Fausto de Sanctis: Judiciário assumiu papel de liderança política

O Judiciário brasileiro assumiu, nos últimos anos, um "crescente papel de liderança política". A afirmação consta de artigo publicado pelo desembargador Fausto De Sanctis, do Tribunal Regional Federal da 3ª Região, no *International Judicial Monitor*, editado pela International Judicial Academy, de Washington, nos Estados Unidos.

No artigo *Recent Legal and Judicial Reform Initiatives in Brazil*, De Sanctis faz um histórico da atuação do Judiciário no período posterior à Constituição de 1988. Segundo ele, a relevância política assumida pela magistratura se deve especialmente à negligência do Legislativo em decidir questões como greve no serviço público, aborto, pesquisas com células-tronco, demarcações de terras indígenas e fidelidade partidária, que agora estão nas barras dos tribunais.

O desembargador também aborda o que chama de “crise geral de eficiência do sistema judicial”, centrada em três aspectos: lentidão, pouca transparência e falta de acesso à Justiça. Ele finaliza com as principais mudanças legislativas e constitucionais dos últimos anos, como a adoção do processo eletrônico, a criação do Conselho Nacional de Justiça, a Súmula Vinculante, entre outras.

Leia o artigo abaixo:

Recent Legal and Judicial Reform Initiatives in Brazil

The Brazilian judicial system is composed of numerous institutions. Its formal nucleus is the judicial power (Articles 92 and 93, Brazilian Constitution), but it also encompasses the essential functions of the branch: prosecutors, public defenders, and private lawyers. Within this context, the Judiciary must be highlighted as the core of the judicial system. The brazilian Judiciary has, over time, assumed a role of growing importance of political leadership.

The historical evolution of the brazilian public institutions, especially after the Federal Constitution of 1988, reveals a shift in government powers from a system that emphasized Legislative and Executive powers to one that also includes the judicial branch. Political disputes avoided by the Legislative Power are now being included in cases being filed in court.

Some examples of recent decisions of the Brazilian Supreme Court reveal that the reluctance of the legislature to exercise its power and authority has been accompanied by the filing of cases in court and the subsequent willingness of the courts to hear these issues. These cases have involved issues relating to the activity of the strike in public service, abortions, stem cell research, tribal lands, elections –regulation of party loyalty, and amnesty for the military. These are issues that traditionally involved theexclusive exercise of legislative power. Therefore, what should be regulated by law, by representativesof the people, turns out to be determined by judicial decisions, not always in keeping with popularsentiment. It is remarkable that the role that the judicial power, specifically the Brazilian Supreme Court,has performed as the last level of confirmation of legislative policy decisions. Defeated groups in the Congress have used the judicial power to obtain decisions about constitutional proposals that had failed in the legislature.

At the top of both the federal court system and the several state court systems, for purposes of appeal, is the Brazilian Supreme Court (Supremo Tribunal Federal — S.T.F.). It is comprised of 11 justices (Ministros) who are appointed by the President and approved by the Senate. The justices of this court must be at least 35 but less than 65 years old. They have life tenure until their compulsory retirement at age 70.

The judicial power now occupies new institutional space. Deciding questions of political nature, the Brazil Supreme Court has becomes a political entity, and has been observed with great interest by various social groups. Thus, Brazilian society has become aware of the importance of judicial decisions in day-to-day social and economic life and economic development. This judicial activity has caused it to become a center for discussion. Legal discussions now involve economists, psychologists, journalists, members of social movements, NGOs etc. who realize the importance of judicial function.

The occupation of a new political space brings new challenges to the judiciary. Where once there was a big distance from social demands, today they are multiplying in the judicial branch. Where once there was a respectful silence relating to its decisions, today there are many critics. If the judicial power was seen in the past as an unfailing institution, today it is the target of political demonstrations and the demands of social movements. The judicial power is being looked as a public service because judicial rulings involve issues of a public policy. Society has started to debate its action, scope and efficiency.

The new political leadership of the judicial power lighted up all the judicial system. Citizens and citizen groups have started a vigorous debate not only about the content of judicial decisions that significantly impact Brazilian life, rights and values, but also on the organizational model of justice and its way of relating to the same society. The discussion of the organization and functioning of judges and judicial power and their institutions are no longer a subject of interest of only a few actors, generally related to legal practice, and have become the interest of broader segments of society.

In 2003, the executive power created, within the Ministry of Justice (Department of Justice), a Judicial Reform Office, which had the authority to consider improvements in judicial service. It is no coincidence that, in the same year, the Senate proposed a constitutional amendment to recast the entire judicial system (so-called 2004 Admendment of Constitution). Under these circumstances, in 2005 the three branches of the Brazilian government (legislative, executive and judicial), in recognition of the

importance and relevance of the judicial function, launched a "Covenant (pact) for a Republican and a Faster Judicial Power," with numerous commitments aimed at providing greater access and efficiency in the whole judicial system.

It has become clear that there has been mobilization in favor of institutional reform and clarification of the judicial function. At the same time, there is an absence of concrete proposals coming from civil society. However, the role of civil society to minimize the problems of management and access is essential. Its indifference to the judicial branch must be overcome through technical approaches (data dissemination, information and studies) and by the service provided to the users showing the importance of management for the betterment of society.

General crisis of the efficiency of the judicial system

The Brazilian legal system has three chronic structural problems: (1) slowness and lack of efficiency in decision-making, (2) lack of transparency and democratization, and (3) the absence of effective access to justice.

The slowness of the judicial decision-making process and lack of concrete impact of many of its decisions has undermined the legitimacy and prestige of the Brazilian judiciary. Some data help quantify the problem. Of 155 countries surveyed by the World Bank, Brazil is among the 35 worst in the length of time required for reaching a decision in a case. This ranking occurred because a case lasts, on average, about eight years. In a survey conducted by a consulting company, a proceeding for judicial recovery of a debt in the bankruptcy court (only 1st instance) in Brazil takes 546 days. In Chile, it is 305 days and in the U.S. 250 days. In Latin America, considering all countries, this period is about 461 days.

Regarding small claims courts, research carried out by the Ministry of Justice points out that the ongoing trials, designed to provide speed and simplicity in handling simple cases, take 349 days to complete all phases of the proceeding and about 300 days to serve the decisions.

The problem of slowness of the judicial system derives from several factors. The lack of clear diagnoses about the functioning of the judicial branch in the country impedes the identification of the problem, but some examination and resulting evidence can show the main bottlenecks, which will indicate the adoption of appropriate policies to overcome them.

The quality of judicial decisions is ultimately determined by a system of uniform jurisprudence which contributes to a reduction of uncertainty. Therefore, it is necessary that decisions involving the creation of binding precedent or that reject appeals be based on the same law grounds; otherwise the decisions create divergent legal positions on the same issue. In addition, an environment of legal uncertainty creates room for corruption. Decisions must be created quickly to reach the apex of the organizational chain in order to obtain binding decisions (new precedent).

Another element to strengthen the judicial process is to eliminate certain kinds of disputes from judicial consideration. Formerly, divorces, separations and succession, even if there was mutual agreement of the parties, needed the approval of a judge. With recent legislative changes, these matters were taken from judicial system.

It is important to highlight the culture of litigation in Brazil, responsible for expanding the already excessive overload of work of judges. There is an absence of extrajudicial programs, such as arbitration to resolve the issue of heavy work loads, because the judicial system is seen as the only way to resolve disputes. One study of small claims courts revealed that only 34.5% of cases reached an agreement in a conciliation hearing. A study from the Ministry of Justice revealed that in cases where the work of a lawyer is involved, the percentages of agreement are lower and the duration of proceedings increases. Lawyers require more production of evidence and take more appeals for their clients. Thus, it is undeniable that the development of community judicial programs, such as mediation, reconciliation and restorative trials are not only a provider of social peace, but also reduce the volume of lawsuits. .

Procedural rules are complex and often incoherent. As a result they generate errors, enabling the perpetuation of demands by establishing several appeals which often turn tardy. This means that the current appeal system should be challenged and changed, and proposals for streamlining the proceedings to insure speed without tarnishing defense rights constitutionally guaranteed should be sought.

In addition to the above issues, there are three other problems: devaluation of the trial courts, absence of risk in the use of repeated appeals, and excess of appellate bodies (four instances). About the devaluation of first instance judgments, it can be said that these courts have been poor in efficiency. The appeals generate the effect of avoiding judicial orders which cannot be served, even on an interim basis, until they are confirmed by a higher Court. That means the majority of cases can take years.

Besides that, the Brazilian law imposes little burden or costs to those who initiate appeals, encouraging dilatory attitudes. This phenomenon is reinforced by the third item. There are too many instances. This situation allows an appeal of a case without a social interest to the Superior Court and the Brazilian Supreme Court, leading to an excess of demand. In principle, however, the higher Courts should have as a function only the standardization of federal law and the Constitution.

The slowness also arises from ineffectiveness of judicial management. The organization of the administrative part of the judicial system presents problems of rationality and modernization. There is too much bureaucracy that allows the conduct of bureaucratic work, aggravating an already overloaded system.

The difficulty to standardize administrative actions, due to the complex federal system and the autonomy of the courts, is a matter only now being discussed under the work done by the National Council of Justice.

Having difficulties of communication in all instances, Brazilian courts historically do not communicate adequately with each other, which they should do to allow for optimum efficiency in the activities of courts by the constant exchange of relevant information.

Lack of participation by the judiciary in the development and implementation of the budget can be mentioned as a additional problem.

Recent reforms of law and the Constitution

Law:
Correcting errors by higher courts (Law 11.276/2006) — when on appeal a higher court finds a error in a first instance decision, instead of returning the case to the trial judge (so that the suit would start again), the court itself can correct the error and decide the case (on issues of law only).

Avoiding multiple appeals — when the judge decides according to a precedent decision from the Superior and Supreme Courts, there is no possibility of appeal (Civil Procedure Code, article 557).

Simplification of procedures — separation or divorce and division of property (in case that there are no minors) can now be decided outside the courts. In 2005, 105,894 separations were granted by the first instance courts (77,201 consensual ones). In 2005, 150,714 divorces were granted by the same instance (102,112 consensual). All together, there were about 180,000 cases that could, in theory, be resolved outside the courts;

Auxiliary employees for the justices (Law 12.019/2009) — the law allows for the convenience of justices the possibility to nominate federal judges or federal appellate judges to work in the Brazilian Supreme Court for six months (renewable for equal terms and a maximum period of two years) to conduct hearings for the production of evidence in cases;

Reform of criminal proceedings — reduction of errors (changing questions to be submitted for the grand jury) (Criminal Proceeding Code, CPP, Article 83); the possibility to summon anyone in a certain time (CPP, art. 362); prohibition of the use of evidence derived from illegal practices (CPP, art.157, § 1); regulation of contradictions in expert opinions (CPP, art.159, § 5); defendant must be heard after witnesses (CPP arts.400, 411, 531); adversarial preliminary stage before the “indictment” (Law 11.719/2008).

Implementation of eletronic lawsuits — Cases in federal small claims courts will not involve the use of paper and will be virtual. All the Courts are being connected and the number of a particular case, since the investigation, will have to be the same.

Incentive and awards — good practices of judges, prosecutors, public defenders, and courts will be rewarded once a year.

Specialized courts for financial crimes and money laundering cases (since 2004) basically in the capitals of the states, 24 criminal courts). This is the result of the National Strategy for tackling money laundering and corruption developed in 2003.

Constitution:
Judicial reform implemented by constitutional amendments from December 2004, introduced important innovations such as the establishment of (1) the National Council of Justice; (2) binding precedent; and (3) discretionary review.

National Council of Justice (Conselho Nacional de Justiça — C.N.J.) — This is an organ for

oversight of the judicial branch, made up of representatives from judges and prosecutors (federal and state levels), lawyers and civil society, basically charged with supervising its administrative and financial conduct. In Brazil autonomy and independence of the judiciary are already guaranteed since the Constitution of 1988. The creation of the National Council of Justice was aimed primarily at the adoption of mechanisms to provide an efficient control of administrative activity of the several judicial organs. It deals with the administration of courts; training of judges; the unification of proceedings and judgments; punishment for misconduct of judges; esstablishing goals (e.g. goal n. 2 — finish with all cases filed before 2005). The CNJ has 15 members (9 judges plus six nominated by the Congress (two), the President (two) and the Brazilian Attorney General (two). The mandate lasts two years, which can be renewed for an additional two years. The C.N.J.. created in 2006 the virtual case, and all internal information must be made by computer systems.

Binding precedents — The Brazilian Supreme Court can issue binding precedents. According to the Constitution, a binding precedent must be adopted by a two-thirds majority of the votes at the Brazilian Supreme Court (eight of 11 votes). It must deal with constitutional matters that have been the object of repeated decisions by the Brazilian Supreme Court. Thus the pre-existence of repeated decisions on a constitutional matter is a requisite for the issuance of a binding precedent. The approval, as well as the review and the annulment of a binding precedent, may be proposed by anyone qualified to file a direct unconstitutionality action. In order to ensure the efficacy of the binding precedent, a complaint may be filed under the Brazilian Supreme Court against a court ruling or administrative act that denies its validity. Binding precedents must be followed for all judges and executive and legislative powers.

Discretionary review — the Brazilian Supreme Court only reviews cases that involve matters of national interest. It assesses the existence or not of relevant questions from the economic, political, social and legal viewpoint that go beyond the subjective interest of the case. It was implemented by Law 11.418/2006. In the first 10 months of 2007 (year of its implementation), there was a reduction of the number of cases by 64%. In 2011, there were 90 million current cases in Brazil (around four million in the federal judicial system, comprised of federal and labor courts). In 2011, the Supreme Court ruled in 102,000 decisions (89,000 from justices by themselves, according to Court’s precedents; 36,754 from the Chief Justice – 1/3).

The functionality and accessibility of the judicial system is fundamental to the strengthening of institutions, citizenship and to the protection and implementation of human rights policies.

Problems of access to the courts and slowness of ruling decisions contribute to social inequality which may cause increasing of levels of violence and disagreements with government policies which can affect the stability of society created by the rule of law. In Brazil, today, there is an awareness that the realization of an expeditious and efficient judiciary is not only a mandate dictated by the Constitution, but also a prerequisite for economic and social development.

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