RISK ANALYSIS OF THE INDEPENDENCE OF BRAZILIAN JUDICIARY

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Abstract: The purpose of this article is to analyze the independence of Brazilian judges in the exercise of their functions. The Brazilian Judiciary has 18,168 (eighteen thousand, one hundred sixty-eight) active judges, admitted through rigorous public examinations, with the guarantees of irremovability from office, lifetime position and no reduction of salaries, provided for in the Constitution. In order to understand how this situation was achieved, this study shows the gradual evolution from the colonial period to the presente. In this scientific research, based on the assumption that the independence of judges is a fundamental requirement for the necessary impartiality, we seek to evaluate the degree of autonomy of the judges in the exercise of their functions. The hypothetical-deductive method will be used, through the analysis of the legislation, doctrine and jurisprudence, to conclude if the safeguards contained in the constitutional and legal norms have been efficient and, if there are flaws to be addressed, to indicate paths and solutions that can lead to an ideal state.

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INTRODUCTION

 razil has no tradition of studying its Judiciary, regarding its historical evolution, its judges, the social, economic and political scope of its decisions and, mainly, its degree of autonomy and independence.

Literature is scarce, forcing the researcher to make a fragmented search in books and magazine articles, often written by professionals from other areas. It is hard work to collect material that will allow the production of quality scientific research.

In this article we will try to analyze the degree of autonomy and impartiality of Brazilian judges at present. To do so, we will give a historical view of the Judiciary, knowing that the past is a requirement to understand the present and to plan for the future.

Thus, in a first moment, the reconstruction of how the Brazilian Judiciary Power was implanted and evolved during the times of the colony will be carried out, going on to the empire period, between Independence (1822) and the Proclamation of the Republic (1889). The understanding of Justice at that time necessarily passes through the work of Lenine Nequete, who notes in comments on the 1824 Constitution that there has been progress in relation to the Judiciary, assuring the judges, at least formally in Article 151, the condition of independence.[3]

Then, the analysis of the third period, between the implantation of the republican regime and the present, will be

[3] Nequete, L. *O Poder Judiciário no Brasil. I – Império.* Brasília: Supremo Tribunal Federal, 2000, p. 40.

made, including the dictatorial periods, the changes of the 1988 Constitution and the reality of our days. The main advances and setbacks in consolidating the autonomy of the Judiciary will be shown. Evidently, it was greater in the republican period and in the years when Brazil experienced moments of full democracy.

It is important to note that, at present, hardly any country will be explicit in reducing the independence of the judiciary. The means are different, small subterfuges spaced through time are used, through which, little by little, the Judiciary Power becomes linked to the other State Powers, without its own autonomy.

A good example of this occurred in Poland, where the mandatory retirement age for judges was reduced from 70 to 65 years. This fact, apparently, would not affect the independence of the Court in the trials. However, indirectly, it ends up removing from the activity independent judges who will be replaced by others, certainly more linked to the interests of the Executive Branch. In view of this, the Court of Justice of the European Union has decided that such rule is contrary to the rule of law and violates the principles of immovability and judicial independence.[4]

2. JUDGES IN THE COLONIAL AND EMPIRE PERIODS

The colonization of Brazil by Europeans started in 1500, when the Portuguese navigator Pedro Álvares Cabral first reached Brazil that, for a long time, remained linked to the Portuguese Courts. The rights of the residents were regulated by Royal Letters, permits and Papal bulls, these for ecclesiastical matters. In 1532 the Portuguese navigator Martim Afonso arrived on the Island of São Vicente, located on the coast of the

[4] Tribunal de Justiça da União Europeia. *COMUNICADO DE PRENSA n.º 81/19*. Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/cp190081es.pdf> [acessed 27 August 2020.

State of São Paulo, and installed the country's first judicial unit there.

The Justice of Portugal was well structured for the time. At the top of the system was the House of Supplication, which was directly subordinated to the King and acted as a true Supreme Court for Portugal and its colonies. In these ones, Courts of Appeals were created, which were considered second instance courts.[5]

As colonization expanded, there was a need for a more complex judicial and administrative structure, as the one that had existed until then was not enough to judge the innumerable conflicts that arose. Thus, after being created and then suppressed, in 1652 the Bahia Court (*Relação da Bahia)* was recreated, Brazil's first Court of Appeals. In 1751, the Rio de Janeiro Court (*Relação do Rio de Janeiro)* was created and, since then, many others through the vast territory of the colony.

To understand the justice of those times, as Arno and Maria José Wehling recall, it is necessary:

> ... to strip ourselves of the views, external or internalized, of contemporary constitutionalism, without which we will not penetrate the institutional complexity of the Old Regime. The state was an amalgamation of functions around the king: there was no division of powers or functions, in the style of Montesquieu. The role of royal justice was diverse, absorbing political and administrative activities, while coexisting with other judicial institutions, such as ecclesiastical justice and the Inquisition.[6]

With the arrival of the royal court in Brazil in 1808, fleeing Napoleon Bonaparte's troops, the Rio de Janeiro Court was transformed into the Brazil's House of Supplication (*Casa de Suplicação do Brasil*). On December 16, 1815, a Letter of

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[5] MARTINS FILHO, I. G. da S. Evolução histórica da estrutura judiciária brasileira, in *Revista Jurídica Virtual*, Brasília, v. 1, n. 5, set. 1999, p. 3. Available at: <http://www.planalto.gov.br/ccivil_03/revista/Rev_05/evol_historica.htm> [acessed 03 March 2014].

[6] WEHLING, A.; WEHLING, M. J. *Direito e Justiça no Brasil Colonia*. Rio de Janeiro: Renovar, 2004, p. 29.

Law was issued creating the United Kingdom of Portugal, Brazil and Algarves. On September 7, 1822, Independence was proclaimed, and Dom Pedro I, son of the King of Portugal, took on the function of Emperor of Brazil.

2.1. THE AUTONOMY OF JUDGES IN THE COLONIAL PERIOD

At the time of the Colony judges did not enjoy greater independence. In addition, it was common for judges to have a temporary mandate. For example, the Judges of Vintena, who performed their duties in villages with 20 to 50 inhabitants, were chosen by the council among the good men to perform such functions for a period of one year. Still, the Prince Regent's Charter, of January 25, 1809, provided for the figure of the Judge of Sesmaria, whose period of activity would be three years.[7]

2.2. THE AUTONOMY OF JUDGES AFTER THE PROCLAMATION OF INDEPENDENCE

After the Proclamation of Independence in 1822, the Political Constitution of the Empire was promulgated, stimulated by orientations of a liberal nature and already under the influence of the French Revolution of 1789, therefore, with the tripartition of powers.

The first reaction was the creation of a University in Brazil. In Spanish America, on May 12, 1551, the University of San Marcos was opened, in the territory that today corresponds to Peru. In Brazil, on the contrary, when Independence was proclaimed, there was still no single university. Whoever wanted to study Legal Sciences should do so in Portugal. As René Ariel Dotti recalls, "legal courses were instituted by the law of

[7] Ordenações Filipinas, Quarto Livro. Available at: <http://www1.ci.uc.pt/ihti/proj/filipinas/l4pa1028.htm> [acessed 12 July 2020].

11.08.1827, creating the law academies of São Paulo and Olinda".[8]

In the Constitution of 1824 it was recognized to the Judiciary the condition of State Power (Title 6, Article 151). In conflicts between the powers, it was the Emperor's duty to ensure the maintenance of independence, balance and harmony and, consequently, to resolve the conflict of positions (Article 98).

The judges were granted greater independence, as they received the status "perpetual", that is, a function for life. In addition, they would lose their position only through a judicial sentence (Articles 153 and 155).

However, these guarantees only granted them partial independence, because they could be removed to other districts (Article 153), which was not insignificant considering the country's huge territorial extension. José Luis de Almeida Nogueira narrates several cases of judges who displeased, with or without reason, the Empire, and were removed or promoted to distant places. For example, Bernardo Avelino Gavião Peixoto, who performed his duties in São Paulo and was removed to Macapá, at that time a distant and small town in the Amazon, a fact that led him to abandon his judicial career.[9]

Judges could also be suspended from their duties by an act of the Emperor, even though they were guaranteed the right to be heard in advance (Article 154). Thus, due process was obeyed.

2.3. THE AUTONOMY OF JUDGES AFTER THE PROCLAMATION OF THE REPUBLIC

The proclamation of the Republic, on November 15,

[8] FREITAS, op cit., p. 16.
[9] NOGUEIRA, J. L. de A. *A academia de São Paulo: tradições e reminiscências*. São Paulo: Saraiva, 1977, vol. 02, p. 320-321.

1889, adopted the federation regime and gave the judges a situation of greater independence. But, of course, the transformations occurred gradually, because the culture of a people does not change suddenly.

The first step was taken with the Provisional Constitution published with Decree nº 510, of June 22, 1890, that was repeated in Decree nº 848, of October 11 of the same year, which organized the Federal Justice, composed by the Federal Supreme Court and by federal judges of first instance.

Decree 848, of 1890, stated that "Federal judges's function will be lifelong and they cannot be removed nor deprived of their positions other than by virtue of a sentence handed down in a competent court and passed in *res judicata*" (Article 2). Therefore, with guarantees of life-time tenure and irremovability, judges would no longer depend on political interference to continue in their positions or even to continue performing their functions in the city to which they were appointed. These punishments could only take place through the sentence of another judge, therefore in a judicial and non-political process.

With the proclamation of the Republic, the 21 former provinces of the Empire became states, therefore with full exercise of the three powers. The Judiciary of these states, little by little, through their constitutions, started to guarantee judges greater conditions of independence. For example, the State of São Paulo, in the State Constitution of 1891, created a significant innovation, that is, the admission of judges through public contests (Article 46).

The 1934 Constitution, of a liberal nature, gave judges the guarantees of lifetime tenure, irremovability and impossibility of salary reduction (Article 64). It also empowered the Courts of Second Instance, allowing them to create their Internal Regulations, organize their secretariats, their notaries and other auxiliary services, in addition to being able to appoint

and dismiss their employees.

However, in 1937, under the dictatorial regime of Getúlio Vargas, a Constitution with a strong authoritarian connotation was edited. In it, the rights guaranteed to the judges were maintained, albeit with some restrictions (Article 91). However, the new Constitution extinguished the Federal Justice of first instance and determined that the laws that were declared unconstitutional by the Judiciary Branch could be submitted again by the President of the Republic to the Legislative Branch, which, if confirmed by two thirds of its members, would declare the judicial decision void (Article 96, sole Paragraph).

This was the greatest affront of the 1937 Constitution to the Judiciary. However, it was revoked by the democratic Constitution of 1946, edited under the influence of the end of the Second World War, when an atmosphere of optimism dominated the world.

In addition, the 1946 Constitution maintained all guarantees given to judges, granted them retirement with the same salaries they received in activity and even gave the Courts the right to elect their presidents, which previously was the responsibility of the President of the Republic or the Governor of the states (Articles 94 to 97).

In 1964, a government regime led by the military began in Brazil, which would continue until 1984. During this period, in 1966, the Federal Justice of first instance was recreated, implemented in 1967. In this same year, a new Constitution came into force. However, its text did not constitute an attack on the guarantees of individual judges nor the Judiciary.

However, during the military regime Institutional Acts were edited, which were legal diplomas edited by the President of the Republic, unilaterally. Known as A.I., they had absolute strength, and could not even be analyzed by the Judiciary. A. I. nº 1, of April 9, 1964, allowed the Chief of Executive to remove from public service anyone who might threaten national

security. A. I. nº 5, of December 13, 1968, the most famous of all, would allow the President of the Republic, among other things, to intervene in states and municipalities, to revoke parliamentary mandates, to suspend for ten years the political rights of any citizen, to declare the confiscation of assets considered illegal and to suspend the guarantee of *habeas corpus*. Such acts, evidently, affected the Judiciary, which had some members impeached, in addition to intimidating many others in the exercise of their functions.

On October 5, 1988, with democracy restored, Brazil had a new Constitution. It was the result of a coalition of all forces and for this reason it became extensive and detailed, with hundreds of articles, paragraphs and indents. The Judiciary was dealt with in Chapter III, Articles 92 to 126.

With the advent of the 1988 Constitution, judges were confirmed all the rights previously achieved (life-time tenure, irremovability and no-reduction of salaries) and still acquired many others. For example, promotions have become by seniority and by merit, thus avoiding political interference (Article 93, item II). In the justice of the states, the promotion of a judge of first instance to the Court of Appeal started to be made by the Judiciary Power itself, without any interference from the Executive Power (Article 93).

The Judiciary Power achieved autonomy and independence as never before. For example, it became the responsibility of the courts to elect their leadership positions, to provide the vacant positions of judge and to propose the creation of new district courts (Article 96, item I, points "a", "c" and "d"). In addition, it was granted to the courts administrative and financial autonomy (Article 98), therefore, they were the only ones to decide on the application of the funds allocated to them by the public budget.

Such guarantees, among many others, have led Brazil to have a strong and independent judiciary, with a situation

different from that of most countries in the world. For example, in Brazil federal or state courts of second instance have their own Judicial Schools, to which their own funds are allocated.

3. RECENT LEGAL INNOVATIONS AND CHANGE PROPOSAL

The independence of the Judiciary is the backbone of a truly democratic country, where the rule of law is a natural consequence. In the democracy there will always be a pre-established constitutional order (regarding Brazil, we currently have 108 amendments to the Federal Constitution of 1988), a legal and normative framework in line with the Constitution, and a body of judges committed to the interpretation and accurate application of the law to cases brought before the Judiciary.

Let us make a historical retrospective through the official website of the federal government. A research starting in 1935 shows that on the 29th of January that year Law nº 14 came into force, dealing with matters related to education.[10] From that date until August 26, 2020, with the enactment of Law nº 14,050, which deals with the federal government's fiscal and social security budget, in other words, in an interval of 85 years and 7 months, 14,036 laws were enacted by the Federal Legislative Branch, not to mention other kinds of norms, such as Amendments to the Constitution, Complementary Laws, Executive Decrees and thousands of administrative acts.

On the other hand, it becomes a daily mission to follow up on the new rules issued by the National Congress, an organ whose vocation is to be the sounding board of society. It is true that many laws only partially change texts already enshrined in previous legislation, as well as regulate, so to speak, goals

[10] BRASIL. Available at: <http://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/leis-ordinarias/anteriores-a-1960-leis-ordinarias> [acessed 27 August 2020].

already fixed. Anyway, daily monitoring of legal innovations is advisable.

This information is important to make it clear how difficult and arduous it is the task in Brazil for those who operate the law, be they lawyers, prosecutors, chiefs of police, judges. The task of knowing the law, inherent to all of them, but especially to the judge, who is the enforcer of the law, according to the famous Latin principle *iuria novit curia*, is something very complex, that demands much more than a brief call for the fulfillment of mentioned duty.

As it is well known, many laws are the result of the social, political and economic moment of society and, for this reason, they must be interpreted with appropriate methods so that the reach is the most complete and capable of stamping the true aspiration of the community.

Many other laws are enacted, after intense debates in Parliament, but their effectiveness is restricted or even suspended by the Judiciary, through the control of constitutionality, be it diffused control (by the hands of thousands of judges spread throughout the national territory in their various levels and competences), or concentrated control, in charge of the Supreme Court, in one of its most important attributions.

After these brief considerations, let us look at the most recent laws that can justify the intimidation of judges in the exercise of their functions.

At the beginning of March 2014, in the Federal Justice of first instance, in Curitiba, PR, the well-known Car Wash Operation (*Operação Lava Jato*) began, which resulted in the condemnation of important politicians and businessmen, in addition to the recovery of a huge amount of money arising from acts of corruption. Encouraged by the success of such initiative, agents of the Federal Public Prosecutor's Office prepared the presentation of a Bill of Law in the Congress, entitled "The 10

measures to fight against corruption". Therefore, based on Article 61, § 2 of the Constitution, they encouraged the population to make a request in favor of the Bill, obtaining 1,741,721 signatures. This was the beginning of Bill 4,850, of 2016.

It happens that in Parliament another Bill of Law, number 7,596, of 2017, which dealt with abuse of authority, was appended to Bill 4,850. After the regular procedure, only the second one was approved in Congress, becoming Law 13,869, of September 5, 2019.

The fear on the part of judges and members of the Brazilian Public Prosecutor's Office was that the new law ended up destroying their independence. In view of this situation, the Association of Federal Judges of Brazil (AJUFE), in October 2019, brought an action on grounds of unconstitutionality (*Açã*o *Direta de Inconstitucionalidade- ADI*) before the Supreme Federal Court, which received number 6,239, since, in the opinion of the Association, some provisions would be tainted with unconstitutionality.

In addition to this law, which gave rise to justified concern among judges, two other ones deserve reference. One is Law 12,850 / 2013, called Organized Crime Law (*Lei da Criminalidade Organizada*), and the other is Law 13,964 / 2019, known as the AntiCrime Package (*Pacote Anticrime*).

In addition to these laws, there is a bill that causes great concern. This is Bill number 5,284, of 2020, which creates protections in cases of criminal investigations involving lawyers.

All these changes will be commented on below.

3.1. AUTHORITY ABUSE LAW

In September 2019 Law nº 13,869 was enacted, which dealt with crimes of abuse of authority, completely revoking

Law nº. 4,898, of 1965, issued at the beginning of the period of the military regime, which until then was the governing law on that topic.

It happens that, after the entire legislative process has passed, the National Congress approved and the President of the Republic enacted the Authority Abuse Law, which had nothing to do with the original request to fight corruption. This fact caused a lot of controversy in the legal and political world, for example, a statement by Justice Luiz Fux, of the Supreme Court, who understood that the Parliament could not deviate from what was contained in the plan of the aforementioned "10 measures against corruption".[11]

For some people, the greatest concern was precisely to curtail and criminalize the free conviction of the judicial authorities and the Prosecutor's Office. Other ones believed that the law would serve to control the action of these agents, sometimes arbitrary.

First of all, it is important to note that, according to Article 1, Paragraph 1, there will only be a crime in the case of actions "practiced by the agent with the specific purpose of harming another person or benefiting himself or a third party, or even for a whim or personal satisfaction". It is, therefore, a case of direct intent, which is opposed to indirect intent, which can be alternative or eventual,[12] and it is therefore necessary to demonstrate that the agent consciously wished to abuse his power.

Another aspect that protects the judges is that any possibility of criminalizing the judge's action had been ruled out if he interpreted the law differently. Article 1, Paragraph 2, explicitly provided that "The divergence in the interpretation of

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[11] LUCHETE, F. *Fux manda Câmara recomeçar do zero votação de pacote anticorrupção do MPF*. Available at: <https://www.conjur.com.br/2016-dez-14/fux-manda-camara-recomecar-zero-votacao-pacote-anticorrupcao>. [acessed 27 August 2020.

[12] GRECO, R. *Código Penal Comentado***.** 13. ed. Niterói: Ímpetus, 2019, p. 84.

law or in the evaluation of facts and evidence does not constitute an abuse of authority".

With that, judicial independence was ensured ─ the greatest predicament of the judiciary of any democratic country ─ because any judge, regardless of the instance of the decision, whether by a single judge or a bench, will have the tranquility to take a position without fearing any reprisal, in order to guarantee their judicial immunity, that is, to decide without the possibility of being held liable, except by intent or bad faith. But there are some articles in the law that may intimidate judges and interfere with their independence and impartiality. The first of them is Article 9 of the Authority Abuse Law, whose wording is as follows:

> Art. 9 Decree a measure of deprivation of liberty in manifest disagreement with the legal hypotheses:
> Penalty - imprisonment, from 1 (one) to 4 (four) years, and a fine.

This provision may, however, interfere with the judge's own activity. Actually, "manifest disagreement" is a subjective concept. What is clear, evident, unchallenged, for someone, may not be so for someone else, even if both have the same opinion about most things.

Imagine the murder of a taxi driver in a small town, causing a protest from all his colleagues, who take the central streets calling for the murderer's arrest. The prompt discovery of the murderer mades the judge declare his preventive arrest, to guarantee public order (Article 312 of the Code of Criminal Procedure). But the killer can file an *habeas corpus* in an court of appeals located dozens or hundreds of kilometers from the facts, arguing that it was his first offense, he has a job and a fixed residence. A second instance judge, far from the facts and the popular pressure, may order the release of the accused saying that the arrest was not necessary. It is enough to open up the possibility for the judge to be prosecuted.

But, imagine that the second instance judge understands

that the prison was correctly ordered. The prisoner appeals to the Supreme Court and his appeal is granted. In this case, the judge of second instance may be prosecuted, because Article 9, Item III, states that it is a crime not to "grant a preliminary injunction or order of *habeas corpus*, when it is clearly applicable".

Another criminal classification that raises concern is the one provided for in Article 36, which states:

> Art. 36. To decree, in a judicial proceeding, the freeze of financial assets in an amount that manifestly exceeds the estimated value for the payment of the party's debt and, in view of the demonstration by the party of the excessiveness of the measure, not to correct it:
> Penalty - imprisonment, from 1 (one) to 4 (four) years, and a fine.

Those who are familiar with the Brazilian judicial reality, know that any system error can generate excessive freezing of assets, incompatible with the amount charged, and it is important to remember that softwares are not immune to failures. In addition, the system searches several accounts of the debtor, including savings accounts and even salary accounts, which may give rise to lien well above the amount under discussion. The criminal classification was created because there are complaints about the delay in examining petitions sent to the judge, narrating the problem. But, in any case, there is one caveat: there is a crime only if, having the excess been demonstrated, the judge does not correct it. Therefore, there is a possibility for the judge to make the correction, which reduces the risk.

With regard to lawyers, Article 43 introduced Article 7-B to Law 8,906 of 1994 (Lawyers Statute), for the purpose of criminalizing as an abuse of authority the violation of the right or prerogative of the lawyer provided for in Items II, III, IV and V of Article 7 of mentioned Statute.

Item II deals with the inviolability of the office or workplace, as well as its working instruments, its written, electronic, telephone and telematic correspondence, provided that they are related to the practice of law. Of course, crime will

only occur if the lawyer is in the regular and lawful exercise of his profession. If he is involved in a criminal action, legal protection does not apply. Likewise, if he refuses to return the written records in his possession after the allowed deadline.

Items III and IV deal with hypotheses of communication with clients and do not pose a risk to functional independence.

However, Item V causes concern. The order for the arrest of a lawyer before a final sentence, in a common cell, is said to be a crime of abuse of authority, since the Lawyers Statute gives them the right to be kept in a military staff room or, if there is not one available, under house arrest. Now, being very common the absence of prison in a special cell and house arrest being unreasonable, given the risk of escape, this Item V causes concern in the judges and can interfere with their independence. In other words, intimidated by the possibility of being prosecuted, they can stop performing their duties as they should.

3.2. ORGANIZED CRIME LAW

Law nº 12,850/2013 (Organized Crime Law) refers, in its Article 3, to the means of obtaining evidence, listing, in addition to the plea bargaining - which will be addressed next - the hypothesis of environmental capture of electromagnetic, optical or acoustic signals, controlled action, infiltration of police officers in investigative activities and cooperation between federal, district, state and municipal institutions and bodies in search of evidence and information of interest to the policial investigation or to the criminal lawsuit in the Court.

Regarding the theme of plea bargaining, there is no doubt that such an institute has practically shaped the issue of obtaining much evidence in criminal prosecutions in the last decade. Indeed, without the plea bargaining it would be impossible to achieve the success of the well-known Car Wash Operation, through which 395 requests for international

cooperation were registered with 50 countries, allowing the recovery of approximately R$ 12 billion to the public treasury and the conviction of nearly 200 people, most of them individuals occupying high positions in public agencies or companies.

In December 2019, Law nº 13,964 was enacted, which became known as the Anti-Crime Package, with the scope of improving criminal legislation and penal procedure, that is, it changed the legal provisions of the Penal Code, the Code of Criminal Procedure and many other laws. Despite the name Anticrime (as it could induce the understanding that the legislators who voted against it would be in favor of the crime), the fact is that several points were challenged, awaiting pronouncement by the Supreme Federal Court.

4. POSSIBLE RESULTS OF THE LEGAL INNOVATIONS AND CHANGE PROPOSAL

Once the three Statutes and the Bill are analysed, that is, Law nº 12,850/2014 (Organized Crime Law), with focus on the plea bargaining, Law nº 13,869/2019 (Authority Abuse Law), Law nº 13,964/2019 (Anticrime Package) and Bill nº 5,284, of 2020, focusing on the judge of guarantees, we will begin to analyze the possible results they may cause in the forensic routine, however without the intention of covering all the factual-legal hypotheses, which will be confirmed or not only through time.

To make it clear, we have chosen topics of greater importance in each law, to analyze the possible outcomes.

a) LAW Nº 12,850/2013 (ORGANIZED CRIME LAW) – PLEA BARGAINING

In the previous law, the plea bargaining was subject of

an agreement between the Prosecutor and the defendant, with the participation of his lawyer, and was confirmed later by the judge, who could reject it if he found any violation of the law. It was up to the judge to allow the substitution of imprisonment sentences for restrictive rights and to grant legal pardon. However, with the legal change, all these attributions passed to the Public Prosecutor's Office, which assumed absolute power.

The present Organized Crime Law, in its Article 4, Paragraph 4, establishes that the Public Prosecutor's Office may not press charge if the defendant is not the leader of the criminal organization or if he is the first to provide effective collaboration under the terms of this article .

Néfi Cordeiro is right in saying that such innovation arises with the creation of a clear transfer of power, when the Organized Crime Law provides that the Public Prosecutor's Office may "stop pressing charges" if the defendant is the first one to collaborate and is not the leader of the criminal organization. Néfi goes on, saying that the Prosecutor, as the holder of the public suit, may not denounce and may renounce his private persecutory right. Here, the Public Prosecutor's Office bargains a favor which is of its exclusive competence, negotiates the right of action.

The plea bargaining laws have always assigned the application of the penalty to the judge, who can reduce and even forgive it. In the revoked Law nº 10.409/ 2002, the Prosecutor was allowed to negotiate only during the investigation of the crime and there were no procedural rules on how it should be done.

The possible results may vary, as in some cases already identified, from an effectiveness of the criminal law with the arrest of people belonging to the upper class, with high prestige in the Brazilian society to, at the other extreme, agreements that are beyond reasonability, subject to questioning or review, which, on the one hand, may discredit Justice, but which may

also provide opportunities for improvement.

b) LAW Nº 13.869/2019 (AUTHORITY ABUSE LAW)

> Article 9. To decree a measure of deprivation of liberty in manifest disagreement with the legal hypotheses:
> Penalty - imprisonment, from 1 (one) to 4 (four) years, and a fine.
> Single Paragraph. Is subject to the same penalty the judicial authority who, within a reasonable time, fails to:
> I - relax the clearly illegal prison;
> II - substitute preventive detention for a different precautionary measure or grant provisional freedom, when clearly applicable;
> III - grant an injunction or order of *habeas corpus*, when clearly applicable.
> Article 10. To decree the coercive conduction of a witness or someone under investigation which is manifestly unreasonable or without prior summons to appear before the court:
> Penalty - imprisonment, from 1 (one) to 4 (four) years, and a fine.
> Article 36. To decree, in a judicial proceeding, the freeze of financial assets in an amount that manifestly exceeds the estimated value for the payment of the party's debt and, in view of the demonstration by the party of the excessiveness of the measure, not to correct it:
> Penalty - imprisonment, from 1 (one) to 4 (four) years, and a fine.
> Article 43. Law nº 8,906, of July 4, 1994, comes into force with the addition of Article 7-B:
> Article 7-B It is a crime to violate the right or prerogative of a lawyer provided for in Items II, III, IV and V of the caput of Article 7 of this Law:
> Penalty - imprisonment, from 3 (three) months to 1 (one) year, and a fine.

The first problem lays on the fact that this whole issue involves the judiciary, being a matter that should be conveyed by means of a complementary law whose initiative is from the Judiciary Power, through the Supreme Federal Court, according to Article 61 of the Brazilian Constitution.

Another issue of great relevance concerns open criminal classifications, which are too subjective, making it very difficult to maintain the noble and fundamental predicates of judicial independence and impartiality.

The judge already has control of his pronouncements through the constitutional duty imposed on him to reasonably motivate decisions and judgments, so that a situation such as adding the four criminal classifications approved by mentioned law may limit the full functioning of the Judiciary. Independence and autonomy may become a criminalized behaviour.

c) LAW Nº 13,964/2019 (ANTICRIME PACKAGE) – JUDGE OF GUARANTEES

Regarding the figure of the judge of guarantees, we now have the unprecedented provision in the Brazilian legal system (following the tradition of some European countries) of the figure of a judge who will function in the extra-procedural phase of criminal prosecution, that is to say, he will be responsible for the measures required by the police or the Public Prosecutor's Office regarding requests for removal of banking, fiscal or telematic confidentiality, as well as search and seizure measures, precautionary detention and telephone interception, including the preliminary analysis of a possible accusation.

On the other hand, there will be a judge for the phase following the receipt of the complaint, so that he will hold the presidency of all criminal prosecution in court, being responsible for hearing the prosecution or defendant's witnesses, deliberating on complementary measures required by the prosecution and defense at the end of the investigation, finishing with the sentence, whether on merit or termination (solving the case without analyzing the criminal merit).

Whatever the reason, the fact is that there was a pronouncement in January 2020, by Justice Luiz Fux, a member

of the Supreme Court and rapporteur of the actions brought on grounds of unconstitutionality, suspending the entry into force of the judge of guarantees. A period of 6 months was granted, which will expire in the middle of this year, so that in the meantime public hearings will be held at the Supreme Federal Court to discuss the matter, studies will be done at the National Council of Justice including the Courts of Justice of the 27 States and the 5 Federal Regional Courts, to plan how it will be implemented, in the event that the Supreme Federal Court considers the contested excerpts of the law to be valid.

It is curious to note that the judge of guarantees meets the basic predicate inherent to the impartiality of the judiciary, that is, mitigating the risk that the same judge who collected the evidence in the pre-procedural phase will be the one who will judge the merit of the future criminal action. It is important the lesson of Antonio Magalhães Gomes Filho, for whom impartiality is a value that manifests itself mainly in the internal scope of the process, reflecting the requirement that in the direction of all procedural activity – and especially in moments of decision – the judge always puts himself *super partes*, behaving as a disinterested third party, therefore above the conflicting interests.[13]

Regarding the possible results, it is true that such legislative innovation has already encountered huge legal and operational controversies. From the legal point of view, some expressed the formal unconstitutionality, because as it deals with the organization of the Judiciary, only the Supreme Federal Court would be the body with legal initiative to address the issue.

On the other hand, several obstacles were mentioned for the effectiveness of the judge of guarantees, mainly the huge area of the country and the fact that 40% of the districts have only one judge, which would put serious obstacles for a

[13] GOMES FILHO, A. M. *A motivação das decisões penais*. São Paulo: Ed.RT., p.37.

satisfactory performance, which could ultimately cause a criminal prescription, thereby increasing impunity in Brazil.

d) BILL N^{O}. 5284, OF 2020 (AMENDS THE STATUTE OF ADVOCACY)

Deputy Paulo Abi-Ackel on November 26, 2020 introduced a Bill amending Law N^{o}. 8,906, of July 4, 1994, which provides for the Statute of Advocacy and the Brazilian Bar Association - OAB. The Bill received the number 5,284 and on December 14th it had an emergency regime approved in its processing.

The Bill deals with several issues related to the practice of law. It is intended that Article 7 of Law N^{o} 8.906, of July 4, 1994 (Statute of Advocacy) has new provisions dealing with search and seizure in law firms, covering the wording of six provisions, of which the first two are copied below:

> § 6-A. It is forbidden to break the inviolability of the lawyer's office or workplace on the basis of mere evidence, testimony or cooperation agreement, without the presence of expert evidence validated by the Judiciary, under penalty of nullity and application of article 7-B.
>
> § 6-B. The lawyer who assists or signs an award-winning collaboration agreement on the activity of another lawyer without the presence of expert evidence validated by the Judiciary, under the terms of § 6 of this article, will respond to a disciplinary process that may culminate in the application of item III, art. 35 of this Law.

Everyone recognizes that those who practice law need to be given full guarantees that they can perform their relevant role well. And everyone also knows that the vast majority of lawyers perform their duties correctly. However, as in all professional classes, including the judiciary, there are those who deviate and engage in illicit practices.

The purpose of Bill 5,284 is simply to make law firms inviolable, similar to Embassies and Consulates, territories

immune to legislation. Article 6, item A, prohibits the breach of inviolability based on evidence, testimony or cooperation agreement. Excluding these hypotheses, it is difficult to imagine that other ones exist. Item B goes further. It imposes on the lawyer who participates in a cooperation agreement involving another lawyer, the obligation to do so only if there is expert evidence validated by the Judiciary. It happens that any expertise, especially accounting, usually takes years to finish. To make it a requirement for the acceptance of the cooperation agreement, disciplinarily punishing the lawyer who participates in the act is, by indirect means, to exclude the cooperation agreement from the legal system.

Paragraphs 6º "C", "D" and "E" bring other requirements that make criminal investigation unfeasible. The approval of the law in the terms proposed, gives rise to a well-founded suspicion that the functions of the criminal judge, in cases of crimes against the economic order and when they involve criminal organizations, will be weakened, preventing the Judiciary from complying with the obligations imposed by the Constitution.

5. OTHER WAYS OF WEAKENING JUDICIAL AUTONOMY

The weakening of the autonomy of the Judiciary and its members can also occur through indirect and less noticeable measures. Budget constraint is one of them. Without adequate resources, the Judiciary will not perform its functions well, given the impossibility of updating itself. In addition, this circumstance affects its members psychologically, creating discouragement that leads to accommodation and adaptation to an inefficient system. In Brazil this problem does not exist, although in recent years budgets have decreased due to the economic crisis. This circumstance may become worse from 2021, when the effects of the COVID-19 pandemic will be felt,

because significant public resources were directed to agencies linked to health and the protection of workers and companies.

Different laws may, incidentally, create points of weakness in the judge's performance. Let's see.

The Constitution of the Republic provides as ordinary instances the District Ccourts and Courts of Appeal. However, it classifies as extraordinary instances the Superior Court of Justice (Article 105, item III), whose main function is to give uniformity to the interpretation of the federal law, and the Supreme Federal Court (Article 102), which has the prerogative of acting as a Constitutional Court and last resort in certain cases.

It happens that access to these two Superior Courts is facilitated by the constitutional provisions themselves. The result is that, unlike most Supreme Courts around the world, in Brazil appeals are easily submitted to the aforementioned courts. This fact results in the accumulation of lawsuits for judgment and an increase in the time span for a lawsuit to reach its end. This delay, which can reach more than 10 years, in the criminal area leads to the prescription of cases of great importance and in the civil area it makes it difficult to fulfill the obligations assumed in contracts. Evidently, this leads to discredit by those who seek to use the Brazilian judicial system.

Sometimes there is disagreement between the superior bodies of the Judiciary and the lower instances, as the latter face the evidence and matter of fact while the former examine the applicable law. Under such conditions, it is normal for the decisions of the first instance and the Courts of Appeal to be more stringent than those of the Superior Courts. This sometimes results in the annulment of complex processes, involving political leaders or businessmen of great representation, under the argument of giving the most complete protection to the right to ample defense.

In this regard, there is a little discussed aspect that is the

psychological one. Judges who sentence cases involving economic crime and criminal organizations attract media attention, becoming famous and popular. It creates difficulties in communication with the judges at the top tier of courts and, at times, misunderstanding in relation to the former. This type of situation deserves its own study, which must include ways of coping with the problem, with the help of the Judicial Schools and experts.

Likewise, the weakening of the Public Prosecutor's Office may have a direct impact on the Judiciary, because if the prosecutors do not have independence and autonomy, the major criminal cases will not be brought to the judges, who will limit themselves to deciding matters of lesser importance.

6. CONCLUSIONS

In view of all the above, it is possible to conclud that the Judiciary Power must be respected as a Power of the Republic, independent, immune to interference from the Executive or Legislative Power, and committed to the impartial application of the Federal Constitution and the laws.

Unconditional respect for the Constitution is a fundamental and unavoidable condition for the existence of a just and human society, protected from any attempts to weaken the Judiciary, which, again, has its honorability based on two core principles, independence and impartiality. .

The risk of rupture of these two principles will always exist, requiring permanent respect for the Federal Constitution, with the respective functioning of the Republican Powers through the system of checks and balances, thus ensuring harmony and independence between them .

In Brazil, the legal changes of the last two years, in a discreet and fragmented way, have been generating losses in the power of judges and in the organs of the Judiciary, mainly due

to the new Authority Abuse Law, that makes them feel afraid of being prosecuted for the practice of such a crime. In addition to these, other measures can contribute to a loss of power and judicial autonomy, such as innovations in sparse laws or budget restrictions.

It should be noted, however, that the Brazilian Judiciary has maintained its independence and autonomy due to the constitutional protection and the quality of its judges, recruited through rigorous public exams. However, it is necessary to remain permanently alert, so that this State Power does not become a mere arm of the Executive Power to endorse its initiatives.

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