THE JUDICIARY – PRINCIPLE OF TRANSPARENCY AND THE DUTY OF INFORMATION

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Primacy of Law can only exist in a transparent legal system whose base should be ruled in the application of the principle of transparency in all its areas. Thus, all the agencies of the Public Administration, especially the Judiciary, should be guided and modeled by the principle of transparency.
Transparency is one of the basic principles of the idea of democracy, born in the course of history as an alternative means for overcoming the obstacles imposed by absolutist States and, thus, containing their eventual excesses and abuses.
Along the last decades, the transparency in the conduct of the public businesses, accomplished by the Public Administration, emerged as a demand in respect to the control and the rulers' responsibility, broadly transmitted by political speeches, by the press and the contemporary literature. The recent legislation accompanies this movement.

§ 1 – PRINCIPLE OF TRANSPARENCY

A) Differences Between Transparency and Publicity.

Transparency in the conduct of the businesses of the Public Administration constitutes a political-legal project that presents itself as a requirement originated even before the contemporary legislations and the recent scientific literature.
Even the meaning of the word transparency exercises a fascination power, which creates an obstacle to the analysis of its real meaning. The principle of transparency in the management of the Public Administration is placed in a relevant level, in a status of almost a sacred thing.
According to Naurin[1], publicity and transparency are two concepts close to one another, since in the literature, sometimes, they are used as if they were synonymous, however it is necessary to distinguish them. When we talk about the principle of publicity, there is a more demanding notion than that of transparency because the first presupposes the second, it seems equally that transparency has a deeper extension than that of publicity, because it can be applied to a private sphere.[2]

[1] NAURIN D., « *Transparency, Publicity, Accountability – The missing links », Swiss Political Science Review*, 12 (3), 2006, pp. 91-92.
[2] *Ibidem.*

Still inside his analysis on transparency, Naurin asserts that, if it exists, there will be a real possibility of access to information and, consequently, the formation of a public opinion on a certain procedure carried out.
Publicity means that the information was really spread, in contrast, transparency does not presuppose a real access, concrete to this information.
The definition of transparency of the public administration can be translated as the performance of the government agency in the sense of turning its daily conduct, and the data resulting from it, accessible to the public in general. The idea of transparency and publicity resembles each other, nevertheless, the two concepts are not same, they complement themselves. From the common definition of the words, publicity has as characteristic that which is public, known, no secret. Whereas, transparency is an attribute of what is transparent, crystalline, limpid, visible; it is what can be seen through light.
Transparency should be composed by three elements: the publicity of the actions, the real comprehensibility of the information and its utility for decisions, aiming thereby to guarantee the veracity of what is disclosed, as well as the possibility of comparison among the divulged data.
The principle of transparency surpasses the publicity concept, since publicity is a mere passive question of publishing certain information as a requisite of its effectiveness. On the other hand, the principle of transparency goes beyond, because it is based on the warranty of accessing the information in a global way, not only those that one wants to present.
Transparency has as characteristic its proactive aspect, that is, there is no need for citizens to search for information through application, it should be published and available for consultation. Such proactive posture produces benefits to the governments, because it improves the flow of the managerial information with the citizens, which contributes to the efficiency of the government action.
Thus, the principle of transparency is not confused with the principle of publicity, because the former exceeds the sense of the latter. The principle of transparency must be understood as the duty to divulge, in a crystalline way, the data regarding public accounts, aiming at the utility of these pieces of information in the sense that these can be monitored.

B) The Evolution of the Concept of Transparency.

The term 'publicity', in the end of the XVIII century, was much more connected with the condition of the practices of public life, since the use of the term 'transparency' was an exception; only used by Bentham and Rousseau[3].

[3] BENTHAM J., « *Of Publicity* », in Michael James, Cyprian Blamires (eds.), Political Tactics, Op. cit., p. 29
[4] *Ibidem.*

In accordance with the contractualist theory of Hobbes, Locke and Rousseau, the sovereign State had extensive powers upon its subjects, who transferred their power to a ruler, who acted like absolute sovereign so as to maintain the order. There were no limitations for the State that could do almost everything and there was no control, on the part of its subordinates, of the acts practiced by him, since they had adhered to the social contract.

In the second half of the XVIII century, in Europe, the moralization of the public life starts to take publicity as a demand, aiming to limit the temptations of corruption amongst the public representatives.[4] Publicity became a principle of governance and a guarantee of integrity of those who want to be representatives in the public life.

Along with the evolution of society, the almost unlimited power of the Sovereign State started to be questioned, suffering limitations. One of these limitations is represented in the right of access to information, as a fundamental right.

In this way, with the possibility of access to information provided by the principle of transparency, anyone can know and supervise the measures, actions and conduct of the State through the disclosure of its data.

Just like in a private or public company in which the access to data must be allowed to its partners or shareholders, so that they can supervise and analyze its accounts and management, people/individuals under the jurisdiction also want and must know how the State/Judiciary spends its money.

Transparency and publicity favor the probity in all public administration levels, especially with regard to justice. Judicial proceedings carried out without visibility permit despotism, negligence, whims and delay.

For important organisms of the international community, access to information is recognized as a basic human right. Since its origin, the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations Organization (UNO) in 1948, had already predicted in its article 19 the access to information: "*article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers*".

In a Democratic Rule-of-Law State, transparency and access to information constitute rights of the citizen and duties of the Public Administration. Therefore, it is the responsibility of the State to inform citizens on their rights and to establish that access to public information be the rule and secrecy, the exception.

In the international scenery, Sweden was, in 1766, the first nation in the world to develop a legal landmark related to access to information, whereas in the United States the law of Freedom of

Information, known as FOIA (Freedom of Information Act), was created only in 1966.[5]
Out of the Latin American countries, Colombia was the pioneer country to establish, in 1888, a Code, which permitted citizens to gain access to internal, Government documents.

§ 2 – THE PRINCIPLE OF TRANSPARENCY IN BRAZIL

A) Evolution of The principle of Transparency in Brazil

In the national context, as a result of two historical, concomitant and complementary factors, transparency has become a vulgarized subject. Increasingly more citizens require, in a democratic perspective, access to information to be acquainted with the performance of the Government, the destination of its tributes, as well as its effective results. In the same way, with the end of the military regime, of exception, a new stage of democratic learning initiated for the Brazilian society through the strengthening of popular participation and with the cooperation of the citizen and the press in monitoring the public activity.
On the other hand, the technological advance made the shortening of the distances possible and allowed, through access to information, mainly, by digital means, that with a simple handling of the keyboard, people could access from their own residence diverse information on people and organizations from all over the world, even to verify and to monitor Government performance in rendering of public services.
The guarantee of access to information and transparency was, throughout the history of Brazil, object of different laws and politics.
The Constitution of the Federative Republic of Brazil of 1988, for example, placed the right of access to public information in the roll of the individual's basic rights. Right in the beginning, Heading I - Fundamental Rights and Guarantees, Chapter I - Individual and Collective Rights and Duties, article 5 set forth:
Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (…) XIV – access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity; XXXIII – all persons have the right to receive, from the public agencies, information of private interest to such persons, or of collective or general interest, which shall be provided within the period established by law, subject to liability, except for the information whose secrecy is essential to the security of society and of the State".[6]

[5] Available on http://www.cgu.gov.br/Publicacoes/transparencia-publica/brasil-transparente/arquivos/ manual lei_ estadosmunicipios.pdf, access on 25.11.2016.
[6] Constitution of the Federative Republic of Brazil,1988

The right of access to information shall enclose the major type of information and agencies and also reach the largest number of persons as possible.

The principles are like compasses which serve to guide any conduct, especially if it is public. It is noticed that the essential function of the principles is to underlie a system and to guarantee its validity.

The constitution of the Republic has brought in its framework principles that shall guide every act of the Public Administration, to wit: legality, impersonality, morality, publicity and efficiency. However, it is not a matter of "including but not limiting", as there are other principles that guide the public power.

In regard to the principle of transparency, intended especially to Public Administration, this one finds legal prediction in the Federal Constitution of 1988 in the article 37, Paragraph 1. *The publicity of the acts, programs, public works, services and campaigns of Government agencies shall be of educational, informative or social orientation character, and shall not contain names, symbols or images that characterize personal propaganda of Government authorities or employees.*[7]

The principle of administrative publicity, according to Canotilho, is characterized as a fundamental right of the citizen, inextricably connected to the democratic principle, having two *substrates*: a positive substrate which makes the state-owned duty to ensure wide and free access to information as a necessary condition for participation, knowledge and control of the Administration; and a negative substrate, except for the security of the society and the State and the right to intimacy, the administrative actions cannot be developed – if in secret.[8]

Such fundamental right is felt in the sense of knowing all the legal proceedings referred to administrative action, as well as its implications and results on account of fundamental right to information, right of access to archives and public registers, right to demand of the State positive actions in order to make possible the visibility, cognoscibility, and control of the administrative actions and the right to guarantee facing the process of production of administrative decisions.[9]

Publicity has always been considered as an administrative principle, due to the fact that being public, the Public Power shall act with major transparency, so that all administered individuals could have at their disposal, whenever they want, knowledge of what the administrators do.

As a result of the principle of publicity, arises the obligation that all administrative acts be opened and available to the citizens, considering that these only exist on account of the interest of the public. The acts of these public agents, legitimized by the society

[7] *Ibidem.*
[8] CANOTILHO J., *Direito Constitucional e Teoria da Constituição.*7. Editora: Coimbra, Almedina, 2003.
[9] BOBBIO N., *O futuro da democracia.* Rio de Janeiro, Editora: Paz e Terra, 1989, p. 89.

for the exercise of their functions, shall always be exposed to control, which is only possible with the outsourcing of those.[10]

From the point of view of realization and effective application of the principle of publicity, it has been understood more and more by the insufficiency of the mere publication of the administrative acts in official environments or by receiving information of personal interest demanded to government agencies. Publicity shall be wider, in other words, availability of such acts must be in clear language and in accessible means.

According to Helly Lopes Meireles, publicity, as a principle of public Administration, includes any state-owned acting, not only under the aspect of official spread of its acts, but also the knowledge of the internal conduct of its agents.[11]

Publicity constitutes a congenital principle to democracy, which can only be moderated in exceptional circumstances and with substantiated reasons, since this is an essential requisite for the efficiency of control of power, as well as an inextricable element of the sense of Democratic State.

Canotilho proposes that in this line of reasoning, behind the principle of publicity, is: *the requirement of security of the right and the prohibition of the "secrecy" policy, which prohibition is not only as a fence to arbitration, but as a duty to inform on the part of the State.*[12]

In sum, the principle of publicity is intended to protect the citizen from any undue intrusion by the Administration into his constitutionally protected field of freedom.

Pursuant to article 37 of the Federal Constitution of 1988, all acts performed by the Public Administration require wide disclosure, except for the hypotheses of confidentiality provided by law.

This legal provision aims to objectify and legitimize the actions taken by the Public Administration by reducing the distance that separates them from those administered; and according to Wallace Paiva Martins Júnior, it is "materialized by publicity, motivation, and popular participation in which the rights of access, information and due legal process are articulated as forms of action"[13].

He also proposes that the principle of administrative transparency be composed of the sub-principles of publicity, motivation and popular participation in administrative management. Associating the principle of transparency with the idea of Democratic Rule-of-Law State.

Thus, the principle of transparency has as its direct consequence "the engraved value and the end expressed by the principles of publicity, motivation and popular participation, since all point to the visibility of the administrative work and inspire the

[10] MENDES G.F., COELHO I., BRANCO P.-G. G., *Curso de direito constitucional*. São Paulo, Editora: Saraiva, 2007, p. 788.
[11] DA SILVA J., *Curso de direito constitucional*. 26. São Paulo, Editora: Malheiros, 2006, pp. 669-670.
[12] CANOTILHO J., *Direito Constitucional e Teoria da Constituição*. 7, Editora: Coimbra, Almedina, 2003, p. 1165
[13] MARTINS JÚNIOR W., *Transparência administrativa*: publicidade, motivação e participação popular. São Paulo, Editora: Saraiva, 2004, p. 40

production of rules such as the right to a petition, and certificate, and the right to information, considered as essential mechanisms in the jurisdictional control of transparency."[14]

Another principle correlated with the Public Administration is the principle of efficiency. Although some writers considered it implicit in the constitutional legal order, it only emerged as an express principle of Public Administration from Constitutional Amendment no. 19 of 4 June, 1998.

For the renowned Hely Lopes Meirelles, it was from constitutional amendment 45/2004 that the principle of efficiency came to be considered, a right with constitutional provision.

"*Since Constitutional Amendment 45/2004, efficiency has become a constitutional right, since, in Heading II, of the Fundamental Rights and Guarantees, item LXXVIII was included in article 5, which ensures to all, at the judicial and administrative level, the reasonable duration of the proceedings and the means to guarantee the speed of its processing".*[15]

Diógenes Gasparini further proposes that:

[16]"The principle of efficiency imposes on the direct and indirect Public Administration the obligation to carry out its duties with speed, perfection and efficiency, in addition, of course, to observing other rules, such as the principle of legality."

For many authors, the principle of efficiency is also known as the principle of good administration, and should be applied to all levels of the Public Administration.

For Alexandre de Moraes, the principle of efficiency is that imposed on the direct and indirect Public Administration and its agents aiming at the pursuit of the common good, through the exercise of their powers in an impartial, neutral, transparent, participatory, effective, without bureaucracy way, and always in search of quality, focusing on the adoption of the legal and moral criteria necessary for the best possible use of public resources.[17]

It is through the principle of effectiveness that one can demand quality in the services provided and in the products offered by the public power, but especially by the Judiciary. It is not enough that the State acts within the legality, because when it comes to public service rendering it is necessary a better performance of its agent that represents the public administration, aiming to produce positive and satisfactory results to the needs of society.

It can be said, therefore, that transparency encompasses efficiency and publicity, but it is more than the sum of both.

Marcus Jurena Vilella Souto presents in an original way a different meaning for the principle of transparency commonly attributed to it. He asserted that the principle of transparency should be considered far beyond its simple concept, and this should be seen

[14] MARTINS JÚNIOR W., *Transparência administrativa*: publicidade, motivação e participação popular. São Paulo: Saraiva, 2004, p.31.
[15] MEIRELLES H., *Direito Administrativo Brasileiro*, 37ª Edição, Editora: Malheiros, pp. 98-99.
[16] GASPARINI D., *Direito administrativo*. 10ª Edição, São Paulo, Editora: Saraiva, 2005, p. 21.
[17] MORAES A., *Direito constitucional*. 5ª Edição, São Paulo, Editora: Atlas, 1999, p. 294.

as the real visible or transparent control that occurs when the intimacy of the authorities invested with power is revealed in the attributions inherent to it. "In other words, the exercise of a public function, aimed at the public, should allow its constant monitoring, without the right of intimacy, which is undeniable to individuals, especially against the State itself, being invoked to exclude such controls."[18]

In the National legal system, Complementary Law No. 101, dated 4 May, 2000, known as the Fiscal Responsibility Law, in the chapter on Fiscal Management, provided the explicit provision for the principle of transparency, in its article 48, defining the instruments that must be object of disclosure by the agencies of the Public Administration, in general.

Art.48. The following are instruments of transparency of the fiscal management, which will be widely disseminated, including in electronic means of public access: the plans, budgets and laws of budgetary directives; the accountability and the respective prior opinion; the Summarized Report on Budget Execution and the Fiscal Management Report; and simplified versions of these documents.[19] The Law on Access to Information (LAI), (Law No. 12,527 of 2011), which determined that public authorities should publicize their actions and thereby facilitate access to information for citizens, with the publication of some information by electronic means and other means, regulated article 5, item XXXIII of the Federal Constitution of 1988. In accordance with the principle of publicity listed in the caput of article 37 of the Constitution, public bodies and institutions should promote the active transparency of their administrative and financial acts, which results in the spontaneous availability of documents and data of collective interest on its management, a practice that covers the three powers.

From the culture of secrecy to the culture of transparency. In terms of public management, the law on access to information represents a paradigm shift, since it limits the use of administrative secrecy, which until now has been the rule, and establishes the principle of transparency.

Thus, with the publication of the law on access to information, publicity has become the rule and secrecy, the exception.

B) Instruments for Application of the Principle of Transparency in Brazil to the Judiciary

In 2004, the Transparency Portal was created by the Federal Comptroller General's Office, whereby everyone can access information on Federal Government expenditures in relation to forecasting and collecting revenues, voluntary transfers and direct expenses in a simple way and independently of the use of

[18] SOUTO M., *Transparência na Administração Pública*. Rio de Janeiro, Revista do TCM-RJ, nº. 35, 2007, pp. 37-38.

[19] Complementary Law 101, of 04/05/2000. Available on http://www.planalto.gov.br/ccivil_03/leis/LCP/Lcp101.htm, access on 25.11.2016

passwords, thus allowing the citizen to monitor how public money is being used and to help control. In other words, digital tools are used so that the greatest number of people has access to information about resource management and similar procedures.

In parallel to the government initiatives, independent and autonomous organizations were created, formed by groups of nongovernmental entities committed to the fight against corruption as "Transparency Brazil", which focuses its action on the search for the integrity of the public power, mainly through the increase of the available information . It focuses its work on two areas: the monitoring of institutions and advocacy.[20]

In the international sphere Transparency has also been the object of initiatives by independent organizations that aim to control and fight against corruption. Transparency International (TI) is a non-governmental organization based in Berlin, Germany, whose main objective is the fight against corruption.[21]

TI is known worldwide for the annual elaboration of a report that measures the countries' perceptions of corruption. The Corruption Perception Index (CPI) is considered to be the most reliable and consistent measurement instrument of corruption level by scientific research and work.

Such initiatives by independent organizations, aimed at controlling and supervising the management and acts of the Public Administration, should be multiplied by all the agencies of the Administration, more especially, by controlling the administration of the Judiciary, as well as its accounts and acts, trying to make them clearer and more effective to those under the jurisdiction.

At the same time, the Ministry of Justice, with the publication of Ordinance No. 3,746/2004, launched its Transparency Program, which aims to disseminate information on the actions and expenditures of the Ministry in a detailed way, and monitoring and follow up by all citizens.

Nowadays, all the agencies of the direct Federal Public Administration have pages of public transparency. In the indirect administration entities, said Transparency Pages have been successfully implemented.

Within the scope of the Judiciary, in order to elucidate the instruments provided for in article 48, the National Justice Council, which is a public institution that aims to improve the work of the Brazilian judicial system, especially with regard to control and administrative and procedural transparency, issued Resolution no. 102 of 15 December, 2009, which regulates the "publication of information referring to budgetary and financial management, personnel and the respective remuneration structures of the courts and councils" [22].

[20] Available on http://www.portaltransparencia.gov.br/sobre/], access on 24.11.2016.
[21] Available on http://www.dw.com/pt-002/transpar%C3%AAncia-internacional-ti/t-19555799, access on 28.11.2016.
[22] Resolution no. 102, of 15 December, 2009, National Council of Justice.

This measure aims to demonstrate which instruments should be disclosed by the agencies of the Judiciary, indicating the criteria as they should be displayed on the websites of their respective agencies.

Within this scope, of the principle of transparency, the National Council of Justice has created a system known as "Open Justice", which makes it easier for all citizens to consult and access information on the location of civil courts, courts, notary offices and other institutions in the service of the judicial system of Brazil and on productivity reports of the procedural secretariats. The database simplifies access to the courts of the country under the management of the Justice Magistrate Court.[23]

The creation of "Open Justice" was one of the greatest encouragement acts to society in the pursuit of the monitoring of the judicial agencies and social control.

Within the scope of the Judiciary, in addition to providing greater transparency on the functioning of the courts, the norm has made it easier and faster for anyone to have access to data, such as compensation for civil servants and magistrates, financial transactions, expenses and bidding processes.

To ensure compliance with the law by the Judiciary, the National Justice Council (CNJ) published Resolution no. 151, which determines the nominal disclosure of the remuneration received by members, servants and employees of the Judiciary on the Internet. The data referring to the payroll of the staff of the CNJ, since June 2012, can be obtained in the compensation and information system of previous periods.

Thus, the performance and results of the judiciary must be permeated by transparency, including with regard to its accounts and contracting, which can be done through the disclosure of data, so that all jurisdictions can know and supervise said measures and actions.

The Ministry of Justice, for its part, has launched its Transparency Program, which is responsible for disseminating information on the actions and expenditures of the Ministry in a detailed manner on the Internet website.

Prior to the enactment of the Law on Access to Information, the CNJ had already adopted measures to make the activities of the agencies of the Judiciary Branch more transparent, such as determining to the courts the publication on the Internet of information on budgetary and financial management, personnel and structure of remuneration of magistrates and servants. By the resolution, the courts have the obligation to make public all their expenses, including expenses with tickets, daily fees, contracting services and works. This information is available on the Transparency Portal or on the "transparency" link on the courts' websites.[24]

[23] Available on http://www.cnj.jus.br/sobre-o-cnj/quem-somos-visitas-e-contatos, access on 25.11.2016.
[24] Available on http://www.cnj.jus.br/transparencia], access on 25.11.2016.

In this spirit of transparency of the acts practiced by the judiciary, any jurisdiction can consult the productivity reports of the Judicial Services and verify the quantitative data on acts received and deliberated in the departments of civil courts.

Internally, the National Justice Council has established rules for courts and councils to publish on their websites relevant information on their financial and budgetary management related to expenditures on human resources, general services such as cleaning and IT, consumption materials, acquisition of assets and other maintenance expenses. The publication of this information gives transparency to the Judiciary's administrations and enables its monitoring and social control.

The creation of TV Justiça, on 11 August, 2002, represented a novelty and a peculiarity of the Brazilian judicial system. The purpose of such a unique creation is to seek the transparency and efficiency of the acts of the Judiciary, and in this way to bring that Power closer to the population.

Unfortunately the creation of the Open Justice system has been undergoing some attempts to limit its publicity and transparency by certain sectors of society, as more recently disclosed in the national press, the approval by the Commission on Science and Technology, Communication and IT of bill 7004/2013 aimed at amending law 8,977[25], in art. 23, h*) A channel reserved for the Federal Supreme Court, for the dissemination of the acts of the Judiciary and its work, without live transmission and without editing of images and sound of its sessions and those of other Supreme Courts.*

The aforementioned bill goes against the "Open Justice" initiative and the principles of publicity and transparency, as it prohibits live and unedited broadcasts of images and sounds of the sessions of the Federal Supreme Court, as well as other Supreme Courts on the TV Justiça channel, distancing and limiting the access to information of those under the jurisdiction to the acts practiced by the Judiciary.

The guarantee of the right of access to information brings benefits both to society and to the Public Administration. In general, access to public information is an important prerequisite for the fight against corruption, the improvement of public management, social control and popular participation.

By having access to public information, citizens have a greater condition of monitoring decisions of public interest, and thus avoid the corruption that thrives in secret. The monitoring of public management by society is an indispensable complement to the supervision exercised by public agencies, the more effective and broad the transparency of government acts and expenditures, the greater the efficiency of the public machine and the risks of corruption become smaller, taking into account the inhibiting nature of transparency.

[25] Available on http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra?codteor=1214815&filename=PL+7004/2013], access on 26.11.2016.

Another relevant aspect of transparency is the fact that it is an element in sustaining the relationship of trust between the citizen and the State, essential to maintain the legitimacy conferred on the Government in the exercise of its functions.

Progress still needs to be made to increase transparency, advances related to the reporting of clear and consolidated information that reveal the link between the resources spent and the results obtained with them. In this way, it will be possible to exercise control over the complete cycle of the execution of the public resource and concomitantly know the close relationship between the use of public money and the improvements and modifications undertaken from it.

The revolution of the digital era, especially with the easy access to the Internet, has greatly contributed to the increase of social participation and control over the execution of public policies. Such an initiative has a key role to play in the application of the principle of transparency, which is seen by many as a path of no return.

It is essential that the State not only provides the information necessary for the control of its acts by society but, above all, makes its data available and easily accessible, in accordance with the principle of transparency, effectiveness and the principle of publicity.

Faced with such principles, what society expects from the State is greater quality and transparency of public services through its acts and expenditures, in order to make the coexistence between public administration and those under its administration/jurisdiction more human, harmonious and satisfactory, aiming at the true realization of rights.