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THE JUDICIARY AS AN OBSTACLE TO DEMOCRACY IN LATIN AMERICA

LUIZ PEDONE

University of Brasília

Departament de Ciència Política

UNIVERSIDADE DE BRASÍLIA

Prédio da FA

70910-900 Brasília, DF BRASIL

Tels.: (061) 347 6853, 348 2865, 348 2426

FAX: (061) 273 3930

E-mail: lpedone@guarany.cpd.unb.br

Residencia: SQN 107 - Bloco G - Apt 401

Tel: 340.5538

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Abstract:

This paper has the objective of analyzing the new attitudes and new roles judges/magistrates and prosecutors have undertaken in Italy and Brazil after the political processes occurred in both countries in the early 1990s.

I argue several factor which have had influence in this changed roles and behavior in Italy and in Brazil. Internal factors have had their overwhelming influence in Italy, such as the examples of judges's struggle against Mafia, of judges that paid with their own lives. In Brazil, the findings of corruption in the Collor presidency have had the short term effect of producing important widespread anti-corruption sentiment and a few judges, magistrates and prosecutors followed different strategies to incriminate corrupt public officials, including lawyers and judges involved.

Some of internal factors also prevent furthering a more transparent and accountable behavior of the magistrates in Brazil. For one the autonomy, and the lack there of, of Brazil's judiciary. Appointments, promotions, education of the law student, oligarchy of Judiciary, and especially a lack of transparency and accountability make up for a less than democratic Judiciary in Brazil. Secondly the codes are outdated, decades behind. In third place the fragmentation of police/public ministry and judiciary with very little coordination account for a clogged up, inefficient judicial process.

The 1987-88 Constitution drafting addressed part of the problem but left many gray areas which could have been amended in the mandatory constitutional revision of 1993-1994, but were, for the main part, left out in the process which frustrated Legislators, the Executive and

civil society. Several proposals to change legislation to curb corruption and quicken criminal process were not voted by the Legislative, some of them have not even left the Ministry of Justice where they were designed.

On the other hand, some external factors are paramount to change the Judiciary more permanently. Political will, now lacking on the part of politicians will have its way into the political agenda as soon as public opinion starts to push to change things around. Exogenous factors also can be brought to play as countries engage in regional integration mechanisms which force compliance to a new set of rules and legislation regarding crimes, crimes against public administration and public biddings for public works and services to be rendered by private companies.

Finally the paper presents some propositions to render the judiciary more responsible to society, with the changes in the structure and dynamics of the judiciary and changes in the political system and in societal groups capable of demanding more democratic judiciary.

Professor Luiz Pedone, is an Associate Professor of Politics and Public Policy at the Department of Political Science of the Institute of Political and International Relations. Chair of the former Department of Political Science and International Relations from October 1989 to December 1993. Author of *Formulação, Implementação e Avaliação de Políticas Públicas no Brasil* (Brasília: Funcep, 1986); editor of *Sistemas Eleitorais e Processos Políticos Comparados: a promessa de democracia na América Latina e Caribe* (Brasília: OEA/CNPq/UnB, 1993). Currently Co-diretor of a Research Project at the University of Brasília entitled "Corruption, Accountability and Democracy: institutional experiments in comparative perspective and their political consequences in Brazil, Italy, Argentina and United States", sponsored by Brazil's National Research Council (CNPq) and the North-South Center/University of Miami.

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I. OVERVIEW

This paper will review the nature of the political relationship between the judiciary and democracy in particular in the recent period of consolidation of the democratic regime. The relationship between politics and the judiciary power has not been sufficiently studied and is now deserving the attentions of scholars in different disciplines, from anthropology to law, from economics to public administration and political science.

The relationship between the judiciary and democracy is not new. European authoritarian regimes, such as Mussolini's in Italy, Salazar's in Portugal and Franco's in Spain, strongly subordinated the judiciary to the executive. Despite this, some judges and magistrates maintained a strong standing against arbitrary decisions taken.

. The Judiciary in Latin America differ one from the other in general terms. The Brazilian and the Costa Rican judiciary are the only one who have long established entrance examination for judges and public ministry.

Even so 1/5 of the Brazilian judges are appointed freely. In the Superior Tribunal de Justiça (Superior Justice Tribunal) --STJ¹-- 2/3 of 33 judges are freely appointed by the President of the Republic and do not have to belong to the public ministry career or to the magistrature career.

At the state level 1/5 are freely nominated. Other are nominated from public ministry and 1 from Ordem dos Advogados do Brasil (OAB) (Brazilian Bar Association). OAB does not criticize this system since the interest is getting the nomination and to retire in 5 years at full pay. A system which is highly corrupt.

Public Ministry in Brazil

The 1988 Federal Constitution recognized in the public ministry the function of defense of the juridical order, of the democratic regime and not disposable social and individual interests. In terms of constitutional warranties life career, not being able to be replaced or removed, and loss of income.

Criminal Justice is the most striking difference between Italian and Brazilian public ministries and magistrature:

¹.- The STJ was created by the 1988 Constitution in substitution to the Court of Appeals (Tribunal Federal de Recursos). the Number of judges appointed increased to 33 members.

Italy legislation has changed in the new Penal Process Code to allow double function of the public ministry as "accusation" and as "judiciary authority". The career is one and only dividing later into "Inquiring Magistrature" and in "Adjudicatory Magistrature" (judicial decisions/sentences)

Public Ministry does not produce evidence in Brasil. The police produces evidence, independent from public ministry, the public ministry does not even have slant idea of what is police investigating. Fragmented system among the Police the Public Ministry and the Judiciary. No coordination no mediation. Introduced as career after the constitution of 1946, the MP only saw some independence with the former General Prosecutor Aristides Junqueira². no limits in the number of terms. Current Supreme Court judge Moreira Alves was General Prosecutor for 12 years (6 terms)

Public Ministry in Italy

institutional set up, powers and prerogatives of public prosecution in Italy; one sole career that involves both "accusatory" and "sentencing" functions. The first degree judges can prosecute big cases (Brescia forum began judging the ENIMONT case³)
National Association of Italian Magistrates
role of the self-governing body of prosecutors and judges (Superior Council of the Magistrature)

In general terms, public prosecutors exercise a very important functions: they may determine "who gets what, when and how" in the community. they may contribute to the definition of public policy decisions in the criminal justice. By designing criminal policies they decide and have an firsthand impact on the dynamics of any democratic regime.

In Italy the public ministry acquired over the years a degree of internal and external autonomy.

².- Junqueira was first elected in 1989, and re-elected for 2 subsequent terms in 1991 and 1995.

³.- ENIMONT rumorous case involves the "black funds" of how Ente Nazionale Idorcarburi (ENI) the Italian petrochemical state giant and the chemical giant Montedison in a joint venture were responsible for the "tangenti" for political parties in amount calculated by the Milan Court on L 152,870,000,000 (: by L/US\$ 1,500), a little over US\$ 100 million. See PAMPARANA, Andrea, *Il Processo Cusani: politici e faccendieri della Prima Repubblica*. Milan: Arnoldo Mondadori Ed., 1994.

NOMINATION PATTERNS IN BRAZIL AND ITALY

BRAZIL

separate careers/some crossover

MAGISTRATURE

1st degree - used to be political nomination, now public examination/promotion to 2nd degree if he is moderate judge, that is, his decisions coincide with other judges at high levels

2nd degree - 1/5 political appointment
"moderate judges"

Tribunal Superior do Trabalho
(labor laws)

Tribunal Superior Eleitoral
(electoral laws)

Superior Tribunal de Justiça
(federal laws) 1/3 political appointment

Brazilian Bar Association list
Brazilian Association of Magistrates

Superior Tribunal Federal
(Constitutional court)
appointment: President
"casa de amigos" (house of friends) - experience as lawyer

PUBLIC MINISTRY

entrance by public examination
promotion by "merit"
Moderate prosecutors
Radical prosecutors
Those who wish to make a long career work with the elites

politization of the public ministry

ITALY

same career -
Superior Council of the Magistrature - presided by the president of the Republic is responsible for appointments, transfers, promotions and disciplinary actions

Sup Co. of Magistrature -
elected by 2/3 of all magistrates, 1/3 by the Parliament among professors of law and lawyers of 15 years experience (art 104 Italian Const.)

- independence

- obligation to act: to prosecute penally

-

PUBLIC MINISTRY

II. INTERNAL AND EXTERNAL FACTORS OF THE DIFFICULT RELATIONSHIP BETWEEN THE JUDICIARY AND DEMOCRACY

A. INTERNAL

1. Education of the lawyers
2. Politicization of the Judiciary
3. Codes
4. Fragmentation

Roots of the problem in Brazil:

According to Urbano Ruiz, judge, president of the Association of Judges for Democracy, the root of the problem in Brazil is the education that is given to the law student. Law is studied in function of positivist interpretation of the legislation. The judge becomes essentially, according to this theory "mouth of the State", how the State speaks out the law.

Hanz Kelsen in his famous book⁴ shows how Law does not, and should not, get contaminated or influenced by any other disciplines. Politics, social movements, history, do not play a role, according to Kelsen. The most conservative view of law is reflected in this theory and his followers

The formation of the lawyer has very little depth in other disciplines. And this has profound consequences later on. The same type of deviations that conforms the public service or the Brazilian electorate⁵

No involvement: "I have done my job (to vote). Now it is up to them (the elected) to do theirs."

The Weberian ideal of the public servant impartial that does not get involved is not true for judges.

Judges thrust the action of the State. Acting as such judges became essentially political. Contradictory, but real.

Supremo Tribunal Federal - at the service of governance. Working to preserve the Economic Adjustment Plans, frustrating the application of justice. A real appendix of the Executive

Serves the rules and it reproduces itself through jurisprudence forming a true doctrine. Subserviency to the Executive prevents change, prevents improvement.

⁴.- KELSEN, Hanz. Teoria Pura do Direito, São Paulo, Martins Fontes, 1987.

⁵.- See WEFFORT, Francisco. Qual Democracia?. 1992

.Democratization of the Judiciary is changing the axis (See Urbano Ruiz interview). Making the Judiciary serve the people serve society.

1. how to achieve citizen control of the Judiciary

2. at the same, how to preserve the State of Law, avoiding dictatorship and return to authoritarian regimes? Judiciary has been serving dictatorships in the past decades in Latin America. Victor Nunes Leal, president of the Supreme Court in 1965 turned the keys of the Supreme of the General-President Castello Branco - one of the last judges to act autonomously.

To be Relevant, as in the case of Portugal and Spain under dictatorial regimes was to make sure law prevailed.

3. to make the rights of the minorities (as understood by the 1988 Federal constitution -- unemployment, abject poverty, misery, racism, etc.

To change the Judiciary is also to extinguish a few of the institution that work against Justice .

Example extinction of the Military Police.

Extinction of the Public Notaries: now every property above circa US\$ 50 is required to have deed/title, absolutely against the spirit of the law 60 years ago, in which the poor did not have to have this encumbrance -- the limit then was 500 times higher.

. market reserve for the law degree holders => become judges who will defend the diffuse interest when lawyers are mainly interested in individual rights which produce piles of files, thus more return to lawyers? Otherwise unemployment of the lawyers.

. slow due process/contradictory sentences/judges with lots of files to analyse. Disobstruction of Justice through recognizing that the conflict is collective and not individual any more.⁶

⁶.- FARIA, José Eduardo. Justiça e conflito. S. Paulo: Revista dos Tribunais, 1992.

- Brazilian Codes are dated:

Civil Code from 1916

Commercial Code 1850

Penal Code 1942 w/ modifications

Code of bankruptcy 1945.

changes in the business/in public administration/in crimes

1988 - new Italian penal Process Code. the Brazilian has the Italian tradition; it is a copy of the Rocco Code from Mussolini Italy (1930). State was preeminent over individual rights.

Today criminality is more complex. Crimes against the economy and against the public administration.

In Brazil difficulty to adapt Laws to the Brazilian reality; laws are produced without the desired effect. No efficacy in laws.

Begging in 1992, Brazilian prosecutor and judges began contacts with Mani Pulite Pool to accommodate laws to reality

Still "dogmas"

- . bank secrecy: coercion from sectors who would be at risk on the fiscal, financial, criminal points of view.

Bentivoglio/Buono Proposal to the minister of Justice Alexandre Dupeyrat (1994)

- . Law which regulates the banking system is from 1964, and was done with Complementary Law, which means that only another Complementary Law or Constitutional Amendment can change it (60% of both houses in two votes)

- . Organic Law of the Public Ministry allows action, but banks challenge constitutionally and always win.

Very important step not yet taken.

We know what has to change but there is no action to change it:

TELEPHONE WIRING:

Brazil does not allow recordings as juridical proof; it not regulated then it is not admitted - hypocrisy

- Changes in the Penal Code as if they were the solution. What we need is make more agile Penal Process.

Society does not know what prosecutors/public ministry do.

●The Judiciary is obstructed and politicized:

When is possible to individuate is collective right: monthly payment of Housing Financial System, pensions from INPS, school monthly payments

When is not possible to individualize, diffuse law. Crimes against environment. Pollution of the Tiete River, who has done it and who has interest

Only one file suit could resolve the question of diffuse and collective. Only one file suit alone could have resolved the question of diffuse and collective rights. This has as a consequence destroying the lawyer's labor market.

Judicial Power functions as a repressive organ. Penal Law only to poor. Consumer and the rich receive special treatment

This has severe political consequences: the judiciary only used to condemn the poor, to repress, can become trashable, disposable, feeding again the possibilities for authoritarian regimes in Latin America.

TV Program "Aqui e Agora": a judge from the State Capital of São Paulo prohibited that prisoners and imprisoned were interviewed in their cells or at the moment of their capture. It was their full right to talk or not talk. The TV program now makes interviews in the periphery of the city of São Paulo --lumpen, poverty --, where judges are less prone to act as their counterpart did.

Prosecutors who have a political party parallel life tend to be coopted. Political life contaminates justice. This is exactly what happened in the State of São Paulo. Former Governor Orestes Quercia, appointed a former Military Police prosecutor, a Public Ministry prosecutor as State Secretary of Justice, Luiz Antonio Fleury. And pushed for his candidacy to substitute him as governor of the state. Impunity was the result: all investigations against Quercia were put aside. there were always judges and prosecutors to make sure that investigations would do not proceed.

Fragmentation

. in the majority of the democratic countries only one judge: ITALY had double tandem, not any more; France is changing.

Public ministry does not produce evidence; poice does that in brazil, independetly from Public ministry;

- Police investigations should be done under direction of Pubic ministry in order act produce good evidence; also promotions/replacement/retirements should be made in such way not disturb investigations

Fragmented system sistema fragmentado: Policias/Mini Pubioc/Poder Judiciario)

sem inermediação sem coordenaxj

Inttroduzido como carreira depois da constituição de 1946 obteve um pouc mais deindependecia com Aristides Junqueira.

. Mas ainda não tem limitte de mandattos.

II. INTERNAL AND EXTERNAL FACTORS OF THE DIFFICULT RELATIONSHIP BETWEEN THE JUDICIARY AND DEMOCRACY

B. EXTERNAL

1. Political will
2. Public opinion
3. Exogenous rules impinged by Regional Integration mechanisms

In the states, they can stay indefinetely. Governors always choose from 3 names.

All very associated with government. Fleuri caso mais acabado desse viculo. Public prosecutor that becomes governor, Fleury. His substitute, Antonio Araldo Ferraz Dal Pozo, withdrew all files investigating corruption, fraud, crimes against Quercia administration.

Public ministry in São Paulo lost credibility, 1991-1994.

other changes: there should not be any privileged fora to any person.

Governors only judged by Superior Tribunal de Justiça. State Justice will reach Brasília. Quercia/Fleuri case inept accusation directors of public enterprises fora is unreachable by the State Justice.

not democratic:

- . since 1988 this does not happen in Italy
- . Enimont case was judged in Brescia by a 1st degree judge. It may be for a prime-minister, ministers, Berlusconi, etc

Argentina:

prosecutor and judges are not career/ too much connected to the Executive Power, who appoints, promotes, removes, retire...
STF from Argentina was augmented by Menem to 25 members, because majority was anti-government

Question: Changes would challenge individual rights?

In Italy, campaign against terrorism: normal measures which have not offended juridical consciousness, 1980-1988.

. Lack of Political Will:

- no public official like to be investigated; utopia to think Legislators would establish laws to incriminate them
- only public opinion can change this
- greater consciousness from Public Ministry
- changes in local politics

. Italy: examples of Giovanni Falcone, Paolo Borzellino, others,
Brazil: very few examples

● Piercamillo Davigo, one of the Mani Pulite Pool prosecutors, visited Brazil and he was asked about the Quercia/Israel case:

- The Public Ministry asked the Central Bank to lift bank secrecy norm to investigate ex-governor Quercia bank accounts.
- The president of the Central Bank denied lifting Quercia and other companies' accounts.

● What would he, Davigo, do if he were in Italy?

"I would have the president of the Central Bank arrested".

But look, this is the PRESIDENT OF THE CENTRAL BANK, just like the Banca d'Italia."

Davigo reply: "It does not matter. I would have him arrested".

Differences in Italy and Brazil

Italian prosecutors and magistrates have more power than in Brazil. They have constitutional guaranties which Brazil's constitution does not give. They were established in function of the action of Italian magistrates.

Courage, Brazilian magistrates and prosecutors are more limited

Lawss are more effective in Italy: more power of coercion, preventive imprisonment

In Brazil politicians, criminals feel "above the law"; not to be reached by law;

"Patteggiamento - Plea-Bargaining of Mafiosi/Politicians/Businessmen in Italy"

Italy - indicted were certain of their conviction; therefore the judges may say

"inview of these evidences you confess and give us other involved, so you can your time reduced, even for crimes and actions not yet condemned."

Brazil: Conviction is not certain, even if all proofs and evidences are there. Judges cannot engage in plea-bargain with indicted because they are not certain of their conviction by the jury, can be freed, etc.

Public Opinion

- massive in Italy: italians wanted to get rid of corrupt political system and start anew.

- in Brazil, during Collor impeachment, public opinion counted; after it dwindled away

Mani Pulite, together with the WW II, has been every-day news in Italian newspapers

1st phase: denunciations, condemnations, suicides, findings, end of the political system, renovation (?)

2nd phase: investigations of the "black funds": CUSANI, ENIMONT

Now begging 3rd phase: how were the "black funds" formed (budget: income tax of the business/ Guardia de Finanze etc.

Berlusconi's private companies

Exogenous Factors which operated in Italy and could work in Brazil

- . Fall of the Wall, end of Cold War => helped end political system
- . European Union obligated Italy to reduce public debt -- renew public work bidding system, etc.
- . European Union was afraid that mafia like behavior would spread through Europe

BRAZIL and MERCOSUL:

Laws must be harmonized in all four countries

Argentina: norms of penal process must change;
"plea bargaining / delação premiada / filme Ocampo Moreno."

Uruguay - fiscal and banking paradise;

Paraguay - non payment of taxes; Antartica/Sousa Cruz (80 million cigarettes - 60 million come back to Brazil); trucks/auto/soya

Maybe external factors are going to work as quickly as did in Italy but they are certainly going to have effects

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