redistribution of decisions and sentences in exceptional workload or backlog. The Judge does not lose the right to his salary in any of these circumstances.

There are no specific rules on the subject, however. The solutions are defined case by case. Thus, it is not possible to abstractly identify what would be the concrete requirements for one or another solution.

It is important to note, finally, that the delay in giving sentences is a matter rigorously faced in the Brazilian Judiciary. Compliance with productivity is strictly required by the Courts. There are reports demonstrating the growth of mental illness in the career due to the workload. Finally, the delay in giving sentences or decisions in general jeopardize career promotion and, in serious cases, can imply the loss of the position of Judge.

C. Are judges expected or required to assist other judges who may be adversely affected from overload so as to ensure that the business of the court is discharged in a timely manner.

There are no specific legal rules on the subject in Brazil. In some cases, Judges are questioned if they are interested in providing assistance. Sometimes, there may be a certain payment for the accumulation of work, although there is no uniformity in this treatment. In other cases, the reallocation is just informed to the Judge. In all cases, however, it is possible to identify that there is a certain expectation on the Administration of the Court that this assistance will be provided by the Judges.

4. REMOVAL FROM JUDICIAL OFFICE

A. Does a regime currently exist in your country pursuant to which a sitting judge may be removed from office. If so, please describe any such regime, giving all relevant details including-

(i) who decides that the judge is to be removed from office;

During the first two years of career of a lower Court Judge, called probationary stage, he could be dismissed from the position only by means of a vote of 2/3 of the members of the respective Court of Appeal (art. 95, I, of the Constitution; article 22, § 1, LC 35/79). After two years in office for the lower Court Judge, or in the other cases, he has the guarantee of life-tenure office and could be dismissed only by a final court decision (art. 95, I, of the Constitution).

(ii) does the judge have a right of audience on any such motion or otherwise possess a right to be heard against the removal and there is an appeal process if removed;

In both situations above, the Judge will be entitled to full defense, including being heard at a hearing and, if necessary, filing an appeal.

(iii) what are the grounds for seeking the removal of a sitting judge;

The grounds for dismissal of Judges are restricted and provided for by law. The general hypotheses for dismissal of a life-tenured Judge are as follows: criminal lawsuit for common crime or for crime of responsibility; exercise of any other profession, except teaching; receiving money or any items of value in the lawsuits within its jurisdiction; exercise of party-political activity (art. 26 of LC 35/79).

A Judge who is not life-tenured can be dismissed, in addition to the hypotheses above, also in case of negligence in fulfilling the duties of the position; behavior not accordingly with the dignity, honor and decorum of his duties; scarce or insufficient work capacity, or professional behavior not compatible with the good performance of the activities (art. 56 of LC 35/79).

(iv) what is the relationship between violation of the ethics code/principles and removal; and

Brazilian law requires the Judge to maintain irreproachable conduct in public and private life, prohibiting procedures that are incompatible with the dignity, honor and decorum of his duties (arts. 35, VIII, and 56, II, of LC 35/79). A Judge who violates these legal duties may lose the position. These legal duties were the basis for the creation of the Code of Ethics for the National Judiciary, by the National Council of Justice (Res. 60 of 2008). In this sense, even if indirectly, there is a relationship between the violation of the Code of Ethics for the Judiciary and the dismissal of the Judge.

(v) describe the transparency in the process.

As a general rule, judgments in disciplinary proceedings against judges are public, with the exception of specific situations of preservation of privacy, accordingly to the Res. 135 of 2011 of the National Council of Justice. In a administrative disciplinary proceeding, for a non-life-tenure Judge, or in a formal lawsuit, for a life-tenure Judge, the procedures are strictly formal and accordingly to the principles of an adversary system and full defense.

It is important to point out, however, that a life-tenure Judge can also be punished with compulsory retirement, with earnings proportional to the time of contribution, by the vote of 2/3 of the effective members of the respective Court or by the National Council of Justice. The hypotheses for this penalty are the same as those for the dismissal of the life-tenure Judge.

Finally, the Constitution guarantees the non-removability of a Judge from office (art. 95, II). The acts of removal and of placement on paid availability of a Judge, for public

interest, shall be based on a decision by the vote of an absolute majority of the respective Court or of the National Council of Justice, and the right of full defense is ensured (art. 93, VIII, of the Constitution).

B. If removed from office, describe the adverse consequences that may affect the removed judge including –

(a) financial (especially pension) consequences;

The dismissal of a Judge entails the loss of all pension rights. There is no right to reimbursement of social security contributions throughout the career.

(b) future employment consequences following removal;

The dismissed Judge cannot practice law in the Court on which he served as Judge for a period of three years following his retirement or discharge (art. 95 of the Constitution).

Even after this deadline, the Brazilian Bar Association may deny registration, depending on the case, due to lack of moral integrity. Thus, the practice of law could become unfeasible.

In general terms, Judges in Brazil have the right to be criminally prosecuted by the Court directly above. This prerogative is lost upon dismissal.

Finally, any judicial conviction for an act of improbity may imply, in addition to dismissal, sanctions such as loss of assets, temporary suspension of political rights, fines, sentence of reimbursement of damages and prohibition of contracting with the Public Power (art. 12 of Law 8.429/92). There are similar punishments for committing crimes of responsibility (Law 1079/50).

(c) societal consequences including loss of title or civic decorations; and

The Judge's dismissal implies, in general terms, the loss of the right to use the title of Judge and considerable social discredit.

(d) disciplinary steps that may be taken against the removed judge.

As a general rule, the dismissal of the Judge is the last stage of the disciplinary process, as it is the most severe punishment. Any crimes or acts of

administrative improbity that he may have committed, however, will continue the normal judicial process.