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HOW ARE THE GUARDS WATCHED OUT? INSTITUTIONAL LIMITS OF THE JUDICIAL INDEPENDENCE IN BRAZIL AND SPAIN

ALEXANDRE DOUGLAS ZAIDAN DE CARVALHO

PhD in Law, State and Constitution
University of Brasília

douglas.zaidan@gmail.com

SUMMARY: 1. Introduction. 2. Judicial independence in the National Council of Justice. 3. Judicial independence at the Spanish General Council of the Judiciary. 4. Limits and Possibilities of Action of the Councils: between the protection of independence and the promotion of accountability of the judicial function. 5. Conclusion.

RESUMEN: Este documento recopila datos sobre el diseño normativo, la composición, la organización y el desempeño de los Consejos de Justicia de Brasil y España, e identifica las principales trabas al funcionamiento de ambos con el fin de acercar su experiencia institucional. La atención se centra en buscar si la institucionalización de los Consejos de Justicia en las experiencias constitucionales post-autoritarias de estos países proporciona parámetros comunes para comprender las prácticas judiciales. Siguiendo un enfoque sistémico-constructivista que confronta discursos y prácticas judiciales, el artículo cuestiona el dogma según el cual la autonomía de los jueces amplía el ámbito de los derechos. La hipótesis es que la preservación de la estructura corporativa y la falta de conexión entre la independencia y la accountability han contribuido a la disfuncionalidad de dichos órganos en perjuicio de todo el Poder Judicial.

PALABRAS CLAVE: independencia judicial, Consejos Judiciales, Brasil, España.

RESUM: Aquest document recopila dades sobre el disseny normatiu, la composició, l'organització i l'acompliment dels Consells de Justícia de Brasil i Espanya, i identifica els principals traves al funcionament de tots dos amb la finalitat d'acostar la seva experiència institucional. L'atenció es centra en cercar si la institucionalització dels Consells de Justícia en les experiències constitucionals post-autoritàries d'aquests països proporciona paràmetres comuns per comprendre les pràctiques judicials. Seguint un enfocament sistèmic-constructivista que confronta discursos i pràctiques judicials, l'article qüestiona el dogma segons el qual l'autonomia dels jutges amplia l'àmbit dels drets. La hipòtesi és que la preservació de l'estructura corporativa i la falta de connexió entre la independència i la accountability han contribuït a la disfuncionalitat d'aquests òrgans en perjudici de tot el Poder Judicial.

PARAULES CLAU*:* independència judicial, Consells Judicials, Brasil, Espanya.

ABSTRACT: This paper collects data on normative design, composition, organization and performance of the Councils of Justice of Brazil and Spain, and identifies the main obstacles to the functioning of both in order to bring closer their institutional experience. The attention is focused on seeking whether the institutionalization of the Councils of Justice in the post-authoritarian constitutional experiences of these countries provides common parameters for understanding judicial practices. By following a systemic-constructivist approach that confronts judicial discourses and practices, the paper calls into question the dogma according to which judges' autonomy widens the ambit of rights. The hypothesis is that the preservation of the corporate structure and the lack of connection between independence and accountability have contributed to the dysfunctions of such bodies to the detriment of the entire Judicial Power.

KEY WORDS: perceptions of corruption; urban planning corruption; media exposure; levels of corruption.

1. INTRODUCTION

In 2006, the poet and literature professor JAMIE HUGHES published a thought-provoking paper on the Journal of Popular Culture entitled 'Who Watches the Watchmen? Ideology and Real World Superheroes'. The text explores how semantic characteristics related to the word 'superhero' leverage the image of such characters to a justice and perfection altar, placing them above and outside the scope of the ideology seen in political and legal conflicts the State has to deal with. The State itself, as metaphorically portrayed by JAMIE HUGHES, is shown as fragile inside the imaginary scenario created around heroism that seems to bring up the wish of all those wanting to cast themselves out and beyond the limits and rules of a State-order society.

The issue presented by JAMIE HUGHES on how the representation of myths or "superheroes" calls upon the construction of an external self-comprehension against real dilemmas and its ideological character —by submitting them to a superhuman judgment of the conflict between good and evil— constitutes a decent starting point in order to think about the notion of judicial independence.

Most Western constitutions have been trying to dissociate their image from the domain of the sacred. If the modernization project implied the advancement of secularization and the discredit of the theological influence to justify political power, it also, on the other hand, needed to bind the exercise of power to the "empty spot" of the legal order. An operation whose success depends on the paradoxical articulation between the law and politics in a constitution written, construed and applied by agents seen as unbiased. It is from the complex network of meanings resulting from such articulation that one can observe the growth of the influence from Courts and the degree of intensity in the participation of the magistracy in the most diversified spheres of life in the world's society[1].

It also occurs that the progressive increase in the importance of magistracy when defining the political sense of rights demanded a justification that could be seen as non-ideological. A justification whose associated semantic field is permanently pressed by the decline of the modern meta-narrative around the prevalence of reason, which critically struck the theory of

[1] Here, the term "world society" does not discard inequalities around the globe, but rather goes from the consideration that the explanation of such differences 'must not present them as data, i.e., as independent variables, but it must, first and foremost, start with the assumption of a world society and then, investigate, how and why this society tends to keep or even increase regional inequalities" (Luhmann, 1997).

law and demystifies the naturalized description that associated judicial decision to positions of either cognitive neutrality or objectively unbiased vision; or a vision such that could be presented as ideally shared among “guards” of the law and order in a liberal democracy.

It is within such context that the current understanding of the judicial activity as indispensably political is inserted, although not politically party-based. And once recognized as such, it is impossible to locate the jurisdiction out of the ideology. In this context, perhaps it would be more appropriate to place it between the so-called "ideological apparatuses of the State" as formulated by LOUIS ALTHUSSER (1970). However, such description, which assumes an adjustment of the legal superstructure to the economic infrastructure, is presented as a problem when we observe that among judges and judicial Courts there are different types of political ideologies, from the most progressive to the ultra-conservative.

Therefore, even considering the importance of economic factors on the legal arrangement related to independence conditions of judges and the impact of economic analysis when formulating judicial decisions, the visualization of the distinct concerned ideologies, by applying the law under the same lenses of ideological apparatuses concerning class struggle, greatly reduces its explanatory capacity. A fact that fails to get a hold of the particularity of phenomena both complex and distinct. If, in terms of evolution, it became highly unlikely to attest the political neutrality of the several visions on the law, the most-sustained speech of members from the Judiciary is that it still maintains its autonomy from political influence under the argument that it falls upon the judicial role of “revealing the correct sense of the law” and refraining from giving it “political use and destination” (Costa, 2013).

Thus, observing the political-legal articulation where judicial independence is inserted is, above all, an effort to understand its limits. The borders of such limits are granted by internal elements of the legal system, characterized by normative and institutionalized guidelines subject to administrative and judicial decision from bodies of the Judiciary, as well as by external elements that remain dependent on relations established with the other systems or other domains of the social system.

The main internal limit of the judicial independence lies in the submission of the judge's activity to the legal system. This is the representative dimension of the foundation and limitation of the judicial role's autonomy. The *duty to justify* decisions following parameters of positive law also reaches out the *professional behavior* of the judges as objects of both procedural rules and magistracy organization. If the judicial independence demands the

binding of judges to the law and to the Constitution while granting certain space of comfort to give sense to textual provisions, it also enforces members of the justice system to comply with certain normative standards and the *accountability* seen as capable of qualifying the *reliability* in answers of the system itself.

The alliance between the recognition of the presence of different ideological nuances in the cognition of judges and the understanding that the judicial role is legitimated only when capable of stimulating credibility in the instituted proceedings, resulted in the creation of Judicial Councils across several constitutional experiences in the 20th century. Such Councils constitute relevant institutions in charge of defining limits and parameters of the judicial independence.

With the purpose of getting ourselves closer to the peculiarities of the operation and impact of the activity of such Councils created in Brazil and Spain, this work raised data on the understanding of both concerning the contours of the *judicial independence*. The intention of observing the limits that each one of such bodies casts on the institutional conditions of the judges' autonomy had as motivation the verification of which similarity and distinction elements are guarded. And which are the causes for the low performance of the Councils against the normative expectations kept at their creation.

Literature on the limits of judicial independence is wide and diversified both in Brazil[2] and Spain[3]. However, there is a lack of investigations supported in empirical surveys capable of providing a systemic vision on how the argument of judicial independence is mobilized. Observing this movement is fundamental in order to identify which sense it acquires in understanding the Councils in charge of the administrative and functional supervision of the Judiciary in both countries.

The *hypothesis* presented in this work is that, in opposition to the normative expectations that followed the purpose of creating and fostering independence in line with the *accountability* of the judicial activity, the operation of both Councils converted them into institutional spaces reserved to protect magistracy corporations and to intermediate conflictive and individualistic interests, partly due to the influence of political parties in the councilor appointment system.

[2] (Clève & Lorenzetto, 2015; Tomio & Robl Filho, 2013; Cunha, 2011).

[3] REQUEJO PAGÉS, J.L divides limits into *immanent* and *transcendent* (Requejo Pagés, 1989. See also: Ibañez, 1999; Hernández, 2008; Nieto, 2005).

Following this goal, the structure of the article is divided in order to provide a global comparative view on the institutional structure of the Brazilian and Spanish Councils. Sections two and three describe elements detailing the concept of judicial independence in the decision-making practice of both Councils, evidencing the similarities and differences reflected in the comprehension of magistracy autonomy. The fourth section analyzes the operation standards of the Councils under the articulation of the notions of *independence* and *accountability* of the judicial role, with the purpose of using them as parameter of criticism concerning the observed obstacles. And, finally, the text offers a comparison as a contribution that, more than describing a compared diagnosis about the experience of both Councils, is also capable of listing the main difficulties and providing general lines to facilitate dialogues on the most common issues.

2. JUDICIAL INDEPENDENCE IN THE NATIONAL COUNCIL OF JUSTICE

The creation of the National Council of Justice (CNJ) by Constitutional Amendment No. 45/2004 was subject of a longstanding dispute between judges, corporations, government and the Legislative Power. The purpose of creating an entity to externally control the Judiciary was a particularly controversial subject in the discussion about the institutional structure of the Judiciary at the National Constituent Assembly (Carvalho, 2017). The voting of the chapter describing the Judiciary at the Constituent took dozens of judges to the halls of the Chamber to defend their corporate positions, mainly in the suppression of the apparatus that instituted the CNJ. Sessions were marked by the strength of the associative *lobby*, which, in the end, won in virtually all its demands.

After thirteen years of processing and under the rejection of many magistracy members, which called it "judicial gag", the reform fostered with Constitutional Amendment No. 45/2004 included article 103-B of the Federal Constitution of 1988, creating the CNJ. The CNJ is composed of 15 (fifteen) members with a mandate of 2 (two) years, admitting 1 (one) mandate renewal. The appointment of members of the Council falls upon the President of the Republic after approval of the choice by the absolute majority of the Federal Senate. The Council is presided by the President of the Supreme Federal Court (STF), and, if the former is absent or impeded, by the Vice-President of the STF. The composition of the CNJ has the following format:

President of the Supreme Federal Court	permanent member and President of the Council
1 Minister of the Superior Court of Justice	appointed by the respective court
1 Minister of the Superior Court of Labor	appointed by the respective court
1 appellate judge of the Court of Justice	appointed by the Supreme Federal Court
1 state judge	appointed by the Supreme Federal Court
1 judge of the Regional Federal Court	appointed by the Supreme Court of Justice
1 federal judge	appointed by the Supreme Court of Justice
1 judge of the Regional Court of Labor	appointed by the Supreme Court of Labor
1 labor judge	appointed by the Supreme Court of Labor
1 member of the Federal Prosecution Service	appointed by the Attorney General
1 member of the State Prosecution Service	chosen by the Attorney General among the nominees provided by the competent body of each state institution
2 attorneys appointed by the Federal Council of the Brazilian Bar Association	appointed by the Federal Council of the Brazilian Bar Association
2 citizens of remarkable legal knowledge and irreproachable conduct	one appointed by the Chamber of Deputies and the other by the Federal Senate

The institutional role of the CNJ was detailed in the constitutional text in terms of control, and administrative and financial operation of the Judiciary, in addition to the enforcement of judges' functional duties. It has received the assignments set out in the Statute of the Magistracy and those mentioned in the Constitution itself: 1) to zeal for the autonomy of the Judiciary and for the compliance with the Stature of the Magistracy, even by issuing regulatory and recommendation acts to take measures; 2) to zeal for the legality of the administrative acts carried out by the Judiciary, being also entitled to deconstitute or review them or establish terms to adopt the required measures, without prejudice of the competence of the Federal Court of Accounts; 3) to judge complaints against members or bodies of the Judiciary, without prejudice of the disciplinary competence of the courts; 4) to file complaints to the Prosecutor's Office in the event of crime against the public administration or abuse of

authority; 5) to revise, routinely or according to demand, the disciplinary proceedings of judges and court members judged in less than a year; 6) to prepare biannual statistical reports on proceedings and sentences prolated, by unit of the Federation, within the different bodies of the Judiciary and 7) prepare an annual report on the status of the Judiciary in the country and on activities of the Council proposing measures deemed necessary to the National Congress.

The operation of the CNJ can be divided into four major areas established according to the internal organization. The *management of judicial politics* would be in charge of defining the strategic planning, plans and goals and the institutional assessment programs of the Judiciary. For those under jurisdiction and citizens the Council keeps the *provision of services*, which includes the acceptance of complaints, electronic pleas and representations against members of bodies of the Judiciary. Within the disciplinary *scope* it is possible to find the judgment of disciplinary proceedings and revision of court decisions. And, finally, the implementation of *transparency* in the judicial service by adopting practices to foster speed efficiency of administrative acts, in addition to preparing statistical reports on procedural motions and performance indicators of the jurisdictional activity.

Considering that nine out of the fifteen members of the CNJ come from the magistracy it can be noted the prevalence of the claim from judges and judge associations concerning the deadlock on the creation of the Council[4]. This is a factor that seems to have jeopardized the very role of the external control of the entity. This perception is supported by the submission of all its decisions, even those of administrative character, to judicial revision[5], which suggests a fragility of the Council's role in fostering *accountability* to the Judiciary.

This dimension of the CNJ's activity, upon the acknowledged possibility of judicial revision, was evidenced in the judgment of ADI No. 3367/DF, proposed by the Association of Brazilian Judges against the creation of the Council. The decision of the rapporteur, followed

[4] Resistance by the corporations of judges against the presence of external members of the CNJ was also demonstrated in one of the arguments against the constitutionality of its creation by Amendment No. 45/2004, filed by AMB: STF. ADI No. 3367/DF, Plenary, rapporteur min. *Cezar Peluso*, *DJ* 13/4/2005.

[5] Including by part of federal courts of first instance, considering that the Supreme Court set out an understanding in the sense that only constitutional acts (writ of mandamus, injunction order and *habeas data*) against acts and decision from the CNJ are subject to the competence of the Supreme Court. In this sense: STF. Pet 4794 ED/PR, 1st Class, rapporteur min. Luiz Fux, *DJ* 13/10/2015; AO 1679 Agr/DF, 2nd Class, rapporteur min. *Teori Zavascki*, *DJ* 26/08/2014 and AO 1706 AgR/DF, Plenary, Rapporteur Min. *Celso de Mello*, *DJ* 18/12/2013.

by the majority of the Court, is marked by an argumentative effort in showing that the compatibility of the CNJ with the constitutional order is the result of the *strengthening* of the *independence* and *impartiality* conditions of judges and courts. However, never based on parameters such as competition or eventual superiority. Au contraire, there is a manifestation of punctual aspects, taken as clear examples, that the exercise of the roles by the entity would be limited to the functional autonomy of the Judiciary. An understanding highlighted by the Supreme Court after denying to the Council the possibility to control the law constitutionality, even following the examination of concrete acts in the exercise of its competence (Clève & Lorenzetto, 2015)[6].

This understanding is symbolized by the restrictive position of the STF concerning assignments of the Council after highlighting that it has "no competence, whose exercise would be capable of interfering in the performance of the Judiciary's typical role"[7], in addition to the reminder that the ministers of the Supreme Court are not subject to the disciplinary control of the entity and the fact that "the role of the Comptroller falls upon the minister representing the STJ" (art. 103-B, par. 5). And even following the defeat of the understanding that the creation of the Council would have been unconstitutional in the STF, some of the defeated ministers[8] recorded harsh notes, clearly positioning themselves against the presence of external members in the composition of the entity.

The argument that prevailed in the decision, however, developed a sort of "domestication of the external control" of the Judiciary, defining the operational borders of the CNJ within the limits of what the Supreme, rather the Congress, would understand as tolerable for the exercise of the administrative, budgetary and disciplinary supervision duties of the CNJ. An understanding that could convert the Council into an institution analogous to the old Magistracy Council, entity bound to the Supreme Court by the end of the military regime. This position demonstrated that the Supreme Court assumed without reserves the role of

[6] STF, MS 28141, rapporteur min. *Ricardo Lewandowski*, *DJ* 10/02/2011.

[7] STF, Excerpt from the vote of min. *Cezar Peluso*, in ADI No. 3367/DF, DJ 13/04/2005.

[8] *Carlos Velloso* attested that the external members "Shall be representatives of the party-based politics, thus causing damages to the Judiciary"; *Ellen Gracie*, who considered incompatible with the Constitution what she called "super powers" of the entity "composed by people not related to magistracy whatsoever", and *Marco Aurélio Mello* to whom the creation of the entity with the presence of members from the Brazilian Bar Association, Public Prosecution Service and those appointed by the Chamber and Senate would offend the eternity clause that separates the powers.

ultimate "guardian" of the autonomous exercise of the judicial role instead of a broader comprehension of the role of the CNJ.

The 10-year institutional experience of the CNJ was marked by three challenges (Penalva & Domingues, 2015) in order to affirm its constitutional role. The *first* challenge was the Direct Action of Unconstitutionality (ADI) 3367, in which the STF confirmed the constitutionality of the entity, although under an interpretation that granted it a contained dimension in face of an external control. The *second* one was the dispute concerning the competences of the Disciplinary Board of Courts, blocked by ADI 4638, in which the Supreme kept the independence of the disciplinary power of the Council against the office of the courts. And finally, the *third* challenge indicates a weakness of the decision following the admission of the jurisprudence of the Supreme Court of a wider revision of acts and decision of the CNJ by federal judges[9].

The representatives of the CNJ have constantly and officially shown their appreciation of judicial independence since the very beginning of the Council's operation. According to GILMAR MENDES, who presided the CNJ in the years 2008-2009, "judicial independence is more relevant that the list of fundamental rights"[10]. However, in the manifestation of the press and the Brazilian Bar Association[11], the main role of the Council is to supervise the magistracy as an instrument of transparency and efficiency of the judicial service. Nevertheless, this optimism regarding the independence of the magistracy is not apparent when its comes to analyze the degree of efficiency and organization the Judiciary in the country. The series of difficulties to carry out the supervision of management acts and the low expectations related to judicial operation, mainly in cases of significant political repercussion,

[9] Accordingly, STF, AO No. 1758 AgrR/CE, 1st Class, rapporteur min. *Rosa Weber*, *DJ* 17/02/2017; AO 1679 AgR-ED/DF, 2nd Class, rapporteur min. *Teori Zavascki*, *DJ* 17/12/2014 and ACO 1680 AgR/AL, Plenary, rapporteur min. *Teori Zavascki*, *DJ* 01/12/2014.

[10] See: CNJ, *President of the CNJ emphasizes the independence at the opening of the National Meeting of the Judiciary*, 28/08/2008, available at: http://www.cnj.jus.br/noticias/65687-presidente-do-cnj-ressalta-a-independia-na-abertura-do-encontro-nacional-do-judicio. See also the text of the former councilor, *Alexandre de Moraes*, entitled 'CNJ struggles to strengthen the Judiciary', 25/03/2006, available at: http://www.cnj.jus.br/agencia-cnj-de-noticias/artigos/13306-a-atua-do-conselho-nacional-de-justitem-sido-benca-para-o-poder-judicio-sim-unipelo-fortalecimento

[11] See: the former president of the Brazilian Bar Association, *Marcos Furtado Coelho*: 'The Brazilian Bar Association and EC No. 45/2005: much more than just ten years' in: *Dialogues on Justice*. Brasilia: Ministry of Justice, 2014, pp. 18-21.

demanded the identification of the main difficulties impairing the effectiveness of CNJ's operation on the independence of the magistracy.

In this sense lies the result of our survey performed in the mechanism of jurisprudence search available at the *website* of the CNJ [12] using as criterion the expression "judicial independence". With the purpose of observing the *use of the argument* relate to independence of judges, the research analyzed and rated *35 decisions* of the Council that made express reference to the term, between October 2005 and May 2016. The collection of data shows relevant evidences concerning the autonomy of judges under the view of the CNJ.

The *first* inference reveals that the semantic resource of the judicial independence is mostly seem in process of disciplinary nature. Twenty-four decisions surveyed were rated as disciplinary complaints (8); disciplinary administrative proceedings (6); investigations (5); requests for disciplinary revision (2); certiorari (2) and request for measures (1). Among the foregoing, sixteen resulted from inquiries made in state justice courts; two in federal courts of first instance; one in an electoral court (TRE/AM[13]); another one in a labor court (TRT 3rd/MG[14]) and one was split between the STJ and the TRF 2nd Region. In two of the decisions it was not possible to identify which were the source courts. The other mentions to "judicial independence", not included in the disciplinary field, occurred in requests for measures (6); administrative control procedures (3) and recovery of records (2).

The *second* element of important comprehension demonstrated the variation of the argument of judicial independence in deliberations. Within the disciplinary scope, 17 out of the 24 mentions obtained a sense in opposition to the interests of the investigated judges and in favor of the filing, continuity of inquiries or application of disciplinary penalties. It was the case of RD n°0000328-42.2009.2.00.0000, which resulted in the preventive leave of the Judge of the 6th Judicial District of São Luis/MA, by violating functional duties. Disciplinary complaint was reported by Councilor GILSON DIPP, who stated:

> "Judicial independence is an assurance of the citizen in order to ensure judgments free of pressures, but in accordance with the law. However, judicial independence is not incompatible with the disciplinary control of the magistracy. Immunity granted by article

[12] CNJ, Available at: http://www.cnj.jus.br/InfojurisI2/JurisprudenciaSearch.seam

[13] Regional Electoral Court in the State of Amazonas.

[14] Regional Labor Court in the State of Minas Gerais.

> 41 of the LOMAN is not absolute, therefore being applicable the administrative and disciplinary accountability of the judge, when, at the exercise of the jurisdictional activity, he/she violates the duty of impartiality (CPC, article 135, section I) and acts, in a reiterated manner, against the expressed legal apparatuses, and violates the duty as provided in article 35, section I of the LOMAN, as well as adopts - in a reiterated and intentional manner and once revealed by a set of evidences - incorrect procedures (LOMAN, article 44), which result in losses to one of the parties due to a procedure not in line with the dignity, honor and decorum of their roles (LOMAN, article 56, section I) and to a functional behavior not in line with the good performance of the activities carried out by the Judiciary (LOMAN, article 56, section II)"[15].

In the other seven decisions of disciplinary nature, the mobilization of the argument of judicial independence seems favorable to the defense of the judges or to support their prerogatives against management acts of Courts and their Comptroller's Offices. An example of such variable is the manifestation provided in proceeding on the failure to comply with the constitutional rules and decisions from the Magistracy Council concerning the location of the Judicial District where the judge operates[16].

At the CNJ, the notion of judicial independence is also perceived as a relevant grounding to analyze claims from the professional category of judges. That was the argumentation developed by Councilor FELIPE LOCKE after examining the Request for Measures n 0002043-22.2009.2.00.0000 on the requirement by AJUFE to acknowledge "the constitutional symmetry between the legal regimes of the Federal Prosecution Service and of the federal magistracy, by informing the latter about the advantages assigned to the former, such as the

[15] CNJ, Excerpt from the vote of Councilor Dipp, in Investigation No. 0001570-36.2009.2.00.0000, judged on 24/11/2009. Likewise, the vote of Councilor *Eliana Calmon* in PAD No. 0001533-77.2007.2.00.0000, from 03/08/2010: "The supported suspicions on the behavior of the judge that arises doubts concerning independence and, as a consequence, impartiality of the judge, characterize the non-compliance with the extent set out in article 35, sections I and VIII of the LOMAN (Organic Law of the Magistracy)". In this case, it was investigated the practice of behavior not in line with the dignity, honor and decorum of the duties of a minister from the STJ and appellate judge from the TRF 2nd Region, following an operation intended to favor members of criminal organization with the purpose of exploiting gambling.

[16] CNJ, Excerpt from the vote of Councilor Locke in Disciplinary Revision No. 0003505-14.2009.2.00.0000 on 15/12/2009: "the immobility, side by side with the vitality and irreducibility of salaries form the core of the constitutional rules that is intended to ensure the *judicial independence*, fundamental clauses of any and all democratic systems, reason why, by making it flexible, the constituent decided that the compulsory removal - including demand of supported decision by the absolute majority of the members of the respective court - is only applicable when it is intended to serve the public interest, which concludes that it constitutes a behavioral aspect subject to be punished by this sort of penalty, as an act that does not approve the permanent exercise of the jurisdictional activity in Court or District".

ones of general and compensatory traits". Actually, the response of the request would imply in affirming the thesis that such advantage could be created by administrative decision of the CNJ, regardless of legal or constitutional expectation and against the contents of an STF docket[17], when the own competence of the Council for the case was questionable. However, the favorable judgment of the request caused the extension of functional advantages of the Federal Prosecution Service's career. The decision emphasized the corporatist nature of CNJ's actions by instrumentalizing the semantics of judicial independence from the false notion that the judges would integrate an unprivileged professional class in terms of remuneration:

> "The maintenance of the reality as of now minimizes the dignity of the magistracy because the economic independence constitutes one of the central elements of its operation. The independence of the judge constitutes a vital pillar of the political process to legitimate the jurisdictional role (...) once functional advantages become, in such case, one of the pillars of independence of the magistracy itself"[18].

The analysis of the arguments employed in the decision shows how the co-opting strategies mobilized by corporate interests have the power to convert the Council into a body to protect those interests, subverting the normativity of its function, which has been called as *Jus Corporatism* (Carvalho, 2017). This situation called attention to the fact that the adoption of the uncritical and crystallized discourse on judicial independence, when handled by the own class of judges, implied the potential increase in the risk that the high judicial bureaucracy would conceal the unional aspect of these claims. Under such perspective, the evaluation of corporation demands, and its budgetary effects, could dismiss the competence of the Parliament and of disputes with other categories of the public service to establish itself as an

[17] In such case, Summation No. 339: "It shall not fall upon the Judiciary, which has no legislative role, to increase salaries of civil servants under the grounds of isonomy".

[18] CNJ, Excerpt from the vote of Councilor Locke. It is worth emphasizing the divergent vote, in the sense of granting the request, as uttered by councilor *Walter Nunes da Silva Junior*, federal judge that once presided AJUFE (claimant) between 2006 and 2008 and directly benefited the change of position by the CNJ on the matter. In his vote, *Nunes* recorded that the "National Council of Justice, even though subject to serious criticism and lack of trust, notably by a significant part of the magistracy, was conceived by Constitutional Amendment 45/2004, specifically to carry on the special and fundamental mission of central entity of the legal system, not intended, either essentially or exclusively - as a censor body - to impose sanctions to judges. It is inserted in its constitutional mission, as a central and strategic body, the preservation of assurances to the magistracy in such a manner that, in cases such as the one in the records, must correct the asymmetric treatment given to the magistracy, which directly opposes the Constitution". CNJ. Pedido de Providências n° 0002043-22.2009.2.00.0000.

issue of hermeneutics to be solved in the CNJ itself. That is, precisely in the field where its main stakeholders, judges, hold discursive hegemony (Carvalho & Costa, 2014).

Beyond that specific aspect, the joint analysis of data and information collected has shown that four main foundations of the *boundaries* of *judicial independence* can be grouped. The *first one* is in the use of *good relationships* for internal promotion and arrival at higher courts, either second instance or superior courts, with the subversion of the criteria of antiquity and merit. The *second one* is the progressive *media exposure* which, on the one hand, seeks to legitimize individual performance and, on the other, stimulates individual self-promotion. The *third one* is the strong *corporate influence* in decision-making on administrative, functional and disciplinary management, perpetuating archaic mechanisms of managerial control and strengthening class privileges. The *fourth one* is in the *lack of transparency*, which suggests the conflict of public and private interests, as, for example, the organization of events for the discussion of internal topics but sponsored by private agents that are, not rarely, directly interested in the decisions.

The adequate dimensioning of these problems goes through the analysis of the variation in the *levels of trust* deposited in the judicial institutions. Studies have revealed that the main problems of the Judiciary in the perception of the population are: the *time taken* for conflict resolution, the *high cost of access*, the *dishonesty* and *partiality* of the institution, and its deficient ability of solving conflicts, in that order (Cunha, 2011; Cunha, Oliveira & Glezer, 2014). About these topics, the last report of the Confidence in Brazilian Justice Index, published by FGV in October 2016[19], with data updated until the first semester of the same year, shows that only 29% of the total of respondents *trust* in the justice system. A value that is lower than those of TV Broadcasters (33%) and much lower than the trust given to the Catholic Church (57%) and the Armed Forces (59%).

Comparatively, between 11 studied institutions, the Judiciary was in the 8° position, only above political parties, the Congress and the Government. The study also shows that the lower the income, the lower the trust in the operation of the justice system, proving that access is higher for those with a higher level of education and income. The gradual fall of

[19] GETÚLIO VARGAS FOUNDATION, *ICJ Brasil Report*, 1° Semester of 2016, p. 15. Available at: http://bibliotecadigital.fgv.br/dspace/bitstream/handle/10438/17204/Relatorio-ICJBrasil_1_sem_2016.pdf?sequence=1&isAllowed=y. Accessed on: 12/12/2016.

trust in the Judiciary can also be observed in the indicator disseminated by *Latinobarómetro*[20].

The understanding of the strong political-corporate expressiveness of the judges by prerogatives in the constituent process, which are continually reaffirmed, points to the need for the expansion of research about the Brazilian Judiciary that considers the class interest of judges. This seems to be an urgent task, not only due to the great impact of corporate topics in the agenda of the CNJ and the STF, but prominently because of the deconstruction of the naturalized discourse that states the judicial apparatus works by virtue of the maintenance of citizenship, when it actually remains vulnerable to the imposition of various legal codes, such as power and money, which emerge even by the corporate networks held internally by its members. In such a scenario, the horizon of expectation to the need of conceiving mechanisms for the protection of impartiality and judicial independence that are resistant to the individualist relationships in which the judges themselves are inserted.

3. JUDICIAL INDEPENDENCE AT THE SPANISH GENERAL COUNCIL OF THE JUDICIARY

Historically, the organization of the Judiciary in Spain has similar records to the Brazilian model (Iñiguez Hernández, 2008). This factor may be understood by the realization that the legal organization and the configuration of the Spanish justice system have left their mark in the judicial organization in colonial Brazil and in the imperial regime set up after the independence[21]. In both models, it can be said that the institutional design of the judicial bodies, according to the liberal canon of the separation of powers, did not result in the autonomous and functional establishment of independent justice systems that are legitimized by the acknowledgment of those under their jurisdiction.

The establishment of the General Council of the Judiciary was foreseen in article 122, 2 of the Constitution of 1978 and thought as a fundamental institution in the protection of judicial

[20] In the survey carried out in 2015 in which 1250 people were heard, only 1% of them evaluated the performance of the justice system as very good; 28% evaluated it as good; 42%, as bad and 17%, very bad, the worst result of the series since 2006.

[21] Sanctioned in 1595, during the reign of Felipe II, the ordinances started to be effective in 1603 throughout all the Philippine dynasty's domain, including the Iberian Union. Even after the end of the union between Spain and Portugal, in 1640, the ordinances remained in force by decision of *D. João IV*. In Brazil, many of its provisions remained in force until the issuance of the Civil Code of 1916, when they were definitively revoked.

independence in Spain, following examples accepted in comparative law[22]. Article 104.1 of the Organic Law of the Judiciary provides that the Council is responsible for the self-government of the Spanish judiciary, whose functions must be exercised on based on the principles of unity and independence. Submitted to their decisions, whether it is the plenary or the offices, are the *Salas de Gobierno del Tribunal Supremo, de la Audiencia Nacional y de los Tribunales Superiores de Justicia*, excluded the Constitutional Court, which is not part of the structure of the Spanish Judiciary.

The CGPJ is composed of twenty members (*vogais*) and the president, who also presides the Supreme Court. All with a temporary five-year non-renewable mandate. At the end of the period, the composition of the entire Council is renewed. Among the twenty members, twelve are active judges of the various instances and eight are chosen among lawyers or jurists of recognized competence and with over fifteen years of professional experience.

The Parliament (Congress and Senate) is responsible for choosing, with a quorum of 3/5, all twenty members of the Council, but the nomination is made by the King. Among the 12 judge members, each legislative house chooses 6 among a list of 36 names previously selected by the professional associations of judges. The choice of members who are not part of the Judiciary is also a responsibility of each legislative house, who elect by 3/5 of the votes the remaining 8 members of the Council.

The definition of the Organic Law that states that the Parliament is responsible for the designation of all the members of the CGPJ is seen with reservation by the associations of judges, who advocate that the prerogative of the legislative choice should be limited to only the eight seats for the external members. This was the claim expressed in note issued on February 29th 2016 and signed by four judicial corporations and was entitled 'Judicial Independence'[23].

It is the responsibility of the CGPJ to oversee and enforce the statute of magistracy, in which the activities of governing the judiciary, regulating the admission, promotion, training and appointment of judges are included. Besides the activities regarding the operation of the

[22] In particular, according to the models of the French Superior Council of Judges described in the Constitution of 1946 and the Italian council created by the constituent of 1947 by direct inspiration of the first (Becerra, 1990).

[23] Available at http://www.abogacia.es/wp-content/uploads/2016/03/COMUNICADO-CONJUNTO-SOBRE-INDEPENDENCIA-JUDICIAL-APM-JpD-FJI.pdf. Accessed on 11/21/2016.

judicial bodies through the conduction of inspections, internal auditing and designation of substitute judges. Its attributions exclude judicial decision, as well as the assessment of conflicts between individuals and the Spanish State. The Council's decisions have an administrative character, including the prerogative of editing regulations and reports, and presenting conflicts involving the self-government of the Judiciary and other governmental bodies to the Constitutional Court.

Among the positions of the Judiciary appointed by order of the CGPJ are the judges of the Supreme Court, and the judges (appeal court judges) and presidents of the courts. The nomination is made by Royal Decree, with the approval of the Minister of Justice. It is also the Council's responsibility to supervise any eventual incompatibilities, granting of licenses and retirements, the establishment of disciplinary proceedings and inquiries, as well as the tasks of training of the judges, which is taken care of by the Judicial School. According to the sentencing of TC No. 108/1986, the roles of the CGPJ include the attributions that potentially affect the jurisdiction and which, therefore, could not be in charge of the Executive:

> "Las funciones que obligadamente ha de asumir el Consejo son aquellas que más pueden servir al Gobierno para intentar influir sobre los Tribunales: de un lado, el posible favorecimiento de algunos Jueces por medio de nombramientos y ascensos; de otra parte, las eventuales molestias y perjuicios que podrían sufrir con la inspección y la imposición de sanciones. La finalidad del Consejo es, pues, privar al Gobierno de esas funciones y transferirlas a un órgano autónomo y separado"[24].

The conditions of material autonomy (*budgetary*), one of the external limits to judicial independence, remained under the responsibility of the Executive Power. They were defined by the Ministry of Justice in the national context and by the Autonomous Communities in the regional context.

On the disciplinary dimension, the role of the Council is defined as the supervision of the fulfillment of the duties of judges. Among the possible functional misconducts that are object of evaluation are unjustified absences and delays, failure to observe audience schedules, abuse of authority, and lack of urbanity and respect towards parties and lawyers, among others.

[24] Spanish Constitutional Court, Sentence No. 108/1986, accessed on 12/10/2016, http://hj.tribunalconstitucional.es/es/Resolucion/Show/671.

For PERFECTO ANDRES IBAÑEZ, the CGPJ has as its primary function the exercise of disciplinary power and should not be confused with a body of political direction of the Judiciary (Ibañez, 1999). The Council lacks attributions that reach the generality of the citizen, restricting itself to the aspect of protecting judicial independence against the interference of plans that are external to the judicial activity, according to the institutionalized normative model of the judge in Spanish constitutionalism.

However, the functioning of the Council has been submitted to a variety of criticisms, which can be divided into three chains: the formation of *partisan blocks* reflected in decisions made by councilors; the *motivational deficit* of decisions resulting from the lack of publicity about the deliberations and the reserved nature of the sessions, and the permanence of the *associative tradition* among the characteristics defining the model of the Spanish judicial self-government.

The strong participation of the parliament in the choice of the composition of the CGPJ is the object of criticism from part of the Spanish doctrine (Ibañez, 1999; Iñiguez Hernández, 2008; Nieto, 2005; Vega Torres, 2012), who sees in such a dimension the partisan weight in the effective hyperpoliticization of the Council's operation, including the informal "distribution of quotas by party" in the choice of councilors[25]. This dimension would contribute to a model that reduces the expectations of judicial independence, since the parties would seek more *loyalty* from those nominated in the exercise of their function than the improvement of the Judiciary based on *professional management* or representativeness of *pluralism* in society.

The choice of the two groups of members (judges and external) assumes a proximity between the candidates and the majority parties in Parliament, which in turn usually occurs between groups of associative leaders. A system that seems to feed back relations of partisanship and corporatism reflected in the composition of the Spanish Council. For DIEGO IÑIGUEZ HERNÁNDEZ, choices are made considering the prevalence of personal relationships constructed in the "*oscuros pasillos*" of the Ministry of Justice, the judicial bodies and the CGPJ itself, taking into account individualistic reasons (Iñigues Hernández, 2008).

But perhaps the aspect that has been the target of most criticism in the form of composition of the Spanish Council is the *intense corporatism*. By authorizing the participation of

[25] That would reflect in the positions taken by the councilors in the deliberations, often anticipated by journalists who predict the outcome (Iñigues Hernández, 2008).

associations of judges in the election of the members, the model would have preserved the *clientelist, corporatist* and *patrimonialist* tradition, which keeps away the expectations of democratization of the Judiciary (Iñiguez Hernández, 2008). In this sense, the pretension of keeping political-partisan disputes away from the self-government of the magistracy resulted in the potential increase in the risk of patrimonialization of member appointments and performance evaluation of the judicial service to the detriment of the desired *accountability*.

As IÑIGUEZ HERNÁNDEZ points out, one of the fundamental problems for what he called the "organic failure" of the CGPJ is in the mechanism of election of members. The system described in the model of 1980, in which all the members indicated by the magistracy belonged to the majority group of the *Asociación Profesional de la Magistratura*, did not leave room for distinct orientations. However, even after the reforms of 1985, 2001 and 2006, the formal criterion of election currently in practice has not resulted in less corporatist compositions.

Currently, the election of the twelve members coming from the magistracy is preceded by the proposition of the candidates by the associations and the agreement between the Congress and Senate groups that choose the names that go to plenary. However, the odd thing has been the fact that the eight members that are external to the judiciary are still proposed by the associations of judges and not by parliament groups (Iñiguez Hernández, 2008). After that, the selection is made through a composition of the leaderships of the parties, in which the majorities of PP or PSOE generally prevail, and the chosen ones are voted for, an action that is taken only by protocol.

The consensus surrounding the archaic system of justice administration in Spain, even after the modernization initiatives of the State structure in the period of Redemocratization post-1978, gathered all party groups in Parliament in the proposal for judicial reform which approved the *Carta derechos de los ciudadanos ante la Justicia*[26] on April 16th, 2002. The Charter states that the rights described therein bind the actions of judges, members of the Public Prosecutor's Office, judicial registrars, medical examiners, public servers, lawyers, prosecutors and all the people and institutions that cooperate with the administration of justice. The document is structured on three grounds: a modern and open justice to the

[26] The full text may be consulted here: https://www.administraciondejusticia.gob.es/paj/PA_WebApp_SGNTJ_NPAJ/descarga/Carta_de_derechos_de_los_ciudadanos.pdf?idFile=0a3af68a-cfe3-4243-83ba-fd4c05610e72 Accessed on 12/15/2016.

citizens; a justice that protects the weak; and a relationship of trust between the clients and their lawyers and prosecutors.

Even before the reform, the CGPJ had edited the *Reglamento 1/1998* and the *Instrucción 1/1999* that disciplined the complaint and denunciation procedures concerning the judicial service and created the *Unidad de Atención al Ciudadano* (Citizen Attention Unit). The entity has been annually disseminating information on population complaints regarding the justice system. The initial records showed a growing dissatisfaction in a trend that had its peak in 2008, with 17,490 demands, but stabilized in a smaller proportion. In the last published report[27], with data from 2015, 12,658 records were counted, among complaints, suggestions, denunciations and requests for information in writing. Of this number, *68%* were motivated by problems in the *operation of judge rulings and courts*; 15%, by disagreement on the outcome of the decisions; and 10% have not been classified or address issues not pertaining to the administration of justice.

The operational problems are mostly related to: *lack of transparency* (these complaints have increased by 13% if compared to 2014); *lack of understanding* about the terms and language used in decisions; *lack of attention* regarding respect and quality of service provided to people (waiting time, information acquisition and lack of respect to the scheduled time for audiences); *lack of responsiveness* to citizenship (due to the failures in access to the mechanisms of complaint and effective accountability of judges for judicial errors or bad judicial service); and, finally, the *deficit of agile and technologically advanced justice* (for covering complaints about delays in proceedings, lack of organization and absence of personnel in the judicial offices, besides the lack of new technologies).

The series of problems detected in the operational model of the *General Council of the Judiciary* have considerable repercussion on the self-understanding of its role as an institution responsible for improving judicial independence. The diagnosis of the entity's failure in the management of the judicial self-government in Spain and the exhaustion of the associative model, seen as inconsistent with the pluralism demanded in the constitutional regime of the magistracy, is made evident by the fragility in the capacity of its deliberations to ensure the

[27] The data and remaining variables of the survey are available at: http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Opinion-y-quejas-sobre-el--funcionamiento-de-la-justicia/Quejas-de-los-ciudadanos-sobre-el-funcionamiento-de-la-Administracion-de-la-Justicia/Sistema-de-Informacion-de-la-Unidad-de-Atencion-al-Ciudadano-del-CGPJ/.
Accessed on 01/12/2017.

expected independence of the judges (Iñiguez Hernández, 2008). This deficit can also be verified when the judicial performance is evaluated by the people under jurisdiction. In the survey conducted by *Eurobarometer* and published by the European Commission, the following question was made:

> "From what you know, how would you rate the justice system in (our country) in terms of the independence of courts and judges? Would you say it is very good, fairly good, fairly bad or very bad?"[28].

The good performance revealed in the general data on the operation of the Spanish justice system is not repeated when it comes to evaluating the *independence of the judges* in the public's view, as with the example of informatization, human resources, alternative forms of conflict resolution and training of judges. Internally, the administration of justice is perceived, by far, among the main problems of the country[29]. However, the last report by the European Commission for the Efficiency of Justice, released on April 10th 2017, which mapped the index of *perception* of judicial independence, points out that among the 28 countries compared, Spain occupied 26th place[30]. Only about 3% of the respondents claimed that judges and Courts enjoy full independence. Approximately 27% of them believe the current degree of independence is acceptable, a number that is much lower than the approximately 59% that consider it low or too low. The main cause of the judicial independence deficit, according to the *survey* is the interference of the government and the politicians (about 48%), followed by the pressure of economic groups or other interests, and the opinion of those who consider judges have insufficient position or *status* for them to have the desired independence.

[28] Data of the survey available at: http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm. Accessed on 11/13/2016.

[29] According to an index of the Center for Sociological Investigations, released in March 2017, only 4% of the Spaniards consider that the administration of justice is among the three major problems in the country. However, this is the highest percentage since January 2001, when it started to be published. See: http://www.cis.es/cis/export/sites/default/-Archivos/Indicadores/documentos_html/TresProblemas.html. Accessed on 03/20/2017.

[30] Only ahead of Bulgaria and Slovakia. See http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-167-F1-EN-MAIN-PART-1.PDF. Accessed on 04/15/2017.

4. LIMITS AND POSSIBILITIES OF ACTION OF THE COUNCILS: BETWEEN THE PROTECTION OF INDEPENDENCE AND THE PROMOTION OF ACCOUNTABILITY OF THE JUDICIAL FUNCTION

The decay of dictatorial regimes and the demands for democratization of the Judiciary have been part of the context of creating judicial councils in various constitutional experiences in recent decades (Garoupa & Ginsburg, 2008). In this context, the discourse of avoiding partisan political influence in the autonomy of the Judiciary constructed and justified. The geopolitical transformations and the expansion of liberal constitutionalism around the world pressed the semantic widening of judicial independence on state structures that traditionally gave the judges little autonomy. Thus, the search for balancing mechanisms between the self-government of the magistracy and the functional accountability of the judges needed to be negotiated in distinct ways (Zimmer, 2011; Pozas-Loyo & Ríos-Figueroa, 2010), depending on the degree of imposition of the economic agents, partisan fragmentation and the conditions of the political system in the constituent processes in which the design of the judicial organization was in dispute.

The institutionalization of normative patterns on the nomination, promotion, functional discipline of judges and evaluation of institutional performance was articulated with the justification of the guarantees of *judicial independence* as being fundamental to liberal democracies, while, on the other hand, it would be able to establish the desired *accountability* of the judicial activity. The complex notion of judicial independence as an expression of the separation of powers in contemporary law has given rise to studies on its semantic uses. However, these uses are more related to constitutional rhetoric than to legal principles of practical application, as ROBERT STEVENS[31] states, before the vagueness and obscurity in which certain situations are presented.

The meaning of judicial independence relies on specific contingencies, although in a lesser extent than the concept of *impartiality*. In studies on independence, there have been common descriptions that refer to it as an *instrumental category*, useful as it serves to ensure the

[31] STEVENS R. raises hypotheses about the increase in democratic control over the nomination and activities of British judges, by the institutionalization of new forms of *judicial review* and the integration with the European Union's human rights protection system. Although it is an important reference, the British model needs to be thought of in its context: one of conjugation of the broad independence of judges linked to a Judiciary that is institutionally dependent on the Parliament in many aspects, such as the discipline of international human rights treaties (Stevens, 1999).

purpose for which it was established: impartiality. A position that raises an alert to the risk of degenerating the concept into privilege (Requejo Pagés, 1989, P. 116 Ss And Garapon, 1996). So, evaluations on independence justify its adequacy when they are able to provide a reflection about the judicial practice, serving as a critical instance. To a certain degree, the CNJ in Brazil maintains this understanding:

> "The judge cannot dispose of the individual judicial independence that was constitutionally conferred upon him: it is more of a responsibility than a privilege. It is the responsibility of remaining independent, of ensuring its independence so that its duties are not threatened by pressures of the most varied natures (...) We know that the Brazilian citizen has resorted to the Judiciary as a last attempt to resolve problems that other institutions could not remedy, in a phenomenon that finds resonance in other countries and is linked to the very expansion of the Judiciary in a global context. The inefficiency of other government actors led the Brazilian population to pursue the achievement of their rights through judicial decisions. The deepening of the democratic and republican process among us has also contributed decisively to this. This fact further increases the responsibility of the jurisdictional role, whose credibility still remains, possibly, higher than that of other roles because of the ethical firmness and the seriousness of most judges in this country. The frustration of the expectation of claimants regarding the posture and conduct of judges is grim for democracy, and risks the integrity and independence of the jurisdictional role in the Democratic State of Law. Mutatis mutandis, the injury caused by the judge who disrespects his/her functional duties transcends the parts of the process: democracy itself is weakened when the judge is corrupted".[32]

PERFECTO ANDRES IBAÑEZ also highlights that the conceptual pair *impartiality – independence* presents itself as a unity/distinction of the autonomy of law. On one hand, the judge is required to be impartial regarding the *litigant parties* to maintain the expectations of impartial examination of the interests presented to consideration. On the other hand, normative requirements address the judge must be subject to legal order (Ibañez, 2012). This last aspect is the reason why the judge cannot be *politically biased* or seen as an agent of the imbalance in disputes that are characteristic of the political system. Thus, the definitions of guarantees of impartiality and judicial independence have a relevant role in protecting

[32] CNJ. PAD 0007400-80.2009.2.00.0000, rapporteur Councilor CHAVES DE OLIVEIRA, J. judged on 03/15/2011.

functional differentiation between politics and law by promoting the discursive autonomy of decision-making spaces that are paradoxically tensioned in the constitutional dimension.

DIETER SIMON explains the reasons for judicial independence in terms of a double guarantee. The *first one* aims to protect the judicial role giving it enough autonomy so that the judge's only commitment is with the law. The *second* aspect of independence is directed to the people under jurisdiction, since, by ensuring that the judge is bound to the law, it prevents decisions to be the result of the judge's will in the interest of a given party (or himself/herself). This is the form set up by the models of judicial proceedings of liberal constitutionalism which negatively conceive the eventual adjudication of politics by the Judiciary, which jeopardizes its impartiality (Dieter Simon, 1985).

This articulation between *judicial independence* and *accountability*, reinserted into the concept of independence, is constructed under a paradoxical tension that reflects on the composition of the councils of justice itself. If the prevalence of members of the Judiciary becomes the institutional option adopted in the design of a council, there is indication that the protection of *independence* has greater weight in its functioning. On the other hand, a composition which has members who are mostly external to judicial bodies may suggest that the Council's central concern is in promoting *accountability*.

Furthermore, the competences established in the forms of indications of the appointment of members may be a relevant parameter to measure the degree of politicization of compositions. An observation made under the reserve that politicization is not only present in eventual external pressures from political agents and parties, but also internally, under the sign of the force of the judges' corporations and the influence of "good relationships" among members of the various hierarchies of the justice system.

In a setting like this, in which judges are pressed by various agents (such as *politicians* and the *press*), it becomes clear how they need to negotiate the conditions for exercising their own power. This involves pondering the relationships between judicial independence and *accountability*, making room for the protection, for example, of budgetary autonomy and prerogatives of judges against threats coming from the Congress or the Executive. And, on the other hand, demanding *self-restraint* on the behavior of judges, whose interest would be in preserving their *political capital* which, publicly, manifests itself through intellectual attributes and reputation.

The observation of the data and speeches produced by the Councils suggests the existence of a significant disconnection between the formality of *normative standards* incorporated in the constitutional and legal texts and the effective *behavior* of judges and institutions of the justice system. If, in the formal plan, the guarantees of independence are expressed in the prerogatives of the judges, in the material plan the limitations imposed by various factors seem to interfere directly in the symbolic generalization of the sense of independence of the judicial function (Bülhmann & Kunz, 2011; Ríos-Figueroa & Staton, 2014)[33].

5. CONCLUSION

In Brazil, the absence of specific doctrinal studies on the concept of judicial independence and the role of CNJ in promoting it is a symptomatic factor of the little attention that the theme has received. In Spain, despite the existence of extensive academic production and frequent criticism about the operation of the CGPJ, little has evolved in a project of reforming the institution in order to adjust the tension between independence and its limits in a productive way for the effective access to justice and improvement of the judicial service.

However, in both constitutional experiences, from the observation of the network of concrete relationships reflected in the legal interpretation about the functional status of the magistracy, the functionality of the guarantees of judicial independence can be verified. That is because it is through this assessment that it is possible to check whether the set of prerogatives, so vigorously claimed in the speeches of the judges as guarantees of the society in the normative plan, are not voluntarily sacrificed by the judges themselves in the concrete plan of the administration of justice on behalf of interests other than the defense of rights or the democratic regime.

In a setting like the one described here, it can be attempted to say that the importance of the classical question renewed by JAMIE HUGHES in 'Who will watch out the guards', with which the theory of law has confronted itself when seeking to provide justifications for the authority of its responses, has shifted its focus to give place to the question about 'how the guards are

[33] The evaluation of the relationship between independence *in fact* and *in law* has highlighted the low degree of relationship between the indexes based on the normative texts and the independent judicial behavior. The argument is that the meaning of independence is more related to the strategies and contextual incentives of the functioning of the institutions of each political system than with the fixed standards of appointment, removal and powers of the judges (Bülhmann & Kunz, 2011; Ríos-Figueroa & Staton, 2014).

watched out'. That is, in a society where ideologies and viewpoints about law are the most diverse, it becomes more productive to discuss *how* the conditions for the independent exercise of jurisdiction can be constructed than to continue betting on *who* will have the heroic personality capable of carrying the fair decision.

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