Independence of Judges in Brazil

Relevant aspects, cases and recommendations

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To all organizations and persons defending human rights in Brazil who contributed to this publication.

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Summary

Presentation

The question of the independence of judges is one of the most troublesome today in Brazil, as a result of a perverse historical accumulation of mistakes and incongruities on the formation and development of the Judiciary Power. This subject raises as a core issue in the perspective of the monitoring of human rights in Brazil, with the support and the participation of the international community, especially the United Nations. This justified the efforts made for elaborating this report-book entitled **Independence of Judges in Brazil: relevant aspects, cases and recommendations.**

This publication is composed of four introductory articles aiming at structuring the subject with regard to Brazil nowadays: The Crisis of the Judiciary in Brazil, by José Eduardo Faria; Independence of Judges and International Human Rights, by Sébastien Conan; The Brazilian Judiciary and the lack of Independence of Judges as a Reflect of the Judicial System in Brazil, by Marisa Viégas e Silva; and Violation of the Principle of Natural Judge and Protection of Human Dignity: Concrete Case Study, by Luiz Mário de Góis Moutinho and José Viana Ulisses Filho; the two last mentioned authors are part of the Association Judges for Democracy.

This introductory part is followed by the report of 37 cases presented by partner's human rights organizations, in order to enhance the practical relevance of the work of

monitoring violations in that field, as well as to highlight the imperative of establishing a democratic system of judges´ activity control.

The publication also includes conclusions and recommendations elaborated through a consultation's process of partners´ entities from several Brazilian States, both virtually (through electronic mail) and by means of a meeting held in the city of Recife, State of Pernambuco, in February 2005. Finally, we included as annex the texts of the United Nations Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct, in accordance with the recommendations of the United Nations Special Rapporteurs aiming at making public these principles, especially the Bangalore ones[1], that have not been largely available in Portuguese up to now, justifying the inclusion of a non-official translation in the Portuguese version of this publication.[2]

This publication is part of the mission of the International Human Rights Program (dhINTERNACIONAL), a six-year-old inter-institutional initiative developed by the National Movement of Human Rights (MNDH – Northeast Regional Section) and GAJOP (Legal Advisory Office for Popular Organizations). One of its objectives is to contribute to improve conquests in the field of human rights in Brazil, through the use of international instruments and mechanisms of human rights protection.

Thus, the program acts in three fronts. First, in the legal area, it sends petitions to international bodies of human rights protection, denouncing human rights abuses occurred in the Brazilian Northeast. Pedagogically, the Program promotes trainings for professionals and activists of local human rights organizations, to make them able

1 The Special Rapporteur Leandro Despouy expressed this recommendation in his first report (E/CN.4/2004/60, §71).

2 Supporting this preoccupation, we emphasize the resolution of the United Nations' Commission on Human Rights 2004/33, stating on the role of the non-governmental organizations: "Recognizing the importance of the role of non-governmental organizations, bar associations and professional associations of judges in the defense of the principles of the independence of lawyers and judges".

to access the international mechanisms independently. Finally, its works with the system of the United Nations, in the purpose of strengthening the international monitoring on the situation of human rights in Brazil. Particularly, it acts to encourage the United Nations Special Rapporteurs to undertake mission of investigation in Brazil, so that they can have an opportunity to better understand the local reality, make reports and recommendations aiming at overcoming the faced problems.

At this respect, in the last years, several of them have visited Brazil: Special Rapporteurs on Torture, Nigel Rodley (2000); on the Right to Food, Jean Ziegler (2002); on Extrajudicial, Summary and Arbitrary Executions, Asma Jahangir (2003); and on the Right to Adequate Housing, Miloon Kothari (2004). At these occasions, the dhINTERNACIONAL Program promoted public audiences in accordance with the mandate of these Rapporteurs, with the active collaboration of the General Public Prosecutor of the State of Pernambuco.

In addition, the Special Rapporteur on Independence of Judges and Lawyers, Mr. Leandro Despouy, undertook a mission in the country on October 2004, to which the dhINTERNACIONAL Program also contributed by mobilizing local organizations, collecting concrete cases of violations, and stimulating a political debate on issues related to the Rapporteur´s mandate.

According to the resolution 1994/41 of the UN Commission on Human Rights, based on the articles 7, 8, 10 and 11 of the Universal Declaration on Human Rights and the articles 2, 4 and 26 of the International Covenant on Civil and Political Rights, the mandate of the Special Rapporteur includes the task of "making concrete recommendations related to the independence of the Judiciary and the practice of the Legal Profession to be taken into account in works, projects and programs of technical assistance of the United Nations", taking in consideration its relation with member-States, in the perspective of the enlargement of democratic basis in the world.

According to Despouy, there is a direct link between independence of judges, consolidation of democracy, States development and human rights protection. In his

report of December 31st, 2003, he points out that "in every democratic society, judges are the guardians of rights and fundamental freedoms. Judges and Courts undertake the judicial protection of human rights".[3]

On a national point of view, Special Rapporteurs visits to countries permit to join local social groups, encouraging them to reflect on solutions to the faced problems. Hence, the recommendations made by the Special Rapporteur in their mission's reports are of main relevance because they will allow the local organizations to use them in the dialogue with local and national public authorities.

The dhINTERNACIONAL Program has contributed to the elaboration of the recommendations of Special Rapporteurs who visited Brazil, by making alternative proposals. In the case of Mr. Despouy´s visit, these are included in the part III of this publication, that will be simultaneously launched in Brazil and in Geneva at the occasion of the 61st Session of the UN Commission on Human Rights to be held on April 2005.

The concern of the Brazilian civil society with the Judiciary is justified by historical reasons. This institution was developed in a very distant way from the population, with serious consequences on the fulfillment of the judicial task, in opposition to the ideal of universality of human rights, sanctioned by the provisions of the 1988 Federal Constitution and the international treaties of human rights ratified by Brazil.

According to Faria, Brazilian magistrates are ideologically divided: "majority of judges maintains a traditional interpretative posture, basically exegetic, while an expressive minority chose a heterodox hermeneutic, i.e. critical, politically aware and with a high social sensibility"[4] . The second posture actually reflects on human rights protection. The juridical world, especially magistrates, needs to be more aware of the social reality, to re-think the capacity of conflict resolution, both internally and internationally,

3 E/CN.4/2004/60, §30.

4 Faria, José Eduardo. Direitos Humanos, Direitos Sociais e Justiça. São Paulo: Malheiros Editores. 1998. P. 11.

in order to correct disparities, aiming at adopting a minimum standard of human rights respect.

Whereas the problem of both central and peripheral countries is to combine generations of rights, according to Campilongo "the new actors from an unequal country as Brazil do not show a minimum interest to release the State from its obligations arising from the social citizenship"[5] . Consequently, the Judiciary Power tends not only to keep on maintaining its capacity of ensuring rights, but also to enlarge it, in order to guarantee citizens rights against either public or private powers. This perspective does not mean, therefore, maximizing the Judiciary's role in social conflict resolution[6] , but this definitely has to assume an essential role. Despite the limits of justiciability of rights, this is a concrete a way to be considered.

This publication includes 37 cases sent by 12 entities or networks – considering that other 24 also contributed in different ways – covering 10 Brazilian States (Alagoas, Ceará, Maranhão, Pará, Paraíba, Pernambuco, Piauí, Paraná, Rio Grande do Norte and São Paulo), in which troublesome situations related to the Judiciary Power are reported. Such cases refers to various subjects, amongst them: agrarian reform, land violence, populations of Quilombolas communities descent, right to adequate housing, child and adolescent rights, judicial moroseness, abuse of conduct by judge, protection of workers' health in the industrial sector, witnesses of crimes against human rights. Although this is a collective work, we emphasize the institutional responsibility of organizations that reported the cases, considering the impossibility of the editors of having a deep and detailed knowledge of each related situation.

We also emphasize that, since 2004, the work of the dhINTERNACIONAL Program is strengthened by the granting of the *special consultative status* in UN Economic and

5 Campilongo, Celso Fernandes. Desafios do Judiciário: um enquadramento teórico. In Faria, José Eduardo. (Org.) Direitos Humanos, Direitos Sociais e Justiça. São Paulo: Malheiros Editores. 1998. Pág. 31.

6 See Grynszpan. Acesso e recurso à justiça no Brasil: algumas questões. In: PANDOLFI, Dulce Chaves *et al.* (Org.). Cidadania, justiça e violência. Rio de Janeiro: Fundação Getúlio Vargas, 1999. p. 112.

Social Council for GAJOP. The *special consultative status* will allow the Program to intervene with more autonomy in the fields related to human rights inside the United Nations system, participating in and expanding the international spaces of human rights' promotion.

Finally we thank our partners organizations – listed at the end of this report-book – for one more collective work, hoping to contribute in the debate and the reform of the Brazilian Judiciary in a democratic perspective.

Recife, 1st of March, 2005.

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Executive Summary

Brazilian judicial power is going through a period of difficulties, in which, amongst other problems, its inefficiencies and lack of concern for the poorer social sectors are being pointed out. In a context of aggressive globalization, where all public priorities are turned to the achievement of economic goals, the role of the Judiciary, as guarantor of the rights of all citizens, taking into consideration its historic conception as an institution to protect the rights of the most influential groups of society, is being questioned.

The difficulties faced by the Judiciary have been pointed out by several UN Special Reporters that undertook missions in Brazil during the last few years – in particular by Mr. Leandro Despouy, Special Reporter on the independence of Judges and Lawyers, in October 2004 – at the end of the same year, the Constitutional amendment n°45/04 concerning judicial reform was sanctioned.

In this context, the independence of the Judiciary, in terms of both the Judiciary as an institution and its main protagonist: the judge, is one of the most debated issues. It is noted that the security of an independent Judiciary is being affected in many ways in Brazil, both in a direct way (pressure, threats, criminal assaults) and in a more insidious way (corruption, connivance, partiality, nepotism, lack of transparency). This is also the result of structural problems such as: the lack of previously defined

clear and objective criteria for judges' promotion and removal, the deficiency of the judges qualification system, the weak financial independence of this institution, its low level of internal democratic participation, or even more, among other reasons, the lack, up to now, of efficient, external, democratic control of the Judiciary.

Depending on the situation, the judge may be a victim of interaction between all or some of those factors, or, on the contrary**,** he can become responsible for or encourage the loss of his own independence, if he sucumbs to the attraction of the benefits that such an attitude can bring him.

All those reasons which explain the high level of impunity and extreme slowness, in the exercising of justice, help to reinforce the disillusionment of the greater part of the population with judicial power, and it also damages the respect and effectiveness of fundamental rights sanctioned by the 1988 Federal Constitution and also by several International Human Rights Treaties ratified by Brazil.

Cases addressed by Human Rights Institutions from many regions of our country report all the above mentioned difficulties, in a very concrete way, in a diverse and representative number of social sectors which suffer from the aforementioned dysfunctions: Children and adolescents, rural workers and quilombo remainder inhabitants, city inhabitants with housing difficulties, population affected by the harmful effects of industrial products and witnesses of crimes against human rights.

Finally, collective recommendations have lead to courses of action to be taken in order to achieve the adequate adaptation of the Judiciary and judges to meet society's demands, which are becoming more and more complex and diverse.

PART I

Reflections on the independence of judges

The Crisis of the Judiciary in Brazil

JOSÉ EDUARDO FARIA[1]

In the 80´s the political debate was focused on the exchange process involving military and civil authorities in the Executive sphere, and the elaboration of a new constitution in terms of Legislative. In the following decade, the Judiciary was on the spotlight in the country's agenda. Part of the society considers the Judiciary the most retrograde Power of the Republic, as well as it is considered an inapt promoter of an essential service. The Judiciary is also insensible to the public financial issues, considering its expenses are questioned in terms of utility several times. Its sentences threaten an economic policy focused on monetary stability, as well as the sentences are able to block governmental initiatives. All these factors would block a reform of the State. This criticism puts the future of the institution in doubt in a context full of social and cultural inequalities, fiscal limitation and radical transformation in the way the economy works.

The aim of this essay is to identify some of the structural factors responsible for the "crisis of justice". First, it examines the difference between the courts in terms of

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architecture and social-economic reality in which they work, focusing the relations between the Judiciary and other political institutions and the society. The second and third parts discuss the "judicialization of the politics" showing how the Judiciary has become vulnerable to external influence, considering the overload of work and the complexity of the society. The fourth part highlights the corrosive impact of economic globalization in the sovereignty of the State, departing from the transformation in law promoted by the capitalism restructure. The fifth part shows how the globalization evolution promotes the shift between the monism and the pluralism in terms of law, what replaces the exclusivity of the judiciary. The last part lists the challenges to conciliate low cost and efficiency, preservation of law and justice.

1 The Judiciary and the social-economic context in Brazil

The "crisis of the judiciary" is reflected in its 3 basic functions: the instrumental, the political and the symbolic (Santos et allii, 1996). In its instrumental function the judiciary is the main locus of conflict resolution. In the political function, it plays an important role in terms of social control, making the accomplishment of rights and obligations, reinforcing the structures of power and promoting the integration of the society. In terms of symbolic aspects, it disseminates the sense of equality and social justice in the society. It socializes the expectations of people concerning the interpretation of the juridical order and calibrates the existing standards of legitimacy in the political life.

The structural incompatibility between the Judiciary's architecture and the social-economic reality of the society provokes an inefficiency to exercise the functions cited above. In historical terms, since the first years of colonial Brazil, from one inquisitorial institution forged by Portugal based on cultural roots of the Counter Reform, till the contemporary days, the Judiciary has always been organized as a bureaucratic system of written procedures with a confused system of terms, bodies and appeals. In functional terms, the institution was conceived to exercise the instrumental, political and symbolic functions in a stable society, with equal levels of income distribution and a legal system integrated by norms which contained standard, uniqueness and hierarchy

in formal-logical terms. The juridical conflicts would be basically inter-individuals and would happen from united interests; however they would be faced in an opposite perspective by the parts. This way, the judicial intervention would only happen after the violation of a right and its initiative would be in charge of the person who was damaged. The judicial litigation would have a retrospective horizon, referring to past events. The law suits would be a process mostly controlled by the parts who would define the questions taken beyond the courts. And the impact of judgment would be their matter.

The Brazilian reality is incompatible with this model of Judiciary. Contradictory and conflictive, it is characterized by social, regional and sectorial inequalities; by situations of misery that deny the formal equality principle and impede the access to the courts for many people and endanger the effectiveness of the fundamental rights; by the increase of unemployment and informal workers; by an urban violence which challenges democracy and comes from economically excluded social sectors to whom the only way of surviving is the day by day break of the law; by a worrying increase in criminality indicators and finally by a fragmented legal system, unable to be predicable concerning its rules are created for a certain conjuncture.

Motivated by all these factors, many social movements appeared in the 70´s and 80´s aiming the amplification of access of marginalized population to the courts. The Federal Constitution of 1988 demanded the recognition of new rights and the courts were overloaded with millions of petitions. However, the courts have never given a final and coherent solution, in a reasonable term, to similar pleas.

The offices have become Kafka´s machines to produce transcriptions, to send certificates and notifications which convert judges into managers of jammed offices, when they should be exercising the jurisdictional function. The formal way the superior courts work provokes the delay of a final solution to the cases and also changes the focus of the judgments. The analysis of procedural details becomes more important than the analysis of essential issues of the litigation. Between 1990 and 1994, 23,18% of the cases decided by the Supreme Federal Court concerned technical procedures

and in 36,37% of the cases the court applied process law arguments as the fundament of their sentences (Castro:1996). Finally, the courts of appeal have become an administrative chamber to confirm identical sentences to identical situations because of a system full of details. Between 1991 and 1996, 84% of the extraordinary appeals judged by the Supreme Federal Court were repetitions of cases already decided by the Court (Arantes e Kerche, 1999:39). In this organizational context, the Judiciary is not able to give answers to its problems.

How can the Judiciary survive if it is too closed and not able to self-evaluate and to answer the external questions? How can it exert its instrumental, political and symbolical functions efficiently? How can it lead with emergent conflicts in a heterogeneous and conflictive society, if the juridical system got old? How can it apply the rights of last generation, if the professional culture of the judges was forged based on premises which are not compatible with the social and economic reality? How can it translate the public interest in concrete situations when there is a conflict of interests between the diffuse rights and the private property rights? If the proceedings rules were conceived to solve inter-individual litigations, how can it deal with group and class conflict? How can it impede the abusive use of appeals which has banalized the superior courts? If the decisions of the judges just refer to the questions in the process, how can it act when the solution of the litigation depends on public policies by the Executive? How can its sentences be coherent if the legal order is inflated and it does not permit similar decisions and it is needed articulation between its bodies? How can it proceed when the other powers need decisions from the courts?

2 The "judicialization" of economy and politics

The lack of plausible answers to these questions exposes the crisis of the Judiciary. As the anachronic proceedings mechanisms do not permit the correct selection and the objective course of the litigations, many times they go in their primitive and explosive state to be appreciated by the magistrates. Then, they find problems to issue coherent and predicable sentences**,** what ensures the compliance with the laws and the contracts.

As the magistrates have to give an answer to the cases brought before them, regardless of the technical complexity and the economic, political and social implications, they feel unable to exert creativity on their decisions which goes beyond the limits of the legal order. In "difficult cases", when the interpretation of a rule is not clear or it is controversial, "the judges have to innovate, using their political judgment" (Dworkin, 1997). The problem is that in many cases, the judgment does not only say what is right and what is wrong according to the law, but also ensures the objectives of the law. The Judiciary does not have proper resources to implement its sentences, particularly the ones which demand material sources and investments by other sectors of the public administration. The institution is in a difficult situation, as it depends on acts, expenses and public programs which are out of its competence.

2.1 – On one hand, when the judiciary insists on facing the Executive, making it offer theses services in a context of fiscal "responsibility" and budget reduction, as well as promoting the control on the constitutionality of the laws and making the economic authorities respect the limits of the legal order, the Judiciary is accused of "judicializing" the politics – of invading areas that are out of its competence, of multiplying the tensions in the governmental sphere. As a consequence, it is threatened with retaliations, because it does not understand the "systemic rationality" of the economy – the term "incomprehension" has been used very frequently by the Executive as a justification to impose barriers to the "justiciability" of its acts and decisions.

The less the macro-economic stability, the bigger the governance crisis – this would be the immediate effect which the "formal idealism" of the magistrates would impede the governors to neutralize, according to their own opinion. The more the governor's power of decision, the less the juridical certainty – according to the magistrates, this would be the corrosive effect of an "economic rationale" which, without a constitutional control, would conduct towards the erosion of the State of Law and to the substitution of the democracy by a bureaucratic-authoritarian regime. It was not a coincidence the proposal to create and external control and a binding summula. This happened after many judges persecuted different sectors of the public administration in order to

create conditions to implement the economic and social rights established in the Constitution; or after the judges interpreted the Constitution in a way that threatened the interests of the responsible for the "fiscal adjustment" policies in the Executive; or because the judges decisions provoked huge costs to the governance, as in the lawsuits related to taxes, and salaries, for instance.

2.2 – On the other hand, to neutralize the risk of retaliations, the Judiciary is able to act pragmatically, tolerating the Executive's argument of "fiscal adjustment" needs as a justification to legislate past situations and to intervene in acquired rights. It also uses commutative justice criteria to judge lawsuits from certain social sectors in order to recognize their rights to citizenship. It is also able to use some arguments as the need for modernization, more investments in technology and structure and the expenditure of the number of forums and judges, keeping themselves far from the operational efficiency and the social justice. There is also an alternative to expand the special courts (juizados especiais) to minor conflicts, what liberates the courts to the solution of more complex and more serious conflicts. This is a successful experience in order to simplify the proceedings in the commutative justice, but it limits the constitutional guarantees and it does not work in the penal area, particularly in controversies involving social rights and distributive questions.

Table 1

	Autonomy to decide	
Judicial creativity	Low	High
Low	1	2
High	3	4

Source: Guarnieri (1996) and Campilongo (2000)

The "judicialization" of the politics is a complex phenomenon and involves different factors. One of the most known is the inability of the State to control, discipline and

regulate a complex and global economy with normative instruments from a juridical order as a result of a Roman system without links to the contemporary reality. The Executive legislates to coordinate, to banalize and to discipline the behavior of the productive agents because of the pressure it suffers from conjuncture factors and the challenges by contingencies which threatens its authority, by circumstantial correlations of powers, by the exercise of incongruent functions and by the pressure to make decisions opposite to the social interests disciplined in constitutional rules. But this legislation does not only damage the Constitution, it also puts together different matters in one single text or fragmentizes the same matter in different laws.

The result of this strategy is a paradox. The more the Executive uses it to discipline the functioning of the economy, the less it sees its goals made concrete and its decisions obeyed. The more rules it creates to solve specific problems, the more the problems are multiplied, because these rules are intercrossed and create complex normative chains, rupturing the logical unity and the conceptual coherence and the doctrine uniformity of the juridical order. When it should promote certainty and raise the efficiency of the laws, because a successful application of the law always provokes effects that strengthen the general confidence on the juridical system.

The Executive legislates non-stop to give stability to the currency which provokes legal instability. The conflicts grow and the tensions are multiplied. It reduces its power of decision and it makes the rational calculus between the productive agents difficult. It distorts the formation of relative prices and it disseminates the insecurity in the economic system, forcing citizens and companies to knock on the courts doors.

Then, the phenomenon of the "judicialization of the politics" happen (Tate and Torbjorn: 1997). As this juridical order does not offer conditions to extract permanent criteria of interpretation, it demands a continuous interpretative work. As its definitive sense can only be established when it is applied to a concrete case, in practice judges assume an effective legislative power. When they apply the law to concrete cases, they become co-authors. For this reason, the Executive and the Legislative are unable to formulate similar laws and without gaps. They are also unable to respect the general

principles of law and to incorporate the legal innovations demanded by the growing integration of markets which raises the possibility of choice and decisions offered to the magistrates. It makes the politics a court issue or the economic life becomes a judicial question. It is the inability of these two powers to formulate a juridical order with unity and coherence which leads the Judiciary to decide short term legal questions with huge economic and social implications, converting the Judiciary into an active institution to legislate.

These problems were explicit during the process of elaboration of the Constitution. The authors pragmatically wrote a Constitution with 'textual opening" in the most polemical matters, because of the lack of homogeneity of groups of legislators which could promote a precise juridical treatment.

As no political party had a qualified majority to act according to a political project able to give a minimum of conceptual coherence and doctrine coherence to the new constitutional order, the strategy used to allow the conclusion of the work in time was the adoption of programmatic rules and the undetermined clauses which would be regulated in the future by supplementary and ordinary laws in another political context.

Because of this, part of the Constitution did not have a clear definition, being impossible to know clearly what acquired right is in fact, what can be object of amendment and what was converted to *petrea clause*. It is spread by many chapters, articles and incises which, on one hand express the precarious balance among the different political powers during the process of elaboration of the new constitution, on the other hand they formally freeze certain social and economic situations without explaining how they could be kept in material terms. In this context, the Judiciary had its power of decision amplified, playing a role in order to revalidate, legitimate, legislate and to be a body of appeal against the decisions of the political system.

At first, this system is able to postpone its decisions to a more suitable moment, facing the Constitution as a flexible formula of collective decisions. (Table 3). The same thing does not happen with the courts. Because of its nature, structure and

function, they have to decide when called to. Even when the rules to be applied are open, undetermined and with gaps, they have to play their role. For the Judiciary, its decisions are based on the premises offered by the political system as laws. If these premises are not coherent, because the legislative production of the Executive is more often directed by its contingent answers to the economic changes, the courts can not be accused for problems which are not its in a material point of view.

Table 2

	Sistem	
Characteristics	Political	Judicial
Actors	Many parts represented by many political parties	At first, two parts with a third participant (the judge)
Litigation	Collective	
Contradictory	Multilateral	Bilateral
Basic decision principle	Rule of the majority as a criterion and with fundament on the decision	Impartial application of the law by a judge
Decision horizon	Prospective	Retrospective
Actor's vision	Macro	Micro
Rationality	Material	Formal
Autonomy	It relates the demands which are decided on a convenience and representatively basis	It can not choose demands, neither delay decisions unlimitedly
Reach	All society	Only the parts of the process

3 The risk of not making the difference between the economic and the judicial systems

This has been the essential question concerning the conflict of interests between the Executive and the Legislative with the Judiciary since the fiscal responsibility policies in the 90´s. If the role of the courts has grown to the point of having political functions, blocking some actions and initiatives of the Executive or substituting the Legislative, it happens because the Constitution of 88 allowed it. The Constitution has given the Judiciary a large amount of rights, including the enlargement of guarantees to protect the fundamental rights. The relation between the Government and the Congress is typically political and because of the rigidness of the Constitution in terms of separation of the powers, it lacked an arbiter. Then, this role was given to the Judiciary. However, how can we be sure that this role will be played essentially in a technical way? How can the judiciary conciliate the political nature of the institutional conflicts taken before it with the need for decisions based on the law? (Sadek e Arantes, 1994:37).

The problem is that, on one hand this can be used as an "argument of defense" by the Judiciary to refute the critics from the other powers, on the other hand it leads to a replacement of proceedings and logical decisions, to the erosion of the values of the Executive and the Legislative and also to an overload in the *policy-making* of the country. The institutional tension and the called "crisis of governance" are the visible consequences of this lack of difference between the roles, competences and prerogatives of the Executive, of the Legislative and of the Judiciary. A juridical anomy is the limit.

In order to neutralize these risks, it is not a role of the judicial system to overcome the inability of the Executive and the Legislative to decide. As well as it is not its role to put values such as the fiscal balance in detriment of its ones, in the name of the "highest interests of the Nation". This is the economic system function. In a complex society, the role of the judicial system is to apply the law, which is why its operative modus is binary, because its structures are only prepared to decide between the legal and the

illegal, the constitutional and the unconstitutional. The judicial system can not be insensible to what happens in the economic and political fields. But the courts are only able to translate this sensitivity on the limits of its operative capacity. When a question is taken before the courts, the maximum they can do is decide if a political or economic decision is constitutional and legally valid. If they go beyond, they are not playing their role properly and it justifies reactions from the other systems.

What are the consequences of the not making the difference in terms of functions of these systems for a complex society? Does the counterattack of the political and economic systems against the extravasations of the functions of the judicial system lead to the loss of its autonomy? (Campilongo: 2001). How can autonomy be preserved when the courts abandon the limits imposed by the juridical system? That is why, when the Judiciary incorporates elements which do not belong to the logic of the juridical system, it breaks its operational logic and makes the application of the law a political issue. This process leads to the erosion of the standards of reference, with tragic consequences.

When the courts are overloaded with other functions or when they are in conflict with other powers, the loss of speed, coherence and quality in its services become a synonym of justice denial – mainly to the low income population. In the political system, late and incoherent judicial decisions foment "crisis of governance". In the economic system, the

Judicial inability to confirm the expectations of the right becomes a factor of insecurity dissemination in the business world and it provokes the multiplication of indirect costs, with a negative impact in the development of the companies, in the legal protection of credits and in the establishment of measures in case there is a need for exaction of credits, also in the definition of material and intellectual properties and in the quality of macro-economic policies.

In the generalized process of not making the difference among the judicial, administrative, political and economic systems, the effects can be mortal for democracy

and for development. In the first case, if in the functional view, the role of democracy is to keep high possibilities of choice and open alternatives of decision. When they are reduced drastically, the fundamental rights and the public freedoms tend to be in danger. In the second case, imprecise judicial orders in terms of form and contradictory in terms of contents, applied by overloaded courts and unable to fix a uniform jurisprudence, always generate additional costs which are transferred to the global cost of the loans through risk taxes.

If the economic agents are rational actors and if their objective consists on maximizing scarce resources, neutralizing risks and minimizing expenses with information, negotiation and contract execution, they will need a clear and precise legal scenario in order to take decisions. In the market, decisions in order to make investments are directly related to the objectivity and the conditions of contracts, the financial operations and the business activities – more precisely, with the security which the investors feel in the way they solve eventual juridical problems involving their resources or the loan borrowers´. (Pinheiro: 2000). When the confidence is low and the results of the economic business are not safe and predicable, the investors add a value of risk to the total of the investment in order to protect themselves. They anticipate the legal and judicial problems they might face. Then, considering the inexistence of an internal saving to finance its own process of development, there is a question in the air about the way the country could attract external resources when there is an imprecise national legal order and an inefficient judicial system.

4 The Judiciary and the integration of markets

With the integration of markets in the last decades, the economic "globalization" modified the notion of time and space. It made the importance of the economic borders relative and made the control of capital flow a difficult process. The globalization process substituted the politics by the market, as the highest body of social regulation. This phenomenon made vulnerable the autonomy of the governors to decide. They have low power of influence and pressure. The international competition

has determined the fiscal and monetary standards what makes the governments reactive and subjected to new conditions. The idea of justice through a tributary policy was emptied and the cuts on social budget and the shortage of the State became an instrument to reduce rights. The system of guarantees, protection and the offer of basic material conditions were destroyed in the name of a process of opportunities equalization. Governmental obligations were converted into a private business and a person that had civil rights was reduced to a mere consumer of business services in a low competitive market and with huge unbalance of power between offers and demanders. The social and economic inequalities were aggravated and the conflicts got stronger among the local, the regional and the central powers.

In order to generate new types of power, the globalization questioned the centrality and the exclusivity of the juridical-judicial structures of the State. The judiciary was not immune to these transformations. In the period of competitive capitalism, it was conceived to preserve the private property, to make individual rights efficient, to ensure the fundamental rights and to guarantee the public freedoms. In the period of organized capitalism, the Judiciary implemented social rights, conditioning the formulation of public policies with compensatory and distributive purposes. With the reorganization of capitalism, this Power sees an uncertain scenario where the State looses its autonomy to decide and the juridical order does not have the some ability to "program" behaviors, choices and decisions.

Because of the new world division of work, the Judiciary, under a hierarchical organizational structure, operatively closed, orientated by a legal-rational logic and submitted to the law in a rigid and linear way, became an institution which has to face the challenge of widening the limits of its jurisdiction, of modernizing administrative structures and of revising its functional standards in order to survive as an autonomous power.

4.1- In terms of *jurisdiction*, as the Judiciary was organized to act in a precise territorial limit and in the context of centrality and exclusivity of the States, its reach tends to diminish in the same proportions the geographical barriers are overcome by

the expansion of communications and transportation and when the economic actors establish multiple nets of interaction. The more the speed of this process is, the more the Judiciary is affected by the regulatory pluralism and by the emergence of less institutionalized mechanisms of conflict resolution. The more intense the economy integration in the planet is, the more affected by emergent justices the Judiciary is in terms of infra-state spaces (the local ones, for instance, with a strong influence by the community) and in terms of supra-state spaces (the international and transnational justices from the multilateral organisms and the market).

All these justices vary according to its level of formality, access, specialization, reach and efficiency. Nowadays, the infra-state spaces have been polarized by "unofficial" forms or non-official forms of conflict resolution (from the self-composition of interest to the imposition of the strongest law in ghettos from big cities) and by alternative means of extrajudicial conflict resolution (administrative intervention, professional self-regulation, strategies of mediation conducted by mediators chosen by the parts, conciliation techniques and arbitration, etc.) (Fitzpatrick: 1988 e Moreira: 1997) The supra-state spaces have been polarized by the transnational jurisdictional bodies and by extra-judicial judicatory mechanisms created and/or stimulated by the multilateral organisms, joint ventures, financial institutions and NGOs.

4.2 – In *organizational* terms, the Judiciary was structured to operate under the process of legislation, whose terms and rites are incompatible with the multiplicity of logic, values, decision process and time horizons nowadays present in the global economy. In this economy, the sense of time is given by a material rationality, by the calculus cost/benefit and by the expectation of profit, while in the courts time is associated to the process guarantees.

For the law, the time in a judicial process is a synonym of security and it is conceived as a relation of order and authority, represented by the possibility of using all the resources and proceedings in a law suit. Each part, intervening in the right moment, is able to present its arguments and they have the guarantee to be heard in the defense of their interests. In this perspective, the time is used as an instrument of certainty, as

it impedes precipitate judgments, not distant to the facts which gave reason for the law suit. The time of the global economy is the real time, the time of simultaneity. When the global economy becomes more complex, it generates more contingences and uncertainties. It makes the agents develop complex mechanisms to protect their business, money and investments from the unpredictability and the undetermined. The promptness becomes a basic condition to the neutralization of the risks from the tensions and unbalances of the markets, which leads to a process of decision based on the capacity and the speed to process highly specialized technical information. Because of this, companies and financial institutions see the time in the civil and penal process as a synonym of elevation of costs in economic business, finding a good argument to justify this point of view in the tendency of having more law suit decided by the application of process law in detriment of the decision based on merits of substantive law.

4.3 –In the organizational plan, the judiciary normally does not have the material and technical conditions to provide its staff with training and specialization to understand the litigations related to complex social and economic contexts, as well as the transnational ones in terms of material rationality. The big corporations are aware of the difficulties of some judicial institutions to deal with what is new and to know its historical context. Then, these corporations are able to avoid countries with Roman law based courts which are held to some juridical archetypes.

This movement has three dimensions: a) transnational corporations tend to respect selectively the distinct national legislations, making an option to concentrate their investments in countries which have a more favorable legislation for them (North: 1990; and Pinheiro: 2000); b) these corporations also tend to search alternatives to the traditional process and to use specialized alternative bodies, in the governmental sphere (through independents and authorities with power of decision, regulation, control and supervision and with technical capacity to lead with complex litigations and with penalties), in the social sphere (through technicians of negotiation, mediation and arbitration) (Auerbach: 1983); and c) they tend to create the rules they need and they

establish mechanisms of self-resolution of conflicts. For the big corporations, the discussions may be faster and objective; old-fashioned codes are substituted by rules and rites defined out of the State sphere; etc. They save time, what makes the combination of fast decisions, process decomplication and low cost be converted into the basic standard of evaluation of public and private proceedings of conflict resolution.

4.4- In *functional* terms, as it was conceived with the exclusive prerogative of positive law application, under the form of a juridical order postulated as complete, logic, coherent and free of gaps, the monopoly of the Judiciary is challenged by the expansion of normative orders and practices which, when they do not deny the courts the exclusivity to exert its function, to rupture conflict of interests, they modify the traditional concept of jurisdiction, broadening it. As it is seen in table 3, they are autonomous and semi autonomous rights, with rules, proceedings and own resources, coexisting with different norms. It is an infra-state juridical pluralism or supra-state. In the economic sphere, on one hand the *Lex Mercatoria,* the autonomous body of practices, codes of conduct, contract clauses and market principles elaborated by the corporate community to self-discipline their activities in an international scale. On the other hand, the *Right to Production*, the group of technical rules formulated to the demands of minimum standards of quality, transportation, security of goods and services, specification of its components, certification of origin of raw materials, etc.

Table 3

Types of Rules and Their Judicial Practice

Types of rules and Characteristics	Marketing Lex and Right to Production	Unofficial Law	Positive Law	Marginal Law
What is at stake	Tensions non declared in public	Material Conflicts	Juridical Procedural Litigations	Aggressions
Objectives	Continuous relations	Substantive solutions	Formal solutions	Defense
Types of rules	Pragmatic and casuistic	"ad hoc" solutions	Codified Law	The law of the strongest
Rationality	Procedural	Material	Formal	Irrational
Formalization modus	Contractual	Negotiation	Application	Lack of formalization
Type of proceedings	Transaction Mediation	Conciliation Arbitrage	Decision	Punishment and Repression
Institutionalization degree	Flexible organization and self-regulated systems	Semi-autonomous social field	State normative field	Social and criminal marginality
Law effectiveness	Acceptation or inclusion	Adaptation to the context	Applicability pretension	Continuous challenge of the order

Source: Adapted from Rouland (1988:447)

As illustrated above, in the infra-state plan, the juridical pluralism had technical-professional justice (specialized in arbitrage) and non-professional and informal (the communities) as a result. Both kinds of justice are operated on criteria of material rationality and they embrace intra-groups, intra-communities and intra-classes conflicts;

and in the supra-state plan, the proliferation of decentralized forums of negotiation and multiplication of normative-technical bodies – as the International Accounting Standards Committee – created to fix parameters, send opinions, etc.

4.5 – Before the increasing autonomy of different sectors of social life promoted by globalization, the Judiciary was taken to a crisis of identity. On one hand, the State to which it belongs to, when promulgates its laws, more frequently is forced to take into account the international issues to know what can be regulated and the rules which will be effectively respected. On the other hand, the courts and the other powers of the State are no more able to regulate complex social contexts through its rules or "directive constitutions" – those who introduces incompatible goals and values with the ones from the positive law. Then, you have the strategies of de-legalization and de-constitutionalization which have been adopted since Reagan and Tatcher, being spread from the USA and England to the rest of the world. In parallel, you have the privatization programs and the substitution of state social security mechanisms by private insurance, amplifying the intercrossing of distinct normative orders.

5 The Judiciary and the processes of de-regulation and de-legalization

The calculus of costs/benefits by legislators has motivated the proliferation of these strategies. On one hand, they are aware that, when they try to use the law as an instrument of control, planning and economic direction, it happens like in the 60´s and 70´s when the States tried to go beyond the permitted by the juridical logic and rationality. On the other hand, with simple normative mechanisms to face different questions and without conditions to amplify the complexity of its judicial-normative order to the similar level of the complexity of social-economic problems, the legislators have used the de-regulamentation and the de-constitutionalization policies. The "fiscal" crisis of those States in the 80´s has shown that these policies are their option to preserve authority, considering they haven't been able to control and direct themselves. The less they intervene, the less will be the risk of being demoralized by the infectivity of its regulatory instruments.

In Brazil, the consequence of this process has been an obscure articulation of internal and external systems and subsystems in the micro and macro plans. One significant part of the national rights has been internationalized by the expansion of the *Mercatoria Lex* and the *Right to Production.* Another part has been emptied by the growth of "private" norms in the infra-national plan, when huge corporations take advantage of the normative gap left by the de-regulation and de-legalization strategies. They create the rules they need in their area of action. The de-regulation and de-legalization at the nation-state level mean the re-regulamentation and re-legalization at the level of the society (Santos: 1995) – to be more precise, at the level of the private organizations which are able to promote direct investments, bring high-technology, etc.

Contributing to the crisis of the Judiciary, the law it has always applied, in countries with juridical institutions of French-Roman origins, is with its formal-logic structure rotten. This law has its organism fragmented by a multiplicity of specialized juridical branches, what provokes a rupture in the conceptual structure of the juridical-technical culture (with private inspiration) of the magistrates. It is also obliged to answer the social and economic demands in a casuistic way and *ad hoc*. The remains of that structured order with completed principles and coherence is replaced by a "non-codified" legislation, which seems to walk in the direction of different normative chains and in the substitution of general interests (as total principles of the juridical system) by corporative interests in conflict between themselves. On the limit, this would be a typical legislation of a State which, no more occupying with exclusivity a central position in the control of the society, is reduced to one of its functional systems, among others.

6 The future of the Judiciary

Will this scenario lead to the disappearance of the Judiciary? It tends to lose its judicatory monopoly in some areas and matters, but it won't disappear. Its future depends on how it will behave in four fields:

6.1 – The first one refers to the social consequences of globalization. As it is a perverse phenomenon, deepening the social exclusion when the gains with productivity

are obtained with the salary degradation, the computerization of the production and the closure of work posts, and as how its evolution created new forms of criminality and economic illicit, demanding answers by the juridical-judicial institutions which were not prepared to face the symbiosis between economic marginality and social marginality launched new challenges in security matters. With globalization, "excluded" of the economic system lost the material conditions to exert their fundamental rights, but they are not freed from the obligations set by the legislation. The State integrates them to the juridical system in their marginal aspects, as under obligation, invaders, etc. Before the amplification of inequality, criminality and the tendency to the collective disobedience by part of the groups situated in the informal economy, the State would reinforce the repressive character of the criminal laws, forcing the Judiciary to apply them. For that, many governments try to change the conception of minimal intervention in penal law, making it more interventionist and precautionary, through the dissemination of fear against its "target" (the excluded) and the emphasis on a pretense guarantee of security.

In terms of economic and labor rights, we live a period of "flexibilization" and de-regulation, in penal law there is a fast definition of new criminal types, justified by the combat on terror, on organized crime, on the money laundry operations and the illegal immigration. There is a tendency of large application of the imprisonment penalty, the shortage of criminal investigation phases and proceedings and the inversion of the *onus probandi* which endangers the legal guarantees.

6.2 – The second area refers to the consequence of the unbalance of the powers initially provoked by the expansion of States of development in the 60´s and 70´s, and from the 80´s, by making the sovereignty relative, with the appearance of globalization. If, at first, to answer the social-democrat pressure, the Executive attracted the legislative initiative, "publicizing" the private law and " making the public law administrative, on a second moment its collision with the Legislative lead the Judiciary to act as a body able to solve the institutional conflicts and to overcome the lethargy to decide.

As the judges are entitled to judge according to the juridical order and on the limits of the process, this obligation gains relevance towards the transformations of the juridical order. Because of the conflict of competences between the Powers, also because the Judiciary has always had to act in a more complex way than the Legislative and the Executive. Yet because of the resistance of some sectors of the society to the annulment of social and fundamental rights through the processes of de-regulation and de-legalization. The more difficult this scenario is, the more difficulty the Judiciary will have to solve conflicts.

6.3- In spite of its tendency to use extra-jurisdictional ways of conflict resolution, the foreign investors tend to feel more confident when the coefficient of juridical certainty where they apply their resources is high (World Bank:2001).It implies in the recognition of the private property. It demands juridical protection to the credits and the establishment of normative initiative to impede their exaction. It demands the observation of contracts and the respect to the intellectual property. It also requires efficient courts able to compensate, in terms of juridical and economic security, the rejection of other ways of litigation solution.

In terms of external investments, in a juridical-judicial order with these characteristics, the indirect costs of the judicial infra-structure tend to be low which becomes a factor to attract capital. In opposition, delaying and inept courts, unable to fix a uniform jurisprudence and to take predicable decisions, lead to options of extra-jurisdictional ways to solve conflicts. It provokes additional costs which are transferred to the price of loans, through the taxes of risk. The initiatives to invest or liberate credits are related to the security the international investors feel in the ways to solve juridical problems involving their resources. When the confidence is low and the results of the economic business are not safe and predicable, the investors add a value of risk to their investment in order to have some kind of protection. It is a way to anticipate the legal and judicial difficulties which may happen.

6.4 – The fourth area refers to the traditional problems of the "corrective" justice and the amplification of the access to the courts. The Judiciary adopted the special

courts (juizados especiais) to face these problems. Although they look like a second class justice to second class citizens (Santos: 1996), we can not underestimate the contribution of these special courts to make the access of the population to the courts possible. The unequal welfare distribution and the distortions caused by this distribution made many matters in the field of the "commutative justice" be contaminated by distributive conflicts, which convert "simple" and trivial questions into political questions.

This contamination has become evident by the ideological treatment to matters like pensions, health insurance, rent, etc. In other moments, it has been expressed by the magistrates, in the way of "judges for democracy" and "alternative" judges. Both of them reveal conscience that the rupture of the unity of the juridical order in normative chains permitted the polarization of the category as there is an increase in more possibilities of choice and decision. They diverge in terms of the orientation they should adopt, motivating the return of the juridical debate on the problem of the reach and the limits of the interpretation. In social and economic contexts stigmatized by deep dualisms, may the interpretation be summarized to a simple act of knowledge (and not of decision, it means, non-political) and the description of rules (and not of creation)?

The first doubt is to know if the Judiciary will know and will be able to administrate these contradictory roles – one, punitive, applied to the marginalized sectors and that is imposed by the repressive character of the new penal law, and other, distributive, what implies in the adoption of compensatory criteria in favor of these sectors, aiming minimum standards of equity.

The second doubt is to know if the members of this Power, of whom 50% come from families with positions in the public sector (Vianna:1997), in which manner does the mentality of the corporation have conscience of this contradiction? Also, this fact demands a discussion about the democratization of the institution. How can an autonomous Power, which controls the access to its posts and where the value of independence is above efficiency and transparence, be the depositary of the democratic

legitimacy? A Power, whose corporate spirit does not have any self control. Finally, a united and homogeneous power in parts, but socially isolated and opposite to debate its problems, which insists in being the only guardian of the values of justice and which does not answer the demands, disqualifying its critics.

The third doubt is to know if the magistrates, in this moment of career standardization and social and professional de-valorization of the corporation, will be open to learn from this debate. It means: (a) if they will have conscience that the Justice, as a public service, is subjected to budgetary restrictions and that the reason for its modernization can not be considered a synonym of new buildings construction. (b) If they will know how to adapt the old administrative practice and the professional culture affected by the globalization to the growing convergence of institutes, categories and proceedings from civil law to the common law (c) If they will be able to reformulate the mechanisms of admission of new magistrates who nowadays do not care about the ethical criteria and the citizenship culture. At this moment, they are limited to evaluate theoretical knowledge of the candidates, giving more importance to a technical-bureaucratic culture, compatible with the role of executive-judge and delegate-judge, but which is not compatible with the complex questions taken to the courts nowadays.

7 Conclusion

Normally the quotidian, organizational and functional knowledge are enough for the functioning of the society and for the differentiation by the institutions between what is right and what is wrong; what is new and what is an anachronism; good and bad. In the period of intense and radical transformation these distinctions become difficult to be recognized and the uncertainties multiply (Santos:1996). In these situations, the institutions have to reformulate their cognitive rules and to revise, deepen and refine their mechanism of learning in order to neutralize risks and be able to adequate themselves to new winds and to guarantee the conditions of survival.

It is based on this learning that the magistrates may be aware of the crossroad where they are. On one hand, the Judiciary is part of a State whose capacity to legislate has

been ruined by globalization. On the other hand, it is situated in an explosive social context which does not remind that idea of a society (typical from the juridical culture of Coimbra) with a plurality of free and independent citizens.

It is called by the "excluded" in order to solve conflicts which affect the process of wealth appropriation and equal distribution of social benefits, but despised by the "included" sectors of the tansnationalized economy The Brazilian Judiciary is a Power which has to redefine its field of action and to forge a more precise functional identity. The institution has the legitimacy given by its institutional independence, by its functional efficiency and by its moral authority. This legitimacy has to be validated by practice, day by day in the courts. That is the reason why the institution must change.

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Independence of judges and international human rights.

SÉBASTIEN CONAN[1]

Introduction

The question of the independence of judges and of the Judiciary – subject of many debates in Brazil – has been largely considered at the international level for many years, within the process of the universal consecration of human rights during the second half of the 20th century, being considered condition sine qua non for the accomplishment of these rights.

Judicial independence can be defined as the faculty for the judge to fulfill his duty on the basis of the objective analysis of facts submitted to his judgment, according to his understanding of the law, free of any external influence, pressure, threat or interference, direct or indirect, from any quarter or for any reason.

In the current context of the reform of the judiciary and of the crisis under which this institution is going in Brazil, this study considers that specific aspect of the debate –

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the independence of the Judiciary – in light of the international law of human rights. With the work carried out by the main international organizations over the last decades, today we have a large set of reference instruments in terms of human rights, that permits us to make a qualitative follow-up analysis of the fulfillment of these rights. However, the consecration of fundamental rights would have had a limited impact if, in tandem, rights linked to the access to justice had not been duly recognized, because a right has validity only when it can be invoked in law.

The existence of the main international courts of human rights – amongst them the European and Inter-American Courts – is justified by the necessity to strengthen the national systems of justice, especially in relation to the rights linked to the access to justice. Indeed, the judges who are on the front line, leading almost daily with cases of violations to human rights, are the national judges.

This study starts from the idea that the independence of the Judiciary constitutes an essential pre-requisite for this institution to fulfill its mission of guaranteeing the fundamental rights of the citizens in any democratic society. For that reason, judicial independence must be preserved and improved, and, from that perspective, the contribution of the international law of human rights can be extremely valuable to put the national debate under a new light, considering that the fight for the accomplishment of human rights is worldwide, and that the global and regional instruments of human rights protection still cross national frontiers with difficulties, especially in Brazil[2] . We will observe that, more than a privilege of the institution, judicial independence is a guarantee for society.

The question takes on a particular meaning in the Brazilian context, bearing in mind the fact that Judicial power, amongst other public institutions, was historically built and consolidated to protect the interests of the elite classes of the society, and directed

2 It has to be reminded that the goal of this study is not to examine specifically the particular factors that explain the lack of independence of judges in Brazil.

against specific social groups, whose rights have been traditionally disrespected by the justice system.

However, society evolved, in its more diverse aspects (political, institutional, economical, cultural, etc), and the social relations generate more and more conflicts, of diverse and complex nature, which represent new challenges for State institutions, including the Judiciary. However, according to the Brazilian jurist Dalmo Dallari, "there is a clear gap between the Judicial Power and the necessities and exigencies of the contemporaneous society"[3].

At the international level, faced with the tumults resulting from the so-called neo-liberal globalization, that challenges the institutional powers of the states – particularly the Executive power, and, at a lower level the Legislative power – demanding more and more of their economical and tax policies resulting from the primacy given to the economy at the global level, Judiciary Power appears to be the ultimate institution able to ensure the protection of fundamental rights and guarantees[4].

The main international instruments of human rights recognize today the imperative to protect and guarantee the independence of judges and courts. For that reason, the ways of progressively improving the implementation of such rights, both at global and regional level started to be discussed, especially through the use of the international courts of human rights. In addition, the United Nations developed consistent documentation on the topic, especially on the basis of works carried out by various specialists who have studied the issue since the Seventies.

In this way, this study aims to examine relevant points related to the independence of judges, on the basis of international instruments of human rights, on the various

3 DALLARI, Dalmo de Abreu, O poder dos Juízes, Editora Saraiva, São Paulo, 1996. p.7. Translations of citations to books written in other languages than english, are free.

4 On the subject, see FARIA, José Eduardo, Direito e Globalização Econômica: implicações e perspectivas, 1a ed., Malheiros, São Paulo, 1998.

principles elaborated by the UN, on the Brazilian and international doctrine and on the jurisprudence of the main international courts of human rights, starting from previous considerations on the role of judges in relation to human rights[5]. To do so, we will make frequent links with the Brazilian context, keeping in mind the perspective of the protection of the rights of the most vulnerable groups of the society[6].

1 The role of judges in the guarantee of human rights

First, let us remind ourselves of the role of the Judiciary Power among the institutions of the State of law. Montesquieu, in the 18th century, made an important contribution to the conceptualization of the core principles of the modern State, which are: separation of powers, respect for fundamental rights and freedoms and the primacy of law. In that vision, Judicial Power is independent and autonomous[7], and constituted one of the pillars of the modern democratic State, beside the Executive and Legislative powers. The Judiciary assumes an essential function in the State: rendering justice. It

5 The uses of the terms "judge" and "magistrate" needs to be clarified. For Giovanni Ettore Nanni, who cites Mário Guimarães, "the word "judge" refers to the function, and the expression "magistrate" to the authority. It is a honorific and respectful treatment. It also covers the authorities who occupy eminent offices in the public administration", NANNI, Giovanni Ettore, A responsabilidade civil do juiz, Editor Max Limonad, São Paulo, 1999, p.148. In Brazil, according to the Organic Law on the Statute of Magistrates, of 1979, which regulates the exercise of the profession, the body of magistrates does not include the function of the Public Prosecutor, differently from other national legal orders as in France or Italy. In this study, we will preferentially use the term "judge", without excluding the use of the term "magistrate" in a generic way.

6 For the UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy, "this is not a matter of analyzing the judiciary strictly from the standpoint of legislation but of looking into how it actually functions, since social, economic or cultural factors may hinder the genuine exercise of rights by certain groups that have enormous difficulty in obtaining access to justice, as is sometimes the case of disabled persons or persons in a situation of extreme poverty"; E/CN.4/2004/60, §67.

7 For Zaffaroni, commenting critics made the separation of powers – evidenced by Montesquieu – aiming to mine the judicial independence, this "does not ensues from the separation of powers, but arises as an exigency of the essence of the jurisdiction"; ZAFFARONI, Eugenio Raúl, Poder Judiciário, Crise, Acertos e Desacertos, São Paulo, Revista dos Tribunais, 1995, p.87.

guarantees the fundamental rights – established by the Constitution – against the eventual abuses committed by the other two powers.

This conception was consecrated in the French Declaration of the Rights of Man and Citizen of 1789, stating in its article 16 that "any society in which the guarantee of rights is not ensured, nor the separation of powers determined has no constitution". Other fundamental texts, as the Declaration of Independence of the United States of 1976 and the Constitution of the United States of 1787, were also inspired by these precepts. This notion is intrinsically linked to the idea of democracy, and both were closely associated with this model of State organization, which progressively extended to a significant number of countries in the world. In Brazil, the notion is consecrated in art. 2nd of the Federal Constitution of 1988: "The Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union", which have the value of "cláusula pétrea" (stone clause, a constitutional clause that can not be altered), according to art. 60, § 4º: "No proposal of amendment shall be considered which is aimed at abolishing: (...) III. the separation of the Government Powers".;

This said, the Judiciary is guarantor of the legal order established on the basis of the Constitution, and the source of his power is the people (CF 1988, art. 1º. sole paragraph – "all power emanates from the people"). Its mission is to ensure that the rights and guarantees enunciated in the Constitution, guided by the respect and the protection of human dignity (Art. 1º, III) and by the primacy of human rights, which is one of the principles that governs the regime in its international relations (art. 4º, II).

From the perspective of human rights, judicial power constitutes one of the main ways - the judicial way - to accomplish these rights, but this does not mean that the other ways are irrelevant.

Once the place and the role of the Judiciary within the State of law are made clear, it becomes easier to understand the responsibility of the main protagonist in charge of fulfilling that duty – the judge – and its role in relation to human rights. Its first mission

is to render justice, which means to recognize and apply to each litigant his rights, in so much as they are duly consecrated in the Constitution or based on it.

We perceive, however, the complexity of the fulfillment of the mission and of the extended role that is being delegated to the judge by society, exceeding the simple function of applicator of the law. As previously said, the judge operates within a social context which is permanently in evolution. He leads with solicitations and demands that question the precepts on which his action is based. For example, he is challenged by specific groups that increasingly exercise their citizenship, becoming aware of their rights and invoking them in justice. For example, we refer to black and indigenous people, rural workers, women, homosexuals, people with disabilities, etc.

The United Nations adopted a structural approach to this subject. The Indian specialist L.M. Singhvi wrote in its 1985 report presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities: "The contemporary international order is premised on the intrinsic and ultimate indivisibility of freedom, justice and peace. It is clear that in the world in which we live, there can be no peace without justice, there can be no justice without freedom and there can be no freedom without human rights (...) the strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice"[8] . For the current UN Special Rapporteur, Leandro Despouy, independence of judges, consolidation of democracy, States development and human rights protection are directly linked. He emphasizes in his first report of 31st of December, 2003, that "in any democratic society, judges are the guardians of rights and fundamental freedoms. Judges and courts undertake the judicial protection of human rights, ensure the right of appeal, combat impunity and ensure the right to reparation"[9] .

8 E/CN.4/Sub.12/1985/18, §74 and 44 (also mentionned in E/CN.4/2004/60 §24).

9 E/CN.4/2004/60, §30.

In its annual resolutions on the subject, the UN Commission on Human rights has repetitively manifested its concern in view of the constant increase of attacks against the independence of judges, reminding us that an independent and impartial Judiciary is a pre-requisite to the protection of human rights, as well as the existing link between the weakening of the safeguards of the Judiciary and the gravity and frequency of violations of human rights[10]. In the same way, preliminary considerations of the Basic Principles on the Independence of the Judiciary, elaborated by the United Nations, give an idea of the decisive role of judges, who "are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens".

The previous UN Special Rapporteur on the subject, Mr. Param Cumaraswamy, goes further, commenting that "Judges are standard setters in society. They interpret and develop the law upon which society is structured and human relationships are conducted. Their actions and conduct, both within and outside the Court, must at all times be above suspicion and be seen to be so if they are to command the respect and confidence of the public. Suspicious conduct of one or two judges is enough to tarnish the image of the entire judiciary"[11].

For all those reasons, independence is a guarantee of major importance for judges in fulfilling their constitutional mission. Indeed, "(...) it is known that without a strong Judiciary the society is unprotected, the citizen loses the guarantees ensured by the Constitution and the Judge is afraid, feels caricatured, weak, insecure, useless and unnecessary"[12].

10 For example, see resolutions n°1994/41 (E/CN.4/1994/132, p.135) and n°2004/33 (E/CN.4/2003/L.11/Add.4, p. 57) of the UN Commission on Human rights, "Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers".

11 The Arab Judicial Forum, Remarks from Panelist Dato' Param Cumaraswamy, September 15, 2003.

12 José Eulálio Figueiredo de Almeida, A reforma do Judiciário: a formação e a independência dos juízes, see references.

2. The international instruments related to the notion of judicial independence.

The independence of the Judiciary is universally recognized and rooted in international law. Combined with impartiality, it is a director principle in the system of the administration of justice in the perspective of the preservation of fundamental freedoms and rights. The main international instruments of human rights approach the notion on this basis.

The Universal Declaration of Human Rights of 1948, which provides at art. 10:

> "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him".

According to art. 14 (1) of the International Covenant on Civil and Political Rights of 1966[13] :

> "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (...)".

The Vienna Declaration and Program of Action of 1993 reaffirms the importance of such a value for human rights in the context of a democratic society, in its first part, paragraph 27 [14] :

> "Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full

13 Instrument elaborated within the Organização of American States (OAS), and ratified by Brazil in 24th of January, 1992.

14 Vienna Declaration and Program of Action, adopted during the Second World Conference on Human Rights, realized from 14 to 25 of June, 1993, A/CONF.157/23.

> conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development".

Art. 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, says:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

At Inter-American level, the American Convention on Human rights, "Pact of San José, Costa Rica", of 1969 [15], provides in its art. 8 (1) on judicial guarantees:

> "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature".

Art. 25 of the Convention, on judicial protection, refers to "competent court or tribunal". The same expression is used in the African Charter on Human and Peoples' Rights, in art. 7(1).

In addition to these conventional norms, Mr. Param Cumaraswamy emphasizes that judicial independence has the value of "general principles of law recognized by civilized nations", according to the art. 38 (1) (b) of the Statute of the International Court of Justice, and he also explains that "the general practice of providing independent and impartial justice is accepted by States as a matter of law and constitutes, therefore,

15 Instrument ratified by Brazil in 25th of September, 1992.

an international custom in the sense of Article 38 (1) (b) of the Statute of the International Court of Justice"[16].

On the basis of this international set of rules, the main international organizations, especially the UN, have been concerned with identifying the difficulties in the application of these norms and in improving their implementation by States. At the beginning of the Eighties, the Indian jurist L.M. Singhvi was requested to carry out various studies on the independence and impartiality of the Judiciary, jurors, assessors, and lawyers, within the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Singhvi submitted his final work in 1985, including a draft declaration on the independence of Justice[17].

At the same time, the Basic Principles on the Independence of the Judiciary were elaborated within debates that took place during the United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Adopted at the 7th Congress, held in Milan from 26 August to 6 September 1985, they were endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 [18].

After providing a definition of the concept of the independence of Judicial Power (points 1 to 7), the text approaches more specific questions, as for example freedom of expression and association for judges (points 8 and 9), qualifications, selection and training (point 10), conditions of service and tenure (points 11 a 14), professional secrecy and immunity (points 15 and 16), and, finally, discipline, suspension and removal (points 17 a 20).

16 E/CN.4/1995/39, §32 and 35. Art. 38 (1) of the Statute of the Court of Justice: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (…) b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations (…)".

17 E/CN.4/Sub.2/1985/18 and E/CN.4/Sub.2/1988/20.

18 During the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, have also been elaborated the Guidelines on the Role of Prosecutors and the Basic Principles on the Role of Lawyers (Havana, Cuba, 1990).

Concerned with how to make these principles effective, and on the basis of other studies carried out by the French jurist Louis Joinet between 1989 and 1993 at the request of Sub-Commission on Prevention of Discrimination and Protection of Minorities[19], the Commission on Human rights, through its resolution nº1994/41, approved the creation of a mechanism for monitoring the question of the independence and impartiality of the Judiciary, and created the mandate of Special Rapporteur on the Independence of judges and Lawyers, which was endorsed by decision nº1994/251 of the Social and Economic Council. His tasks are: to inquire into any substantial allegations transmitted to him or her and report his or her conclusions thereon; to identify and record not only attacks on the independence of the judiciary, lawyers and court officials but also progress achieved in protecting and enhancing their independence, and make concrete recommendations including the provision of advisory services or technical assistance when they are requested by the State concerned; to study, for the purpose of making proposals, important and topical questions of principle with a view to protecting and enhancing the independence of the judiciary and lawyers. The first 3-years mandates were assumed by Malaysian jurist Dato' Param Cumaraswamy (1994-2003), then substituted in 2003 by the current Rapporteur, Argentine jurist Leandro Despouy.

More recently, the Bangalore Principles of Judicial Conduct have been elaborated as a result of the works of the Judicial Group on Strengthening Judicial Integrity, composed by Chief Justices from various regions of the world. Adopted by the Group in 2002 at The Hague (Netherlands), these principles were prepared taking into account the two main legal traditions (common law and civil law), and are considered as fundamental to reach the standards of court viewed by the main international instruments. There are, in total, six principles: independence,

19 Final report of L. Joinet, E/CN.4/Sub.2/1993/25 and Add.1.

impartiality, integrity, propriety, equality (of treatment), and competence/ diligence[20].

The Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct detail the scope of the notion of independence of the Judiciary and help to define and understand better its contents and meanings[21]. However, it has to be said that those instruments are not compulsory for States, because they are not conventions assigned between them and submitted to the corresponding process of incorporation in domestic law[22]. They only provide guidelines to States, to the various agents involved in the Judiciary, and to the society in general, including non governmental organizations. The Bangalore Principles must be used to complement the Basic Principles on the Independence of the Judiciary, as well as to the legal rules of deontology[23] that apply at national level, not to substitute them.

These two instruments present similarities and differences. Both detail, in their preliminary considerations, the primacy of the principles of independence, impartiality and competence of courts within systems of the administration of justice, on which depend the protection and implementation of these rights. The first principle of

20 The use of the publication Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, elaborated by the OHCHR in cooperation with the International Bar Association, has been very useful for the elaboration of this text, especially chapter 4, Independence and Impartiality of Judges, Prosecutors and Lawyers; Professional Training Séries, nº. 9, available for download in: http://www.ohchr.org/english/about/publications/training.htm.

21 Both instruments are annexed to this publication. Amongst other documents prepared by international organizations, we can mention the Recommendation No. R (94) of the Council of Europe on the independence, efficiency and role of judges, adopted by the Committee of Ministers, in 13 of October, 1994, at its 51st meeting, and the European Charter on the Statute of Judges, adopted in July 1998 and April 1999. See www.coe.int.

22 Even if, as said before, the Basic Principles on the Independence of the Judiciary were endorsed by the General Assembly of the United Nations.

23 The term "deontology" to which we refer can be defined as the different moral and ethical rules of conduct related to a determined professional body, in this case, the magistrates.

Bangalore, independence, is then described as "a pre-requisite to the rule of law and a fundamental guarantee of a fair trial".

In relation to the differences, the focus is not the same. While the Basic Principles are related to the independence of the Judiciary as an institution, the Bangalore Principles insist on the "judicial conduct", that means, the behavior of the judge, based on his or her own ethic. As the preliminary considerations emphasize, these principles aim to ensure the guarantee of the public confidence in the judicial system and in the authority and moral integrity of the Judiciary. It is essential that judges, individually as well as collectively, respect and honor the judicial function. This means that to be seen to be independent is as important as being independent[24].

These principles are not addressed to the same agents. The Basic Principles are primarily addressed to States, aiming to assist them in their function of ensuring, promoting and respecting such values. For example, the first basic principle establishes that "the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country". They also provide various practical obligations in this way, such as the granting of adequate resources to the institution of the Judiciary (principle 7).

Regarding the Bangalore Principles, they intend to establish standards of ethical conduct for judges, providing them with guidelines for the fulfillment of their duties. They are also addressed to other agents, such as members of the Executive and Legislative Powers, lawyers, and the public in general, in order that they better

24 About corruption, the current Special Rapporteur Leandro Despouy emphasizes in his 2003 report that "the fact that the public in some countries tends to view the judiciary as a corrupt authority is particularly serious: a lack of trust in justice is lethal for democracy and development and encourages the perpetuation of corruption. Here, the rules of judicial ethics take on major importance. (...) judges must not only meet objective criteria of impartiality but must also be seen to be impartial; what is at stake is the trust that the courts must inspire in those who are brought before them in a democratic society. Thus one can see why it is so important to disseminate and implement the Bangalore Principles of Judicial Conduct (…)"; E/CN.4/2004/60, §40.

understand the role and the attributes of the Judiciary. However, according to its preliminary considerations, there is no doubt that "the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country". It is also the judge's duty to defend and observe in an exemplary way, the value of independence, both individual and institutional (this is a pre-requisite of the first principle enunciated, independence) and uphold safeguards in discharging his or her functions in order to maintain this independence.

In relation to the measures of implementation, only the Bangalore Principles provide that:

> "By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions".

The absence of clear and detailed guidelines in relation to the implementation of these principles and of mechanisms of monitoring, constitutes, without doubt, an important limit to its accomplishment in practice. The intention of their elaborators may not have been to do so - as they were not official representatives of States – but only to construct a referential landmark on the subject, without necessarily establishing measures of implementation.

However, in assessing the first years of existence of those instruments, previous Special Rapporteur emphasizes that "the need for written judicial ethical standards is now generally accepted. Many countries have such standards either as codes of conduct, guidelines or just principles. In a few they are incorporated in the Constitution (...) It must be stressed that the principles enumerated in these instruments are

very general and basic. General though they are, they represent the first intergovernmental standards spelling out the minimum standards and are today the acknowledged yardstick by which the international community measures the independence of judges (...)[25]

We add that that these instruments also constitute references for the work of non governmental organizations. In this respect, we can observe that, in addition to the aforementioned instruments, a series of other documents related to the independence Judiciary and judges, of regional scope, elaborated by non governmental groups, particularly professional associations have emerged over the years. In general, they aim to reinforce the notion of independence of the Judiciary and the necessity to protect it.[26]

25 The Arab Judicial Forum, op. cit. The current Special Rapporteur, Leandro Despouy, adds with satisfaction that "the Basic Principles on the Independence of the Judiciary have become a common reference source for international human rights bodies and procedures, both universal and regional, as well as for the United Nations human rights treaty bodies, the Commission and the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights when the independence and impartiality of courts are assessed", E/CN.4/2004/60, §71. In relation to the Bangalore Principles particularly, finalized in 2002, it seems to be early to objectively asses their reception and application by the different national agents.

26 Amongst other, we can mention the Minimum Standards of Judicial Independence, adopted by the International Bar Association (IBA), in 1982; the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted in 1995 and revised in 1997 within the LAWASIA (Law Association of Asia and the Pacific). Within the Commonwealth, various groups and associations of magistrates, lawyers and members of national parliaments elaborated the "Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence", in 1998, which were considered and adopted by the chiefs of governments of the countries of Commonwealth in the same year. Finally, the International Association of Judges, entity that represents 67 national associations of magistrates, elaborated a series of guidelines in a "Universal Statute of the Judge". These new instruments were brought to the attention of the Special Rapporteur, who informed that he could use them in his relations with States of the referred regions is needed. He also expressed his satisfaction in observing that the preoccupation of these organizations to establish standards for the promotion of the independence of the Judiciary. However, he is concerned by the proliferation of these new instruments, recommending that efforts shoul be made to implement the existing instruments. Finally, he admits that this phenomenon can point out the necessity of fulfilling the gaps of the current standards, that would need to be revised; E/CN.4/1999/60, §49; e E/CN.4/2000/61, §35.

3 Relevant aspects of the notion of independence of judges

On the basis of the different instruments raised, various important aspects related to the notion of independence of judges will be examined, amongst them its main dimensions, the relation between the concepts of independence and impartiality, and, finally, the limits of independence, understanding by this that the concept is not absolute.

3.1 Institutional and individual dimensions of judicial independence

The concept of the independence of judges comprises two distinct dimensions: the institutional dimension, that approaches the independence of the Judiciary as an institution of the democratic State, and the individual dimension, that considers the independence of the judge as the main protagonist of the institution. The two dimensions are necessary to ensure the independence, however the second one will be examined in more detail.

Mr. Singhvi already pointed out this double dimension in 1985: "The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions (...) Their absence leads to a denial of justice and makes the credibility of the judicial process dubious"[27]. Obviously, these two dimensions are intrinsically interlinked.

The analysis of the Basic Principles permits us to assess the institutional dimension. Reinforced in the first basic principle enunciated ("It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary"), this dimension refers to the notion of competence (3), to independence in the decision-making process (4), to financial (7) and administrative independence (14), and to the right and duty to ensure a fair process (6) - the last one referring also to the individual independence [28].

27 E/CN.4/Sub.12/1985/18 and Add.1-6 (also mentionned in E/CN.4/1995/39, §34).

28 Within the institutional dimension, Pr José de Albuquerque Rocha distinguishes the polictical and the administrative independence. See ROCHA, José de Albuquerque, Estudos sobre o Poder Judiciário, Malheiros, São Paulo, 1995.

With regard to the individual dimension, it means judges enjoy independence in the fulfillment of their functions, and, for that reason, benefit from a series of guarantees. In return, they have the duty to decide on the cases submitted for their analysis according to the law, and with impartiality. The Basic Principles determine the implications for the guarantee of individual independence: freedom of expression and association (8 and 9), qualifications, selection and training based on adequate qualifications and personal qualities (10), guarantee of tenure (11 and 12), financial security (11) and promotion (13). In this way, the judge is entitled and required to ensure a fair process (6), as stated within the institutional dimension. If not, his accountability can be invoked according to determined conditions (17 to 20).

Consequently, the protection of individual independence means that the judge must uphold safeguards against influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason (Principle of Bangalore 1.1, Basic Principles 2 and 4). The threats and pressure can be internal or external. The Bangalore Principles identify, as origins of external threats, the society in general and the litigants (1.2), and also the executive and legislative powers (1.3). In relation to the internal threats and pressure, the Principles identify ones own colleagues (1.4), however the hierarchy of the institution is another possible source. On this aspect, the Argentine jurist Zaffaroni comments that "the lesion to internal independence used to be graver than the violation to the own external independence", and, after providing examples of lesion to internal independence, affirms that it "is much more continuous, subtle, humanly deteriorating and ethically degrading"[29] .

Independence of judges implies, then, absence of hierarchy within the institution. Superior courts or judges are not empowered to send orders to lower courts, for that reason judges are different from public servants. For Zaffaroni, "an independent judge, or better, just a judge can not be conceived, in a modern democracy as an employee of the executive or legislative powers, nor can be employee of the Supreme

29 ZAFFARONI, Op. Cit., p.88-89.

Court. The Judiciary Power can not today be conceived as one more branch of the administration, and, can not conceive its structure in a hierarchical form of an army. A Judiciary vertically militarized is as aberrant and dangerous as a horizontalized army"[30]. This allows the lower court judge to take considered decisions, in a situation of total independence and in conformity with the law and his conscience. Such a decision will be subject, in case of appeal, to cassation by another one from any superior court. This is a possible application in practice of the concept of the independence of judges.

In Brazil, Constitution and laws provide the majority of the elements pointed out by the different UN principles. The independence of the Judiciary is consecrated constitutionally, as we saw in the first part of this study. It has to be restated art. 5, guaranteeing equality before the law, and particularly paragraph LIII: "no one shall undergo legal proceeding or sentencing save by the competent authority". According to art. 92, judges are considered as "bodies" of the Judiciary Power", as well as the courts they belong to, which tends to exempt them from any idea of hierarchy. The Constitution also ensures, at art. 99, that "The Judicial Power is ensured of administrative and financial autonomy", and establishes, at art. 95, a series of guarantees for the discharge of the judicial function, as well as prohibitions, in order to preserve the independence of the Magistrates. These guarantees are life tenure, irremovability and irreducibility of pay.

There is also the Complementary Law n° 35, of March 1979, providing Organic Lei on the Statue of Magistrate (Lei Orgânica da Magistratura Nacional), instrument that regulates the conditions of entrance and of exercise of the profession, detailing the guarantees enunciated in the Constitution (art. 25 to 32, title II). It also has to be noted, at title III, chapter I – Duties of the magistrate, art. 35, paragraph I: "Fulfill and make fulfill, with independence, serenity and exactness, the legal dispositions and the acts of office". At the same article, we also emphasize the paragraph VIII: "maintain irreproachable conduct in public and private life" [31].

30 ZAFFARONI, Op. Cit., p.88.

For the Brazilian jurist Fábio Konder Comparato "both subjective guarantees as well as institutional ones form the system of fundamental guarantees, organized at constitutional level. In that quality, they have the same characteristics of fundamental rights"[32].

The guarantees enunciated aim at attributing to the judge all the necessary conditions to enjoy independence, however, as the Special Rapporteur Despouy already emphasized[33], there is an indispensable moral requirement on the part of the judge, to keep him away from any suspicions and maintain his authority. The guarantees are only functional, but it is necessary to find support in the values of the judge himself. On this aspect, Zaffaroni insists: "the judge is a person, therefore, with moral conscience, and, consequently, ethical or moral independence can not be imposed on him, because it is something completely individual and of his own conscience. The law can only encourage that moral independence. The possibility or space that we refer to is the legal independence of the judge, which is the only one that can preoccupy us"[34].

3.2 Independence and impartiality

The aforementioned notion of impartiality deserves special attention. This is a concept that runs through the different instruments examined and which is closely linked to independence, but not identical. In legal terms, both notions have the same value, because the provisions mentioned above**,** of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European and

31 It is interesting to note that Statute of Magistrates points out at art. 93 of the Constitution ("A supplementary law, proposed by the Supreme Federal Court, shall provide for the Statute of the Judicature (...)") was never established. In fact, Complementary Law of 1979, "LOMAN" – elaborated before the 1988 Constitution – that is in force until the approval of the Complementary Law of the art. 93. Cf. DA CRUZ, José Raimundo Gomes, Lei Orgânica da Magistratura Nacional interpretada, 2a edição, Editor Juarez de Oliveira, São Paulo, 2002.

32 Fábio Konder Comparato, O Papel do Juiz na efetivação dos Direitos Humanos, in Associação dos Juízes para a Democracia, Direitos Humanos - Visões Contemporâneas, São Paulo, 2000.

33 E/CN.4/2004/60, §40.

34 ZAFFARONI, Op. Cit., p.87.

American Conventions on Human rights approach them together, through the use of the expression "independent and impartial tribunal".

Independence and impartiality are also the first two principles enunciated in the text of Bangalore, qualifying the second one as being "essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made". The second point of the Basic Principles expressly uses the term "impartially" to determine how the Judiciary must make its decisions. According to the sixth point, it also ensues from the principle of the independence the responsibility of the Judiciary "to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected"[35].

Anticipating our developments on the international jurisprudence, we note that for the UN Human Rights Committee, impartiality implies that judges must not express prejudices on the cases submitted for their analysis, nor must conduct himself or herself in a way that promotes the interests of one of the litigants. If he does so, these judges will be disqualified and have to be substituted, if not art. 14 of the International Covenant on Civil and Political Rights will be violated[36]. The Handbook Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers[37], in his chapter 4, highlights the jurisprudence of the European Court on Human Rights to provide a definition of impartiality. For the Court, the notion consists of two dimensions: subjective and objective. Subjective because "no member of the tribunal should hold any personal prejudice or bias", and objective because "it must offer guarantees to exclude any legitimate doubt in this respect", emphasizing

35 For Singhvi, "The concept of impartiality is in a sense distinct from the concept of independence. Impartiality implies freedom from bias, prejudice and partisanship; it means not favoring one more than another; it connotes objectivity and an absence of affection or ill-will. To be impartial as a judge is to hold the scales even and to adjudicate without fear or favor in order to do right ..."; E/CN.4/Sub.2/1985/18 and Add.1-6, §79 (also mentioned in E/CN.4/1995/39, §34).

36 Communication No. 387/1989, Karttunen v. Finland, Decision of 17 November 1992, CCPR/C/46/D/387/1989, §7.2.

37 Op. Cit.

that "even appearances may be of a certain importance", because "what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings [38].

In a way, impartiality is a condition of the other principles of Bangalore thus enunciated. Especially the fifth principle – equality – whose first point is of particular relevance in the Brazilian context, because it addresses the necessity for the judges to be aware of the diversity of social groups, whatever the origin, race, color, gender, religion, caste, disability, age, marital status, sexual orientation, social and economic status, etc. This principle can be associated to the value of non discrimination. For Zaffaroni, impartiality can only be guaranteed by pluralism, excluding, however, any idea of neutrality: "the judge can not be someone "neutral", because there is no ideological neutrality, except under the form of apathy, irrationalism, or decadence of the thinking, which are virtues of nobody, and even less of a judge"[39]. While the independence would refer to the statute and the office assumed, the impartiality would be primarily related to the posture of the judge, to his conduct during the process, according to the conception of José de Albuquerque Rocha[40].

In a certain manner, the criteria of independence would not be sufficient to guarantee a fair process; the criteria of the impartiality also need to be fulfilled. It can be considered, therefore, that impartiality constitutes a limit to independence. The respect of impartiality ensures the fair judicial decision, and prevents judge's abuse based on the independence guaranteed to him. Dalmo Dallari notes that "we will observe, here, the meeting of two fundamental interests. It is a judge's right to enjoy independence for judging, but there is also people's right to this kind of judgment. Each individual, each human person, has the right to have his case, his accusation, examined and

38 Eur. Court HR, Case of Daktaras v. Lithuania, judgment of 10 October 2000, §30, see www.echr.coe.int.

39 ZAFFARONI, Op. Cit., p.92-93.

40 Ver ROCHA, José de Albuquerque, op. Cit.

processed by a independent and impartial judge"[41]. In the same way, independence is an indispensable precondition of impartiality. Therefore, we better understand the articulation between the two concepts.

Finally, the Italian author Giovanni Pugliese, cited by Cappelletti, tends to consider that, in a scale of values, impartiality would be above independence, the second one being just "a mean aimed to safeguard other value – certainly connected, but diverse and much more important that the first one – which is the impartiality of the judge[42].

3.3 Limits to the independence of judges

The independence we are addressing here is not something absolute, it has limits. These are established by the rule of law – either at Constitutional level, or at legislative level – in which this legal norm is applied, according to the specificities of the case submitted to his analysis, aiming to establish – or re-establish – justice, through the decision he will take. If the judge abuses his independence, seeking undue favors or benefits for one of the litigants - and, sometimes, for him – and harm to the other, he puts himself in situation of illegality.

For Cappelletti, this matter is a "problem of balance between the value of the guarantee (...) of the independence, external and internal, of judges, and the other modern value of the democratic duty to make an accounting of its acts"[43].

Independence is not a privilege for the judge created to bring him personal benefits, but it is an attribute, a mean, created for the finality of "guaranteeing to the judge the possibility to discharge, in full autonomy and independence, the functions that are requested to him"[44]. Finally, for Dalmo Dallari, "far away from being a privilege for

41 Dalmo de Abreu Dallari, Independência da Magistratura e direitos humanos, in Associação dos Juízes para a Democracia, Direitos Humanos - Visões Contemporâneas, São Paulo, 2000.

42 CAPPELLETTI, Mauro, Juízes irresponsáveis?, Sergio Antonio Fabris Editor, Porto Alegre, 1989, p.31.

43 Cappelletti, Ibid., p.33.

judges, independence of magistrates is necessary for people, who need impartial judges to ensure the pacific and fair harmonization of conflict of law"[45] . Cumaraswamy continues, saying that, "the guarantee of judicial independence does not only aim to ensure that justice is made in individual cases, but also to ensure public confidence in the system. Independence of the judiciary is not right or privilege of judges. It is the right of all the consumers of justice"[46] .

Judges are considered accountable for their conduct. This is a precondition of the Bangalore Principles, according to what they can be brought before adequate institutions established for such intentions. Therefore, enjoying independence does not exempt the judge from his accountability, either legally (at the civil, penal or disciplinary levels), or socially[47] . The Basic Principles provide on such hypothesis at points 17 to 20 ("Discipline, suspension and removal").

4 The contribution of the jurisprudence of the international courts on human rights

The international courts on human rights operating over the last 50 years, complementarily to national courts, have logically had to examine – in parallel to the grounds of each individual case – issues related to difficulties of victims to obtain a satisfactory response from national tribunals in their disputes. By this way, a large jurisprudence was established on issues linked to the access to justice, amongst them the access to an independent and impartial court, the right to a fair process and in a reasonable timescale, for example. Through the analysis of relevant points of this jurisprudence, we will observe that the UN Human Rights Committee, the European

44 Ibid., p.31, mentioning Giuliani e Picardi.

45 Dallari, op. cit., p.45.

46 The Arab Judicial Forum, op. cit.

47 For more details on the different types of judge responsibility, cf. CAPPELLETTI, ibid.,1989; and NANNI, ibid.,1999.

Court on Human Rights, and the Inter-American Commission and Court on Human Rights, have tended, to reinforce and extend the notion of the independence of the Judiciary.

The UN Human Rights Committee, mechanism created under the art. 28 of the International Covenant on Civil and Political Rights of 1966 [48], has frequently defended that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception"[49]. For the Committee, an independent, impartial and competent tribunal can be assessed with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative[50].

Institutions who have been challenging the notion of the independence of the Judiciary are the so-called special courts, which include military courts, issue of particular relevance in Brazil. The international courts frequently had to comment both on the legitimacy of their existence and their conditions of functioning. For example, the UN Human rights Committee has taken decisions that tend to restrict the scope of these types of courts[51].

In the last years, the European Court, who provides a large number of decisions related to the application and scope of art. 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, had the opportunity to examine various situations related to the so-called "State Security Courts" in Turkey[52]. Some military

48 The Brazilian State has not ratified the 1st Optional Protocol to the Covenant, of 1966. For that reason, it is not submitted to the Committee's competence to analyze individual complaints of violations to human rights enunciated in the Covenant.

49 Communication No. 263/1987, M. Gonzalez del Río v. Peru, in UN doc. GAOR, A/48/40 (vol. II), p. 20, § 5.2.

50 General Comment nº13: Equality before the courts and the right to a fait and public hearing by an independent court established by law (Art.14), §3, 13/04/1984, 21st session.

51 Ibid.

judges sat on these Court that examined criminal process against civilians, for cases that had nothing to do with the interior order of the armed forces. This means that they intervened in the non military judicial order.

In the first two mentioned cases, the Court observed that some characteristics of the Statute of military judges participating in the State Security Courts, made their independence and impartiality doubtful. The European Court concluded that the defendants, all civilians, had legitimate reasons to fear a lack of independence and impartiality of those Courts. According to the Court, decisive criteria are whether these doubts can be considered as objectively justified. The European Court observed that the State Security Court of Ankara, in judging and condemning the defendants, was not an independent and impartial Court in the terms of art. 6 of the European Convention. According to a constant jurisprudence, such courts can not, in any hypothesis guarantee a fair process for people submitted to their jurisdiction.

At the Inter-American level, the Commission on Human rights has constantly been concerned by the accomplishment of autonomy, independence and the personal integrity of the Judiciary's members, either through studies or speeches, or through the elaboration of direct recommendations to member States. In some occasions, The Inter-American Commission referred to various principles formulated by the United Nations, expressing its wishes to be introduced and respected by the countries.

For example, the 1996 annual report of the Commission[53] , at chapter 7, related to the consolidation of the administration of justice in domestic legal systems, makes the following recommendation:

> Given the fundamental role played by the judiciary in discharging the responsibility of each member state to respect and protect the human rights of those subject to its jurisdiction, a role of primordial

52 Ýncal c. Turquie, 09/06/1998; Çiraklar c. Turquie, 28/10/1998; Sadak and others c. Turkey. Ver www.echr.coe.int. On the same question, see also Findlay v. United Kingdom, 25/02/1997.

53 Available at http://www.cidh.org/annualrep/96eng/chap.7.htm.

> importance in a democratic society, the Commission recommends that member states:
>
> Take the steps necessary to protect the integrity and independence of members of the judiciary in the performance of their judicial functions, and specifically in relation to the processing of human rights violations; in particular, judges must be free to decide matters before them without any influence, inducements, pressures, threats or interferences, direct or indirect, for any reason or from any quarter.

The decision of the Inter-Americana Court on Human Rights in the "Constitutional Court" case[54] , involving the State of Peru under Fujimorí´s presidency, reinforces this imperative. In 1996, by five votes against two, the Peruvian Constitutional Court decided that a law in respect of the conditions of the presidential re-election was non applicable. It then started a campaign of pressure, intimidation and harassment against the five judges forming the majority. On 28 of May 1997, after having been tried before the Legislative Power, three of them were removed under the allegation of having infringed the Constitution.

For the Inter-American Court, their removal was the result of a political trial by the legislative power. The Inter-American Court pointed out the fact that some of the 40 members of the Congress who had addressed to the Constitutional Court a letter requesting a decision on the question of the constitutionality of the referred law, also participated in the various commissions and sub- commissions appointed during the impeachment proceedings. Furthermore, some of those members taking part in the vote on the removal of the judges were in fact expressly prohibited from doing so on the basis of the Rules of Congress. The Inter-American Court also observed irregularities in the process of the defense of the judges, and established that the new Constitutional Court that considered the writs of amparo were the same persons that, or were involved, in the Congress proceedings. Consequently, the Constitutional Court

54 Corte IDH, Caso del Tribunal Constitucional Vs. Perú. Competência. Sentence of 24th of September, 1999, Série C No. 55; Sentence of 31th of January, 2001, Série C No. 71, available at http://www.corteidh.or.cr/sériec/index_c.html.

did not meet the requisites of judicial impartiality of the Inter-American Court. The appeal of the victims could not produce the intended result, and were condemned to fail, as they did.

The Inter-American Court on Human rights observed that the proceedings of the political trial to which the three judges were submitted did not ensure the guarantees of a fair process. Furthermore, the Legislative Power did not fulfill the necessary conditions of independence and impartiality in conducting the political trial of the judges. The Court concluded that art. 8 (judicial guarantees) and 25 (judicial protection) of the Americana Convention on Human rights were violated.

The Inter-American Court on Human Rights also had the opportunity to analyze the compatibility of the Americana Convention with process of civilians before military courts. The "Petruzzi and others Vs. Perú" case[55] refers to the extension, by decree-law, of the competence of military courts to judge civilians accused of crime of treason, without considering that before it only had authority to do it in situation of war. The Inter-American Court judged that these military Courts did not meet the requisites of an independent and impartial tribunal, because its establishment displaced the jurisdiction of the common court initially established by law. Furthermore, the Inter-American Court points out specific elements regarding the military judges who sat on the referred Court, questioning the reality of its independence. For that reason, the Court concluded that the impossibility for the defendants, civilians, to be judged by a common tribunal constituted a violation the due process of law of art. 8 of the Inter-American Convention.

However, in the "Genie Lacayo" case[56] , the Inter-American Court observed the fact that a military court is involved in a trial of civilians does not mean in itself that their human rights were violated. In this case, the accused party had the possibility to

55 Corte IDH, Caso Castillo Petruzzi y otros Vs. Perú, Sentence of 30th of May, 1999, Série C No. 52.

56 Corte IDH, Caso Genie Lacayo Vs. Nicaragua, Sentence of 29th of January 1997, Série C No. 30.

participate in the judicial proceedings, to submit evidences, and to appeal against the decision before the Supreme Court of Justice of Nicaragua. It also assessed that the presence of the terms "Sandinista juridical conscience" in the referred decrees – and the effective of a legal provision in which this terms were used – did not constitute a violation to the independence and impartiality of the court, because the term had only a superficial ideological connotation.

Conclusion

Human Rights are universal, for that reason, the respect they enjoy and their implementation must be assessed globally. We know that an efficient administration of justice –supporting and strengthening the whole judicial system – is a privileged way to accomplish the fundamental rights and guarantees in any country. This has represented a constant concern of the international organisms – particularly for the UN and OAS – in order to encourage the application of these principles in the States, amongst them the independence of Judiciary and judges. From that perspective, national agents need to be closer to the issue, strengthening the knowledge and applicability of international norms and principles to domestic law, as well as to transpose in a more systematic way the debates taking place within international organisms to the national level.

This is the task of the public Power in general, in accordance with its legal and political responsibility in international law, and to its responsibility to human rights. But it also includes non governmental organizations, and, above all, according to the Bangalore Principles, the Judiciary and the staff involved in the system of justice, including judges. Such a posture held by the institution would benefit democracy, improve the image of the institution and reinforce its authority before society.

Regarding judges, this posture of defending his independence logically ensues his responsibility to the Constitution and Justice, and goes much further than the role of simple applicator of the law. This means that the judge must accept the idea that he

assumes a political and social role. It is in the interests of the whole society that judges enjoy effective independence in the performing of their duties. The independent judge is neither neutral nor isolated, he exercises a public function, his power comes from people, for that reason, he must respond to society, and needs to interact with it. This idea is supported in Brazil by part of the doctrine and also by an increasing number of judges within the body of the magistrates[57] .

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57 Ver DALLARI, op. cit., 1996, and Associação de Juízes para a Democracia, op. cit., 2000.

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The Brazilian Judiciary and the lack of independence of judges as a reflect of the judicial system in Brazil

MARISA VIEGAS E SILVA[1]

1 Introduction

Considering a brief analysis of the recent historical events, which took place in Brazil, we can assert that the democratic advance of the post-dictatorial period was responsible for the construction of a legislative and institutional apparatus of protection of the fundamental rights and freedoms. In spite of this advance, however, it seems undeniable that such apparatus has not functioned effectively for this purpose.

The problems of this system occur in all the phases of the defense procedure and implementation of these rights and freedoms and they are clearly perceived in the daily functioning of institutions in charge of Justice administration such as the Judiciary, the Public Prosecutor and the Police. With regard to the specific case of the Judiciary,

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the faults of performance are uncountable; and among them we must highlight the lack of autonomy and independence of the magistrate board.

In the current global context of interdependence and promotion of international commitments in the field of the human rights, some parameters had been established by the United Nations concerning the independence of the judges. It remained clear, among other issues, the necessity of such independence to be legally guaranteed by the national State[2] .

The international panorama traced by the United Nations, which we will analyze in more detail, is doubtless applied to the Brazilian case, by the time it discloses and explains a great part of the problems that provoke the Judiciary in Brazil. However, informal rules that are valid in Brazil guide the behavior of national institutions and, therefore, those rules also orientate the behavior of the Judiciary, but they are not identified in the report of the United Nations. Thus, the peculiarities of the Brazilian system hinder the general model considered by the Rapporteur to be carried out in Brazil without due adaptations under penalty of remaining inefficacious.

The subject of the national peculiarities of each country was mentioned in a general way concerning the conclusions of the Rapporteur on the Independence of Judges and Lawyers. According to him, the Judiciary must be analyzed with regard to the structural context of Power separation, legality and State of Law not only from the legislative, but also from the functional point of view, considering the existence of "economic, social and cultural factors, which can hinder the genuine exercise of rights by certain groups ".[3]

Once analyzed the above mentioned, it remains for us to come back to the general model proposed by the United Nations, and then go through the Brazilian peculiarities and the way they influence the application of this general model in the country.

2 ONU, Princípios Básicos sobre a Independência do Judiciário, 1985, princípio 1.

[3] L. Despouy, Report E/CN.4/2004/60 of 31.12.2003, item 67.

2 The international panorama traced by the United Nations

According to the United Nations, the independence of the Judiciary implies that this Power must decide in such an "impartial way", based on facts and laws, besides exempt of improper influences and pressures". Likewise, it must be ensured to the litigants the access to due process of law and the respect to their rights as part of the process. Finally, the State must provide adequate resources for the good functionning of the Judiciary[4] .

As for the first report presented to the United Nations' Commission on Human Rights, the Special Rapporteur on the Independence of Judges and Lawyers Leandro Despouy synthesizes, based on the work of his predecessor and the study that had been developed by the Commission on Human Rights itself, his vision concerning the situation of the Judiciary in the world.

According to the report, "the independence of judges and lawyers is threatened all over the world, ranging the most varied levels and forms".[5] Structural and institutional difficulties such as scarcity of financial resources, inadequate legislation, existence of obsolete criminal and procedural criminal codes as well as the lack of adjusted training and equipment for the court officials are pointed as obstacles to the independent functioning of the Judiciary[6] .

Other obstacles mentioned against the good functioning of the justice system are the general moroseness in the execution of the judicial tasks and the impunity. For the rapporteur, the moroseness seems to be the result of structural or functional problems that incapacitate the judiciary as for its performance and also as a product of improper political interference. With regard to the impunity, it is seen as the result of these factors, adding up others such as restrictions to the right to defense.[7]

4 UN Basic Principles on the Independence of the Judiciary, 1985, principles 2, 6 and 7.

5 L. Despouy, 2003, p.11.

6 Ibid, item 33..

7 Ibid, itens 35 e 37.

Another preoccupying feature of the Judiciary in the whole world is the issue regarding corruption. As the rapporteur clarifies, the corruption goes far beyond the mere resource deviation or bribery concession, but it also points out to the administration of the justice inside the Judiciary. There are many alternative forms of corruption: the lack of transparency in the proceedings, the existence of a bribery system or the partiality in the judgment. The partiality in the judgment may be identified by means of politicizing the decisions as well as the attitudes based on extralegal loyalties.[8]

Other dysfunctions, which may point out an affront to the independence and impartiality of judges and lawyers, are the prejudice acts against certain classes of the population; the pressures and threats to the judges; the questionable criteria of nomination, promotion or transference of the magistrates; the unequal access to justice; not enough attention dedicated to the special treatment deserved by children and adolescents in conflict with the law; the disproportional punishment of the transgressor or the punishment in disagreement to the principles of international human rights; and the adverse impact of the divergence of opinions among magistrates and lawyers' associations.[9]

Finally, this report introduces special circumstances, which can proportionate the violation of the independence of judges and lawyers: State reasons and national security safety; administration of justice at emergency states; practices applied to offenses related to terrorism; trial of civil people in military courts, among others.[10]

Based on the factors presented by the rapporteur and in accordance with previous studies developed by GAJOP, we could divide the impeditive causes of the Judiciary autonomy into four classes: a) external factors: attacks, threats, pressures and even attempt upon the life and the physical integrity of the judges; b) internal factors: elitism, partiality, not enough social commitment, nepotism; c) structural factors: lack

8 Ibid, item 39.

9 Ibid, itens 44, 45, 48, 50, 51 e 52.

10 Ibid, itens 54 a 63.

of training concerning the international and regional patterns of human rights, financial independence of the Judiciary, hierarchy of the institution, system of nomination, systems of internal and external control; d) circumstantial factors: justice administration in a state of emergency, reason of State and doctrine of the national security, practices related to the terrorism, judgment of civil people at military courts, among others.

As for the Brazilian system, we realize that almost all these factors are presented, excepting those circumstantial ones. Even so, among those circumstantial factors, we registered the existence of the military courts in charge of judging common crimes[11] .

All these orders of factors constitute, in our opinion, consequences of such a bigger and wider structural problem, ranging the whole concept that still guides the system of Brazilian administration of justice. It remains for us come back, thus, to the way this system is conceived, by means of the analysis of its laws and institutions.

3 The bankruptcy of the Brazilian Judiciary's autonomy as part of a deficient system of administration of the justice.

As mentioned before, despite being placed in the global context of lack of independence of the judges and magistrates, the Brazilian reality possesses peculiarities as for the national administration of justice system. With regard to our understanding, the study of these particularities is essential for a real comprehension of the lack of independence of the Brazilian magistrates.

In legislative terms, the current normative in general is good, but barely applied. In some cases, the rights are specified in law, but they are not regulated, making impossible their joy by the citizens. Moreover, considering the countless modern and advanced norms regarding the protection of the rights and freedoms, there are still procedural structures, which practically impede the application of a protective legislation[12] .

11 Article 92, VI of the Federal Constitution of Brazil.

12 Pinheiro, 2004, online.

In institutional terms, although there are good and adequate institutions to defend and protect the human rights, they are not strong enough to fight against the seriousness of the abuses to human rights in Brazil[13] .

Among the reasons for such a weakness, one could mention the lack of autonomy (some times budgetary, but also political) and even the institutional mentality, which means that the system is applied in different ways depending on the society class that is taking advantage of it. Another claim, which is always present, is that the institutions that compose the Brazilian system of administration of justice would need to act in partnership, rather than the disarticulated form featured nowadays.

First, we remind that Brazil is inserted in a Latin American context, in which, according to Zaffaroni, the criminal law is applied in a way that the sanction is not attributed based on the harmful behavior of the individual, but on his social origin[14] .

With regard to the Brazilian case, it is known that traditionally the structure of administration of justice exists traditionally as means of social containment of the lowest-leveled classes by the highest ones. This model, deriving from the colonial period in Brazil and added by authoritarian characteristics from the dictatorial regimes lived by the Country, seems to have resisted to the evolution of the Brazilian society and to the political changes along the centuries, having also resisted to the transition of the authoritarian regime in 1985[15] . Evidently, this historical inheritance is surrounded by discriminatory concepts based on the social classes, race or gender, which are reflected, therefore, on the system of administration of the justice.

Having this in mind, we remember the theory of Paulo Sergio Pinheiro on the incapacity of the new civil governments of the post-dictatorial period in carrying out the institutional

13 Inter-American Commission on Human Rights, report 2000, item 6.

14 Zaffaroni, 1999, p. 58-74; Mazzilli, 1996, p. 36.

15 Pinheiro, 1991.

control of the State's will. Pinheiro argues that during the whole Brazilian republican period there had always been a parallel regime of exception for the poor people, villains and beggars, who have never been substantially affected by any of those political transitions. During the periods of constitutional democracy, this parallel regime was dissimulated and in the authoritarian phases this dissimulation fell down[16] .

According to Pinheiro, these new governments pretended that the illegal coercion of the State could be controlled by the simple change in the politics in the center of the power, starting to treat the repressive devices as neutral institutions, whereas actually they are not. These repressive bodies, which continue to be impregnated of the will, the terror and the abuses of the relations of power, had continued to act in an independent way, despite the democratic speech on the incapacity of intervention in these practices[17] .

Thus, in the majority of the Latin American countries, the democratic governments had not been capable to remodel the institutions composing the system of justice administration and to punish their agents for committing crimes. Because of this context, the ruling classes continue to manipulate the state institutions, using them to protect themselves against the most popular classes[18] .

The great feature of the Brazilian case, according to the previous mentioned author, is the extraordinary longevity that these authoritarian practices and cultures have acquired, going through every political regime and persisting despite the increasing complexity of the society. In contrast to what happened in other countries, in which the bourgeois revolutions of the XVIII century had been capable to originate strong enough institutions to limit the abuses of power, the laws and the Brazilian institutions from the post-democratic period do not manage to control the illegal coercion of the State, even minimally[19] .

16 Ibid., p. 48-49.

17 Ibid., p. 50-51.

18 Pinheiro, 1999, p. 2-5.

19 Pinheiro, 1991, p. 52-53.

In order to explain this phenomenon, Pinheiro appeals to the expression "socially implanted authoritarianism", borrowed from Guillermo O'Donnell, according to whom the relations of power are not rooted only in the macro political institutions, but also in the micro political ones, which are the interpersonal relations that characterize the oppression pattern[20].

When one produces a change in the central political power (a change concerning political representation or even democratic transition), this network of micro-absolutisms does not modify, as "these small authorities have internalized and adapted to micro-contexts the pattern of oppression spread out by the macro-power". The transition towards democracy is only possible by the time this network of micro-absolutisms, historically submitted to the Brazilian popular class, is disassembled[21].

With regard to this, we have to affirm that this micro-network of authoritarian behaviors, identified in practices such as torture and elimination of suspects, is present in practically all the Brazilian institutions protecting the human rights, as for example, the Judiciary.

The current weakness of these institutions – among them the Judiciary - to fulfill with their legal attributions is featured by the incapability of fully being in charge of their attributions as a result of keeping the same models of inherited interpersonal relations since the slavery and authoritarian regimes[22].

Facing all these factors, the lack of autonomy of the Judiciary only appears to be one more symptom of the conception of the justice system in Brazil as well as an example of the "socially implanted authoritarianism" mentioned by Pinheiro and O'Donnell. Once not becoming equally accessible to everyone and judging the individuals differently according to their social class, the Judiciary acts according to these informal rules.

20 Ibid., p. 51.

21 Ibid., p. 55 e 56.

22 Pinheiro, 1991, p.56.

As for the report itself, the stories concerning a clear position of socially implanted authoritarianism are highlighted and deserve special attention. In fact, the denunciations presented by the Land Pastoral Commission in the state of Paraíba (CPT/PB), in which agricultural proprietors organize and keep private military services accused of summary executions among other crimes, "the State system has been serving the economic and political interests of a privileged group enjoying the right to access to the private property". Yet, one can realize the case of the Prison of Workers, members of the Landless Movement (MST) in the city of Bonito, in which the justification of the sentence of arrest of rural workers evidences traces of authoritarian and conservative thoughts as when it refers to the landless workers as "criminals with such degree of periculosity".[23]

Still focusing on the report, the Observatório Negro in the state of Pernambuco (Oneg/PE – Organization in charge of defending the rights of Negroes) describes, when considering the difficulty in selecting, characterizing and punishing the crime of racism, a situation of socially implanted authoritarianism with regard to the racial issue. According to the Organization, "when composing the social mosaic and when perceiving the reality in such a uniform sense, legitimizing only the universe of white-skinned people, the public agents in charge of the guarantee of justice have held a disfavored position in relation to the negro population under the excuse of being acting neutrally. Such a circumstance figures, at the very least, as a breach of independence concerning their performances. In practice, it means that even though there is a relative legal framework that describes the discriminatory behaviors against this specific population, the justice and security system do not manage to be instruments of equity between the negro and the white races in Brazil because the preconception and the proper concept translated as the myth of the racial democracy do not allow discriminatory behaviors to be caught by the agencies that are responsible for the accusatory procedure".[24]

23 See part II of this publication.

24 This situation was reported to the Special Rapporteur during his visit in Recife in October 2004.

Once understood the peculiarities of the Brazilian system and its main exponent, which means the socially implanted authoritarianism, we must refer the discussion towards the general factors for the lack of independence of the Judiciary as pointed out by the United Nations and the form they are interpreted in Brazil.

4 The Brazilian Judiciary autonomy and its faults.

Before focusing on the factors themselves, namely those which debilitate the autonomy of the Brazilian Judiciary, we assume as essential to briefly comment on what we understand as the most important characteristics of the Brazilian judicial performance nowadays: impunity and moroseness of judicial activities and its so-related efficiency's incredulity.

4.1 Impunity, moroseness and incredulity from the population as the main characteristics of the Brazilian judicial performance.

Nowadays one of the greatest challenges to the implementation of human rights in Brazil is the impunity. As for the impunity, it is closely related to the activity of the Judiciary by the time it is directly resulted from bad judicial assistance.

More than a mere violation, impunity is a chronicle problem that afflicts all kinds of human rights' violation nowadays. Impunity in Brazil is so chronicle and generalized that becomes a peculiar feature of the Brazilian system.

With regard to this, as stated by the above-mentioned Special Rapporteur from the United Nations on Independence of the Judiciary and Lawyers, the performance of judges as human rights' guardians is essential for a democratic society.[25]

Without a strong and autonomous Judiciary, it is impossible to combat impunity, resulting therefore in a harmed protection of human rights. While applying rules to concrete cases of crimes or simple conflicts, the judicial function is essential by the time one considers

25 L. Despouy, 2003, item 30.

to solve litigation by means of a judicial process based on previously established rules, thus avoiding the chaos of private justice among the citizens[26] .

Another fundamental concept, which cannot be laid aside, is the moroseness. In general, the Brazilian Judiciary is notoriously known by its proceedings' slowness. Innumerous justifications could be pointed out and, thus, we will analyze them further when regarding structural and external factors.

A good example of slowness in the Brazilian Justice is reported in the case of the "Emasculated Children", presented in this report, in which seventeen children and adolescents were kidnapped, emasculated and killed in the city of Altamira, in the countryside of the Pará state, between 1989 and 1993. Despite the barbarity of those crimes, the judgment took place only thirteen years after the criminal act.

Finally, we must highlight the incredulity of the population as the third major characteristic from the Brazilian judicial performance. Either as a direct result of impunity and moroseness, either merely because it is implicitly understood by the population that such Power is not accessible to everyone, in Brazil there is a danger situation as mentioned by the United Nations in its book named *Human Rights in the Administration of Justice. A manual on Human Rights for Judges, Prosecutors and Lawyers*: "If people meet problems in order to ensure Justice to themselves, they could take the law into their own hands, resulting in an even greater deterioration of justice administration and possibly in new violent conflicts".[27]

4.2 The structure of the Brazilian Judiciary and the Military Justice as the circumstantial factor in the Brazilian model

Under structural terms, the Brazilian Judiciary is composed by a complex framework divided according to its federal and state competencies. With regard to a recent study

26 Pinheiro, 2000.

27 United Nations, Human Rights on Administration of Justice, 2003, page 116.

published by the Judiciary Reform Secretary from the Brazilian Justice Ministry, the organization of the Judiciary Power is "very complex, fragmented, few uniform and few known". Yet according to this research, it happens because of "our country's continental dimensions, our organization as Federative Republic, huge regional inequalities and significant difference concerning the regional demands in favor of Justice access".[28]

As for the global context, the Judiciary system ranges five lower courts, five federal high courts, federal low justice and those respective judges in all states, besides electoral, military and labor judges. As for the states, the framework is composed by lower courts and courts of appeal (so called Courts of Justice), besides Special Judges for lower amount cases.

Analyzing this judicial framework, we must highlight the existence of a so-called Military Justice, which is, despite its name, used in Brazil for judging crimes committed against civil citizens. The military jurisdiction has been blamed for the majority of the problems of the Brazilian Judiciary, especially those related to the impunity concerning severe human rights' violations.

According to the Judges for Democracy Association (JDA), when it carried out the proposals for Judiciary Reform, "it is evident the incompatibility between the Legal Democratic State and the existence of a Military Court as one of the bodies from the Judiciary Power as it harms the principle of equality and establish a privileged treatment for a certain group of people only because they pursue a military occupation. (...) The judgment of military people by military members jeopardizes the impartiality of the decision, once considering that the impartiality of a magistrate is the essential character of the jurisdiction".[29]

According to the Brazilian Law, the verification of crimes committed by military policemen rests with the military jurisdiction[30]. So, no matter what kind of crime was committed

28 Diagnostical Report of the Judiciary Power, 2004, page 4.

29 AJD, 2004.

30 Federal Constitution, article 124.

by a policeman, even if he is carrying out a civilian activity, as the ostensive policing, the act will have to be verified and judged by the Military Court: Military Police, Military Public Prosecutor and Military Judiciary.

Nowadays the military jurisdiction is proven to be a meaningless mechanism in Brazil. Created at the time of the military regime and kept by the current Constitution, the Military Judiciary together with its police figures as a Brazilian anomaly regarding its current patterns[31]. Its maintenance has often been attacked both internally and internationally by critics, especially due to its huge parcel of contribution for such an endemic impunity in Brazil[32].

The approval of the Law number 9.299/96, also known as "Lei Bicudo", took off the competence of the military jurisdiction over murders committed by military policemen. In spite of having represented some advance on the issue, in fact, the proof that these intentional homicides had been committed by policemen continues to be in charge of the police, as well as all the rest of the crimes committed by them, not limiting the performance of the military judiciary indeed[33].

Besides these specific problems, which aggravate its deficiency, the military justice also suffers the general problems that affect the other areas of performance from the Brazilian Judiciary, as we will see later.

4.3 Identification of factors that weaken the independence of judges in Brazil.

4.3.1 External factors: pressure, attacks and threats against life and physical integrity of magistrates.

As we previously mentioned, the factors that influence the performance of the Judiciary are various, among them several factors due to external origin. It is the case of

31 Jurisprudence of International Organisms on Military Jurisdiction, CEJIL, 2002, p. 2.

32 Jurisprudence of International Organisms on Military Jurisdiction, CEJIL, 2002, p. 2. BICUDO, 1996, page 293.

33 Inter-Anerican Commission on Human Rights, report 2000.

pressures and/or threats (direct or indirect) over the magistrates, many of those deriving from their hierarchic superiors or some governmental authority.

These threats are carried through by those interested people themselves, but they can also arise in accordance with pressures in the name of local authorities. In Brazil the existence of an increasing organized criminality has enough contributed to the increase of threats against the judges, mainly the ones who deal with drug and weapon traffic crimes, besides corruption in its more varied degrees.

This sort of external factor could also lead to more serious details, as it is the case of attacks to the magistrates' physical integrity or life. Besides less common than the pressures and menaces, the affront under the physical integrity and the life of judges is a real menace that has already happened in previous situations.

With regard to this, we should remind that according to the item 31 from the report on her visit to Brazil, the United Nations special rapporteur for Extrajudicial, Summary and Arbitrary Executions, Asma Jahangir, describes a range of outrages against the life of a female judge, who was in charge of examining lawsuits related to death squads together with the police. According to item 32 of the same document, the rapporteur denounces the assassination of the judge Antônio José Machado Dias on March 2003 due to his performance on criminal lawsuits related to the heads of organized crime in the city of Rio de Janeiro.

Another very well known case of affront to the life of a magistrate was the one related to the judge Alexandre Martins de Castro Filho, who was assassinated in the Espírito Santo state on March 14th 2003 due to his performance on lawsuits involving organized crime in Espírito Santo.

One must assume that these are not isolated cases concerning external interference in the performance of magistrates, because there are records of different kinds of pressures and threats.

4.3.2 Internal factors: elitism, partiality, little social commitment, corruption and nepotism.

Elitism is another peculiar feature of the Judiciary in Brazil, which is present in various situations of the judicial practice. Firstly, we should remind the high costs not only to take an action but also and especially to keep it active, considering the previous mentioned procedural moroseness. Elitism is also evident with regard to the technicist vision disconnected to reality and often prejudiced on the part of the judges, who most of the times do not have a good background in human rights.

The high judicial costs of actions in Brazil are realized by this report concerning the cases introduced by the ACPO (acronym for: Organic Pollutants Combat Organization), in which citizens individually or through NGOs have to combat in trial powerful economic groups responsible for the intoxication of their former employees due to the contact with pollutant agents in their labor space. Differently from those against whom they litigate, these citizens have no access to expert professionals on the issue in discussion nor have economic conditions to afford real proofs, which means that, in association to the insensibility and partiality of many magistrates, contributes to ungranted actions.

Yet considering the issue of onerousness of the judicial system, we understand that equal conditions to all the litigants also involves a better apparatus of the Brazilian Public Defense, a branch in charge of defending the poorest classes of the population. Without any strengthening of this branch, the democratization regarding the access to the Judiciary will hardly be achieved, as well as the equity between the parts during the legal proceedings.

Another issue is related to the lack of sensibility and social commitment, which result in biased decisions on part of the magistrates. Either because of the absence of perception regarding the political role they have or because of fidelity to powerful social groups, the fact is that many judges simply decide in such a biased way favoring those socially dominant groups.

Thus, we remind the case "Campo do Vila" in respect to the housing right. The judicial apparatus seems to be pending for the maintenance of the *status quo* of the Brazilian elite than the commitment of being the guardian of individual and collective rights of the citizens.

The lack of exemption concerning the decisions and deliberations from magistrates is also evident with regard to the case of José Severino da Silva, know as "Indío", in which, considering the context of land invasions by rural workers, the judge Rivoldo Sarmento and later the female judge Aída Cristina Lins Antunes ordered his arrest even unprovided with adequate juridical justification, besides real evidences of racial prejudice. With regard to the case "Engenho Prado", in which some families from the Comissão Pastoral da Terra (acronym for: Land Pastoral Commission - LPC) occupied lands along Conjunto Prado, the judge Carlos Alberto Maranhão deliberately ignored the petitions of the rural workers denouncing the violence they were suffering on the part of the owners of the Santa Tereza factory.

The internal factors are the most direct reflection of the previously mentioned "socially implanted authoritarianism". Once adopting an elitist point of view, the Judiciary keeps the same authoritarian patterns identified before, as it keeps the onerous jurisdictional service, unfair decisions and little social commitment.

With regard to the criminal justice system, Eugenio Raúl Zaffaroni defends the theory that we assume to be equally applicable to the Administration of Justice System in general and, therefore, to the Judiciary. According to him, once carried out the selective procedure to career ingression, it also begins the so-called "fossilization" procedure, according to his words. Such phenomenon, by which the system takes advantage of humbler people, corrupts and makes them lose their identification, besides forcing them to have an unconditional solidarity for the artificial group to which they are supposed to belong. It applies to magistrates, Prosecutors and judicial employees. A false sense of power is generated, leading those individuals to identify themselves with their functions, isolating them from the criminalized sectors and fossilizing them so that they do not be touched by their case[34] .

With regard to this, we defend that capacity building courses on human rights to the magistrates and the existence of an external accountability of judges would represent a considerable step against the unequal proceedings of some judges as for the parts.[35]

It is also very common, with regard to the judicial activity, denouncements of corruption and nepotism, so that in the cases introduced by the Association of Combat against Persistent Organic Groups (ACPOG) some evidences of corruption on the part of the judges are observed, as they pronounce biased decisions in favor of the economically strongest part.[36]

The matter concerning nepotism is also very common considering the Brazilian conception on the Judiciary. It deals about the situation denounced in the report by the CDHMP (acronym for: Human Rights and Popular Memory Center - HRPMC) and by the CDHEC (acronym for: Collective of Human Rights, Ecology, Culture and Citizenship - CHRECC), in which chief judges from the Justice Court of Rio Grande do Norte state, when they became aware of the Judiciary Reform Project that prohibits nepotism by its provisions, started to exonerate their non-relative assessors, substituting them by kinship people.[37]

4.3.3 Structural factors: lack of training, lack of financial independence, hierarchy, nomination system, and external and internal control system.

In accordance to internal factors, the external factors are closely connected to the authoritarian concept that conducts the Brazilian judicial system.

Some structural questions could initially be pointed: the insufficiency of the number of judges; the amount of intricate legal procedures; the excess of foreseen resources by

34 Zaffaroni; Pierangelli, 1999, p. 76-77.

35 L. Despouy, 2003, item 42.

36 See part II of this publication.

37 Ibid.

obsolete codes of process or the excess of recesses and the excess of forensic vacation. Actually, all these questions contribute to the moroseness previously mentioned and so that the Judiciary works in favor of those it is supposed to, which means the economically richer portion of the Brazilian population.

Likewise, many internal factors also suffer influence of the structural factors, namely: the accusation concerning the Judiciary to be far from reality and too much technicist can be attributed in part to the system itself, which does not foresee an enough number of judges to work on the causes, centering their activities in such an exaggerated form. Unable to entirely appreciate each case due to the little number of magistrates for the huge amount of processes, the judges are seen as indifferent and distanced from reality.

Another structural justification for the same apparently internal factor is that, according to Hélio Bicudo, those few judges are basically concentrated in big cities and not spread along the cities in the countryside or distant neighborhoods, in which they could better understand the situation besides being inspected by the citizens[38].

Thus, due to the judicial system's structure itself, it is practically decided based on a legal theory and not based on facts and people who are behind the issue[39]. Another crucial point mentioned in here raises into debate, namely the general incredulity of the population in the Judiciary, strengthening its weakness and lack of autonomy[40].

Part of the critics in relation to the performance of the Judiciary can also be explained by problems related to the professional formation and the form of election for a certain position. The imperfections in the professional formation are innumerous: bad background acquired since colleges, which teach the theory disentailed of practical

38 BICUDO, 2004, online.

39 Ibid.

40 BRAZIL, Ministry of Justice,1996. Pré-Projeto do Plano Nacional de Direitos Humanos.

activities; the lack of interdisciplinary schooling; the lack of attention regarding forensic ethics and human rights; and the lack of control concerning quantity and quality of the students graduated in these colleges[41] .

The Brazilian system does not present concrete deficiencies in the system of magistrates' nomination, once it happens by means of exams and titles, according to the content of the article 93, I from the Brazilian Constitution. The public examination is an important instrument in order to prevent that the bearer of a judge position is chosen by political indication.

The political indication ends up invigorating, as it may seem, in the process of promotion and/or removal of judges. As advised by the Association of Judges for Democracy/ PE, the criteria of security and promptness used in these cases are too much vacant and inexact, which end up prevailing those political indications[42] .

With regard to the process of conscription of future members for these institutions, it is observed that a significant amount of the candidates looks for a career because of its remuneration and professional advantages that the position offers. According to official data of the Judiciary Reform Secretariat from the Ministry of Justice, the wage of a Brazilian federal judge in 2002 was in the top world ranking of wages of judges[43] . It is a guarantee of independence to the judge, fact that becomes to be an attractive for professionals, who, in absolute, are not identified with the institutional function that the position demands. On the other hand, despite the imperfections of the selective process, there is no follow-through of a new member since his probation period in order to form, to support, correct or even to refuse him[44] .

41 Mazzilli, 1996, p. 23-25.

42 This situation was reported to the Special Rapporteur during his visit in Recife in October 2004.

43 Relatório Diagnóstico do Poder Judiciário, 2004, p. 69.

44 Mazzilli, 1996, p. 27-29.

This is the way we reach the reality presented by many judges in the performance of their functions: the little commitment with the function they are in charge of and the carelessness concerning the personal improvement of the judge after his admission, besides those problems of material order (little structure) and the rest of questions of improper political interference (a good example is the influence of the Executive in the indication for the "quinto constitutional", i.e. constitutional provision that foresees the integration of Prosecutors and from Advocacy into the board of some courts. They are "gowned" judges, meaning that they have got the right to become a magistrate without public examination and other exigencies, please refer to the article 94 from the Brazilian Federal Constitution).

With regard to the administrative and financial autonomy of the Judiciary, it is ensured by the article 99 of the Federal Constitution, by which the courts must elaborate their own proposals "within the limits stipulated with the rest of the powers concerning the law of budgetary directives". According to the Judiciary Reform Secretariat, "there are, in Brazil, many judiciary powers - Federal Justice, state justices, Labor Justice, Military Justice, Electoral Justice, lower court, high court and the superior courts - each of them possessing a high level of autonomy"[45].

The necessity of a more serious inspection concerning the performance of the Judiciary, as for itself, had already featured to be a recurrent object of claim of many sectors of the society. A good example of the unpunished disobediences that had been committed and still continues was also presented by the CDHMP and the CDHEC, namely the case of Public Interest Action number 1031. With regard to it, the President of the Court of Justice from Rio Grande do Norte state granted, in December 2002 by means of administrative act, the magistrates and consequently himself an increase of 35% (thirty five percent) in their wages. The other agencies of the justice system that could inspect it failed in their performance. Some of them had even copied such model, granting themselves an equal salary raise[46]. That is why the external control of

45 Relatório Diagnóstico do Poder Judiciário, 2004, p. 4.

46 See part II of this publication.

the Judiciary constitutes one of the main points of the legislative reform, which was recently approved by the Brazilian Congress, as we will start analyzing.

4.4 The Judiciary Reform and its reflex on the Autonomy of judges in Brazil

Today's boasted Judiciary Reform has had its legislative beginning more than 12 years ago, when the deputy of the Labor's Party Bicudo Helium presented the Project for Constitutional Amendment number 96/92. Many years later, the project has the majority of its original idea, starting to reflect the thinking of a plurality of actors that participated of its elaboration[47].

In order to speed up its transaction, the project was divided into two parts, one of them was recently promulgated, in December 2004, under the legislative identification of Constitutional Amendment number 45/2004. The idea of this reform basically consists of improving the management of the Judiciary, modifying infra-constitutional legislation and amending the Brazilian Constitution in order to guarantee a more efficient and accessible Judiciary[48].

Many of the problems mentioned herein were dealt in accordance to the constitutional legislation recently promulgated. Therefore, we could highlight some provisions approved aiming at:

- Celerity: include the principle of process celerity in the Constitution; punishment to the judge, who unduly retains the documents for a long time, preventing him to achieve a promotion; extinction of forensic vacation; proportionality of the number of judges according to the number of inhabitants and the judicial demand; immediate distribution of the lawsuits; delegate to the servitors the practice of acts without decisory demand;

47 Relatório Diagnóstico do Poder Judiciário, 2004, p. 18.

48 Relatório Diagnóstico do Poder Judiciário, 2004, p. 6, 17

- Transparence: divulgation of the administrative decisions and creation of an advisory department;

- Formation, selection and lifelong tenure of the magistrate board: necessity of a three-year-experience concerning juridical activities before initializing the career; prohibition of advocating activities for at least three years in the court or tribunal from which he was exonerated or retired; recognition of acknowledgment based on the criterion of productivity; submission to an official course as mandatory stage for achieving lifelong tenure;

- Administrative and financial autonomy: in case there is no follow up of a budgetary proposal in due time, the already approved values prevail for the current budget. The proposal cannot trespass the limits established by the Budgetary Directives Law, excepting through supplementary or special line of credit's opening.

- Decentralization of judicial activities: introduction of the so called itinerant justice, as well as regional Chambers for the Federal Regional Court, Justice Courts and Federal Labor Courts.

- Judiciary control: with regard to this, the great news of the reform (and also one of the most debated issues) is the creation of the National Justice Council, in charge of "watching over the Judiciary autonomy, inspecting administrative acts and the accomplishment of disciplinary rules ranging the judicial management, and planning public policies related to the access to the Judiciary and to the improvement of jurisdictional rendering[49] .

Yet with regard to the reform, it is worth highlighting the possibility of shifting the competence towards the Federal Justice concerning the crimes against human rights, expressive upgrade of the human rights' treaties to the status of constitutional and the Brazilian submission to the jurisdiction of the International Criminal Court. With regard to the military jurisdiction, one highlights the constitutional confirmation of the

49 Ibid, p. 18.

Common Justice's competence concerning deceitful crimes against civil lives committed by militaries.

Then, we realize that much of the contents debated and criticized in the Brazilian justice system were object of constitutional reform so far. It remains for us to controvert the effective consequence of such modifications.

5 Conclusions

We have presented that in the recent period of the Brazilian history one has built and consolidated a structure aiming at protecting human rights, which, despite counting on a good legislation and good institutions, has not been enough to implement such rights. Likewise, we realized that the great part of the debate is related to the Justice distribution system and, considering this context, to the lack of autonomy from the Judiciary.

We have also observed that the issue regarding the independence and autonomy of the Judiciary is a global matter, which has already been studied and defined on the part of International Organizations such as the United Nations by means of its Special Rapporteurs and the Human Rights Commission. Based on the studies from the Commission, we have identified four classes of factors, which provoke the lack of independence of the Judiciary: internal, external, structural and circumstantial factors.

With regard to the Brazilian case, in accordance to our analysis, all those classes of factors are often present in such a network. On the other hand, we could observe that the majority of those factors has already been approached and even supposed to be solved due to the advent of the Constitutional Amendment 45/2004, recently approved and part of the Judiciary Reform.

We have also observed that the Brazilian institutions are debilitated by the so called socially implanted authoritarianism, according to Paulo Sérgio Pinheiro and Guillermo O'Donnel, which consists of a pattern of authoritarian behaviors that guide the laws

and the Brazilian institutions so that those laws and institutions serve as a mechanism of control of the poorest social classes by the richest ones. Such a model has begun during the Brazilian colonialism experience, and then it was strengthened by authoritarian experiences faced by our country and survived till the redemocratization, influencing the behavior of the institutions so far.

Without any intention of reducing the importance of some measures recently adopted, our main argument in this article points them as innocuous if directly applied to the Country without a major preoccupation with the colonial structure still in vigor.

Concerning it, we remind that Brazil possesses a very advanced Constitution, which guarantees rights, a well-articulated infra-constitutional legislation, several democratic institutions, as well as two national programs on human rights. In spite of that, it continues to have as its main challenge to be faced the real utilization of the whole normative-institutional structure, consequently followed by the defense and implementation of fundamental rights and freedoms.

Once again we must insist that we are not trying to deny the validation of the measures already taken. Despite fitting the greatest part of the global model, the Brazilian one has its peculiarities and it will not be possible to think of a restoration of the Judiciary's autonomy in Brazil without mentioning the concept of the Brazilian justice system itself.

Likewise, any effort dedicated to the construction of a more autonomous Judiciary goes through the acknowledgment that these informal and almost "invisible" rules are also influenced by the Judiciary in several ways. Once acknowledged the existence of such rules, it is necessary to elaborate a strategy in order to deconstruct and updating them according to the historical democratic moment of Brazil. Without such precautions, every initiative pointing to restructuring the Judiciary will be fated to fail.

Therefore, it remains for us to adapt the global strategies proposed by the United Nations to the local necessities of the Brazilian structure, so that the Judiciary Power in Brazil can be restored to its real role as autonomous and independent defender of the human rights.

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Violation of the principle of natural judge and protection of human dignity: a concrete case study

LUIZ MÁRIO DE GÓIS MOUTINHO | JOSÉ VIANA ULISSES FILHO[1]

1 Introduction

The matter on the movement of judges in the structures of the Judiciary Power seems to be an internal subject of the corporation. It looks like the Civil society should not worry about it. The movement issue involves promotion, removal by designation or substitution and any act which provokes the movement of the magistrate.

The reality is different. Behind this innocent vision, there are many interests at stake in order to manipulate the independence of the judges. In some situations there is a huge concentration of power in the hands of the administrator who decides the life of the judge who is forced to make favors against his own dignity. In other situations there is a manipulation of the designation of judges, particularly the so called substitute judges. There are also pre-elaborated decisions.

1 Judges of the judicial district of Recife, State of Pernambuco; members of the Association Judges for Democracy (AJD).

All these things destroy the most legitimate interests of the citizen who has the constitutional subjective right to have access to an independent, impartial and efficient Judiciary Power as one of the manners to guarantee an effective jurisdictional protection to the human dignity.

In this perspective, analyzing the State Constitution of Pernambuco and the State Code of Judiciary Organization, we observe that parts of these legal documents violate constitutional principles and fundamental rights of the citizen, recognized as supra-constitutional principles and rights. Like in the article X of the Universal Declaration of Human Rights which states that "*Everyone is entitled in full equality to a fair and public hearing by an* ***independent and impartial tribunal****, in the determination of his rights and obligations and of any criminal charge against him.*"

After these preliminary statements, this essay will analyze a concrete case to show that, in the State of Pernambuco, the institution and the functioning of the so called substitute judges violate constitutional principles.

2 Norms of the State of Pernambuco incompatible with the Federal Constitution

The base of the acts of the presidency of the State Court of Justice (TJPE) are the §§ 2 and 3 of article 52 of the State Constitution of Pernambuco (CE-PE) and articles 127 and 129 of the State Code of Judiciary Organization (Pernambuco, 1970).

The cited paragraphs of the State Constitution above are special rules concerning the movement of judges.

However, the state legislator is not competent to treat an organic matter concerning magistrates in the national sphere or to treat organizational matters of the state justice. The first is the Supreme Federal Tribunal's competence and the second, the State Court's according to the articles 93 and 125, § 1 of the Federal Constitution/88.

Because of this, all the articles of the State Constitution, in terms of Judiciary Power and Magistrates, which treats the matter differently from the Federal Constitution and the National Organic Law on Magistrates, are formally unconstitutional (Brazil. Supreme Federal Court, 2003).

The Federal Constitution of 1988 does not mention any kind of judges with full jurisdiction with exclusive function of substitution and support. The Federal Constitution of 1967 and the previous ones had these kinds of judges.

The Constitution of 1967 mentioned the temporary judge in the State Justice sphere. His/Her main function was the substitution of other judges. The issue was included in the National Organic Law on Magistrates of 1975.

Nowadays there is not this kind of judge with exclusive function of substitution or of limited jurisdiction in Brazil.

The magistrates have the guarantee of not being removed. There is no difference between the main judge and the judge with function of substitution in the Federal Constitution or in the National Organic Law on Magistrates [2]. Both kinds of judges have full jurisdiction, there is no axiological reason for such difference[3].

The judges will be removed in two situations: at his request or public interest. Exceptionally he/she will be removed because of an act of indiscipline or an unlawful act. The situations which permit the removal are very restrict, the judge will not be removed because of any other reason than the cited above.

2 "Art. 25 - Except the express restrictions of the Constitution, the magistrates have guarantees of lifetime position, protection against removal and wage reduction."

3 "To ensure the independence of the Judiciary Power, the Constitution gives the magistrates some special guarantees, some more related to the structure of the organs which are called institutional, and some related to the autonomy of the function which are subjective rights and are nominated subjective or functional guarantees: a) art. 91 (lifetime position, protection against removal and reduction of wages); b) *omissis.*" (Nunes, 1943, p. 91-92). The Constitution referred by the author is the 1937 one.

Then, the rules of the State Constitution and the State Code on the Judiciary Organization (COJ) of Pernambuco are formally unconstitutional because they create new situations concerning the movement of judges which are not in the Federal Constitution and in the National Organic Law on Magistrates. The state laws also create new types of magistrates and substitute judges which are not in the text of the Federal Constitution.

Article 93, I of the Federal Constitution/88 refers to one kind of substitute judge, the one who is under the approbatory process.

After two years of effective practice, the magistrate acquires all guarantees: lifetime position, protection against wage reduction and removal, regardless of being the office holder judge or a judge with a function of substitution.

Materially, the referred articles of the State Constitution of Pernambuco and the State Code on the Judiciary Organization are unconstitutional because they are in conflict with principles, guarantees and fundamental rights set in the Federal Constitution.

The judges referred in §§ 2 and 3 of article 52 of the State Constitution are magistrates with full jurisdiction and with function of substitution. These judges have the same constitutional guarantees of the office holder judge without any kind of restriction included in the text of the Federal Constitution.

The articles of the State Constitution and the State Code on the Judiciary Organization establish restrictions to the protection against removal of judges that are not according to the Federal Constitutional and the National Organic Law on Magistrates.

According to the Federal Constitutional and the National Organic Law on Magistrates, the judge will be removed in two situations: at his request or because of a public interest, and in this last hypothesis, restrict to the practice of indiscipline or an unlawful act. In any other situation, the judge will not be removed which would consist on a violation of the constitutional guarantee. Then, the articles referred are in conflict with the articles 95, II and 93, VIII of the Federal Constitution.

3 Due Process of Law and the respect for the principles of the natural judge and the public administration

The protection against removal aims the guarantee of the independence of the magistrate. Master Professor Luis Pinto Ferreira states: "The protection against removal is the guarantee that the magistrate will be protected against the free will of another state agent."

The disrespect for this principle concerning the judge with a function of substitution by the State Law harms the constitutional principle of isonomy because it gives different juridical treatment to an identical situation that is why it is materially unconstitutional. It also violates the fundamental principle of the jurisdiction, which means the natural judge principle.

The isonomy is once more violated by the State Law considering it admits the voluntary movement of the substitute judge without the observation of the National Organic Law on Magistrates and the State Code on the Judiciary Organization.

The natural judge principle is a fundamental right which belongs to the society as well. All persons have the right to be judged by independent and impartial judges.

The impartiality principle of the judge is also affected by the possibility of removal of the magistrates with a function of substitution, admitted by §§ 2 and 3 of article 52 of the State Constitution of Pernambuco and articles 127 and 129 of the State Code on the Judiciary Organization.

The due process of law is a guarantee and a right which belongs to all. The possibility (created by the laws cited above) of the administration of the Judiciary remove a judge with full jurisdiction discretionarily, without showing the reasons of the removal, is a violation of the due process of law. The natural judge principle is harmed because of the violation of the independence and the impartiality principle of the judge.

In the criminal field, the effects of this flexibility are more serious and evident because it amplifies the persecutory power of the State once they provide the administrator

with the power of replacing or designating the judge to conduct a certain process or several proceedings.

The Public Administration, including the Judiciary Power, must be guided by the following principles: legality, morality, impersonality, publicity and efficiency.

The protection against removal embraces the level and the geographic space. It corresponds to the circumscription, the section, the headquarters, the judiciary district, the building, the Forum.

§§ 2 and 3 of article 52 of the State Constitution of Pernambuco and articles 127 and 129 of the State Code on the Judiciary Organization violate the impersonality principle because there is no objective criteria to lead the subjective decision of judge removal whose reasons are not publicized.

The experience has demonstrated that the reasons of the administration to designate a magistrate with a function of substitution to the best judiciary units (a district close to the biggest or most developed cities, or with less level of violence, for instance) are purely subjective, based on family relations, friendship or internal/external political interest of the Judiciary Power. .

Publicity is another Public Administration Principle which is violated by the State Laws as the reasons of judges' removal are not clear and are not shown to the public.

The judges with a function of substitution are not linked to a judiciary unity and are designated to a Forum without any previous substitution schedule. The President of the State Court is in charge of choosing the magistrate. This free will is the reason for the material unconstitutionality of the articles of the State Juridical Order.

The morality of the public administration, characterized by the loyalty and the good faith, is also affected by the indiscriminate practice of designating judges with a function of substitution.

Loyalty means transparence in the practice of administrative acts. There must be previous and adequate information about the choice of a judge to be designated and the reasons of this designation.

Good Faith is materialized by the respect for the legitimate expectation of whom the administration has a relation with. In the case under study, the parties subjects of the process relations.

It is unfair to the parties when the public administration allows the movement of a servant which has got a legal protection against an act like this, without any previous reason for the practice of the act.

The party has the legitimate expectation that the Professional, which received his/her process and which has practiced acts on it, will not be sacked of its conduction because the Federal Constitution guarantees this right.

When a judge with a function of substitution is designated to a new office with retroactive effects considering the date of designation, her acts in the previous unity could be annulled as the date of designation would be in conflict with her past jurisdiction. This is a concrete situation which happened with a judge.

The lack of criteria previously defined to the substitution of judges and the fact that the judges with a function of substitution are not bonded to a judicial unity permits practices against the morality. It also puts the judicial process in doubt. (Brazilian Institute of Criminal Science. Newsletter, 2003)

§§ 2 and 3 of article 52 of the State Constitution of Pernambuco and articles 127 and 129 of the State Code on the Judiciary Organization are also in conflict with the efficiency principle (article 37 of the Federal Constitution).

This instability causes many problems: it impedes the management of the process by the magistrate; it does not allow the formation of a team as the persons may be removed any moment, including the judge; it impedes the establishment of an

administrative routine in the judiciary unit. Finally, it is against the good administration principles and rules.

In the jurisdiction sphere, the damage is bigger. The judge does not have enough time to get to know the processes which are under his/her jurisdiction. The magistrate, after reading the process, has to maturate the facts and the law exposed in order to decide in the correct time.

The frequent movement of a judge with a function of substitution brings insecurity to the person in charge of the decision and is a loss of work many times considering this person may be removed from his judiciary unity any moment.

In practice, the mobile judge may limit himself/herself to conduct processes of low complexity in order to decide quickly. These magistrates are able to do a single hearing and make urgent decisions as well.

This permanent situation of movement may foment strategies created by bad professionals who exist inside the Judiciary. In a situation of complexity, the judge may find an easy solution, not a final one, as he knows that soon he/she may be removed and will not have to decide the complex process. This practice seems to be invisible for the administration of the Judiciary. There is not and there will not be any control for a situation like this.

The judge who is in constant movement looses his identity in the structure of the Judiciary and consequently becomes invisible. This situation brings serious risks to the efficiency and mainly to the morality of the jurisdictional work.

Linked to a judiciary unit, the judge with a function of substitution may be identified. That is the judge of that unit. The rights and wrongs committed by him will be quickly seen by all, lawyers, parties and administration. The permanent movement of the judge gives an argument for the bad judge justify his lack of compromise.

Finally, we understand that the possibility of permanent movement of a judge with a function of substitution and the fact of not being linked to a judiciary unity is in conflict

with the efficiency principle of the public administration. Consequently, it is materially unconstitutional.

4 How to adequate rules to principles: suggestion

According to what has already been stated, the constitutional principle of proportionality (Bonavides, 2003, p. 434-436) is another victim of the judiciary organization of Pernambuco in relation to the substitute judge non-linked to a judiciary unit.

The proportionality is a result of the examination of the adequacy, necessity and proportionality ***stricto sensu*** of the **mean** used to reach certain **objective.**

The **objective** to be reached by the organizational model of the judiciary in Pernambuco, with a staff of judges with a function of substitution non-linked to a judiciary unity, is the efficiency of the distribution of the jurisdictional activity.

This model (mean) makes the management of human resources flexible and gives discretionary power to the public administrator who is able to designate judges to fill absences.

There will be the violation of the proportionality principle, every time that the **means** used to reach an **objective** are not appropriate and/or when the lack of proportion between the means and the objective is evident.

We must list and give the definition of the sub principles of the proportionality principle: adequacy, necessity and proportionality *stricto sensu*.

Adequacy is the apt mean chosen to reach a result. The **necessity** sub principle is observed from a fundamental right.

Finally, the proportionality *stricto sensu* is the balance between the intensity of the restriction to the fundamental rights affected and the importance of the realization of the fundamental right which is in conflict with it and gives fundament to the adoption of the restrictive measure (Silva, 2005, p. 40-41)

The **mean** chosen by the organization of the justice in Pernambuco – judges with a function of substitution and non-linked to a judiciary unity – to reach the **objective** of the efficient distribution of the jurisdiction, is not adequate because it is not able to **foment** that goal.

Efficiency means the fulfilment of an activity to reach the highest number of results, in a short term, with the best quality and with security.

The efficiency of the jurisdictional activity will be reached if the judge with a function of substitution is linked to a judiciary unit and if the designation to substitute another judge follows a previously defined schedule.

The exaggerated flexibility given to the public administrator to move the judge with a function of substitution and the fact of not being linked to a judiciary unity – **means** – are not able to **foment** the **objective** of efficient distribution of the jurisdictional activity, reason for the violation of the sub principle of **adequacy**.

This model of organization does not fit the sub principle of **necessity** as well.

Another **mean** may be used to reach the **objective** of the efficient jurisdictional activity without the violation of any of those principles, guarantees and fundamental rights.

In some situations the judiciary unit does not have a magistrate. For these hypotheses, there is a mechanism called automatic substitution which must be used by all judges. However a previously defined schedule must be observed.

The model cited is the only able to guarantee the efficient distribution of the jurisdiction and the respect to all principles, guarantees and fundamental rights listed below, because it:

a) guarantees the protection against removal to all magistrates;

b) respects the isonomy principle because it gives an equal treatment to identical situation as after two years of activity, all judges have the same constitutional guarantees;

c) keeps the independence of the magistrate;

d) does not have any conflict with the principle on the independence of the judge;

e) keeps the independence of the Judiciary Power once it protects the independence of the magistrates and prevents the removal at the discretion of the public administrator;

f) respects the principle and the fundamental rights of the natural judge, which demands a jurisdiction with independent and impartial judges;

g) respects the due process of law;

h) mitigates the persecutory power of the State;

i) is not in conflict with the morality principle of the Public Administration because the movement of the judge in this case is previously and publicaly defined;

j) respects the publicity of the acts of the administration of the Power;

k) is not in conflict with the impersonality principle because the criteria concerning the choice of a judge to substitute another is defined by law;

l) respects the efficiency principle considering the substitute judge linked to a judiciary unit may have a proper rhythm of work, being in the command of the work, being able to decide quickly and with security;

m) respects the fundamental principle of the democratic State of law by observing all principles, guarantees and fundamental rights listed above.

In this context, the mean of the existent judiciary organization is not **necessary** because there is another mean to reach the same **objective** without the violation of constitutional principles, guarantees and fundamental rights

The non-observation of the sub principle of adequacy and necessity would be enough to characterize the disrespect for the constitutional principle of proportionality and consequently, the material unconstitutionality, not being necessary the examination of the **lack of proportionality *stricto sensu.***

In short, §§ 2 and 3 of article 52 of the State Constitution of Pernambuco and articles 127 and 129 of the State Code on the Judiciary Organization create an **inadequate mean**, **not necessary and not proportional *stricto sensu*** to presume the reach of the **objective** of the efficient distribution in terms of jurisdictional activity, reason of their material unconstitutionality.

5 Conclusion

We conclude that the State Constitution of Pernambuco and the State Code on the Judiciary Organization – in terms of substitute judges, more specifically about its mobility to substitute other judges at the discretion of the administrator – violate specific constitutional norms which explicitly protect fundamental rights and guarantees of the citizen as well as it happens with the due process of law and the natural judge principle.

Moreover, it violates the subjective right of the magistrate who is in the situation of substitute judge and it threatens the security of each citizen against the state will, once it makes the magistrate fragile. It makes him/her dependent and partial and it affects all institutional and personal guarantees which must guide the democratic State of law expressed through the existence of norms which guarantee the independence and the impartiality of each judge and it demands the need for objective criteria in terms of distribution of competence of the magistrates.

The substitute judge in the State Constitution of Pernambuco and the State Code on the Judiciary Organization is a brutal harm to universal principles which protect the human dignity and which must be preserved by civilized States in the universal context of respect to the human rights.

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PART II

Cases of violation to the independence of judges

Presentation of the cases

RIVANE ARANTES[1]

The following cases are the result of a collective work, coordinated by the International Human Rights Program (dhINTERNACIONAL) in 2004/2005, on the occasion of the official mission in Brazil of the UN Special Rapporteur on the Independence of Judges and Lawyers, Mr. Leandro Despouy, in October 2004.

The purpose of this initiative was to mobilize networks, articulations and organizations of the organized civil society, especially those that are part of the National Movement of Human Rights, Northeast regional section, on the necessary debate on the problems and challenges faced by users of the Judiciary and other organizations in their relations with the institution, as guarantor of human rights.

That debate resulted in the elaboration of this report, that intends to highlight cases that help us reflect on the main questions, problems and challenges that hinder the judicial power from efficiently protecting and preserving human rights.

In this way, a total number of 26 entities, programs and networks participated in this project since the beginning. The result was the elaboration of a first report – which also

1 Lawyer, member of the team of the dhINTERNATIONAL Program (MNDH-NE and GAJOP).

included cases related to Public Prosecutors, the Police system, lawyers and human rights defenders – and that was presented to the Special Rapporteur during his visit.

This publication, however, intends to focus on cases that reflect practices of the Judiciary in opposition to its responsibility of rendering Justice. Thus, we counted on the contribution of 12 entities, amongst them non governmental organizations of human rights; associations (including judges associations); Citizenship and Judiciary Watches, covering three regions of the country: North, North-East and South-East.

This work reports 37 situations that both denounce and reflect on the main difficulties faced by the users of Justice, especially the so-called vulnerable groups (black people, women, homosexuals, etc.), in their relations with the various aspects of the judicial power. In this way, we approach questions such as: apathy, connivance with economical and political groups; prejudice; lack of social compromise; corruption; etc.

We also call attention to other questions that challenge this institution, within its own structure, requiring the adoption of new standards. For example, questions such as the necessity for establishing objective criteria for the promotion and removal of judges, as well as attacks against "activist" magistrates.

The following reports are based on two kinds of sources: on the one hand, information and data transmitted by organizations of the civil society; on the other hand, articles of the respective State's main newspapers.

The facts related to the Independence of the Judiciary are reported in such a way that aim to preserve, as often as possible, the identity of the victims. However, when they identify themselves as human rights defenders[2] , their names are fully reported, for

2 Art. 1 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Resolução 53/144 of the General Assembly of the United Nations of 09.12.98) – "(...) Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels".

the purpose of highlighting the risks they are exposed to, as well as the legitimacy of their work, as a concrete exercise of democracy.

We also preserve the identity of the magistrates who are denounced, as far as we do not have information that legal proceedings were opened. Furthermore, this book – as instrument of denunciation – is a collective exercise of the so-called "active citizenship", expressed in the Rights to free expression and manifestation[3], constitutionally guaranteed, and to Communication[4], respecting obviously the constitutional principle of innocence[5].

This multiple-faced reality also inspired the participating entities to debate their various experiences and propose recommendations aiming to improve the independence of the Judiciary. Such proposals are listed in the third part of this work.

In this way, we hope to contribute to the achievement of a fairer State and a more independent Judiciary, indispensable condition the full accomplishment of the human rights of all.

3 Art. 5, IV – the expression of thought is free, and anonymity is forbidden; Art. 220 – The manifestation of thought, the creation, the expression and the information, in any form, process or medium shall not be subject to any restriction, with due regard to the provisions of this constitution.

4 Art. 5, IX – the expression of intellectual, artistic, scientific, and communications activities is free, independently of censorship or license.

5 Art. 5, LVII – no one shall be considered guilty before the issuing of a final and unappealable penal sentence.

Reports of cases

The National Movement of Human Rights – Northeast Regional Section (MNDH/NE) and the Legal Advisory Office for Popular Organizations (GAJOP) warn that the content of the cases reported below is the full responsibility of entities and organizations that presented them, and whose names are mentioned before the cases. The MNDH-NE and GAJOP, as well as the editors of this publication, are not responsible for the information contained in these reports.

1. Brazilian Association of Exposed to Asbestos (ABREA) and the Virtual-Citzen Network for the banishment of Asbestos in Latin America - São Paulo

1.1 Decision of the Supreme Federal Court (STF) to revoke State laws for the banishment of asbestos.

The asbestos, for their excellent properties of thermal isolation and incombustibility, became privileged raw material for construction in the industry's sector in the postwar period. However, it is cancerous for human beings, and its intense use generated serious consequences to the health of workers exposed to this product for years, with thousand of annual deaths in the Occidental Europe and United States. In Brazil, the government and other authorities, in special the Judiciary, have ignored for many years the appeals of the movement for the banishment of asbestos in Brazil and for justice to the victims (industrial workers), arguing technical ignorance and the absence of national research on this area.

This complicity, supposedly based on the defense of economic interest against the public interest and the preservation of physical integrity and mental health, can be observed in a decision of the Supreme Federal Court (STF), in response to a action of unconstitutionality against the States of São Paulo (ADI 2656) and Mato Grosso do Sul (ADI 2396). Without analyzing the grounds of the case, the two Reporters Judges, Ellen Gracie and Mauricio Corrêa, followed in their votes by the plenary assembly, decided for the unconstitutionality of the state laws, alleging that both "transposed Federal Government's legislative ability to establish general norms for the production and consumption, protection of the environment and control of the pollution and the protection and defense of health"[6].

6 STF Decisions of May 08, 2003, declaring the unconstitutionality of provisions of States laws of São Paulo (ADI 2656) and Mato Grosso do Sul (ADI 2396), prohibiting the use of asbestos. Available in http://www.stf.gov.br/noticias/imprensa/ultimas/ler.asp?CODIGO=46190&tip=UN#

In September 26, 2001, the STF´s member Ellen Gracie, reporter of the case, granted a preliminary sentence who suspended the effectiveness of the Law from Mato Grosso do Sul. In her vote, she referred to the Federal Law nº 9.055/95 as "being sufficient for the health's protection, and also because it prohibits the use of more dangerous kind of asbestos. The decision was favorable to the state of Goiás, author of the action Unconstitutionality (ADI nº 2396), that produces the variety *crisotila* or white asbestos, which, according to studies, this kind does not offer risks to human health since the precautions determined in the Law 9.055/95 have been taken"[7] .

Some contradictions on can be appointed in her decision; it mentioned a law "supposedly" fulfilled, would not bring risks to human health. However, at no moment the STF requested evidences of the real fulfillment of such law, which refers to the fallacious "controlled use of asbestos". So the reporter recognizes that there are risks, because there is no exempt the Brazilian asbestos.

The option for the defense of the economic interest seems to be clear. Such decision is inconsistent, founded upon a presumed "safe or controlled use". This argument strengthens the thesis, technically almost unsustainable, that the risks of cancerous asbestos can be "controlled", preserving by this way economic interests, instead do the primacy of life and the inalienable right to the health of the Brazilian population.

The proper site of the STF does not allow doubts at this respect: "the city of Minaçu, in Goiás State, is one of world-wide producers of asbestos and the state of Goiás intends, with the direct action of unconstitutionality (ADI), to protect the tax proceeding from the commercialization of the product, that today represents 30% of the rude profits of the State[8] ". This decision places Brazil out of the map of countries that have opted for preserve its population health, and also "closes the door to the States legislate on health and environment"[9] , obstructing them to sanction more restrictive laws than the Federal Government in this subject.

7 Available in http://www.stf.gov.br/noticias/imprensa/ultimas/ler.asp?CODIGO=13916&tip=UN

8 Ibid.

9 Citation of the jurist Paulo Afonso Lemes Machado, Professor of environmental law at the São Paulo State University (UNESP), in article published for the State agency in October 11, 2001.

This decision of the STF can constitute a precedent for others 04 similar actions opened at the end of 2004 against the States of Pernambuco, Rio de Janeiro and Rio Grande do Sul, that aim at revoking state laws for banishment of asbestos. This decision is also contrary to the content of the article 196 of our Federal Constitution, that affirms explicitly that " Health is a right of all and a duty of the State and shall be guaranteed by means of social and economic policies aimed at reducing the risk of illness and other hazards and at the universal and equal access to actions and services for its promotion, protection and recovery". It also disrespects the Additional Protocol to the American Convention of Human Rights of November 17, 1988, which establishes at art. 10-1 that "Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being".

1.2 Case of Judge João Carlos da Rocha Matos

For a long time, the asbestos industry has hindered anti-abestos movements from alerting Brazilian population on the risks of the exposition to this product, consumed in large scale in Brazil. Moreover, it repetitively attempted to use the Judiciary as shield for its criminal action, in order to perpetuate impunity and to difficult judicial actions in favor of victims.

In a certain manner, the Brazilian Judiciary can be seen as a "business balcony", homologating suspicious extra-judicial agreements, and granting insignificant amount of money to compensate victims. No serious inquiry has been carried out to investigate how agreements were made, since the majority of asbestos victims is illiterate and confess that they even did not read or understand the contents of the contract they signed. By the way, it is common that the same lawyer represents both parts in the transaction.

Moreover, victims have to wait for about ten or more years to obtain a final judicial decision, for cases in which life expectancy is less than one year after the appearance of the illness. Consequently, victims yield to companies "blackmail", whose representatives and lawyers warn that they will appeal until last resort.

Victims do not trust the Brazilian Justice, for that reason, they prefer accepting unfair agreements, in order to be sure to receive any compensation when still alive, and also to obtain recognition that their illness was contracted at work.

Activists defending victims and fighting for the banishment of asbestos also suffer intimidation. One example is the internationally known ABREA´s activist Fernanda Giannasi. After leading a national campaign for the banishment of asbestos, initiated almost two decades ago, she suffered threats, including the possibility to be removed from her position at the Labor Ministry, in which she works as engineer in charge of monitoring companies using asbestos. Some of them brought civil and criminal (03 out of 06) actions against her, alleging financial and moral damages.

For example, in 1998, she was sued by the company ETERNIT, after having publicly questioned the validity of extra-judicial agreements and denounced the "Mafia of Asbestos". The action was closed after strong reaction of the national and international public opinion in favor of the engineer.

In 2002, the activist made critics to the way Trade Unions were created before the 1988 Constitution, illustrated by the creation by a former Labor Minister of a Trade Union created under the command of a powerful French multinational asbestos group. The process of their creation disrespected the legal rules in force at that time, which constituted crime against the work organization. Fernanda Giannasi was denounced and the case was processed before the Federal Justice as it involves an ex-minister – now working for big companies – who would have taken advantage of the position he occupied, at that time, at the Labor Supreme Court. However, the Federal Public Prosecutor concluded in favor of the closing of the case, concluding that "really, in the case, there is no indication of defamation (...)".

Nevertheless, this opinion was rejected by Judge João Carlos da Rocha Matos, from the 4th Federal Chamber of Justice of São Paulo, who required sending the process back to the General Public Prosecutor of the Republic. The denunciation was finally accepted by the Public Prosecutor who re-examined the case. Judge Rocha Matos

received the complaint and qualified the activist's acts under art. 139 of the Brazilian Criminal Code, on the crime of defamation.

However, some months later, Judge João Carlos da Rocha Matos was arrested through the scandalous Federal Policy Operation known as "Anaconda"[10] . Judge Rocha Mattos, famous for the agility of his decisions, was accused to maintain closed links with the organized crime, and is currently in prison. Thanks to that, Fernanda Giannasi escaped to an unfair sentence. The process against the engineer continues in progress under the responsibility of the substitute of the former Judge Rocha Mattos, in the 4th Federal Chamber.

Fernanda Giannasi was sued one more time before the Federal Justice, but as the ex-minister does not occupy public office anymore, the case was re-sent to the State Criminal Justice, that should state on it soon. This new denunciation aims at denigrating, through the Judiciary Power, the fight for environmental justice led by the engineer Fernanda Giannasi in defense of victims of asbestos.

The engineer denounced to the Federal Police and to the Federal Public Prosecutor the crime committed by the French multinational company against the workers organization of Capivari, under connivance of the Brazilian government. Up to now, none of these bodies responded; on the contrary, Federal Justice started to investigate Fernanda Giannasi.

2. ACPO – Association of Combat to Persistent Organic Pollutants – São Paulo

2.1 Case M.P.

For sixteen years, M.P. had worked for CARBOCLORO Chemical Industry, a company of chlorine-soda located in the city of Cubatão, in the state of São Paulo. For eight

10 Source: Site of the Folha de São Paulo - www.folha.com.br -November 11, 2003.

years long, M.P. had worked in the chemical production unit, using metallic-mercury-based technology, which is highly harmful to health; according to researches, it is ranked as neurotoxic, mutagenic and teratogenic. However, the medical department of the above mentioned company had never informed on the damage due to exposition to this chemical substance.

On 11th of November 1995, M.P. was considered invalid for work due to the sequels proceeding from the exposition to metallic-mercury in accordance to the following entities: Workers' Health Care Center in Santos; Workers' Health Care Reference Center in São Bernardo do Campo; Nucleus of Psychosocial Attention in Santos; and the Medical Examination from the Social Security National Institute (INSS) in Santos.

Before his retirement, M.P. brought Indemnity Lawsuit against CARBOCLORO because of job-related accident. The judge S.C.P.O., from the First Civil Judicial district of Cubatão, decided for the absence of grounds, considering that indemnity was improper, as that it was not proved the existence of such occupational disease acquired by the company's blame. Thus, the judge was based on a medical report, which certified a different result compared to the one from INSS, whose result justified his retirement in function of his contamination by mercury.

The company's doctor and the medical expert of the Tribunal of Santos were denounced to the Regional Council of Medicine of São Paulo, which after almost three years of investigation transformed the denounces of the victim into a disciplinary process against them for fraud. One copy of this lawsuit was attached to the Indemnity Action, however, the body in charge of judging it did not grant it. The decision remained in the Notice of Appeal judged by the 10th Civil Chamber of the Court of Justice in São Paulo in 1998.

CARBOCLORO refuses to provide any medical or financial support to the victims. According to M.P.: "in Brazil, unfortunately, it seems that the financial power influences some doctors, experts and part of the Judiciary. I am under the clear impression that the multinational companies manipulate the data, occulting or omitting the truth. I also

have an impression that some judges, even after realizing the distortion on the part of the company, do not lead the process towards a FAIR outcome".

2.2 Case Jeffer Castelo Branco

Jeffer Castelo Branco[11] had worked for Rhodia S/A[12] since 1983, at the factory of carbon tetrachloride and perchloroethylene. Besides the final products to be fractionated through distillation, there were also chloridic acid and organochlorid[13] residues, both at a large quantity.

The contact with these substances had the result to infect Jeffer Castelo Branco, who started to suffer chronicle infection due to organochlorid substances, especially HCB[14] (hexachlorobenzene), causing[15] partial and permanent incapacity, which prevents him from working in the labor market.

By reason of that, Jeffer Castelo Branco brought an Indemnity Lawsuit against Rhodia S/A[16] , pleading the existence of job-related accident. According to the investigation carried out by Doctor Agnes Soares da Silva in 1995, "(...) the author presents occupational background and compatible exams attesting chronicle intoxication by

11 Jeffer Castelo Branco is the ACPO president.

12 Rhodia S/A belonged to Clorogil, an associate of the international group Progil. In 1966, it started to produce the so called "Chinese powder". In 1974, it started to produce other carbon and chloride based substances. The raw material, namely propene and chloride, generate chloridic acid as a sub product. The approximate composition of the residues is around 70-80% of hexachlorobenzene (HCB) and 10-15% of hexachlorobutadiene (HCBD).

13 Organochlorid are substances composed of Carbon, Hydrogen and Chloride. These products are toxic, being absorbed and stored in human beings, especially in livers, kidneys and fat tissues.

14 The HCB – hexachlorobenzene is a kind of organochlorid metabolized by the liver, provoking alterations of porfirines and consequently causing a skin disease.

15 Background based *in* Medical Investigation - Doctor Agnes Soares da Silva - 1995.

16 Process Number 934/99 was processed in the 2nd Chamber of the judicial district of Cubatão - SP.

means of organochlorid substances and levels of HCB higher than those people exposed to the "dumps" from Rhodia (approximately 10 times higher), even when compared to the international literature"[17] .

We should emphasize that, as for Jeffer's history, there is no antecedents of chemical products exposition of such nature, even considering that he worked in a field of chemical products, but had no direct contact with those.

Besides that, Jeffer cannot work in the industry, not only because of the interdiction as a risk area, but also because Jeffer would hardly be considered apt by an admission exam from other chemical industry to develop his function. The two main reasons are the organochlorid residues at high levels in his organism, which evinces great exposition to chemical substances; and he also developed a kind of mental disease, influenced either by organochlorid substances or serious intoxication symptoms.

Despite this situation, in 2001 Judge M.R.N.V. from Cubatão stated the lawsuit as groundless, justifying that Jeffer "(...) worked in an industrial area, thus, he cannot demand that his health remain completely safe as compared to a climatic resort (...)". Jeffer did not accept the decision and appealed against it. Now, he is still waiting for the trial.

Being criticized in public by the ACPO through the press, this Judge reconsidered his decision some days later, granting indemnity for an inhabitant of contamined areas in the Process number 330/99, stating his sentence as follows: "(...) the mere existence of HCB in the blood is to be considered as a harm, even because nobody is born presenting HCB levels in the blood (...) Therefore, I recognize the damage (...)".

17 Idem.

3. Amar Ribeirão – Association of Mothers and Friends of Children and Adolescents in situations of risk for Ribeirão Preto and Region – São Paulo

3.1 The case of Judge G.S.L.

The Council of Guardianship II (Conselho Tutelar) of Ribeirão Preto – SP recorded that in February of 2002, the judge for Infants and Youths of that city, G.S.L., holder of that title since December 2002, entered the centre for abused Children and Adolescents (CACAV), a municipal shelter, accompanied by two policemen, having received information that there were children on the roof of the institution.

Immediately, he asked the coordinator of the shelter for details of any "offences". However, she responded that the institution was solely a shelter for abused children and adolescents and not a place of detention and recuperation for offenders. The judge asked which of the children were brave enough to admit that they had been on the roof before he arrived, as only one was still on the roof when he arrived. Four of them, aged between seventeen and eight years, confessed.

Following this, the judge confirmed that he would detain the three oldest youths in the FEBEM and the others in the Casa das Mangueiras (a local shelter), asking that the coordinator check the viability of these actions. The coordinator requested the intervention of the Council of Guardianship in response to which the judge ordered that the two youngest stand in the corner of the playground and stare at the wall.

The judge, then had functionaries of FEBEM together with the help of a police vehicle effect the detention of the youths confirming that "from that date the adolescents had passed from being victims to being offenders", adding that everything they had broken, they themselves would fix and that the wall surrounding the institution should be higher and covered with roles of barbed wire because "if anyone smaller tries to jump they will be hurt".

Witnessing her friends being detained, one adolescent reacted stating that they were not criminals. The judge, however, told her that "she should keep quiet or he would make her life a hell, besides arranging for her detention". As the youth continued to protest, it was suggested that she be detained for obstructing the authorities. The staff of the shelter interceded informing him that the adolescent was the mother of a one year old child, to which he responded that "a person like this is not capable of creating a child", and he again threatened to take her.

The adolescent then fetched her son saying that he would not be capable of this act. In response the judge ordered that the guards take the child from the mother and again ordered that the adolescent be detained, adding that she should be handcuffed in complete opposition to the Statue of Children and Adolescents. The magistrate, next, said to the adolescent that everything could be avoided if she apologized. As she then apologized, she was released.

The three adolescents who were detained, remained in the FEBEM for three days. Having spent the weekend imprisoned, on the Monday the adolescents were set free, but before leaving, they addressed the aforementioned judge in the interview room. On entering the judge asked them if they had slept well and in a threatening tone said "I am not nice. You don't know the limits of my imagination".

It is clear that this detention was arbitrary because it was carried out without the requirements of the aforementioned law (law nº 8.069/90) being observed.

Besides this, the same judge was allegedly involved in other similar situations:

a) According to information received by the Council of Guardianship I of Ribeirão Preto, G.S.L., judge for Infants and Youths, organized meetings with the directors of public schools, during which he produced a firearm from his belt and stated that in the worst case scenario, this was the solution, referring to the firearm.

b) Furthermore, according to the same source, during a visit to a public school to gather information in respect of the aforementioned student, the magistrate ordered

that the same phrase be written on the black board many times, putting the student in a humiliating and uncomfortable position.

c) Finally, in front of an audience of mothers of young offenders, the aforementioned judge went as far as to state to some that "your problem is that the midwife did not kill your child at the time of the delivery".

It is not too much to remember that a judge must always serve ethically with civility and with respect for the human rights of every person. These obligations are not a question of faculty or prerogative but of obligation, which accordingly can be seen in the internal rules and regulations of tribunals and legal bodies both in the national and international sphere.

3.2 Case of the illegal detention of children in an institution for offenders

On June 23 2004 Infants and Youths judge of Ribeirão Preto – SP, G.S.L., ordered the temporary detention in FEBEM, of two children aged 11, based on article 108 of Law nº 8.069/90. The children were sent to Rio Verde Temporary Detention Unit, in that city, for four days, where they experienced two rebellions. The boys were sent free later.

The detention was found to be absolutely arbitrary, taking into account that in child cases the aforementioned law authorizes the Council of Guardianship (Conselho Tutelar) and in its absence, the Judiciary - only to adopt preventive steps as they are children - instead of detention which is advisable only for teenagers (people from 12 to 18 years old) who have broken the law. Furthermore the mother of the children was not informed about the decision.

Local media questioned the judge, searching for explanations and he justified his actions by saying that the children had lied about their age, although it seems strange as the victims were visibly under 12 due to their physical complexion which even suggested under nourishment. It must also be highlighted that the responsibility for checking all

legal requirements before taking the decision - in this case the age of those involved in order to identify if they are or aren't in fact teenagers – lies with the judge.

The disciplinary steps required to address these acts have not reached any conclusion so far.

4. Dom Helder Câmara Centre for Studies and Social Actions (CENDHEC) – Pernambuco

4.1 Civil Public Law Suit to avoid the deterioration of the Police Directory on Child and Adolescent (DPCA) in Pernambuco

On 03rd of June 2003, the CENDHEC took a Public Civil Law Suit before the courts versus the Governor of Pernambuco and the State Secretary of Social Defense. The aim of the petition was to avoid the process of reform of the Police Directory on Child and Adolescent (DPCA). There was and Administrative Decree (number 25.484 – 22/05/2003) which would reduce the competence of DPCA.

The DPCA was composed by 18 police members, and during the process of reform, 06 of them were removed to the countryside. This fact would cause problems to the functioning of the Directory which is situated in Recife[18] .

The law suit was taken before the Childhood and Youth Chamber of the Tribunal of Recife, with a preliminary sentence petition against the act of the Governor of Pernambuco and the Secretary of Social Defense in order to keep the structure of DPCA in the same situation than before the Administrative Decree.

In a first moment, the Judge of the 3rd Childhood and Youth Chamber of Recife accepted our preliminary petition and determined the return of the 06 members to Recife. He also determined the accomplishment of legal and constitutional guarantees in order to offer a specialized and qualified treatment to children and adolescents issues.

18 Created by Decree 17.495, 13 May 1994.

The Governor of Pernambuco appealed and the Court of Appeals of Pernambuco (TJPE) suspended the effects of the first decision. The decision kept the reduction of the police deputies and determined the incompetence of Childhood and Youth Forum of Recife to judge the case. According to the understanding of the Court the competent forum to judge would be the State Forum of Public Finance.

CENDHEC appealed to the same Court (TJPE), but did not succeed. The last option was a special appeal to the Superior Court of Justice (STJ).

The Special Appeal was filed on 09 of June 2004 and waited for five months and finally was denied. It was not judged in terms of merit, the decision of TJPE was that the appeal would not be suitable for this case in terms of form and not contents.

In spite of all these facts, the Childhood and Youth Chamber of Recife understands it is competent to judge the case. However, while the competence problem is not solved, the DPCA has had its structure deteriorated and the object of the law suit looses its object after 19 months of delaying and long proceedings to an urgent matter.

4.2 Improper judicial demands in cases of legalization of land possession

Nowadays, CENDHEC has got 342 cases of legalization of land possession in communities situated in Special Zones of Social Interest (ZEIS) in Pernambuco. Most are individual, except 02 of them which refer to the community of Campo do Vila in Recife. All the law suits face the same problem of excessive delaying in the jurisdictional service and the lack of sensitivity of the judges to guarantee the right to housing.

The cases are being processed in the only three chambers of Public Registry (Varas de Sucessões e Registros Públicos) in Pernambuco. The magistrates do not remain a long time in these places (during the legal action more than 30 judges have acted), with different postures and understandings.

In about 10 years, there were only 04 sentences, 02 of them judging the cases in favor of the communities, and 02 of them extinguishing the legal action without a judgment of merits.

In front of the lack of sensitivity of the magistrates, CENDHEC has promoted a work in order to make them aware of the necessity of the legalization of the land in low income communities. However, the permanent exchange of judges makes this work unfruitful: when a magistrate becomes aware, he/she is transferred to another forum.

The overload of work and the small quantity of forums to appreciate these kinds of cases make the proceedings long and delaying (sometimes it takes more than one year for a first judicial response, and it is needed to put your name on a list to have an opportunity of appointment with the judge).

The paragraph above describes a difficult situation, but there are other problems, maybe more relevant. The judges have required to the petitioners evidences that this person does not own another landed property in the whole country. Considering the material impossibility of complying with this order as we are dealing with poor people, it is evident that the Constitution left the solution to this problem to the contradictory phase of the process.

In Campo do Vila, for instance, 02 collective law suits were filed in 2003 in order to benefit about 94 families who have lived in this place for more than 30 years in a peaceful, gradual and spontaneous way. In this case, there were different judicial proceedings. One of them developed very quickly, without any improper demand and according to the relevant law (Estatuto da Cidade). However, in the other case, the judge demanded lots of acts, as individual certificates from all the metropolitan area of Recife to prove that the persons did not own another urban or rural landed property, for instance. An appeal was necessary to combat this demand which has not been decided until now, disrespecting the legal provision of agility.

19 Source: Jornal do Commercio December 17, 2004, available in http://jc.uol.com.br/jornal/2004/12/17/not_119520.php.

The excessive delay is also demonstrated through the following example: the conciliatory audience was appointed only 06 months after the file of the petition, and it was necessary 10 months before the first decision, in which demanded the above described negative certificates of possession.

5. Commission on Human Rights of the Brazilian Bar Association – State of Piauí

5.1 Denunciation of Chief Judges and Judges to the Supreme Court of Justice (STJ).

The General Vice-Prosecutor of the Republic, Mr. Eitel Santiago Pereira, denounced 16 people, supposedly involved in criminal activities (corruption, traffic of influence, delaying of sentences, pressure to Public Prosecutors, etc) in the State of the Piauí in 2004 [19].

Among them, there were Chief Judges A.F.L. and J.S.A., both former Presidents of the Court of Justice of the State, as well as their respective sons; Judge S.M.M. (3ª Criminal Chamber of Terezina); ex-General Public Prosecutor of Justice A.P.L.; Public Prosecutor J.M.B.F.; Civil Police Officer B.V.; and the journalist A.C.

The Chief Judge J.S.A., who at the time were Vice-president of the Court of Justice of Piauí, would have received money to maintain the Vice-mayor of the city of Jerumenha (304 kilometers away from Terezina), Mr. Anderson Evelyn Filho, in the position of Mayor that he assumed in 1999 after the removal of the elected mayor.

The Chief Judge A.F.L. would have intermediated negotiations to delay legal actions against the businessman and lawyer Joaquin Matias Barbosa Melo. According to the press, one of his was subject to 13 fiscal actions initiated by the State Treasury Secretary, and whose administrative proceedings disappeared from the Court of Justice of Piauí. Public Prosecutor J.M. is also suspect to have obstructed the

investigation involving the businessman. Judge S.M. would have been denounced for having supposedly negotiated sentences.

From the 16 concerned people, the 04 authorities above mentioned – Chief Judges J.S.A. and A.F.L., Public Prosecutor J.M and Judge S.M – have been removed from their functions, through a STJ decision of December 2004.

6. Land Pastoral Commission (CPT) – Pernambuco, Paraíba and Alagoas

6.1. Illegal imprisonment of Landless Workers - Alagoas

The State of Alagoas is one of the most violent in Brazil, with strong influence of the organized crime. In terms of Judiciary, the impunity is associated to its low efficiency in the State. The situation has been faced by social movements which have been criminalized and isolated by the authorities of the Judiciary, who have intimidated the leaders and the poorer population.

On August 5, 2003, families settled near the towns of São Miguel dos Milagres and Porto de Pedras, in Alagoas, in order to demonstrate, in the local road, for the food distribution promised by the Rural Development Ministry and by INCRA[20].

The Judge from Porto de Pedras, Mr. R. S., went to the place and arrested 08 rural workers, one of them was a 71 years-old man and two were under 18. The Judge alleged the families were doing a toll in a public place, without having any complaint or occurrence of such irregularity in the local police stations.

In 1999, in that region, the same Judge had already arrested 05 rural workers without a plausible reason. His conduct is well known in that region, and the persons arrested

20 The INCRA (Instituto Nacional de Colonização e Reforma Agrária) is a federal body created in 1970 in order to realize the agrarian reform, to register rural property and to manage the lands of the Federation.

by him are curiously known as the "judge's prisoners". The Court of Jusitce of Alagoas released some of the workers without any compensation from the State. However, some of them remain imprisoned: José Armando Roque da Silva, Mauro Ferreira dos Santos, Severino Amaro da Silva, Eronildo dos Santos, José Cícero da Silva (homonym) e José Cícero da Silva (homonym).

One of the most remarkable cases of abuse of authority by magistrates in the State happened in Murici, on May 26, 1999; when the representative of CPT, José Severino da Silva, known as "Índio", was arrested. The decision came from the Judge Mrs. A. C. L. A., alleging disregard to authority and preservation of the public order.

The motivation of this decision was some improper comments made by the representative of CPT about the Judge on April 15, made in a land property occupied by rural workers. They were addressed to a Judiciary Official representative in charge of the accomplishment of a Mandate of Land Reintegration.

José Severino da Silva was imprisoned in the Public jail of União dos Palmares, and was transferred 03 times, during the 29 days he was imprisoned. On June 03, The Judge J. A. from the Justice Court of Alagoas denied a Habeas Corpus petition in favor of in José Severino da Silva and requested information about the case to Judge Mrs. A. C. L. A. under 72 hours. Judge A. C. L. A. did not respond.

On June 22, the Habeas Corpus was granted and the Justice Court considered the prison illegal, because there was no police inquiry or judicial process; the crime did not permit bail; the victim did not have any criminal record, neither hindered the proceedings. Then, under these circumstances, the Judge could not have decreed his imprisonment.

On early 2004, CPT lawyers filed a compensatory law suit for the moral and material damage suffered by José Severino da Silva against the State of Alagoas. Until now, it

21 The Inquiry Parliamentary Commission was set on May 08, 2001. It analyzed denounces about violence in the countryside and the formation of militias in Paraíba State. It was known as the "CPI of the violence in the countryside". Its final report was approved in March 2002 by the Parliament of Paraiba.

was not decided which Judge will conduct the process. The Justice Tribunal of Alagoas which is located in the capital city Maceió requested the case, but this determination has not been accomplished and the process remains in Murici.

6.2 Engenho do Bom Fim Case – Paraíba

The State of Paraíba suffers from the historical consequences of the rural situation in the country, particularly the high concentration the land are in the hands of a small number of farmer, which explains high levels of violence. According to the Inquiry Parliamentary Commission (CPI) [21], these farmers represent the more conservative oligarchy in the country, because of the relations with State public authorities, specially, from the Security System and the Judiciary.

In general, the members of the system of justice are conniving with the violence used by economic groups against rural workers, as well as against groups which struggle for the rural reform. This "protection" given to the economic and politic interests of the land owners is responsible for most of the conflicts which have occurred in the countryside of the State.

In the town of Areia – Paraíba, a farmer suited a legal action of possession reintegration in order to get rid of the occupants of the farm, who were about to acquire the land, known as Engenho Bom Fim. On May 27, 2004, during one hearing, the judge J. J. T., decided partly in favor of the farmer, establishing limits to the lands of the rural workers.

The farmer was not satisfied with the decision, and on June 01, 2004, he petitioned, alleging that the workers had invaded the limits of his area, disobeying the judicial decision. On July 02, 2004, the same judge decided in favor of the farmer, not taking into consideration the visit *in loco* by judicial officers who concluded that there was no disobedience to the judicial decision. However, the Judge stated: "The defendants disobeyed the judicial decision and amplified the invaded area. Order and respect of the institutions have necessarily to return in this country (…)"

According to the Federal Constitution, article 126, and Supplementary Law nº 60/ 2004, published on May 04, 2004, the Judge from Areia is absolutely incompetent to process and decide rural matters. Consequently his decisions do not have validity. The State Court of Justice is in charge of nominating a Civil Judge in the capital of the state to judge the matter. In this context, on June 02, 2004, Mr. M. A. P. J was designated to judge the case.

The workers required the incompetence of the Judge from Areia to decide the matter in favor of the Judge appointed by the State Justice Court, as well and they informed the Judge from Areia about the incompetence. However, the Command of the Military Police in Campina Grande has already been notified to remove the workers. If this action happens, the workers will stop their activities and production, consequently it will provoke hunger and suffering for these families.

6.3 Engenho Prado Case – Pernambuco

In the Northern part of Pernambuco State, João Santos and his family have controlled the sugar cane business in Pernambuco for more than 90 years. This fact has made them one of the most influent groups in the region. The sugar cane business declined and some of their properties were abandoned, including Engenhos Prado, Papicu, Taquara, Dependência and Tocos. They used to be administrated by the Group's Company called Companhia Agroindustrial Goiana (CAIG). Because of a judicial battle with another family, the Fitipaldi, the properties officially did not belong to them since 1996.

In this context, in February 1997, 300 families linked to Land Pastoral Commission (CPT) occupied the lands from Prado area, organizing themselves in 3 communities: Chico Mendes I (Engenho Prado); Chico Mendes II (Engenho Prado) and Ismael Felipe (Engenho Taquara). In these communities they had developed crops for their own consumption and to be sold in the market of 05 municipalities of the region (Tracunháem, Araçoiaba, Nazaré da Mata, Carpina and Paudalho).

In the same year, INCRA declared through decree that these lands were unproductive. However, in November, 1999 João Santos Group filed a legal action in the Supreme Federal Court (STF) and annulled the decree. The legal action alleged the existence of a project to reforest the region with bamboo.

In December 2000, INCRA and IBAMA, provoked by CPT, declared that the Bamboo Project was not being executed and that there was a practice of environmental crime with the plantation of sugar cane in areas of preservation. Then, the battle re-started and the process was re-opened.

In 1999, one member the community, Mr. Ismael Gonçalves Felipe was killed and nothing was done to punish the criminal. The proceedings are in course in the same town with the Judge C. A. M.

In March 2003, Group João Santos obtained the possession of Engenhos Prado, Papicu e Taquara again. Attacks against workers and their families started: crops were destroyed, water sources were poisoned and the Military Police and a private militia blocked the access to the communities. This fact was observed *in loco* by Judge J. F. from the State Court in July 2003.

Judge C. A. M. has ignored the petitions of the workers. Petitions filed in May 2003 were not appreciated for more than a year. The same does not happen in favor of Grupo João Santos. Judge C. A. M. decides very quickly and makes things easier to the business group. He acts illegally, blocking the access of the lawyers of CPT to the process.

Finally in November 01, 2003 the workers were removed from the area as the result of another reintegration of land possession legal action in favor of João Santos Group. The judicial order was accomplished in the absence of Judge C. A. M who was not in the Tribuanl. He commanded the operation by phone, giving orders to remove the workers.

In the same month, another Decree from the President of the Republic was signed to settle the workers in some areas of Prado region. Untill now there was no accomplishment of this order because of a decision of the STF impeding INCRA to go on with the process.

The families are in an extremely vulnerable situation along the road PE-41 waiting for a final decision of the STF (Legal Action n. 24.764 – Mandado de Segurança). Judge S. P. is in charge of the process. The merits were supposed to be appreciated on December 16, 2004.

The Judges of the STF (Sepúlveda Pertence, Eros Grau, Peluso, Carlos Brito e Joaquim Barbosa) voted in favor of the workers firstly, maintaining the Decree of the President of the Republic from November 2003. Judges Marco Aurélio, Gilmar Mendes and Carlos Velloso had opposite opinions. The score was 5x3 in favor of the workers when Judge Eros Grau, who had already voted in favor of the workers, required the process for appreciation. Then, the proceedings were suspended and a final decision was expected for March 2005.

6.4 Quilombo of Castanhinho Case – Pernambuco

The slavery system, implemented by the European colonizers in Brazil, left prejudice, discrimination and social exclusion to African descent people. Moreover, their basic right to access to the land property was denied. Many laws have been created to repair this situation, but they are not sufficient to combat the disrespect of the fundamental rights of these peoples.

In August 2004, in Garanhuns[22] – Pernambuco, a reintegration of land possession legal action was suited (n. 7991/04) by Elias Manoel Spinelli and Maria Adelma Jordão Spinelli, against José Carlos Lopes da Silva, leader of Quilombo[23] of Castanhinho. The petitioners alleged invasion of an area of 43 hectares, on 20 May, 2004.

In a hearing on September 13, 2004, it was proved the existence of a certificate of the domain of the area (183,60 hectares) issued by Palmares Foundation in July 2000, in favor of the African descent people.

22 270 km far from Recife.

23 Community ensued from historical hiding place of fugitive negro slaves.

On November 20, 2003, the Decree n°. 4887/03 defined that INCRA would be in charge of the legalization of the areas of Quilombos. Even under these conditions, the local Judge Rinaldo Adilson de Souza, from Garanhuns, decided in favor of the new owners, disrespecting the fact that the competence to judge the case was from the Federal Justice.

The lawyer of the Quilombo community of Castanhinho appealed to the State Court. However, up to now, the decision of the Judge of Garanhuns is still in force. The locality was included in a group of areas to be recognized by INCRA, considering they were continuous lands and they were being used by the African descent people as livelihood through their own crops.

6.5 Illegal imprisonment of landless workers in Bonito – Pernambuco

The municipality of Bonito[24] - Pernambuco, is in a context of violence and death threats against rural workers promoted by private militias supported by farmers. The lack of punishment is another problem in the region.

Since 1998, more than 400 families linked to MST (Landless Workers Movement) have settled in the municipality and have produced crops for their sustainability, as well as to supply the markets in the area.

The settlement is situated on lands which belong to João Santos Group, a very influent group in the State of Pernambuco and in the Northeast. There are many denounces against the Group related to fiscal and labor matters.

In 1998, the Group filed a reintegration of possession legal action against the landless workers in Bonito, which fails, because these filed, on February 2003, a successful action aiming at maintaining them in the area. Nowadays, the workers are waiting for a Decree from the President of the Republic in their favor.

24 70 km from Recife.

On April 28, 2004, the rural workers Antônio José Lourenço, Cícero José da Silva and João Manoel da Silva, without previous criminal records, were arrested in Bonito, accused of participation in the destruction of a vehicle in Uberaba Farmer.

The Judge Severino Coutinho da Silva ordered the imprisonment of the rural worker during the judgment of the process without a plausible reason. He showed prejudice when he stated that the rural workers represented an "evil to the society". Many local organizations criticize the acts of the Judge and the workers were released after 15 days in prison.

6.6 Aliança Sugar Cane Factory Case – Pernambuco

Aliança Sugar Cane Factory is situated in the northern part of Pernambuco in the municipality of Aliança. This is a very violent area where crime is not punished. Criminals have the support of farmers, politicians and members of the Judiciary. The Factory stopped its production about four years ago, and is responsible for a huge amount of debts from unpaid labor rights of more than 1.200 workers dismissed over the last years.

These workers have struggled for their rights in order to compensate the debts with the possession of the lands of the Factory (about 7.000 hectares) through a legal action. The lands were declared unproductive by INCRA in 1999. However, the judicial process is stuck at the Federal Regional Court of 5Th Region (TRF). It is clear that some illegal protection is given to factory owners.

In order to keep the possession of the Factory, an agreement was made with the workers. This negotiation did not respect some legal requirements. Because of the over valorization of the land, the workers received small portions of land which can not be legally registered on their behalf.

These facts and others problems concerning taxes were denounced to some institutions like the Labor Prosecutor Office, The State and Federal Prosecutor Offices. However, only few measures were taken and the reality has not changed.

The factory owners were being protected by part of the Judges of TRF. However, in 2004, a strong movement of local, national and international human rights organizations provoked the president of TRF, Judge Margarida Cantarelli who accelerated the process.

In the State Justice sphere, some decisions in favor of the farmers created complicated juridical situations, which resulted in the increase of the violence in the area. Rural workers Antônio Cosme da Silva (April, 13 2003), Ivanildo Ferreira de Lima (October 18, 2003) and Severino José da Silva (November 19, 2003) were assassinated. Severino Luis da Silva had to leave the area to preserve his life.

On May 25, 2004, a Decree from the President of the Republic declared the lands of Engenhos Sirigi, Maribomdo, Oiteiro Alto, Cana Brava, Maré, Ajudante, Natal and Belo Horizonte unproductive and decided in favor of the rural workers. However, two months later, the Judge from Aliança, L.M., decided three reintegration of land possession against the workers. The Judge kept the process in her hands, denying the access to it of the workers´ lawyers.

In one of the legal actions (Engenho Maré), Mr. Eduardo Fernandes de Araújo, other lawyers[25] from CPT, and some workers were accused to be bad-intentioned litigants by Judge L. M.

7. International Human Rights Program (dhINTERNACIONAL) - MNDH-NE and GAJOP – Pernambuco

7.1 Case of the 50 Judges investigated in Pernambuco

According to a local newspaper[26] , since September 2004, the Court of Justice of Pernambuco, through the Special Court[27] , is investigating the performance of 50

25 Bruno Ribeiro De Paiva; Daniel Pinheiro Viegas; Dominici Sávio Ramos Coelho Mororó – CPT lawyers, linked to the National Movement of Human Rights (MNDH) and the National Network of Popular Lawyers (RENAP).

26 Source: JC Online – http://jc.uol.com.br/jornal/2004/10/05/not_110663.php.

27 The Special Court of the Court of Justice of Pernambuco is composed by the 15 more ancient magistrates of the Court.

judges of the State. 20 of them are suffering under criminal investigation. Some of them have already been removed from their positions. The most relevant information was that almost 12%, according to mentioned newspaper, of the 430 Judges of the State were object of investigation.

The Chief Judge José Antônio Macedo Malta, President of the Court, informed that "all the cases refer to the irregularities in the conduction of processes, withdrawal of high amounts of money authorized without the proper caution, in addition to the emission of specific decisions (alvarás and mandados) in an inadequate form".

At that time, 07 judges were removed from their functions, some of them related here: R.A.A. (Judicial district of Glória de Goitá); P.A.L (1st Chamber of the Judicial district of Bezerros); E.J.A.C. (1st Chamber of the Judicial district of Vitória de Santo Antão); H.L. (Criminal Chamber of the Judicial district of Palmares) and A.R.A. (1st Civil Chamber of the Judicial district of Jaboatão dos Guararapes).

The investigations occur under judicial confidentiality, reason why it is not possible to know the reasons of these removals. However, according to the local newspapers, the causes of the removals of the Judges of Jaboatão dos Guararapes and of Palmares, were respectively the following ones:

a) Judge of Jaboatão dos Guararapes

The Judge A.R.A. was denounced for irregularities before the 1st Chamber of the judicial district of Jaboatão dos Guararapes, where he was exercising his functions. The magistrate was supposed to have authorized the seizure of 980.000 Brazilian Real of the accounts of two pensioners who lived in Rio de Janeiro, S.S. and A.F.K. (the second one died 10 years ago).

According to the local newspapers, the Judge's decision was based in false documents and the action would have been processed in record time - 17 days from the interposition of the judicial action to the release of the money.

To obtain success, the group responsible for the blow, supposedly using false documents, would have alleged that both pensioners owed almost a million of Brazilian Real to a "ghost victim". The civil police would have concluded that the group practiced fraud crimes, public documents fake and formation of criminal group.

The referred Judge had been removed before from his position in 2000, for the duration of one year and a half. The Special Court of Justice opened disciplinary proceedings against the magistrate in October 2004, after having decided to remove him.

b) Judge of Palmares

According to the local newspapers, in 2003, various institutions, amongst them the Brazilian Bar Association – Section of Pernambuco, State Public Prosecutor and Tutelary Council of Palmares, would have would have to denounced H.L., female judge of the Criminal Chamber of Palmares. According to the press, the accusations referred to abuse of authority and other arbitrary acts.

According to the same source, the most re-echoed situation attributed to the magistrate was the supposed decision of arresting the priest A.V., in August 2003. To take this decision, the judge commanded in person a search inside the Church, where a home for children and teenagers also functions. The judge would have ordered the arrest of the priest, under the argument that they have found photos of two female adolescents wearing biquiní, and an erotic magazine. Even having decided for bail, the magistrate would not have accepted that the deposit was made during the weekend and, would only have let the priest free after collecting the correspondent value in an official bank, in the following Monday.

Another situation attributed to the magistrate was a denunciation, supposedly made in 2003, by a 16–year-old teenager to the DPCA - Police Direction of Child and Teenager and directed to the TJ/PE. According to the press[28], the teenager

28 Source: Jornal do Commercio, Cidades, 29.10.2003 (http://www.jc.uol.com.br/jornal).

supposedly would have been under the guard of the judge and would have denounced that the magistrate "had for habit to pester him with insistence". In the same year, many representatives of Palmares as the City Council, City Hall, Brazilian Bar Association (OAB-PE), Catholic Church, Rotary Club, Chamber of Sales Directors (CDL) and Council of Defense of the Children and the Teenager would have written a document, entitled Letter of Palmares, where they had demonstrated their dissatisfaction with the magistrate.

The Special Court of Justice of Pernambuco (TJPE) decided to remove the judge from her functions in 2003 and to install disciplinary proceedings to investigate the denounces.

According to the press, the judge would have considered herself victim of politic questions, "because she was bothering many of the powerful people of the city", but she would go "to continue investigating the organized crime in Palmares, even removed from the Judicial district".

7.2 Case of Judge P.P.B.A. – Ceará

According to the press[29] , in 27.02.05, J.R.C.R., 32 years, left his house to go to work at about 6:30 p.m., for his third night of duty, starting from 7 p.m until 7 a.m. He had started to work, as a member of the security staff, only three days before in the Lagoa Supermarket, in the city of Sobral, state of Ceará. Divorced, he was living with his parents and had a six years-old son

At about 10 p.m, when the supermarket was already closing and there were only few customers finishing their purchases, the Judge P.P.B.A., of the 2nd Chamber of the Judicial district of Sobral, tried to enter in the establishment when he was informed by J.R.C.R., that the supermarket was already closed. When P.P.B.A. identified himself as judge, the shop manager authorized his entrance. As we can see in the images of the

29 Source: O Povo – O Jornal do Ceará, Cotidiano, 10.03.05 (httpe://www.noolhar.com/opovo) and Jornal do Commercio, Brasil, 02.03.05 (http://www.jc.uol.com.br/jornal).

supermarket internal circuit cameras, the magistrate then left the supermarket and, when he came back, he already had a gun in his hand. P.P.B.A. punched J.R.C.R. and then, he shot him in the nape of the neck, in "point-blank". Then, the judge simply left the place, as if nothing had happened.

Trying to escape without being caught in the act, the Judge only presented himself at the Tribunal of Justice of the State of Ceará capital more than 24 hours after the facts. The Judge was removed from his position. On the same day, the Tribunal decreed his temporary arrest. The Chief Judge Ernani Barreira Porto, reporter of the process, affirmed that he had based his decision on the popular impact, in result of the way that the crime was committed, and in respect to the public order, that was offended. The 18 appeals court judges decided the detention of the Judge unanimously.

Because of his position of (ex) judge, P.P.B.A. will be investigated by the Court of Justice and not by the judiciary police. His process will run in a different way in comparison with common processes. In parallel to the criminal proceedings, he will be administratively processed by the Internal Disciplinary Body (Corregedoria) of the Court of Justice, in order to investigate the functional responsibility of the Judge.

The barbarian crime of killing, especially for frivolous reasons, horrible in itself – becomes even more repudiating when committed by a judge, whose function is to protect lives. The facts related here, condemned by all the society, need to result in the incrimination of the Judge and the achievement of Justice. It is not acceptable that a judge take advantage of his functional prerogatives to commit such acts and benefit himself of impunity.

The Judge, high-rank public server, must conduct himself exemplarily. As defender of Justice, pillar on which raises the rights guaranteed in the Federal Constitution, must behave in an irreproachable way, both in his public and private lives.

30 Codename used by the CPMI – Mixed Parliamentary Inquiry Board who investigated the accusations of the sexual exploitation of children and adolescents in Brazil, concluded by the Council of Deputies in July 2004.

Such criminal conduct disrespects the provisions of art. 35, paragraph VIII of the Organic Law of the National Statute of Magistrates, on the obligations of judges ("to keep irreproachable behavior in the public and private life"), the United Nations Principles of Bangalore on Judicial Conduct, and other Constitutional and Criminal domestic provisions.

8. FOCOEJ – Forum for Judiciary External Control – Paraíba

8.1 Case of sexual abuse against D.G.S.P.

In 2001, D.G.S.P. (Deise)[30] , aged 13, was sexually abused, supposedly by J.E.A.L., at that time judge for Infants and Youths of the judicial district of Bayeux, Paraíba.

The crime occurred inside the Forum, when Deise went there as was required by that authority. On that occasion the judge gave money to the mother, so that she would let him talk to Deise privately. When Deise left the judge's room, she reported that the judge had put her on his lap and asked if she was afraid of him. After that he had stood up and called her closer to him, while putting his genital organ outside his trousers and asked her to masturbate him. Next he asked if she needed anything, stating "I know your house needs reforming". Finally the judge approached her lifting her blouse, caressing her breasts and asking if she was feeling anything and then released her.

After that the judge took Deise to his parents' house, in João Pessoa/PB, where she was subjected to threats, harassment and abuse until the day she could not stand it any longer and ran away. In July, 2001 Deise, accompanied by her mother, made these

31 The crimes of sexual abuse are included in the Penal code of Brazil as crimes against customs, and are all tried through the measure of complaint-crime or, by a ministerial organ, by the request of the victim or legal representative, within 6 months of knowing of a crime being committed (Art. 225 CPB).

32 Art. 224 of the Penal code of Brazil – Violence is presumed, if the victim: a) is no older than 14 (fourteen) years old; b) is insane or with mentally difficulties, and the agent knows of these circumstances; c) cannot for any other reason offer resistance.

facts officially known to the Council of Guardianship of the city. This board took the case to the Justice Magistrate of the State where the process culminated with the compulsory retirement of the aforementioned judge. However, as the victim and her legal representatives did not stand against the ex-judge within the legal period of time[31], the criminal responsibility for the practice of this crime was not addressed, though, when it happened the teenager was 13 years old which would on its own, constitute violence[32].

In retaliation for the accusation, the Council of Guardianship of Bayeux, at that time, received many anonymous death threats (typed notes and phone calls).

Even being punished by Justice Tribunal, the ex-judge was nominated by the governor to another public post in the State. Nevertheless he was soon discharged due to an accusation of fraud against him. He was also indicted by the Mixed Parliamentary Inquiry Board (CPMI) being part of a list of 250 people indicted. In spite of this fact he lodged a petition to the Court of Justice where he pleaded his return to jurisdictional activities.

The investigation process carried out by CPMI informed that the ex-judge still keeps a close relationship with authorities in Bayeux and he usually drinks in a pub beside the Petrol Station 'Novo Nordeste', a well known point for prostitution in the city, about 100m from Deise's house. There are also 17 legal actions in process at the Court of Justice, both criminal and administrative, involving that judge.

CPMI concluded that this case should be sent to the Public Ministry and to the Court of Justice of Paraíba, in order to reopen the process of verification of sexual abuse reported in this paper, and to initiate investigation of some information that the ex-magistrate kept sexually abusing other teenagers, suggesting that TJPB (Court of Justice of Paríba) analyze this man's behavior by means of other tools and check his behavior relating to Councils of Guardianship.

9. GAJOP – Legal Advisory Office for Popular Organizations – PROVITA – Witness Protection Program – Pernambuco

9.1 Case D.M.

Mr. D.M. is the only witness to a murder which took place at the triple Paraná border (the other two witnesses, who did not seek protection, were chased and killed). With his life at risk, Mr. D.M. joined the PROVITA witness protection and support program for victims and the relatives of victims of violence – in February 2000, together with his family, (wife and daughter), and left the program in 2005.

Although he joined the program because of his situation as a threatened witness, there is also a legal disposition (law nº.9.807/99) so that the court of security and justice could deal with such a case as a priority. Up to now, after 5 years have passed, Mr D.M. has never received a hearing from the 3rd criminal court of Foz de Iguaçu – Paraná, where the Crime Process nº 001/99 is established and where responsibility for the aforementioned felony were investigated.

Such circumstances were the cause of the intense disappointment, and eventually convinced Mr. D.M. to give up the protection program, having left his family and relatives and his place of birth in the interests of justice and entering in this program so that the reported situation would not be repeated.

Situations such as the one reported above are not exceptions, they occur in all 17 protection programs established in the country, impeding the effective legal results of the processes.

Furthermore it strongly affects the sufferers health, being a strong cause of frustration and resentment, as most of the accused people are still free while the (witnesses or victims) are away from their daily life.

To change the described situation and to achieve the effective legal performance of the PROVITA daily running, the magistrate running the Council should act according to what is advocated by the law and its respective internal regulations. However, we identify a low adherence of the law courts to the suggested proposal, and on the contrary, in some cases, some magistrates prevent lawyers from having access to the official reports, and in so doing, impede the establishment of a link between the protected witness and the case which led to their protection.

10. Citizenship and Judiciary Watch (OJC) – Rio Grande do Norte

10. 1 Case of the murder of the attorney Gilson Nogueira

The attorney Francisco Gilson Nogueira de Carvalho was working at the CDHMP – Centre for Human Rights and Popular Memory in the State of Rio Grande do Norte.

From 1995, he intensified the investigation and denunciation of the existence of a death squad within the State Civil Police, called "Golden Boys ". He concluded that the criminal group was led by Maurílio Pinto de Medeiros, who occupied a high-rank office at the Secretary of Public Security and Social Defense of that State.

On 20th October of 1996, Gilson Nogueira was murdered at the entrance of his home, in the city of Macaíba city, State of Rio Grande do Norte. Investigations were inefficient and did not focus on the main suspects, who are the members of the death squad he denounced where he was still living. Therefore the first investigation was closed.

Based on the extra-official investigation made by A.L., the case was reopened and it was possible to get one of the crime arms, which belonged to the police officer Otávio Ernesto Moreira, assistant of Mr. Maurílio Pinto de Medeiros. Probably for that reason, A.L. was murdered on 3rd March 1999, in front of his house in Macaíba.

In addition to the innumerous technical failures in the proceedings on Gilson Nogueira´s homicide, his process was transferred from the judicial district of Macaíba, in which the crime was committed, to the Judicial District of Natal, capital city of the State of Rio Grande do Norte, without the existence of any relevant elements justifying such procedure (art. 424 Penal Process Code). The case had worldwide repercussion and is now being processed before the Inter-American Human Rights Commission of the OAS – Organization of American States (case nº 12.058- Brazil). A.L.'s murderer is still unpunished. The attorney of Gilson Nogueira´s family was denied access to the files of the proceedings.

The people he denounced while he was alive were not investigated, among them: 1) Maurílio Pinto de Medeiros, 2) Maurílio Pinto de Medeiros Júnior, 3) Jorge Luís Fernandes, o "Jorge Abafador" and 4) Admilson Fernandes de Melo, becoming evident serious omission in the investigations.

Another relevant aspect regards the transference of Otávio Ernesto Moreira's process, the the only suspect arrested, thanks to A.L. It violates the Brazilian Law, which establishes that the trial must take place in the judicial district in which the crime occurred, before Jury. It is important to emphasize that the trial which took place in Natal, was unconstitutional and fraudulent, because even before its conclusion, Doctor Plácido Medeiros, Chief Police Officer, was informed about the final vote (5x2 – acquitted).

In this same process, the Judge President of the Tribunal Jury of Natal denied several requests of the accusation to provide evidences. He also did not permit to attach to the proceedings, a copy of the legal files, that contained evidences that A.L. obtained against the real responsible for Gilson Nogueira's murder.

10.2 Case of the murder of the Public Prosecutor Manoel Pessoa

The Public Prosecutor of the Judicial District of Pau dos Ferros, State of Rio Grande do Norte State, Manoel Alves Pessôa Neto, was brutally and cowardly murdered on November 08, 1997, while he was working in his office inside of the city Court. The

gunman, Edmilson Pessoa Fontes, assumed the material authorship of the crime when he was captured in March, 1998; as well as the deal that led to the crime, pointing as the intellectual author, the Judge of the Judicial District, Francisco Pereira de Lacerda.

The mentioned Prosecutor had his life taken because of his investigation on irregularities committed by the Judge Lacerda, as well as his involvement with the organized crime in that region. On August 16, 1999, the mentioned Judge was condemned by the Rio Grande do Norte's Court of Justice to a penalty of 35 years of prison. He remained imprisoned during the course of the process and until the eves of the trial, because it was proven that he threatened witnesses and intimidated Prosecutors and victim's relatives. In November 2004, the first Chamber of the STF (Supreme Federal Court), stating on the appeal, maintained the same decision.

However, in June, 1999, before the trial, the judge was released by the proper Court of Justice, supposedly by maneuvers articulated by the Reporter Judge, Mr. R.G., who would have submitted the petition for preventive custody revocation to vote when five other judges of the Court were absent, amongst whom, four that had decided contrary before. However, when the Judge was already condemned, he obtained success in preliminary sentences of Habeas Corpus, petitioned to the Superior Court of Justice, granted by the judge Vicente Leal, who had denied twice the order of Habeas Corpus previously, regarding the same case.

The mentioned judge has been investigated for selling judicial sentences, mainly regarding Habeas Corpus granted to dealers and people involved in organized crime in Brazil[33] . Currently, the Judge Francisco Lacerda is imprisoned in a Military Police Battalion, benefiting from exemptions that do not exist in the Brazilian Criminal Execution Law; he was not dismissed, although the Supreme Federal Court determined the

33 He was investigated by the Federal Police's Operation called 'Diamond'. He retired after the facts became public, however, he still perceives all the pecuniary advantages related to the position of Minister of the Superior Court of Justice.

34 He is one of the police officers denounced by the Lawyer Gilson Nogueira, as part of the death squad known as "Golden Boys". See case 10.1.

provisory – but integral – execution of the condemnatory Sentence by the Court of Justice, which requires his imprisonment to a Maximum Security Penitentiary and the immediate loss of the position of Judge

The condemnatory Sentence of the Court of Justice was not fulfilled yet. The Judge is still imprisoned at the Military Police Battalion and still occupies the position of Magistrate, perceiving the advantages that such position guarantees (aid reclusion in the value of 2/3 of the wage of a Judge), despite the opposite determination of the Supreme Federal Court and the initiatives of the Public Prosecutor.

10.3 Case of the Judge of the Criminal Execution's Chamber of Natal

The titular Judge of Criminal Execution's 12th Chamber of the Judicial District of Natal – State of Rio Grande do Norte State, C.A.T.S., refuses to determine the arrest of the civil policeman Jorge Fernandes Luiz, known as "Jorge Abafador"[34], to a Maximum Security Penitentiary.

"Jorge Abafador" was condemned to a penalty of 47 years of reclusion for being one of the main responsible for the "*Chacina* Mãe Luiza". However, he still works in a Police Station, where he benefits from some exemptions, such as circulating at any time, without any formality.

On November 2001, provisional measures were requested to the Inter-American Commission on Human Rights of the OAS - Organization of American States in favor of Roberto Monte, coordinator of the CDHMP – Center of Human Rights and Popular Memory and for Plácido Medeiros, Civil Police Officer, because of the threats proceeding from "Jorge Abafador". The Commission recommended to the Brazilian Government to provide protection to both of them.

The protection was initiated in 2003, but only for Roberto Monte. In relation to Plácido Medeiros, the Government refuses to do so because he was Civil Police Officer. However, on May, 06, 2004, a Federal Judge determined the end of the protection, in

response to an action petitioned by the Federal Police Agents Union. The president of this union is Odilon Benício Júnior, investigated for the murder of Gilson Nogueira, reason why he does not supposedly maintain good relations with the CDHMP that also monitors this case.

Public Prosecutor, National Penitentiary Council, public opinion, through the press, and also Plácido Medeiros already questioned the Criminal Execution's Judge on the irregularities concerning this prisoner, on the necessity to require the Government of the State to imprison him, and to the necessary loss of his position and wage.

However, instead of fulfilling the Criminal Execution Law (Law nº7.210/84), the Judge declared in public that *"while I will be Judge of the Criminal Executions 'Jorge Abafador', or any other policeman, will not be transfered into a Maximum Security Penitentiary in Rio Grande do Norte State"*.

10.4 Illegal financial favour for Judiciary´s officials

The Court of Justice of the State of Rio Grande do Norte, on August 2003, instituted or extended in favor of all officials (assessors and those in indicated positions) of the proper court, a 100% wage increase, through an internal administrative proceeding, disrespecting the relevant law on the matter. Indeed, any financial advantage to public servants only can be accorded by Law, since that it has to be duly and specifically established by a Budgetary Law.

The mentioned administrative proceeding (n.º 102.138/2003-TJRN) ensues from the fact that some officials of the Court obtained such increase through "extra judicial agreement" with the Government of the State.

The CDHMP - Center of Human Rights and Popular Memory wrote to the State Public Prosecutor of Rio Grande do Norte, questioning the legality and the administrative probity of such "extra judicial agreements".

The mentioned Public Prosecutor communicated the case to the General Prosecutor of the Republic (Procurador Geral da República), who denounced the unconstitutionality (Ação Direita de Inconstitucionalidade n.º 3.202) of the referred agreements before the Supreme Federal Court (STF), on May 13, 2004. However, no measure was adopted to investigate the administrative, civil and criminal responsibilities of the Chief Judges (desembargadores) who voted this decision.

In the beginning of 2004, the current President of the State Tribunal of Accounts, Counselor Tarcísio Costa, addressed to the State's Assembly, a Project of Law that guarantees wage increase to all officials occupying indicated position in the Court (most of them are relatives of members of the State Tribunal of Accounts), and created 30 effective positions and more 50 transitory positions. Despite the irregularity of the initiative, the Project was approved by the Assembly and ratified by the State Governor. The State Public Prosecutor competent in these matters appealed to the General Prosecutor of the Republic, who denounced the unconstitutionality of this act (Ação Direita de Inconstitucionalidade n.º 3219) on June 01, 2004. However, the necessary legal measures had not been adopted to investigate the civil, administrative and penal responsibilities of the President of the State Tribunal of Accounts.

On May 21, 2004, at request of the same General Public Prosecutor, the General Prosecutor of the Republic denounced the unconstitutionality (Ação Direita de Inconstitucionalidade n. º 3211) of a Complementary Law originally created by the Court of Justice of Rio Grande do Norte, but approved by the Legislative Assembly and ratified by the State's Governor. This law allowed a group of Judiciary´s servants to be promoted without public examination, and then increase their wage. In this situation, nothing was done to invsetigate administrative, civil and criminal responsibilities in relation to this act that creates improper expenditures to the State Treasury.

10.5 Case of the Popular Action 1031

In December 2002, the President of the Rio Grande do Norte's Court of Justice, at that time, Chief Judge A.C.F., occupied the Governance of the State, because of the

simultaneous absences of the Governor, the Vice-president and the President of the Legislative Assembly.

He took advantage of this situation to determine a 35% wage increase of State's Judges, simply though a Resolution addressed to the administrative sectors of the State.

According to the Federal Constitution and in State Constitution, such wage increase in favor of the public servants may only be granted by Law, and duly and specifically established by Budgetary Law. When members of the other legal professions knew about this, they did not question it, implementing them on the same basis (35%). Public Prosecutors, members of the State Tribunal of Accounts, State Public Prosecutors and Public Prosecutors of the Legislative Assembly also benefit from the measure.

Because of the gravity of such facts, the President of the Trade Union CUT (Central Única dos Trabalhadores / RN), Francisco Batista Júnior; the coordinator of the CDHMP - Center of Human Rights and Popular Memory, Roberto de Oliveira Monte and the lawyer Daniel Alves Pessoa, sent a petition of Popular Action (nº1031) to the Supreme Federal Court (STF), in order to request the prohibition of the referred acts and the use of public expenses without legal basis. However, the General Prosecutor of the Republic, Mr. Cláudio Fonteles and the Judge Reporter, Carlos Velloso, decided that the STF was not competent to analyze and process this preliminary action (liminar).

The petitioners, unsatisfied, appealed against the decision, sending the case to the Plenary Assembly of the STF, and requiring, alternatively, that the STF received at least partially the action against the self-increase of the judges, as a STF precedent decision did in a similar case. However, the Public Action was definitively closed. It was even not sent to another – lower – court. Today in the State of Rio Grande do Norte the referred beneficiaries continue to perceive the value of the 35% increase.

10.6 Case of impunity of Maurílio Pinto de Medeiros

Maurílio Pinto de Medeiros is carrying out a calumnious and defamatory public campaign against the CDHMP - Center of Defense of the Human Rights and Popular

Memory, especially its coordinator, Roberto de Oliveira Monte, accusing them to be "evidences creators" and "to host bandits". Last attacks date from July 22, 2004, in a communitarian radio station in São Gonçalo do Amarante - Natal. Mr. Maurílio Pinto de Medeiros also attacks the honor of Mr. Placido Medeiros de Souza, as well as against the honorable memory of the Lawyer Gilson Nogueira.

From September 2000, the CDHMP and Roberto Monte started to charge him on the ground of "press crime" (articles 20 to 22, of the Law n. º 5.250/67). Several judicia actions have been initiated since 2001.

Mr. Maurílio Pinto de Medeiros assumes his conduct before the Judiciary. However, Judges and Court always "identify" some formal irregularities in the proceedings, or do not take the necessary measures in accordance to the deadlines. In this way, such actions can be reached by prescription, although the law establishes that proceedings should be fulfilled in shorter time in case of "press crime".

Consequently, the Judiciary creates formal and useless obstacles, in opposition to doctrine and jurisprudence, in the purpose of disassembling the criminal action, compelling the victims to appeal to Superior Courts in order to restart the criminal proceedings[35] .

The involved judges are: F.S., Judge of the 9th Criminal Chamber of the Judicial District of Natal/RN (chamber that processes "press crime" cases); D.M., currently retired, was Chief Judge of the Court of Justice and Reporter of one of the appeals presented by the victims; C.A., Chief Judge and Reporter of another appeal; D.C., Chief Judge and Reporter of other two unsuccessful appeals (exactly in processes for which there

35 Example of this is the fact of the judges do not accept the CDHMP's journalistic "clipping" as prove of the offensive publication (even being a certified copy), under the argument of that Law would demand the "complete and original newspaper". It matters to clarify that the justifications of the judges do not convince, a time that Mr. Maurílio Pinto de Medeiros, in judgment (preliminary statement), assumes the practical of the denounced behaviors. Otherwise, the arguments are technically incorrect, since, in the phase of receiving the complaint (initial part of the criminal action), merit examination does not become about the proves, but they are only strong indications to start a criminal proceeding.

were evidences of the calumny and of the fact that Maurílio Pinto de Medeiros assumes it). Maurílio Pinto de Medeiros is suspected to have used his "networks" in order to influence the impunity he benefits from.

10.7 Case of the Lawyer Daniel Alves Pessoa

The lawyer Daniel Alves Person is the son of the former Public Prosecutor Manoel Alves Pessoa Neto, assassinated in 1997 (case 10.2). He monitored the criminal proceedings and the trial of the murderers, in partnership with the Public Prosecutor.

In 1998, he started to work with the NGO CDHMP - Center of Human Rights and Popular Memory, which also monitored the case, in order to add efforts to make justice. The Court of the Jury condemned Mr. Francisco of Pereira de Lacerda, Judge of the Judicial District of Paus dos Ferros, to a penalty of 35 years of prison for being the intellectual author of the homicide, as well as the private guard Orlando Alves Mari. In November 2004, the first Chamber of the STF (Supreme Federal Court), stating on the appeal, maintained the same decision.

As Daniel and the CDHMP questioned some aspects of the proceedings, – what apparently bothered part of the Judiciary summit, he started to suffer reprisals in his work of lawyer. The situation worsened when he was one of the petitioner of the Popular Action nº 1031 (case 10.5). During meetings of the State Association of Judges (AMARN), some magistrates would have accorded to decide negatively in all the proceedings in which the lawyer may be involved, including in the most urgent ones (liminar). Such facts would have effectively occurred in 04 cases, as well as in the above mentioned Popular Action nº 1031

For example, in one of the case he defends, he had to wait for more than two years before the first instruction hearing to be appointed; in others, Police Inquiry were even not opened. Since 2001 up to now, only one case was judged in a lower Court. Daniel appeal against it, since it was contrary to interests of his clients.

For example, in a similar process to one defended by Daniel, invoking the civil liability of the State, initiated in January 2004 and defended by another lawyer whose clients are linked to a big company (process n. º 001.04.001227-2), the case is about to be judged.

According to Daniel, this shows "a certain unwillingness" regarding the processes he assumes, which are mostly actions against the State in benefit of poor people and victims of violence from the proper state agents.

11. Pará Society of Human Rights Defense (SDDH/PA) – Pará

11.1 Case of Sister Adelaide Molinari

In 14th of April, 1985, Sister Adelaide Molinari was in the bus station in Eldorado dos Carajás – State of Pará, with the president, at that time, of the Union of the Rural Workers of that city, Arnaldo Delcídio Blacksmith, when José de Ribamar Rodrigues Lopes approached and shot against Arnaldo, reaching both of them.

José de Ribamar´s intention was to kill the president of the Union, because he was in conflict with the farmers of the region. However, the shot crossed the body of the trade union member and reached the religious in the height of the neck. Arnaldo survived, but sister Adelaide died instantaneously. Eight years later, Arnaldo suffered another attack in Eldorado dos Carajás, this time fatal.

Altough his preventive arrest was decreed, José de Ribamar Rodrigues Lopes remained fugitive up to 09 of June of 2003, when he was arrested by the Federal Police, in Rio de Janeiro, and transferred to the prison of Curionópolis, State of Pará, city where the criminal process was opened.

36 According to the principle of non communication, the jurors are forbidden to keep external contact during the accomplishment of the Jury, in order to guarantee that they consider only the facts displayed in the Court. If it is proven that the jurors violated the Principle, the judgment should be cancelled, as art. 564, III, "j" of the Brazilian Code of Criminal Procedure.

Despite the fact that the criminal process was running for a couple of years, the defendant was judged only one year after his arrest. José de Ribamar, at that time, confessed the crime, but the defendant accused of having ordered the murder was not judged because he died.

José de Ribamar was at last judged by the Court of Curionópolis in April 28th and 29th of 2004, 19 years after the homicide and, for the surprise of all, was acquitted.

This is one more controversial case of the Pará Judiciary that, in addition to the long time for emitting the judgment, contributes to increase the sensation of impunity that is not sensation anymore, but progressively becomes reality.

The case became controversial because it had forceful evidences of the author of the crime, with witnesses depositions and material elements. However, what made the Pará society surprised was the fact that the Principle of Non Communication[36] between the jurors, one more time, was violated (three jurors had mobile phone during the judgment, keeping contacts with other people during the session of the Jury). This fact compromised the jury that, after analyzing the evidences presented during the judgment, decided to acquit the defendant.

During the session of the Jury, the accusation registered such facts, and the Chief Judge of the Court of the Jury of the judicial district of Curionópolis, R.A.I., at that moment, affirmed that he could only speak about the Principle of Non Communication in the sentence. At the accusation's surprise, the judge affirmed later that the discovery of the use of mobiles was made after having registered the sentence. The SDDH, who acted as assistant of accusation, appealed against the sentence to the Court of Justice. The appeal has not been judged yet.

11.2 Case of the massacre of Eldorados dos Carajas

On 17th of April, 1996, about 1.500 land workers of the Landless Movement (Movimento Sem Terra - MST) started a walk in Para´s highway nº150, in Eldorado dos

Carajás, in order to call the attention of the State Government on the necessity of making the agrarian reform in Brazil, and also to claim the dispossession of the Macaxeira Farm, located in Marabá.

During the manifestation, a sergeant of the Military Police approached the leaders of the MST and allowed them one hour time to present their claims, so that they could re-open the highway. They ask for 50 buses, necessary to carry part of the group to Marabá for negotiating with the Government of the State of Pará.

However, the buses arrived there with 69 military police soldiers, armed with guns and rifles, under the command of Major Oliveira, and started to occupy one side of the highway. Others 85 military policemen, under the command of the Cel. Pantoja, stood on the opposite extremity of the highway.

Then, the Military Police started to fire and shoot against the workers. During two hours and a half, they persecuted them. The operation was concluded with the slaughter of 19 workers and the injury of 89 people (69 workers and 12 military police soldiers).

The first trial – occurred in August 1999 – judged the three policemen who commanded the operation. They had been condemned by the jury but, later, they were acquitted by judge R.V., through an absurd legal maneuver sponsored by the defense attorneys. At the end of year 2000, the Court of Justice of the State of Pará recognized the judiciary error and cancelled the trial.

Due to the high number of defendants, the Court of Justice of the State of Pará decided for the separation of the trial in various sessions. Thus, on 14th of May 2002, in a Jury that lasted about 40 hours, Cel. Mário Pantoja was condemned, as co-author for murder, to 228 years of imprisonment. The attorneys of the defense appealed of the sentence, based on an error in the redaction of one of the questions analyzed by the jury.

37 Unknown authorship is given when, for crimes with many defendants, it cannot be selected who is the author of a crime.

The other defendant, Captain R.L., was acquitted, based on the thesis of the Unknown Authorship[37] , although the evidences against him were the same than those which led to the condemnation of Cel. Pantoja. In the following session, the other policemen was acquitted.

In another session that occurred in 22nd of May 2002, Major José Maria Pereira was condemned to 158 years of imprisonment, as co-author of the slaughter. The Soldiers who ordered the slaughter in Eldorado dos Carajás had been declared guilty and was sentenced to 386 years of imprisonment, but they appealed the decision and for that reason they remain free, in opposition to the Brazilian Law, because it was a hideous crime.

The SDDH, as assistant of accusation, appealed against these decisions. The Brazilian Government was denounced before the Inter-American Commission of Human Rights of the OEA, through individual petition registered under the case the nº P-11.820.

11.3 Illegal Prison Case in Anapu

The rural workers U.A.S., C.B.C., J.P.R.S. e J.A.C. were caught in the act and arrested in the city of Anapu, State of Pará, in 27th of February 2004, under the accusation of having assassinated a member of the security staff of the "River Anapu" farm and wounded two others. The case was then transmitted to the headquarters of the Judicial district, located in Pacajá, 220 km from Altamira (where the workers were imprisoned) and 80 km far away from Anapu (where the fact occurred). In June 29th 2004, while the Public Prosecutor still did not have formally denounced the case, the Judge of Pacajá declared his incompetence for processing the case and transmitted it to the Agrarian Chamber of Altamira, where a new request for release was made, which has still not been analyzed.

This case contains several irregularities: the arrest was illegal; there was a long delay in presenting denunciation by the Public Prosecutor (the period is five days when the defendant is imprisoned); illegal constraint of the workers, because as they were imprisoned for approximately one year, their request for release has still not been analyzed.

11.4 Case of the Judge Fredison Capelini

In 20th of January 2004, a homicide was committed in the city of Novo Progresso, State of Pará. The police inquiry concluded that the crime has been ordered by a member of the local assembly of the city, Jovenil Vargas, and by his brother, João de Vargas.

In 12th of February, Dr. Fredison Capelini, judge of the judicial district of Novo Progresso decreed the arrest of both of them and determined that they should imprisoned in the State Penitentiary of the City of Itaituba.

The defendants presented three requests for *Habeas Corpus* to the Court of Justice of the State of Pará in order to be released, but they were all denied. Jovenil Vargas alleged that his arrest compromised the fulfillment of his mandate in the local assembly of Novo Progresso and required his transference there so that he could participate in the sessions.

Then he was transferred to Novo Progresso in September 2004 and, after having attended some sessions of the City Council under police escort, he simply disappeared. He left a letter to Judge Fredison Capelini, in which he threatened the magistrate and his family of death, if he did not revoke the order of arrest of himself and his brother.

The Judge communicated the threats to the competent bodies and now he is currently under protection of the Civil Police, which also carried out the protection of Jovenil Vargas.

11.5 Case of Judge Jorge Vieira

The Judge of the Labor Chamber Jorge Antonio Vieira Branches is known in the State of Pará for his decisions against slave work[38] . He was also the first judge to condemn

38 Some rural workers, attracted by the perspective to get job and in order to support their families, accept to work in very bad conditions. When they arrive in the farm in which they will work, they are already in debt, because they will have to reimburse the expenditures of transport and food. These expenditures are deducted by the farmers from their monthly wage. Workers are also obliged to buy food in the farm, where the products are more expensive. At the end of the month, the value of the debt is bigger than the wage. By this way, they can not pay the debt, so they have to continue working in the farm. This is the contemporary slavery.

for moral damages a farmer responsible of slavery, which changed the national jurisprudence and encouraged the work of social movements and the Ministry of Labour against the implemented system of "slavery for debt".

Jorge Vieira was titular of the Labor Chamber in the city of Parauapebas, south of the State of Pará, when he pronounced the first sentence condemning a local farmer to pay an indemnity for moral damages to an enslaved worker. The judge then started to suffer death threats, and, in September 2003, he required protection to the Federal Police.

The Ministry of Justice granted it, and also determined his transference to the city of Belém, capital of the State, where he would supposedly be safer. But, for mere bureaucratic reasons, he was protected by Federal Police agents only for four days.

Despite the lack of protection and the continuity of threats, the Judge did not give up his fight for the eradication of the slave work in the region. He was transferred to the city of Marabá, Southeast of the State of Pará, by determination of the Labor Regional Tribunal, as he was not integrally protected and out of the threats.

Recently, he condemned the "Jorge Mutran Exportação e Importação" Group, one of the biggest companies of Agricultural Business in Pará and owner of the Cabeceiras Farm, in Marabá. In two Control operations in 2001 and 2002, 47 workers in slave conditions were found. The Mutran Group will have to pay the biggest fine applied in the country up to now for slave work and for submitting workers to inhuman conditions.

11.6 Case of Brother Henri

Henri Burin des Roziers, Dominican Brother, lawyer, born in Paris, arrived in Brazil in 1978. Since 1991, he works as legal assessor for the Land Pastoral Commission (Comissão Pastoral da Terra - CPT) in the south of the State of Pará.

Since April 2000, he has been suffered calumnies from farmers and judges from the region where he works defending rural wokers and also death threats. In 2001, two

rural workers had been accused, without evidence, to have committed a murder in the city of Rio Maria.

When he assumed the defense of the accused workers, calumnies against Brother Henri raised, because the investigation could lead him to the persons responsible for the crime, who could be a influential people of the region. At that time, the hindrances to the work of Brother Henri and other lawyers from social movements were denounced, as well as the conduct of judges who took decisions disrespecting the law.

On this basis, the Chief of Justice of the State of Pará required information to the Judge of Rio Maria, R.C.O.M., on the situation of the process n.º 904/01, related to the referred homicide.

In reply, R.C.O.M., through the letter n.º 197/2003, made personal accusations against the Brother Henri, accusing him to use humble people to influence justice, insinuating that Brother Henri was also suspect in the referred homicide and using the doctrine "of Adolf Hitler to mine the images of the magistrate, the State Justice, the Public Prosecutor and the Police".

For that reason, Brother Henri denounced the judge R.C.O.M. to the Internal Disciplinary Body (Corregedoria) of the Court of Justice. R.C.O.M. has been temporarily removed, and he is administratively processed.

11.7 Case José Batista

José Batista Gonçalves Afonso, is lawyer and coordinator of the Land Pastoral Commission (Comissão Pastoral da Terra - CPT). In 4th April 1999, he and eight others leaders of social movements were accused to detain several members of the INCRA´s

39 The INCRA (Instituto Nacional de Colonização e Reforma Agrária) is a federal body created in 1970 in order to realize the agrarian reform, to register rural property and to manage the lands of the Federation.

40 This case was processed before the "Juizado Especial", special judge that only deals with smaller cases.

staff[39] and other public representatives, when they were attending a meeting at the headquarters of the Institute, reason why he was criminally sued.

In a hearing in the Federal Special Court[40] , it was agreed that the defendant would monthly donate food during six months to a social institution and that they would appeared twice a month in the same Court.

In May 2003, Batista, the State Coordinator of the Federation of Rural Workers (Federação dos Trabalhadores na Agricultura - FETAGRI) and the State Coordinator of the Landless Movement (Movimento Sem Terra - MST), were accused of leading an invasion to the headquarters of the INCRA, in Marabá. Batista actually were only called to intermediate discussions between the workers and members of the INCRA.

Consequently, new proceedings were opened. The Federal Judge, H.M.N. and the representative of the Federal Public Prosecutor, were in favor of the conclusion of a new agreement ("transação penal"). However, the substitute federal Judge, F.A.G.C.J., revoked both agreements, understanding he could not apply them because the defendants have had the same conducts in both situations.

Actually, the first judicial agreement had been duly processed and respected in all its aspects. Furthermore, the first federal judge who analyzed the case and the representative of the Federal Public Prosecutor expressed themselves positively at this respect. This case allows doubts on the behaviors of the State magistrates, showing clear disrespect to Brazilian law.

11.8 Case H.S.F.

In November 1997, in the State of Pará, a group of the Civil Police made an inspection commanded by Officer Clóvis Martins, Director of the Division of Administrative Police. While inspecting bar of Mr. H.S.F., they realized that it was functioning irregularly and that it would have to be closed. The reaction of H.S.F. was interpreted by the Officer as disrespect to authority, so he decided to arrest him.

In the Police station, the victim was imprisoned and supposedly tortured by members of the Civil Police, under the eyes of Officers Clóvis Martins and Neyvaldo Coast. The victim was only set free in the following day. H.S.F. was caught in the act and accused of disrespecting the authority. The examination of the Legal Medical Institute clearly evidenced that he suffered wounds.

In November 18th of 1997, H.S.F. was heard by the Internal Disciplinary Body of the Civil Police (Corregedoria). Administrative proceedings were opened to collect denunciations against the Civil Police members, for illegal imprisonment and torture, but concluded that the accusation was unfounded and close the case. Clóvis Martins is suspected to have influenced the investigation.

On 17th of December 1997, the Public Prosecutor of the 7th section (7ª Promotoria de Justiça) required the opening of a police inquiry, which concluded, almost one year later, that H.S.F. suffered body wounds, but could not collect evidences necessary to identify the perpetrators.

The Public Prosecutor of the 6th criminal section recognized the existence of the torture, but he declared himself incompetent. Thus, the inquiry was sent to the 18ª Criminal Chamber of Belém and redistributed to another Prosecutor, who expressed herself in favor of the closing of the case, disrespecting the arguments of previous Prosecutor.

The Judge of the 18ª Criminal Chamber homologated the closing of the case. At the victim´s request, he sent the case to the State Public Prosecutor, so he could decide the controversy between the opinions of the two Public Prosecutors. The State Public Prosecutor expressed himself in favor of closing of the case, which was accepted by the judge who determined to close the proceedings.

The SDDH, as assistant of accusation, requested to re-open the proceedings on the basis on new evidences. On 14th of June 2000, it denounced, for the crime of torture, the following members of the Civil Police: Neyvaldo Costa da Silva, Clóvis Martins

Miranda Filho, Daniel Mendonça Gomes, Amilton da Silva Dias, Manoel Maria Amaral Borges and Paulo Ricardo Cantuário Moutinho.

The case was received by the 18º Criminal Chamber, on 19th of June 2000. The defendants´ attorneys presented a petition of *Habeas Corpus* requesting the cancellation of this decision, arguing irregularities in the proceedings. For the SDDH, in according to the Federal Constitution, the crime of torture did not allow that the defendants remain free during the proceedings; consequently, preliminary defense could not be opened, as requested by the defendants.

In opposition to the law, the Court of Justice of the State of Pará, unanimously, decided in favor of the Habeas Corpus. The Public Prosecutor appealed of this decision, understanding that it violates a provision of the Federal Law, but the appeal was denied by the second president of the Court of Justice of the State of Pará. The Public Prosecutor appealed again (Agravo de Instrumento), but this has still not been analyzed, because of a procedural irregularity.

11.9 Case of the rape of children in Altamira

Between the years of 1989 and 1993, 17 children and teenagers had been kidnapped, raped and killed in the city of Altamira, interior of the State of Pará. Two of them have survived. The number of victims can be much higher. The victims were: R.S.S. (08 years); W.O.P. (09 years); J.S.M. (10 years); O.B.C. (10 years); N. F. (10 years); F.L.S. (10 years); R.F.S. (11 years); G.F.L (12 years); E.S.T. (12 years); K.F.C. (12 years); T.M. (13 years); A.C.O.S. (13 years); J.C.X. (13 years); J.S.P. (13 years); S.F.S. (14 years); M.F.S. (14 years); G.S. (14 years).

Mrs. V.A., 72 years-old, was accused to be the leader of a sect called Lineamento Universal Superior (LUS). The sexual organs of the boys were, probably, destined to evil rituals that were part of the sect lessons and were described in a book written by V.A., as well as in videos, where it is possible to see members of the sect staging rapes.

The judgment of the defendant occurred after 13 years of the crimes, and were separated in various sessions of Jury. Four out of the five defendants were condemned: Carlos Alberto dos Santos (Military Police soldier); Amailton Madeira Gomes (businessman); Anísio Ferreira de Souza and Césio Flávio Caldas Brandão (doctors).

The judgment of Mrs. V.A. began in 20th of November 2003, and was tarnished by denounces of espionage on the Public Prosecutor, by threats to the assistants of accusation and the Police Officer who carried out the investigation, in Altamira. After various sessions, the jury acquitted Mrs. V.A., by 6 votes against 1, understanding that there were not sufficient evidences.

Some days later, a police inquiry was opened to investigate the incommunicability between the jurors. The Head of the General Services Division of the Court of Justice of the State of Pará, Mr. G.N.P. – relative of the former President of the Court of Justice – would have supposedly allow, through written order, to reinstall phones in the rooms of the hotel where the jurors were housed. The authorization would have been required by an Officer of Justice, Mr. A.C..O., supposedly following an order of the current President of the Court of Justice, Judge Dr. R.V.

The Police Officer who carried out the investigation informed that 65 calls had been made and that some jurors had received visits in the hotel. The Head of the Division of Services was removed in January of 2004, as well as the Officer of Justice. The Court of Justice of the State announced the opening of administrative proceedings to investigate the involvement of the members of the staff in this case.

In February 2004, the police inquiry was concluded and pointed out four Officers of Justice, because they presented a certificate of false incommunicability, attached to the sentence of the process. In March, the Public Prosecutor denunciated three Officers of Justice, understanding that one of them had not attended the trial, because he was in vacation on this day and signed the certificate when he returned.

Only on 4th of March, the Court of Justice, through the Internal Disciplinary Body (Corregedoria), decided to investigate the Judge. Up to now, the investigation has still not been concluded, although it should regularly be done in less than 60 days.

It has to be clarified that the Public Prosecutor and the assistants of accusation appealed of the jury's decision, requiring the cancellation of the judgment, alleging the violation to the principle of incommunicability between the jurors, as well as the expressive number of evidences.

11.10 Case of the settlement of Fazendinha, Parnarama – State of Maranhão

On 16th of December 2003, 33 families, who have lived for more than 10 years in settlement of Fazendinha, located in the land parcel (loteamento) of Data Tanque, in the city of Parnarama - Maranhão, have violently been expulsed from this area by Mr. José Carlos Nobre Monteiro, that violently removed them from the area. Then, Police agents continued to intimidate them around the area where they improvised a provisory camp.

The area where families were settled was part of Mr. Simão Barbosa de Carvalho´s property. However, he had never questioned the occupation of the families, as both parts even worked in partnerships, in which families were responsible for cultivating parcels of lands and the products were commercialized by the farmer. However, in July of 2003, Mr. Simão sold part of his lands to Mr. José Carlos Nobre Monteiro, responsible for the expulsion of the workers.

The team of the Land Pastoral Commission (Comissão Pastoral da Terra - CPT), and bishop D. Luís D'Andrea, of the Diocese of Caxias, met the families in order to take emergencies measures (delivery of food) and bring legal support, on 24th and 30th of December 2003.

The CPT requested preventively that the families could return to their lands, but the Judge did not accept and decided to organize a meeting, that took place on 47th of

June 2004, in the Tribunal of Parnarama, for the hearing of witnesses. Second meeting took place on 17th, of June, in order to conclude an agreement between Mr. José Carlos Nobre and the CPT´s attoney, legal representative of the rural workers.

But in the meantime, at Mr. José Carlos Nobre Monteiro´s request, the judge of Parnarama, C.P.J., on 15th of June, emitted a favorable preventive decision to the farmer, enabling him to keep the possession on the referred land, and determining that, in any way the families could return to the area and practice act of disorder in the property.

We observe that the Judge denied the provisional measure to the rural workers but granted it to the farmer. This claimed to be the legal possessor of the lands, although he needed to initiate a distinct judicial action (Action of Rectification of the Area), aiming to legalize his lands and to annex the area in which the families are temporarily settled.

12. National Rapporteur on the Human Right to Adequate Housing and the Urban Land

12.1 Case of the illegal expulsion of 300 families linked to the Without Roof Workers Movement (Movimento dos Trabalhadores Sem Teto – MTST)

In June 2003, the association "Promorar Planta Arte Associação Pró Moradia" initiated a judicial action against J.P.S., requiring preventively the recovering of the possession of the Farm "Bussocaba", located in the division of the cities of Osasco and São Paulo.

The action was processed in the 1st Civil Chamber of Osasco (under nº 1.523/03), that positively responded to it. However, there was no evidence that the referred area was the same than the one occupied by the families "without roof", because the author of the judicial action did even not described the property. Moreover, up to now, the presumed defendant has still not been identified.

Consequently, 300 families have been violently expulsed, and had to temporarily stay on the edges of the Raposo Tavares Highway. At this occasion, some workers were illegally detained and led to the Police station, including an adolescent.

It is needed to be clarified that the area belonged to the ex-deputy Sergio Naya, owner of the building company responsible for the collapse of the building Palace II, in Rio de Janeiro, that killed eight people. In Osasco, Naya intended to construct a closed condominium, but in 1998 the construction was seized because it did not fulfill the local law.

The above mentioned decision was pronounced without considering that the continuity of those families was being negotiating in the City hall of Osasco, the Secretariat of Justice of the State of São Paulo, the Commission of Human Rights of the Brazilian Bar Association and the National Rapporteur on the Right to Housing, with the support of the United Nations Program for Social and Cultural Rights. Moreover, this decision was guaranteed by another decision pronounced by the Judge of 6th Civil Chamber of Osasco, in a similar action processed by the SERSAN (Society of Congregated Companies Sergio Naya), whose preliminary hearings had been appointed for November 2003.

This decision was inconsistent because, for this kind of process, the property has to be evidenced, as well as the irregularity practiced by the defendants and the loss of the property alleged (Arts. 926 and 927 of the CPC). The decision did not mention anything about the property; it was only a supposition of property. The documents attached to the files of the process were in fact a promise of sale that was not officially registered. Moreover, there was no evidence that the families were occupying the referred building. In addition, after the expulsion, they had to remain without shelter, in provisory places, without water and energy, worsening the violation to the human right to Housing.

This seems to be one more case in which the Judiciary Power was used to defend particular interests, through the unrestricted protection of private property, even disrespecting the principle of the social function. This resulted in the expulsion of poor social groups from area of real estate high valuation, where supposedly live the Judge and the Mayor of the City.

PART III

Recommendations

Recommendations of the organized civil society for the construction of an independent Judiciary Power in Brazil

We present, below, recommendations related to the main issues affecting the Judiciary Power, which were identified in the practical experience of several entities of the organized civil society.

1. Promotion and transference of Magistrates in the organizational structure of the Judiciary Power

- Establishing objective basis for defining the guiding criteria of the promotion and transference of magistrates inside the organizational structure of the Judiciary, in any of its specificities (removal, promotion, substitution, designation etc.) which must also be measured by consulting the users of Justice.

- The objective basis for defining the promotion and transference of magistrates must be centered in accordance with the following criteria[1]:

1 The proposed criteria are mere examples.

a) The magistrate must act with urbanity and without prejudice when dealing with the users of Justice, especially those who are placed in area of social vulnerability;

b) The magistrate must keep his/her impartiality, equity and ethics when dealing with judicial demands;

c) The magistrate must act with agility, considering reasonable and enough time to convince him/her, besides safeguarding the technical quality of his/her intervention;

d) The magistrate must be available to receive the public in general;

e) The magistrate must show initiative and availability to participate, periodically, in juridical update courses, especially those regarding Human Rights;

f) The decisions of the magistrate must reflect an impact in favor to the effectiveness of the Human Rights;

g) Definition of objective basis in the light of the Human Rights in order to choose the "fifth constitutional"[2] available for lawyers and members from the Public Prosecution.

2. Impartiality

- The Judiciary Power will have to foment, among their members, diffusion and incorporation of the international principles related to the independence of the Judiciary (Bangalore Principles of Judicial Conduct and the United Nations Basic Principles on the Independence of the Judiciary).

- The Judiciary Power will have to create mechanisms of formation and control so that the magistrates equally deal with the parts, especially with regard to high complexity

2 Article 94 from the Federal Constitution - One-fifth of the seats of the Federal Regional Courts, of the Courts of the States, and of the Federal District and the Territories shall be occupied by members of the Public Prosecution, with over ten years of office, and by lawyers of notable juridical learning and spotless reputation, with over ten years of effective professional activity, nominated in a list of six names by the entities representing the respective classes.

situations (life risk, social clamor, economical, social and environmental implications involving economic and political groups, etc.)

- The Judiciary Power will have to introduce the subject "Human Rights" into the selection process of the Superior School of Magistrates, as well as for applying to other any courses of qualification for magistrates.

- The Judiciary Power will have to encourage the magistrates to participate in external courses on Human Rights.

3. Moroseness and slow progress

- The Judiciary Power, through its competent branches (internal disciplinary bodies, Ombudsman, etc.) will have to organize periodical evaluation on the fulfillment of procedural deadlines by magistrates and on the accomplishment of procedural diligences by the staff of the tribunal.

- The Judiciary Power will have to organize periodical entrance examination for Judge positions in order to gradually decrease the lack of magistrates.

- The Judiciary Power will have to organize periodical entrance examination for the rest of the Judiciary positions in order to improve its efficiency of functioning.

- The Judiciary Power will have to include the topic PRODUCTIVITY among its criteria of evaluation, taking into account the reasonable time necessary to convincing the magistrate and to safeguarding the technical quality of its intervention.

- The Judiciary Power will have to uniform the internal administrative proceedings in order to enable the adequate use of new technologies, especially computer's technologies. It will also have to create centralized and integrated services of cases registration in order to speed up the judicial services and to save operational costs.

- The Judiciary Power will have to foment, through campaigns, the use of measures of collective nature (collective security injunction, direct action of unconstitutionality[3], etc.)

- The Judiciary Power will have to foment the practice of arbitration[4] (Law number 9.307/96) as alternative way of dispute resolution for private and patrimonial disputes.

- The Judiciary Power will have to encourage Judges to promote the duties of Conciliation[5], by holding hearings for previous justification, and participating in public hearings.

- The Judiciary Power will have to expand the Special Civil and Criminal Courts[6] both at State and Federal levels, so that they can work equally in big cities as well as in small towns on a full-time basis, with duly qualified and updated staff.

4. Nepotism

- The Judiciary Power will have to promote periodical public examinations to fill the various positions in the organization.

- The Judiciary Power will have to reduce the number of indicated positions within the organization, filling these remaining jobs with persons who passed through from public examinations.

3 *Mandado de segurança coletivo* and *ação direta de inconstitucionalidade*.

4 Arbitration (Law number 9.307/96) – the parts, in such a free and sovereign way, choose an arbitrator with the power of deciding aside the positive laws, but with the privileged application of uses and costumes, equity and international trade practices.

5 The Civil Process Code, with regard to its article 125, IV, cogently determines that: "the judge will lead the process in accordance with the provisions of this Code, charging him of: IV – attempting, at any time, to conciliate the parts".

6 *Juizados Especiais Cíveis e Criminais*.

- The Judiciary Power will have to create mechanisms to avoid indicated positions to be filled with relatives of official Judges and Chief Judges from other chambers. Relatives of magistrate will only be able to hold a position in the organization by means of approval in a public entrance examination.

5. Access of the population to the Judiciary Power

- The Executive Power will have to create a Public Legal Defense – politically and financially autonomous –, composed by a staff qualified and aware of Human Rights issues, in order to ensure the due access to the Judiciary and judicial defense in favor of the most vulnerable part of the population.

- The Judiciary Power will have to implement criteria of Affirmative Actions in the access to the career of magistrate, as well as in the specific formation to Judge career.

- In situation of conflict or grave social impact, the Judge will have to pronounce the decision after being aware of the general situation by means of *in loco* visit, respecting the principle of defense.

- The Judiciary Power will have to create specialized branches in all States in order to combat crimes committed against the interest of vulnerable groups.

- The Judiciary Power will have to refer, during its intervention, to Alternative Reports on Human Rights in Brazil, prepared by the civil society and handed over to specialized bodies of the United Nations and the Organization of the American States.

6. Special Military Courts in Brazil

- Extinguishing the Brazilian Military Justice in all its bodies.

7. Aggressions against the Judiciary Power (pressure on the part of economic groups, death threats, assassinations, etc.)

- Recall for the State´s responsibility, through its security´s system, in guaranteeing the jurisdictional function and the physical integrity of Judges.
- To guarantee physical integrity to magistrates, as well as the exercise of their duty, including the judges threatened of death or under risk into the Program of Protection of Human Rights Defenders, as soon as it will be implemented.
- The Judiciary Power will have to support the instauration and monitoring of the legal proceedings necessary to investigate and punish the persons responsible for the attacks suffered by Judges when exercising their jurisdictional function.

8. Judiciary Reform

- Defining objective criteria for the establishment of the federalization of crimes committed against Human Rights.
- The choice of the federalization of crimes committed against Human Rights will have to be guided by the following criteria[7]:

a) Gravity of the facts;

b) Capacity of mobilizing the society and the State institutions;

c) Capacity of changing institutions and law;

d) Commitment of the local State-member while investigating the crime committed by certain organized groups and/or public agents;

7 Demonstrative criteria.

- The Judiciary Power will have to strengthen the Internal Disciplinary Body (Corregedor), granting autonomy and counting with the participation of the civil society.
- The Judiciary Power will have to strengthen the Ombudsman, granting financial, political and functional autonomy.
- The position of Ombudsman will be assumed by a representative of the civil society elected by the Human Rights State Councils[8] .
- The Judiciary Power will have to consider the criteria listed above at item 1 for the participation of magistrates in the National Justice Council[9]

8 *Conselhos Estaduais de Direitos Humanos.*

9 *Conselho Nacional de Justiça.*

ANNEXES

ANNEX 1

Basic Principles on the Independence of the Judiciary[1]

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

1 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always

conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

ANNEX 2

The Bangalore Principles of Judicial Conduct[2]

Preamble

WHEREAS the *Universal Declaration of Human Rights* recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the *International Covenant on Civil and Political Rights* guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

2 The Bangalore Draft Code of Judicial Conduct 2001adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002. See www.ohchr.org.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the *United Nations Basic Principles on the Independence of the Judiciary* are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

Value 1:

INDEPENDENCE

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

Value 2:

IMPARTIALITY

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Value 3:

INTEGRITY

Principle:

Integrity is essential to the proper discharge of the judicial office.

Application:

3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

Value 4:

PROPRIETY

Principle:

Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:

4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.

4.3. A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.

4.4 A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.

4.5 A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.

4.6 A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.

4.7 A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.

4.8 A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.

4.9 A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.

4.10 Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.

4.11 Subject to the proper performance of judicial duties, a judge may:

4.11.1 write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;

4.11.2 appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;

4.11.3 serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or

4.11.4 engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.

4.12 A judge shall not practise law whilst the holder of judicial office.

4.13 A judge may form or join associations of judges or participate in other organisations representing the interests of judges.

4.14 A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.

4.15 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.

Value 5:

EQUALITY

Principle:

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").

5.2 A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.

5.3 A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues,

without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.

5.4 A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.

5.5 A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.

Value 6:

COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

Application:

6.1 The judicial duties of a judge take precedence over all other activities.

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"*Court staff*" includes the personal staff of the judge including law clerks.

"*Judge*" means any person exercising judicial power, however designated.

"*Judge's family*" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"*Judge's spouse*" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

ANNEX 3

Model of Complaint of violation to the Special Rapporteur of the United Nations on the Independence of Judges and Lawyers

The Special Rapporteur on the Independence of Judges and Lawyers acts on information submitted to him regarding alleged violations, either by non-governmental organizations or by individuals. Based on the information given, the Special Rapporteur sends allegation letters and urgent appeals to concerned Governments to clarify and/or to bring their attention to the alleged facts.

After assessing that the information received is *prima facie* credible, the Special Reporter transmits an allegation, usually by letter, to the government in order to obtain its response. The credibility of the source of the allegations will be established by the Special Rapporteur by reference to: corroborative sources; the degree of details presented by the alleged victim, about him or herself, and the event or interference alleged; logic; the laws in force in the concerned State.

In cases of grave allegation of violation - for example, threats to the life of the alleged victim - the Special Rapporteur will send an urgent appeal to the concerned Government.

This method will follow the procedures established for other thematic mechanisms of the United Nations Commission on Human Rights.

Whether addressed through a letter or through as an urgent appeal, the Government concerned will be expected to respond expeditiously to the Special Rapporteur´s request for information of explanation. At this respect, the Special Rapporteur draws attention to Commission of Human Rights Resolution 1993/47, in which Governments are encouraged to so respond.

These interventions can relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. In general, these procedures remain confidential until the publication of the Report - that includes the summary of the communications and the answers sent by the States -presented annually by the Special Rapporteur to the Commission of Human Rights of the ONU.

The Special Rapporteur mandate does not only cover questions related to judges, but also to prosecutors, lawyers and any other legal professions related to the Judiciary. In addition to the main international instruments of human rights, the mandate of the Special Rapporteur is based on the following instruments: the Resolution n.° 94/41 of the Commission of Human Rights (creating the position of Special Rapporteur), the Basic Principles on the Independence of the Judiciary, the Basic Principles on the role of Lawyers and Prosecutors and the Principles of Bangalore of Judicial Conduct.

The communications must be written, preferentially, in one of the official languages of the United Nations - English, Spanish or French, among others – in a clear, detailed and concise form. Communications that contain abusive language (or that are obviously politically motivated) are not considered by the Rapporteur. Communications must contain the following information:

- Identification of the person(s) or organization(s) submitting the communication (the author of the communication should decide if this information will be kept confidential or not);

- Identification of the alleged victim(s) if he or she is different of the author of the communication;
- A detailed description of the circumstances of the incident in which the alleged violation occurred: facts, judicial proceedings, including place, date and institutions involved;
- Identification of the alleged perpetrator(s) of the violation, as well as the alleged motives;
- Legal, politic or any measures, local or national, that have already been taken in response to the alleged facts, and institutions that have already been contacted.

The communications should be sent to:

UN Special Rapporteur of the Commission on Human Rights on the Independence of Judges and Lawyers, Mr. Leandro Despouy

c/o Office of the High Commissioner for Human Rights (OHCHR)
United Nations Office at Geneva (UNOG)
8-14 Avenue de la Paix
1211 Geneva 10
Switzerland
Fax: +41 22 917 9003
E-mail: urgent-action@ohchr.org

Presentation of the participating organizations

Independence dos Judges in Brazil: relevant aspects, cases and recommendations.

Publication of the **International Human Rights Program (dhINTERNACIONAL)**, project run on an inter-institutional basis by the National Movement of Human Rights – Northeast Regional Section (MNDH/NE) and the Legal Advisory Office for Popular Organizations (GAJOP), with financial support of the Ford Foundation and ICCO. The Program aims to democratize the access to the international mechanisms of Human Rights protection, especially at global (United Nations system) and regional (Inter-American system) levels, between the local human rights organizations and their professionals. The International Human Rights Program works on three fronts: 1) legally, which consist in bringing petitions on individual cases of human rights violations occurred in Brazil to international bodies of human rights; 2) pedagogically, in which the Program promotes training for professionals and activists of local human rights organizations, to make them able to access the international mechanisms independently; 3) politically, it interacts with the organized civil society, national and international political bodies, in the purpose of strengthening the international monitoring on the situation of human rights in Brazil. In this perspective, it intervenes before the extra-

conventional mechanisms of the United Nations, particularly the Special Rapporteurs, by the communication of denounces of violations and information on the situation of human rights in Brazil, encouraging them to undertake missions of investigation in the country.

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Partners Organizations

National Movement of Human Rights – Northeast Regional Section (MNDH/NE)

The National Movement of Human Rights (MNDH) is a non-profit, democratic, ecumenical, apolitical movement of the organized civil society, that works in the whole Brazil, through a network of more than 300 affiliated entities. Founded in 1982, it constitutes today the main national human rights articulation in the country. Based on the idea of FIGHT FOR LIFE, AGAINST VIOLENCE, it promotes human rights as being universal, interdependent and indivisible. Its main goal is to establish a culture of human rights, in which prevail the values of dignity, promotion and respect to physical, moral and intellectual integrity of

the human being, independently of its political opinions, religion, sexual orientation, socio-economical condition, or ethnic origin. Works on the following areas: a) formation of social agents on the organization, strengthening and articulation the organizations of the civil society; b) formulation and proposal of public policies which affirm citizenship in the more diverse social areas; c) active participation in historical fights in favor of excluded people as articulator and interlocutor; d) active presence in spaces of action of the national and international civil society doing *lobbying* work. The Northeast Section of the MNDH covers eight States, representing more than 70 affiliated entities.

Regional Council

Aldenice Rodrigues Teixeira
Aluísio Matias
Antonio Pedro de Almeida Neto
Benedito Pereira Cunha
Daniel Nunes Pereira
Gladys Almeida
Ilzver de Matos Oliveira
José Cláudio Rocha
Mércia Maria Alves da Silva
Roberta Schultz

Legal Advisory Office for Popular Organizations (GAJOP)

The Legal Advisory Office for Popular Organizations is a non governmental human rights organization founded in 1981, in the State of Pernambuco, Northeast region of Brazil. GAJOP´s mission is to contribute to the democratization of the Brazilian State and society by strengthening citizenship. GAJOP´s mission statement includes the following objectives: a) to contribute to the respect of the rights to security and justice as necessary condition for the full democracy and citizenship, b) to contribute to the preservation of life, physical and psychological integrity, and liberty, c) to give priority the defense of the rights of children and adolescents, and d) to contribute to

consolidate a new legal thinking, on the basis of the alternative practice of law. GAJOP is affiliated to the National Movement of Human Rights (MNDH) and to the Brazilian Association of Non Governmental Organizations (ABONG). Its activities include: legal action (for example in case of homicides committed by police officers, death squads, and members of the organized crime); support and protection to witness of crimes to human rights and victims of violence; monitoring the justice and security systems in the State of Pernambuco; human rights education (for police officers, prison staff, students, social workers, etc); and access to international instruments of human rights protection. Since 2004, GAJOP is an NGO in Special Consultative Status in the Economic and Social Council (ECOSOC) of the United Nations.

Collegial Coordination

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Valdênia Brito – Coordinator Assistant
Célia Rique – Coordinator of the Education for Citizenship Program
Jayme Benvenuto Lima Jr. – Coordinator of the International Human Rights Program (dhINTERNACIONAL)
Tereza Mahon – Administrative Coordinator

Financial partners

Ford Foundation

The Ford Foundation is a private, nonprofit organization created in the United States to provide support for innovative persons and institutions worldwide. Their objectives are to: strengthen democratic values, reduce poverty and injustice, strengthen international cooperation, and advance human achievement. Its works mainly by making grants of loans that built knowledge and strengthen organizations and networks.

Since its inception, the Foundation has slightly provided more than US$10 billion in grants and loans.

ICCO

ICCO´s work (Interchurch Organization for Development Co-operation) consists in financing activities which stimulate and enable people to create and organize dignified housing and living conditions. ICCO is active in countries of Africa, Middle-East, Asia, Pacific, Latin America and Caribbean, Centre and East-Europe, in the structural combat to poverty, based on Protestant-Christian values.

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