



BRAZILIAN MAGISTRATES ASSOCIATION

Paulo Roberto Dornelles Junior
Labor Judge

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Israel

Judicial Workplace and Judicial Independence

What is the impact on judicial independence of the judicial workplace (including nominations and appointments, independence in decision making, governance, assignments, fund and other resources)?

The Constitution of the Federative Republic of Brazil¹, of 1988, establishes judicial independence as a fundamental principle. The Constitution provides that the legislative, executive and judicial powers are independent and harmonious with each other (art. 2); assures judges life tenure, irremovability and irreducibility of

¹ English translation (not fully updated):
https://www2.senado.leg.br/bdsf/bitstream/handle/id/243334/Constitution_2013.pdf?sequence=11&isAllowed=y

remuneration (art. 95); and determines the «administrative and financial» autonomy of the judiciary (art. 99).

Brazilian laws and international treaties to which Brazil is a signatory also provide for judicial independence. Examples are the Organic Law of the National Magistracy (arts. 35 and 40), of 1979, and the American Convention on Human Rights (art. 8, 1), of 1969.

Nominations and appointments

Judges are recruited through civil public examinations held by the judiciary (arts. 37 and 93 of the Constitution). The same is true for Public Prosecutors. The Public Prosecutors also have functional independence (art. 127 of the Constitution). Public servants are hired by civil public examinations.

Commission offices can be exercised by non career civil servants in the cases, conditions and percentages established in law, and are reserved exclusively for the duties of directors, chiefs of staff, and assistants (art. 37, V, of the Constitution). These civil servants are appointed by the judiciary itself and can they be dismissed "ad nutum".

The Courts are also composed of one-fifth of Lawyers and Public Prosecutors. Both are appointed by the respective class, approved by the Court, appointed by the head of the executive branch and approved, finally, by the legislative branch.

The 11 (eleven) Justices of the Federal Supreme Court, the highest Brazilian Court, are appointed by the President of the Republic among citizens of « notable juridical learning and spotless reputation ». They are appointed by the President of the Republic after approval by the absolute majority of the Federal Senate (art. 101 of the Constitution). The Justices of the Brazilian Supreme Court are called Ministers. Some of the Supreme Court Justices are career Judges. There are debates in Brazil proposing that the members of the Supreme Court must be career Judges.

The presence of the executive and legislative powers in the process of appointing Judges to the Courts and Justices to the

Supreme Court can be considered part of the Brazilian constitutional system of « checks and balances » of powers.

The judicial units in which the Judges will work are determined by law. The distribution of court cases to Judges occurs randomly, based on computerized systems.

Independence in decision making

Safeguarding judicial independence could be considered the “raison d'être” of the International Association of Judges. The history of the IAJ, in the words of Louise Mailhot, is “rooted in judicial independence”².

Judicial independence, however, is not an abstract principle. There are concrete elements that guarantee it and that are directly or indirectly related to the work environment:

1) The guarantee of sufficient remuneration to the Judge to « secure true economic independence ». This principle is provided for in art. 8, 1, of the Universal Charter of Judges, edited by the IAJ;

2) The need to equip the judiciary « in terms of personnel and resources to enable it to perform its duties in a proper manner », in the view of Frederico Carlos Sainz de Robles³.

In fact, it is not possible to consider that a Judge is actually independent without having a decent and assured remuneration or without having human or material resources to exercise jurisdiction.

There are important issues involving both topics in Brazil, which will be examined below.

Governance

² Mailhot, Louise. *History of the International Association of Judges*. Coord. Louise Mailhot, Rio de Janeiro: Forense, 2008, p. 1.

³ Voss, Rainer. *History of the International Association of Judges*. Coord. Louise Mailhot, Rio de Janeiro: Forense, 2008, p. 128.

The Brazilian judiciary has constitutionally guaranteed its administrative autonomy.

The National Council of Justice, the body responsible for the financial and administrative control of the judiciary, has adequate representation of members of the judiciary.

In general terms, it is possible to affirm that this aspect of judicial independence is effective in Brazil.

Assignments, fund and other resources

The Brazilian judiciary financial autonomy is constitutionally assured.

The budget of the judiciary will be the object of a proposal « within the limits stipulated jointly with the other Powers in the law of budgetary directives » (art. 99, § 1, of the Constitution).

Although there is a certain political balance with the other powers in this subject, the Supreme Court does not admit undue interference by the other powers in the budget proposals of the judiciary⁴.

Please provide examples in the judicial workplace that foster judicial independence and identify barriers and practices that impede or negatively impact judicial independence.

Fostering independence

1) Overall, the Brazilian judiciary has adequate constitutional guarantees of judicial independence, as well as administrative and financial autonomy.

2) The Brazilian judiciary can be considered highly computer-based. The electronic process is adopted in practically 100% of

⁴ Brazilian Supreme Court, Writ of Mandamus 21.450, 1992. Link: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85527>

lawsuits. Brazil has consolidated experience with virtual hearings due to its continental dimensions. There are, in general terms, adequate material computational resources and technical support.

These conditions, associated with the edition of administrative rules by the National Council of Justice to regulate non presential work and the adequate training provided by the Courts, allowed an extraordinary adaptation of Brazilian justice to the period of the pandemic. Between March 2020 and January 2021, more than 22 million sentences were handed down; about 34 million decisions were given; more than 58 million court orders were issued. And Justice was responsible for allocating about R\$ 600 million to fight the coronavirus pandemic, the equivalent of more than one hundred million dollars. The evolution of this adaptation process in Brazil and in several other countries was the subject of a report made by the Brazilian International Secretariat⁵.

It can be fairly said that these conditions ensured the regular and independent exercise of jurisdictional functions in a particularly challenging scenario. The continuity and high productivity of judicial work was allowed from the residence of the Judges and judicial servants, guaranteeing access to justice without exposing to considerable risk to life.

Barriers and practices for judicial independence

Three can be considered the main aspects related to the judicial workplace that currently have a negative impact on judicial independence in Brazil:

1) Budget constraints

Amendment to the Constitution No. 95 of 2016 limited the adjustment of public budget only to monetary inflation of the previous year, for twenty years. This limitation imposes difficulties for the replacement of public servants and Judges. The table below

⁵ <https://www.iaj-uim.org/news/report-on-worlds-judicial-activity-during-the-coronavirus-pandemic/>

shows the deficit of Judges and civil servants in the judiciary in 2021:

Year of 2021	Judges	Public servants
Positions occupied	17.988	226.003
Vacant positions	4.707	49.662
Total deficit	26,6%	21,97%

2) Remuneration and monetary inflation

The remuneration of Judges is irreducible (art. 95, III, of the Constitution). The Constitution also provides for the annual review of the remuneration of public servants in general (art. 37, X, of the Constitution). This review has not taken place. A loss of remuneration resulting from monetary inflation of at least 50% is estimated.

3) Security

A Judge must have his security guaranteed against threats by the exercise of the profession. This is an elementary requirement for real judicial independence.

In 2018, the National Council of Justice of Brazil published a report called «Diagnosis of the Institutional Security of the Judiciary»⁶. The document examines, among other topics, security in the buildings of the judiciary and Judges at risk.

With regard the buildings, the report identifies that, of the judicial units, only 23% had a metal detector; just 24% had security cameras; and only 4% had an X-ray mat. According to the report, 110 Brazilian Judges were reported under threat in 2017.

Although improvements have taken place since then, there are still threatened Judges in Brazil and a need for improvement in the security measures for Judges and the judiciary.