Economic reform and judicial governance in Brazil: balancing independence with accountability

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INTRODUCTION: THE POLITICAL ECONOMY OF JUDICIAL GOVERNANCE

The prevailing consensus on judicial governance posits that an independent judiciary is a prerequisite for the rule of law, which entails preventing the misuse of authority and bringing the government to account for its abuses of power. This article argues that it is not a sufficient condition and that it needs to be counterbalanced by the self-restraining mechanisms of accountability. It scrutinizes the role of the Brazilian judiciary in economic policymaking since the restoration of democracy in 1985 and unveils the central paradox of judicial governance in Brazil: while the judiciary constitutes a key institution of accountability, its effectiveness is hampered precisely by its lack of accountability.

Legal and judicial reform has become a core objective of reformers seeking to consolidate democracy and deepen market reforms. It is also a critical concern of those international organizations seeking to assist them.[1] Judicial reform is an essential dimension of the now-lauded 'second-generation' economic reforms, which underscore the centrality of the institutions of governance for anchoring market-oriented reforms and consolidating democracy. The new paradigm of development economics identifies the strengthening of political institutions and reform of the state as determinant variables for effective economic governance.[2] There exists a substantive body of evidence correlating the rule of law with economic growth and investment as well as democratic governance.[3] Yet, effective judicial reform has been elusive in many transitional and developing countries.

International financial institutions and donor governments are funding a myriad of initiatives aimed at reforming judicial systems and strengthening the rule of law in transitional and developing countries. The fight against corruption, which now dominates the debates on development assistance and aid effectiveness, has created an added impetus for promoting judicial reform and enhancing the rule of law. The World Bank and regional development banks have been at the forefront of this agenda, which the IMF now also endorses.[4].

The judiciary fulfils two main functions in any democracy: a *political function* related to the republican system of checks and balances and a *legal function* aimed at applying the law and resolving disputes. The effectiveness of the rule of law hinges upon the existence of a judiciary imparting the law consistently and impartially. Accordingly, the credibility of the judiciary and the reliability of its decisions are largely dependent upon its independence from political power, and in particular the executive. Furthermore, an impartial judiciary, acting as an agent of restraint on political authorities, is the guarantor of the separation and balance of powers. As such, its is a central institution of 'horizontal accountability' complementing the mechanisms of 'vertical accountability' provided for by regular, free and fair elections.[5]

Judicial independence has been particularly damaged by the expeditious modes of government adopted by Latin America's newly restored democracies to swiftly implement radical market-oriented economic reforms. Government by decree beyond times of economic emergency has significantly eroded the quality of democratic institutions, as it entailed neutralizing the 'veto points' in the decision-making process. In particular, governments sought to circumvent and often succeeded in defusing the

mechanisms of accountability that an independent judiciary would have provided. This trend has been particularly acute in economic policymaking, as the radical market-oriented reforms in the late 1980s and early 1990s were implemented by recurring to expeditious modes of government. Wary of the obstruction potential of independent-minded courts, governments endeavoured to create politically pliant judiciaries by packing the courts with political allies. As a result, the credibility and reliability of the judiciary as a check on government power has been compromised, significantly undermining the quality of democracy and often leading to hybrid regimes, aptly labelled 'delegative democracies.'[6]

However, Brazil appears to have been an exception to this rule. Endowed with a high level of independence by the democratic Constitution of 1988, the Brazilian judiciary has provided an effective check on the executive, thereby fulfilling its accountability functions vis-à-vis the other two political powers. On repeated occasions, it has openly confronted political authorities over the use and misuse of executive decrees for implementing economic reforms. The most dramatic instance of judicial independence and political accountability came in 1992 during the congressional impeachment of a sitting president, Fernando Collor. Similarly, in 1994, it suspended the mandate of a prominent long-time senator for campaign financing irregularities. This was the first time in Brazil's history that the courts removed a legislator under democratic circumstances.

The Brazilian trajectory has largely been neglected in comparative analyses of judicial governance in Latin America. Unlike in the rest of the region, the main question in Brazil is not whether the judiciary is sufficiently independent, but rather whether it has become too independent. As such, the Brazilian case provides a useful contrast to the main thrust of this volume, which posits that independence is a central attribute of the judiciary's credibility. Judicial independence has proved excessive in many respects, creating an insulated, unresponsive, and, at times, irresponsible judiciary. The challenge of judicial reform in Brazil is thus radically different from that of the rest of Latin America. While strengthening judicial independence is a core objective of judicial reform in Spanish-speaking Latin America, in Brazil the challenge resides in strengthening the accountability of the judiciary vis-à-vis the society and the polity. In both cases, however, it has proved particularly difficult to reform judiciaries, no matter how dependent or independent the courts are.

Furthermore, the Brazilian experience is increasingly an illustration of things to come. It reflects, with a decade of anticipation, an emerging trend in Latin America, as the courts progressively re-assert themselves. It underscores the dangers of strengthening judicial independence without simultaneously enhancing the countervailing mechanisms of accountability within the judiciary itself.[7] In recent years, and for a variety of reasons, the judiciaries have regained strength. Often in the wake of crises of governance or regime transition, they have been able to create a new role for themselves. In Mexico, Colombia, Argentina, and more recently Peru, the courts are actively asserting their new-found authority in order to regain a semblance of popular legitimacy. As the judiciary is one of the most discredited political institutions in Latin America, regaining credibility is a struggle for survival.

This article assesses the governance of the judiciary in Brazil since the restoration of democracy in 1985. It focuses on the role of the judiciary in the process of economic reform and evaluates the judiciary's effectiveness in fulfilling its accountability functions. It argues that democratic governance in Brazil is hampered by excessive judicial independence, anchored in its strict interpretation of the separation of powers enshrined in the 1988 Constitution. It further posits that the challenge of judicial reform in Brazil resides in strengthening the countervailing mechanisms of accountability in order to enhance the judiciary's social responsiveness and political responsibility. After all, in formally democratic Latin America, the judiciary is the only non-elected branch of government. The paradox of judicial governance in Brazil is that while the judiciary contributes to the 'horizontal accountability' of

the state, providing checks and balances on executive power, it lacks the restraints provided for by the mechanisms of 'vertical accountability' of democratic elections. Moreover, the judiciary's entrenched independence renders judicial reform particularly difficult.

Judicial reform is likely to gain greater prominence following the historic victory of Luiz Inacio Lula da Silva in the presidential elections of October 2002. His campaign commitments included promises to tackle endemic corruption and overhauling the judicial system.[8] The *Partido dos Trabalhadores* (PT) has indeed been at the forefront of successive attempts at reforming the judiciary in the last decade. Judicial reform is one of the main priorities of the new Minister of Justice, Márcio Thomas Bastos, who assumed office in January 2003.[9]

This article is structured in four substantive sections. The first section focuses on the restoration of judicial independence during the democratic transition in the mid-1980s. The second section takes a closer look at the delicate interplay between economic reform and judicial governance since the late-1980s. The third section underscores the need to strike a more adequate balance between independence and accountability for anchoring the judiciary's political credibility and social legitimacy, while the fourth section delves into the political economy of judicial reform. The article concludes with a series of remarks on the rule of law and judicial institutionalisation.

DEMOCRATIC TRANSITION AND JUDICIAL INDEPENDENCE

By any standard, the Brazilian judiciary enjoys extraordinarily levels of independence. Judicial independence is both *nominal*, enshrined in extensive constitutional guarantees, and *substantive*, in terms of the powers granted to the courts and the willingness of judges to exercise them.

Restoring judicial independence

Reacting to decades of authoritarian rule (1964-1985), the Constituent Assembly of 1985-88 considered that the rehabilitation of the judiciary's independence was paramount to the return to democracy. It thus granted the judiciary broad functional autonomy and a high level of nominal and structural autonomy. The Brazilian Supreme Court, the *Supremo Tribunal Federal* (STF), had indeed confronted the abuses of the authoritarian regime on repeated occasions. For example, in 1968, it declared key portions of the military's National Security Law unconstitutional, prompting the latter to shelve the judiciary's independence by packing the Supreme Court in 1969. Indeed, the authoritarian regime sought to impose its authority through the legal system itself by issuing executive decrees with force of constitutional law, the so-called 'institutional acts.' Judicial assertiveness fluctuated thereafter as the military pursued its strategy of protracted decompression and gradual opening in an erratic manner in the mid-1970s. The courts nevertheless were able to re-assert their authority on increasingly controversial issues and re-establish some degree of independence during the later years of the military regime.[10]

After decades of politicization of the judiciary, the Constituent Assembly considered that the restoration of the judiciary's credibility and legitimacy necessarily entailed securing its political independence. It thus decided to insulate the judiciary entirely from the other branches of government, in the hope that it would use its new-found authority in a responsible manner. Furthermore, and even-though the Supreme Court had largely been shaped by the military government, the new civilian authorities resisted purging the judiciary, as many civilian and authoritarian governments had done in the past. For example, following the military coup in 1964, the governing junta packed the court in order to neutralize legal challenges to its extensive use of emergency decree powers.

The constitutional drafting process significantly impacted on the design of judicial reforms. The Constitution was drawn up by the Congress elected in October 1986, which decided to act simultaneously as a regular parliament enacting ordinary legislation and a constitutional assembly tasked with writing a new constitution. This choice rendered the constitutional drafting process particularly vulnerable to pork-barrel politics and political deal-making. Furthermore, it took place in the context of a fragmented political system composed of a myriad of political parties with few coherent proposals on what a judiciary ought to look like. Lacking technical expertise, the Congress delegated much of its law-drafting authority to judicial experts and the legal profession, such as the Brazilian Bar Association. Often oblivious of the broader institutional architecture of governance being designed by other parliamentary committees, these experts constructed an ideal type of judicial system based on the republican principles of the separation and balance of powers, which emphasized functional autonomy and political independence.

By any standard, the Brazilian judiciary was granted particularly high levels of independence. The 1988 Constitution restored most of the provisions of the republican Constitution of 1946, which was largely inspired by the United States Constitution. In an effort to strengthen the individual independence of judges, the terms and conditions of tenure were significantly enhanced. Judges were guaranteed life-tenure, with retirement at the age of seventy as well as generous and irreducible salaries. They were also shelved from undue political interference in the management of their careers as the judiciary was endowed with setting its own selection, nomination and promotion procedures. Furthermore, judges could not be transferred from one court to another.

An atomised legal system

Similarly, and in order to enhance the independence of lower courts vis-à-vis superior courts, the Congress constrained the powers of the Supreme Court by rejecting the binding nature of superior courts decisions on lower courts, in particular in constitutional matters. It resisted the introduction of the precedent into the legal system arguing that it would unfairly bound judges to a ruling of other courts, thereby constraining their individual independence. This system was chosen to ensure the effective protection of the myriad of economic, political and social rights enshrined in the Constitution by allowing several means of recourse at different levels in the judicial system. However, while anchoring the independence of the judiciary as an institution of accountability, these arrangements have atomised the judiciary and created a diffuse judicial system, in particular in the field of constitutional judicial review.

The rejection of the legal principle of *stare decisis* - 'stand by things decided' - is the poisonous centre of the Brazilian judicial dilemma. There are many legal and political reasons why Brazil ignores the principle of precedent. It strengthens the independence of individual judges and the autonomy of individual courts vis-à-vis their hierarchies. Politically, it gives politicians more means of legal recourse against the government's decisions. This legal principle of determining points in litigation according to the precedent is the defining character of the United States legal system and partly explains why the problems linked to the internal coherence of the justice system found in Brazil are largely absent in the United States. The precedent allows in particular for a coherent and vertically centralized legal system based on a set hierarchy of norms and judicial institutions.

The Constitution also strengthened the functional independence of the judiciary as a governance institution by insulating it from the broader political system. The courts were given total control over their administrative, personnel and disciplinary affairs. While the Senate can initiate impeachment

proceedings against Supreme Court justices, only superior-level judges can remove lower-court judges. While this system contains pressure from political forces outside the judiciary, it nevertheless grants considerable disciplinary powers to the judicial hierarchy and exposes lower-rank judges to pressure by their superiors. Furthermore, in order to prevent any encroachment on its independence by the executive or the legislature through its finances, the judiciary has near total control over its budget. At the federal level, the STF prepares the annual budget for the federal court system and submits it directly to Congress, effectively circumventing the executive branch. The federal government has thus little control over the judiciary's budget, which can become problematic in times of economic austerity. Any infringement on these procedures is immediately considered a violation of the principle of the separation of powers.

The 1988 Constitution undeniably extended unprecedented power and independence to the judicial branch. Brazilian judges are particularly proud of their legal system. Supreme Court Justice José Neri da Silveira has praised the independence of the Brazilian judiciary, qualifying it as 'unique in Latin America'[11] and former Supreme Court President José Celso de Mello Filho has argued that the Brazilian judiciary is the 'most autonomous' in Latin America.[12] Indeed, the governance of the Brazilian judiciary exhibits characteristics radically different from their counterparts in the region. In a hearing of the parliamentary commission on the reform of the judiciary in April 1999, Supreme Tribunal of Justice Minister, Antonio de Padua Ribeiro, lauded the 'self-governance' and the 'sophistication' of the Brazilian judiciary.[13]

ECONOMIC REFORM AND JUDICIAL GOVERNANCE

The judiciary's leverage on the political process in presidential systems can best be assessed through the control of constitutionality of executive decrees. As Roberto Gargarella aptly underscores in his article, the 'republican controls' provided by an impartial judiciary contribute to restrict 'the executive's tendencies to increase its own powers'. The effectiveness of this mechanism of accountability is thus a useful indicator of the performance of the judiciary in its political and constitutional role as a guarantor of the separation of powers and arbiter of the respective prerogatives of the executive and legislative branches of government.

Executive decrees and economic policymaking

A central measure of judicial effectiveness resides in the judicial review of executive acts by constitutional courts. Judicial review powers are particularly important indicators of judicial performance in Latin America where most new and restored democracies have opted for presidential systems of government relying heavily on executive decrees to govern. This method of government has been resorted in response to economic crises, which have been recurrent in Latin America in the last two decades since the restoration of democracy in the early-mid 1980s, as it allowed for decisive policymaking. In some cases, the legislature willingly delegated its law-making powers to the executive (delegated decree authority). In other cases, the constitution provided the executive with the right to rule by decree (constitutional decree authority), a prerogative often abused by impatient governments in centralized presidential systems.[14] In constitutional terms, executive decrees are often at the fringe of legality and have been compared to a *de facto* usurpation of legislative powers.

Judicial review has proved to be an effective means through which the Brazilian judiciary has exerted its influence in the policymaking process, in particular in its defence of the extensive economic and social rights enshrined in the statist Constitution of 1988. The Constitution grants extensive

prerogatives to the courts in the review of the acts of the executive and the legislature. The judiciary has frequently displayed independence in its decisions. On repeated occasions, it has been able to block successive governments' attempts at reforming the economy and struck down numerous executive decrees, some of which admittedly of questionable legality.[15] It often ruled against the executive and enforced some of the most ill-conceived welfare portions of the generous 245-article Constitution, sometimes to the detriment of economic rationality and the requirements of austerity. Indeed, judicial independence partly explains why Brazilian reformers have had to muddle-through economic reform, in particular in the areas of labour and fiscal reform. To a certain extent, the Constitution itself, rather than the judiciary, is to blame, as the courts must apply the law. However, in many instances, the courts have also interpreted the laws in particular ways, often to further their own corporate advantages.

The experience of President Fermando Collor's economic stabilization package of 1990 is illustrative in that regard. Collor introduced a heterodox shock program aimed at taming Brazil's hyperinflation and, to do so, resorted to expeditious tactics. Although the decree law (*decreto-lei*) was considered a heritage of Brazil's authoritarian tradition, executive decree-powers were retained by the Constituent Assembly to enable presidents to govern even in a context of minority government, especially in times of acute crisis. Article 62 of the Constitution allows the president to decree 'provisional measures with the force of law', 'in cases of urgency and relevance.' However, to deter abuses such as those of the military junta's 'institutional acts', the use of decree-laws was codified. If the legislature did not convert the executive decree, or *medidas provisórias* (MP), into law within thirty days, the decree would automatically become null and void. However, a shortcoming of constitutional provisions was their silence on the reintroduction of decree-laws not processed by Congress within the imparted period for doing so or rejected by it.

Collor's presidential style soon led to increased tensions with an overwhelmed Congress over the constitutionality of such practices with the judiciary. Upon assuming office in March 1990, Collor proceeded to implement a radical stabilization package, the *Plano Brasil Novo* better known as the Collor Plan. Within hours of being sworn in, Collor issued twenty-two executive decrees followed by a myriad of supplementary decrees. In particular, MP 168 included the introduction of a new currency and a freeze on bank accounts. Fearing potential legal and judicial challenges, Collor pre-emptively placed restrictions on judicial injunctions against the banking restrictions by issuing yet another executive decree. The Supreme Court stopped short of overturning the presidential decrees but nevertheless allowed citizens to recover their frozen assets, thus leading to the gradual unravelling of the ill-conceived and ill-considered first stabilization plan.

Collor's decrees generated more controversies than those of his predecessor, José Sarney, as they were grounded on more fragile legal bases. However, 'the reasons for Collor's liberal use of MP were different from those of Sarney. Sarney relied on executive decree power because he was weak; the early Collor relied on the MP because he was strong'.[16] Some of Collor's decrees were clearly intended to discourage or neutralize legal challenges to the stabilization package. As such, they tended to undermine the separation of powers and strain executive-legislative relations as they often encroached on Congress' jurisdiction. Collor's tactic was to inundate Congress with executive decrees and to re-issue any decree that Congress did not consider within the legal limit of thirty days.

In May 1990, Collor issued a decree that authorized the president of Brazil's highest labour court to suspend any wages increases won by trade unions in class-action suits that the government regarded as inflationary. The Chamber of Deputies ultimately rejected it but Collor immediately re-issued an almost identical decree. Acting on an injunction by the *Procurador-Geral da República,* the Brazilian Attorney General, the Supreme Court struck down the second decree in June. It argued that the

president had exceeded his constitutional powers and overstepped the bounds of presidential authority by re-issuing a measure that Congress had explicitly rejected. Collor complied with the ruling and, in his second year in office, refrained from over-stretching his decree powers.

Judicial activism in economic policy

This episode enhanced the authority of the judiciary and strengthened its position in the democratic institutional system then being shaped. It was particularly important because it took place at a time when the three branches of government were redefining their respective role in the new democratic context. By questioning the constitutionality of decree authority, the judiciary thus contributed to define the outer limits of presidential power and mediate executive-legislative relations. Executive decree authority was further regulated and the president's use of decree powers constrained when, in March 1991, Congress adopted a bill introduced by then-Deputy Nelson Jabim.

There are many examples of judicial activism in economic policymaking. Under the administration of Itamar Franco in 1993, the STF upheld the rulings of regional federal courts that generalized a pay rise that had been conceded to discontent military officers. It argued that, as the Constitution mandates a national wage policy, any wage increase to one category of public sector employees must be granted to all state employees. Despite the government's protest that such a measure would further destabilize the country's shaky public finances and contribute to hyperinflation, the government was legally obliged to broaden the salary increase to any public servant who asked for it. The same year, in an attempt to narrow the fiscal deficit, the government attempted raising revenue by instituting a controversial new tax on financial transactions. It secured approval from the Congress and proceeded to implement the tax reform. However, lower courts overruled both the executive and the legislature arguing that the Constitution stipulates that no tax can be levied the year it is created. The executive was thus forced to retract its measure and devise alternative to measures to control the fiscal deficit and tam inflation.

More recently, in 1999, the Supreme Court judged two critical fiscal reforms unconstitutional. In the pursuit of fiscal adjustment, the Congress had adopted two reforms aimed at achieving a primary fiscal surplus equivalent to 3.25 percent of GDP, as part of the US$41.5 billion rescue package negotiated with the IMF. The reforms consisted of an increase in public sector workers' pensions contributions and a reduction of pension benefits. The Supreme Court judgement resulted in a US$1.2 billion shortfall in the federal budget in a particularly inauspicious moment. More fundamentally, it created an additional uncertainty about the credibility of the government's economic policy and austerity programme.

As William Prillaman aptly notes, these actions 'reinforced the notion that the Brazilian judiciary was able to ensure a fair degree of horizontal accountability among other branches and levels of government'.[17] In that respect, the Brazilian experience sharply contrast with that of its neighbours such as Argentina where the judiciary has been unable or unwilling to confront the executive's abuse of authority and indeed became one of its first victims.[18]

INDEPENDENCE AND ACCOUNTABILITY

Despite the above-mentioned activism of judicial authorities, the legitimacy of the Brazilian judiciary has reached abysmal levels. Popular frustration with the judiciary is pervasive across the political and social spectrum.

The perverse incentives of excessive independence

The unaccountable independence of the judiciary negatively affects its performance, as it distorts the incentives which shape judicial behaviour. Few incentives exist within the judiciary to discipline it, reward good performance and sanction poor performance. The courts are slow, distant, inaccessible, and often corrupt and the weakness of the mechanisms for internal discipline and external control inhibits the effectiveness of performance-based management systems.

A decade of failed judicial reform increased backlogs and trial delays. The inadequacy of measures aimed at enhancing efficiency such as case management techniques and adequate human resources management have dramatically compounded the problems. Bureaucratic congestion of the courts is a major hindrance. Judges spend most of their time in routine administrative affairs rather than judicial decision-making. Not surprisingly, trial delays in the federal court system increased dramatically in the course of the 1990s. The crisis of efficiency of the courts is partly due to unreasonable caseloads and backlogs, further lengthening trial delays. There is an acute shortage of judges (in 1995, about 6,000 judges for 158 million, a ratio of one judge for every 25,000 citizens, compared to an average ratio of one judge for every 3,000 in OECD countries) tasked with managing an increasing number of cases. However, the judiciary, jealously defending its institutional independence, tends to resist any external interference in the way it manages its human resources, especially in the selection of new judges, as well as other efficiency enhancing reforms such as the creation of the system of justice.

The number of cases entering the federal judicial system increased dramatically in the course of the last decade, which would appear to suggest that access to justice has significantly improved and a growing confidence in the law and the courts as dispute-resolution mechanisms. However, this is not the case. First, the increase in the number of cases is principally due to the surge in the cases put forward to the superior courts, as constitutional provisions tend to turn even minor disputes into constitutional challenges. Indeed, efficiency-enhancing measures focused on the federal court system and in particular the Supreme Court. A court of last appeals for non-constitutional issues, the *Superior Tribunal de Justiça* (STJ), was established to assist the STF, but proved insufficient. Second, access for average citizens regarding civil or criminal cases has continued to lag, worsening delays and further undermining popular trust in the justice system. Small-claims courts at the state level, which were foreseen by the Constitution, were established under pressure from the federal government on unwilling and resource-constrained states. As a result, recourse to the legal system is often considered a delaying tactic rather than a means to resolve disputes.

The lack of legitimacy of the judiciary is intrinsically linked to the lack of credibility of the law in Brazil and the Brazilians' unbearable tendency to evade it. The Brazilian anthropologist Roberto da Matta notes that Brazilians tend to think that laws are so abundant and changeable that one cannot obey them all.[19] Paradoxically, although Brazilian citizens routinely evade the rules, they hope that the laws will eventually be respected and cure Brazil's ills. Historically, the law has been often used as an instrument of political repression and social exclusion, reflected in the famous quote by Getúlio Vargas: 'for my friends, whatever they want; for my enemies the law'.[20]

The dangers of unaccountable independence

The shortcomings of judicial governance in Brazil reveal the tensions, if not contradictions that exist between independence and accountability. While the prevailing consensus holds that independence is a critical dimension of the judiciary's credibility as an institution of 'horizontal accountability', reformers have often overlooked the corresponding need to enhance external accountability in the

judiciary. This shortcoming is due, in part, to the fact that accountability is a difficult concept in the democratic framework of the separation of powers.[21]

The paradox of judicial governance in Brazil is that, as an institution of 'horizontal accountability,' the judiciary is devoid of incentives for 'vertical accountability.' It is an unconstrained power in the sense that it is not subjected to the checks that periodic democratic elections would have provided. The question then becomes: who guards the guardian?[22] Excessive independence tends to generate perverse incentives and insulate the judiciary from the broader economic and political context, risking converting it into an autarkic institution unresponsive to social demands. Hence, the question is whether the courts 'have become too independent - whether the Brazilian judiciary in fact had become an entrenched bureaucratic oligarchy in need of restraint and devoid of all accountability to other branches of government and to the public.'[23]

Moreover, the judiciary has often misused its independence to protect its own corporate interests. Allegations of wasteful spending, nepotism and corruption are common, reflecting a bureaucratic disregard for financial accountability.[24] In 1994, for example, the federal court system had a budget of about half a billion dollars, but spent over 880 million dollars with little fear of sanction. The *Tribunal Superior do Trabalho* (TST) alone, which processed less than 5,000 of the nearly 80,000 cases brought before it in 1993, spent more than both chambers of Congress, an astonishing US$400 million. The luxurious buildings of the *Superior Tribunal de Justiça* (STJ), completed in 1995 for US$170 million, has more empty offices than full ones, yet it includes an indoor theatre, a ballroom and a swimming pool. As Prillaman argues, these examples are 'indicative of a bureaucratic class that has become oblivious to the austere conditions confronting the rest of the country'.[25]

The institutional abuse of functional autonomy is compounded by judges' individual abuses of their privileges. As the judiciary sets its own budget and spends as it sees fit, senior judges have granted themselves generous salaries and pensions as well as lavish institutional perks such as sixty days of paid vacation a year, a furnished apartment, and an impressive support staff. Indeed, Brazilian senior judges are amongst the best paid in the world: a Supreme Court justice earns over US$10,000 a month and a typical first instance judge around US$ 3,000. Retirement benefits tend to be similarly generous. Clearly, the judiciary has not shared the austerity reforms: between 1987 and 1999, personal costs in the judiciary rose by a staggering 760% (compared with 220% for the executive branch), mainly in salary increases and new personnel.[26]

Constitutional judicial review

Structurally, the perverse nature of the Brazilian justice system and the dangers of excessive independence are reflected in the system of judicial review of the constitutionality of laws. The Constitution enlarged the procedures to request the review of the constitutionality of a law. The Act of Unconstitutional Law (*Ações directas de inconstitucionalidade*, ADIs) allows groups affected by government decisions to petition against federal acts on constitutional grounds in front of almost any court. This measure represents an effort to enhance access to judicial recourse and protect against the government's violation of human rights and civil liberties. However, the shortcoming of the system of constitutional judicial review lies in the absence of a hierarchy of norms in constitutional matters, as lower-court judges are not necessarily bound by the decisions of the Supreme Court. They can appreciate the constitutionality of laws and regulations in the judgement of concrete legal cases. The Brazilian system of constitutional law constitutes a 'hybrid system of constitutional judicial review of laws' reflecting the decentralization of the judicial system.[27] While acting as a constitutional court, the STF does not possess the corresponding powers of enforcement, as it lacks exclusive authority over the

declaration of (in)-constitutionality of laws. The resulting 'balkanization' of the judicial review system is particularly dysfunctional and particularly prone to politicization.[28] Furthermore, the level of detail of constitutional provisions is such that almost any dispute can become constitutional, overloading the STF with minor disputes.

Recent reform proposals aim at rationalizing judicial review by making the STF's decisions binding on lower-level courts, thereby strengthening the role of the STF as a genuine constitutional court.[29] However, proposals for concentrating judicial decision-making have been strongly resisted by lower-court judges who have jealously defended their independence. For example, the 1993-94 constitutional revision adopted the declaration of constitutionality (*Ação declaratória de constitucionalidade,* ADC), an alternative mechanisms for judicial review for which the binding principle was established. The main proponent of the ADC, Nelson Jobim, also defended the application of the binding principle to ADIs with the introduction of the s*úmula de efeito vinculante* (SEV). However, the SEV was strongly resisted by lower-level judges who criticized it precisely because of the centralization of justice it entailed. Nevertheless, positions are gradually shifting. In a recent decision in November 2002, the STF appeared to support the binding nature of ADIs.[30]

Political parties have also fiercely resisted concentration because the judicial system has proved to be a particularly effective tool for doing politics by other means. ADIs have been particularly useful political tools for political parties, which can also challenge the constitutionality of laws. Between 1988 and 1993, the courts received more than 100 ADIs by opposition parties seeking to undo particular economic initiatives. A real concern according to Prillaman is whether these ADIs 'involved genuine constitutional issues or whether they were manipulated for partisan advantage to the detriment of the overall court system,' transposing a political conflict into a constitutional one.[31] The opposition considers the hybrid nature of the judicial system as a political instrument that enables it to contest, delay and dilute government policies, especially in the economic realm. The 'judicialization of politics' tends to transform 'judicial institutions into a locus for obstruction of the political majority by the political minority.'[32] More fundamentally, the debate over constitutional judicial review reflects the tensions between parliamentary prerogatives and judicial independence. As Rogério Bastos Arente notes, the most contentious issue concerns the 'very nature of superior tribunals of justice and their legitimacy to have the last word on specific types of cases'.[33] The main stumbling block is thus linked to the internal architecture of the judicial system and the hierarchy of judicial authorities. Nevertheless, the PT's historic victory in 2002 is likely to alter the parameters of judicial politics.

THE ELUSIVE QUEST FOR JUDICIAL REFORM

Judicial reform in Brazil is marked by an intractable paradox. Despite its importance in the public debate over the last decade, it has proven extremely difficult to craft a sufficient consensus on the shape of the reforms required, devise a credible reform project, and create a coherent pro-reform coalition. Judicial independence makes it particularly difficult to reform an entrenched judiciary.

The governance of the judiciary

The most contentious aspects of the judicial reform agenda centre on the governance of the judiciary. Successive reform proposals shared several concerns: enhancing the administration of justice, rationalizing the mechanisms for constitutional judicial review, strengthening the mechanisms of accountability and external control, broadening access to justice, and democratizing judicial institutions. Judicial reform has two principal dimensions. The first dimension concerns the internal

structure and administrative efficiency of the judiciary and is part of the broader process of the modernization of the state. The second dimension concerns the role of the judiciary in the democratic system of institutional checks and balances and the respective powers of the three branches of government, especially considering the fact that the judiciary is the only non-elected democratic institution. While administrative reform has received broad support, the judiciary hierarchy has fiercely resisted any encroachment on its independence. This uncompromising stance has often derailed promising administrative and organizational reforms, further weakening the efficiency of and access to the justice system.

Working through the labyrinth of Brazilian politics is proving particularly damaging to the articulation of a comprehensive strategy for judicial reform. Judicial reform in Brazil (or lack thereof) is shaped by the very nature of the political system and the inchoate party system that characterize Brazil.[34] Regrettably, the judicial reform agenda resembles, using Arente's metaphor, a 'chaotic building site' that lacks an overall architectural plan. Successive *ad hoc* reform efforts 'do not reflect a harmonious and coherent project and end up creating new sources of instability in the judicial apparatus'.[35]

The case of Brazil illustrates the degree to which excessive independence, lacking the balancing constraint of accountability, has enabled the judiciary to resist reform and avoid external oversight and control. Despite numerous attempts, judicial reform has proved elusive, although for radically different reasons than in the rest of Latin America. The judiciary has been particularly effective at resisting reform and the creation of external controls, defending a strict interpretation of the principle of separation of powers and the system of checks and balances enshrined in the Constitution.

It is particularly telling that those on the left who advocated for maximizing judicial independence during the debates of the Constituent Assembly now lament the judiciary as the most unresponsive branch of government and the least fiscally disciplined. The judiciary is perceived as a power above the country and the laws themselves. José Dirceu, from the PT, has complained that 'there is nothing more arrogant than the Brazilian judiciary' and José Genoíno, a leading leftist intellectual, has repeatedly accused the judges of behaving as if they were 'untouchable.[36] Nelson Jobim, a federal deputy who served as Justice Minister from 1995 to 1996 before accepting a seat on the Supreme Court, has lamented the lack of transparency of the judiciary in the promotion and punishment of judges and defended the introduction of some sort of external control.[37]

Repeated attempts at placing judicial reform on the political agenda and introducing external oversight have failed to overcome the defensive corporate culture of the judiciary. Although there has been no shortage of reform proposals, actual movement has been curiously absent. For example, during the 1993 constitutional review process, twelve of the eighteen proposals for judicial reform called for introducing some form of external oversight of the judiciary. Judicial reform has hardly figured on the political agenda, nor has it been fiercely sought by President Cardoso's two consecutive administrations (1994-2002). More urgent reforms such as fiscal and labour reforms and the economic and financial crisis of 1998-99 have relegated judicial reform to the sidelines. Consequently, 'without more sustained pressure for judicial reform, the ability of the courts to resist reform efforts becomes much easier.'[38]

Nevertheless, in June 2000, the Chamber of Deputies finally adopted a much-diluted proposal for a constitutional amendment, which had been introduced in 1992 by PT's Hélio Bicudo. The proposal, which is currently being considered by the Federal Senate, is the result of long and protracted political negotiations. The absence of a minimal consensus within the parliamentary commission on judicial reform itself prevented a vote on the proposal put forward in 1996. The commission unsuccessfully

ended its work in 1998 without being able to define the broad contours of a reform project.

However, the commission was reactivated was reactivated later that year, as a response to allegations of mismanagement in the judiciary, which had had become a prime target of Antonio Carlos Magalhães's crusade against corruption. In early 1999, the commission's *rapporteur,* Aloysio Nunes Ferreira (from the governing PSDB), delineated the three main axes for judicial reform: the creation of an institution of external control, with administrative and disciplinary functions; the rationalization of the judicial decision-making; and the modernisation of the administration of justice. His successor, Zulaiê Cobra Ribeiro, introduced even more stringent mechanisms of external oversight. The commission nevertheless diluted her project and when the Chamber of Deputies finally adopted the text in 2000, political parties had further altered it.

External control and oversight

A central thrust of the reform being considered resides in the need establish some sort of external oversight, beyond the reasonably effective mechanisms of internal control performed by the internal affairs departments.[39] The judiciary is the least supervised of the three branches of government. Proposals for establishing a body tasked with the exercise of external control emerged and gained momentum in the early 1990s. Indeed, since the constitutional convention that drafted the 1988 Constitution, most proposals for judicial reform have included considerations over the external control and oversight of the judiciary by means of a judicial council. Establishing some sort of external control on the judiciary is a key objective of the new Minister of Justice, Márcio Thomas Bastos.

The motivations for establishing such a judicial council are radically different from those in the rest of Latin America. In many countries of Latin America the establishment of judicial councils responded to the need to strengthen the political independence of the judiciary by insulating the management of the court system from political interference.[40] In principle, the rationale for creating a judicial council resides in its ability to rationalize the administration of justice and anchor the independence of the judiciary. In Brazil, however, the prime objective is to increase transparency and strengthen accountability in the internal functioning of the judiciary.

The creation of a judicial council has been extremely controversial, being perceived as an attempt of the executive to interfere in judicial matters. In 1977, President Ernesto Geisel enacted a controversial constitutional amendment by executive decree creating an external oversight body for disciplining and punishing recalcitrant judges. Since that time, the creation of a body for external oversight and control is a particularly controversial issue. The debate is imbued with controversies, as the creation of an agency of external control has been denounced as an undue political interference in judicial governance and a violation of the principle of the separation of powers. This is an erroneous interpretation, however, as external control seeks to strengthen the judiciary's accountability in the internal administration of its affairs, in particular its finances. It does not, and should not entail control over the independence of judicial decisions.

Nevertheless, the debate has progressively shifted in the course of the last decade. In the early 1990s the creation of a judicial council was fiercely resisted on the grounds that it encroached on the independence of the judiciary. By the end of the decade, it was considered compatible with republican principles with and even indispensable to the consolidation of democracy, as it would enhance the responsiveness of the judiciary to social demands. A consensus progressively emerged concerning the mandate and attributions of a judicial council, grounded in the need to dramatically improve the internal administration of judicial resources. The composition of the judicial council proved to be a

more contentious issue, as the judiciary resisted the inclusion of representatives of non-judicial professions, which was ultimately endorsed.

So, why has judicial reform proved so elusive in Brazil? The political economy of judicial reform has proven particularly intricate, embedded in the classical dilemma of collective action. Potential losers and hence opposition to reform are concentrated in the judicial hierarchy while potential winners are more diffuse and difficult to mobilize. Those more actively resisting reform are to be found in the legal profession itself and the judicial hierarchy in particular.[41] However, the judicial profession is not a homogeneous entity and its position has changed over time. While in the early 1990s most magistrates opposed the creation of a judicial council, by 2000 most of them supported it, although they favour an institution composed primarily of jurists. Moreover, while senior judges tend to resist reform, lower-level judges favour it. Proponents of judicial reform also include a majority of public prosecutors, the government and the ruling coalition, as well as lawyers, civil society organizations and trade unions. The private sector has also expressed increasing concern, if not frustration, with the lack of reliability of the judicial system and credibility of judicial decisions, especially in the field of commercial law and litigation. Most parliamentarians favour the creation of a judicial council, especially senators.

Amongst political parties, the PT has been the most active proponent of judicial reform and the establishment of mechanisms for social control and political accountability. Its accession to power in 2002 may increase its chances of implementing such reforms. Both Dirceu and Genoíno are key members of the incoming government of President Lula da Silva, the latter as Secretary General of the PT and the former as the President's Chief of Staff.

TENTATIVE CONCLUSIONS: HOW MUCH IS ENOUGH? HOW MUCH IS TOO MUCH?

The paradoxical conclusion of this essay is that, in Brazil, the social legitimacy of the judiciary as an institution of 'horizontal accountability' is undermined precisely by its lack of 'vertical accountability'. An often-held assumption of judicial reformers is that guaranteeing the independence of the judiciary is paramount to ensuring the effectiveness of the judicial system. Judicial activism in economic policymaking has extended beyond the impartial interpretation of the law and the constitutional role of the judiciary. The case of Brazil demonstrates that, without the restraining effect of accountability, independence in and of itself is not sufficient to anchor the rule of law. Indeed, in a recent study, Robert Howard and Henry Carey suggest that judicial independence *per se* does not necessarily generate greater political rights or increase civil liberties: 'it is only with greater social development that judicial independence becomes a factor'.[42]

Reformers clearly succeeded in restoring the political independence of the judiciary and isolating it from political pressures. The central question is whether reformers went too far and created a judiciary so autonomous that is has become devoid of all accountability, a 'power above the law.'[43] As Prillaman underscores, 'Reformers achieved unprecedented levels of structural and individual independence, but, in the process of reacting to more than two decades of military rule, swept aside the balancing constraints of accountability and transparency'.[44]

Unaccountable judicial independence has been widely criticized and both the executive and legislative branches of government have repeatedly stated their support for establishing mechanisms of external control on the judiciary. Public contempt for the judiciary has reached unprecedented levels but there is a high degree of public disinterest and resignation with increasing backlogs and trial delays. The unreliability and uncertainty of the judicial process also has a negative impact on economic growth and

development, as it increases the 'Brazilian cost' of doing business. Hence, while it was originally assumed that judicial independence would enhance the legitimacy, credibility and reliability of the court system, it achieved none of these objectives.

Responsible independence rests on restraint and accountability. This requires 'the judiciary's recognition that independence is balanced by accountability, and that in the end it does provide a public service and is answerable to the public for the quality of its output. It also means that in certain areas such as budget management, compliance with rules on procurement or conflict of interest, it may well be subject to the same standards as any other public entity. Independence is most relevant to its role in deciding cases and applying the law, but not necessarily to how it handles its finances, makes its purchases, or selects its support staff.'[45]

As such, while the courts' judicial decision must satisfy to high standards of political independence, the judiciary must be held accountable for the manner in which it manages its finances.[46] Transparency and accountability in judicial finances are critical to strengthen the judiciary's credibility. As such, the judiciary must satisfy to the same external oversight and control by those state institutions responsible for guaranteeing integrity in public finance management. In the case of Brazil, the supreme audit institution at the federal level, the *Tribunal de Contas da Union* (TCU), exercises this function. However, the challenge for enforcing external oversight of judicial finances rests in the weakness of the TCU itself. These considerations open a new area of enquiry for enforcing the accountability of state institutions, such as the judiciary or the parliament, in the management of public resources.

Furthermore, adequately balancing the four dimensions of judicial impartiality and credibility (independence, accountability, efficiency and access) is a permanent challenge. Most studies of judicial reform tend to presume the existence of a positive synergy or virtuous circle between the different dimensions of judicial reform. Few reformers have foreseen the existence of potential tensions and trade-offs amongst them. Indeed, the most damaging aspect of the failure of judicial reform in Latin America has been the inability to achieve a workable balance between the different dimensions of judicial credibility.[47]

More fundamentally, variables such as judicial independence, accountability or efficiency are necessarily continuous rather than dichotomous variables. The central question is not whether or not the judiciary is independent, but rather how independent it should be considering a country's specific circumstances. How much is enough? How much is too much? Ultimately, achieving 'the right degree of independence' is a challenging task for any democracy.[48] As Linn Hammergren convincingly demonstrates, a 'common feature throughout the region is the failure to admit that the underlying problem is inadequate judicial institutionalization, not too little independence'.[49] Indeed, 'accountability should not be understood as the diametric opposite of independence; the interaction of the two is more complex.'[50] Finding the right balance between judicial independence and judicial accountability is the defining challenge of judicial reform in Brazil as elsewhere in Latin America.

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