

JUDICIAL COUNCILS, INDEPENDENCE, AND ACCOUNTABILITY: THE CASE OF
BRAZIL'S NATIONAL COUNCIL OF JUSTICE

By

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To my family - for your unceasing love and support and constant exposure to new and wonderful experiences throughout my life. You have truly equipped me to be the man I am supposed to be.

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LIST OF ABBREVIATIONS

ADIN	Ação Direta de Inconstitucionalidade
AJUFE	Associação dos Juízes Federais do Brasil
AMB	Associação dos Magistrados Brasileiros
ANAMATRA	Associação Nacional dos Magistrados da Justiça do Trabalho
CNM	Conselho Nacional da Magistratura
CCJ	Comissão de Cidadania e Justiça
CJF	Consejo de la Judicatura Federal
CSJ	Consejo Superior de la Judicatura
CSM	Conseil Supérieur de la Magistrature (France), Consiglio Superiore della Magistratura (Italy), Conselho Superior da Magistratura (Portugal)
DPJ	Departamento de Pesquisas Judiciárias
ENFAM	Escola Nacional de Formação e Aperfeiçoamento da Magistratura
NCJ	National Council of Justice (Conselho Nacional de Justiça)
OAB	Ordem dos Advogados do Brasil
PEC	Proposta de emenda à Constituição
STF	Supremo Tribunal Federal
STJ	Superior Tribunal de Justiça
TST	Tribunal Superior do Trabalho

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The debate over how to balance the concepts of judicial independence and accountability has become more controversial with the recent choice of many countries to adopt judicial councils for administrative and disciplinary purposes in the courts. Both of these concepts are considered vital to a well-functioning judiciary in a democratic context, but there is much disagreement over how best to balance them. Judicial councils are attempts to do so, but their installation has added many more questions to what are concepts already in need of stronger definition.

Brazil's Conselho Nacional de Justiça (National Council of Justice, or NCJ) is a recent example of a debate over these two concepts and a country's attempt to balance them through a judicial council. The NCJ is a 15-member body composed of judges, lawyers, prosecutors, and civil servants selected by their respective courts and branches. It is endowed with administrative, budgetary, and disciplinary functions with jurisdiction over the national court system, that is: some federal courts, state courts, and specialized courts. The NCJ was a highly controversial proposal because it included members from outside the judiciary. Supporters argued that this

would increase democratic values and society's role in the judiciary, while detractors contended that this would violate judicial independence.

This study analyzes the concepts of judicial independence and accountability both as abstract and concrete concepts in the Brazilian case. Using data collected through secondary source research and qualitative interviewing of key actors familiar with the NCJ, it identifies the narratives of both sides of the debate in order to infer more information on how the concepts of judicial independence and accountability are perceived in the Brazilian case. This study clarifies the definitions of these two concepts and suggests possible operationalizations based on the Brazilian case. As judicial councils are becoming more predominant, understanding the tension between judicial independence and accountability is vital to understanding how the judicial system works and how it can be reformed.

The conclusions of this study are that perceptions of judicial independence and accountability are dependent upon local conditions in cases. In Brazil, these perceptions depended upon a loose or strict interpretation of the separation of powers doctrine as defined by Article Two of the 1988 Constitution. A looser interpretation meant support for the NCJ with outside membership, while a stricter interpretation meant opposition due to the belief that this violated judicial independence. The second conclusion is that these two concepts are intrinsically connected, meaning that there are a number of elements that each share and that define the tension between them. Finally, the NCJ could act as a model of operationalization for accountability as many countries have adopted judicial councils with similar structures and duties. These conclusions are important due to their implications for the relationship between a judicial system and democratic consolidation.

CHAPTER 1 INTRODUCTION AND SUMMARY

Overview

The debate over judicial independence and accountability has recently risen in importance due to the increasing popularity of judicial councils worldwide that attempt to balance the two concepts (Garoupa & Ginsburg 2009). This debate is positioned within the core of judicial reform as many countries have struggled to find a balance between independence and accountability that is suitable to judges interested in protecting the independence of their institution and reformers who believe that the judiciary should have more oversight. Countries must answer this question due to the judiciary's vital role in democratic consolidation, maintenance of a fair economic market, and the fact that the essential function of these councils determines the level of efficiency, accessibility, and ethicality of a judicial system (Thome 2000, 692).

How to balance judicial independence and accountability became a point of contention in Brazil and resulted in the formation of the Conselho Nacional de Justiça (National Council of Justice, or NCJ) in 2004. The NCJ is a judicial council composed of 15 members from the judiciary, federal and state prosecutorial offices, and civil society. The NCJ is endowed with the responsibility to “oversee the administration of the courts and exercise some disciplinary authority over lower court judges . . .” (Brinks 2004-2005, 615). Formed as part of Constitutional Amendment n. 45, a judicial reform measure meant to increase efficiency, access and accountability, the NCJ ensures that lower courts process cases in reasonable amounts of time, are aptly staffed, are modernized, and have a proper budget (Mendes n.d.). It also handles complaints and discipline issues of judges.

Despite agreement on the need for judicial reform in Brazil, the implementation of the

NCJ was controversial because of its possible threat to judicial independence. Prominent judges contended that the NCJ violated the republican principle of separation of powers as set forth in the 1988 Constitution by including six members from outside the court system. This, in their view, would have increased the influence of other branches of government over the judiciary's responsibility of adjudication (Corrêa et al. 2004).

Problem Statement

In this project, I seek to define the debate about independence and accountability in Brazil in order to understand the issues surrounding the formation of a judicial council. Using the information obtained from in-depth interviews with key informants, I will answer the following questions: what do independence, accountability, and external control mean to the various participants in the debate, and what are the core issues about which they disagree? Who are the key actors (individuals, NGOs, aid agencies, etc.)? What is the main narrative of these conflicting groups? Finally, what are the implications of the Brazilian case for countries struggling with this same question and democratic consolidation?

Rather than test an a priori hypothesis, the purpose of this work can be described as an attempt to understand the bases of the tensions associated with judicial reform and, specifically, the controversies related to the NCJ in Brazil. In order to make sense out of these complex issues, I propose a conceptual framework that gives priority to the inherent tension between the concept of independence and the concept of accountability. I contend that, in addition to providing an understanding of events in Brazil, the conceptual approach I use here can be applied in other contexts by proponents of judicial reform.

Chapter 2 analyzes the concepts of a judicial council, judicial independence, and judicial accountability through a literature review of law and judicial reform articles. It explores the tension between independence and accountability and seeks to define how judicial councils act

as a balance between them. It also reviews examples of judicial councils from around the world in order to see how they function in comparison to Brazil and see how they have dealt with this same tension. This chapter is meant to provide a conceptual framework that will be used to organize the qualitative research in Chapter 4.

Chapter 3 explores the National Council of Justice as Brazil's judicial council. First, this chapter offers a short analysis of Brazil's judicial system in order to offer the context in which a number of problems grew that would later influence reformers to choose a judicial council. Next, it analyzes the Brazilian judiciary's recurring problems of the lack of access, efficiency, and accountability of the courts, how these problems contributed to a growing push for judicial reform following democratization in 1985, and how that push culminated in 13 years of debate leading up to Constitutional Amendment n. 45 in 2004 and the formation of the NCJ. Finally, this chapter analyzes the structure and purpose of the NCJ with a mind toward fitting it into the comparative model as an example of a judicial council.

Chapter 4 clarifies Brazil's debate over judicial independence and accountability as it relates to the NCJ. Through analysis of the public dimension of the debate on the NCJ in the media, the congressional debate between 1992 and 2005, and qualitative interview research identifying the key actors involved and their essential narratives, this chapter identifies key elements that structure the debate between those for and against the NCJ and how they fit within the broader debate over independence and accountability. The use of qualitative research is important because the best way to define these concepts is to turn to the very people and institutions that deal with them every day. It also deepens the understanding of these concepts within the Brazilian context and beyond in order to show the issues surrounding the implementation of a judicial council to achieve reform. Chapter 5 defines the debate in Brazil

and explores the broader implications of this study.

Significance

This work clarifies one of the main debates in Brazilian judicial reform. It thus provides a better idea of how to balance judicial independence and accountability through the NCJ by clarifying the perceptions and expectations of each concept. A better understanding of one another's positions will facilitate discussion between opposing groups, resulting in a more coherent and unified judicial reform movement in that country. It is my hope that this research will lead to an effective balance between judicial independence and accountability in Brazil.

Second, it contributes a significant comparative study to judicial reform literature, specifically on the understudied and increasingly important topic of judicial councils. In terms of broader implications, the recent rise of judicial councils worldwide as well as a paucity of study on the subject necessitates case studies such as this one that further clarify the concepts of judicial independence, accountability, and external control.

Clarifying the debate over judicial independence and accountability in Brazil will help to identify the elements that go into that argument and create that tension. Finally, I contend that the conceptual approach that I have developed in this study, and have applied to Brazil, has the potential to be the basis of further study of judicial systems worldwide.

CHAPTER 2 JUDICIAL COUNCILS, INDEPENDENCE, AND ACCOUNTABILITY

Importance of the Judiciary in Democracy

With the transition from authoritarian to democratic regimes in many countries over the last 20 to 30 years, the notion of democratic consolidation has become a much-studied issue among political science scholars. Part of this study has been the analysis of how institutions affect both the functioning and the deepening of democracy, a term that refers to progress toward improved democratic governance. Along with this discussion has come the realization that if democracy is to work, a strong rule of law is necessary in order to create a state based in law and justice where citizens understand that they cannot use corrupt means to advance private interests (Larkins 1996). Linz and Stepan (1996) confirm that the rule of a law is one of five key components of a consolidated democracy as it “protects individual freedom and associational life.” Instituting and strengthening this sense of justice in society is useful for building effective democratic institutions, making them more open and responsive to citizens, preventing corruption, creating a fair and just economic market and ensuring the protection of civil and human rights (Thome 2000, 692).

The primary institution responsible for creating a strong rule of law is the judiciary, and thus there is a growing interest in judicial studies and judicial reform among scholars, nongovernmental organizations, human rights groups, aid agencies, and government reformers (Carothers 2001; Thome 2000). There is consensus that a poorly-functioning judiciary is detrimental to a democratic society because it fails to restrict potentially overbearing government security forces and leaders, does not create conditions from which economic development can proceed, cannot properly investigate crime due to an inept criminal justice system, cannot provide efficient and effective justice due to extreme delays, and does not adequately prosecute

corruption. This leads to extreme mistrust in the judicial system as a result (Buscaglia and Dakolias 1995, 12; Frülhing 1998, 242; Prillaman 2000, 2, 3).

As a regional example, Latin America has fallen prey to many of these problems as a result of poor judicial systems. The region's recent history of human rights violations under the military regimes, the growing problem of crime, the persistence of corruption in both the public and private realms, and eroding confidence in the judiciary as an effective institution have prompted government reformers to undertake various judicial reforms in order to strengthen the rule of law (Latinobarometer 2007; Thome 2000). O'Donnell (1996) conjectures that there is often a disparity between the formal rules and actual behavior of an institution within democracy. In the case of the judiciary, problems in enforcing the rule of law reflect its poor performance as an institution in democracy. Judicial reform, therefore, is a measure to improve the actual behavior of the judiciary in order to match the formal rules of how this institution should function within a democracy.

Included in the overarching realm of judicial reform are the concepts of judicial independence and accountability. These two concepts – which inherently exist in a state of perpetual tension – are critically important to the establishment of a judiciary that fulfills its proper role in democracy. Judicial councils, as we shall see, have become something of a high-wire act as they seek to find a balance between these two concepts.

Recent Rise of Judicial Councils

Judicial councils are becoming popular mechanisms for judicial reform in Latin America and around the world (Hammergren 2002; Garoupa and Ginsburg 2008a, 2009b). Essentially, a judicial council is a body composed of judges, other judicial officials, members of other government branches, and members of civil society (whether they be attorneys or from judicial organizations) entrusted with various accountability duties over the judiciary. They have a

variety of roles depending on where you look, but scholars have identified four main functions that each more or less fulfills. Judicial councils: 1) ensure judicial independence by placing the appointment of judges in the hands of other judges, 2) produce and oversee an adequate budget, 3) handle administrative issues, and finally 4) discipline judges that break ethics rules (Garoupa and Ginsburg 2009, 109).

The central issues involved in the creation of a council are judicial independence and accountability. In the review that follows, the goal is to clarify what these terms mean and to provide a conceptual framework that will act as a guide in research of these issues in the case of Brazil.

Judicial Independence and Accountability Defined

Because the study of the judiciary and its reform in Latin America is a relatively new field, concepts such as judicial independence and accountability are in need of better definitions and operationalization (Kapiszewski and Taylor 2008, 754). In addition, many judicial studies have failed to build on these concepts, exacerbating this need. It is my intention here to use previous studies of judicial independence and accountability in order to clarify the utility of these concepts in the judicial reform effort. This work will act as a conceptual framework in analyzing the original research regarding Brazil's judicial council, the National Council of Justice, later in this thesis.

Judicial independence is a particularly difficult issue to define due to a number of competing interpretations of the concept and, especially due to disagreement with respect to the fundamental question: "independent from what?" Often, scholars of judicial independence have fallen into the trap of adopting too "monolithic" a definition by ignoring its subtleties and varieties across cases and in different courts (Burbank and Friedman 2002, 4, 11; Brinks 2004-2005, 595, 596). Judicial independence scholars have looked at a number of different facets

belonging to the subject and have come to some generic conclusions, but there is still a great deal of ambiguity regarding how to measure it and what factors must be in place to define a judiciary as independent (Kapiszewski and Taylor 2008; Russell 2001).

In order to understand the concept of judicial independence, I begin with a baseline. Fiss (1993), Larkins (1996, 608) and Russell (2001, 9) highlight the axiom of a “neutral third” in the conflict resolution function of the judiciary. The various scholars contend that it is essential to justice that judges make decisions based on their interpretations of the law and their consciences as objective professionals. In effect, what these scholars define here is impartiality.

The degree of impartiality is determined by the type and depth of relationships a judiciary or judges have with actors around them. Russell (2001, 2) defines judicial independence as “a concept about connections – or, more precisely, the absence of certain connections – between the judiciary and other components of the political system.” These connections – or pressures on the judiciary’s and individual judge’s decision making – are both outside and inside the judiciary. Outside pressures include other government institutions (legislative and executive), civil society, non-governmental organizations, the press, and plaintiffs or defendants in a particular case. Inside pressures come in the form of pressure from fellow judges or higher courts (International Bar Association 1985). Ultimately, however, this framework of pressures is a two-way street as individual judges possessing a healthy autonomy from them are still capable of making biased decisions. There are also some overlaps in this framework depending on the circumstances of the case.

Let us first look at how a judiciary, as an institution and with respect to individual judges, is influenced by outside relationships. Fiss (1993, 58) notes that a key aspect of judicial independence is “party detachment,” or the detachment of the judiciary as an institution or an

individual judge from the control or influence of contending “parties in the litigation.” Brinks (2004-2005, 599) breaks this idea down into two concepts: preference independence, the idea that judges must not have a particular preference for either side in a case, and decisional independence, the lack of interference in the decision-making process by either side in a case.

Individual judges often face pressure from litigants willing to offer bribes for favorable decisions. In many developing countries threats of violence are also common and pose a severe problem to judicial independence. Russell (2001) emphasizes the need for proper structure, income, and protection in order to fend off the possibility of bribery. He also notes that an independent judge has removed himself from political organizations and business corporations that might use their connection to gain favorable decisions. Brinks (2004-2005) refers to “telephone justice” where judges receive phone calls from prominent litigants telling them how to judge particular cases. A high percentage of Bolivian judges have reported some sort of contact with someone associated with a case asking for this particular favor.

Freedom from interference by other institutions of government is an essential characteristic of judicial independence. An independent judiciary has complete power over its decision-making process in the sense that the executive and the legislature are not interfering in that process. Also, when the government is involved in a particular case, the judiciary must not have a pro-government bias, proving that it is capable of acting as a neutral third even in major constitutional or governmental questions (Larkins 1996). Institutionally, an independent judiciary has an adequate budget to carry out its duties, proper legal training for judges, effective internal administration, and a transparent judicial appointment process determined by merit rather than favor (Frühling 1998). All of these features help avoid dependence upon other branches of government.

Generally speaking, Latin American courts have suffered from this particular lack of independence as governments have frequently tried to shape the courts to their likings or threatened them in order to procure favorable decisions. Governments have compromised judicial independence by using tactics such as limited tenure in order to remove sitting judges during a change in administration, court packing to suit the administration's desires for more docile courts, purging of judges appointed during previous administrations simply because they disagree on particular issues, and the creation of new courts that challenge the jurisdiction of the extant courts (Prillaman 2000, 20). Judges have also been historically weak compared to the rest of the government as they have fallen short in protecting civil and even basic human rights, and have often lacked an adequate budget to do their jobs correctly (Frühling 1998). Actions such as these undermine both preference and decisional independence.

Next, individual judges are independent of forces within the judiciary. Fiss (1993, 58) refers to this idea as "individual autonomy." This type of independence is subtler than the first but equally important. Internal judicial independence concerns the issues of internal administration, judicial appointments, and judicial evaluation. Individual judges must be ensured independence within that system, as there are instances in which judicial superiors become overbearing in order to create homogeneity in the judiciary.

Independent judges decide cases without interference based on their interpretation of the law and their own consciences. As we have seen, this form of independence is challenged by outside forces, but unique forces within the judiciary challenge independence as well. Individual judges in common law countries face pressures from higher courts due to stare decisis, and judges in both common and civil law countries face pressure from "regular appellate procedures" (Fiss 1993, 58). The standard is that an independent judge will make his own evaluation of the

case and face no retaliation if his decision is in anyway contrary to that of other judicial powers (Becker 1970).

In particular cases, constitutions grant higher courts complete power over the evaluation and removal of lower court judges. This has harmed judicial independence in a number of particular cases due to the possibility of the higher court's partisan interests. Chile is an excellent example of a Supreme Court that backed General Augusto Pinochet's regime because of its own conservative moorings and held lower court judges in check if they overstepped their bounds in investigating the regime (Hilbink 2007). In addition to political support, the Chilean judiciary as a whole ignored blatant violations of human rights against leftist agitators by the regime and continued to ignore them well after Pinochet stepped down in 1990. Individual judges faced reprimand or removal by the Supreme Court for accepting cases against military officials, but there are examples today of judges willing to break that barrier and pursue charges against military officials.

Despite pressures from both outside and inside the judiciary, one cannot ignore the behavior of individual judges in the discussion of judicial independence. A judiciary and its judges can have a relatively high degree of autonomy to decide cases in the sense that pressure is reduced, but there is no guarantee that they will do so in a fair and unbiased manner (Russell 2001). As we saw in Chile, one must look at the ideological leaning of judges and the judiciary as a factor in judicial independence. The "International Bar Association's Code of Minimum Standards of Judicial Independence" (October 22, 1982) calls for judges to remove themselves from political organizations or any other organization that would result in a bias in favor of one side in a dispute in a case or, on a broader scale, a systematic bias in favor of a particular group, class, or party.

There are a few ways in which this caveat is demonstrated. In looking at how an independent judiciary relates to outside relationships, there is a flaw in thinking that an independent judiciary is in perpetual disagreement with other branches of government and thus frequently reversing their decisions. This may indicate that a judiciary possesses institutional autonomy but that its individual loyalties may lie with other outside groups or that there are few ways to overturn legislation constitutionally (Russell 2001, 7). This clearly indicates a problem with judicial independence on a behavioral level.

In terms of internal relationships, judicial independence is tricky because judges in collegial courts “must operate in conjunction with their colleagues” (Burbank and Friedman 2002, 31). It is important to ask the question whether individual judges have the necessary autonomy from other judges to make decisions guided by their own interpretation or whether their decisions are merely to appease or advance an agenda or career. Autonomy does not automatically guarantee that a judge will decide cases in a fair manner (Russell 2001). As courts are inevitably hierarchical and collegial, it is necessary to explore each of these subtleties to grasp a better picture of judicial independence in particular cases.

As we see, judicial independence is defined by the relationships that the judiciary as an institution has with pressures outside of itself, while it also encompasses an internal dimension, as judges must be free to decide cases based on their own convictions and the law free from pressure from both colleagues. There is also a behavioral element in that although judges may have sufficient independence from both outside and inside pressures, they must also lack biases toward particular sides in cases. These ideas will define the essential characteristics of judicial independence in my conceptual framework.

We will now discuss the concept of judicial accountability. Often viewed as the antithesis of judicial independence, accountability seeks to answer the question of “who watches the watchmen?” (Cappelletti 1985; Garoupa and Ginsburg 2009). No one argues that a judiciary should be an island unto its own, completely autonomous from the accountability structures already in place in the rest of society. As we have seen, the judiciary and its judges are far from perfect in the sense that they are capable of mistakes as well as moral failure, and thus scholars argue that, just as the rest of society is upheld by the rule of law, so too should the courts have to tow the line in some way (Burbank and Friedman 2001, 12). The problem is that just as scholars ask “independent from what?” with regards to judicial independence, they also ask “accountable to whom?” with regards to accountability (Kapiszweski and Taylor 2008).

Although judicial independence and accountability seem to be two disparate concepts in the sense that one might take away from the other, numerous works argue that they are in fact “different sides of the same coin” (Burbank and Friedman 2001, 14). The two concepts form an unbreakable connection when one understands the relationship between individual judges and the judiciary as an institution. In order for the judiciary to enjoy independence from other government institutions, individual judges must have an “extrainstitutional independence,” meaning that they are free to make their own decisions without backlash from within the judiciary. At the same time, the judiciary must function within the bounds of the law, requiring that judges “yield some intrainstitutional independence” (Burbank 1999). However, others contend that judicial independence and accountability are two distinct concepts in the sense that they should be measured separately as indicators of judicial performance (Staats et al. 2005). Again, this anticipates a battle between these two important components of judicial activity.

Essentially, judicial accountability holds responsible those who have been given the very important role of adjudication in society (Cappelletti 1985). The perceived need for more judicial accountability is positively correlated with the rise of judicial power, or the increased involvement of judges in shaping how litigation plays out and how they affect the development of the law. There have also been a number of developments requiring the increased involvement of the judiciary, including the rise of the modern welfare state, the increase in modern legislation, the increased awareness of social rights, and finally the ever-growing complexity of society resulting in the replacement of individual-based problems by group-based conflicts and class action litigation in the courts. All of these recent phenomena have led many to see the role of fair and just adjudication as critically important, and thus they argue that those entrusted with this duty be accountable to someone or something.

The discussion of judicial accountability encompasses not only the potential for judicial officials to commit crimes but to simply ignore administrative guidelines such as deadlines and even showing up to work on time. Case inefficiency is a huge problem in today's judiciary and is caused by poor judicial training, a lack of resources, and judges who simply believe that they will not be sanctioned for slack work. Nepotism and cronyism have also prompted many to call for more judicial accountability in the appointment process (Prillaman 2000, 21, 22).

There are a number of factors that enter into judicial accountability including the honesty of the courts, their competence in applying the law in a fair manner, and the effectiveness of ethics standards, both how internalized they are and how well they are carried out (Staats et al. 2005). Cappelletti (1985, 557, 558) creates a menu of dimensions important to judicial accountability: 1) political accountability of both individual judges and the judiciary as an institution (this is broken into two dimensions, the first being accountability to other political

branches and the second being accountability to the constitution), 2) public accountability, meaning accountability to society, 3) a “vicarious” accountability allowing those who have been wronged by judicial negligence to hold the state rather than the judiciary liable for such wrongdoing (this protects judges from frivolous lawsuits by dissatisfied litigants), and 4) legal accountability as divided into penal liability (subject to criminal sanction for breaking a law), civil liability (a willful violation of judicial duties not meeting criminal levels) and disciplinary liability (discipline local to the judiciary, whether it be loss of seniority, censure, forced retirement and even removal). All of these dimensions result in a wronged party being awarded for damages caused by a judge guilty of some sort of wrongdoing.

We see from our analysis of judicial accountability that the current definition of the concept is based on the principle that adjudicators must be accountable to the judiciary itself, society, and the varying forms of the law for both administrative and moral shortcomings. Effectiveness and ethics standards are important components for maintaining accountability. This is the essential definition that I will use for my conceptual framework.

The Tension between Judicial Independence and Accountability

Judicial accountability as defined in this way runs into two major obstacles, the first of which is the doctrine of judicial immunity (Cappelletti 1985). This doctrine has been prevalent in many countries, including England, France, Germany, and Italy, and has created the notion that judges are above reproach. Judicial accountability counters that idea by holding judges accountable for wrongdoing against individuals in particular cases.

The second obstacle is the crux of this work and is connected to the first obstacle as well: how does one find a balance between judicial independence and accountability? It is clear that scholars and reformers acknowledge the necessity of both concepts in order to have both a well-

functioning judiciary as well as a strong rule of law in government circles at the same time, but that few reformers can agree on how exactly to reach that balance.

There are two major questions, however, regarding the combination between the ideas of judicial accountability and independence: 1) who should be responsible for holding judges accountable, and 2) how do they respect the bounds of judicial independence? As we have seen, an independent judiciary is one that is free from interference from the executive and the legislature as well as any other outside pressures that would affect decision-making, and thus scholars recommend that accountability mechanisms remain internal to the judiciary. The more recent solution to this crisis of accountability has been the use of the judicial council.

A judicial council is essentially a balancing act between these two concepts. It both promotes judicial independence by providing the judiciary a say over appointment, promotion, and budget while, at the same time, providing judicial accountability through ensuring efficiency, access, and using disciplinary procedures against judges who fail to meet professional standards or have committed wrongdoing. Judicial councils, however, still do not satisfy this need for a balance inasmuch as those in the judiciary who strongly advocate their institution's independence continue to argue against those who desire more outside accountability. The argument revolves around whether a council of this sort should even exist, and if it should, how seats should be allocated to both judicial and non-judicial members. As we will see in Chapters 3 and 4, this has caused tension in Brazil, but first we will look at some examples of judicial councils around the world and how this debate has manifested itself in those cases.

Comparative Analysis of Judicial Councils Worldwide

The spread of judicial councils has become a worldwide phenomenon with nearly 60% of countries currently having some form of one (Garoupa and Ginsburg 2009). Europe and Latin America offer some prominent examples in comparison to Brazil as many civil law countries

follow a similar tradition of instituting judicial councils and have struggled with the same difficult balance of independence and accountability (see Table 2-1). France, Italy, and Portugal offer the best examples in Europe, while Mexico and Colombia offer the best examples from Latin America. The United States also has its own variation of judicial councils under the common law tradition.

The primary way that designers of judicial councils have tried to ensure both independence and accountability has been through the proper allocation of council seats to judicial and non-judicial officials. This has caused the greatest controversy in each case as many argue that a judicial council composed completely of judges is merely internal control and does not hold the judiciary accountable. The other side argues that too many non-judicial members is too much external control and thus hurts judicial independence. Europe has a long tradition of judicial councils and has shifted this balance depending on circumstances surrounding the courts. The purpose of these councils in Europe has been to “insulate the functions of appointment, promotion and discipline of judges from the partisan political processes while ensuring some level of accountability” (Garoupa and Ginsburg 2009, 105).

France’s Conseil Supérieur de la Magistrature (High Council of the Judiciary) has existed on paper since 1883 and as an official body of the judiciary since 1946 (CSM France Homepage 2009). It lists its primary duty as the appointment of sitting judges and prosecutors to around 400 positions on three high courts and ensuring judicial independence by assisting the President of the Republic in that duty. It also holds judges to an ethical standard through disciplinary procedures. Beginning in 1958, the council’s composition included the President of the Republic, the Minister of Justice, and judicial members appointed by the President.

In 1993 and 1994 due to concerns that the council was responsive only to the interests of the President, a constitutional reform amendment changed the composition to allow for the election of magistrates to the council (Garoupa and Ginsburg 2008). It also divided the council into two committees, one to handle the judiciary and the other to handle prosecutors. This composition change was also a response to those who desired to see more accountability over the judiciary after a number of prominent political scandals in the 1990's prompted individual judges to investigate politicians more frequently and to assuage fears that the executive was reducing the judiciary's independence.

Italy's Consiglio Superiore della Magistratura (CSM) is similar in structure and purpose to France's CSM as its constitutional duties include "employment, assignment, transfer, promotion and disciplining of judges" (CSM Italy 2009). Much like France, political scandals have prompted many to seek more accountability for the judiciary as the prospects for "overzealous judges" prosecuting politicians rose in the 1990s. Its composition underwent change in order to create more accountability with the reduction of the council from 33 to 24 members and the addition of eight university law professors alongside judges. Judges still remain the majority on the council because Italy believes that their increased presence enhances judicial independence. Italy's judiciary has a long history of uninhibited independence, and thus this push for accountability is a good example of the recent rise in support for more judicial oversight.

Portugal has also ensured that judges are the majority on its judicial council, the Conselho Superior da Magistratura (The Superior Council of the Judiciary), for the same reasons as in Italy (Garoupa and Ginsburg 2009). This council is primarily responsible for promotion and tenure as well as disciplinary action (CSM Portugal Homepage 2009). Portugal has an interesting

setup in the fact that it has three separate judicial councils for judicial courts (The National Council of the Judiciary), administrative courts (The Superior Council of Administrative and Fiscal courts), and for prosecutors (The Superior Council of Prosecutors) (Garoupa and Ginsburg 2009).

In order to strengthen judicial independence in Portugal, government leaders eliminated the idea of judicial self-government by handing the administrative and disciplinary duties over to the CSM. The composition of the CSM has evolved three times in order to balance independence and accountability, moving from exclusive judicial membership, to membership of judges having predominance over non-judicial members, and finally the equality of both judicial and non-judicial members. The judiciary determines its own judicial members, while the Assembly of the Republic chooses non-judicial members (CSM Portugal *Competências e Atribuições* 2009).

Despite their being around longer, European councils still engender debate. Hammergren (2002) argues that despite the goal to reduce partisanship in the appointment process, European judicial councils have not been successful in doing so as factionalism remains a huge obstacle. Some are beginning to argue that judicial councils in Europe have created overly independent judiciaries, while others argue that they are intruding on the independence of individual judges as they add pressure to conform to certain institutional norms. This shows that even veteran judicial councils are still struggling with this same issue.

Latin American countries besides Brazil have experimented with judicial councils, but as Hammergren (2002) argues, there has been a reassessment as to how successful they have been. Countries in Latin America instituted judicial councils along the same vein of European countries, but the reasons behind their implementation were different. As we saw in our discussion of judicial independence, Latin American countries have struggled to maintain a

judiciary free from partisan control and interference from other government branches. Its Supreme Courts were guilty of mishandling the budget and administration of the courts as well as interfering in the affairs of lower court judges (Hilbink 2007). Thus, most Latin American countries instituted judicial councils in order to create more independent judiciaries, better administrative control, and find better judges to raise professionalism (Hammergren 2002, 6).

Although judicial councils are in many ways a modern marvel in the world of Latin American judicial reform, most countries have not been satisfied with their results due to a continued lack of professionalism amongst appointed judges, the quick growth of bureaucracy around them, and generally poor results when it comes to administrative issues. Those in the judiciary advocate for the removal of judicial councils, while those outside of it believe that increasing their power would help the situation (Hammergren 2002, 16). Again, the primary way that reformers satisfied both sides was through the proper allocation of seats on the council to both judicial and non-judicial members, each respectively appointed by the courts and other branches of government.

Mexico created its judicial council, the Consejo de la Judicatura Federal (Council of the Federal Judiciary, or CJF), in 1994 in order to create more judicial independence (CJF Mexico Homepage 2009). It is composed of the Supreme Court President, three judges, and three members from outside the judiciary, a much smaller composition than the judicial councils found in Europe. The council is responsible for choosing lower court judges, handling administrative duties (evaluations of judges, their training, promotion, and discipline), and finally allocating the budget (Hammergren 2002). Reforms in 1999 handed more of the council's powers to the Supreme Court president, prompting criticism that it is too corporatist and that it is infringing on individual judicial independence. It has also been criticized for being too expensive.

Colombia's judicial council, the Consejo Superior de la Judicatura (The Superior Council of the Judiciary), was formed in 1991 in order to create a more efficient judiciary in the face of rising crime and violence (Hammergren 2002). Similar to the judicial council in Mexico, the CSJ was one aspect of a major judicial reform initiative undertaken in 1991. Its essential functions are to oversee the discipline of judges and others associated with the judiciary as well as the administrative duties that would distract judges from their primary duties in judging (CSJ Colombia Homepage 2009).

Colombia's government created the CSJ as a result of a lack of modernization and a growing need for more professionalism in the judiciary. Inefficiency in processing cases and the misallocation of resources prompted reformers to look at the idea of a judicial council in order to free the judiciary of its dependence upon the legislative and executive branches and create a stronger judiciary capable of handling modern issues. The CSJ is composed of two divisions, the first of which is the administrative division composed of one member of the Constitutional Court, two from the Supreme Court of Justice, and three from the Council of State. This division helps in the selection of judges and handles budgetary issues. The second is the disciplinary division composed of seven judges elected by both houses of the Congress.

On an interesting note, the common law United States has its own history of judicial councils at the state level. State legislatures formed these councils to oversee the administration of the courts for reform purposes and to assist in choosing judges based on a merit system. Interestingly enough, the judicial council movement was sufficiently prominent in the 1920s and 1930s to garner attention from a number of scholars, and the main issue surrounding these councils was the fear that they violated the separation of powers doctrine and that it was inappropriate for judges to sit on these councils due to the fact that the councils' duties "are not

judicial in their nature” (*Harvard Law Review* 1929, 818; Sikes 1935). As of 1994, 23 states had adopted a form of judicial council made up of judges and lawyers to choose candidates for the State Supreme Court based on merit. This was known as the “Merit Plan,” and the primary impetus behind it was to increase judicial independence (Garoupa and Ginsburg 2008).

As we see with both European and Latin American civil law examples as well as in the common law tradition of the United States, judicial councils were primarily created to ensure the independence of the judiciary by giving them the job of judicial selection, administrative control of the judiciary, budgetary oversight, and disciplinary control as well. Having responsibility over these duties also ensures judicial accountability by raising the quality of justice, but each of these judicial councils has had to define where judicial independence ends in terms of protecting the decision-making power of judges and where accountability begins in terms of punishing wrongdoing.

As we saw, one of the most controversial questions on how to ensure judicial accountability through a judicial council is who exactly should sit on it. Reformers in the previous examples had to define the line between judicial independence and accountability by answering this question and chose the external control model in order to satisfy those who feared too independent of a judiciary. We note similar origins of these councils, namely the need for more judicial independence and accountability, the lack of modernization, problems with efficiency, and the inadequacy of either internal or external methods of handling these important issues.

Despite attempts to balance independence and accountability, there is still a great deal of controversy over the judicial councils of our example countries. There are many critics that argue that current judicial councils either favor the courts too much or that they are create judiciaries

that are too independent. Others contend that they are hurting individual judges by placing too much pressure on them, and that the presence of non-judicial appointees on some councils undermines judicial independence. This is connected to the question of whether judicial councils constitute internal or external administration, something that, as we will see in Brazil, is not quite clear and again has caused controversy. It is evident from our brief analysis that more research needs to be done in order to clarify judicial independence and accountability in individual cases so that these concepts might be better understood on a broader level. Brazil clearly offers the opportunity to do that as it is a newer democracy and has recently addressed this important question through the implementation of its own judicial council, the National Council of Justice.

In this chapter, we have reviewed the literature on the concept of judicial independence, determining that scholars have defined it as limits on outside and inside pressures that affect the judiciary as an institution and as individual judges. We have also looked at the literature on judicial accountability, determining that it essentially means the idea of holding those possessing the important role of adjudication accountable to the judiciary itself, society and the law for both administrative and moral failure. We observed how judicial councils are how our example countries have attempted to balance those two concepts and how they are primarily responsible for creating a more independent and accountable judiciary through administrative, selection, and disciplinary control. We looked at six different cases to offer a comparison of how these judicial councils function and what they look like. Finally, we determined that the way that judicial reformers have satisfied those wanting more independence and accountability is through the allocation of seats to judicial and non-judicial officials. Chapter 3 focuses on Brazil's case, looking at the origins and functions of the National Council of Justice.

Table 2-1. Comparison of judicial councils worldwide

Country	France	Italy	Portugal	Mexico	Colombia	United States
Council Name	Conseil Supérieur de la Magistrature	Consiglio Superiore della Magistratura	Conselho Superior da Magistratura	Consejo de la Judicatura Federal	Consejo Superior de la Judicatura	Multiple Councils – no specific name
Impetus for Implementation	Increase Judicial Independence	Increase Judicial Independence, especially in relation to the executive	Increase Judicial Independence, but ensure more accountability through ending judicial “self-government	Increase Judicial Independence	Create a more efficient judiciary in the face of rising of crime and violence	Create a merit-based selection process and administer the courts; ensure judicial independence
Current Structure	Two internal committees, one to handle the judiciary and the other to handle prosecutors	One main council and accompanying commissions	Three committees for judicial courts, administrative courts, and prosecutors	One main council and accompanying commissions	Two divisions, one to handle administration and the other to handle discipline	As of 1994, there were several councils at the state level

Table 2-1. Continued

Country	France	Italy	Portugal	Mexico	Colombia	United States
Current Composition	Heterogeneous – President of the Republic, the Minister of Justice, and Judges elected by the people	Heterogeneous – President of the Republic, 16 judges, 8 law professors and lawyers appointed by the Parliament	Heterogeneous – 8 judges, 7 members appointed by the parliament, 2 members from the executive branch	Heterogeneous – The Supreme Court President, three judges, 2 representatives from the Senate, and 1 representative from the executive branch	Heterogeneous – Administrative division made up of 1 member of the Constitutional Court, 2 from the Supreme Court of Justice, and 3 from the Council of State	Generally composed of judges and lawyers
Functions	1) Appointment of judges and prosecutors to 400 positions within the high courts 2) Ensure judicial independence with the President of the Republic 3) Discipline of judges for misconduct	1) Employment, assignment and transfer of judges 2) Discipline of judges for misconduct	1) Promotion and tenure of judges 2) Discipline of judges for misconduct	1) Selection and Promotion of judges 2) Discipline of judges for misconduct	1) Administrative division handles judicial selection and promotion 2) Administrative division handles the allocation of the budget 3) Disciplinary division handles sanctions for misconduct	1) Judicial selection to state supreme courts based on “Merit plan”

Sources for additional information included in table include Hambergren (2002, 9-12) and Barbosa and Costa (2009).

CHAPTER 3 BRAZIL'S NATIONAL COUNCIL OF JUSTICE

Brazil's National Council of Justice (hereafter referred to as the NCJ) is an example of yet another controversial effort to strike a balance between independence and accountability through the use of a judicial council. Since the creation of the NCJ, it has been the subject of both praise and scrutiny with respect to both its creation and its activities. Various groups and interests in Brazil battled for 13 years over how best to create a more modern, more responsive, and less corrupt judiciary, finally settling on external control through the NCJ as its solution. In this chapter, I will explore the reasons behind the implementation of the NCJ as well as its current structure and purpose.

This chapter is important because it shows why judicial reformers choose to implement judicial councils and identifies the types of problems councils are designed to solve. Brazil is a particularly good case to study because of its pragmatic judicial system, it is a new democracy, and it has recently dealt with the issues of balancing independence and accountability. We will see why judicial councils are important to study because they are implemented to address significant issues present in every judicial system around the world. First, I will recount a brief history of Brazil's judicial system in order to clarify the origins of its current problems. Next, I will investigate how these problems have affected justice in Brazil, and why they prompted Brazil's government to pursue judicial reform. Finally, I will provide information on the structure and purpose of the NCJ by analyzing the methods and procedures it uses to establish a higher quality of justice.

Context of Brazilian Judicial Reform

Brief Note on Brazil's Judicial System: Brazil inherited a civil law tradition from Portugal when it was a colony, and Roman-canonical procedure remained in place following independence. Although a written civil law tradition forms its basis, Brazil's legal system has been known to be more pragmatic when compared to its Latin American neighbors due to its introduction of elements from the common law tradition of the United States. The 1891 Constitution adopted a republican and federalist form of government along the lines of the Constitution of the United States (Rosenn 1986; for the modern structure of Brazil's Judicial System, see Figure 3-1). Hence, Brazil modeled its judiciary after that of its American counterpart by incorporating judicial review of legislation, high institutional independence and a great deal of independence for individual judges. Federal judges even drew upon landmark decisions in the United States, an example being *Marbury vs. Madison*, the first case to establish the precedent of judicial review in the United States (Prillaman 2000). This republican Constitution also granted states jurisdiction over procedural matters for its own judiciaries. Fleischer and Wesson (1983, 84) argue that these peculiarities generally freed Brazil from politicization and purges within the judiciary that were common occurrences in its Latin American neighbors during this same period.

Brazil's pragmatism has resulted in a civil law system that includes minor modifications made over the years in order to address particular problems. The largest of these was the 1939 Code of Civil Procedure that radically altered the judicial system by making judges more active and introducing oral proceedings. In 1973, a new Code replaced the 1939 version and attempted to improve efficiency by reducing the need for written documents and pleadings, eliminating unnecessary restrictions on judges, and removing other obstacles that had led to major case delays. The most radical elements of this Code were the powers granted to judges to have more

control over whether or not to dismiss a case either for lack of a cause of action or standing by a particular party, to order discovery, and even to personally inspect certain aspects of a case (Rosenn 1986, 488).

Although this code sought to increase a judge's power, between 1964 and 1985 the military government sought to limit the judiciary's independence by declaring its own acts the highest laws of the land and removing the possibility of judicial review. It purposefully transferred cases from lower courts to the Supremo Tribunal Federal (Supreme Federal Tribunal, or STF) under the pretext that the case pertained to national security issues. It removed judges if they threatened the government's agenda, and packed the courts with pro-military partisans. Although Brazil's judiciary experienced this outside pressure, the military regime was not as harsh toward the courts as in other Latin American countries due to its desire to maintain a "façade of legalism." This resulted in a judiciary that remained willing to stand up to the government on certain issues, thus creating a sort of "political space" for the judiciary during the years leading up to the military government's end and return to democracy in 1985 (Prillaman 2000, 77, 78; Santiso 2004).

The period of democratization, as we shall see, has proven to be a struggle for Brazil's judiciary as a democratic institution. Drawing from O'Donnell's (1996) thoughts on the disparity between the actual behavior and formal rules of democratic institutions, the struggle to match the judiciary's actual performance with that of its expected output in Brazil's democracy has been the goal of reformers since democratization in 1985. The 1988 Constitution created an "Estado de Direito," or "State of Rights," placing the judiciary in the important role of upholding the rule of law and protecting individual rights in order to create a "fraternal and pluralist" society (Nalini n.d.). The high expectations of a state grounded in the rule of law prompted the drafters

of the 1988 Constitution to attempt to design the judiciary in order that it would fulfill its proper role as a democratic institution.

Despite the good intentions of the designers of the judiciary, serious problems set in as a result of institutional failures. The bureaucratic nature of the civil law tradition and a high amount of judicial formalism combined with poor judicial branch management exacerbated the serious problem of judicial inefficiency. Constitutional reforms meant to create more accessible courts actually added to the problem of inefficiency as they turned nearly every dispute into a constitutional dilemma, flooding the judiciary with thousands of new cases. As such, these reforms did nothing to increase access to the poor and again limited access by making the quest for justice a futile effort due to extreme delays. In addition, a high degree of independence created a judiciary that in the eyes of many was completely unaccountable to the rest of the government, aloof of society's concerns, and oftentimes corrupt due to the failure of internal committees to discipline misconduct.

All of these problems led to a legitimacy crisis in the judiciary as public opinion polls showed an extreme lack of confidence in the courts. Specifically, these polls revealed that Brazil's citizens saw the system of justice as prone to discrimination toward the lower class and women, and that the main result of inefficiency was economic trouble both on a micro and macro level (Grynszpan 1999; Pinheiro 1999, 95-100). Debate in the 1990s and 2000s over how to reform Brazil's judiciary eventually led to a judicial council as the agreed solution.

We will now analyze the aforementioned problems with access, efficiency, and accountability in order to show why Brazil opted for a judicial council to improve its quality of justice. It is important to note beforehand that these problems, which continue to this day, are interconnected and share some of the same causes and effects.

Persisting Problems

Access

Lower class citizens' lack of access to justice has been a serious dilemma throughout Brazilian history. Falcão (2004, 51) summed up the state of judicial access in Brazil prior to democratization:

The majority of the conflicts that involve our citizens do not arrive at our system of justice. Slowness, formalism, technicalities, being out of date, bureaucracy, and high costs keep the rich and poor away. Nonetheless, however, conflicts do not go away. They exist, only they are resolved in other places and in other ways.

Ribeiro (2008, 467, 468) offers a structural analysis of Brazil's problems with access to justice dating back to colonial days and the stay of the Portuguese royal family in Brazil from 1808 to 1822. In her opinion this "ossified" the institutional tradition of Portugal's justice system in Brazil, resulting in a "disconnect" between the "formal country," which is found in the Constitution and the formal rights of the country, and the "real country," or the people that exist at the fringes of these codified rights.

In addition to the marginalization of the population was the implementation of a highly centralized form of government following independence in 1822. This had the effect of creating an elitist system of justice based on "personal privilege" rather than the rule of law. It further meant that courts simply did not exist in more remote regions of the country, thus leading to a lack of what Ribeiro (2008, 467) refers to as "communitarian pressure" for justice in those areas. As a consequence, Brazil's judicial system reinforced an elitist mentality by seeing much of the population as ignorant of how justice and politics worked.

The proclamation of the Republic in 1889 only hardened the barriers between marginalized sectors of society from the overly elitist justice system. Although the Republic abolished the monarchy and opted for a federal system, Brazil's judiciary remained a very

disconnected and centralized institution. Its civil law tradition meant that it was highly bureaucratized and formalistic, meaning that it was overly complicated and very slow for an average citizen seeking justice.

Lower class citizens were the most disadvantaged in Brazil's justice system. For much of Brazil's history, equality under the law was more a "façade" than a genuine reality (Nalini n.d.). Poorer regions have lacked the resources and sufficient number of judges found in wealthier regions, resulting in a lack of institutionalized justice in those areas (Prillaman 2000). A historical bias against the poor under Brazil's formalistic justice system has also curtailed efforts at genuine reform. Nalini (n.d.) argues that Brazil exemplified the quote in the 1930s by the highest court in Great Britain that "the poor are a disgrace of which the law cannot assume responsibility."

Democratization, however, has brought with it a push to increase access and demolish these historic barriers. Modern reformers of the judiciary as well as scholars believe that governments must encourage and ensure equal access to the courts for all citizens (Nalini n.d.; Thome 2000). Having fair access to justice by all classes in society promotes confidence in the rule of law and creates a fair society, two important aspects of what scholars see as a well-functioning democracy (Nalini n.d.).

Shortly before democratization in Brazil, Falcão (1981) created the expectation that his country's judiciary would be an institutionalized conflict resolution mechanism capable of handling a "new standard of emerging conflict" that is present in democracy. From his perspective in 1981, this meant that the judiciary would seek to resolve conflicts in the upcoming political transition to democracy, and beyond. Greater access to the judiciary would mean that important conflicts would be resolved in a fair and just manner not only because groups could

freely bring cases to the courts but also because the courts were both structurally sound and intelligent enough to understand and handle new issues. In 1983, Falcão (2004, 45, 46) argued that making the judiciary more accessible involved serious institutional reforms, specifically the lowering of judicial costs, the guaranteeing of an attorney for those who could not hire one, the hiring of new judges, the creation of new courts, improving courts in the interior of the country, and modernizing the judiciary as a whole.

In tandem with the idea that institutional reform was necessary for an accessible judiciary came the axiom that citizens too had a responsibility to understand the law and use the judiciary to achieve just resolution in their own personal conflicts. Scholars of democracy and the judiciary continue to argue that citizens must use their rights in order for them to be effective (Jelin 1996; Nalini n.d.; Ribeiro 2008). Thus, democratization created the expectation in Brazil that citizens must understand the law and how to properly use it. As we will see here, the question of access in Brazil has focused on how to get the right balance between institutional reform and citizen education about how the judiciary can work for them.

Institutional reform began when the drafters of the 1988 Constitution agreed that increased access to government for all citizens was its top priority. In an effort to set the tone that the new government would be both transparent and accessible, the Congress opened the Constituent Assembly to the input of a broad spectrum of interest groups. The result was a staggering 61,142 proposed constitutional amendments, nearly 21,000 speeches given on the Constitution in hearings, and finally around 100 volumes containing the annals of the Constituent Assembly. Because the National Congress itself served as the Constituent Assembly, the drafters ensured that every political party received representation in the various committees in charge of particular sections of the Constitution. This resulted in a highly convoluted and intensely

fractured drafting process from which eventually came a very long and overly specific constitution (Rosenn 1990, 777; Prillaman 2000).

Despite the problems with the Constitution, the final draft included an article completely devoted to individual rights, one of which assured access to justice for all Brazilian citizens. Article Five, line XXXV states, “The law shall not exclude any injury or threat to a right from the consideration of the Judicial Power” (Constitution of Brazil – English 1988, Art. Five). This important step led the way to more institutional reforms undertaken along much of the same lines as Falcão’s (2004) recommendations made in 1983.

Brazilian reformers have worked, first of all, to make the judicial system easier to approach. The simplification of the Code of Civil Procedure was the first step in this process (Ribeiro 2008). The 1988 Constitution instituted small claims courts around the country with oral arguments and a way for citizens to directly interact with judges assigned to their cases. More citizens’ groups were granted access to confront constitutional issues through the implementation of the Ação Direta de Inconstitucionalidade (Act of Unconstitutional Law, or ADIN). Rather than having to go to the solicitor general to challenge a particular law, members of the government, labor unions, and citizens groups themselves could now bring an ADIN before the courts. Class action lawsuits were given more of a window to succeed as they could now include a widened range of issues (Prillaman 2000, 81, 82).

Although cases increased dramatically as a result of these measures, reforms to improve access were both uneven and unsuccessful. Most states initially failed to implement the system of appeals courts due to high debt. Despite a constitutional mandate ordering them to do so, it eventually came down to the federal government to implement this plan nearly ten years after the Constitution was drafted. Plans to put more judges on the benches also fell short of their goal. In

the hopes of raising the professionalism of incoming judges, more rigorous examination standards only served to exacerbate this problem as nearly 80% of judicial exam-takers could not pass the first round of exams. This meant that the judiciary either filled its vacancies with lesser-qualified candidates or not at all (Prillaman 2000, 93).

Even with the right of access codified in the Constitution and some institutional reform, citizens were reluctant to exercise their right to use the judiciary to resolve conflict due to their perception that it and other government institutions were inefficient and “impermeable.” The judiciary in their view was not the best way to resolve conflicts due to these institutional failures (Ribeiro 2008, 471). The judicial process in Brazil and the rest of Latin America was often too formalistic and incomprehensible to the average citizen (Prillaman 2000, 25). There had also been a shortage of explanation by judges and officials as to the relevancy of the courts in everyday issues, and the judiciary lacked the services and the training to keep up with citizens regarding their rights and cases (Nalini n.d.).

Trust in the judiciary was extremely low as a result of the disconnect between itself and society. Polls taken by Vox Populi, Data Folha and other Brazilian polling agencies show that on average 70% of Brazilians did not trust in the effectiveness of the judiciary (Sadek 2004, 7). The conclusion from this lack of trust is that the judiciary had not fulfilled its end of the bargain as a democratic institution up to that point.

In addition, reforms to increase access did not help the poor. Nalini (n.d.), a Brazilian judge, offers a unique perspective on the problem of access to the poor as he argues that poverty is often a barrier that “impedes the submission of all conflicts to the attention of an impartial judge.” In reference to Mauro Cappelletti’s (Cappelletti and Garth 1981, 7) idea of prioritizing legal aid for the poor as crucial in “enforc[ing] a right of effective access,” he argues that Brazil

has failed to do so as the right to access in the Constitution is merely a “rhetorical declaration” rather than a meaningful assurance for all. The poor must deal with a persistent bias against them in the judiciary, meaning that although they receive legal representation in a case free of charge, lawyers in these instances are more likely to perform below the standards of how they would do so if a wealthier client hired them. Nalini (n.d.) concludes that because judges are “servants of the people,” they are responsible for improving access for “millions of underprivileged.”

Throughout the 1990s and early 2000s, government reformers acknowledged that an overhaul of Brazil’s judiciary was the only way to improve access for lower class citizens and civil society groups in Brazil. This in turn would mean more confidence among citizens that the judiciary would be effective in establishing justice and would be able to resolve their own conflicts in a peaceful and just manner. The NCJ was the culmination of this movement. Reformers agreed that institutional reform would also be important to another of the judiciary’s problems, inefficiency.

Efficiency

Inefficiency, meaning excessive delays in the administration of justice, has been and still is the most visible and by far most serious problem facing Brazil’s judiciary. Much like inaccessibility, inefficiency and slowness have defined Brazil’s court system since Brazil’s colonial days (Sadek 2004). A *Folha de São Paulo* article dated September 9, 2004 offers a recent and stark picture of this issue. A woman identified as “Teresa’s daughter,” a fictitious name as noted by the article, had been waiting for a pension from her ex-husband since January of that year. She filed a lawsuit against him, but due to the chronic slowness of Brazil’s court system and an added judicial strike, she had been waiting nearly 73 days from that point to the time that the article was written without a response. Because she could not get her pension, she was forced to request a special scholarship to pay for her daughter’s schooling and decided to cut

out nonessential expenses. The article aptly states, “Those that have cases in the justice system need to redouble their patience and wait” (Fernandes 2004).

This story is just one of thousands detailing what many have called the “crisis in the judiciary” as chronic inefficiency has hurt the judiciary’s image and effectiveness in democracy (Barbosa n.d.; Hertel 2005; Sadek 2004; Zanferdini 2004). The causes of inefficiency are numerous. First, judicial formalism, or the strict regulation of court procedures found often in civil law tradition, has created a system dominated by documentation, excessive rules, and overly complicated procedures (Ribeiro 2006). *Folha de São Paulo* reported on January 1, 2004 that bureaucratic hurdles, even down to the use of multiple “rubber stamps” to approve documents, take up to approximately 70% of the time it takes to process a case (*Folha de São Paulo* 2004). Sadek (2004, 24) argues that there are demands to lessen these and other excessive bureaucratic obstacles by reducing the number of hearings and instituting summary proceedings throughout the judiciary. The result of reducing the complexity of the judicial system would in the eyes of many allow for faster and more effective case processing.

A second reason for inefficiency is the poor administration of the courts. A World Bank (1997) study of judicial reform in Brazil and Latin America highlights the “inadequate administrative capacity of the Courts of Justice, deficiencies in the management of cases . . . [and] a lack of transparency in the control of spending of public funds . . .” Judges often complain about the paucity of sufficient resources to be able to handle large caseloads. They cite low salaries for staff as being one of the main reasons for the inability to afford better quality of labor.

Third, Brazil’s chronic shortage of trained judges has affected efficiency as well as access. Prillaman (2000, 93) notes that in 1995, both state and federal judges combined for

approximately 5,984 judges for Brazil's population of 158 million, meaning that there was one judge for approximately every 25,000 citizens. Ribeiro (2008, 476) offers the slightly improved statistic of one judge per every 16,954 citizens in 1998. Compared with the Organization for Economic Cooperation and Development's (OECD) ratio of one judge for every 3,000 citizens, Brazil's numbers clearly show that its justice system is ill-equipped to handle the thousands of cases that come its way each day (Prillaman 2000, 93).

Combined with this problem is the issue of judicial recruitment. As mentioned before, judicial professionalism has been low as a result of difficult testing for those who want to become judges. Sadek (2004, 21) notes that courses for judicial candidates have been poor, that there have often been no requirements for judicial schooling, and that many of the candidates are too young. Low professionalism has resulted in a court system unable to deal with the increasing caseload over the past few decades.

Reforming the inefficiency of the justice system has become a top priority since democratization. Dwindling respect and a "diminishing . . . level of tolerance with the low efficiency of the judicial system" forced reform to the fore in Brazil (Sadek 2004, 6). Thome (2000, 697) notes that with democratization have come new pressures from aid groups such as the World Bank that were preoccupied with inefficiency due to the indispensability of a fast and effective judiciary in improving economic development and democracy. In the eyes of those working to consolidate democracy, Brazil became the embodiment of the axiom "justice delayed is justice denied" (Rosenn 1986, 523).

The first major reform was the creation of the Superior Tribunal de Justiça (Superior Tribunal of Justice, or STJ) in 1988. This court eased the burden on the STF by becoming the "court of last appeals" for all non-constitutional matters, thus leaving only constitutional

questions to the former (Sadek 2004; Prillaman 2000, 82). Along with the STJ came a reorganization of the judicial structure as the government changed the federal courts of appeals, which had been based in Brasília, to “regional federal courts” in the five major regions of the country¹ in order to lessen the distance one had to travel to appeal and thus reducing the backlog of cases (Prillaman 2000, 82).

These reforms, however, were unsuccessful in improving efficiency due to the unforeseen problems in simultaneously reforming access to an already backed up court. Carothers (2001, 12) explains the difficulty in reforming these two important aspects of judicial reform, noting that increased access to a court system already experiencing efficiency problems can lead to significant logjams in cases. The 1988 Constitution shot itself in the foot by assuring open access to the court and including an exhaustive list of political, social and economic rights, all of which had been threatened or denied under the military regime and could now be used in a variety of new lawsuits. In addition, it created a highly decentralized form of government based on federalism and states’ rights. The result was a demand throughout Brazil for immediate implementation of many of these rights. For the courts, this proved to be disastrous as nearly every dispute, including divorces, property issues, and even bar fights, became some sort of constitutional question that filled the docket of the STF (AJUFE 2004, 38, 39; Prillaman 2000, 91). Not only did this dramatically exacerbate the problem of inefficiency, but due to the near futility of reaching resolution in a case due to extreme delays, it also hurt the basic access of citizens to simple justice (Ribeiro 2008).

Every year after the ratification of the 1988 Constitution saw a dramatic rise in the number of cases entering both the state and federal judiciaries. Estimates in the 1990s were

¹ Brazil has traditionally been divided into five regions: North, Northeast, Central-West, Southeast, and South.

cloudy as to how many cases were still on the docket nationwide, however, former STF President Carlos Velloso estimated that it was somewhere around 50 million. He even added that many of them had still been pending since as early as the 1940s (Prillaman 2000, 90).

In the 1980s and 1990s, new expectations about a more active judiciary also affected the balance between access and efficiency. Legal mobilization became common in every issue ranging from wage negotiations to human rights questions as many began to see it as a bargaining chip (McCann 1994). The judiciary also experienced what Vallinder (1995, 13) refers to as a “judicialization” of political issues, meaning that the judiciary was expected to involve itself in a rising number of political disputes. Judicial review of legislative and executive decisions became an expected attribute of a modern judiciary.

Because the causes of efficiency emanated from inside the judiciary, reformers agreed that institutional reform was the solution. They agreed that tackling the issue of an overly independent and unaccountable judiciary would improve both access and efficiency as Brazil’s courts have traditionally controlled their own administration, discipline, and budget.

Accountability and Corruption

In an effort to create a stronger judiciary, the 1988 Constitution increased judicial independence in response to the military dictatorship’s encroachments on the courts. Because the Constituent Assembly granted power to judicial experts to shape the courts due to their particular expertise on the subject, they did so without considering the plans of other Constituent Assembly committees designing other institutions. Thus, many argue that the Constitution granted too much independence to Brazil’s judiciary as a result (Santiso 2004, 165).

Following the design of Montesquieu’s republican model of separation of powers, the Constituent Assembly gave the judiciary a high degree of both political independence and autonomy. Practically speaking, this meant that the judiciary had complete control over its

salaries, its appointment and promotion decisions, its budget, and its disciplinary process. An inter corporis model of internal committees handled these duties while disciplinary committees known as *corregedorias* were responsible for issues of judicial misconduct (Baltazar Júnior 2010). It granted individual judges a high degree of personal independence by raising tenure to 70 years of age for retirement and boosted internal independence by reducing the binding power of Supreme Court decisions on lower courts (Santiso 2004).

It was hoped that these measures would ward off political interference, but the truth is that this high degree of independence and internal control produced a court that was, for the most part, unaccountable to the rest of the government and society. Santiso (2004, 164-167, 171) argues that the results of Brazil's high judicial independence were courts that had little reason to enforce self-discipline or incentivize good performance. The effects of this lack of accountability exacerbated the aforementioned problems of access and efficiency because poor oversight became a characteristic of internal court administration. Judicial corruption also became more prominent as a result of the lack of power that the state *corregedorias* had to punish misconduct (Baltazar Júnior 2010). Prillaman (2000, 85) puts it best when he suggests that the Brazilian Judiciary became "an entrenched bureaucratic oligarchy in need of restraint." He adds that although Brazilians could not come to a consensus on a number of other important issues since re-democratization, they firmly agreed that the judiciary's leash needed a tug.

Excessive judicial independence had also produced a judiciary that in the eyes of many was aristocratic and aloof. Brazilians saw their judiciary as corrupt as lavish salaries – in some cases higher than that for the President of the Republic himself – and luxurious perquisites, such as free apartments and cars, were provided for a job most people thought was poorly performed (Prillaman 2000; Santiso 2004).

Judicial corruption, particularly nepotism, increased rampantly as a result of the lack of power of internal committees to punish misconduct and maintain proper oversight. In the 1990s, Senator Antônio Carlos Magalhães conducted his own investigation of judicial nepotism throughout the country and received roughly 1,500 complaints in 1995 and almost 3,000 in 1999. Two Northeastern states were particularly corrupt as investigators discovered that much of the staff hired by the state Supreme Courts was made up of family members. In addition to doing little to prevent nepotism, state corregedorias and other internal mechanisms of accountability often failed to properly investigate and sanction judges who were accused of wrongdoing. Many times, these committees chose to keep an investigation open for long periods so as to exceed the statute of limitations, an act that absolved judges of all wrongdoing in many instances. Any sort of government crackdown on corruption, specifically an anti-nepotism law signed in 1996 and a Senate commission to investigate the issue, was met with stiff resistance in the form of strikes and verbal attacks (Prillaman 2000, 87)

The crisis of legitimacy that was the consequence of the problems noted above prompted a consensus among reformers in Brazil that institutional reform was a necessity in order to improve the quality of justice in Brazil (Ribeiro 2008).

March toward Reform: Thirteen Years of Debate (1992-2005)

The way to reform the judiciary, however, became the topic of debate amongst individuals and groups with a stake in building a better judiciary. By far the most controversial aspect of any proposed reform agenda was the creation of a judicial council that would oversee the administrative, fiscal, and disciplinary matters of the judiciary. This judicial council would seek to improve access and efficiency and would constitute a measure of external control to improve judicial accountability.

The idea of a judicial council is not something new in Brazil. In 1977, the military government under President Ernesto Geisel created a judicial council, the Conselho Nacional da Magistratura (National Council of the Magistracy, or CNM), which had disciplinary duties but no administrative or budgetary control. Although its implementation was meant to create a façade of judicial independence, the CNM merely served as a tool to punish judges who did not agree with the military regime and failed to stop the regime's encroachment on its affairs. Following democratization in 1985, the new government eliminated the CNM because of its legacy of violating judicial independence. In its place, the Constitution granted the judiciary "self-government" through the implementation of an internal judicial governance structure (Hammergren 2002; Filho 2008). Because of this mixed history with judicial councils, the prospect of implementing another created anxiety in Brazil (Garoupa and Ginsburg 2008a, 69; 2009b, 111; Santiso 2004, 176).

Despite this mistrust, reformers agreed that a judicial council would be an effective form of judicial accountability. Reform moved forward, but controversy and questions remained as to whether it would harm judicial independence. The debate over the NCJ lasted for thirteen years (1992-2005) and culminated in the passage and implementation of Constitutional Amendment n. 45 by the Brazilian Congress in 2004 and 2005 respectively. Congress planted the seeds of Constitutional Amendment n. 45 in 1992 with the first piece of legislation offered by Hélio Bicudo in the House of Deputies. First known as Constitutional Amendment Proposal (PEC) 96-A of 1992 ("Reform of the Judiciary") and then revised in 1995 to become PEC 112-A, it was the initial step toward the judicial reform amendment implemented in 2005 (Bandeira 2005). The congressional commission created to handle this amendment held numerous hearings. Commissioners interviewed persons associated with the judiciary and judicial associations that

were both for and against its implementation. From recommendations made in these commissions, various changes and proposals were offered to this amendment. This later resulted in the passage of PEC 29 in 2000 (Sadek 2001).

Members of the Congress proposed a number of different versions of the council, each with a slightly different composition. As mentioned in Chapter 2, the composition of judicial councils is at the crux of the debate between judicial independence and accountability. The main contention was whether membership of the council would include non-judicial appointments, drawn from other branches of government and civil society (Sadek 2001). In addition, there was disagreement over how many branches of the judiciary would sit on the council as reformers desired to maintain internal independence of lower courts from higher courts (Brinks 2004-2005).

Deputy Jairo Carneiro of Bahia proposed a 15-member council composed of 13 judges from each sector of the judiciary: the two high courts, the labor courts, the military courts, the regional federal courts, the state courts of appeals, and finally judges representative of the national magistracy as whole. The remaining two came from outside the judiciary from the federal and state prosecutors' offices (Ministério Público) and from the Ordem dos Advogados do Brasil (the Brazilian Bar Association, or the OAB).

The proposal put forth by Deputy Aloysio N. Ferreira of São Paulo differed from that of Carneiro by reducing the total number of councilors to nine and including three non-judicial members. It would include the president of the STF, two more STF ministers, a judge from the Tribunal Superior do Trabalho (Superior Labor Tribunal, or TST), a judge from the Tribunais de Justiça (the state high courts), and three jurists. This setup would have meant that a third of the

NCJ would have been composed of non-judicial members (the three jurists) and would have eliminated the representation of many different parts of the judiciary.

A third initiative by São Paulo Deputy Zulaiê Cobra proposed 13 members, seven of which would be from the various branches of the judiciary and six of which would be two members from the federal and state prosecutors' offices, two lawyers from the OAB, and finally two citizens of sufficient judicial knowledge. In 2000, the commission drafted a plan that included 14 members, six of which would be from outside the judiciary. Following debate in the House of Deputies, a 15-member council composed of nine judicial members from each branch of the judiciary and six non-judicial members from the federal and state prosecutors' offices, the OAB, and finally civil society was agreed to by vote on January 19, 2000 (Sadek 2001, 102-111). This would be eventually become the formalized composition of the council as included in Constitutional Amendment n. 45.

Structure and Purpose of the National Council of Justice

Constitutional Amendment n. 45 placed the NCJ in control over all courts except the STF. Therefore, the NCJ has administrative, financial, and disciplinary control over state, federal, labor, electoral, and military courts as well as extrajudicial services (Baltazar Júnior 2009a, 2010b). The council is “national” in the sense that it has jurisdiction over tribunals on both the state and federal level. The Constitution outlines the primary duties of the NCJ:

It is incumbent to the council the control of the administrative and financial acts of the Judicial Branch and of the fulfillment of functional duties by the judges, including, besides other tasks determined by the Magistrates' Statute², the following:

² The Magistrates' Statute is available in Article 93 of the 1988 Constitution. It establishes the exam process for judicial candidates, standards for those candidates, promotion by merit and seniority, courses for judicial candidates, judicial salaries, and pensions, and transparency standards for the judiciary. As a result of Constitutional Amendment n. 45, the Statute now includes provisions stipulating a proper proportion of judges to population and the immediate distribution of cases to ensure access and efficiency respectively (Constitution of Brazil – English 1988, Art. 93).

- I. to care for the autonomy of the Judicial Branch and for the observance of the Magistrates' Statute, with powers to issue regulatory acts, within its jurisdiction, or recommend measures;
- II. to care for the observance of Article 37³ and examine, by its own initiative or by provocation, the legality of administrative acts performed by members or bodies of the Judicial Branch, with powers to dissolve them, alter them or fix terms for the adoption of the necessary measures to the exact obedience of law, without prejudice of the jurisdiction of the Brazilian Court of Audit (TCU)⁴;
- III. to hear of and examine the complaints against members or bodies of the Judicial Branch, including those against their auxiliary services, annexes, and notary services and registering bodies which function by delegation of the public power or made official, without prejudice of the correctional and disciplinary jurisdictions of the courts, with powers to advocate current disciplinary cases and to determine the removal, the temporary suspension or the retirement with remuneration proportional to time in office as well as apply other administrative sanctions, ample defense being ensured;
- IV. to report to the federal prosecutors' office, in cases of crimes against the public administration or abuse of authority;
- V. to revise, by own initiative or by provocation, the disciplinary cases involving judges and members of courts which had been judged less than one year ago;
- VI. to prepare an annual report, with proposals of the measures deemed necessary, about the status of the Judicial Branch in the country and the activities of the Council, which shall be part of the message by the President of the STF to be forwarded to the National Congress, on the occasion of the opening of the legislative session (Constitution of Brazil – English 1988, Art. 103-B).⁵

The NCJ's structure is designed to accomplish these goals. The main council of 15 members is known as the Plenário. Its makeup as approved in 2000 and included in Constitutional Amendment n. 45 is broken down as follows:

- one judge of the STF named by the STF;

³ Article 37 lays forth the ethical responsibilities of all public officials and forbids them from using their offices for personal gain. It states that public officials "shall obey the principles of lawfulness, impersonality, publicity, [and] efficiency..." (Constitution of Brazil – English 1988, Art. 37).

⁴ The *Tribunal de Contas da União* (Brazilian Court of Audit, or TCU) is an external control device that oversees the fiscal management of the National Congress, the Presidency, and other federal institutions (TCU Homepage 2010, The Court).

⁵ Small repairs made to this translation either due to errors in the original or to make the language more understandable.

- one judge from the STJ selected by the STJ;
- one judge from the highest labor court, the TST, chosen by the TST;
- one appellate judge from one of the state highest courts (a Tribunal de Justiça) selected by the STF;
- one state court judge selected by the STF;
- one federal appellate judge named by the STJ;
- one federal trial court judge named by the STJ;
- one appellate judge from the regional labor court selected by the TST;
- one trial court judge from the labor courts also chosen by the TST;
- one member of the federal prosecutors' office selected by the solicitor general;
- one state prosecutor chosen by the solicitor general from among nominees put forth by each state's prosecutorial entity;
- two lawyers selected by the OAB;
- two persons of "notable judicial knowledge and unimpeachable reputation," one chosen by the House and one chosen by the Senate (Brinks 2004-2005, 615)⁶.

As mentioned before, the Congress agreed to this structure because, in its view, having a majority of judges on the council was a way to maintain judicial independence and "judicial self-government." It included representatives from each branch of Brazil's judiciary to respect "almost all of the angles of the National Judiciary." In addition, the Congress decided to include six members from outside the judiciary to take into account their "external points of view," something that had not been done in the 1977 council (Filho 2008). The NCJ is presided over by the STF minister, and members are nominated by the President of the Republic and approved by Senate.

⁶ For a list of current members of the NCJ, see http://www.cnj.jus.br/index.php?option=com_content&view=article&id=7723&Itemid=939 (last visited March 3, 2010).

The president of the NCJ has many responsibilities, the most important of which are to look after the business of the NCJ, represent it before other government bodies or organizations, and preside over general meetings. Councilors have the responsibility to attend hearings, to propose projects, and to oversee the numerous duties that the NCJ undertakes. They can also create commissions, both temporary and permanent, to study aspects of the judiciary (NCJ 2008 - Regimento Interno).

As of 2007, the NCJ had six permanent commissions all created to handle particular aspects of the Council's duties. They include: 1) the Commission of Computerization, Modernization, and Special Projects, 2) the Commission of Statistics and Strategic Management, 3) the Commission of Funds and Reequipping of the Judicial Power, 4) the Commission of Legislative Follow up and Prerogatives in the Career of the Magistracy, 5) the Commission of Access to Justice, Special Courts and Reconciliation, and 6) the Commission of Reform of Internal Administration (NCJ Infojuris 2008, 461). The NCJ assigns councilors to these commissions who must then report their findings to the President of the NCJ and to the Plenário for further debate and discussion (NCJ 2008, Regimento Interno, Chapter 6).

Beneath the Plenário sits the Corregedoria Nacional de Justiça, a section of the NCJ responsible for the discipline and correction of judges from every court except the STF. Each state still has a corregedoria made up of a judge elected for two years, the chief justice of the state Supreme Court, and a staff, but these state bodies now have a national corregedoria that oversees them and can directly punish judges who are guilty of misconduct at both the first and appellate level.

The Corregedoria Nacional has a procedure for the discipline of judges who are accused of wrongdoing. First and foremost, the NCJ adopted a "Code of Magistrates' Ethics" as its

standard of judicial conduct for its jurisdiction. Approved in 2008, the Code reinforces the original Magistrates' Statute by listing the proper conduct of judges. In a section titled "General Dispositions" (Section 1), it states that:

The exercise of a judgeship demands conduct compatible with the precepts of this Code and of the Magistrates' Statute, orientating himself by the principles of independence, of impartiality, of knowledge and qualification, of courtesy, of transparency, of professional secrets, of prudence, of diligence, of professional and personal integrity, of dignity, of honor and of *décor* (Código de Ética da Magistratura, Ch.1, Art. 1).

The rest of the Code explains these principles in more detail, outlining what it means to be an ethical, intelligent and a wise judge that makes decisions carefully based on the arguments and facts of a case. The NCJ also adopted an administrative statement that defined nepotism in the judiciary due to the prevalence of this particular problem (NCJ Infojuris 2008, 470).

If accusations of negligence or corruption are brought before the NCJ, it has the right to suspend the accused judge and investigate the charge (NCJ 2009, Regimento Interno, Ch. 3). First, charges are brought to the state *corregedorias* and if necessary to the *Corregedoria Nacional de Justiça*. Following an investigation, the *Corregedoria Nacional* determines if the matter is grave enough to warrant disciplinary proceedings. If so, it sends the complaint to the state *corregedoria* where the accused judge is based and asks the local system to investigate the issue. If the issue is determined to be an infraction, the *Corregedoria Nacional* will submit it to the full body of the NCJ, which will then call the accused judge in to give a defense. During that time, the full NCJ decides whether or not to suspend the accused judge from his duties and put a substitute in his or her place. If there is enough evidence to back up a charge of corrupt activity, the NCJ presents its evidence to the federal prosecutors' office.

In addition, the *Corregedoria Nacional* is responsible for ensuring that the National Judiciary is up to date, transparent, and efficient. One of the ways that it does so is through the

regular inspection and correction of state judiciaries. Inspection teams generally consist of Corregedoria Nacional staff but can include workers from other parts of the judiciary as well as NCJ councilors. They have the freedom to determine when and how these inspections take place and have full and free access to documents and computer records. These teams investigate irregularities that include issues with efficiency, access, and corruption. If they find problems, the Corregedoria Nacional proposes how the state judiciary can fix them. It then submits a report to the NCJ Plenário detailing the situation, along with recommendations. The Plenário then ensures that these measures are adopted.

Next, the NCJ created a section called the Departamento de Pesquisas Judiciárias (Department of Judicial Research, or DPJ). The purpose of the DPJ is to provide judicial statistics on a regular basis to assess areas of concern and need and to create a more transparent judiciary. It assists in providing information on how the NCJ can modernize the judiciary in order that it might better address the issues of access and efficiency. In August 2005, the NCJ passed Resolution no. 4, a resolution “creating the System of Statistics of the Judiciary . . .” (NCJ Infojuris 2008, 377). This resolution stipulated that the NCJ “prepare a monthly statistical report about delayed cases and sentences . . . in the different areas of the judiciary.” In addition, the NCJ must produce an annual report on the judiciary as a whole, its recommendations to address problems, and its activities over the year. The NCJ submits this report to the National Congress, which then acts on the given proposals.

In order to address the problems of professionalism amongst judges and ensure that the judiciary follows the Magistrates’ Statute, the NCJ passed resolutions that restructure the promotion process by reiterating the need for better training and emphasizing merit as the only criterion for career advancement. Resolution no. 6 weighs a judge’s performance, productivity,

efficiency, and tenure to decide promotions. Education is also an important factor in both judicial practice and promotion as noted in Resolution nos. 10 and 11 (NCJ Infojuris 2008, 378, 380-382).

As the Constitution granted the NCJ the power to undertake new measures necessary to improve the judiciary, it has recently done so by implementing the National Week of Reconciliation as an institutional solution to improving both access and efficiency. During this week, citizens throughout the country can bring unresolved cases before NCJ-trained mediators. According to NCJ President Gilmar Mendes, “The purpose of this initiative is to produce the solution of these conflicts through a conciliatory way” (NCJ 2009, Mendes). The homepage of the program notes that citizens can bring their disputes that are already in the courts before a mediator, a person chosen out of civil society, to help achieve resolution (NCJ 2009, Movimento pela Conciliação).

In this chapter, we have reviewed the reasons behind why Brazil chose to implement a judicial council. Following democratization in 1985, new expectations of the role of the judiciary in Brazilian society prompted reform that would seek to match the actual performance and output of the judiciary with expectations of what it should be in a democracy. Thus, reformers saw that it had to improve the persisting problems of inaccessibility, inefficiency, and a lack of accountability. Although they adopted a number of measures to do so, much of the reform initiatives implemented in the 1990s either were insufficient or backfired, further exacerbating these three problems. Thus, for 13 years reformers debated over the best way to ensure that these problems would improve and that the judiciary would become a more effective part of democracy. This would eventually result in the formation of the NCJ in 2004, which as we have seen is endowed with the ability to address these problems.

The debate over the NCJ would be highly controversial due to the difficulty of agreeing on a balance between judicial independence and accountability. The Brazilian debate over the NCJ is particularly useful in the analysis of judicial councils because of what it can teach us regarding these concepts, both in terms of their abstract definitions and their concrete manifestations. In Chapter 4, we will review this debate through the analysis of the perceptions of judicial independence and accountability and how they affected both support and opposition to the implementation of the NCJ. This will strengthen our ideas regarding judicial independence and accountability and our understanding of how a judicial council balances them.

THE BRAZILIAN COURT SYSTEM

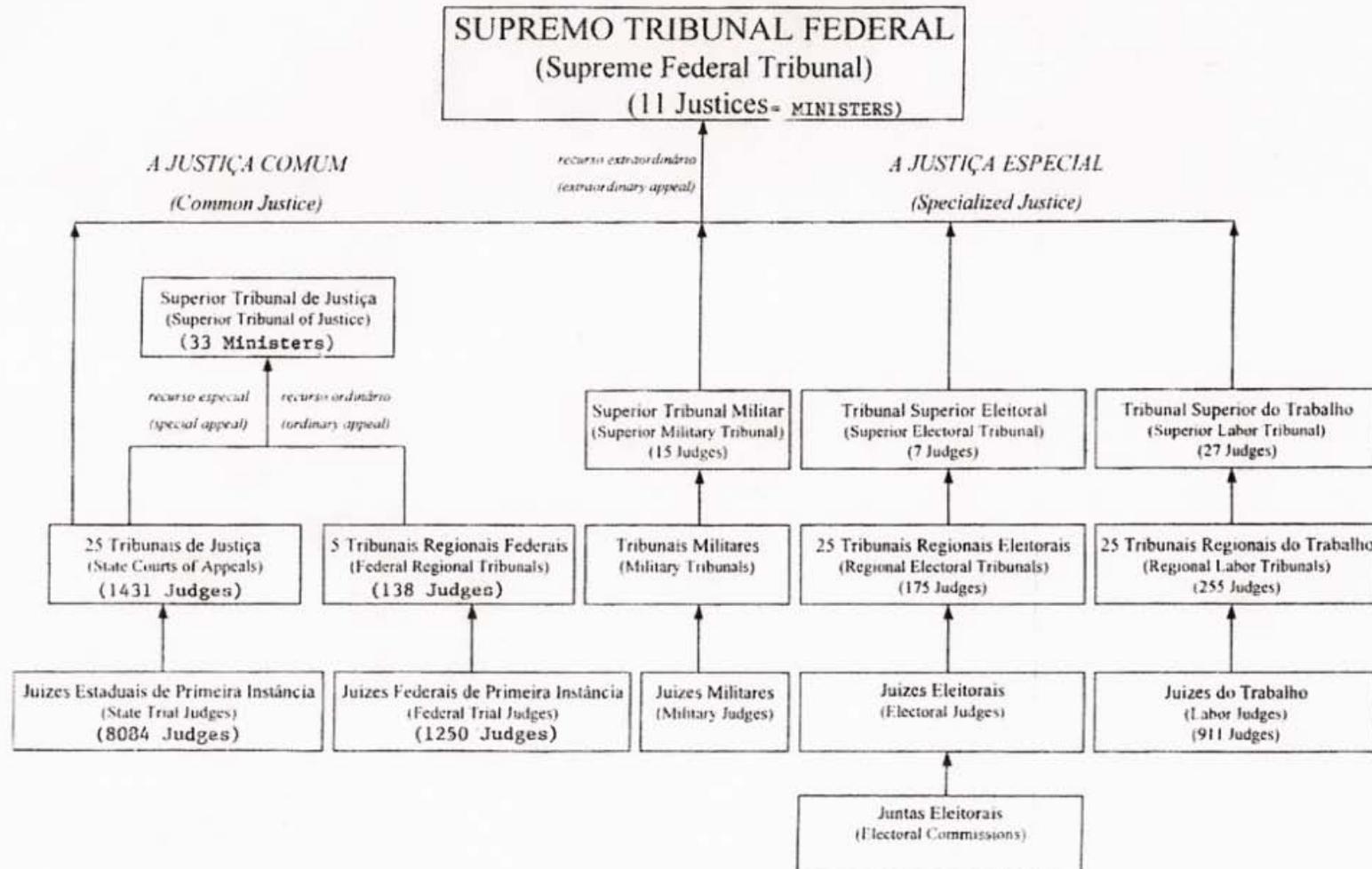


Figure 3-1. The Brazilian court system. [Messitte (2009) used with permission].

CHAPTER 4 FINDINGS AND INTERPRETATION

In our discussion of judicial independence and accountability in Chapter 2, I noted that there is inherent tension between these two concepts and that judicial councils have been a modern solution to achieve balance between them. In Brazil, the case of the NCJ is no different in its purpose as a judicial council. What I have discovered is that the debate over the implementation of a judicial council in Brazil was centered on how supporters and opposition perceived these concepts and how each side believed they should be defined on their respective sides of the same coin. The way that both the support and opposition to the NCJ perceived these concepts was manifested in their interpretation of the federal doctrine of separation of powers as laid out in Article Two of the 1988 Constitution. From this interpretation came their opinions on who would exercise accountability over the Judicial Branch. As we have noted before, much of this debate centered not only on whether or not to create a council, but who specifically would sit on this council, whether it be exclusively judicial membership or a mix between judicial and non-judicial members.

The motivation behind this chapter is not only to better define and understand the concepts of judicial independence and accountability within the Brazilian case but also to do the same in the general field of judicial reform due to their weakness and lack of operationalization (Kapiszewski and Taylor 2008). These concepts within the context of the Brazilian case will help us to see how a particular judiciary has addressed the critical questions and controversies behind judicial independence and accountability. It is with hope that this study will contribute significant insights into how better to define these concepts and how to operationalize them more effectively for future study on the matter.

Methodology

My research method was inductive, meaning that I inferred themes that better operationalize the concepts of judicial independence and accountability from the case of the NCJ in Brazil. I used three steps to discover these themes. First, I built a conceptual framework to guide me in my research and take advantage of already existing literature on the concepts of judicial independence and accountability. Next, I conducted analysis of secondary materials (e.g. news articles, congressional commission reports, journal articles and book chapters), looking for ways that supporters and detractors framed their opinions of the implementation of the NCJ in order to understand their perceptions of these concepts. Finally, I conducted semi-structured interviews to offer a glimpse on how these concepts are defined and manifested (obviously in the form of a judicial council, the NCJ) in Brazil. Finally, I analyzed my research and added new themes to the concepts of judicial independence and accountability.

Building a Conceptual Framework through the Literature

My conceptual framework, which is Chapter 2 in this work (summary available in table 4-1), is constructed along the lines of Herbert Blumer's (1931) ideas about sensitizing concepts in order take advantage of the previous literature on the subjects of judicial independence and accountability. A sensitizing concept, which "lacks such specification of attributes or benchmarks" and "merely suggest[s] directions along which to look," is contrasted with a definitive concept, which "refers precisely to what is common to a class of objects" and has a "clear definition" (Blumer 1954). The use of pre-existing works is important in strengthening these two concepts. Stronger concepts contribute to theory building within this particular field (Kapiszewski and Taylor 2008).

Due to the lack of definitiveness of these concepts, using them as sensitizing concepts in my qualitative research is a good first step. Sensitizing concepts can be "tested, improved, and

refined,” making them versatile tools in this instance (Bowen 2006, 3). My conceptual framework taken from the review of the literature acted as a basis in my analysis of themes found in my research. Essentially, it assisted in analyzing how judicial independence and accountability are perceived in Brazil. Understanding these perceptions leads us to the key reasons behind the debate over the NCJ.

In order to assess the debate over judicial independence, accountability, and the NCJ in Brazil, it was important to consult a number of different sources. First, I decided to analyze the public dimension of the debate through analysis of the Brazilian media, congressional record, and some academic sources to see how judges, lawyers, politicians, and scholars chose to frame their arguments for or against the NCJ. This also identified key actors and groups on both sides of the debate. Next, I went straight to the source to conduct semi-structured interviews of key informants to gauge the perception of judicial independence and accountability among those who are knowledgeable about the Brazilian judiciary and the NCJ.

Analysis of the Brazilian Media, Congressional Records, and Other Sources

In order to define the public debate between both sides as well understand their perceptions of the concepts of independence and accountability, it was important to observe how supporters and detractors framed their ideas (Benford and Snow 2000). Simply put, framing is a technique used to maximize outside support for a particular side. Those who seek to frame their arguments in a certain way choose how to identify problems, how inclusive or restricted their themes are, the scope of their argument, and how resonant an argument should be.

Benford and Snow (2000, 614) refer to the concept of collective action framing in their study of how social movements characterize their arguments, stating that their purpose is to “mobilize potential adherents and constituents, to garner bystander support, and to demobilize antagonists.” My purpose in utilizing the concept of collective action frames was to analyze how

supporters and detractors expressed their opinions regarding judicial independence and accountability through the medium of advocacy for or against the NCJ.

Specifically, I adapted Benford and Snow's (2000, 617) idea of motivational framing, or the use of certain words and ideas to sway supporters, to look for themes that strengthen the sensitizing concepts in my conceptual framework. These themes are a vocabulary of motive that offers insights into the perceptions of judicial independence and accountability. I adopted repetitive themes in my coding of sources as perceptions of judicial independence and accountability in the Brazilian case.

Because the high interest in the subject of the creation of a judicial council resulted in the use of the public realm to sway audiences toward one position or another, I selected some media reports that were from the period of debate (1992-2005) and that included information on the key players and arguments involved. The reports from the commission in charge of overseeing the passage of Constitutional Amendment n. 45 contained the perspectives of numerous key individuals who testified between 1992 and 2005 regarding the formation of the NCJ. I selected passages from these reports of a few key individuals whose arguments I felt to be clearest and that offered a bit of information that did not necessarily appear in the others. Finally, there were a number of articles and books that offered opinions and information regarding the debate over the NCJ that were written by judges, lawyers, and those in the academic world. These were both consulted for reference and to gauge the opinions of various judicial experts on judicial independence, accountability, and the formation of the NCJ.

The themes taken from these sources provided an excellent introduction to the themes that I would later come across in my interviews. Although my interviews weigh more in my analysis, the information from these sources appears side-by-side and is just as useful in better

defining the sensitizing concepts of this study.

Semi-structured Interviews in Brasília

My next research step was to spend six weeks conducting semi-structured interviews of key informants in Brasília, Brazil's capital and headquarters of the NCJ. Brasília was the ideal location for field research due to the high concentration of judges and persons with knowledge about the government and judiciary. In addition, the most qualified subjects to interview regarding judicial independence and accountability in Brazil were those that dealt with the issues on a daily basis. From these interviews, I was able to gain insight into how these concepts function concretely as they affect institutional design and decision-making in Brazil. From this, I was able to infer new information regarding these concepts.

I spoke with a total of 11 key informants (see Appendix A) during my time in Brasília. A key informant in this instance was an individual selected on the estimate that they were familiar with the NCJ and its surrounding controversy. These key informants included NCJ councilors, lawyers, and judges familiar with the NCJ, and presidents of judicial organizations. I used a snowball-sampling framework to build this network of key informants, and subjects told me who else to interview based on their contacts that were familiar with the NCJ. This study's small sample size (11) means that the results cannot be generalized to represent the entire Brazilian judiciary, legal community, or the population with knowledge or opinions regarding the NCJ. Instead, all findings must be interpreted as being local to the individuals interviewed.

Most of my respondents were supportive of the NCJ. Respondents who once belonged to the opposition were difficult to find because according to the Vice President of the STJ, Ari Pargendler, the debate was essentially over after the implementation of the NCJ in 2005 and "a judge does not have the legitimacy to challenge something that is in the Constitution." However, there was enough information in my analysis of secondary sources to compensate for this deficit.

I used active semi-structured interviews to collect data for this project. The term active refers to Holstein and Gubrium's (1995, 14, 17) idea that "the interview and its participants are constantly developing," and that an interviewer and his respondent are working together to build a more complete picture of a concept. An active interviewer "converse[s] with respondents in such a way that alternate considerations are brought into play. They may suggest orientations to, and linkages between, diverse aspects of respondents' experience, adumbrating – even inviting – interpretations that make use of particular resources, connections and outlooks." This method was particularly useful in connecting key informants' experiences with and opinions of judicial independence and accountability to their knowledge of the Brazilian judiciary and the NCJ. Thus, this method enabled me to bridge the gap between these concepts and reality in Brazil. This makes these concepts stronger and therefore more practical and better understood in real situations.

I constructed my interview guide with the goal of discovering how participants perceived concepts within this debate and what their opinions were of the NCJ (see Appendix B). Specifically, my questions extracted informants' opinions regarding judicial independence, judicial accountability, and how to define the line between them. In addition, I asked informants for their opinions regarding the formation of the NCJ and what they believed its role to be within the judiciary. There was a general question on the state of judicial reform in Brazil in order to offer context to both the formation of the NCJ and other judicial reform mechanisms implemented in 2004, but I included the responses to this question in my analysis only if they offered relevant information to my central concerns.

Once I reached a point of saturation on a particular subject, I began to draw conclusions regarding the perceptions of independence and accountability among both supporters and

opposition and how they differed over where to draw the line between them. I then connected these thoughts to their opinions of the NCJ's formation and current role in Brazil's judicial system.

Data Analysis

Following the collection of my secondary sources and interview notes, I coded the collected information based on repetitive themes. These themes emerged over the course of the analysis of these transcripts and were not based on a priori information. After the coding process, I analyzed these themes to infer new information I could add to my conceptual framework. From the case of Brazil and the NCJ, I was able to expand the concepts of judicial independence and accountability in how they are defined, measured, and related.

Themes

Numerous themes emerged from both secondary and qualitative research. I will present these themes in two categories: 1) respondents' general opinions and perceptions regarding judicial independence and accountability both as abstract concepts and as they are defined in Brazil, and 2) analysis of the debate over the NCJ. We shall see how opinions expressed regarding the concepts in the first category affected the debate over the NCJ in the second category.

In the first category of general perceptions, respondents defined judicial independence as both institutional independence and individual independence. They defined institutional independence by invocation of the separation of powers doctrine in Article Two of the Constitution and the general notion that the executive and legislative branches should not interfere in judicial decision-making, while individual independence in their view meant a judge's ability to decide cases based on his or her own convictions and the law free from pressure from colleagues and higher courts. Respondents emphasized the need for judicial

accountability and defined it as individual responsibility, administrative responsibility, institutional accountability, and responsibility to abide by the law. How respondents decided to balance these concepts depended on how specifically or broadly they defined them. Most respondents offered the explanation that judges are always independent to decide cases based on their own convictions and the law, but that they must face consequences in instances of both administrative and moral failure.

In the second category regarding the debate over the NCJ, I discovered that there was disagreement between supporters and detractors over how strictly or loosely to define the separation of powers clause in Article Two of the Constitution. This affected views on how to define judicial independence in Brazil, which simultaneously defined how to define accountability. There were two competing views on the issue of accountability: “external control” versus “internal control.” Supporters of external control supported the NCJ with members external to the judiciary, while advocates of internal control meant opposition to the NCJ and a continuation of the *inter corporis* model or the implementation of a council made up of only judges. Those who supported external control had a looser interpretation of Article Two, while those who supported internal control had a more strict interpretation of that clause.

The debate over the NCJ shows the intrinsically connected nature of judicial independence and accountability. As one defines from whom an institution is independent from, one also defines to whom it should be accountable. This debate also shows that these concepts are defined by local factors in a case. First, we will analyze general opinions on judicial independence and accountability and then move to the debate over the NCJ.

Informants' Opinions on Independence and Accountability

Two forms of judicial independence

Interviews revealed that judicial independence in Brazil has two essential aspects: institutional and individual independence. Antônio Umberto, an NCJ councilor and a labor judge from the 10th Region's Labor Tribunal, referred to this two-part idea of independence as a "mosaic," and that the concept of judicial independence could be viewed through "various prisms." The first aspect of judicial independence in Brazil is determined by the separation of powers doctrine in Article Two of the Constitution: "The Legislative, the Executive, and the Judicial, independent and harmonious in themselves, are the powers of the Union" (Constitution of Brazil – English 1988, Article Two). In addition to this overarching statement, the Constitution includes specific sections covering the various jurisdictions, powers, and internal administrations of these three branches.

The separation of powers doctrine has its origins in English philosopher John Locke and the idea of three distinct powers: the legislative (the supreme power), the executive (internal affairs and judicial matters), and the federative (external affairs, i.e. foreign relations). Locke believed that it was not necessary to create institutional independence between these powers. Thus, the legislative was the supreme power, and the executive and federative were controlled by one entity, the crown. This idea of a tripartite system was further developed by French philosopher and political thinker Baron de Montesquieu in his work *Esprit des Lois* (The Spirit of Laws, published in 1748). Montesquieu developed the model of the executive, legislative, and the judicial, but he believed that each possessed its own inherent independence and that the judiciary was a separate branch as opposed to an offshoot of the executive (Fairlie 1922-1923). He noted on this subject:

When the legislative and executive are united in the same person or body, there can be no liberty, because apprehensions might arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. There is no liberty if the judicial power be not separate from the legislative and executive. Were it joined to the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with the violence of an oppressor. There would be an end of everything if one man or one body, whether of princes, nobles, or people, exercised these three powers; that of making the laws, of executing the public resolutions, and of judging the cases of individuals (*Esprit de Lois*, Book II, Chapter 6 as cited in Fairlie 1922-1923).

It was with this philosophy in mind that the writers of Brazil's 1988 Constitution inserted the separation of powers doctrine as the guarantee of institutional independence in Brazil. This is now the guiding doctrine of institutional independence in Brazil.

All informants invoked the separation of powers doctrine to justify judicial independence. Rui Stoco, an NCJ councilor and judge of the Tribunal of Justice of São Paulo, expressed this best when he noted that the Constitution of Brazil "states that the powers of the Republic are 'harmonically independent' without any interference of one in the other, and each one has its own prerogatives." Within that framework, he added that the judiciary has the power to adjudicate. Councilor Antônio Umberto noted that judicial independence in Brazil is the "functional division of the [Judicial] Branch" from other branches in the federal scheme and that "it is necessary as an attribute of the branch itself" so that the institution remains a "trustworthy element of social pacification."

Hussein Kalout, Head of the Office for International Affairs of the STJ, broke down the framework of institutional independence in Brazil by noting that there are "three independent budgets" for each branch, and that although the legislative branch decides on how large the budget should be, each branch has the final say into how it is broken down once allocated.

Marcos Degaut, the Director General of the Escola Nacional de Formação e Aperfeiçoamento da Magistratura (The National School for Training and Improvement of the Magistracy, or

ENFAM), noted that the essential purpose of maintaining independence was to keep the judiciary free of “political submission.”

Dr. Pierpaolo Cruz Bottini, former secretary of judicial reform (2003-2007) and currently a lawyer who still has connections with the NCJ, defined the judiciary’s independence as “administrative autonomy” from the other branches of government. It is important in his view that the judicial branch be able to determine its own criteria for the judicial profession as well as its own policies because independence from other branches of government protects the judiciary’s essential “function of adjudication.”

Hussein Kalout reiterated this need for administrative autonomy by highlighting Brazil’s current system of internal promotion of judges as a success. He explained how the President of the STJ is selected by the President of the Republic from a list of three ministers already present on the court. This, in his view, is an example of Brazil’s judicial independence because the executive branch “cannot intervene in the decision of who is going to [be the president].”

One of the most fascinating perspectives on institutional independence came from Joaquim Falcão, the NCJ councilor of “notable judicial knowledge and unimpeachable reputation” chosen by the Federal Senate and director of the Getúlio Vargas Foundation. Citing Montesquieu’s purpose of preventing tyranny in creating “checks and balances” and three independent powers controlled by society, he argued for the existence of the idea of “interindependence,” noting, “instead of harmony [between the three powers], I see reality as interindependence and competition.” The ideal of harmony between these three branches is “desired but not reached” in his view, thus they are independent by definition, but in practice they are all interconnected and competing elements.

Another interesting perspective came from Luciano Chaves, the current President of the Associação Nacional dos Magistrados da Justiça do Trabalho (The National Association of Labor Judges, or ANAMATRA), who argued that the independence of the judiciary is a “reflex of the independence of the judge.” Thus, Chaves believed that there is relationship between this first aspect of judicial independence and what the second aspect, which is the individual independence of judges in Brazil.

All informants agreed that judges must possess their own level of independence in order to be to adjudicate fairly. Fernando Mattos, President of the Associação dos Juízes Federais do Brasil (Association of Federal Judges of Brazil, or AJUFE) emphasized the need for a judge “to decide cases based on his conviction.” José Baltazar, an Auxiliary Judge of the Corregedoria Nacional de Justiça, argued that judges must have independence to decide cases “free of pressures” and “according to evidence and the law,” not based on any sort of interference from the outside (specifically from the executive and legislative branches) nor from the inside (from other judges or superior courts). Pierpaolo Bottini reiterated this need, noting that in deciding cases, independent judges “do not depend on other judges nor on other courts - his decision is his own.” Antônio Umberto added to the idea of a judge’s connection to outside pressures, contending that they must be “disconnected from the parties involved [in a case] and from other interests that could disturb his convictions.”

One aspect that informants emphasized was how the career entrance exams (known as the concurso público) administered by the judiciary itself strengthened independence. Hussein Kalout explained that the process of education and selection of new judges must remain independent from other branches of government. He argued that the present system in Brazil of exams administered by the judiciary protects this independence because “if [a candidate] is

approved, they are judges for life” not based on political favor, but by their merits as determined by the exams. As a result of being judges for life, no one can remove them from their jobs “no matter which political party is in power.”

Varying definitions of accountability

Several themes emerged on the issue of accountability. The particular difficulty in discussing accountability in Brazil was that there is no direct Portuguese translation. The closest concept in Portuguese to accountability is *responsabilidade*, or “responsibility for one’s actions” in the judicial system. Some respondents knew the concept accountability in English and thus used that as their framework, but nearly every respondent had his own version of what accountability signified.

The ideas of “responding for one’s actions,” the words of José Baltazar, and understanding the “social and political consequences” of judicial decisions and actions, the words of Pierpaolo Bottini, were the base of many perceptions of judicial accountability. Baltazar reserved the issue of accountability for those who are either functioning poorly administratively or have committed a more serious offense. He noted that judges should have to respond for both of these shortcomings. Pierpaolo Bottini argued that an accountable judge understands that his decisions have economic, social, and political repercussions for society. Thus, an accountable judge takes into consideration the effect that his decision could have in a social context.

Joaquim Falcão spoke on much of the same lines as Pierpaolo Bottini, noting that an aspect of accountability was the “harmony, or . . . the empathy of judicial decisions with the ‘struggles and hope’ of the people.” He added,

It is the legitimacy of the decisions with the people. There is a quote from Niklas Luhmann, a German author, who says that the judiciary has to produce and implement sentences and that that implementation brings social peace. If the

implementation of sentences does not bring social peace, you have a lack of legitimacy, and you are going to have some form of control by society.

He notes that this “control” is institutional, and in Brazil this control is now the NCJ.

There were two particularly fascinating observations about accountability that I later found to be in extreme contrast with one another. Although both informants supported the NCJ initially, their perceptions of what accountability meant were radically different. Antônio Umberto argued for the personal accountability of judges, noting that adjudicators “[have] to know how to be impartial.” He added, “It is necessary that there is a ‘self-accusation’ of [their] own partiality in order to correct it; [they have] to have conscience in order to correct [themselves] even if no one accuses them.”

ANAMATRA president Luciano Chaves took an opposing view of accountability. Citing French sociologist Émile Durkheim’s idea of collective consciousness and spirit, Chaves noted that a judge is “not a judge of himself. He is someone that observes the values that society in some way shares. This is not public opinion. . . . He should have this capacity to explain his actions of what he does in accord with that reference value, with that axiological guideline, that guideline of [social] values.” The essential difference between these two arguments is whether a sense of accountability is an internal or an external aspect. Where does it generate from: a judge’s own conscience, or a connection to a collective conscience in society? What these two statements reveal is that there could be a significant difference of philosophy regarding accountability in the Brazilian judiciary and beyond. These statements also point to the difficulty of the concept of accountability as these respondents disagree on the question of to whom the judiciary should be accountable to.

Some respondents offered more concrete explanations of what accountability means. Administrative control was a theme expressed by AJUFE President Fernando Mattos, who

explained that accountability meant the financial and administrative maintenance of the judiciary. He emphasized the idea of central “strategic planning” as part of his framework for accountability in the judiciary. Hussein Kalout offered the idea that an ethics code and transparency are vital aspects of accountability because judges hold an important position in society and are paid some the highest salaries in the country to exercise their duties well and in a just manner.

Beyond his explanation of accountability as the connection of judicial decisions to “social peace,” Joaquim Falcão described accountability through the use of “meritocracy” and the judicial examination process as well as the necessity of institutional accountability, meaning the “administration of the justice system” and “management” of the courts. Meritocracy in his view was an important aspect of accountability because it ensured impartiality in the judicial system. He further explained how the NCJ fulfills the institutional need for accountability in Brazil, as it is a central management mechanism for the courts.

The tension between independence and accountability

All informants agreed on the difficulty of balancing independence and accountability. Antônio Umberto, Pierpaolo Bottini, Marcos Degaut, Hussein Kalout, and José Baltazar agreed that accountability and independence are interrelated concepts. Umberto noted, “[Accountability/responsibility] is in a certain way a development of independence, that is, something that gives a judge the tranquility to decide cases.” Degaut noted the “unbreakable” and “complementary” nature of the two concepts, pointing out that one cannot be without the other.

Kalout pointed out that too much independence is dangerous and could potentially create a “dictatorship of the judiciary.” Baltazar expanded on this point by noting “some judges think that independence makes them unaccountable . . .” He emphasized the necessity for

accountability in the administrative realm, specifically with the efficient judgment of cases, and both the criminal and civil realm if he commits an offense.

Pierpaolo Bottini noted that an independent and accountable judge understands the effects of his decisions on society, but that his decisions are not based on popular opinion. Popular opinion may not look favorably upon a particular decision of a judge, but it is the judge's prerogative to decide, as he is independent to decide based on his own conscience.

Antônio Umberto essentially argued that an independent judge holds himself accountable if he understands his duties and keeps himself in check with them. He stated, "The more that a judge can maintain himself in relation to his duties of impartiality [and] legal authority . . . [it will be] more difficult for him to slide into exaggerations, which lead him to . . . irresponsibility."

José Baltazar used the NCJ to explain the line between independence and accountability. The NCJ cannot castigate a judge for a decision he has made, but if he is making questionable decisions that often favor parties to which he is connected, the NCJ has the right to investigate that. This is a difficult duty as he notes that corruption is often a "hidden" crime "without a receipt." One has to be absolutely sure about the wrongdoing that is occurring. In connection to this idea, Hussein Kalout noted that the Corregedoria Nacional de Justiça both preserves judicial independence while preventing a dictatorship of the judiciary. This particular perspective shows that the NCJ's job is just one more example of the previously mentioned high-wire act between these two concepts.

Now that I have introduced the basic perceptions of judicial independence, accountability, and their relationship, I will turn to the topic of the debate to see how these

different ideas regarding judicial independence and accountability resulted in debate over the implementation of a judicial council in Brazil.

Debate over the NCJ

Judging from my interviews regarding judicial independence and accountability, it is quite clear that both concepts are considered critically important in the creation of a well-functioning Brazilian judiciary. There was a consistent reference to the separation of powers doctrine to explain institutional independence, and there was a consistent reference to the idea that the judiciary must be accountable to society and to itself in both an administrative and legal way. In the 1990s and early 2000s, these points of view converged with the problems in the judiciary mentioned in Chapter 3 to result in a significant debate over how to reform the judiciary. Both sides staunchly clung to the idea of independence as defined by Article Two of the Constitution, but there was disagreement over how to translate the priority for accountability into concrete results. There were a number of sticking points, but the most prominent theme used by both sides to explain their position on independence was the separation of powers doctrine.

The debate over the separation of powers doctrine is broken down into two subthemes denoting the two different forms of accountability mechanisms proposed. The first is external control, which has been interpreted to mean by some the management of the judiciary by other branches and outside entities. The second is internal control, which means the administration of the judiciary by judges only. The debate over external versus internal control stemmed from whether or not to include the members on the NCJ from the OAB, the federal and state prosecutors' office, and especially the members of civil society appointed by the House of Deputies and Federal Senate. The way to determine why supporters and detractors chose either one of these options depended on their interpretation of the separation of powers doctrine and what they believed it said about judicial independence in particular. This interpretation of

judicial independence would also affect their view of who held the power of judicial accountability. One again sees the interrelatedness of these two concepts in this debate.

To be clear, neither side argued for the violation of judicial independence. Castro e Camargo (2004) argues with reference to both support and opposition to the NCJ, “No one believes it efficient or just to have a judiciary submitted or dependent on other powers.” Indeed, my interviews confirm that judicial independence as defined by Article Two of the Constitution was believed to be an essential element for a well-functioning judiciary by both sides. The only disagreement was whether the inclusion of outside members would violate the constitutional clause regarding powers that are “independent and harmonious in themselves.”

Supporters of the NCJ included a mix of judges, judicial organizations, government leaders, and reform organizations. They viewed the inclusion of members external to the judiciary as beneficial as it would create a judiciary instilled with “social principles viewed as more democratic” (Sadek 2001, 119). Thus, their version of accountability included a council that both protected judicial independence by maintaining budgetary, administrative, and disciplinary control in the hands of judges but also included the perspective of lawyers, prosecutors, and civil society. This idea of the NCJ is better explained by the 1999 testimony of Fernando Neto, then president of AJUFE, to the special commission handling PEC 96-A/92. Following a citation of his 1993 article proclaiming judges in Brazil as “arrogant,” “irreproachable,” and “deciding [cases] when [they] want do decide” to note the need for accountability, Neto stated:

The necessity of external control is greater for the courts. Who manages the STF in its delays in judgment? Who manages the STJ? Who manages the Regional Federal Tribunals and the Tribunals of Justice? No one. They are men of absolute power. . . . Change is necessary. Therefore, we welcome the proposal of external control. . . . [The] control that we propose, part would be made up of the federal and state prosecutors’ offices, lawyers, [and] lower court judges. . . . A council composed

like this would neutralize corporatism (Comissão Especial PEC nº 96/92 – Testimony from Fernando Costa Tourinho Neto April 27, 1999).

Neto specifically advocated for members from outside the judiciary from the prosecutors' offices and from the OAB. Other supporters took this a step further and emphasized the need for accountability and connection to civil society. Interestingly, it is President Luis Inácio “Lula” da Silva that offered the clearest reasoning behind connecting civil society to the judiciary through the NCJ. In a 2003 meeting on public security with leaders of the state of Santa Catarina, Lula contended:

An external control of the judiciary is necessary; it is necessary to know how the black box functions of that power which considers itself untouchable . . . This country needs . . . to recover the sense of justice for all and for self-esteem. These institutions were made in order to serve people, not to serve themselves. We want justice that is equal for all and not a justice that cares only for those who are privileged. . . .” (*Consultor Jurídico* 2003).

A second commission testimony provides an excellent summary of the thoughts of supporters regarding inclusion of non-judicial members and civil society in relation to the separation of powers doctrine. At the same commission meeting where Fernando Neto testified in 1999, Dyrceu Cintra Júnior, then president of the Associação Nacional de Juízes para a Democracia (National Association of Judges for Democracy), advocated for the inclusion of members of civil society on the NCJ and offered an explanation as to why this would not harm the separation of powers doctrine. He noted that Montesquieu never intended for a model in which three powers would be “compartmentaliz[ed]” and appear more like “three governments” rather than three branches. In his view, Montesquieu argued more for the “separation” rather than the “division” of powers in order to avoid their “concentration.”

Cintra continues by noting that the separation of powers doctrine does not forbid the use of “reciprocal controls,” and that nowhere had Montesquieu’s scheme been “patented . . . so that it could function in all periods of history and under varying social circumstances.” He noted that

it was not the intention of the NCJ to “control the judiciary” but merely improve its management and budget. In addition, he emphasized the need for a better connection to society by stating, “It would be interesting to create a body of external oversight of the Judiciary, in which even civil society would participate” (Comissão Especial PEC nº 96/92 – Testimony from Dyrceu de Aguiar Dias Cintra Júnior April 27, 1999). This view still holds today as evidenced by Hussein Kalout’s argument that the NCJ is a sort of “parliament that is composed of multiple powers. They represent all sectors of society.”

It is clear that the term “external control” did not represent a threat to judicial independence for supporters. For them, external control meant the inclusion of non-judicial members on the NCJ to connect the judiciary to civil society and to different perspectives. It did not mean the interference of other powers in the administration or decisions of the judiciary. Informants either accepted the term external control or corrected me by noting that the NCJ represents internal control of the judiciary. Attorney Ives Gandra da Silva Martins of São Paulo, someone who was initially opposed to the NCJ but is now a member of the body as of 2009, succinctly stated, “Today, there is not external control. Of the 15 members of the NCJ . . . the majority is from the Judiciary.” STJ Vice President Ari Pargendler argued for a different meaning of the term control:

The expression “external control of the judiciary” has not been well understood. There is not external control of the judiciary . . . The “external control” administered by the NCJ is limited to administrative questions, basically with planning and management of the judicial branch. In terms of “control,” we have the STF, the STJ, the regional federal courts, and the tribunals of justice that examine, from a critical point of view, but internally, the decisions that come from the hierarchy of first level judges. . . .

As Pargendler sees it, external control is actually the NCJ’s internal power over judicial management and not interference in judicial decisions. The concept of “control” in his argument refers to the ability of superior courts to review judicial decisions, but this is strictly done inside

the judiciary and no other branch has power over that decision process because of judicial independence according to Article Two of the Constitution. Thus, in his view, the NCJ preserves judicial independence through its administrative control, but it has no power over judicial decisions.

Councilor Rui Stoco took a similar path in describing the difference between external and internal control. He contended that the concerns that the opposition had of outsiders controlling the judiciary and interrupting the ability of the judiciary's "capacity of independence to judge" had not taken place since the implementation of the NCJ. He noted,

In my view, external control does not exist. A national council exists composed of representatives of various elements of the magistracy, being federal, state, labor . . . the federal prosecutors . . . and there are the lawyers, [two] named by the OAB, the other [two] named by the Federal Senate . . . So, it is a mixed formation. It does not have representatives from only from one element, but from all elements. So therefore it is not external control.

José Baltazar defined external control as "outside of the courts." He argued that there must be some form of control, and in his view the NCJ "does not represent an intervention of the other powers." Fernando Mattos differentiated between internal versus external control by noting that internal control was local to each tribunal as they had management over their own acts and budget. He argued that the NCJ was internal control as it acted as the central body of administrative management and planning for the National Judiciary. He defined external control in a way that no one else did by noting that the Brazilian Court of Audit (TCU) acts as an external control device as it examines the expenditures of the executive, legislative and even the judicial branch.

Antônio Umberto offered an argument along the same lines as Mattos. He noted:

There was a great fear about the participation of outside people, but it seems to me that the structure that the National Congress gave the NCJ turned out very well, because at the same time that it mixes people from inside and outside, which gives it the sense that it is external, at the same it does not cease being, in some

ways, internal from the standpoint in which it was placed in the Constitution as a very important leadership body, but it is not the leadership body of the judicial branch as it is under the control of the STF . . . It is an atypical control, because one cannot say that it is internal control, because internal control is the high control, it could be said, of one tribunal by another tribunal. And at the same time it does not exercise the same power as the Brazilian Court of Audit (TCU) or, in some aspects, our own National Congress . . . it is a superior entity, but still inside the Judicial Branch. It is a hybrid model that does not fit in a typical model . . . of internal control or external control.

In general, it was judges themselves that formed the main opposition to the NCJ and external control due to their view that it violated judicial independence. The judiciary did not necessarily oppose the idea of a council, but their primary opposition opposed the inclusion of members external to the judiciary as designed by the Congress (Sadek 2001). The term external control was particularly unnerving to judges who saw the inclusion of these non-judicial members on the NCJ as a subversion of judicial independence by the executive and legislative branch. Sadek (2001, 113, 114) confirms these points by including a number of opinion surveys showing the unpopularity of the formation of the NCJ during the 1990s and early 2000s. Members of the judiciary were staunchly against the inclusion of members external to their branch, specifically the inclusion of members from the OAB, the state and federal prosecutors' offices, members of civil society, the legislative branch, and especially the executive branch. In a 2000 survey, nearly 46% marked that the creation of the NCJ with members external to the Judiciary would "not be positive."

Various voices joined the opposition publicly denouncing the NCJ and external control because of their belief that it violated the separation of powers doctrine. In a commission testimony dated September 27, 1995, Minister Carlos Velloso, then president of the Supreme Electoral Tribunal, argued his opinion against the NCJ:

I think that to subject whichever of the powers to an external inspection body . . . [would be] a serious attack on the separation of powers. . . . [This] council of citizens would give a certain transparency, but . . . it would not represent anything

[of the branch]. Deputy, I reiterate what we need, and that is, a council . . . of members from the judicial branch, a council with legitimacy. In order for a council to have legitimacy, it should have representatives from all parts of the Judiciary (Comissão Especial PEC nº 96/92 – Testimony from Carlos Mário da Silva Velloso September 27, 1995).

The root of the fear of these judges was that the NCJ would politicize the judiciary with the inclusion of non-judicial members. Michel Temer, a Brazilian lawyer and politician from São Paulo, wrote in 1994 on this concern:

[The] National Council of Justice will be one more power, independent of the others. It will be composed . . . of members of current parties . . . that will give rise to, if not directly, than at least indirectly, harmful influence on judicial decisions. I do not want to say with this that a judge will be intimidated by the Council. There will be, however, obvious worry of a judge with the Council, of the heterogeneous composition, with members who have not always been knowledgeable of the judicial art (Temer 1994, 77, 78).

Ives Gandra da Silva Martins initially advocated against the NCJ and the potential for politicization by differentiating between the judiciary and the other branches of government:

In the aspect of structure, there is no justification for control. The Judicial Branch is not a political power, but a technical power. While the political powers (legislative and executive) look to the people for their strength, sometimes manipulating their desires or establish themselves through demagoguery and inconsistent promises, the Judicial Branch is made up of specialists that, after exhaustive and rigorous selection exams . . . are recruited among skilled professionals. While the Judicial Branch flees from the media . . . the other two powers search for the media and speak on everything (Martins 2005, 45).

Prominent judges issued a press release through the AMB on March 23, 2004 as an open letter to the Congress in opposition to the formation of the NCJ. Court Presidents Maurício Corrêa (STF), Nilson Naves (STJ), José Julio Pedros (Superior Military Tribunal), and Francisco Fausto (TST) signed the letter and used much of the same language as seen before. The four presidents stated that “they [felt] obligated to bring to the knowledge of the nation that the respective tribunals [had] approved an institutional position against the participation of outside persons in the framework of the magistracy through the NCJ” and that the issue of “external

control of the Judiciary has generated serious concerns in the heart of the Brazilian judiciary” (Corrêa et al. 2004).

The argument of these four judges was that although the Brazilian judiciary was in need of reform due to slow processing of cases and poor access to justice by marginalized classes, the thought of external control by a body that includes members who are not in the judiciary was not the solution. They framed their argument by exploring the constitutionality of the NCJ as well as the very nature of a republic. Citing the 1891 Brazilian Constitution, the first constitution developed in republican Brazil following the collapse of the monarchy, the judges noted that a republic requires a separation of powers, and that the very thought of external control “threatens the independence of one of the powers of the Republic.” They continued by utilizing the *Federalist Papers*, citing letter number LXVIII that states that no other power should have “directly or indirectly, a dominant influence over the others.”

The letter’s most virulent statement on the separation of powers argument is the reference to the NCJ as a “fourth power that would threaten the independence of the judiciary” (UOL 23 March 2004). Although these judges supported judicial reform and wanted to see society satisfied with their judicial system and their access to justice, they did not believe that external control would solve these issues and reiterated that this “reform is not what [Brazilian society] is waiting for” (Corrêa et al. 2004).

Sabbato (2004) offered his take on the ideas of separation of powers and unconstitutionality by exploring the formation of the 1988 Constitution and its ideas on separation of powers. He argued that the Constitutional Assembly rejected the “French model” of external control of the judiciary in order to preserve the idea of only three powers. Sabbato also described how the implementation of the 1958 Conseil Supérieur de la Magistrature resulted in

the loss of France's judiciary due to politicization. He argued that the same would happen in Brazil, saying, "it is not possible to control the Judicial Branch without the prevalence of political interests over the technical context." He concluded that external control would violate Article Two, and that it would not be "viable in Brazil" because its implementation would have been contingent on the approval of a "new constitutional order."

All of this opposition culminated in the AMB's filing of an ADIN against the implementation of the NCJ following the passage of Constitutional Amendment n. 45. The article by the AMB announcing the ADIN noted, "The magistrates are protesting against the fact that the Council has members that come from outside the judiciary," something that they believed would lead to the "politicization of the Brazilian judiciary" (*O Globo* 10 December 2004). The official ADIN concisely listed the reasons for the AMB's accusations of unconstitutionality of the NCJ:

- a) The amendment would be offensive to the principle of separation of powers, on account of the heterogeneous composition of the National Council of Justice, and to the independence of the judiciary;
- b) The responsibilities attributed to the National Council of Justice would be responsibilities native of the Tribunals themselves;
- c) All attempts at creation of state councils of justice have been rejected by the Supreme Federal Tribunal;
- d) The heterogeneous composition of the Council would create judges without full powers judging judges with full powers;
- e) The National Council of Justice would violate the federative pact;
- f) There would be superimposition of the responsibilities of the National Council of Justice over those of the Council of Federal Justice and of the Superior Council of Labor Justice; and
- g) There would be a habit of formal unconstitutionality of Art. 103-B, §4º, inc. III, added in the Constitution by Constitutional Amendment n. 45, since the Federal Senate would have altered the referred position and not devolved the matter to the House of Deputies.

This ADIN was unsuccessful, however, as the STF argued that the inclusion of members from outside the NCJ was not unconstitutional as there had been a tradition of including members on “judicial bodies” from the federal and state prosecutors’ offices and from the law profession. In addition, they noted there were example of lawyers “of notable judicial knowledge” being included in other judicial bodies but not enjoying the same privileges as a judge (AMB 2004).

As we analyze the differences between these two groups, we notice that there is not much contrast as to their general thoughts regarding judicial independence. Both the support and opposition argued that politicization of the judiciary by other branches of government was harmful to independence as defined by Article Two of the Constitution. However, the two sides disagreed on the essential question of to whom the judiciary should be accountable. Both sides agreed that accountability was important, but one side believed that it should strictly be the judiciary’s job to do so through internal control while the other side advocated for an external control mechanism that would make the judiciary accountable not only to itself but to civil society as well. Some judges saw this as a threat to independence, while supporters viewed this positively as an infiltration of democratic ideas, an end to corporatism, and the beginning of an accountable judiciary.

There are many questions that can be drawn from the case of the NCJ in Brazil. Based on Montesquieu’s ideas regarding three separate powers, how interconnected and responsible is each power for one another? How much of a role do other branches have in ensuring judicial independence and accountability? Are government branches interdependent as Councilor Falcão argues, or should they have more separation than they already do? Is the NCJ, a hybrid body which combines the views of all elements of the judiciary as well as lawyers, prosecutors, and civil society the best way to achieve judicial accountability, or is a different model that is

only composed of judges the answer to achieving that goal? What are the risks and benefits to either model? The conclusion that Brazil reached on December 17, 2004 in a 56-2 vote in the Federal Senate for Constitutional Amendment n. 45 was that external control as advocated by its supporters would be Brazil's form of judicial accountability (Guerreiro 2004). We will see in Chapter 5 how this debate influenced these questions and our knowledge of judicial independence and accountability.

Table 4-1. My conceptual framework

Judicial independence	Judicial accountability
<p>Judges should be a “neutral third,” meaning they make decisions in an impartial manner based on interpretations of the law and their consciences as objective professionals (Fiss 1993; Larkins 1996, 608; Russell 2001, 9).</p>	<p>The courts should follow the same rule of law as the rest of society (Burbank and Friedman 2001, 12).</p>
<p>Independence is a concept about connections or the absence of connections (Russell 2001, 2).</p>	<p>Individual judges have “extrainstitutional independence” in the sense that they cannot be punished by the judiciary for their individual decisions. However, they must follow the law and “yield some intrainstitutional independence” (Burbank 1999).</p>
<p>Criteria for an institutionally independent judiciary are an adequate budget, proper legal training, effective internal administration, and a transparent appointment process (Frühling 1998).</p>	<p>It is important to hold those accountable who have been given the duty of adjudication in society (Cappelletti 1985).</p>
<p>There are outside pressures on independence that include government institutions, civil society, non-governmental organizations, the press, and parties in a case (IBA Code of Minimum Standards of Judicial Independence, October 22, 1982).</p>	<p>There are both administrative and legal dimensions to accountability – the honesty of the courts, their competence in applying the law in a fair manner, and the effectiveness of ethics standards, both how internalized they are and how well they are carried out (Staats et al. 2005).</p>
<p>Criteria for an independent individual judge are their freedom from higher courts, being able to interpret the law based on their own conscience, no affiliation with political organizations, and autonomy from judicial colleagues (Frühling 1998).</p>	<p>The Cappelletti (1985) Formula: 1) Political Accountability of both individual judges and the judiciary as an institution (two dimensions are the accountability to other political institutions and accountability to the Constitution), 2) Public Accountability (accountability to society), 3) “Vicarious” Accountability (the state is held accountable rather than a particular judge to avoid frivolous lawsuits), and 4) Legal accountability (penal, civil, and disciplinary accountability)</p>

Table 4-1. Continued

Judicial independence	Judicial accountability
<p>There are two types of independence: 1) Preference independence (no particular preference for either side in a case) and 2) Decisional independence (the lack of interference in the decision-making process by either side in a case) (Brinks 2004-2005, 599).</p>	
<p>An individual judge's own behavior is an important factor beyond institutional and individual independence. Political ideology and affiliation as well as personal biases can negatively impact a judge's independence and therefore must be taken into account when evaluating independence (Russell 2001, 7).</p>	

CHAPTER 5 CONCLUSIONS, APPLICABILITY, AND THOUGHTS FOR FUTURE STUDY

From these themes in the case of Brazil, I was able to infer new information on how to define and operationalize the concepts of judicial independence and accountability. This information is helpful for a number of reasons, the first of which is that it adds nuance and context to these concepts. In deepening our knowledge of the parameters of independence and accountability, we can create more in-depth studies of these two concepts for other cases. Second, from the case of Brazil we have learned how the creation of a judicial council attempts to manage these two concepts. This information is helpful not only for those who are studying Brazilian judicial reform, but it is useful in other cases where judicial councils are present. One understands their function better and the problems associated with trying to balance independence and accountability. Finally, these findings are critically important to the study of the relationship between the judiciary and democratization, as judicial councils are responsible for maintaining and improving the quality of justice in many cases. Because judicial councils are endowed with these duties, it is therefore important to understand how they balance judicial independence and accountability as addressing this issue determines how a council improves the quality of justice.

My first observation is that this study has shown that these two concepts can be analyzed inductively in concrete situations in which they have affected policy. What I mean is that perceptions of judicial independence and accountability, both as general concepts and as defined concretely in political systems, affect whether or not a person supports the implementation of a judicial council and how it should be staffed. The way that someone perceives independence is based on from whom the judiciary is independent in their case and why, and the way that

someone perceives accountability is based on to whom they are accountable in their case and why.

The inductive process creates a two-way street between concept and reality. The conceptual framework of judicial independence and accountability informs us as to what to look for in order to recognize the presence of these concepts in a concrete situation. In turn, the peculiarities of this concrete situation inform us as to how we can better define these concepts and operationalize them so as to create better measures for future study. The identification of themes that defined the Brazilian reality informed me on what supporters and detractors believed about judicial independence and accountability both as general concepts and concrete examples. Therefore, case studies like this one, which have been lacking, are critically important in finding common factors between cases that can then be used in more in-depth research.

My second observation from this process was the realization of the intrinsically conjoined nature of judicial independence and accountability. These two concepts share a definitional boundary, meaning that in any situation in which one must measure or address one of the concepts, the other is measured or affected in some way as well. This is along the same lines as Burbank and Friedman's (2001, 14) conclusion that judicial independence and accountability are "different sides of the same coin." Answering the question of "accountability to whom?" simultaneously addresses the question of "independence from what?" My conclusion here is that any study of these two concepts either abstractly or concretely must always consider their relationship. One cannot address the issue of judicial independence in a concrete situation without simultaneously addressing judicial accountability and vice-versa.

The case of the NCJ will explain these two observations. Both the interviews on the concepts and the analysis of the debate reveal that there was a particular issue, the separation of

powers doctrine as defined in the Constitution, at which these two concepts converged. There was opposition due to the opinion of many in the judiciary that the inclusion of non-judicial members violated this doctrine and would lead to the politicization of the judiciary by other branches. Clearly, they had a very strict view of judicial independence due to a strict interpretation of Article Two. This also meant that they had a strict view of accountability as they believed that internal control, or the administration of the courts by judges only, should be the adopted model. This shows that peculiarities within systems determine the way that judicial independence and subsequently judicial accountability are viewed.

Supporters of the NCJ managed to carefully define the line between these two concepts by aptly answering the two questions in the prior paragraph to achieve enough legitimacy for implementation in 2004 (see Table 5-1). First, they successfully showed that they supported judicial independence as outlined in Article Two by framing the inclusion of non-judicial members as “including society,” “increasing democratic values in the judiciary,” and “reducing corporatism.” They stated that this would not politicize the judiciary, and that including a majority of judges and remaining accountable to the STF would ensure independence as well. By doing this, supporters simultaneously defined accountability by designating the NCJ as an administrative body, not a body interested in judicial decisions. Accountability also meant that a judge would not be punished for a decision he made inside of the courtroom, but he would face punishment for only administrative and legal infractions (specifically, corruption). One sees the relationship between these two concepts immediately: defining one concept automatically results in the definition of the other. These have concrete manifestations in terms of who sits on the council and what powers it has.

Turning to each concept in a more specific manner, interviews revealed a great deal regarding their definitions and operationalizations. Starting with independence, most informants followed the ideas laid out in the conceptual framework regarding both outside and inside pressures as well as the dichotomy of institutional and individual independence. However, Luciano Chaves' remark that institutional independence is based on individual independence deserves more consideration. One could build a measure considering individual independence along with a menu of items that define institutional independence that already exist in the conceptual framework to measure a judicial branch's overall independence. Understanding case study peculiarities, as we saw in Brazil, is vitally important to understanding this concept.

The debate over the separation of powers doctrine and Joaquim Falcão's idea of interdependence also raises a number of questions as to how interrelated government branches are or should be. Checks and balances are clearly an important piece of a federal system, but so is accountability. Supporters of the NCJ argued that Montesquieu's model never prohibited the use of control and that his idea of separation/division of powers is bit more relative than previously thought (Comissão Especial PEC nº 96/92 – Testimony from Dyrceu de Aguiar Dias Cintra Júnior April 27, 1999). The definition of independence is transformed when one understands that there are connections, and in the words of Falcão, even competition between branches that ensure that they do not become compartmentalized. Therefore, policymakers who deal with judicial independence must adequately define both the limits and possibilities of the relationships between different branches to ensure not only independence but also accountability. The NCJ is a good example of how policymakers in Brazil have stretched the definition of independence between branches to adequately account for all the elements that they see as important in creating an accountability mechanism.

I was also able to infer a number of thoughts regarding the concept of judicial accountability. First, my respondents easily defined accountability along much of the same lines as Cappelletti's (1985) four-part formula. In fact, Antônio Umberto even mentioned Cappelletti's formula as part of his own idea regarding the concept. We saw through the NCJ the implementation of this formula, as judges in Brazil must face penalties for both administrative and moral shortfalls. Umberto added a new element to the pre-existing ideas of accountability, and that is the idea of "individual accountability." A judge is responsible not only to the law or an administrative council, but he is also responsible to himself, meaning that he must ensure his own impartiality even if no accusation is brought against him. Judicial accountability must start with the individual in his view.

Beyond finding new criteria for accountability, the most important discovery of this work was that the main controversy over this concept is not necessarily how it is defined, but who exercises it within society. Kapiszewski and Taylor (2008, 751) argue that this question is the "central dilemma" for scholars in their study of the concept. This is where understanding Brazil's case is critically important in adding insights as to how to begin to answer this question.

My findings from Brazil on judicial independence and accountability have implications for other countries struggling with these same questions and are critically important to the study of the relationship between democratization and the judiciary. New democracies struggling to successfully balance judicial independence and accountability through a judicial council must understand the peculiarities of their political system, specifically the relationships between branches of government and the judiciary's relationship with society. We saw how Brazil's judiciary became increasingly disconnected and therefore unaccountable to both the rest of the government and society itself. This had dire consequences as the judiciary became aloof of

society's concerns and allowed corrupt activity to manifest itself within the courts. This translated into a poorly functioning judiciary within democracy as neither access nor efficiency improved for citizens seeking justice. Therefore, it became critically important for Brazil to improve its quality of justice by answering the difficult questions of "independent from what?" and "accountability to whom?"

By addressing these two questions, the NCJ attempts to improve the quality of justice by ensuring that Brazil's judiciary is not too independent by being accountable, meaning that it is more responsive to the rest of the government and to society. This means a better understanding of current issues, more access to the population, higher efficiency, and a consistent correction of wrongdoing. Trust among the populace rises as a result of a well-functioning judicial system, and the rule of law is legitimized,

Judicial councils have the potential to assist in the consolidation of democracy due to their mission to improve justice. A deeper understanding of the concepts of judicial independence and accountability is a good start, therefore, on the path toward a stronger judicial system. My findings from Brazil are part of that start as they add nuance to these concepts and even suggest possible forms of operationalization for future study. Both Brazil and other new democracies benefit from stronger concepts as they work to define this balance in order to improve their respective justice systems.

The NCJ is truly an innovation. According to Antônio Umberto, it is an atypical model, both combining members from inside and outside the judiciary to fulfill the necessity of accountability. However, is the NCJ the right model for ensuring both judicial independence and accountability? If it is, and many consider it to be so, can its model be duplicated in other countries? Supporters indirectly argued that the NCJ was the embodiment the concept of

accountability, that this model of external control which in some ways looks more like internal control was the most suitable, although not perfect, method in ensuring both independence and accountability. If this model represents accountability, meaning if a judicial council has representatives from each element of the judiciary, from elements connected to the maintenance of the rule of law (prosecutors and lawyers), and elements from civil society, and if it has only administrative and disciplinary duties with no power to impinge on the actual judicial decisions of judges, can we use these criteria in other cases to argue that a judicial council has created a judiciary is both independent and accountable? Can a judicial council like this be operationalized as a measure of either concept, and has Brazil found that long sought after balance? These ideas are important for the analysis of judicial councils everywhere, but they are for future works to analyze.

Table 5-1. The NCJ’s Balance of judicial independence and accountability

“Different sides of the same coin”	
Judicial independence	Judicial accountability
Maintenance of judicial independence as defined by Article Two of the Federal Constitution	The primary duties of the NCJ are administrative, budgetary and disciplinary
Against politicization of the judiciary	A judge is only punished based on administrative failure or corrupt activity
Under the authority and review of the STF	The NCJ has no authority over the judicial decision-making process of a judge
15 members composed of nine judges from each branch of the Judiciary (therefore, the majority of the NCJ is judicial), two from the prosecutorial sector, two from the OAB, and two from civil society	Internal accountability assured as majority of NCJ is judicial
No interference in judicial decision-making	External accountability to other branches and society is also assured through the inclusion of outside members

APPENDIX A
LIST OF INFORMANTS AND FURTHER ACKNOWLEDGEMENTS

Informants Appearing in Order Interviewed

Rui Stoco – Judge of the Tribunal of Justice of São Paulo; Councilor, NCJ, 2007-2009

Pierpaolo Cruz Bottini – Attorney, Bottini & Tamasauskas Advogados; former Secretary of Judicial Reform

José Paulo Baltazar Júnior – Auxiliary Judge of the *Corregedoria Nacional de Justiça*, NCJ

Joaquim Falcão – Director, Getúlio Vargas Foundation; Councilor, NCJ 2005-2009

Hussein Kalout – Head of the Office for International Affairs, STJ

Antônio Umberto de Souza Júnior – Labor judge from the 10th Region’s Labor Tribunal; Councilor, NCJ, 2007-2009

Luciano Athayde Chaves – President, ANAMATRA

Marcos Degaut – Director General, ENFAM

Ari Pargendler – Vice-President of the STJ

Fernando Cesar Baptista de Mattos – President, AJUFE

Ives Gandra da Silva Martins – Attorney in São Paulo, Professor Emeritus of Mackenzie University, and UNIFMU; Councilor, NCJ, 2009-present

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Christina Zackseski, Director of Projects, NCJ

Neide Alves Dias De Sordi, Executive Director, Department of Judicial Research, NCJ

Fábio Mirto Novais Florêncio, Technical Director, Department of Judicial Research, NCJ

Ludmila Galvão, employee of the STJ and relative of my host family’s husband/father

The various assessors and secretaries of the informants

APPENDIX B
INTERVIEW GUIDE

1. What does independence mean in the judicial system?
2. What does accountability mean in the judicial system?
3. In your opinion, what is the current state of judicial reform in Brazil? Which efforts were successful or not, and what areas need improvement?
4. How important is accountability in the Brazilian judicial system? How should reformers reconcile the need for independence and accountability?
5. What do you think about the phrase “external control of the judiciary?” What was your initial position regarding the formation of the NCJ?
6. What should the central role of the NCJ be in the general context of judicial reform in Brazil?
7. Is a structure like the NCJ, a group that oversees state courts, the most useful way to assure accountability in the judicial system?
8. Do you believe that the NCJ improves or damages the judicial system as it is currently?
9. How does the NCJ fit within the federal structure of the Brazilian judiciary? Does it help or harm federalism?

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BIOGRAPHICAL SKETCH

Steven Reed Minegar was born in Tampa, Florida to Craig and Judith Minegar. Growing up he lived in Tampa; Cincinnati, Ohio; and finally Winter Park, Florida where he graduated from Winter Park High School in 2004. He then attended the University of Florida where he graduated Phi Beta Kappa with a Bachelor of Arts in Political Science and History. While attending UF, he became fascinated with both political institutions, specifically the study of the judiciary, and Latin America. He was particularly interested in the study of Brazil and the Portuguese language.

His interests in the judiciary grew on an undergraduate research trip to Santiago, Chile in 2007. There, he conducted research regarding the role of activist lawyers and judges in trials of former military officials for human rights violations and how they had transformed Chile's judiciary into a more rights-conscious body. From there, he wrote a paper titled "Chile's 'Rights Revolution': How Lawyers and Judges Changed Chile's Passive Judiciary."

He decided to pursue his Master of Arts in Latin American studies with a thematic concentration in Political Science. During that time, he was awarded two Foreign Language and Area Studies (FLAS) Year Fellowships, one Summer FLAS Fellowship for the study of Brazilian Portuguese, and a Center for Latin American Studies Field Research Grant to conduct research on independence and accountability in Brazil's judiciary. He hopes to eventually pursue a Ph.D. in political science and a career in academics.